

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLANT

-vs-

JESSICA DEROV

DEFENDANT-APPELLEE

CASE NOS.: 2008-0853
2008-0858

ON APPEAL FROM CASE NO. 07 MA 71
BEFORE THE COURT OF APPEALS FOR
THE SEVENTH APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE
MOTHERS AGAINST DRUNK DRIVING (MADD)

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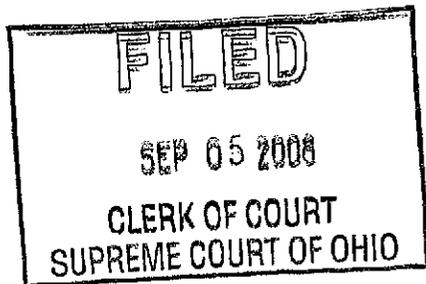


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of Amicus Curiae, Mothers Against Drunk Driving (MADD) was sent by ordinary U.S. mail to attorneys Paul J. Gains, Rhys B. Cartwright-Jones, and Ralph M. Rivera, Mahoning County Prosecutor's Office, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503-1426 as counsel for Appellant-State of Ohio, and Robert C. Kokor, 394 State Route 7, P.O. Box 236, Brookfield, Ohio 44403 as counsel for Appellee, on September 5, 2008.

So Certified,

A handwritten signature in black ink that reads "Tim Van Eman". The signature is written in a cursive style with a horizontal line extending to the right from the end of the name.

Tim Van Eman (0002015)
Counsel for Amicus Curiae
Mothers Against Drunk Driving (MADD)

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STATEMENT OF FACTS

On March 28, 2008, the Seventh District Court of Appeals published an opinion holding that portable breath tests are not to be considered as a factor in establishing probable cause to arrest for operating a vehicle while intoxicated (OVI). The Seventh District cited Tebo, New Test for DUI Defense: Advances in Technology and Stricter Laws Create Challenges for Lawyers, for support of its decision. State v. Deroy, Mahoning App. No. 07MA71, 2008-Ohio-1672, Pars. 11 and 12.

On July 9, 2008, this Court determined a conflict exists with State v. Gunther, Pickaway App. No. 04CA25, 2005-Ohio-3492 and certified the question:

Whether the results of a portable breath test are admissible to establish probable cause to arrest a suspect for a drunk driving offense.

State v. Deroy, 118 Ohio St. 3d 1503, 889 N.E. 2d 1023 (table), 2008-Ohio-3369.

STATEMENT OF AMICUS CURIAE INTEREST

Mothers Against Drunk Driving (MADD) is a 501(c)(3) non-profit grassroots organization with more than 600 affiliates and two million members nationwide. MADD is the nation's leader in the fight against drunk driving. Through the work of dedicated volunteers and supporters, drunk driving fatalities have declined by 4% since MADD's inception in 1980. More than 2300 anti-drunk driving laws have been passed, public awareness has risen and thousands of impaired driving victims have received assistance. The mission of MADD is to stop drunk driving, support the victims of this violent crime, and prevent underage drinking. Although substantial progress has been made in the war on impaired driving, it continues to be the nation's most frequently committed violent crime and three out of every ten Americans will be involved in an alcohol-related crash sometime in their lives.

In 2007, 12,998 people were killed in vehicular crashes caused by offenders driving under the influence of alcohol (according to the National Highway Traffic Safety Administration). Of those 12,998 fatalities, 391 Ohioans were killed in 2007 according to NHTSA. NHTSA estimates that 500,000 people have been injured in alcohol-related crashes in Ohio.

MADD is one of the largest grassroots organization in the United States conducting public policy efforts to address the problem of impaired driving. It supports legislative initiatives on both the state and federal level. Although great strides have been made toward eliminating impaired driving, much work still remains. One of the primary tools used in fighting impaired driving is the officer's ability to make arrests based on probable cause. Portable breath tests are instrumental in making this decision. If the decision made by the Court is not reversed, it will become substantially more difficult for law enforcement officers to ascertain probable cause in a large proportion of OVI cases in the State of Ohio.

In the last twenty (20) years MADD national office has purchased and distributed thousands of portable, mobile, preliminary breath testing instruments to law enforcement agencies throughout the United States and Ohio. In Ohio from 1996 to the present, one manufacturer alone (Intoximeters) has distributed 1,629 PBTs (Appendix 1).

PROPOSITION OF LAW:

THE RESULTS OF A PORTABLE BREATH TEST FROM AN INSTRUMENT ON THE CONFORMING PRODUCTS LISTS OF EVIDENTIAL BREATH MEASUREMENT DEVICES APPROVED BY THE NATIONAL HIGHWAY SAFETY TRAFFIC ADMINISTRATION ARE ADMISSIBLE TO ASSIST IN ESTABLISHING PROBABLE CAUSE TO ARREST FOR AN IMPAIRED DRIVING OFFENSE

LAW AND ARGUMENT

In a vast majority of the states, PBTs are acceptable as an additional tool to establish probable cause. “While there may be questions as to the admissibility of either [*sic* PBT or HGN] of these tests as substantive evidence of guilt on the DUI charge, both are admissible to determine whether probable cause existed. See United States v. Iron Cloud, 171 F.3d 587 (8th Cir. 1999).” United States v. Bourgeois, U.S. Dist. Ct., S.D., Mississippi (2007), 2007 WL 2219 335 (Appendix 2).

Some states have even created a separate penalty, criminal or otherwise, for refusing to submit to a PBT, including:

Kansas Code Section 21-3105 (2) and 21-4503 (4), a fine of not more than \$500.
(p. 189)

Minnesota Code Section 169 A-51 will subject a person to the provisions of the Implied consent law. (p. 273)

Nebraska Code Section 60-6, 197(3) and 60-6, 211.02(2). Any driver must submit to a PBT if the officer has reasonable grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident. Section 28-106 a Class V Misdemeanor. (p. 317)

Michigan Code Section 257.625 m. A misdemeanor for a person to refuse to submit to a PBT while operating a CMV; not more than 93 days in jail and/or a fine or not more than \$100.00. (p. 263)

Digest of Impaired Driving and Selected Beverage Control Laws, U.S. Dept. of Transportation, NHTSA, 24th Ed. (2007) (Appendix 3)

The National Highway Traffic Safety Administration (NHTSA) is the agency to which courts defer when determining the admissibility of field tests. State v. Homan (2000), 89 Ohio St.3d 421. In 1973, the United States Department of Transportation and the NHTSA, with advice from the National Safety Council, developed a protocol and notice procedure for scientifically testing and evaluating all Evidential Breath Testing devices (EBTs) including non-mobile units (i.e., BAC data masters, BAC verifiers, intoxilyzers) and mobile units “designed to

be transported to non fixed operational sites in the field.” (i.e., PBTs, Alco-Sensors III and IV). Highway Safety Programs; Standard for Devices to Measure Breath Alcohol, 38 Fed. Reg., No. 212, 30459 (November 5, 1973). (See Appendix 4). These standards were updated in 1984 and again in 1993. Highway Safety Programs; Standard for Devices to Measure Breath Alcohol, 49 Fed. Reg., No. 242, 48854 (December 14, 1984) (See Appendix 5) and Highway Safety Programs; Model Specifications for Devices to Measure Breath Alcohol, 58 Fed. Reg., No. 179, 48705-48710 (September 17, 1993) (See Appendix 6). These standards comply with the National Bureau of Standards among other scientific criteria (Appendix 5, p. 48855).

Only after the same vigorous laboratory standards were applied to both mobile and non-mobile, PBT and stationary EBTs, was there approval by NHTSA and entry into a list of approved devices. These devices also may be removed from the approved list for failure “to perform according to NHTSA standards.” (Appendix 4, p. 30460). The standards were established and adjusted after national public notice and institutional and public comment and response. (Appendix 5, p.48855)

The National Highway Traffic Safety Administration then published in the Federal Register a “Conforming Products Lists of Evidential Breath Measurement Devices.” Many PBTs, including Alco-Sensors III, IV, used by the Ohio State Highway Patrol, have been specified on that list since 2000. 65 Fed. Reg., No. 141, 45419 at 45421 (July 21, 2000) (Appendix 7); 69 Fed. Reg., No. 134, 42237 (July 14, 2004) (Appendix 8); and most recently 72 Fed. Reg., No. 241, 71480 at 71482 (Dec. 17, 2007) (Appendix 9). Furthermore, in the U.S. Department of Transportation publication, Digest of Impaired Driving and Selected Beverage Control Laws, the PBT is defined as an instrument acceptable for probable cause determinations. (p. ii) (Appendix 10).

NHTSA has further explained the accepted uses and purposes of PBTs:

Preliminary Breath Testing

The basic purpose of preliminary breath testing (PBT) is to demonstrate the association of **alcohol** with the observable evidence of the suspect's impairment....The PBT provides the evidence that **alcohol** is the chemical basis of that impairment by yielding an on-the-spot indication of the suspect's blood alcohol concentration (BAC). The PBT provides direct indication of the BAC level. It does not indicate the level of the suspect's impairment.....

Preliminary breath testing, like psychophysical testing, is a stage in the **pre-arrest** screening of a DWI suspect....The PBT result is **only one** of many factors the officer considers in determining whether the suspect **should** be arrested for DWI. It **should never** be the sole basis for a DWI arrest. The PBT result is an **important** factor because it provides direct indication of **alcohol** impairment....

Advantages of PBT

A PBT offers several important advantages for DWI detection. It may:

- corroborate other evidence by demonstrating that the suspicion of alcohol impairment is consistent with the officer's observations of the suspect's mental and physical impairment.
- confirm the officer's own judgment and help gain confidence in evaluating alcohol impairment accurately, based on observations and psychophysical tests.....
- disclose the possibility of medical complications or impairment due to drugs **other** than alcohol. (The PBT can confirm or deny that alcohol is the cause of the observed impairment. For example, observed psychophysical impairment coupled with a PBT result showing a very low BAC indicates an immediate need to investigate the possibility that the suspect has ingested a **drug other than alcohol** or suffers from a medical problem.)
- **help** to establish probable cause for a DWI arrest...
(*emphasis added*)

National Highway Traffic Safety Adm., U.S. Dept of Transp., HS 178 R 9/04, DWI Detections and Standardized Field Sobriety Testing Student Manual (2004), at VII 7, 8 (Appendix 11).

Of course there are advantages and limitations to PBTs as there are other explanations besides impairment for glassy eyes, slurred speech, bloodshot eyes, poor balance, odor, etc. However, PBTs are "reasonably accurate." *Id.*, at VII 8.

Of recent concern to the Ohio State Legislature is the increase in incidence of impaired driving due to “other drugs” besides ethanol (alcohol). The enactment of Ohio Rev. Code § 4511.19 A(1)(j) (i) thru (x) prohibited certain levels of “other drugs” (cocaine, marijuana, etc.) in urine or blood. Disallowing the use of PBT results for probable cause determination would hinder law enforcement from narrowing the scope of investigation into the use of these “other drugs.” *Id.*, at VII 8.

It is apparent that the United States Department of Transportation and/or NHTSA, after extensive study and review, has sanctioned the use of PBTs for assistance in probable cause determination and confirmation of the consumption of alcohol. Such verification is necessary as some drivers stopped for OVI deny any intake of alcohol. In Homan, *supra*, the Ohio Supreme Court recognized NHTSA (U.S. Dept. of Transportation) as a proven authority on methods to detect the level of impairment in an individual. Reliance on NHTSA’s publications was indicated, at pp. 424 and 425 and in the dissent at p. 430. Any analysis of the question of use of PBTs for probable cause should include the same due deference, as in Homan, to NHTSA’s findings and recommendations.

This Court held in State v. Edwards (2005), 107 Ohio St.3d 169, 174 “... [J]udicial officials at suppression hearings may rely on hearsay and **other** evidence, even though that evidence would not be admissible at trial.” (*emphasis added*) Extraneous material, “non-evidential” material, like hearsay is often used to establish probable cause.

In 2001, the Ohio Department of Health (ODH) eliminated the category of “non-evidential” instruments from its approved list. Its Alcohol Testing Chief explained in response to the Third District Court of Appeals’ misinterpretation that this elimination had nothing to do with the Department’s belief whether the PBT was reliable for probable cause/non-evidential

(suppression) issues, but rather that the ODH had no regulatory authority for such category: “non-evidential (i.e., probable cause).” (Appendix 12).

Any analysis of the question before this Court must begin with an appraisal of probable cause. “Probable cause does not require the **officer** to correctly predict that **conviction** will result.” Bowling Green v. Godwin (2006), 110 Ohio St. 3d 58, 62. The emphasis should be on what, an “objectively reasonable” **police officer** would believe.....[*Emphasis added*] *Id*, at 62. It should follow that when a laboratory tested and NHSTA approved PBT indicates a positive alcohol test result, tantamount to an admission of consumption of alcohol, an objectively reasonable trained and experienced police officer could consider this in his totality of circumstances.

Since 1985, Ohio courts have considered admission of consumption, albeit likely understatement, in their criteria for finding a totality of circumstances for probable cause to arrest. See State v. Homan (2000), 89 Ohio St. 3d 421, 427; State v. Boczar, Ashtabula County App. NO. 2004-A-0063, 2005-Ohio-6910, at par. 52; State v. Maston, Mahoning County App. No. 02CA101, 2003-Ohio-3075, at par. 7; State v. Maloney, Geauga County App. No. 2007-G-2788, 2008-Ohio-1492, at par. 37. (This most recent 11th District case also accepts the results of the PBT (.134) for probable cause, at par. 58 and **conflicts** with the 7th District’s statement in Deroy that the 11th District does not admit PBTs for probable cause, Deroy, *supra*, at par. 10; State v. Thompson, Union County No. 14-04-34, 14-04-35, 2005-OHIO-2053, at par. 19; State v. Menking, Washington Cty. App. No.02CA66, 2003-OHIO-3515, at par. 16; Village of Gates Mills v. Wazbinski, Cuyahoga County App. No. 81863, 2003-OHIO-5919, at par. 23; State v. Sandlin, Warren County App. No. CA 2000-01-010, Oct. 23, 2000, at p. 3 of 4; Dutkiewicz v. State of Ohio, Lucas County C.A. No. L-85-071, July 19, 1985, at p. 2 of 2. All the Appellate

Districts 7th, 3rd, 8th, 11th and 12th cited in Derov for not allowing PBT testimony for probable cause are contained in this list.

The ultimate question may be best posed as:

Is the admission of consumption of alcohol, including the amount consumed by a driver being investigated for driving under the influence of alcohol, more “reasonably trustworthy” to a “reasonably trained and experienced law officer”, than a PBT which has undergone standardized testing by the U.S. Department of Transportation/NHTSA? Is this admission of alcohol from a more “reasonably trustworthy source” than the PBT which shows a positive reading of alcohol?

See comparable language, City of Mason v. Murphy (Warren 1997) 123 Ohio App 3d 592, 598.

If this Court answers in the negative to both questions, then the conclusion must be that PBT results should be considered as a source for confirming or establishing alcohol consumption and a portion of the totality of circumstances test like odor, glassy eyes, slurred speech, slow movements, etc, no more..... but certainly no less.

CONCLUSION

No one can seriously dispute the magnitude of the drunken driving problem or the states' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. The United States Government reports that "drunk drivers cause an annual death toll of nearly 13,000 and cost society at least \$114 billion dollars annually. Ohio is hardly immune from the drunk driving problem; Ohio police reports indicate Ohioans share the road with 140,000 drunk drivers." For decades, this Court has "repeatedly lamented the tragedy." South Dakota v. Neville, 459 U.S. 553, 558, 103 S.Ct. 916, 920, 74 L.Ed.2d 748 (1983); see Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 412 1 L.Ed.2d 448 (1957) ("The increasing slaughter on our highways...now reaches the astounding figures only heard of on the battlefield").

Michigan v. Sitz (1990), 496 U.S. 444, 451.

This "battlefield" spreads throughout our nation, including all of Ohio. In the vast majority of states, reasonably prudent, trained, and experienced law enforcement personnel are equipped with a "reasonably trustworthy source" to be included in the totality of circumstances for probable cause...PBTs. There is no sufficient reason to deny the citizens of Ohio the same protection that other states have in ridding their highways of drivers under the influence of alcohol.

MADD supports the continued use of PBTs for consideration in finding probable cause to arrest for OVI in Ohio. Elimination of their use will result in extreme hardship in the prosecution of impaired drivers.

MADD respectfully requests that this Court hold that the result of NHTSA approved PBTs be admitted at "non-evidential" suppression hearings as a component for totality of circumstances in determining probable cause to arrest for operating a motor vehicle while under the influence of alcohol.

Respectfully submitted,



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Intoximeters

World Leader in Breath Alcohol Testing for Over Fifty Years

August 18, 2008

MADD Ohio State Office
5900 Roche Drive, Suite 250
Columbus, OH 43229-3277

RE: Intoximeters PBT's Sold in the State of Ohio

Dear Sirs:

During the period of 1996 through 2008, Intoximeters has sold approximately 1,629 Alco-Sensors, Alco-Sensor III's, and Alco-Sensor FST's in the State of Ohio with an average price of \$435.00.

Sincerely,

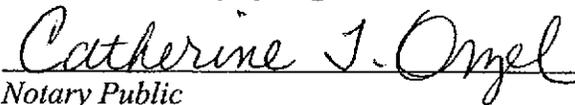


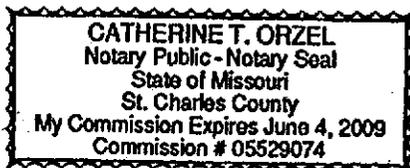
M. R. Forrester
Chairman

cc: Martin Aubry, Perrysburg Prosecutor's Office

State of Missouri
County of St. Louis

Subscribed and sworn to before me by M. R. Forrester on this 18th day of August 2008.


Notary Public



Westlaw.

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Slip Copy, 2007 WL 2219335 (S.D.Miss.)

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U.S. v. Bourgeois
S.D.Miss.,2007.

Only the Westlaw citation is currently available.

United States District Court,S.D. Missis-
sippi,Jackson Division.

UNITED STATES of America

v.

Joann BOURGEOIS.

Criminal Action No. 3:06CR51TSL-JCS.

July 30, 2007.

George L. Lucas, Federal Public Defender, Jackson,
MS, for Joann Bourgeois.

Dunn Lampton, U.S. Attorney's Office, Jackson,
MS, for United States of America.

MEMORANDUM OPINION AND ORDER

TOM S. LEE, United States District Judge.

*1 This cause is before the court on the appeal of Joann Bourgeois of her March 27, 2006 conviction pursuant to 36 C.F.R. § 4.23 (DUI refusal). The government opposes the appeal, and the court, having considered the parties' memoranda and the record in this case, concludes that the appeal is not well taken and thus, that defendant's conviction is due to be affirmed.

On November 12, 2005, around 9:58 p.m., Bourgeois, who had admittedly consumed four to five alcoholic beverages at a wedding earlier in the evening, was stopped at a checkpoint established by Natchez Trace Parkway Park Rangers at the intersection of the Natchez Trace Parkway and a local road.

At trial, Ranger Rachel Strain testified that as she approached Bourgeois' vehicle, she smelled "a very strong odor of an alcoholic beverage" and observed that Bourgeois had bloodshot eyes, slurred speech and was behaving nervously. Additionally, the other Ranger on the scene recovered an open bottle of

beer from the vehicle's console. Strain administered the Horizontal Gaze Nystagmus field sobriety test FN1 and concluded that Bourgeois was deficient in each of the six areas. Strain administered a "walk and turn" test and the "stand on one leg" test, and again concluded that Bourgeois did not perform satisfactorily.^{FN2} Finally, Strain requested that Bourgeois take a portable breath test. Bourgeois complied, and after a brief wait for the results, Strain announced to Bourgeois that she was .02 over the legal limit. Strain arrested Bourgeois on suspicion of driving under the influence and transported her to a local police department to administer the Intoxilyzer 8000 test. At the station, Bourgeois refused the test and Strain issued citations for driving under the influence (36 C.F.R. § 4.23), breath test refusal (36 C.F.R. § 4.23)^{FN3}, and open container violation (36 C.F.R. § 2.35).

FN1. An HGN test is conducted by asking the driver to cover one eye and focus the other on an object, usually a pen-held by the officer at the driver's eye level. As the officer moves the object gradually out of the driver's field of vision, she watches the driver's eyeball to detect involuntary jerking. The officer then observes: (1) the inability of each eye to track movement smoothly; (2) pronounced nystagmus at maximum deviation; and (3) onset of the nystagmus at an angle less than 45 degrees in relation to the center point.

Young v. City of Brookhaven, 693 So.2d 1355, 1359 (Miss.1997) (internal citations omitted).

FN2. Regarding this test, Strain testified:

Ms. Bourgeois could not stand as directed and with one foot in front of the other. She had to stand with both feet together. During the test, she did not walk heel to toe in any of her steps, and also

when she turned around she stopped to steady herself. During the one leg stand, she swayed before the test began, and that was the conclusion of that test.

Although Strain claimed at trial that Bourgeois had not performed satisfactorily on the HGN or either of these other tests, the video tape of the stop reflects that after Bourgeois had completed these three field tests, Strain assured her that if she passed the portable breath test, the final field test, she would be free to go. Either Strain had concluded at the time that the result of the first three tests was satisfactory, or at least equivocal, which is not what Strain claimed at trial, or she intended to mislead Bourgeois.

FN3.Part 4 of Title 36 of the Code of Federal Regulations deals with traffic and vehicle safety within the National Park System. Section 4.1 states:

The applicability of the regulations in this part is described in § 1.2 of this chapter. The regulations in this part also apply, regardless of land ownership, on all roadways and parking areas within a park area that are open to public traffic and that are under the legislative jurisdiction of the United States.

Section 1.2(a) of Title 36 of the Code of Federal Regulations provides, in part:

a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned lands and waters administered by the National Park Service; [and]

(2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to

the terms of a written instrument.

Section 4.23 provides, in part:

a) Operating or being in actual physical control of a motor vehicle is prohibited while:

(1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or

(2) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath. Provided however, that if State law that applies to operating a motor vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph....

(c) (1) At the request or direction of an authorized person who has probable cause to believe that an operator of a motor vehicle within a park area has violated a provision of paragraph (a) of this section, the operator shall submit to one or more tests of the blood, breath, saliva or urine for the purpose of determining blood alcohol and drug content.

At trial, the magistrate judge heard testimony from Strain regarding the administration of the HGN test and viewed the video tape of Strain's stop of Bourgeois and found Bourgeois not guilty of driving under the influence, stating he could not "conclude from the tape that she was impaired. She did better than anybody I've ever seen on that particular test of DUI." However, he found her guilty of DUI refusal and imposed a fine of \$1300 and placed her on probation. He further informed Bourgeois that

"[t]he State of Mississippi will suspend your license for their purposes for the requisite amount of time, and after you've paid the fine and done that, you will be on non-reporting probation."

On appeal, Bourgeois argues that because Ranger Strain did not have a reasonable suspicion to demand an Intoxilyzer test, the magistrate judge erred by admitting the fact of her refusal into evidence and by finding her guilty of DUI refusal. She additionally argues that the magistrate judge sentenced her under the wrong statute. Specifically, she argues that "[t]he magistrate judge sentenced Bourgeois under the Assimilated Crimes Act, 18 U.S.C. § 13, where 18 U.S.C. § 3118, enacted by Congress in 1988, specifies the punishment for refusal as loss of driving privileges on federal reservations." For its part, the government contends the magistrate judge correctly found that there was sufficient probable cause to warrant administration of the Intoxilyzer test, which Bourgeois refused. It further maintains that Bourgeois was properly charged and sentenced under § 4.23. The court agrees with the government on both points.

*2 The court first addresses whether the magistrate judge should have suppressed the evidence of the DUI refusal. In reviewing the denial of a motion to suppress, this court employs a two-tiered standard, examining the factual findings of the trial court for clear error, and its ultimate conclusion as to the constitutionality of the law enforcement actions *de novo*. *United States v. Washington*, 340 F.3d 222, 226 (5th Cir.2003). Having reviewed the record in this case, the court concludes that there is no error.

Defendant phrases her argument on this point in terms of whether Strain had a "reasonable suspicion" to require her to take the Intoxilyzer test. Under the law, however, while Strain was required to have *reasonable suspicion* before initiating the field sobriety tests, see *Rogala v. District of Columbia*, 161 F.3d 44, 52 (D.C.Cir.1998) (holding that only reasonable suspicion is required to conduct a field sobriety test because it is such a minimal intrusion on the driver), under 4.23(c), Strain was actually re-

quired to have *probable cause* to believe that a violation of 4.23(a) had occurred in order to require a blood, urine, saliva or breath test. See 4.23(c) ("At the request of an authorized person who has probable cause to believe that an operator of a motor vehicle within the park has violated a provision of paragraph (a), the operator shall submit to one or more tests ... to determine blood alcohol and drug content). For the reasons that follow, the court concludes that she had both.

Bourgeois' admission that she had been drinking earlier in the day, together with Strain's observations that Bourgeois strongly smelled of alcohol, had bloodshot eyes and had an open container of beer within arm's reach, could have given rise to reasonable suspicion that she was driving while impaired. As Bourgeois correctly points out, the purpose of the field tests is to confirm or dispel the officer's suspicion that an individual is driving while impaired by alcohol. See *United States v. Frantz*, 177 F.Supp.2d 760, 764 (S.D. Ohio 2001) ("The purpose of the field sobriety tests is to confirm or disconfirm an initial suspicion of DUI."). Here, there are no results of such tests. According to Bourgeois, because the magistrate judge found that she passed all the physical field sobriety tests, Strain's reasonable suspicion was negated and thus, there certainly could not have been probable cause to require her to take the Intoxilyzer test. Bourgeois' argument on this point overlooks the fact that Strain testified that Bourgeois failed not only the HGN test but also registered above the legal limit on the portable breath test. While there may be questions as to the admissibility of either of these tests as substantive evidence of guilt on the DUI charge, both are admissible to determine whether probable cause existed. See *United States v. Ironcloud*, 171 F.3d 587 (8th Cir.1999) (collecting cases, portable breath test reliable as screening test to develop probable cause), and *Deloach v. City of Starkville*, 911 So.2d 1014, 1017 (Miss.App.2005) (HGN test results may be used to demonstrate probable cause). Accordingly, despite the fact that Bourgeois flawlessly completed the "walk and

turn” test and the “stand on one leg” test, the magistrate judge did not err in concluding that there was probable cause to require Bourgeois to take the Intoxilyzer test as requested by Strain.

*3 Bourgeois, apparently under the misapprehension that she was prosecuted pursuant to the Assimilated Crimes Act, 18 U.S.C. § 13, *et seq.*, next argues that the government sentenced her under the wrong statute. Specifically, she urges that she should have been sentenced under 18 U.S.C. § 3118. This statute provides:

(a) Consent.-Whoever operates a motor vehicle in the special maritime and territorial jurisdiction of the United States consents thereby to a chemical test or tests of such person's blood, breath, or urine, if arrested for any offense arising from such person's driving while under the influence of a drug or alcohol in such jurisdiction. The test or tests shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving a motor vehicle upon the special maritime and territorial jurisdiction of the United States while under the influence of drugs or alcohol in violation of the laws of a State, territory, possession, or district.

(a) Effect of Refusal.-Whoever, having consented to a test or tests by reason of subsection (a), refuses to submit to such a test or tests, after having first been advised of the consequences of such a refusal, shall be denied the privilege of operating a motor vehicle upon the special maritime and territorial jurisdiction of the United States during the period of a year commencing on the date of arrest upon which such test or tests was refused, and such refusal may be admitted into evidence in any case arising from such person's driving while under the influence of a drug or alcohol in such jurisdiction. Any person who operates a motor vehicle in the special maritime and territorial jurisdiction of the United States after having been denied such privilege under this subsection shall be treated for the purposes of any civil or criminal proceedings arising out of such operation as operating such

vehicle without a license to do so.

Initially, the court observes that although Bourgeois asserts that the magistrate judge sentenced her under the wrong statute, the gist of her argument is that the government prosecuted her under the wrong statute. This argument should have been raised before the trial court and was not. Accordingly, as she has not preserved this error for appeal, it may be reviewed only for plain error. *United States v. Duncan*, 191 F.3d 569, 575 (5th Cir.1999) (“Plain error review applies to claims that were not raised before the trial court.”).

Based on the following, the court concludes that prosecution under § 4.23 was not improper. The court's research of this issue has found that § 3118 was enacted as an implied consent statute to aid in the government's prosecution of crimes under the Assimilated Crimes Act.^{FN4} The ACA “provide[s] a set of criminal laws for federal enclaves by the use of the penal law of the local state ‘to fill the gaps in federal criminal law.’” *United States v. Brown*, 608 F.2d 551, 553 (5th Cir.1979) (internal citations and quotations omitted). “The government can resort to state law for prosecution only if no act of Congress directly makes a defendant's conduct punishable.” *Id.* Here, the enactment of § 4.23(a) precludes prosecution under state law via the ACA.^{FN5} *United States v. Hall*, 979 F.2d 320, 322 (3rd Cir.1992) (collecting cases and concluding that a federal regulation (as contrasted with a statute) operates as an “enactment of Congress” within the meaning of the ACA). According, the magistrate judge did not err by failing to sentence Bourgeois under § 3118.^{FN6}

FN4. The section was enacted on November 18, 1988 and originally codified at 18 U.S.C. § 3117. The original enactment at Pub.L. 100-690, Title VI, § 6477(b)(1) makes clear that the new law is an “Assimilated Crimes Act” amendment.

FN5. The government assertion that § 3118 does not apply to prosecutions of crimes

occurring in national parks because national parks do not come within the federal government's special maritime and territorial jurisdiction as set out in 18 U.S.C. § 7 is incorrect. In *United States v. Magee*, 29 F.3d 625 (5th Cir.1994), the Fifth Circuit affirmed the defendant's conviction under 18 U.S.C. § 1117 (conspiracy to murder). The crime occurred on the Natchez Traceway Parkway and the indictment recited that the court's subject matter jurisdiction was premised on 18 U.S.C. § 7(3).

FN6. Given that prosecutors have the discretion to "choos[e] among statutes that impose different penalties, even if they are violated by the same conduct," *United States v. Batchelder*, 442 U.S. 114, 125, 99 S.Ct. 2198, 2204-05, 60 L.Ed.2d 755 (1979), and that § 4.23 has been deemed an enactment of Congress, contrary to defendant's assertion otherwise, it does *not* "go[] without saying" that a federal criminal statute would necessarily invalidate a federal criminal regulation which purported to regulate the same conduct as the statute.

*4 Based on the foregoing, it is ordered that the conviction of defendant Joanna Bourgeois is affirmed.

SO ORDERED.

S.D.Miss.,2007.
U.S. v. Bourgeois
Slip Copy, 2007 WL 2219335 (S.D.Miss.)

END OF DOCUMENT



U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**



DOT HS 810 827

August 2007

Digest of Impaired Driving and Selected Beverage Control Laws

Twenty-Fourth Edition

Current as of January 1, 2007

This document is available to the public from the National Technical Information Service, Springfield, Virginia 22161

Pre-Sentencing Investigation Law (PSI) (Yes/No):

Yes Alcohol and Drug Evaluation required §§8-1008(c) and (d), 8-1567

Sanctions for Refusal to Submit to a Chemical Test:

Refusal to Take a Preliminary Breath Test:
Criminal Sanctions (Fine/Jail):

Yes Infraction A fine of not more than **\$500** X
§§21-3105(2) and 21-4503(4), \$90 if a person pleads guilty or no contest under the uniform fine schedule.
§8-2118(c)

Administrative Licensing Action
(Susp/Rev):

None
None

Other:
Refusal to Take Implied Consent
Chemical Test:

Criminal Sanction (Fine/Jail):
Administrative Licensing Action
(Susp/Rev):

None

First occurrence- Suspension – 1 year (mand); second occurrence- Suspension – 2 years; third occurrence- Suspension – 3 years (mand); fourth occurrence- Suspension – 10 years; fifth or subsequent occurrence- Permanent Revocation §§8-1002(a) and 8-1014(a)

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:
Imprisonment:

First offense (Class B misdemeanor) – **48 consecutive hours to 6 months**; second offense (Class A misdemeanor) – **90 days to 1 year**; third and subsequent offenses (felony) – **90 days to 1 year** §§8-1567(d), (e), (f) and (g)

Mandatory Minimum Term:

First offense – **48 consecutive hours**; second offense - **5 consecutive days** (or 48 consecutive hours, then work release or house arrest); third and subsequent offenses – **90 days** (or 48 consecutive hours, then work release or house arrest); fourth or subsequent offense – **90 days** (or 72 consecutive hours, then work release.)§8-1567(d), (e), (f) and (g).

Note: I. Under the DWI law, "imprisonment" includes "any restrained environment under the control of a court and law enforcement agency". §8-1567(r)(2). However, incarceration for a felony DWI offense is not to be served in a facility operated by the State Secretary of Corrections. §21-4704(i). II. All offenses committed by a person during a lifetime are considered in determining the number of priors. §8-1567(l)(3).

Fine:
Amount (\$ Range):

First offense – **\$500 to \$1000**; second offense – **\$1000 to \$1500**; third and subsequent offenses – **\$1500 to \$2500**; fourth or subsequent offense – **\$2500**.
§8-1567(d), (e) (f) and (g).

Mandatory Minimum Fine (\$):⁴⁶⁷

First offense – **\$500**; second offense – **\$1000**; third offense – **\$1500**; fourth or subsequent offense – **\$2500**.

⁴⁶⁷ An "assessment" of \$110 is levied against persons who are either convicted of a DWI offense or who enter a DWI diversion program. The "assessment" funds are used to support community-based alcohol and drug safety action

Sanctions for Refusal to Submit to a Chemical Test:

Refusal to Take a Preliminary Breath Test: X

Criminal Sanctions (Fine/Jail):
 Administrative Licensing Action (Susp/Rev):

See Footnote No. ⁶²⁶

Other:

Refusal to Take Implied Consent Chemical Test:

Criminal Sanction (Fine/Jail):

It is a crime to refuse to submit to a chemical test under the implied consent law. §169A.20, subd. 2
 A refusal to submit to a chemical test is a drunk-driving offense.

Administrative Licensing Action (Susp/Rev):

Admin. Revocations. Revocation 1 year
 §169A.52, subd. 3(a) However, for a first refusal criminal offense conviction, the licensing revocation of 90 days applies instead of this action. §169A.54, subds. 1(2) and 6

First offense – 15 days mandatory – For persons < 18 years old-90 days mandatory; subsequent refusal (within 10 years) or a refusal where the person has had a prior drunk-driving or admin. per se violation (within 10 years) – 180 days mandatory For persons < 18 years old-360 days mandatory §171.30, subds. 2a and 2b

Other:

After these mandatory periods, a person is eligible for limited driving privileges. §171.30

This licensing action is imposed even if a test is obtained without consent following a refusal. §169A.52, subd. 3(a)

In any civil or criminal hearing or trial, the results of a breath test, when performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument ... are admissible in evidence without antecedent expert testimony that an infrared or other approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath.

Sanctions Following a Conviction for a DWI Offense:

Criminal Sanctions:

Fourth Degree Drunk Driving Offense - No Aggravating Factors- Misdemeanor §169A.27

Third Degree Drunk Driving Offense -

One Aggravating Factor-Gross Misdemeanor §169A.26

Second Degree Drunk- Driving Offense

⁶²⁶ A refusal to submit to a PBT will subject a person to the provisions of the implied consent law (§169A.51). X
 §169A.41, subd. 4 Historical Note: Under a previous PBT law, which used similar language, the State Supreme Court held that a refusal to submit to a PBT would not result in licensing action. Only a refusal to submit to the implied consent would be grounds for such action. *State, Department of Public Safety v. Grovum*, 209 N.W.2d 788 (Minn. 1973)
 Comment: It appears reasonable to assume that this holding would also preclude the imposition

STATE:

NEBRASKA

General References:

Revised Statutes of Nebraska and
Nebraska Administrative Code (NAC)

Basis for a DWI Charge:

Standard DWI Offense:

Under the influence of alcoholic liquor*
§60-6,196(1)(a)

Illegal Per Se Law (BAC/BrAC):

≥.08^{729and730} §60-6,196(1)(b) and (c)
Persons Under 21 Years Old-BAC/BrAC ≥.02 but
<.08 Traffic Infraction (Civil Offense) §§60-6,
211.01, 60-6, 211.02(3) and 60-672

Presumption (BAC):

None

Types of Drugs/Drugs and Alcohol:

Under the influence of **Any Drug** §60-6,196(1)(a)

Other:

Chemical Breath Tests for Alcohol Concentration:

Preliminary Breath Test Law:

Yes §§60-6,197(3) and 60-6,211.02(2) Any driver **X**
must submit to a preliminary test if the officer has
reasonable grounds to believe that such person
has alcohol in his or her body, has committed a
moving traffic violation, or has been involved in a
traffic accident.

Implied Consent Law:

Arrest Required (Yes/No):

Yes⁷³¹ §60-6,197(2)

Implied Consent Law Applies to

Drugs (Yes/No):

Yes §60-6,197(1)

Refusal to Submit to Chemical Test

Admitted into Evidence:

Yes §60-6,197(11) (Criminal Cases) and *State v.*
Romell, 204 N.W.2d 573 (1973)

Refusal to Submit to Chemical Test

After valid arrest is separate crime:

Yes A driver involved in a motor vehicle crash where
there are reasonable grounds that the driver is DWI
may be required to submit to a chemical test to
determine if he/she has either alcohol or drugs in
his/her system. Injury or death is not a prerequisite
for this requirement. §60-6,197⁷³²

* In cases involving "driving while under the influence" where both alcohol and drugs are involved, it is not necessary for the State to prove which substance, alcohol or drugs, caused the impairment. *State v. Falcon*, 615 N.W. 2d 436 (Neb. 2000).

⁷²⁹ This State's illegal per se law also makes it an offense to operate a motor vehicle with a breath alcohol concentration of .08 or more.

⁷³⁰ Standards: Grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. §§60-6,196(1) and 60-6,211.01

⁷³¹ Probable cause (not an arrest) is needed prior to requesting a person under 21 years old to submit to a test for evidence related to a violation of §60-6, 211.01 (driving with a BAC/BrAC ≥.02). §60-6, 211.02(2)

⁷³² A surviving driver (or pedestrian) 16 years old or older who is involved in an accident where there has been a fatality shall be required to submit to a chemical test of the blood, breath or urine in order to determine the amount of alcohol or drugs in the body. The tests' results and the identity of the persons tested are considered public records and are subject to being disclosed. §§60-6,103 and 60-6,104.

Chemical Tests of Other Substances for Alcohol Concentration Which Are Authorized Under the Implied Consent Law:

Blood: Yes §60-6,197(1)
 Urine: Yes §60-6,197(1)
 Other: None

Adjudication of DWI Charges:

Mandatory Adjudication Law (Yes/No): No. Pretrial diversion of DWI cases is prohibited. §29-3604
 Anti-Plea-Bargaining Statute (Yes/No): No
 Pre-Sentencing Investigation Law (PSI) (Yes/No): Yes.⁷³³ Alcohol screening is required for either a first or subsequent offender. §60-6,196(8)

Sanctions for Refusal to Submit to a Chemical Test:

Refusal to Take a Preliminary Breath Test:
 Criminal Sanctions (Fine/Jail): Class V Misdemeanor: **\$100 fine**, no imprisonment X
 §§28-106 and 60-6,197(3)

Administrative Licensing Action (Susp/Rev): **Yes: immediate confiscation of license, one-year revocation** for refusal to take test; **90-day** revocation if test failed. Revocation limited to **30 days** with installation of ignition interlock §§60-498.01 and 60-498.02

Other: Persons Under 21 Years Old: A person under 21 years old who refuses to submit to a preliminary breath test to determine if he/she was driving with a BAC/BrAC ≥.02 may be arrested for a violation of §60-6, 211.01. §60-6, 211.02(2)

Refusal to Take Implied Consent Chemical Test:
 Criminal Sanction (Fine/Jail): First offense (Class W misdemeanor) – Not more than **\$500/60 days**; second offense within 12 years – (Class W misdemeanor) – Not more than **\$500/90 days**; third offense within 12 years – (Class W misdemeanor) – Not more than **\$600/1 year**; fourth or subsequent offense within 12 years – (Class IV felony) – Not more than **\$10,000/5 years**. §§28-105, 28-106 and 60-6,197

Mandatory Sanctions:
 I. If probation is not granted: first offense – **\$400/7 days**; second offense (within 12 years) – **\$500/30 days**; third offense (within 12 years) – **\$600/90 days**; fourth or subsequent offense (within 12 years) – **10 days** §§28-106 and 60-6,197(4)
 II. If probation is granted: first offense – **\$400**; second offense (within 12 years) – **\$500/5 days or 240 hours of community service**; third offense (within 12 years)

⁷³³ "A court may order a pre-sentence investigation in any case." §29-2261 (2) and (3)

is valid until the conclusion of the DWI criminal proceedings, or if not prosecuted, for 90 days or until admin suspension, whichever comes first.

Post DWI Conviction Licensing Action:
 Type of Licensing Action
 (Susp/Rev):

See Footnote No.⁶⁰⁶.

- 1) **Driving while visibly impaired:** first offense – **Suspension**; second offense (within 7 years) – **Revocation**; third offense (within 10 years) – **Revocation**
 - 2) **Driving while under the influence/illegal per se:** first offense – **Suspension**; second offense (within 7 years) – **Revocation**; third offense (within 10 years) – **Revocation**
 - 3) **Any DWI offense** where there is a "serious impairment of a body function" – **Revocation**
 - 4) **Persons Under 21 Years Old: Any Bodily Alcohol Content** – first offense – **Suspension**; a violation of this prohibition where there have been 2 violations of any other drunk-driving law provision – **Revocation**; in addition, for any offense where there has been a prior revocation within 7 years – **Revocation**
- Citations for the above actions: §§257.303(2) and (4) and 257.319(8)

Term of License Withdrawal
 (Days, Months, Years, etc.):

- 1) **Driving while visibly impaired:** first offense – **90 days** (If the offense involved driving while impaired by a controlled substance or a controlled substance and alcohol – **180 days**); second offense – not less than **1 year**; any subsequent offense where there has been a prior revocation within 7 years – not less than **5 years**. §§257.303(2) and (4) and 257.319(8)

Chapter 777.

⁶⁰⁶ Licensing action under the point system: vehicle manslaughter or driving while under the influence/illegal per se-6 points; driving while impaired-4 points; twelve points in two years may result in suspension/revocation. A suspension cannot be longer than one year. §§257.320(1) (d), (2) and (4) and 257.320a (1) (a), (c) and (i)

DWI Offenses and Commercial Motor Vehicles (CMV)/Commercial Driver's Licenses (CDL): A person's privilege to operate a CMV is suspended for 1 mandatory year (3 years if transporting hazardous materials) if, while driving a CMV, that person (1) has violated the law that prohibits CMV operation with a BAC/BrAC/UrAC ≥.04, (2) has violated the provisions of the drunk driving law (§257.625(1), (3), (4), (5), (6) or (7)) or (3) has refused to submit to a chemical test for alcohol concentration or the presence of controlled substances. For either (1) a subsequent violation or (2) a combination of two or more violations of any of the above listed items, a revocation for not less than 10 years. §257.625f (1) (b) and (c). Under §257.625m, a person who operates a CMV with a BAC/BrAC/UrAC ≥.04 but <.07 commits a criminal offense: first offense (misdemeanor) – Jail – Not more than 93 days and/or fine of not more than \$300 and license suspension for 90 days (a restricted license is available for all of this period); second offense (within 7 years) (misdemeanor) – Imprisonment for not more than 1 year and/or a fine of not more than \$1,000 and license revocation for 1 year (mand); and, third offense (within 10 years) (felony) – Imprisonment to 5 years or probation with county jail from 30 days to 1 year (w/48 con hrs) with 60 to 180 days of community (the minimum imprisonment and/or community service are mand) and/or a fine of \$500 to \$5,000 and license revocation for 5 years (mand). In addition, a CMV operator who has a BAC/BrAC/UrAC ≥.015 must be placed "out-of-service" for 24 hours. Finally, it is a misdemeanor for a person to refuse to submit to a preliminary breath test (PBT) while operating a CMV; the sanctions for this offense are imprisonment for not more than 93 days and/or a fine of not more than \$100, and results in a 24-hour out-of-service order. Note: The standards for BAC, BrAC and UrAC are respectively as follows: grams of alcohol per 100 milliliters of blood, grams of alcohol per 210 liters of breath or grams of alcohol per 67 milliliters of urine. §§257.1c, 257.4b, 257.7a, 257.303(2) and (4), 257.312e, 257.319(8)(f), 257.319b, 257.319d, 257.625a (4) and (5) and 257.625m

Westlaw.

38 FR 30459-02

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38 Fed. Reg. 30459 (November 5, 1973)

NOTICES

DEPARTMENT OF TRANSPORTATION
National Highway Traffic Safety Administration

HIGHWAY SAFETY PROGRAMS
Standard for Devices to Measure Breath Alcohol

November 5, 1973

The purpose of this notice is to publish the details of a program for development of a qualified products list for use by the National Highway Traffic Safety Administration, and by State and local governments using Federal funds for purchasing evidential breath-testing equipment.

38 FR 30459-30463

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APPENDIX 4

Abuse, and Mental Health Administration, and pursuant to the provisions of Public Law 92-463, section 10(d).

Agenda items are subject to change as priorities dictate.

Substantive program information may be obtained from the contact person listed above.

The NIAAA Information Officer who will furnish summaries of the meeting and a roster of committee members is Mr. Harry C. Bell, Associate Director for Public Affairs, National Institute on Alcohol Abuse and Alcoholism, Room 6-C-15, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20852, telephone: 301-443-3306.

Date: October 29, 1973.

ROGER O. EGESEB, *Interim Administrator, Alcohol, Drug Abuse, and Mental Health Administration.*

[FR Doc.73-23479 Filed 11-2-73;8:45 am]

Food and Drug Administration
[FAP 2A2810]

NATIONAL MARINE FISHERIES SERVICE
Notice of Withdrawal of Petition for Food Additives

Pursuant to provisions of the Federal Food, Drug, and Cosmetic Act. (sec. 409 (b), 72 Stat. 1786; 21 U.S.C. 348(b)), the following notice is issued:

In accordance with § 121.52 *Withdrawal of petitions without prejudice* of the procedural food additive regulations (21 CFR 121.52), National Marine Fisheries Service, Department of Commerce, Washington, DC 20235 has withdrawn its petition (FAP 2A2810), notice of which was published in the FEDERAL REGISTER of August 2, 1972 (37 FR 15443), proposing that § 121.1202 *Whole fish protein concentrate* (21 CFR 121.1202) be amended by raising the limit on the level of residue of isopropyl alcohol that may be present in whole fish protein concentrate.

Dated: October 25, 1973.

ALBERT C. KOLBYE, JR., *Acting Director, Bureau of Foods.*

[FR Doc.73-23433 Filed 11-2-73;8:45 am]

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

HIGHWAY SAFETY PROGRAMS

Standard for Devices to Measure Breath Alcohol

The purpose of this notice is to publish the details of a program for development of a qualified products list for use by the National Highway Traffic Safety Administration, and by State and local governments using Federal funds for purchasing evidential breath-testing equipment.

The Highway Safety Act of 1966 provides that each State shall have a high-

way safety program designed to reduce motor vehicle accidents and deaths, injuries and property damage resulting therefrom. The Secretary of Transportation is charged with the responsibility for developing uniform standards for highway safety programs, pursuant to section 402(a) of the Act, and for carrying out a research and demonstration program, pursuant to section 403 of the Act. From the outset of the program, development of a broadly-based alcohol countermeasures program has been a high priority. Highway Safety Program Standard No. 8 covers Alcohol in Relation to Highway Safety, and establishes requirements for the alcohol-related aspects of the State programs. The standard includes requirements for legislative actions (such as development of implied consent laws, and laws establishing presumptive levels of intoxication), as well as for development of breath testing and other law enforcement capabilities. The NHTSA has also conducted a vigorous research and demonstration effort to advance the available technology in this field.

In these efforts it has been clear that development and use of accurate testing devices is essential. All jurisdictions covered by the Act now have implied consent statutes. All but four have statutes establishing a 0.10 percent blood alcohol level or lower as a presumptive level of intoxication. Some States have also recently adopted statutes establishing a certain blood alcohol level as illegal "per se", for a person in control of a motor vehicle.

In addition to a requirement in Standard No. 8 for development of controls relating to breath-testing activities, Volume 8 of the Highway Safety Program Manual provides additional guidelines for assisting States in implementing programs. Section IV, paragraph 3 of the Manual deals with chemical tests for alcohol impairment. The requirements with respect to breath tests are further specified in subsection 3(c), "Analysis of Breath". This section provides certain specifications for the accuracy of breath-testing equipment to be used in the law enforcement process. With the rapidly advancing breath-sensing technology there has been a proliferation of new devices being offered on the market for use by police in enforcement programs. As a result of these developments there is a need for an extension of the requirements currently provided in Volume 8 of the Manual. Officials from State and local governments have requested guidance in making purchases; court developments have highlighted the importance of accuracy; and the continuing use of Federal funds for purchasing breath-testing equipment makes it important to ensure effective expenditure of the funds.

To meet this need a variety of standards are being developed by the National Bureau of Standards (NBS) for the NHTSA. The first of these standards covers evidential breath-testing devices. The development of this standard included a review of the current state of the

art in breath-testing devices to develop a performance standard against which devices could be tested and a qualified products list developed. The effort began initially in the Committee on Alcohol and Drugs of the National Safety Council (NSC) and has been carried through by the NHTSA in close collaboration with the National Bureau of Standards. Since many manufacturers may wish to sell products to the NHTSA and State and local governments using Federal funds it was decided that a comment and assistance on the standards would be sought from manufacturers as well as from scientific and other technological experts. In December 1972, manufacturers were sent copies of the draft standard for review. The NBS mailed a draft of the standard, with a request for comments or suggestions, to 22 manufacturers, 52 State governors' representatives and highway safety coordinators (with a request that they forward an additional enclosed copy of the draft to their State official responsible for selecting or purchasing breath-testing equipment), and 21 other experts in the field, most of whom were members of the Executive Board of the Committee on Alcohol and Drugs, National Safety Council. Replies have been received from 12 manufacturers, 30 State officials, and 6 other experts. Comments were also received from an ad hoc review subcommittee of the National Safety Council Committee on Alcohol and Drugs.

Generally the letters approved of the draft, although most letters contained suggestions for change. Subjects most frequently mentioned were the system of units, the definition of blood alcohol equivalent (BAQ) and the specificity test using alcohol-free subjects.

As a result of these suggestions, the units for blood alcohol concentration were changed from mg/ml to the more familiar percent weight by volume (percent W/V) based upon grams of alcohol per 100 milliliters of blood. The definition of BAQ was eliminated. The name of the specificity test was changed to "Blank Reading" test. The scope of the standard was also changed to include mobile evidential breath testers.

Three letters suggested that the precision and accuracy tolerances were too tight and three others (including the Committee on Alcohol and Drugs) suggested that these tolerances were too loose. After restudying the data, NBS decided not to change these tolerances, which are based on a chi-square test at the 95-percent confidence level using data from 90 tests at NBS with three different breath testers at the three concentration levels.

Notice of the availability of the draft for review was also published in the Commerce Business Daily in December 1972.

The result of this review and deliberation is the standard testing procedure set forth below. Items meeting the standard will be included on a qualified products list that will be used to determine acceptability for purchase by the Federal Government in its efforts and for

purchase by the State and local governments with funds available pursuant to section 402(a) of the Act.

Qualification testing to these standards, of products submitted by manufacturers, will be conducted by the DOT Transportation Systems Center (TSC), 55 Broadway, Cambridge, Massachusetts 02142. The National Bureau of Standards will act as consultants to the Transportation Systems Center in the conduct of these tests. Tests will be conducted semi-annually. Manufacturers wishing to submit devices for evaluation must apply for a test date to the Department Systems Center not later than 4 weeks after publication of this notice. Normally, at least 30 days will be required from the date of notification until the test can be scheduled. One week prior to the scheduled initiation of the testing program, the manufacturer will deliver two units of his equipment to TSC. In addition to the Operator's Manual and the Maintenance Manual normally supplied with the purchase of this equipment, the manufacturer shall deliver to TSC specifications and drawings which fully describe these units. Proprietary information will be respected.

The two units submitted must be a prototype model. One of the two units will be returned to the manufacturer at the end of the testing period. The United States will reserve the right to purchase the remaining device at its discretion. The manufacturer will have the right to check his units between the arrival in Cambridge and the start of the test, but will have no access to the units during the tests. Any malfunction of the device which results in failure to complete any of the tests satisfactorily will result in failure of the qualification program. If a device fails, it may be resubmitted for next testing series.

All testing is expected to be completed within 3 months of the date of publication of this notice. The test results will be transmitted to each manufacturer. On the basis of these results, the NHTSA will develop a qualified products list covering the evidential breath-testing equipment. It is expected that within 6 months of the publication of this notice an NHTSA Directive will be issued amending Volume 8 of the Highway Safety Program Manual to include the qualified products list as a funding criteria. Only devices appearing on this list will be purchased with Federal funds available under sections 402 (a) or 403 of the Act. However, units not on the list may be purchased by DOT or NBS for experimental or developmental testing.

Retesting of devices will be conducted under several circumstances. First, it is expected that annual periodic testing will be conducted using devices purchased on the open market. Second, the NHTSA intends to modify and improve these standards as new data and test procedures become available. It is intended, for example, to add to the standards another section defining means of checking for the capability of a device to collect deep lung air by the use of rebreathing techniques. It is also intended to

increase the requirements for accuracy and precision if warranted by cost-effectiveness considerations. A requirement may be added for instruments to produce a permanent record of the test results. Comments and recommended revisions are invited from all interested parties. Suggestions should be addressed to the Associate Administrator, Traffic Safety Programs, National Highway Traffic Safety Administration, DOT, 400 7th Street, SW, Washington, D.C. 20590. Notification will be provided in the FEDERAL REGISTER of each such modification. The manufacturers whose equipment has already been tested to the standard will be notified to resubmit the equipment for testing to the new specification only.

Third, if at any time a manufacturer changes the design of a device currently on the NHTSA qualified products list, the manufacturer should submit the proposed changes to the DOT Transportation Systems Center for review. Based on this review, the NHTSA will decide whether the change will require retesting of the unit. Normally, such retesting will be accomplished at the next annual testing period. In special cases, however, the NHTSA may, at its option, permit an earlier retesting of the device.

Fourth, the DOT Transportation Systems Center will, on behalf of NHTSA, establish a Standards Compliance Information System (SCIS) for the purpose of eliciting information on the performance of devices listed on the NHTSA qualified products list. Reports will be solicited from State and local agencies on their acceptance testing. In addition, field performance data will be obtained from law enforcement agencies using the equipment. User reports will be elicited to assure that (1) devices continue to perform according to the NHTSA standard, and (2) experience in field use does not indicate an excessive breakdown rate or maintenance problems.

If information gathered through the SCIS indicates that an instrument on the qualified products list is not performing in accordance with the NHTSA standard, the Transportation Systems Center will initiate a special investigation. This study may include visits to users and additional tests of the device obtained from the open market. If this investigation indicates that the devices actually sold on the market are not meeting the NHTSA standard, then the manufacturer will be notified that the instrument may be dropped from the qualified products list. In this event the manufacturer shall have 30 days to reply.

Based on the DOT Transportation Systems Center investigation and the data presented in reply by the manufacturer, the NHTSA will make a determination as to whether the instrumentation should remain on the qualified products list. Devices dropped from the list may not be resubmitted for reconsideration for a period of 1 year. Upon resubmission, the manufacturer must submit a statement describing what has been done to overcome the problems which led to the dropping of the device in question from the list.

The primary objective of these standards is to ensure that Federal funds provided to the States under Section 402 of the Highway Safety Act are expended only for effective breath test equipment. A second objective of these standards is to assist the State and local communities by providing a centralized qualification test program for breath-testing devices designed to collect evidence in law enforcement programs. These standards are not intended to replace the current qualification programs required in certain States for this equipment or to directly regulate the manufacture of breath-testing equipment. However, some States may wish to make use of this program in addition to setting their own requirements. Finally, it is hoped that these standards can assist industrial organizations in producing breath test equipment by establishing a minimum national performance standard against which they can develop their designs.

Accordingly, the DOT performance standard for evidential breath testers to measure alcohol content shall be as set forth below.

(23 U.S.C. 402, 403.)

Issued on: October 30, 1973.

WILLARD Y. HOWELL,
Acting Associate Administrator,
Traffic Safety Programs, National Highway Traffic Safety Administration.

EVIDENTIAL BREATH TESTERS FOR ALCOHOL CONTENT

1. *Purpose and Scope.* The purpose of this standard is to establish performance requirements and methods of test for evidential breath testers. Evidential breath testers (EBT) are instruments which measure the alcohol content of deep lung samples of breath with sufficient accuracy for evidential purposes. The standard as a whole is intended primarily for use in qualification testing of EBT.

2. Classification.

2.1 Mobility.

2.1.1 *Mobile evidential breath testers.* EBT which are designed to be transported to nonfixed operational sites in the field.

2.1.2 *Nonmobile evidential breath testers.* EBT which are designed for operation at a fixed location.

2.2 Power source.

2.2.1 *Battery powered evidential breath testers.* EBT which are powered by batteries.

2.2.2 *A.C. powered evidential breath testers.* EBT which are powered from the a.c. power lines.

3. Definitions.

3.1 *Alcohol.* Ethanol; ethyl alcohol.

3.2 *Blood alcohol concentration (BAC).* Blood alcohol concentration, expressed in percent weight by volume (percent w/v) based upon grams of alcohol per 100 milliliters of blood in accordance with the Uniform Vehicle Code¹

¹ Copies of the Uniform Vehicle Code Supplement 1 1972 are available from the National Committee on Uniform Traffic Laws and Ordinances, 955 North L'Enfant Plaza, SW., Washington, D.C. 20024.

§ 11-902.1(a) (Supplement 1, 1972). A BAC of 0.10 percent w/v is equivalent to 0.10 grams of alcohol per 100 milliliters of blood (0.10g/100ml or 1.0mg/ml).

Alcohol concentrations in either breath or in vapor mixtures are expressed in milligrams of alcohol per liter of vapor (mg/l). For convenience, an equivalent BAC will be given in percent w/v in parentheses. To convert a vapor concentration in units of mg/l to units of percent w/v, multiply by 0.21.

3.3 Qualification tests. Tests performed to check the compliance of a product with the requirements of a standard in advance of, and independent of, any specific procurement action.

3.4 Standard deviation. A common indication of precision among repeated measurements of a single quantity given by:

$$\text{Standard Deviation} = \sqrt{\frac{\text{Sum } (X - \bar{X})^2}{N-1}}$$

where:

N = the number of measurements,
 \bar{X} = the value of a single measurement, and
 \bar{X} = the mean of all X's.

An equivalent formula which is often more convenient for performing calculations is:

$$\text{Standard Deviation} = \sqrt{\frac{SS}{N-1}}$$

where SS = Sum of $X^2 - \frac{(\text{Sum of } X)^2}{N}$

3.5 Systematic error. The difference between the mean measured value and the known value, expressed as a percentage of the known value.

4. Requirements.

4.1 Precision. Evidential breath testers shall measure the alcohol content of vapor mixtures with an average standard deviation of no more than 0.02 mg/l (0.004 percent W/V) when tested in accordance with 5.1.

4.2 Accuracy. Evidential breath testers shall measure the alcohol content of vapor mixtures with a systematic error of no more than plus or minus 10 percent at an ethanol vapor concentration of 0.24 mg/l (0.050 percent W/V), and no more than plus or minus 5 percent at concentrations of 0.48 mg/l (0.10 percent W/V) and 0.72 mg/l (0.15 percent W/V), when tested in accordance with 5.2.

4.3 Blank reading. Evidential breath testers shall indicate an average instrument reading of no more than 0.048 mg/l (0.010 percent W/V) when breath from alcohol-free subjects is tested in accordance with 5.3.

* This conversion factor is based on a commonly used value recommended by the Committee on Alcohol and Drugs of the National Safety Council; that is, 2.1 liters of "deep lung" air at 34°C contains approximately the same quantity of ethanol as 1 ml of circulating pulmonary arterial blood. See, for example, R. N. Harger, R. B. Forney and R. S. Baker, "Estimation of the Level of Blood Alcohol from Analysis of Breath," Quarterly Journal of Studies on Alcohol, 17, 1-18 (1956).

4.4 Breath sampling. Since the breath/blood correlation will be poor if an improper breath sample is taken, the instrument reading shall be compared with direct measurements of capillary or venous whole blood samples, in accordance with 5.4, to test for deep-lung sampling performance.

Note.—The use of this test in the standard does not imply that direct blood measurements are necessarily the only possible means for checking the deep-lung sampling performance of the instrument. If an acceptable performance test which involves breath alcohol measurement alone is developed, revision of this standard will be considered.

4.4.1 The limits to bias in breath/blood correlation shall be zero and -0.020 percent W/V as determined by the value of \bar{Y} , the evidential breath tester reading corresponding to a BAC of 0.10 percent W/V on the breath/blood correlation line drawn in accordance with 5.4.13. That is, the value of \bar{Y} shall be between 0.08 and 0.10 percent W/V.

4.4.2 At least seven of the eight breath-alcohol data points calculated in 5.4.10 shall not depart from the breath/blood correlation line by more than ±0.020 percent W/V. That is, at least seven of the eight breath-blood points plotted in accordance with 5.4.12 shall lie between the two lines drawn in accordance with 5.4.14 parallel to the breath/blood correlation line and passing through the points $\bar{Y} + 0.020$ and $\bar{Y} - 0.020$ percent W/V.

4.5 Power.

4.5.1 When a.c. powered evidential breath testers are operated at a.c. line voltages of 108 volts and 123 volts (rms) in accordance with 5.5, the systematic errors shall not exceed plus or minus 5 percent, and the standard deviations shall not exceed 0.03 mg/l (0.004 percent W/V).

4.5.2 Battery powered evidential breath testers shall have an indicator which warns when the accuracy and precision requirements (4.1 and 4.2), cannot be met because of battery condition.

4.5.3 The operator's manual supplied with battery powered evidential breath testers shall state the approximate number of breath tests which can be performed before battery replacement or recharging is necessary.

4.6 Ambient conditions.

4.6.1 Evidential breath testers shall meet the requirements of this standard when operated within the following ambient conditions.

(a) Temperature: 20°C (68°F) to 30°C (85°F).

(b) Pressure: 835 mm (25 in) to 787 mm (31 in) Hg.

(c) Relative Humidity: 10-90 percent.

4.6.2 When an evidential breath tester is designed for operation at temperatures outside the limits specified in 4.6.1.a, the instrument shall be tested in accordance with 5.6 at each of the specified limits outside the range 20°C to 30°C. The systematic errors shall not exceed plus or minus 5 percent and the standard deviations shall not exceed 0.02 mg/l (0.004 percent W/V).

4.6.3 If a temperature correction is required, this correction shall not exceed 20 percent of the uncorrected value.

4.7 Vibration stability of mobile EBT. Evidential breath testers shall measure the alcohol content of vapor mixtures with a systematic error of no more than plus or minus 5 percent and a standard deviation of no more than 0.02 mg/l (0.004 percent W/V) after they have been subjected to the vibration test in accordance with 5.7.

4.8 Electrical safety. Evidential breath testers shall meet the following requirements of the American National Standard Electrical Safety Requirements, ANSI C 39.5-1964: 3.1, Shock Hazard; 3.1.1, Grounding; 3.4, Flammability; 4.1.1, Marking of Terminals; 4.1.3, Male Plugs; 4.2.1, Internal (Wiring and Cabling); and 4.4, Over-Current Protection.

4.9 Operator's manual. An operator's manual shall be supplied by the manufacturer or distributor with each evidential breath tester. This manual shall clearly state the instructions for operation and maintenance of the instrument, and shall include the following information.

(a) The ranges of temperature, atmospheric pressure and relative humidity within which the instrument is designed to be operated.

(b) Any temperature corrections to compensate for ambient temperatures outside the range given in 4.6.1.a.

5. Test methods. The ambient conditions of temperature, pressure, and humidity shall be within the ranges specified in 5.1, 5.2, 5.3, 5.4, 5.5, and 5.7.

5.1 Precision test using known ethanol vapor concentrations.

5.1.1 Connect a device which supplies known concentrations of ethanol vapor to the evidential breath tester in accordance with the instructions in the operator's manual. The device and the ethanol mixture used therein shall meet the requirements of the standard for breath tester calibrating units.

5.1.2 Flush the sampling assembly of the instrument completely with the alcohol vapor sample as described in the operator's manual.

5.1.3 Using the evidential breath tester, measure each of the three known ethanol vapor concentrations listed below ten times:

(a) 0.24 mg/l (0.050 percent W/V).

(b) 0.48 mg/l (0.10 percent W/V).

(c) 0.72 mg/l (0.15 percent W/V).

5.1.4 For each of the three sets of ten measurements made in accordance with 5.1.3, calculate the standard deviation. (See sample calculation in appendix A.) Add the three standard deviations and divide by 3 to obtain the average standard deviation.

5.2 Accuracy test using known ethanol vapor concentrations. Use the test

* Copies of this ANSI publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018.

data obtained in accordance with 5.1 to calculate the systematic error at each of the three known vapor concentrations.

5.3 Blank test using alcohol-free test subjects.

5.3.1 Select five test subjects in generally good physical condition. The test subjects shall have consumed no alcoholic beverage during the 2-day period prior to testing and no more than the equivalent of 3 ounces of 100-proof liquor during the 4-day period prior to testing.

5.3.2 At least two of the five subjects selected shall be smokers and shall smoke at least once during the 2-hour period preceding the start of testing, but shall stop at least 20 minutes before the start of testing.

5.3.3 Take a breath sample from each test subject and obtain an instrument reading, allowing sufficient instrument recovery time (i.e., the time necessary to properly clear the evidential breath tester when following the operating instructions) between measurements.

5.3.4 Repeat 5.3.3 to obtain a total of ten measurements.

5.4 Breath sampling test.

5.4.1 Select eight test subjects in generally good physical condition.

5.4.2 The subjects' body temperatures measured orally shall be between 97.0° F and 99.5° F just prior to the start of testing.

5.4.3 Alcoholic beverages (mixed if desired with a non-alcoholic beverage) shall be consumed by the eight subjects over a period of 1 to 2 hours. A very light meal consisting of one sandwich and a non-alcoholic beverage shall be offered to the subjects before the start of the drinking period. Smoking shall be permitted if desired during the drinking period.

5.4.4 The eight subjects shall be divided into two groups of four. Each subject shall be given a different amount of alcoholic beverage to drink, to ensure that there is a distribution of BAC's within each group, and that Group I BAC's are within the range 0.04 to 10 percent W/V and Group II BAC's are within the range 0.1 to 0.2 percent W/V. Table 1 shall be used as a guide to calculate the consumption of alcoholic beverages necessary for a subject to reach a particular BAC. No constraints on body weight of subjects is implied in table 1. However, the listed amounts of liquor should be adjusted for light and heavy subjects.

TABLE 1

BAC, percent W/V	Amount of 100-proof liquor consumed	Body weight, pounds
0.05-0.06	3 ounces.....	175-150
0.10-0.12	5 1/4 ounces.....	175-150
0.20-0.23	10 ounces.....	175-150

5.4.5 A waiting period preceding the taking of a breath sample from each subject in accordance with 5.4.7.1 shall begin when he has consumed all of the alcoholic beverage given him. The duration of this waiting period shall be at least 90 minutes if capillary blood samples are to

be drawn, and 120 minutes if venous blood samples are to be drawn. During the waiting period the subjects shall not consume any alcoholic beverages. Those subjects who smoke may do so, but shall stop at least 20 minutes before the testing begins.

5.4.6 Blood samples, to be taken by a medically qualified person, shall be either venous blood from the cubital arm vein or capillary blood from the finger tip.

5.4.7 Instruct each subject individually as to the manner in which a breath specimen is to be delivered to the instrument under test, in accordance with the operator's manual. The test shall then proceed as follows.

5.4.7.1 Take the subject's breath sample and obtain the instrument reading.

5.4.7.2 Take a blood sample within 2 minutes after taking the breath sample.

5.4.7.3 Repeat 5.4.7.1 taking care that the breath testing instrument has had sufficient recovery time, but allowing no more than 6 minutes between the taking of the first and second breath samples.

The blood samples shall be analyzed within 72 hours after being taken, using a method of analysis which meets the requirements of 5.8. No less than two determinations of alcohol concentration shall be made on each blood sample.

5.4.8.1 A reference sample of known concentration of ethanol in whole blood in the range between 0.05 and 0.20 percent W/V shall be prepared by the analyzing laboratory, and five determinations of the reference sample ethanol concentration shall be made concurrently with the analysis of the blood samples.

5.4.8.2 The analysis of the reference sample and the blood samples shall be considered acceptable only if—

(a) The standard deviation of the five determinations of the reference sample concentration does not exceed 0.005 percent W/V; and

(b) The systematic error of the five determinations of the reference sample concentration does not exceed plus or minus 5 percent.

5.4.9 Calculate the average of the BAC measurements for each test subject. Let the letter X equal this average BAC, and use the subscripts 1 to 8 to designate the test subjects in ascending order of alcohol concentration (i.e., X₁, X₂, * * *, X₈).

5.4.10 Calculate the averages of the duplicate instrument readings made in accordance with 5.4.7 for each test subject. Convert if necessary to the same units used in 5.4.9 (percent W/V) by means of the conversion factor 0.21 (see footnote 2). Designate each average instrument reading with the letter Y and the same subscript used to identify the subject in accordance with 5.4.9.

5.4.11 Compute the following averages, and designate them as indicated.*

- (a) X_n, as the average of X₁, X₂, and X₃.
- (b) X_L, as the average of X₁, X₂ and X₃.

*See appendix B for a sample calculation. An additional example may be found on pages 5-27, paragraph 5-4.3.2 of NBS Handbook 91, "Experimental Statistics," available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

- (c) Y_n, as the average of Y₁, Y₂, and Y₃.
- (d) Y_L, as the average of Y₁, Y₂, and Y₃.
- (e) X̄, as the average of all eight X values.
- (f) Ȳ, as the average of all eight Y values.

5.4.12 Plot on graph paper the points corresponding to (X̄, Ȳ), (X_n, Y_n), (X_L, Y_L) and the eight breath-blood points corresponding to (X_i, Y_i), (X₂, Y₂), * * * (X₈, Y₈) (see figure in appendix B).

5.4.13 Draw a straight line, referred to as the "breath/blood correlation line" through the point (X̄, Ȳ) and parallel to a line (not drawn in the graph) joining the points (X_L, Y_L) and (X_n, Y_n).

5.4.14 Draw two lines parallel to the breath/blood correlation line and passing through the points Ȳ+0.020 and Ȳ-0.020% W/V.

5.5 Power line voltage test.

5.5.1 Apply line power to the a.c. powered EBT under test through a variable autotransformer having a nominal input voltage of 117 volts a.c. and an output adjustable between 0 and 130 volts, and having a current rating as required by the instrument under test. Any voltage regulating device used with the instrument shall be connected between the variable autotransformer and the instrument under test.

5.5.2 Monitor the autotransformer output voltage with an rms a.c. voltmeter having an accuracy of plus or minus 2 percent in the range of 105 to 125 volts.

5.5.3 Adjust the voltage of the EBT to 108 volts. After at least one-half hour, check the voltage and readjust if necessary. Then immediately measure a known ethanol vapor concentration of 0.48 mg/l (0.10% W/V) ten times as in the precision test (5.1).

5.5.4 Increase the voltage to 123 volts, and at least one-half hour later readjust the voltage if necessary and again measure a known ethanol vapor concentration of 0.48 mg/l (0.10% W/V) ten times.

5.5.5 Calculate the systematic errors and the standard deviations for each of the two sets of ten measurements (obtained with line voltages of 108 volts and 123 volts).

5.6 Ambient temperature test.

5.6.1 The test temperatures shall be constant and accurate within plus or minus 3°C throughout the duration of the testing period.

5.6.2 Allow at least 1 hour for the instrument to come to temperature equilibrium after each test temperature change.

5.6.3 Perform steps 5.1.1 and 5.1.2. Measure a known ethanol vapor concentration of 0.48 mg/l (0.10 percent W/V) ten times at each test temperature.

5.6.4 Calculate the average value of the ethanol vapor concentration measured at each test temperature. Apply any temperature corrections specified by the operator's manual to obtain the adjusted average values.

5.6.5 Using the adjusted average values, calculate the systematic error for each set of ten measurements. Also calculate the standard deviation for each set of ten measurements.

5.7 *Vibration test for mobile EBT.*

5.7.1 Subject the mobile EBT to vibrations of simple harmonic motion having an amplitude of 0.015 inches (total excursion 0.03 inches) applied initially at a frequency of 10 Hz and increased at a uniform rate of 30 Hz in 2½ minutes, then decreased at a uniform rate to 10 Hz in 2½ minutes.

5.7.2 Subject the unit to vibrations of simple harmonic motion having an amplitude of 0.0075 inches (total excursion 0.015 inches) applied initially at a frequency of 30 Hz and increased at a uniform rate to 60 Hz in 2½ minutes, then decreased at a uniform rate to 30 Hz in 2½ minutes.

5.7.3 Repeat 5.7.1 and 5.7.2 in each of three directions, namely in the directions parallel to both axes of the base and perpendicular to the plane of the base.

5.7.4 Perform steps 5.1.1 and 5.1.2. Measure a known ethanol vapor concentration of 0.48 mg/l (0.10 W/V) ten times, and calculate the systematic error and the standard deviation.

5.8 *Blood alcohol methodology test.* The analytical measurement system for the blood alcohol concentration determination shall be checked in the testing laboratory at least once prior to that laboratory performing the analysis required in 5.4.8.

5.8.1 The determination of the ethanol concentrations of the reference blood alcohol samples shall be performed by the same laboratory personnel who determine the ethanol concentrations of the test subject blood samples taken in accordance with 5.4. The analysis of the reference samples shall closely parallel the analysis of the test subject blood samples, especially with respect to laboratory conditions and analytical technique.

5.8.2 Prepare with an accuracy of plus or minus 1 percent, a blank (an alcohol-free blood sample), and three reference blood alcohol samples having ethanol concentrations within plus or minus 10 percent of 0.05, 0.100 and 0.200 percent W/V, by adding known quantities of ethanol to alcohol-free whole blood containing a suitable preservative.

5.8.3 Determine the ethanol concentrations of each of the three reference samples and the blank five times.

5.8.4 Compute the means, standard deviations, and systematic errors for each of the four sets of five determinations.

5.8.5 The method of analysis shall be considered acceptable if:

(a) The apparent ethanol concentration of the blank (alcohol-free blood) does not exceed 0.002 percent W/V.

(b) The average of the standard deviations from the analyses of the three reference samples does not exceed 0.005 percent W/V.

(c) The systematic error of the analysis of the 0.05 percent W/V reference

sample does not exceed plus or minus 10 percent; and

(d) The systematic errors of the analyses of the 0.100 and 0.200 percent W/V reference samples do not exceed plus or minus 5 percent.

APPENDIX A

SAMPLE CALCULATIONS OF PRECISION AND ACCURACY

The results of ten sample measurements made in accordance with 5.1 at three known ethanol vapor concentration levels are as follows:

Measurement	0.24 mg/l (0.050 percent W/V)	0.48 mg/l (0.10 percent W/V)	0.72 mg/l (0.18 percent W/V)
1	0.045	0.092	0.148
2	0.046	0.097	0.149
3	0.049	0.100	0.145
4	0.048	0.105	0.148
5	0.045	0.094	0.145
6	0.049	0.098	0.147
7	0.047	0.095	0.152
8	0.050	0.102	0.147
9	0.047	0.093	0.154
10	0.046	0.094	0.152
Average	0.047	0.097	0.149
S.D.	0.0018	0.0042	0.0029
Average		0.030	
S.E.	-5.0	-3.0	-0.7

APPENDIX B

SAMPLE CALCULATIONS IN THE DEEP LUNG SAMPLING TEST

B.1 Breath and blood alcohol concentration measurements have been made for each

of eight subjects in accordance with 5.4. The average of the BAC measurements for each subject is entered in the X column of Table 3. The average of the duplicate instrument readings for each subject is entered in column Y of Table 3.

TABLE 3

Blood		Breath	
X % W/V	Y % W/V	X % W/V	Y % W/V
X ₁ =0.0510	Y ₁ =0.0510	X ₁ =0.0510	Y ₁ =0.0510
X ₂ =0.0640	Y ₂ =0.0648	X ₂ =0.0648	Y ₂ =0.0648
X ₃ =0.0820	Y ₃ =0.0717	X ₃ =0.0717	Y ₃ =0.0717
X ₄ =0.0890	Y ₄ =0.0899	X ₄ =0.0899	Y ₄ =0.0899
X ₅ =0.1250	Y ₅ =0.1164	X ₅ =0.1164	Y ₅ =0.1164
X ₆ =0.1590	Y ₆ =0.1294	X ₆ =0.1294	Y ₆ =0.1294
X ₇ =0.1900	Y ₇ =0.1577	X ₇ =0.1577	Y ₇ =0.1577
X ₈ =0.2030	Y ₈ =0.1647	X ₈ =0.1647	Y ₈ =0.1647

B.2 The average values computed in accordance with 5.4.11 for the above data are:

X_L=0.06587% W/V Y_L=0.06260% W/V
 X_H=0.18400% W/V Y_H=0.1506% W/V
 \bar{X} =0.12025% W/V \bar{Y} =0.10570% W/V

B.3 The data points and breath/blood correlation line are entered in the sample graph (Figure 1) as required in 5.4.12 and 5.4.13.

B.4 The value of \hat{Y} , as defined in 4.4.1, is equal to 0.091% W/V.

B.5 All eight of the breath/blood points lie between the two lines drawn parallel to the breath/blood correlation line and through the points

$\hat{Y} + 0.020\% \text{ W/V} = 0.111\% \text{ W/V}$ and
 $\hat{Y} - 0.020\% \text{ W/V} = 0.071\% \text{ W/V}$.

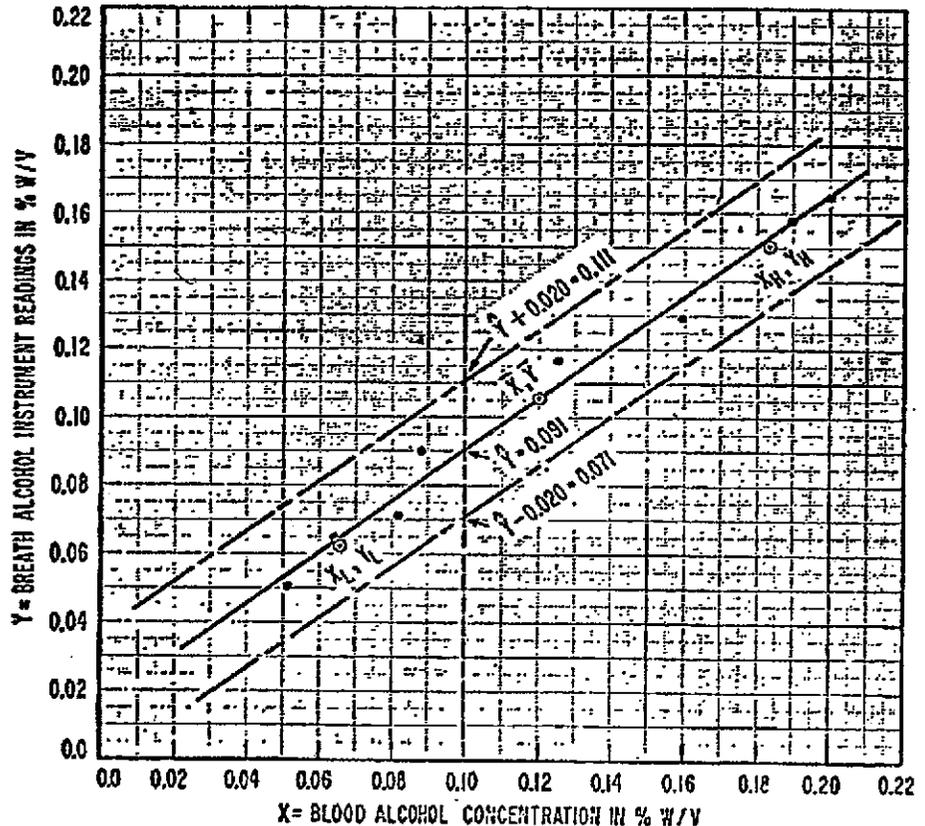


Figure 1- Sample Data from Deep Lung Sampling Test

[FR Doc.73-23369 Filed 11-2-73; 8:45 am]

* This test was taken from EIA Standard RS-204-A (July 1972) which is available from Electronic Industries Association, Engineering Department, 2001 Eye Street NW., Washington, D.C. 20006.

**National Highway Traffic Safety
Administration**

[Docket No. 84-05; Notice 2]

**Highway Safety Programs; Standard
for Devices To Measure Breath
Alcohol****AGENCY:** National Highway Traffic
Safety Administration (NHTSA), DOT.**ACTION:** Notice.

SUMMARY: This notice converts the standard for devices to measure breath alcohol from a mandatory standard to model specifications. The standard (38 FR 30459) established requirements for the performance and testing of evidential breath testers (EBT's) which are instruments that measure the alcohol content of deep lung breath samples with sufficient accuracy for evidential purposes. NHTSA is converting the standard to provide flexibility to the States and because the benefits of the standard can be maintained without the existence of a mandatory requirement.

DATE: This notice becomes effective on December 14, 1984.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald E. Engle, Office of Alcohol Countermeasures, NTS-21, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, D.C. 20590, Telephone (202) 426-9581.

SUPPLEMENTARY INFORMATION: On May 11, 1984 (49 FR 20100) the National Highway Traffic Safety Administration (NHTSA) issued a notice proposing to convert the standard for devices to measure breath alcohol from a mandatory standard to model specifications. Interested parties were invited to submit comments on or before June 11, 1984.

No objections have been received regarding the proposed conversion. Accordingly, the mandatory standard is hereby rescinded and, in its place, the model specifications are issued in the notices section of this Federal Register for use by State and local governments. Also published is a list of EBT's, which have been tested and found to conform to these model specifications (Conforming Products List).

The model specifications are in the same format as the standard. They add, however, an alternative laboratory method to test the breath sampling capability of EBT's thereby eliminating the need to test with human subjects. This method represents state-of-the-art technology and furthers the agency's goal of promoting an effective alcohol

countermeasures program by simplifying and improving testing procedures.

NHTSA will continue to test EBT's to determine whether they comply with performance criteria recommended in the NHTSA model specifications. Results of this testing will be published by NHTSA.

State and local governments may either rely on NHTSA's test results and adopt the model specifications, or set their own requirements. In this way the integrity of the States' alcohol countermeasures programs is not compromised. It is the agency's belief that the States will continue to give the programs high priority.

Since this notice converts a standard to model guidelines, thus increasing State flexibility, the 30 days notice of the effective date required by the Administrative Procedure Act is not applicable.

NHTSA has analyzed the impact of this action and has determined that it is neither "major" with the meaning of Executive Order 12291, nor "significant" within the meaning of Department of Transportation regulatory policies and procedures. Because the purchase of alcohol testing devices with Federal money is allowable notwithstanding their compliance with the Federal standard, the rescission of this standard will have no economic impact on State or local governments nor on the manufacturers of EBT's. Because there will be virtually no economic or other impact from this conversion, a full regulatory evaluation is not necessary.

In accordance with the Regulatory Flexibility Act, the agency has evaluated the effects of this action on small entities. Based on that evaluation, I certify that the rescission of this standard will not have a significant economic impact on a substantial number of small entities. While some manufacturers of EBT's may be small businesses as defined by the Regulatory Flexibility Act, they will not be significantly affected by this action. The standard set forth testing procedures to determine equipment accuracy and precision. However, the States have been permitted to purchase these instruments with Federal funds whether or not they comply with the Federal standard. This action will, therefore, have no effect on either the manufacturers of these products or on small governmental units and will not impose any cost or other burden. Accordingly, a regulatory flexibility analysis is not necessary.

The agency has also analyzed this action for the purpose of the National Environmental Policy Act. The agency

has determined that rescission of this standard will not have any effect on the human environment.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50.)

Issued on December 11, 1984.

Diane K. Steed,

Administration.

[FR Doc. 84-32585 Filed 12-11-84; 12:58 p.m.]

BILLING CODE 4910-59-M

Highway Safety Programs; Model Specifications for Evidential Breath Testing Devices; Publication of a Conforming Products List

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice.

SUMMARY: This notice establishes model specifications for the performance and testing of evidential breath testing devices (EBT's). These model specifications replace the Standard for Devices to Measure Breath Alcohol (38 FR 30459) which is rescinded in the notices section of this Federal Register. These model specifications are issued for use by State and local governments.

This notice also publishes a Conforming Products List (CPL) which is a list of EBT's which have been found to conform to the model specifications.

DATE: This notice becomes effective on the date the rescission of the mandatory standard is published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald E. Engle, Office of Alcohol Countermeasures, NTS-21, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Telephone (202) 426-9581.

SUPPLEMENTARY INFORMATION: On May 11, 1984 (49 FR 20103) the National Highway Traffic Safety Administration (NHTSA) issued a notice proposing to issue model specifications for the performance and testing of evidential breath testing devices. The notice also published as attachment C a Conforming Products List (CPL) of EBT's found to conform to the proposed model specifications.

The notice indicated that the agency would continue to test EBT's and would release its findings to provide States which choose not to conduct their own testing with adequate information upon which to base their purchasing decisions.

This program therefore assists the State and local communities by providing a centralized qualification test

program for breath-testing devices designed to collect evidence in law enforcement programs. The model specifications are not intended to replace the current qualification programs required in certain States for this equipment or to directly regulate the manufacture of EBT's. However, some States may wish to make use of this program in addition to setting their own requirements. While the agency is not imposing its findings on State and local governments, NHTSA encourages each State to consider adopting the NHTSA model specifications as its own.

Interested parties were invited to submit comments on or before June 11, 1984. The comments which have been received are discussed below.

Model Specifications

In addition to converting the standard to model specifications, the agency proposed a major change to the test methods themselves. The standard previously in effect required determination of breath sampling characteristics of EBT's through direct correlation of blood analysis with instrument readings of breath alcohol concentration. Human subjects are used for these tests. These model specifications permit the incorporation of a simulation procedure to evaluate the breath-sampling capability of EBT's, thus eliminating the need for human subjects. This method utilizes an instrument called a Breath Alcohol Sample Simulator (BASS) which was developed by the DOT's Transportation Systems Center (TSC) in collaboration with the National Bureau of Standards' Law Enforcement Standards Laboratory. The work of both groups was funded by NHTSA. The BASS is a mechanical device which simulates human breath.

There are distinct advantages to the replacement of intoxicated human subjects with a mechanical system. The analysis of alcohol concentration in a given subject is accomplished by using a sample collected from a single breath which the subject delivers to the testing device. Each subject must provide a large number of breath samples during the testing, over a short period of time. For this reason, it is difficult to ensure that all samples are uniform. To take this into account, tests involving human subjects must be conducted under more carefully controlled conditions. Human subject testing is also an expensive procedure requiring payment for on-site medical staff, clinical facilities and test subject.

Use of the BASS eliminates these problems. Although human breath

cannot be produced in every aspect, the key physical parameters relevant to breath alcohol content measurement can be accurately and reliably simulated in a controlled laboratory environment. The result is a more accurate and reliable evaluation of EBT's using a simpler, more cost-effective technique.

By eliminating the need for human blood-breath correlations through the incorporation of the BASS, the model specifications represent the state-of-the-art in the area of breath-alcohol testing evaluations.

It is important to note that BASS is intended only for the purpose of testing whether an instrument conforms with these model specifications and is not intended to replace the conventional calibration units currently used by local agencies to calibrate EBT's.

The agency recommends use of the BASS as the preferred method for evaluating EBT's. However, the existing test protocol which utilizes human subjects is also incorporated in the model specifications. The agency does not wish to impose the BASS upon any State which might wish to continue with human subject testing.¹

No objections have been received regarding the incorporation of a simulation procedure to evaluate the breath-sampling capability of EBT's.

Comments were submitted by the Department of Justice, State of California, suggesting that additional values at higher BAC levels be included in the model specifications. California indicated that, while the tests focus on the BAC level of 0.10, the average DWI arrest in the State is between 0.17 and 0.18. A great number of BAC readings are therefore beyond the test parameters. Testing at the additional higher BAC levels was suggested to insure linearity at higher BAC values.

Under the model specifications, testing is conducted at .05, .101 and .151. NHTSA believes that testing at these levels is sufficient to ensure accurate information for a DWI arrest. Under the current procedures, linearity is established up to at least the .151 BAC level. In every state, a BAC level of .10 or lower is either illegal per se or presumptively illegal, and in no state is either level higher than .15. Therefore,

even in the case where the suspect's BAC is above .151, the extent to which the BAC is beyond that level is not significant and need not be proved.

California suggests that in cases where a driver is charged with vehicular manslaughter or second-degree murder, higher BAC levels are significant. In such cases, a higher degree of criminal culpability must be proved, and verifiable BAC readings which exceed the parameters tested under these model specifications would enhance the utility of test results. NHTSA agrees that tests at higher BAC levels can provide the States with useful information in such cases. Since these higher levels are not uniform among the States, however, tests should be conducted on a case-by-case basis. TSC has performed a number of tests at BAC levels above .151 and will perform additional tests upon request. For additional information regarding such tests, interested parties should contact NHTSA's Office of Alcohol Countermeasures (OAC), NTS-21, NHTSA, 400 Seventh Street, S.W., Washington, D.C. 20590. Since higher BAC levels are not recommended in the model specifications, failure of linearity at these levels will not cause an instrument to be dropped from the CPL.

California also indicated that in PR 5.2.3, the value given for test series (a) should have been 0.05 percent w/v. This typographical error has been corrected. Other typographical errors have also been corrected and editorial changes have been made, none of which effect the model specifications substantively.

Procedures

Testing to these model specifications of products submitted by manufacturers, will be conducted by the DOT Transportation Systems Center (TSC). Tests will be conducted semiannually, or as necessary. Manufacturers wishing to submit EBT's for testing must apply for a test date to NHTSA's Office of Alcohol Countermeasures (OAC), NTS-21, NHTSA, 400 Seventh Street, S.W., Washington, D.C. 20590. Normally, at least 30 days will be required from the date of notification until the test can be scheduled. One week prior to the scheduled initiation of the test program, the manufacturer will deliver at least one unit of its equipment to TSC, DTS-48, Kendall Square, Cambridge, Massachusetts 02142. The manufacturer shall be responsible for ensuring that its device is operating properly and is in proper calibration. If the manufacturer wishes to submit a duplicate, backup instrument, it may do so. In addition to the Operator's Manual and the Maintenance Manual normally supplied with the purchase of this equipment, the

manufacturer shall deliver to TSC specifications and drawings which fully describe its units. Proprietary information will be respected. (See 49 CFR Part 512, regarding the procedure by which NHTSA will consider claims of confidentiality.)

The manufacturer will have the right to check its instruments between their arrival in Cambridge and the start of the test, but will have no access to them during the tests. Any malfunction of the instrument which results in failure to complete any of the tests satisfactorily will result in a finding that the instrument does not conform to the model specifications. If an instrument fails to conform, it may be resubmitted for testing.

On the basis of these results, NHTSA will publish a Conforming Products List (CPL) identifying the EBT's that conform to the model specifications.

Retesting of instruments will be conducted when necessary. NHTSA intends to modify and improve these model specifications as new data and test procedures become available. (The test procedures may be altered, if necessary, to meet unique design features of a specific instrument.) Notification will be provided in the Federal Register of each such modification. If NHTSA determines that retesting is necessary, a manufacturer whose equipment has already been tested to the model specifications will be notified to resubmit the equipment for testing to the new specification only.

NHTSA shall certify that the CPL does, in fact, reflect whether a given instrument meets the performance criteria set forth in the model specifications.

If at any time a manufacturer changes the design of an EBI currently on the CPL, the manufacturer should submit the proposed changes to OAC for review. Based on this review, NHTSA will decide whether the change will require retesting of the instrument. Normally, such retesting will be accomplished at the next testing period.

OAC will be the point of contact for information about acceptance testing and field performance of equipment already on the list. When it is available, NHTSA requests that State and local agencies provide both acceptance and field performance data to OAC. Information from users will be used to: (1) Help NHTSA determine whether EBI's continue to perform according to the NHTSA model specifications and (2) ensure that field use does not indicate excessive breakdown or maintenance problems.

¹ States that wish to continue with human subjects testing can alternatively obtain a reference measurement directly from the respiratory system through the use of rebreathed air. This technique was devised by TSC, under contract with NHTSA. For information on the use of rebreathing techniques, interested parties may write to the Office of Alcohol Countermeasures, NTS-21, NHTSA, 400 Seventh Street, S.W., Washington, D.C. 20590 and should request the Interim Report (Rebreathed Air as a Reference for Breath-Alcohol Testers, DOT-HIS-401533).

If information gathered indicates that an instrument on the CPL is not performing in accordance with the model specifications, NHTSA will direct TSC to conduct a special investigation. This study may include visits to users and additional tests of the instrument obtained from the open market. If the investigation indicates that the instruments actually sold on the market are not meeting the model specifications, then the manufacturer will be notified that the instrument may be dropped from the list. In this event the manufacturer shall have 30 days from the date of notification to reply.

Based on the TSC investigation and any data provided by the manufacturer, NHTSA will decide whether the instrument should remain on the list. Upon resubmission, the manufacturer must submit a statement describing what has been done to overcome the problems which led to the dropping of the instrument in question from the list.

No comments have been received regarding these procedures.

Conforming Products List

On May 11, 1984 (49 FR 20109) the National Highway Traffic Safety Administration (NHTSA published as Appendix C the Conforming Products List (CPL) listing the instruments which had been found to conform to the model specifications.

Comments were submitted by the Department of Health, Commonwealth of Pennsylvania, indicating that the Smith and Wesson Model 1000 Breathalyzer instrument had been omitted from the CPL. This omission was the result of a typographical error prior to the printing the notice. The Smith and Wesson Model 1000 Breathalyzer instrument should have been listed as a conforming product. Additionally, several EBT's have since been tested and found to conform to the model specifications. The CPL, as updated and corrected, appears as Appendix D to this notice. The fact that an EBT does not appear on the list does not necessarily indicate that it failed to meet the model specifications. It may not have been included instead because it was not tested.

In accordance with the foregoing, the

DOT model specifications for the performance and testing of evidential breath testing devices are issued as set forth below.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50 and 501)

Issued on: December 11, 1984.

George Reagle,
Associate Administrator for Traffic Safety Programs.

Model Specification for Evidential Breath Testers

1. Purpose and Scope

The purpose of these specifications establish performance criteria and methods of testing for evidential breath testers. Evidential breath testers (EBT's) are instruments that measure the alcohol content of deep lung breath samples with sufficient accuracy for evidential purposes. These specifications are intended primarily for use in the qualification testing of EBT's.

2. Classification

2.1 Mobility

2.1.1 Mobile Evidential Breath Testers

EBT's that are designed to be transported to non-fixed operational sites in the field.

2.1.2 Nonmobile Evidential Breath Testers

EBT's that are designed to be operated at a fixed location.

2.2 Power Source

2.2.1 Battery Powered Evidential Breath Testers

EBT's that are powered by batteries.

2.2.2 AC Powered Evidential Breath Testers

EBT's that are powered from the AC power lines.

3. Definitions

3.1 Alcohol

Ethanol; ethyl alcohol.

3.2 BAC

Blood alcohol concentration, expressed in percent weight by volume (% w/v) based upon grams of alcohol per 100 cubic centimeters of blood or per 210 liters of breath in accordance with

the Traffic Laws Annotated,¹

Section 11-902.1(a) (Supp. 1983). A BAC of 0.10% w/v means 0.10 grams of alcohol per 100 cubic centimeters of blood (0.01 g/100 cc or 1.0 mg/cc) or 0.10 grams of alcohol per 210 liters of breath. Alcohol concentrations in either breath or in air mixtures can also be expressed in milligrams of alcohol per liter of air (mg/l); to convert mg/l to units of percent weight by volume, multiply by 0.21.²

3.3 Qualification Tests

Tests performed to check the compliance of a product with these specifications.

3.4 Standard Deviation

A common indication of precision among repeated measurements of a single quantity given by:

$$\text{Standard Deviation} = \sqrt{\frac{\text{Sum } (X - \bar{X})^2}{N - 1}}$$

where:

N = the number of measurements.

X = the value of single measurement, and

\bar{X} = the mean (average) of all X's.

An equivalent formula which is often more convenient for performing calculations is:

$$\text{Standard Deviation} = \sqrt{\frac{SS}{N - 1}}$$

$$\text{where } SS = \frac{\text{Sum of } X^2 - (\text{Sum of } X)^2}{N}$$

¹ Copies of the Traffic Laws Annotated are available from the National Committee on Uniform Traffic Laws and Ordinances, 801 N. Glebe Rd., Suite 400, Arlington, VA 22203.

² The conversion factor of 0.21 is a commonly used value recognized by the Committee on Alcohol and Other Drugs of the National Safety Council; that is, 210 liters of "deep lung" air at 34°C contains approximately the same quantity (mass) of ethanol as 100 cc of pulmonary blood. See, for example, R. N. Harger, R. B. Forney and R. S. Baker, "Estimation of the Level of Blood Alcohol from Analysis of Breath," Quarterly Journal of Studies on Alcohol, 17, 1-10 (1936).

3.5 Systematic Error

As used in these specifications, the difference between the mean measured value and the known value, expressed as a percentage of the known value.

4. Requirements

4.1 Precision

EBT's shall measure the alcohol content of vapor mixtures with an average standard deviation of no more than 0.020 mg/l (0.0042% w/v) when tested in accordance with paragraph 5.2.

4.2 Accuracy

EBT's shall measure the alcohol content of vapor mixtures with a systematic error of no more than $\pm 5\%$ or 0.005% w/v, whichever is greater, when tested in accordance with paragraph 5.3.

4.3 Blank Reading

EBT's shall indicate an average instrument reading of no more than 0.048 mg/l (0.010% w/v) and no single reading shall exceed 0.096 mg/l (0.020% w/v) when tested in accordance with paragraph 5.4.

4.4 Breath Sampling

The ability of EBT's to analyze the appropriate portion of the breath sample shall be determined by testing in accordance with paragraph 5.5. EBT's shall indicate instrument reading of 0.48 mg/l (0.101% w/v) $\pm 5\%$ for each of 10 tests conducted with each of the three specified sample volume/delivery rates.

4.5 Power

4.5.1

When AC powered EBT's are operated at line voltages of 108 V and 123 V (rms) in accordance with paragraph 5.6, the systematic errors shall not exceed $\pm 5\%$, and the standard deviations shall not exceed 0.020 mg/l (0.0042% w/v).

4.5.2

The operator's manual supplied with EBT's that operate from internal battery power shall state the maximum period of time or the number of breath tests that can be performed before battery replacement or recharging is necessary. When tested in accordance with paragraph 5.7.1, the systematic errors shall not exceed $\pm 5\%$, and the standard deviations shall not exceed 0.020 mg/l (0.0042% w/v).

4.5.3

When battery powered EBT's that are designed to operate from a 12 V DC vehicle power supply are operated at voltages of 11 and 15 V DC in accordance with paragraph 5.7.2, the

systematic errors shall not exceed $\pm 5\%$, and the standard deviations shall not exceed 0.020 mg/l (0.0042% w/v).

4.5.4

When battery powered EBT's that have an indicator that warns when the accuracy and precision requirements (pars. 4.1 and 4.2) cannot be met because of battery condition are tested in accordance with paragraph 5.7.2.5, the indicator shall function as intended.

4.6 Ambient Conditions

4.6.1

EBT's shall meet these specifications when operated within the following ambient conditions.

- a. Temperature: 20 to 30 °C (68 to 86 °F)
- b. Pressure: 73 to 105 Kilopascals (548 to 788 mm Hg)
- c. Relative Humidity: 10 to 90%

4.6.2

EBT's shall be tested in accordance with paragraph 5.8 for their ability to operate properly at low and at high temperatures. The low temperature tests shall be conducted at 20 °C (68 °F) or at the lowest temperature at which the manufacturer states (par. 4.9.) that the unit will operate properly, whichever is lower, and the high temperature tests shall be conducted at 30 °C (86 °F) or the highest temperature at which the manufacturer states that the unit will operate properly, whichever is higher. The systematic errors shall not exceed $\pm 5\%$ and the standard deviations shall not exceed 0.020 mg/l (0.0042% w/v).

4.7 Vibration Stability of Mobile EBT.

Mobile EBT's shall measure the alcohol content of vapor mixtures with a systematic error of no more than $\pm 5\%$ and a standard deviation of no more than 0.020 mg/l (0.0042% w/v) after they have been subjected to the vibration test in accordance with paragraph 5.9.

4.8 Electrical Safety

EBT's shall meet the following safety requirements of the American National Standard Electrical Safety Requirements: ANSI C 39.5-1974,³ sections 6. Marking; 6.1. Unsafe Temperature; 9.2. Accessible Parts; 9. Precautions Against Spread of Fire; 11. Protection Against Electric Shock (pars. 11.1 and 11.2); 13. Components, Parts and Accessories; 14. Terminal Devices; and 15. External Supply Cords.

³ Copies of this ANSI publication may be obtained from the American National Standards Institute, Inc., 1420 Broadway, New York, New York 10018

4.9 Operator's Manual

An operator's manual shall be supplied by the manufacturer or distributor with each EBT. This manual shall clearly state the instructions for operation and maintenance of the instrument.

5. Test Method—Bass

All tests shall be conducted under environmental conditions meeting the requirements of paragraph 4.6.1. Each EBT under test shall be operated in accordance with manufacturer's instructions. All instrument readings (equivalent BAC) shall be recorded to three decimal places (i.e., 0.XXX % BAC).

With the exception of the tests described in paragraph 5.6, all AC powered EBT's shall be operated directly off of laboratory power lines that provide nominal 120 V AC.

5.1 Equipment

5.1.1 Breath Alcohol Sample Simulator

The breath alcohol sample simulator, used to determine the sampling capability of EBT's, shall be capable of delivering a total sample volume ranging from 2.0 liters to 6.0 liters during time intervals from 6 to 12 seconds at a temperature of 34 ± 0.1 °C. When used to generate an ethanol vapor profile, the test sample shall consist of three successive ethanol mixture steps as follows: 0.030% w/v; 0.090% w/v; and 0.101% w/v. The delivery duration of each ethanol mixture shall be adjustable to 2.0, 3.3 and 4.0 ± 0.1 s. The ethanol vapor mixture of the last step shall meet the requirements of the NHTSA Model Specifications Calibrating Units⁴ and the simulator shall have sufficient capacity to deliver a minimum of 12 complete 6-liter samples with no more than 1% degradation of the ethanol vapor concentration from the final reservoir. A suitable simulator is described in Appendix A.

5.1.2 Power Supply

The DC power supply shall be adjustable from zero to 15 V, or such other higher operating voltage as may be specified by the manufacturer, have a maximum peak-to-peak ripple of 75 mV and be capable of providing an output current equal to 1.5 times the operating current of the EBT under tests.

5.1.3 Calibration Device

The calibration device and the ethanol mixture used therein shall meet

⁴ The model specifications are issued in the notices section of this Federal Register.

the requirements of the NHTSA Model Specifications for calibrating units.

5.2 Precision Test

5.2.1

Allow the instrument to warm up for a period of 30 min., or as specified by the manufacturer. Connect the EBT, in accordance with the instructions in the operator's manual, to a calibration device that supplies known concentrations of ethanol vapor.

5.2.3

Using the EBT, measure each of the three known ethanol vapor concentrations listed below 10 times:

- a. 0.24 mg/l (0.050% w/v)
- b. 0.48 mg/l (0.101% w/v)
- c. 0.72 mg/l (0.151% w/v)

5.2.4

For each of the three sets of 10 measurements made in accordance with paragraph 5.2.3, calculate the standard deviation to two significant figures. (See sample calculation in Appendix B.) Add the three standard deviations and divide by three to obtain the average standard deviation.

5.3 Accuracy Test

Use the test data obtained in accordance with paragraph 5.2 to calculate the systematic error at each of the three known vapor concentrations.

5.4 Blank Test

Rinse each of the three vapor mixture reservoirs of the breath alcohol sample simulator (par. 5.1.1) with water to remove all traces of ethanol from the reservoirs. Place distilled water in each reservoir, and install the exhaust manifold on the reservoir assembly. Turn on the heaters and allow the system to stabilize at 34.0°C. Drive the piston of the delivery cylinder to the bottom of its travel. Adjust the timer for each reservoir to provide a step duration of 3.3 ± 0.1 seconds. Connect the air supply cylinder to a source of test gas containing five parts CO₂, 0.004 parts CO, 80 parts N₂ and 14 parts O₂. Operate the simulator through three complete cycles to flush the system and fill it with the specified gas mixture.

Connect the EBT to the output of the simulator. If it is possible, connect the output of the EBT to a spirometer to measure the volume of gas delivered through it. If the breath tester vent port is not accessible, place the unit under test in an air tight laboratory glove box of sufficient size to provide at least 15 cm. (6 in.) clearance between the sides and top of the interior surfaces of the glove box. The glove box shall be equipped with internal outlets for 110 V

AC power, or connections for DC power as appropriate for the instrument under test and a transparent viewing window that allows observation of all controls and displays of the breath tester. Connect the output of the simulator to the input of the breath tester by means of an air tight feed in the wall of the glove box and install a fitting on a vent port in a wall of the glove box and connect the 9 L vitalometer to it. Measure directly the sample volume delivered to the breath tester as the volume of air displaced from the glove box.

Adjust the cylinder driver pressure to deliver a total sample volume of 2 liters in a total delivery time of 10 s.

Subject the EBT to 10 complete cycles, noting the instrument BAC indication for each of the 10 tests.

5.5 Breath Sampling Test

Fill the ethanol vapor reservoirs of the breath alcohol sample simulator (par. 5.1.1) with a mixture of ethanol and water that will yield ethanol vapor concentrations of 0.050; 0.090 and 0.101% w/v respectively in reservoir numbers 1, 2, and 3. Install the exhaust manifold and turn on the heaters. Allow the system to stabilize at a temperature of $34.0 \pm 0.1^\circ\text{C}$. Adjust the drive pressure as determined in paragraph 5.4, and set the timer for each reservoir profile step to 3.3 ± 0.1 seconds.

Attach the EBT to the output of the simulator. Run the simulator through 10 complete cycles, allowing sufficient time for the EBT to recover between cycles, if required, and record the indicated instrument reading for each test.

Adjust the profile step timers for each reservoir to 2.0 seconds. Using the procedure outlined in paragraph 5.4, adjust the initial drive pressure to provide a total delivery volume of 2.0 liters. Conduct 10 tests as above and record the instrument readings for each test.

Adjust the profile step timers for each reservoir to 4.0 seconds, using the procedure outlined in paragraph 5.4, adjust the initial drive pressure to provide a total delivery volume of 6.0 liters. Conduct 10 tests as above and record the BAC readings for each test.

Throughout the above test sequence, monitor the ethanol vapor concentration in solution reservoir number 3, and replace the mixture as required to ensure compliance with the requirements of the NHTSA Model Specifications for Calibrating Units.

5.6 Power Line Voltage Tests

5.6.1

Apply line power to each AC powered EBT under test through a variable autotransformer having a nominal input voltage of 117 V AC and an output adjustable between 0 and 130 V, and having a current rating as required by the instrument under test. Any voltage regulating device used with the instrument shall be connected between the variable autotransformer and the instrument under the test.

5.6.2

Monitor the autotransformer output voltage with an rms AC voltmeter having an accuracy of $\pm 2\%$ in the range of 105 to 125 V.

5.6.3

Adjust the voltage to the EBT to 108 V. Wait at least 30 min., readjust the voltage if necessary and then immediately measure a known ethanol vapor concentration of 0.48 mg/l (0.101% w/v) 10 times, as in the precision tests (par. 5.2).

5.6.4

Increase the voltage to the EBT to 123 V, wait at least 30 min., readjust the voltage if necessary and again measure a known ethanol vapor concentration of 0.48 mg/l (0.101% w/v) 10 times (par. 5.2).

5.6.5

Calculate the systematic errors and the standard deviations in accordance with paragraphs 5.2 and 5.3, for each of the two sets of 10 measurements (obtained with line voltages of 108 V and 123 V).

5.7 Battery Powered Tests

5.7.1 Internal Power Supplies

Install new disposable batteries or fully charged rechargeable batteries in the EBT under test if it is designed to operate from an internal battery power supply.

5.7.1.1

Turn the EBT under test on, and allow it to warm up as specified by the manufacturer and measure a known ethanol vapor concentration of 0.48 mg/l (0.101% w/v). If the manufacturer specifies a maximum number of tests that can be conducted before recharging or replacing the batteries, repeat the test until that number of measurements have been made. If the manufacturer does not specify the number of tests that can be made, but instead specifies a maximum period of operation during which the

EBT will provide accurate analysis, allow the unit to operate continuously for that period of time; measure a known ethanol vapor concentration periodically during the time of continuous operation at intervals equal to approximately one-tenth of the manufacturer specified time (the last measurement taken at the maximum time limit) to obtain a total of ten measurements.

5.7.1.2

Calculate the systematic error and the standard deviation for the set of measurements obtained in paragraph 5.7.1.1 in accordance with paragraphs 5.2 and 5.3.

5.7.2 External Battery Power Supplies

Connect an EBT that is designed to operate from a vehicle power supply to a variable laboratory dc power supply that meets the requirements of paragraph 5.1.2.

5.7.2.1

Monitor the power supply voltage with a voltmeter having an accuracy of $\pm 2\%$ in the range from 10 to 16 V dc.

5.7.2.2

Adjust the voltage to the EBT to 11 ± 0.25 V. Wait at least 30 min., adjust the voltage if necessary and then immediately measure a known ethanol vapor concentration of 0.48 mg/l (0.101% v/v) 10 times, as in the precision test (par. 5.2).

5.7.2.3

Increase the voltage to the EBT to 15 ± 0.25 V, wait at least 30 min., readjust the voltage if necessary and again measure a known ethanol vapor concentration of 0.48 mg/l (0.101% v/v) 10 times, as in the precision test (par. 5.2).

5.7.2.4

Calculate the systematic error and standard deviation for each of the two sets of 10 measurements obtained at 11 and 15 V.

5.7.2.5

If the battery powered EBT under test incorporates an indicator to warn the operator when the power has been depleted such that the accuracy and precision required can no longer be met, operate the unit from the internal batteries continuously and note whether the indicator functions properly. If the manufacturer specifies the voltage level at which the indicator operates, remove the internal batteries and connect the EBT to a variable DC power supply (par. 5.1.3) and adjust the input voltage to

that level; note whether the indicator functions as intended.

5.8 Ambient Temperature Test

Maintain the test temperatures constant and accurate within $15 \pm 1.0^\circ\text{F}$ τηροβηροθτ τη δθρατιον οφ τηε τεστινγ περιουθ.

5.8.1

Allow at least 1 hour for the evidential breath tester EBT to come to temperature equilibrium at each requirement test temperature.

5.8.2

Measure a known ethanol vapor concentration of 0.48 mg/l (0.101% w/v) 10 times at each test temperature.

5.8.3

Calculate the systematic error and the standard deviation for each set of 10 measurements.

5.9 Vibration Test for Mobile EBT's*

5.9.1

Subject the mobile EBT to simple harmonic motion having an amplitude of 0.38 mm (0.015 in.) [total excursion 0.76 mm (0.030 in.)] applied initially at a frequency of 10 Hz and increased at a uniform rate to 30 Hz in $2\frac{1}{2}$ min., then decreased at a uniform rate to 10 Hz in $2\frac{1}{2}$ min.

5.9.2

Subject the unit to simple harmonic motion having an amplitude of 0.19 mm (0.0075 in.) [total excursion 0.38 mm (0.015 in.)] applied initially at a frequency of 30 Hz and increased at a uniform rate to 60 Hz in $2\frac{1}{2}$ min., then decreased at a uniform rate to 30 Hz in $2\frac{1}{2}$ min.

5.9.3

Perform the tests described in paragraphs 5.9.1 and 5.9.2 in each of three directions, namely in the directions parallel to both axes of the base and perpendicular to the plan of the base.

5.9.4

Measure a known ethanol vapor concentration of 0.48 mg/l (0.101% w/v) 10 times, and calculate the systematic error and the standard deviation.

6. Alternate Test Method Human-Subject Testing

The ambient conditions of temperature, pressure, and humidity shall be within the ranges specified in

4.6.1 during the tests described in 6.1, 6.2, 6.3, 6.4, 6.5, and 6.7.

6.1 Precision test using known ethanol vapor concentrations.

6.1.1 Connect a device which supplies known concentrations of ethanol vapor to the evidential breath tester in accordance with the instructions in the operator's manual. The device and the ethanol mixture used therein shall meet the requirements of the standard for breath tester calibrating units.

6.1.2 Flush the sampling assembly of the instrument completely with the alcohol vapor sample as described in the operator's manual.

6.1.3 Using the EBT, measure each of the three known ethanol vapor concentrations listed below ten times:

- (a) 0.24 mg/l (0.050 percent W/V),
- (b) 0.48 mg/l (0.10 percent W/V),
- (c) 0.72 mg/l (0.15 percent W/V).

6.1.4 For each of the three sets of ten measurements made in accordance with 6.1.3, calculate the standard deviation. (See sample calculation in Appendix B.) Add the three standard deviations and divide by 3 to obtain the average standard deviation.

6.2 Accuracy test using known ethanol vapor concentrations. Use the test data obtained in accordance with 5.1 to calculate the systematic error at each of the three known vapor concentrations.

6.3 Blank test using alcohol-free test subjects.

6.3.1 Select five test subjects in generally good physical condition. The test subjects shall have consumed no alcoholic beverage during the 2-day period prior to testing and no more than the equivalent of 3 ounces of 100-proof liquor during the 4-day period prior to testing.

6.3.2 At least two of the five subjects selected shall be smokers and shall smoke at least once during the 2-hour period preceding the start of testing, but shall stop at least 20 minutes before the start of testing.

6.3.3 Take a breath sample from each test subject and obtain an instrument reading, allowing sufficient instrument recovery time (i.e., the time necessary to properly clear the evidential breath tester when following the operation instructions) between measurements.

6.3.4 Repeat 6.3.3 to obtain a total of ten measurements

6.4 Breath sampling test.

6.4.1 Select eight test subjects in generally good physical condition.

6.4.2 The subjects' body temperatures measured orally shall be between 97.0° F and 99.5° F just prior to the start of testing.

6.4.3 Alcoholic beverages (mixed if desired with a non-alcoholic beverage)

* The test was taken from EIA Standard RS-201-A (July 1972) which is available from Electronic Industries Association, Engineering Department, 2001 Eye Street, N.W., Washington, D.C. 20006.

shall be consumed by the eight subjects over a period of 1 to 2 hours. A very light meal consisting of one sandwich and a non-alcoholic beverage shall be offered to the subjects before the start of the drinking period. Smoking shall be permitted if desired during the drinking period.

6.4.4 The eight subjects shall be divided into two groups of four. Each subject shall be given a different amount of alcoholic beverage to drink, to ensure that there is a distribution of BAC's within each group, and that Group I BAC's are within the range 0.04 to .10 percent W/V and Group II BAC's are within the range 0.1 to 0.2 percent W/V. Table 1 shall be used as a guide to calculate the consumption of alcoholic beverages necessary for a subject to reach a particular BAC. No constraints on body weight of subjects is implied in table 1. However, the listed amounts of liquor should be adjusted for light and heavy subjects.

TABLE 1

BAC, percent W/V	Amount of 100-proof liquor consumed	Body weight, pounds
0.05-0.06	3 ounces	175-150
0.10-0.12	5½ ounces	175-150
0.20-0.23	10 ounces	175-150

6.4.5 A waiting period preceding the taking of a breath sample from each subject in accordance with 6.4.7.1 shall begin when he has consumed all of the alcoholic beverage given him. The duration of this waiting period shall be at least 90 minutes if capillary blood samples are to be drawn, and 120 minutes if venous blood samples are to be drawn. During the waiting period the subjects shall not consume any alcoholic beverages. Those subjects who smoke may do so, but shall stop at least 20 minutes before the testing begins.

6.4.6 Blood samples, to be taken by a medically qualified person, shall be either venous blood from the cubital arm vein or capillary blood from the finger tip.

6.4.7 Instruct each subject individually as to the manner in which a breath specimen is to be delivered to the instrument under test, in accordance with the operator's manual. The test shall then proceed as follows.

6.4.7.1 Take the subject's breath sample and obtain the instrument reading.

6.4.7.2 Take a blood sample within 2 minutes after taking the breath sample.

6.4.7.3 Repeat 6.4.7.1 taking care that the breath testing instrument has had sufficient recovery time, but allowing no more than 8 minutes between the taking of the first and second breath samples.

The blood samples shall be analyzed within 72 hours after being taken, using a method of analysis which meets the requirements of 6.8. No less than two determinations of alcohol concentration shall be made on each blood sample.

6.4.8.1 A reference sample of known concentration of ethanol in whole blood in the range between 0.05 and 0.20 percent W/V shall be prepared by the analyzing laboratory, and five determinations of the reference sample ethanol concentration shall be made concurrently with the analysis of the blood samples.

6.4.8.2 The analysis of the reference sample and the blood samples shall be considered acceptable only if—

(a) The standard deviation of the five determinations of the reference sample concentration does not exceed 0.005 percent W/V; and

(b) The systematic error of the five determinations of the reference sample concentration does not exceed plus or minus 5 percent.

6.4.9 Calculate the average of the BAC measurements for each test subject. Let the letter X equal this average BAC, and use the subscripts 1 to 8 to designate the test subjects in ascending order of alcohol concentration (i.e., X_1, X_2, \dots, X_8).

6.4.10 Calculate the averages of the duplicate instrument readings made in accordance with 6.1.7 for each test subject. Convert if necessary to the same units used in 6.4.9 (percent W/V) by means of the conversion factor 0.21 (see footnote 2). Designate each average instrument reading with the letter Y and the same subscript used to identify the subject in accordance with 6.4.9.

6.4.11 Compute the following averages, and designate them as indicated.⁶

(a) X_{II} , as the average of X_6, X_7 and X_8 .

(b) X_I , as the average of X_1, X_2 and X_3 .

(c) Y_{II} , as the average of Y_6, Y_7 and Y_8 .

(d) Y_I , as the average of Y_1, Y_2 and Y_3 .

(e) X , as the average of all eight X values.

(f) Y, as the average of all eight Y values.

6.4.12 Plot on graph paper the points corresponding to (X, Y), (X_{II}, Y_{II}), (X_I, Y_I), and the eight breath-blood points corresponding to (X_1, Y_1), (X_2, Y_2), . . . (X_8, Y_8) (see figure in Appendix C.).

6.4.13 Draw a straight line, referred to as the "breath/blood correlation line"

through the Point (X, Y) and parallel to a line (not drawn in the graph) joining the points (X_I, Y_I) and (X_{II}, Y_{II}).

6.4.14 Draw two lines parallel to the breath/blood correlation line and passing through the points $\bar{Y} + 0.020$ and $\bar{Y} - 0.020$ W/V.

6.5 Power line voltage test.

6.5.1 Apply line power to the a.c. powered EBT under test through a variable autotransformer having a nominal input voltage of 117 volts a.c. and an output adjustable between 0 and 130 volts, and having a current rating as required by the instrument under test. Any voltage regulating device used with the instrument shall be connected between the variable autotransformer and the instrument under test.

6.5.2 Monitor the autotransformer output voltage with an rms a.c. voltmeter having an accuracy of plus or minus 2 percent in the range of 105 to 125 volts.

6.5.3 Adjust the voltage of the EBT to 108 volts. After at least one-half hour, check the voltage and readjust if necessary. Then immediately measure a known ethanol vapor concentration of 0.48 mg/l (0.10% W/V) ten times as in the precision test (6.1)

6.5.4 Increase the voltage to 123 volts, and at least one-half hour later readjust the voltage if necessary and again measure a known ethanol vapor concentration of 0.48 mg/l (0.10% W/V) ten times.

6.5.5 Calculate the systematic errors and the standard deviations for each of the two sets of ten measurements (obtained with line voltages of 108 volts and 123 volts).

6.6 Ambient temperature test.

6.6.1 The test temperatures shall be constant and accurate within plus or minus 3°C throughout the duration of the testing period.

6.6.2 Allow at least 1 hour for the instrument to come to temperature equilibrium after each test temperature change.

6.6.3 Perform steps 6.1.1 and 6.1.2. Measure a known ethanol vapor concentration of 0.48 mg/l (0.10 percent W/V) ten times at each test temperature.

6.6.4 Calculate the average value of the ethanol vapor concentration measured at each test temperature. Apply any temperature corrections specified by the operator's manual to obtain the adjusted average values.

6.6.5 Using the adjusted average values, calculate the systematic error for each set of ten measurements. Also calculate the standard deviation for each set of ten measurements.

⁶ See Appendix D for a sample calculation. An additional example may be found on pages 5-27, paragraph 5-4.3.2 of NBS Handbook 91, "Experimental Statistics," available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

6.7 Vibration test for mobile EBT.⁷

6.7.1 Subject the mobile EBT to vibrations of simple harmonic motion having an amplitude of 0.015 inches (total excursion 0.03 inches) applied initially at a frequency of 10 Hz and increased at a uniform rate of 30 Hz in 2½ minutes, then decreased at a uniform rate of 10 Hz in 2½ minutes.

6.7.2 Subject the unit to vibrations of simple harmonic motion having an amplitude of 0.0075 inches (total excursion 0.015 inches) applied initially at a frequency of 30 Hz and increased at a uniform rate to 60 Hz in 2½ minutes, then decreased at a uniform rate to 30 Hz in 2½ minutes.

6.7.3 Repeat 6.7.1 and 6.7.2. in each of three directions, namely in the directions parallel to both axes of the base and perpendicular to the plane of the base.

6.7.4 Perform steps 6.1.1 and 6.1.2. Measure a known ethanol vapor concentration of 0.48 mg/l (0.10 W/V) ten times, and calculate the systematic error and the standard deviation.

6.8 *Blood alcohol methodology test.* The analytical measurement system for the blood alcohol concentration determination shall be checked in the testing laboratory at least once prior to that laboratory performing the analysis required in 6.4.8.

6.8.1 The determination of the ethanol concentrations of the reference blood alcohol samples shall be performed by the same laboratory personnel who determine the ethanol concentrations of the test subject blood samples taken in accordance with 6.4. The analysis of the reference samples shall closely parallel the analysis of the test subject blood samples, especially with respect to laboratory conditions and analytical technique.

6.8.2 Prepare with an accuracy of plus or minus 1 percent, a blank (an alcohol-free blood sample), and three reference blood alcohol samples having ethanol concentrations within plus or minus 10 percent of 0.05, 0.100 and 0.200 percent W/V, by adding known quantities of ethanol to alcohol-free whole blood containing a suitable preservative.

6.8.3 Determine the ethanol concentrations of each of the three reference samples and the blank five times.

6.8.4 Compute the means, standard deviations, and systematic errors for

each of the four sets of five determinations.

6.8.5 The method of analysis shall be considered acceptable if:

(a) The apparent ethanol concentration of the blank (alcohol-free blood) does not exceed 0.002 percent W/V.

(b) The average of the standard deviations from the analyses of the three reference samples does not exceed 0.005 percent W/V.

(c) The systematic error of the analysis of the 0.05 percent W/V reference sample does not exceed plus or minus 10 percent; and

(d) The systematic errors of the analyses of the 0.100 and 0.200 percent W/V reference samples do not exceed plus or minus 5 percent.

Appendix A Breath Alcohol Sample Simulator

The concentration of alcohol in a single expired breath from a human subject, following the ingestion of alcohol, is asymmetric with time as shown in Figure A-1, a typical alcohol sample profile.

Figure A-2 shows a block diagram of a breath alcohol sample simulator that is suitable for use in a laboratory to evaluate the deep lung sampling capability of instruments used to measure the alcohol concentration of human breath. For a full discussion of the development of this equipment, refer to NBS Special Publication 480-41,⁸ issued in July 1981.

The breath alcohol sample simulator consists of three ethanol vapor chambers connected to a common exhaust manifold. In use, air from a large piston and cylinder is routed sequentially through each of the ethanol vapor chambers (each adjusted to a different and higher ethanol vapor concentration) to produce at the exhaust manifold in a series of concentration steps joined together to form a single asymmetric profile.

The discussion that follows identifies equipment by manufacturer and model; however, this does not constitute an endorsement of their products. Any equipment meeting the requirements as specified in paragraph 5.1.1. of this standard may be used to construct a breath alcohol sample simulator.

The three ethanol vapor chambers are grouped together as shown in Figure A-3. The input and output valves (Model 53C1014N14-2, Valcor Engineering, Kenilworth, NJ) are automatically

controlled so that the air passes through each solution at the proper time and for the proper duration. Heaters, thermoregulators, and the stirers used in the solution reservoirs were taken from MK II Simulators (Smith and Wesson Electronics, Springfield, Mass.), the shafts of which were extended. The air diffusers (double) were taken from Model 999 Air Pump (Lew Childre and Sons, Inc., Foley, AL). High precision thermometers ($\pm 0.1^\circ\text{C}$) are used to monitor the temperature. Initial pressures are variable from 0 to 200 inches of water. Although maximum final delivery pressure is only 64 in. of water, higher initial pressures are needed to overcome the high flow resistance of the air diffusers.

The air supply for the breath alcohol sample simulator is provided by a 7 liter air driven piston and cylinder assembly. The duration of the step for each ethanol vapor chamber is controlled by a relay timer (Model W21LMACOX-2, Magnecraft Electric Co., Chicago, IL).

When used to evaluate the deep lung sampling capability of breath alcohol instruments, the solution reservoirs are filled with water and ethanol in the proper proportions to result in ethanol vapor concentrations of 0.060, 0.090, and 0.101% w/v, respectively in reservoir numbers 1, 2 and 3. The heaters are then turned on and the reservoirs and exhaust manifold allowed to stabilize at a temperature of 34°C. The concentration of the ethanol vapor in reservoir number 3 is tested in accordance with the procedures of the NHTSA Model Performance Specifications for Calibrating Units for Breath Alcohol Testers to ensure that the concentration is 0.101% w/v as required.

The relay timers for each of the three reservoirs are adjusted to provide an individual profile step each equal to one-third of the total delivery duration, such as 4.0 seconds at concentrations of 0.060% w/v, 0.090% w/v, and 0.101% w/v. The instrument to be tested is then connected to the output of the exhaust manifold.

The 7 liter air supply cylinder piston is driven to the bottom position of its travel. The pressure regulator on the input of air supply is adjusted to the predetermined test pressure for the instrument under test to deliver the total sample volume in the required time. The pressure valve to the piston is then opened, and the timers are allowed to cycle automatically to deliver the required alcohol vapor concentration profile to the unit under test.

⁷ This test was taken from FIA Standard RS-204-A (July 1972) which is available from Electronic Industries Association, Engineering Department, 2001 Eye Street NW, Washington, D.C. 20008.

⁸ Available from the Law Enforcement Standards Laboratory, National Bureau of Standards, Washington, D.C. 20234.

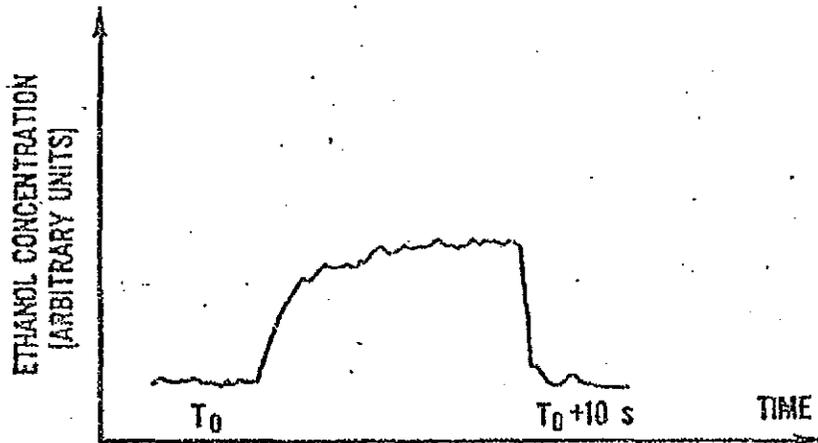


Figure A-1

Appendix B—Sample Calculations of Precision and Accuracy

The results of 10 sample measurements made in accordance with 5.1 and 6.1 at three known ethanol vapor concentration levels are as follows:

TABLE B-1

Measurement No.	0.21 mg/l (9.50% w/v)	0.49 mg/l (0.101% w/v)	0.12 mg/l (0.131% w/v)
	% w/v	% w/v	% w/v
1	0.045	0.092	0.149
2	0.046	0.097	0.149
3	0.049	0.100	0.145
4	0.049	0.105	0.148
5	0.045	0.094	0.146
6	0.045	0.098	0.147
7	0.047	0.093	0.152
8	0.050	0.102	0.147
9	0.047	0.083	0.154
10	0.046	0.094	0.152
Average	0.047	0.097	0.149
Standard deviation	0.0018%	0.0042%	0.0029%
Average standard deviation		0.0030%	
Systematic error	-6%	-4%	-1%

Appendix C

Sample Calculations in the Deep Lung Sampling Test

C.1. Breath and blood alcohol concentration measurements have been made for each of eight subjects in accordance with 6.4. The average of the BAC measurements for each subject is entered in the X column; and the average of the duplicate instrument readings for each subject is entered in column Y as follows:

Blood X percent W/V	Breath Y percent W/V
X ₁ = 0.0510	Y ₁ = 0.0510
X ₂ = 0.0640	Y ₂ = 0.0648
X ₃ = 0.0820	Y ₃ = 0.0717
X ₄ = 0.0880	Y ₄ = 0.0699
X ₅ = 0.1250	Y ₅ = 0.1164
X ₆ = 0.1590	Y ₆ = 0.1294
X ₇ = 0.1900	Y ₇ = 0.1577
X ₈ = 0.2030	Y ₈ = 0.1647

C.2 The average values computed in accordance with 6.4.11 for the above data are:

X _L = 0.06567% W/V	Y _L = 0.08250% W/V
X _H = 0.18400% W/V	Y _H = 0.1506% W/V
\bar{X} = 0.12025 W/V	\bar{Y} = 0.1057% W/V

C.3 The data points and breath/blood correlation line are entered in the sample graph (Figure C-1) as required in 5.4.12 and 5.4.13.

C.4 The value of Y, as defined in 4.4.1, is equal to 0.091% W/V.

C.5 All eight of the breath/blood points lie between the two lines drawn parallel to the breath/blood correlation line and through the points $\bar{Y} + 0.020\% W/V = 0.111\% W/V$ and $\bar{Y} - 0.020\% W/V = 0.071\% W/V$.

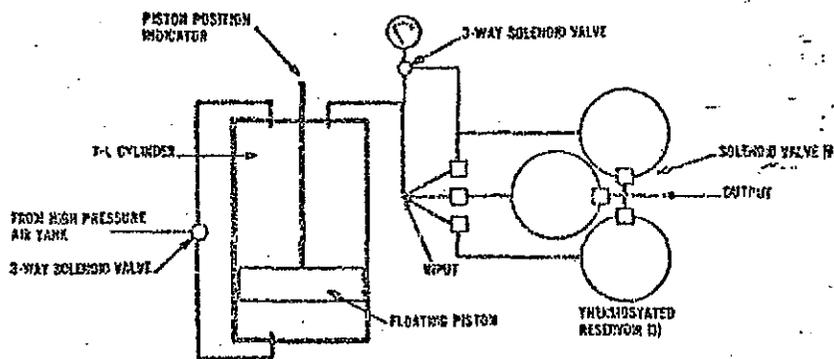


Figure A-2

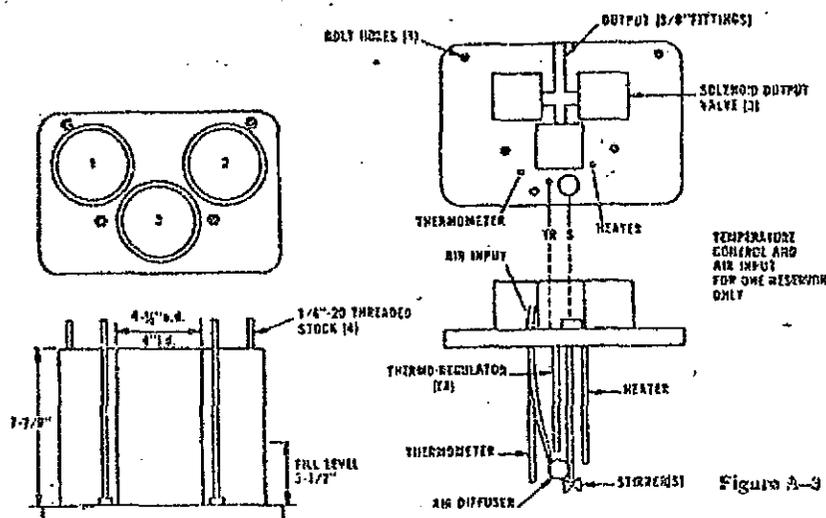
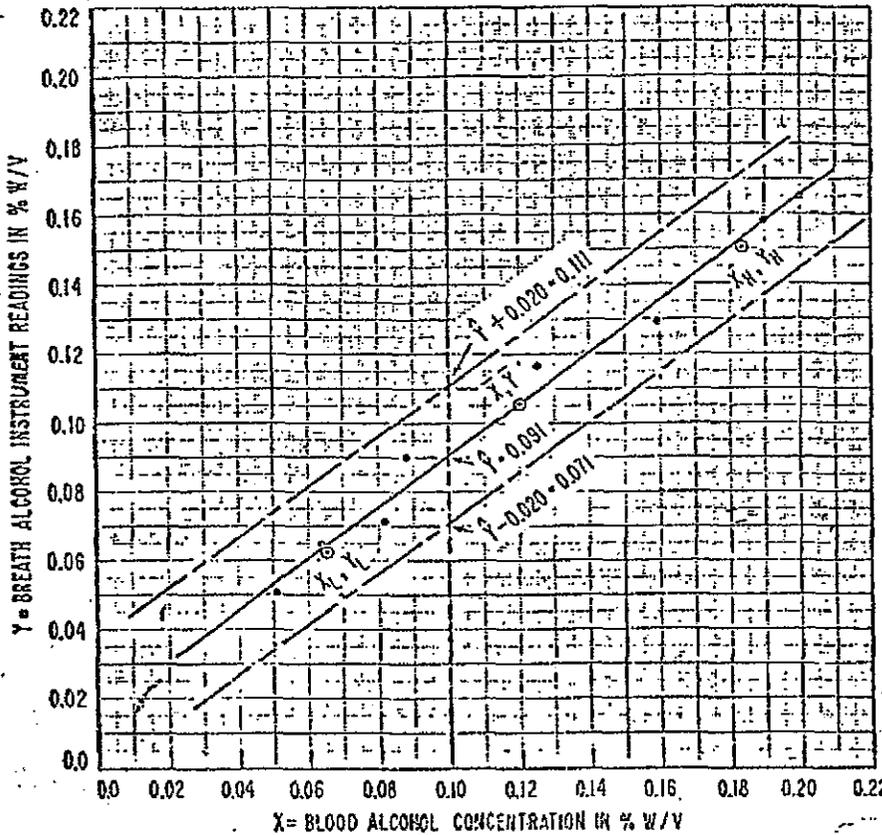


Figure A-3



Highway Safety Programs; Standard for Calibrating Units for Breath Alcohol Testers

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.
ACTION: Notice.

SUMMARY: This notice converts the standard for calibrating units for breath alcohol testers from a mandatory standard to model specifications. The standard (40 FR 36167) established performance requirements and methods of testing for calibrating units. Calibrating units provide known concentrations of ethanol vapor for the calibration or calibration checks of instruments, used by law enforcement officials, which measure breath alcohol. NHTSA is converting this standard to provide flexibility to the States and because the benefits of the standard can be maintained without the existence of a mandatory requirement.

DATE: This notice becomes effective December 14, 1984.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald E. Engle, Office of Alcohol Countermeasures, NTS-21, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 426-9581.

SUPPLEMENTARY INFORMATION: On May 11, 1984 (49 FR 20102) the National Highway Traffic Safety Administration (NHTSA) issued a notice proposing to convert the standard for calibrating units for breath alcohol testers from a mandatory standard to model specifications. Interested parties were invited to submit comments on or before June 11, 1984.

No objections have been received regarding the proposed conversion. Accordingly, the mandatory standard is hereby rescinded and, in its place, the model specifications are issued in the notices section of this Federal Register for use by State and local governments. Also published is a list of calibrating units which have been tested and found to conform to these model specifications (Conforming Products List).

The model specifications closely resemble the standard. NHTSA will continue to test calibrating units to

Figure C-1 Sample Data From Deep Lung Sampling Test

APPENDIX D.—CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer model	Mobile	Non-mobile
Alcohol Countermeasures System, Inc., Port Huron, Mich.; Alert JSAD	x	x
BAC System Inc., Ontario, Canada; breath analysis computer		x
GAMEC Ltd., North Shields, Tyne and Ward, England; IR breath analyser		x
CMI, Inc., Mintum, Colo.; Intoxilyzer		x
1. 4011	x	x
2. 4011A	x	x
3. 4011AS	x	x
4. 4011AS-A	x	x
5. 4011AW	x	x
6. 4011A27-10100	x	x
7. 4011A27-10100 with filter	x	x
8. 5000	x	x
Decator Electronics, Decator, Ill.; Alco-Tector model 500		x
Intoximeters, Inc., St. Louis, MO; Photo Electric Intoximeter		x
GC Intoximeter MK II	x	x
GC Intoximeter MK IV	x	x
Auto Intoximeter A1-1000	x	x
Intoximeter 3000	x	x
Alco-Sensor III	x	x
Alco-Sensor III with printer	x	x

APPENDIX D.—CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer model	Mobile	Non-mobile
Komyo Fikagaku, Kogyo, K.K.; Kitagawa Alcoyzer DAP-2	x	x
Luckey Laboratories, San Bernardino, Calif.		x
Alco-Analyzer 1000		x
Alco-Analyzer 2000		x
National Draeger, Inc., Pittsburgh, PA		x
Alcotest 7010	x	x
Breathalyzer 900	x	x
Breathalyzer 900A	x	x
Omicron Systems, Palo Alto, Calif.		x
Intoxilyzer 4011	x	x
Intoxilyzer 4011AW	x	x
Siemens-Alis Cherry Hill, N.J.; Alcomat	x	x
Smith and Wesson Electronics, Springfield, Mass.		x
Breathalyzer 900	x	x
900A	x	x
1000	x	x
2000	x	x
Verax Systems, Inc., Fairport, NY; The BAC Verifier	x	x

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 BILLING CODE 4910-59-M

determine whether they comply with performance criteria recommended in the NHTSA model specifications. Results of this testing will be published by NHTSA.

State and local governments may either rely on NHTSA's test results and adopt the model specifications, or set their own requirements. In this way the integrity of the States' alcohol countermeasures program is not compromised. It is the agency's belief that the States will continue to give the programs high priority.

Since this notice converts a standard to model guidelines, thus increasing State flexibility, the 30 days notice of the effective date required by the Administrative Procedure Act is not applicable.

NHTSA has analyzed the impact of this action and has determined that it is neither "major" within the meaning of Executive Order 12291 nor "significant" within the meaning of Department of Transportation regulatory policies and procedures. Because States and localities have been purchasing units on the approved list with and without Federal funds, there is no reason to believe that these practices will change if the Federal standard becomes model specifications.

The rescission of this standard will have no economic impact on State or local governments nor on the manufacturers of calibrating units. Because there will be virtually no economic or other impact from this conversion, a full regulatory evaluation is not necessary.

In accordance with the Regulatory Flexibility Act, the agency has evaluated the effects of this action on small entities. Based on that evaluation, I certify that the rescission of this standard will not have a significant economic impact on a substantial number of small entities. While the manufacturers of calibrating units may be small businesses as defined by the Regulatory Flexibility Act, they will not be significantly affected by this action. It is fully expected that States and localities will not alter their purchasing practices as a result of this proposed action. This action will, therefore, have no effect on either the manufacturers of these products or on small governmental units and will not impose any cost or other burden. Accordingly, a regulatory flexibility analysis is not necessary.

The agency has also analyzed this action for the purpose of the National Environmental Policy Act. The agency has determined that rescission of this standard will not have any effect on the human environment.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50)

Issued on: December 11, 1984.
Diane K. Steed,
Administrator.

[FR Doc. 84-32507 Filed 12-11-84; 12:55 pm]
BILLING CODE 7533-01-M

Highway Safety Programs; Model Specifications for Calibrating Units for Breath Alcohol Testers; Publication of a Conforming Products List

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.
ACTION: Notice.

SUMMARY: This notice establishes model specifications for the performance and testing of calibrating units. These model specifications replace the Performance Standard for Calibrating Units for Breath Alcohol Testers (40 FR 36167) which is rescinded in the notices section of this Federal Register. These model specifications are issued for use by State and local governments.

This notice also publishes a Conforming Products List (CPL) which is a list of calibrating units for breath alcohol testers which have been found to conform to the model specifications.

DATE: This notice becomes effective on the date the rescission of the mandatory standard is published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald E. Engle, Office of Alcohol Countermeasures, NTS-21, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Telephone (202) 426-9581.

SUPPLEMENTARY INFORMATION: Since August 19, 1975 NHTSA has conducted a program to test calibrating units for breath alcohol testers for accuracy in accordance with specifications set forth in a performance standard (40 FR 36167) and has published a qualified products list (QPL) of devices found to conform to those performance requirements. A review of State purchasing decisions has led the agency to conclude that most calibrating units purchased by States

and localities with and without Federal funds have been those which appeared on the list. On September 16, 1982, the agency issued new NHTSA 402 funding requirements which stated that the use of 402 funds for the purchase of alcohol testing devices is no longer limited to the purchase of devices on the QPL. While the notice did not address calibrating units, the agency feels that, since there is no basis for a distinction, the purchase of these units should be treated similarly.

Therefore, on May 11, 1984 (49 FR 20102) NHTSA proposed to convert the mandatory standard for the performance and testing of calibrating units to model specifications. The notice indicated that the model specifications would closely resemble the standard for calibrating units which appears in 40 FR 36167.

The agency will continue to test calibrating units and will release its findings to provide States which choose not to conduct their own testing with adequate information upon which to base their purchasing decisions.

This program therefore assists the State and local communities by providing a centralized qualification test program for calibrating units for alcohol testers used in law enforcement programs. The model specifications are not intended to replace the current qualification programs required in certain States for this equipment or to directly regulate the manufacture of calibrating units. However, some States may wish to make use of this program in addition to setting their own requirements. While the agency is not imposing its findings on State and local governments, NHTSA encourages each State to consider adopting the NHTSA model specifications as its own.

Interested parties were invited to submit comments on or before June 11, 1984. No objections have been received regarding the issuance of these model specifications.

Procedures

Testing to these model specifications of products submitted by manufacturers, will be conducted by the DOT Transportation Systems Center (TSC). Tests will be conducted semiannually, or as necessary. Manufacturers wishing to submit calibrating units for testing must apply for a test date to NHTSA's Office of Alcohol Countermeasures (OAC), NTS-21, NHTSA, 400 Seventh Street, SW., Washington, D.C. 20590.

Highway Safety Programs; Model Specifications for Devices to Measure Breath Alcohol

Agency: National Highway Traffic Safety Administration, DOT.

Action: Notice.

Summary: This notice amends the Model Specifications for evidential breath testing devices published in 1984 and updates the list of conforming products. Recent trends indicate that the states are lowering the alcohol levels that indicate drunk driving (e.g., "zero tolerance" laws for underage offenders). Moreover, these specifications address comment received in response to a Department of Transportation Notice of Proposed Rulemaking published in the **Federal Register** on December 15, 1992 (57 FR 59382). The Model Specifications and the Conforming Products List set forth below reflect new lower evaluation thresholds for devices to measure breath alcohol, to better reflect the range of critical measurements during actual use.

Dates: This notice becomes effective October 18, 1993.

For further information contact: Ms. Robin Mayer, Office of Alcohol and State Programs, NTS-21, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366-9825.

Supplementary information: On December 14, 1984 (49 FR 48854), the National Highway Traffic Safety Administration (NHTSA) issued a notice converting the mandatory standards for beath test devices (38 FR 30459) to Model Specifications for such devices. The Notice indicated the Agency would continue to test evidential breath testers (EBTs) and would release its findings to provide States which choose not to conduct their own testing with adequate information upon which to base their purchasing decisions.

Since publication of the Model Specifications in 1984 (49 FR 48855), States have been moving toward a lowering of alcohol levels which indicate drunk driving and enacting new laws targeting youthful offenders (i.e., "zero tolerance" laws).

On December 15, 1992, the U.S. Department of Transportation (DOT) published Notices of Proposed Rulemaking (NPRMs) proposing rules to implement the "Omnibus Transportation Employee Testing Act of 1991", which requires alcohol testing programs in aviation, motor carrier, rail, and mass transit industries in the interest of public safety. The Research and Special Programs Administration (RSPA) has proposed similar regulations for the pipeline industry. In general, the proposed rules would prohibit covered employees from performing safety-sensitive functions when test results indicate a breath alcohol concentration (BAC) of 0.04 or greater. Slightly different consequences would apply with respect to an employee having a BAC of 0.02 or greater but less than 0.04. If NRPMs are adopted as final rules, transportation workers in safety-sensitive positions will be tested at lower alcohol levels (commercial motor vehicle driver are already subject to DWI standards at ≥ 0.04).

DOT received comments in response to the rulemaking actions recommending that if NHTSA's Model Specifications are to be used for the transportation workplace alcohol testing programs, then the Model Specifications should be consistent with the requirements of the rules.

In light of the trend toward lowering alcohol levels and to address the comments received in response to DOT's NRPMs NHTSA has decided to revise its Model Specifications by lowering the BACs at which instruments are evaluated.

Under the earlier specifications, EBTs were evaluated for precision and accuracy at 0.000, 0.050, 0.101, and 0.151 BAC, and tests for operation of the devices at various conditions of operation were performed at 0.101 BAC. The Specifications below establish evaluations for precision and accuracy at 0.000, 0.020, 0.040, 0.080, and 0.160 BAC, and evaluations at various conditions of operation at 0.080. Tests for acetone interference will

also be conducted at 0.020 BAC. NHTSA is also expanding its definition of alcohol to better reflect State laws and the capabilities of testing devices.

These revisions will assist the States and local communities by providing a centralized qualification test program for breath testing devices designed to collect evidence in law enforcement programs. The Model Specifications are not intended to replace the current qualification programs required in certain States for this equipment or to directly regulate the manufacture of EBTs. However, some States may wish to make use of this program in addition to setting their own requirements. While the agency is not imposing these Model Specifications on State and local governments, NHTSA encourages each State to consider adopting them.

Procedures

Testing of EBTs submitted by manufacturers to these model specifications will continue to be conducted by the DOT Volpe National Transportation Systems Center (VNTSC). Procedures for submitting instruments for evaluation have not changed. Tests will continue to be conducted semi-annually or as necessary. Manufacturers wishing to submit EBTs for testing must apply to NHTSA for a test date (Office of Alcohol and State Programs, NTS 21, NHTSA, 400 Seventh Street, S.W., Washington, D.C. 20590). Normally, at least 30 days will be required from the date of notification until the test can be scheduled. One week prior to the scheduled initiation of the test program, the manufacturer will deliver the device to be tested to VNTSC, DTS 75, Kendall Square, Cambridge MA 02142. The manufacturer shall be responsible for ensuring that the device is operating properly and is in proper calibration. If the manufacturer wishes to submit a duplicate backup device, he may do so. The Operator's Manual and the Maintenance Manual will be delivered with the EBT with specifications and drawings which fully describe the device. Proprietary information will be respected. (See 49 CFR Part 512, regarding the procedure by which NHTSA will consider claims of confidentiality.)

The manufacturer will have the right to check the EBT between arrival in Cambridge and the start of the test and to ensure that the EBT is in proper calibration but will have no access to it during the tests. Any malfunction of the EBT which results in failure to complete any of the tests satisfactorily will result in a finding that it does not conform to the Model Specifications. If the EBT fails to conform, it may be resubmitted for testing.

On the basis of these results, NHTSA will continue to publish a Conforming Products List (CPL) identifying the EBTs that meet the performance criteria set forth in these Model Specifications.

In anticipation of the publication of this notice and DOT's final rules to implement the Omnibus Transportation Employee Testing Act of 1991, NHTSA invited manufacturers currently known to produce EBTs to submit their instruments for evaluation utilizing these amended specifications. Instruments provided by the manufacturers have been evaluated under these Model Specifications, and this notice includes, as Appendix A, a revised CPL. This CPL identifies those instruments found to conform with the Model Specifications, as amended by this notice. It also identifies those instruments that meet the Model Specifications detailed in 49 FR 48850 (December 14, 1984).

Re-testing of instruments will continue to be conducted as necessary. NHTSA intends to modify and improve these model specifications as new data and improved test procedures become available. (The test procedures may be altered in specific instances, if necessary, to meet unique design features of an EBT.) If these model specifications are modified, notification will be provided in the Federal Register. If NHTSA determines that re-testing to the modified specification is necessary, a manufacturer whose equipment is listed on the CPL will be notified to resubmit the equipment for testing to the modified specification only. Also, if at any time a manufacturer wishes to change the design of an EBT currently on the CPL, the manufacturer shall submit the proposed changes to OASP for review. Based on this review, a determination will be made regarding whether

re-testing is required. Guidance to manufacturers on considerations governing this decision is given in Appendix B.

OASP will continue to be the point of contact for information about acceptance testing and field performance of equipment already on the list. When it is available, NHTSA requests that the State and local agencies provide both acceptance and field performance data to OASP. Information from users will be used to: (1) Help NHTSA determine whether EBTs continue to perform according to the NHTSA Model Specifications and (2) ensure that field use does not indicate excessive breakdown or maintenance problems.

If information gathered indicates that an instrument on the CPL is not performing in accordance with the Model Specifications, NHTSA will direct VNTSC to conduct a special investigation. This study may include visits to users and additional tests of the instrument obtained from the open market. If the investigation indicates that the instruments actually sold on the market area not meeting the Model

Specifications, then the manufacturers will be notified that the instrument may be dropped from the list. In this event the manufacturer shall have 30 days from the date of notification to reply. Based on the VNTSC investigation and any data provided by the manufacturer, NHTSA will decide whether the instrument should remain on the list. Upon resubmission, the manufacturer must submit a statement describing what has been done to overcome the problems which led to the dropping of the instrument in question from the list.

This notice addresses comments received by DOT in response to its NPRMs on The Omnibus Transportation Employee testing Act of 1991 published in the **Federal Register** on December 15, 1992. The changes to the Model Specifications for evidential breath testers contained in this notice become effective on the date noted above. If any person believes NHTSA should reconsider the changes made in this notice, that person may submit a petition for reconsideration. The petition shall be submitted to the Administrator, National Highway Traffic Safety Administration, 400 7th Street, SW, Washington, DC 20590. It is requested, but not required, that 10 copies be submitted. The petition must be received by the date noted above and contain a brief statement of the basis for the petition. The statement may not exceed 15 pages in length, but necessary attachments may be appended to the submission without regard to the 15 page limit. The filing of a petition will not stay the effective date of this notice.

In accordance with the foregoing, the Model Specifications for performance testing of EBTs are set forth below.

Authority: 23 U.S.C. 402, 403, 408 410; delegations of authority at 49 CFR 1.50 and 501.

Michael B. Brownlee,
Associate Administrator for TSP.

Model Specifications for Evidential Breath Testers

1. Purpose and Scope

These specifications establish performance criteria and methods for testing of evidential breath testers (EBT). EBTs measure the alcohol content of deep lung breath samples with sufficient accuracy for evidential purposes. These specifications are intended primarily for use in the conformance testing of EBTs.

2. Classification

2.1. Mobility

2.2.1. Mobile EBT. EBTs that are designed to be transported to non-fixed operational sites in the field.

2.1.2. Non-mobile EBT. EBTs that are designed to be operated at a fixed location.

2.2 Power Source.

2.2.1. Battery EBT. EBTs that are powered by batteries.

2.2.2. AC Powered EBT. EBTs that are powered from the AC power lines.

3. *Definitions.*

3.1. Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

3.2. BAC, BrAC. Blood alcohol concentration: grams alcohol per 100 milliliters blood or grams alcohol per 210 liters of breath by breath in accordance with the Uniform Vehicle Code, Section 11-903(a)(5)¹. BrAC is often used to indicate that the measurement is a breath measurement. In these Model Specifications, concentration units of test samples are referred to as BAC units and are grams of alcohol per 210 liters of air.

3.3. Conformance Tests. Tests performed to check the compliance of a product with these specifications.

3.4. Standard Deviation. An indication of measurement precision of the EBT in a test, expressed as follows:

$$\text{Standard deviation} = \{\text{Sum } (X_i - X_m)^2 / (N-1)\}^{1/2}$$

where X_i = a single measurement result

X_m = the average of the measurements

N = the number of measurements made in the

test

3.5 Systematic Error. An indication of the accuracy of the EBT in a test.

$$\text{Systematic error} = \{(X_m - \text{test BAC}) / \text{test BAC}\} 100$$

3.6 Calibrating Unit (CU). A device that produces an alcohol-in-air test sample of known concentration that meets the Model Specifications for Calibrating Units (FR 48 48865).

3.7 BASS. Breath alcohol sample simulator. A device which provides an alcohol-in-air test sample with known and adjustable alcohol concentration profile, flow rate, and air composition at 34⁰centigrade (See NBS Special Publication 480-41, July 1981², for a description of a BASS unit suitable for use in Test 4.)

4. *Test Methods and Requirements.*

Each of the tests below require 10 measurements to three decimal places made at 0.080 BAC or other specified BAC using the EBT being evaluated. Procedures specified by the manufacturer will be followed. Unless otherwise specified, the tests will be performed in the absence of drafts and at prevailing normal laboratory temperature, humidity, and barometric pressure. Ethyl alcohol will be used to prepare the test samples in this Model Specifications. A CU of the type which uses aqueous alcohol solutions thermostated at 34⁰C and a ratio of headspace concentration of 0.000393 (see FR 48865) will be used to provide the BAC samples. The CU shall be capable of delivering 10 complete vapor samples with alcohol depletion of not more than 1%. Human breath

¹ Available from National Committee on Uniform Traffic Laws and Ordinances, 405 Church Street, Evanston IL 60201.

² Available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

will be used to drive the CU. (For Test 4, the BASS device will be used.) Performance requirements are indicated in square brackets. [SE=systematic error, SD=standard deviation].

Test 1. Precision and Accuracy. Test at each of the specified BAC [SE≤0.005 BAC; SD≤0.0042].

Test 1.1: 0.020 BAC [SE≤0.005 BAC; SD≤0.0042]

Test 1.2: 0.040 BAC [SE≤0.005 BAC; SD≤0.0042]

Test 1.3: 0.080 BAC [SE≤0.005 BAC; SD≤0.0042]

Test 1.4: 0.160 BAC [SE≤0.008 BAC; SD≤0.0042]

The following test is information only for the potential users. There is no performance requirement.

Test 1.5: 0.300 BAC

Test 2. Acetone Interference. Test at 0.020 BAC with the specified amount of acetone added to the CU solution³. Replace the solution if acetone depletion is indicated during the test. [SE≤0.005 BAC; SD≤0.0042]

Test 2.1: 70 microliters acetone per 500 ml solution.

Test 2.2: 115 microliters acetone per 500 ml solution.

Test 3. Blank Reading. Test at 0.000 BAC. The tester shall use his or her own breath for this test and he or she may not consume alcohol for a period of 48 hours prior to this test nor smoke for a period of 20 minutes prior to this test. [SE ≤0.005 BAC with no single result greater than 0.005 BAC]

Test 4. Breath Sampling (Alternate test in Appendix C may be used). Prepare the BASS solutions so that the BAC of each of the three segments of the simulated breath sample increases from 0.048, to 0.072, to 0.080. Use compressed breathing air to drive the samples. If the EBT is sensitive to carbon dioxide at concentrations found in human breath, the driver gas will contain this gas at that concentration. Use a spirometer to measure sample volumes and, if necessary, place the EBT in a glove box to make that measurement. Perform three tests at each of the following volume-time combinations [SE≤0.005 BAC; SD≤0.0042]:

	volume of each segment (liters)	time of each segment (seconds)
Test 4.1:	0.67	3.3
Test 4.2:	0.67	2
Test 4.3:	2	4

Test 5. Input Power. If the EBT is powered by nominal voltages of 120 volts AC or 12 volts DC, condition the device for one half hour at the appropriate input voltage specified below, then test at that voltage. Monitor the input power with a voltmeter accurate to +2% full scale in the range used and re-adjust the voltage, if necessary. [SE≤0.005 BAC; SD≤0.0042]

Test 5.1: 108 VAC

Test 5.2: 123 VAC

Test 5.3: 11 VDC

Test 5.4: 15 VDC

³ The amounts of acetone have been specified on the basis of an experimentally determined water to air partition factor of 365 to 1 at 34°C to yield a sample of acetone-in-air at concentrations of 0.3mg/l and 0.5mg/l.

Test 6. Ambient Temperature. Use a temperature chamber controllable to $\pm 1^{\circ}\text{C}$. Soak the EBT at the specified temperature for 1 hour before each test, then test at that temperature [SE \leq 0.005 BAC; SD \leq 0.0042].

Test 6.1: 20 $^{\circ}\text{C}$

Test 6.2: 30 $^{\circ}\text{C}$

The following portion of Test 6 is applicable to hand held EBT and is for information to potential users only. Soak hand-held EBT at specified temperature for one hour before each test, then test at that temperature. Operate the CU outside of the temperature chamber, if necessary, to ensure that it remains at normal operating temperature. There is no performance requirement.

Test 6.3: 10 $^{\circ}\text{C}$

Test 6.4: 35 $^{\circ}\text{C}$

Test 7. Vibration Stability. Use a programmable shake table with sufficient power to drive the weight of the EBT to be tested. Through each of its three major axes, subject the EBT to simple harmonic motion of the specified amplitude and frequency. Sweep through each frequency range in 2.5 minutes, then reverse sweep to the starting frequency in 2.5 minutes. After vibration, test the EBT. [SE \leq 0.005 BAC; SD \leq 0.0042]

frequency range to peak)	Amplitude	(Hertz)	(inches, peak
10 to 30	0.030		
30 to 60	0.015		

Test 8. Electrical Safety Inspection. Examine the EBT for protection of the operator and person being tested from electrical shock. Examine for proper use of input power fuses, and verify that there are no exposed male connectors at high potential. Determine that overheating does not occur during operation and that undue fire hazards do not exist.

APPENDIX B. Guidelines for Re-testing of Modified EBT.

Manufacturers contemplating revisions to an EBT which is currently listed on the Conforming Products List are advised that the revision may effect the status of the device on the List. It may or may not be necessary to re-test the revised EBT. The manufacturer should inform NHTSA of the contemplated change so that a judgment can be made. The following lists the type of information NHTSA uses in determining the necessity to re-test an instrument, and is provided as guidance to manufacturers:

- Manufacturer and Model Name.
- Nature and reason for change.
- Scope of change (e.g., will existing devices be retrofitted? Will the change apply to some users but not others?).
 - Will the change affect performance of the device as regards the Model Specifications? (Precision and accuracy, acetone interference, blank reading, linearity, sampling efficiency, low or high temperature operation, low or high input power operation, mobile operation, electrical safety)
 - Will the change alter performance with regard to the possibility of chemical or electrical interference or unusually high relative humidity?
 - How will the changes be documented for the benefit of the user? (e.g., will the changes be documented in service bulletins and/or service manuals? If not, why not?)

APPENDIX C. Alternate Breath Sampling Test.

Select eight human subjects who are in good health. Their oral temperatures prior to the start of testing shall be between 97.0°F and 99.5°F

Divide the subjects into two groups of four. The target BAC range for group 1 shall be from 0.04 to 0.10. The target BAC range for group 2 shall be from 0.10 to 0.20. In order to obtain a distribution of BACs, each subject shall be given a different amount of alcohol to drink. As a rough guide to dose vs. peak resultant BAC, and based on ingestion of a 100 proof beverage, a body weight of 160 lbs., and a 2 hour drinking period, 3 oz. of beverage should produce a BAC of 0.04; 6 oz. should produce a BAC of 0.10; and 8 oz. should produce a BAC of 0.15.

Blood samples taken shall be either from a vein in the arm or from capillaries in the finger tip. Non-alcoholic swabs shall be used to prepare the skin surface. If finger tip blood is to be taken, a 90 minute waiting period will be observed before beginning breath sample testing and if venous blood is to be taken, a 120 minute period will be observed. No subject may smoke during the 20 minute period before testing begins.

Use the EBT to measure the subject's breath, then take a blood sample, then measure the subject's breath again. Allow no more than five minutes between the taking of the first and second breath sample.

The blood samples shall be analyzed within 72 hours of being taken and at least two alcohol determinations shall be made on each sample. A reference sample of known BAC in the range 0.05 to 0.15 shall be prepared by the analyzing laboratory. Five determinations of the reference sample shall be made concurrently with the analysis of the human subject blood samples. The SD of the reference sample analysis shall not exceed 0.005 BAC and the SE shall not exceed ± 5 per cent of the known BAC.

Calculate the average blood result and the average breath result for each subject. Label each average blood result X_i ($i=1$ to 8 for each of the subjects, in ascending order of BAC). For each such result X_i , label the companion average breath result Y_i .

Calculate X_H , the average of the three highest blood results, and X_L , the three lowest. For the three highest blood results, and for the three lowest blood results, calculate the companion averages of the breath results, Y_H and Y_L .

Calculate X_M , the average of the eight blood results, and Y_M , the average of the eight breath results.

On graph paper, plot the points corresponding to (X_M, Y_M) , (X_H, Y_H) , (X_L, Y_L) , and the eight points (X_i, Y_i) . Draw a straight line, the blood-breath correlation line, through the point (X_M, Y_M) and parallel to the line joining the points (X_L, Y_L) and (X_H, Y_H) .

At $X=0.100$ on the blood-breath correlation line, mark a point on the perpendicular at $Y=-0.020$ and another at $Y=+0.020$. Draw a line through each of these points, the negative bias and positive bias lines, parallel to the blood-breath correlation line. Requirements:

1. The value on the Y axis which corresponds to the point $X=0.100$ shall lie at or between 0.080 and 0.100.
2. At least seven of the eight averaged breath results shall lie within the area between the positive and negative bias lines

SUMMARY: The FHWA is issuing this notice to advise the public that a supplement to an Environmental Impact Statement (EIS) will be prepared for a proposed highway project in Lincoln County, Oregon. The Oregon Department of Transportation (ODOT) initially started the project development process for the proposed Pioneer Mountain-Eddyville project with the intent to use their own funds to construct the project. They published a Draft Environmental Impact Statement (DEIS) in September 1993 and held a Public Hearing in October 1993. ODOT did not complete the final EIS for the proposed project. ODOT is now proposing to request federal aid participation for the project. As a result, FHWA is reviewing the DEIS, public hearing testimony, and comments received on the DEIS to determine if all federal regulations and processing requirements have been met.

FOR FURTHER INFORMATION CONTACT: Anthony Boesen, Region 2 Liaison Engineer, Federal Highway Administration, Equitable Center, Suite 100, 530 Center Street NE, Salem, Oregon 97301, Telephone (503) 399-5749.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with ODOT and after evaluation of the DEIS, public hearing testimony and written comments, will prepare a Supplemental Environmental Impact Statement for the project, and hold additional public hearing as necessary.

The proposed project will realign a 10 mile, 2-lane roadway section from mile point 14.5 to 24.75 of the Corvallis-Newport Highway (US 20). Two Build Alternatives and a No-Build Alternative were considered in the DEIS. Build Alternative number one generally followed the existing roadway and the Yaquina River. Build Alternative number two is on new alignment and overall reduces the highway length by 2.5 miles. An option common to both Build Alternatives was considered for a short segment on the west end of the project; this design option was a channel change of Simpson Creek. Based on public input, agency comments and coordination, and overall environmental impacts, Build Alternative number two without the channel change of Simpson Creek is the preferred alternative determined by ODOT. Lincoln County has strongly supported Alternative 2 and has now included the proposed project in their county comprehensive land use plans.

The project is considered necessary to improve the highway to current safety standards, eliminate numerous sharp

curves, reduce a higher than average accident rate that occurs on this segment of highway, and is part of an overall upgrade of this highway between the Willamette Valley and the Oregon Coast.

There have been no significant changes in development/conditions in the area since the DEIS was prepared, as the proposed route is predominately through underdeveloped large timber company holdings that have been logged within recent years. The project has been developed with consideration for the proposed listings of the salmon by the National Marine Fisheries Service (NMFS). Since then the salmon has been formally listed by NMFS. There appears to be no Section 4(f) eligible properties that would be impacted by this proposed project.

The DEIS describing the proposed action and solicitation of comments was sent to all appropriate federal, state, and local agencies by ODOT. Public meetings and a public hearing were held for the project. ODOT published a Hearing Study Report/Decision Document in March 1994 that summarized and responded to all comments received at the public hearing and on the DEIS. As a result of comments received, minor changes are being considered for inclusion in the proposed project and subsequent environmental documents. Since ODOT formally circulated the DEIS, we propose to develop a supplemental EIS and circulate it with a copy of the summary of the DEIS as part of our normal distribution. Copies of the entire DEIS will be made available upon request. Additional public meetings/public hearing will be held as needed.

To ensure that the full range of issues related to this proposed action are addressed and significant issues identified, comments, and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: July 12, 2000.
 Elton Chang,
 Environmental Engineer, Oregon Division.
 [FR Doc. 00-18454 Filed 7-20-00; 8:45 am]
 BILLING CODE 4910-22-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-00-7570]

Highway Safety Programs; Model Specifications for Devices To Measure Breath Alcohol

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice amends the Conforming Products List for instruments that conform to the Model Specifications for Evidential Breath Testing Devices (58 FR 48705).

EFFECTIVE DATE: July 21, 2000.

FOR FURTHER INFORMATION CONTACT: Dr. James F. Frank, Office of Traffic Injury Control Programs, Impaired Driving Division (NTS-11), National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, D.C. 20590; Telephone: (202) 366-5593.

SUPPLEMENTARY INFORMATION: On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (38 FR 30459). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974 (39 FR 41399).

On December 14, 1984 (49 FR 48854), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices, and published a conforming Products List (CPL) of instruments that were found to conform to the Model Specifications as Appendix D to that notice (49 FR 48864).

On September 17, 1993, NHTSA published a notice (58 FR 48705) to amend the Model Specifications. The notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC; added a test for the presence of acetone; and expanded the definition of alcohol to include other low molecular weight alcohols including methyl or isopropyl. On June 4, 1999, the most recent amendment to the Conforming Products List (CPL) was published (64 FR 30097), identifying those instruments found to conform with the Model Specifications.

Since the last publication of the CPL, two (2) instruments have been evaluated and found to meet the model specifications, as amended on September 17, 1993, for mobile and

non-mobile use. They are: (1) Intoxilyzer 400PA manufactured by CMI, Inc. of Owensboro, KY. This device is a hand-held breath tester with a fuel cell alcohol sensor. (2) Alco Sensor IV-XL manufactured by Intoximeters, Inc. of St. Louis, MO. This

device is a hand-held breath tester with a fuel cell alcohol sensor that is microprocessor controlled. It is designed to minimize operator involvement in performing the test and processing the test data.

The CPL has been amended to add these two instruments to the list.

In accordance with the foregoing, the CPL is therefore amended, as set forth below.

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer and model	Mobile	Nonmobile
Alcohol Countermeasure Systems Corp., Mississauga, Ontario, Canada:		
Alert J3AD*	X	X
PBA3000C	X	X
BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer*		
BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer*	X	X
CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer*		
CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer*	X	X
CMI, Inc., Owensboro, KY:		
Intoxilyzer Model:		
200	X	X
200D	X	X
300	X	X
400	X	X
400PA	X	X
1400	X	X
4011*	X	X
4011A*	X	X
4011AS*	X	X
4011AS-A*	X	X
4011AS-AQ*	X	X
4011 AW*	X	X
4011A27-10100*	X	X
4011A27-10100 with filter*	X	X
5000	X	X
5000 (w/Cal. Vapor Re-Circ.)	X	X
5000 (w ³ / ₈ " ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
PAC 1200*	X	X
S-D2	X	X
Decator Electronics, Decator, IL: Alco-Tector model 500*		
Decator Electronics, Decator, IL: Alco-Tector model 500*		X
Draeger Safety, Inc., Durango, CO:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII-C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
900*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410-II	X	X
Gall's Inc., Lexington, KY: Alcohol Detection System-A.D.S. 500		
Gall's Inc., Lexington, KY: Alcohol Detection System-A.D.S. 500	X	X
Intoximeters, Inc., St. Louis, MO:		
Photo Electric Intoximeter*		
Photo Electric Intoximeter*	X	
GC Intoximeter MK II*	X	X
GC Intoximeter MK IV*	X	X
Auto Intoximeter*		
Intoximeter Model:		
3000*	X	X
3000 (rev B1)*	X	X
3000 (rev B2)*	X	X
3000 (rev B2A)*	X	X
3000 (rev B2A) w/FM option*	X	X
3000 (Fuel Cell)*	X	X
3000 D*	X	X
3000 DFC*	X	X
Alcomonitor		X
Alcomonitor CC	X	
Alco-Sensor III	X	X
Alco-Sensor IV	X	X
Alco-Sensor IV-XL	XL	X
Alco-Sensor AZ	X	X
RBT-AZ	X	X
RBT III	X	X
RBT III-A	X	X
RBT IV	X	X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
RBT IV with CEM (cell enhancement module)	X	X
Intox EC/IR	X	X
Portable Intox EC/IR	X	X
Komyo Kitagawa, Kogyo, K.K.:		
Alcolyzer DPA-2*	X	X
Breath Alcohol Meter PAM 101B*	X	X
Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, CO:		
PBA 3000B	X	X
PBA 3000-P*	X	X
PBA 3000C	X	X
Alcohol Data Sensor	X	X
Phoenix	X	X
Lion Laboratories, Ltd., Cardiff, Wales, UK:		
Alcolmeter Model:		
300	X	X
400	X	X
AE-D1*	X	X
SD-2*	X	X
EBA*	X	X
Auto-Alcolmeter*	X	
Intoxilyzer Model:		
200	X	X
200D	X	X
1400	X	X
5000 CD/FG5	X	X
5000 EN	X	X
Luckey Laboratories, San Bernardino, CA:		
Alco-Analyzer Model:		
1000*		X
2000*	X	
National Draeger, Inc., Durango, CO:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII-C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
900*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410-II	X	X
National Patent Analytical Systems, Inc., Mansfield, OH:		
BAC DataMaster (with or without the Delta-1 accessory)	X	X
BAC Verifier Datamaster (with or without the Delta-1 accessory)	X	X
DataMaster cdm (with or without the Delta-1 accessory)	X	X
Omicron Systems, Palo Alto, CA:		
Intoxilyzer Model:		
4011*	X	X
4011AW*	X	X
Plus 4 Engineering, Mintum, CO: 5000 Plus4*	X	X
Seres, Paris, France:		
Alco Master	X	X
Alcopro	X	X
Siemens-Allis, Cherry Hill, NJ:		
Alcomat*	X	X
Alcomat F*	X	X
Smith and Wesson Electronics, Springfield, MA:		
Breathalyzer Model:		
900*	X	X
900A*	X	X
1000*	X	X
2000*	X	X
2000 (non-Humidity Sensor)*	X	X
Sound-Off, Inc., Hudsonville, MI:		
AlcoDate	X	X
Seres Alco Master	X	X
Seres Alcopro	X	X
Stephenson Corp.: Breathalyzer 900*	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, CA:		
Alco-Analyzer 1000		X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
Alco-Analyzer 2000		X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, NY:		
BAC Verifier*	X	X
BAC Verifier Datamaster	X	X
BAC Verifier Datamaster II*	X	X

Instruments marked with an asterisk () meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., Instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All Instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Body Fluids.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50 and 501.1)

Issued on: July 17, 2000.

Rose A. McMurray,
Associate Administrator for Traffic Safety Programs.

[FR Doc. 00-18455 Filed 7-20-00; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-99-8187; Notice 2]

Athey Products Corporation, Grant of Application for Decision That Noncompliance Is Inconsequential to Motor Vehicle Safety

Athey Products Corporation (Athey) determined that certain Mobil model Street Sweepers it produced are not in full compliance with 49 CFR 571.105, Federal Motor Vehicle Safety Standard (FMVSS) No. 105, "Hydraulic and Electric Brake Systems," and filed an appropriate report pursuant to 49 CFR Part 573, "Defect and Noncompliance Reports." Athey also applied to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301—"Motor Vehicle Safety" on the basis that the noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of an application was published, with a 30-day comment period, on October 21, 1999 in the Federal Register (64 FR 56835). NHTSA received no comments on this application during the comment period.

Paragraph S5.3 of FMVSS No. 105 requires each vehicle with a gross vehicle weight rating greater than 10,000 pounds, except for a vehicle with a speed attainable in 2 miles of not more than 33 mph, to be equipped with an antilock brake system (ABS) that directly controls the wheels of at least one front axle and the wheels of at least one rear axle of the vehicle. Vehicles that do not comply with the requirements of a FMVSS are subject to

the notification and remedy requirements of Chapter 301, unless exempted pursuant to 49 U.S.C. 30118(d) and 30120(h) on the basis that the noncompliance is inconsequential to motor vehicle safety. The effective date of the requirement for ABS on medium and heavy duty hydraulically-braked trucks was March 1, 1999.

Between March 1, 1999 and July 31, 1999 Athey manufactured, sold and/or distributed 21 Athey Mobil M8A model street sweepers and 56 Mobil M9D model street sweepers which were not equipped with ABS as required by FMVSS No. 105. To the best of Athey's knowledge, there were no other vehicles manufactured by the company that are noncompliant with the ABS requirements.

Athey supported its application by stating that the agency recognized that vehicle stopping distances and stability would not be substantially improved with ABS during maximum braking at speeds below 33 mph. According to Athey, the noncompliant vehicles are capable of speeds in excess of 33 mph, but spend the majority of their operating time at speeds below 33 mph. A review of information from its customers indicated that these street sweepers spend 80% to 90% of their operation time at speeds that are most effective at removal of road debris, speeds in the 3 to 7 mph range. In Athey's opinion, due to the low speed operation of these vehicles and the type of road use of street sweepers, maximum brake application does not normally cause lockup and the subsequent loss of vehicle control or jack knifing. Athey also stated that these street sweeper models are seldom operated in inclement weather thereby reducing the need for ABS.

Athey further stated that the hydraulic service brake system with which the noncompliant street sweepers are equipped is capable of providing substantially more brake torque than necessary to meet the 30 mph and 60 mph stopping performance requirements in FMVSS No. 105.

In addition to information supporting its arguments that the noncompliance with FMVSS No. 105 is inconsequential, Athey cited several other developments and circumstances that it considered relevant to its application. Athey stated that it attempted to secure the necessary ABS equipment from suppliers in order to meet the March 1, 1999 effective date for ABS installation, but experienced delays in receiving ABS equipment from suppliers due to a backlog of orders for ABS components. Further, immediately upon becoming aware of the consequences of the noncompliance, Athey halted all further sales and/or distribution of the Mobil model M8A and M9D street sweepers until compliance with the ABS requirements was achieved.

According to Athey, the importance of the service provided by street sweepers on public and private roadways should not be overlooked. The removal of waste material such as broken glass and other sharp, potentially dangerous objects from the roadway is a health and safety benefit.

Athey also noted that the agency granted a temporary exemption to the Johnson Swooper Company (JSC) under 49 CFR part 555 from the ABS requirements of FMVSS No. 105. The agency cited the low speed operation of the JSC street sweepers and a reduction in the number of sweepers to fill the need of municipalities if JSC sweepers were not available, as important factors in its decision.

Upon its review of this petition, the agency believes that the true measure of inconsequentiality to motor vehicle safety is the effect of the noncompliance on the operation of the vehicles. Athey has described the effect of the absence of ABS on the operational characteristics, the braking capacity, and the braking stability of these specialized vehicles. The street sweepers spend the majority of their operating time at speeds in the 3 to 7 mph range for maximum debris removal effectiveness, speeds well below the vehicle speed capability for which ABS

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
Alco-Analyzer 2000		X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, NY:		
BAC Verifier*	X	X
BAC Verifier Datamaster	X	X
BAC Verifier Datamaster II*	X	X

Instruments marked with an asterisk () meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50 and 501.1)

Issued on: July 17, 2000.

Rose A. McMurray,
Associate Administrator for Traffic Safety
Programs.

[FR Doc. 00-18455 Filed 7-20-00; 8:45 am]

BILLING CODE 4910-39-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety
Administration

[Docket No. NHTSA-99-6187; Notice 2]

Athey Products Corporation, Grant of
Application for Decision That
Noncompliance Is Inconsequential to
Motor Vehicle Safety

Athey Products Corporation (Athey) determined that certain Mobil model Street Sweepers it produced are not in full compliance with 49 CFR 571.105, Federal Motor Vehicle Safety Standard (FMVSS) No. 105, "Hydraulic and Electric Brake Systems," and filed an appropriate report pursuant to 49 CFR Part 573, "Defect and Noncompliance Reports." Athey also applied to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301—"Motor Vehicle Safety" on the basis that the noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of an application was published, with a 30-day comment period, on October 21, 1999 in the Federal Register (64 FR 56835). NHTSA received no comments on this application during the comment period.

Paragraph S5.5 of FMVSS No. 105 requires each vehicle with a gross vehicle weight rating greater than 10,000 pounds, except for a vehicle with a speed attainable in 2 miles of not more than 33 mph, to be equipped with an antilock brake system (ABS) that directly controls the wheels of at least one front axle and the wheels of at least one rear axle of the vehicle. Vehicles that do not comply with the requirements of a FMVSS are subject to

the notification and remedy requirements of Chapter 301, unless exempted pursuant to 49 U.S.C. 30118(d) and 30120(h) on the basis that the noncompliance is inconsequential to motor vehicle safety. The effective date of the requirement for ABS on medium and heavy duty hydraulically-braked trucks was March 1, 1999.

Between March 1, 1999 and July 31, 1999 Athey manufactured, sold and/or distributed 21 Athey Mobil M8A model street sweepers and 56 Mobil M9D model street sweepers which were not equipped with ABS as required by FMVSS No. 105. To the best of Athey's knowledge, there were no other vehicles manufactured by the company that are noncompliant with the ABS requirements.

Athey supported its application by stating that the agency recognized that vehicle stopping distances and stability would not be substantially improved with ABS during maximum braking at speeds below 33 mph. According to Athey, the noncompliant vehicles are capable of speeds in excess of 33 mph, but spend the majority of their operating time at speeds below 33 mph. A review of information from its customers indicated that these street sweepers spend 80% to 90% of their operation time at speeds that are most effective at removal of road debris, speeds in the 3 to 7 mph range. In Athey's opinion, due to the low speed operation of these vehicles and the type of road use of street sweepers, maximum brake application does not normally cause lockup and the subsequent loss of vehicle control or jack knifing. Athey also stated that these street sweeper models are seldom operated in inclement weather thereby reducing the need for ABS.

Athey further stated that the hydraulic service brake system with which the noncompliant street sweepers are equipped is capable of providing substantially more brake torque than necessary to meet the 30 mph and 60 mph stopping performance requirements in FMVSS No. 105.

In addition to information supporting its arguments that the noncompliance with FMVSS No. 105 is inconsequential, Athey cited several other developments and circumstances that it considered relevant to its application. Athey stated that it attempted to secure the necessary ABS equipment from suppliers in order to meet the March 1, 1999 effective date for ABS installation, but experienced delays in receiving ABS equipment from suppliers due to a backlog of orders for ABS components. Further, immediately upon becoming aware of the consequences of the noncompliance, Athey halted all further sales and/or distribution of the Mobil model M8A and M9D street sweepers until compliance with the ABS requirements was achieved.

According to Athey, the importance of the service provided by street sweepers on public and private roadways should not be overlooked. The removal of waste material such as broken glass and other sharp, potentially dangerous objects from the roadway is a health and safety benefit.

Athey also noted that the agency granted a temporary exemption to the Johnson Sweeper Company (JSC) under 49 CFR part 555 from the ABS requirements of FMVSS No. 105. The agency cited the low speed operation of the JSC street sweepers and a reduction in the number of sweepers to fill the need of municipalities if JSC sweepers were not available, as important factors in its decision.

Upon its review of this petition, the agency believes that the true measure of inconsequentiality to motor vehicle safety is the effect of the noncompliance on the operation of the vehicles. Athey has described the effect of the absence of ABS on the operational characteristics, the braking capacity, and the braking stability of these specialized vehicles. The street sweepers spend the majority of their operating time at speeds in the 3 to 7 mph range for maximum debris removal effectiveness, speeds well below the vehicle speed capability for which ABS

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2004-18512]

Highway Safety Programs; Model Specifications for Devices To Measure Breath Alcohol

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice amends the Conforming Products List for instruments that conform to the Model Specifications for Evidential Breath Testing Devices (62 FR 62091).

EFFECTIVE DATE: July 14, 2004.

FOR FURTHER INFORMATION CONTACT: Dr. James F. Frank, Office of Research and Technology, Behavioral Research Division (NTI-131), National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590; Telephone: (202) 366-5593.

SUPPLEMENTARY INFORMATION: On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (38

FR 30459). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974 (39 FR 41399).

On December 14, 1984 (49 FR 48854), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices, and published a Conforming Products List (CPL) of instruments that were found to conform to the Model Specifications as Appendix D to that notice (49 FR 48864).

On September 17, 1993, NHTSA published a notice (58 FR 48705) to amend the Model Specifications. The notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC; added a test for the presence of acetone; and expanded the definition of alcohol to include other low molecular weight alcohols including methyl or isopropyl. On October 3, 2002, the most recent amendment to the Conforming Products List (CPL) was published (67 FR 62091), identifying those instruments found to conform with the Model Specifications.

Since the last publication of the CPL, two (2) instruments have been evaluated and found to meet the model specifications, as amended on September 17, 1993, for mobile and non-mobile use. In alphabetical order by company, they are: (1) The Alcotest 6510 manufactured by Draeger Safety, Inc., Durango, CO. This is a hand held device intended for use in stationary or roadside operation and is powered by an internal battery. It uses a fuel cell sensor. (2) The Alco-Sensor FST manufactured by Intoximeters, Inc., St. Louis, MO. This is a hand held device intended for use in stationary or roadside operation and is powered by an internal battery. It uses a fuel cell sensor. Finally, a technical correction has to be made in the name of one device on the CPL. The current CPL lists the "Intox EC/IR 2" manufactured by Intoximeters, Inc., St. Louis, MO, but the device should be listed as "Intox EC/IR II."

The CPL has been amended to add the two instruments identified above to the list, and to make the one technical correction indicated.

In accordance with the foregoing, the CPL is therefore amended, as set forth below.

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer and model	Mobile	Nonmobile
Alcohol Countermeasure Systems Corp. Mississauga, Ontario, Canada:		
Alert J3AD*	X	X
Alert J4X.ec	X	X
PBA3000C	X	X
BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer*	X	X
CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer*	X	X
CMI, Inc., Owensboro, KY:		
Intoxilyzer Model:		
200	X	X
200D	X	X
300	X	X
400	X	X
400PA	X	X
1400	X	X
4011*	X	X
4011A*	X	X
4011AS*	X	X
4011AS-A*	X	X
4011AS-AQ*	X	X
4011 AW*	X	X
4011A27-1010D*	X	X
4011A27-1010D with filter*	X	X
5000	X	X
5000 (w/Cal. Vapor Re-Circ.)	X	X
5000 (w/3/8" ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
8000	X	X
PAC 1200*	X	X
S-D2	X	X
S-D5	X	X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
Draeger Safety, Inc., Durango, CO:		
Alcotest Model:		
6510	X	X
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII-C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
800*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410-II	X	X
Gall's Inc., Lexington, KY: Alcohol Detection System—A.D.S. 500		
Intoximeters, Inc., St. Louis, MO:		
Photo Electric Intoximeter*		
GC Intoximeter MK II*	X	X
GC Intoximeter MK IV*	X	X
Auto Intoximeter*	X	X
Intoximeter Model:		
3000*	X	X
3000 (rev B1)*	X	X
3000 (rev B2)*	X	X
3000 (rev B2A)*	X	X
3000 (rev B2A) w/FM option*	X	X
3000 (Fuel Cell)*	X	X
3000 D*	X	X
3000 DFC*	X	X
Alcomonitor		
Alcomonitor CC	X	X
Alco-Sensor III	X	X
Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000)	X	X
Alco-Sensor IV	X	X
Alco-Sensor IV-XL	X	X
Alco-Sensor AZ	X	X
Alco-Sensor FST	X	X
RBT-AZ	X	X
RBT III	X	X
RBT III-A	X	X
RBT IV	X	X
RBT IV with CEM (cell enhancement module)	X	X
Intox EC/R	X	X
Intox EC/R II	X	X
Portable Intox EC/R	X	X
Komyo Kitagawa, Kogyo, K.K.:		
Alcozyzer DPA-2*	X	X
Breath Alcohol Meter PAM 101B*	X	X
Lifelog Technologies, Inc., (formerly Lifelog, Inc.), Wheat Ridge, CO:		
PBA 3000B	X	X
PBA 3000-P*	X	X
PBA 3000C	X	X
Alcohol Data Sensor	X	X
Phoenix	X	X
FC 10	X	X
FC 20	X	X
Lion Laboratories, Ltd., Cardiff, Wales, UK:		
Alcolimeter Model:		
300	X	X
400	X	X
SD-2*	X	X
EBA*	X	X
Intoxilyzer Model:		
200	X	X
200D	X	X
1400	X	X
5000 CD/FG5	X	X
5000 EN	X	X
Luckey Laboratories, San Bernadino, CA:		
Alco-Analyzer Model:		
1000*		X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
2000*		X
National Draeger, Inc., Durango, CO:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII-C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
900*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410-II	X	X
National Patent Analytical Systems, Inc., Mansfield, OH:		
BAC DataMaster (with or without the Delta-1 accessory)	X	X
BAC Verifier DataMaster (with or without the Delta-1 accessory)	X	X
DataMaster odm (with or without the Delta-1 accessory)	X	X
Omicron Systems, Palo Alto, CA:		
Intoxilyzer Model:		
4011*	X	X
4011AW*	X	X
Plus 4 Engineering, Minturn, CO: 5000 Plus4*	X	X
Seres, Paris, France:		
Alco Master	X	X
Alcopro	X	X
Siemens-Allis, Cherry Hill, NJ:		
Alcomat*	X	X
Alcomat F*	X	X
Smith and Wesson Electronics, Springfield, MA:		
Breathalyzer Model:		
900*	X	X
900A*	X	X
1000*	X	X
2000*	X	X
2000 (non-Humidity Sensor)*	X	X
Sound-Off, Inc., Hudsonville, MI:		
AlcoData	X	X
Seres Alco Master	X	X
Seres Alcopro	X	X
Stephenson Corp.: Breathalyzer 900*	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, CA:		
Alco-Analyzer 1000		X
Alco-Analyzer 2000		X
Alco-Analyzer 2100		X
Verax Systems, Inc., Fairport, NY:		
BAC Verifier	X	X
BAC Verifier Datamaster	X	X
BAC Verifier Datamaster II*	X	X

Instruments marked with an asterisk () meet the Model Specifications detailed in 49 FR 48664 (December 14, 1994) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC). Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50 and 501.1)

Issued on: July 9, 2004.

Marilena Amani,

Associate Administrator for Program Development and Delivery.

[FR Doc. 04-15970 Filed 7-13-04; 8:45 am]

BILLING CODE 4910-99-D

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2004-17623; Notice 2]

Cooper Tire & Rubber Company, Grant of Petition for Decision of Inconsequential Noncompliance

Cooper Tire & Rubber Company (Cooper) has determined that certain tires it manufactured during 2004 do not comply with S6.5(f) of Federal Motor

Vehicle Safety Standard (FMVSS) No. 119, "New pneumatic tires for vehicles other than passenger cars." Pursuant to 49 U.S.C. 30116(d) and 30120(h), Cooper has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, "Defect and Noncompliance Reports." Notice of receipt of a petition was published, with a 30-day comment period, on May 7, 2004 in the Federal

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[Federal Register: May 4, 2001 (Volume 66, Number 87)]
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From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr04my01-164]

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2001-9324]

Highway Safety Programs; Conforming Products List of Screening
Devices To Measure Alcohol in Bodily Fluids

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice amends the Conforming Products List (CPL) of devices that conform that Measure Alcohol in Bodily Fluids (59 FR 39382).

EFFECTIVE DATE: May 4, 2001.

FOR FURTHER INFORMATION CONTACT: Dr. James F. Frank, Office of Research and Traffic
National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington,

SUPPLEMENTARY INFORMATION: On August 2, 1994, Model Specifications for Screening Devices were published in the Federal Register (59 FR 39382). In these model specifications, NHTSA recognized specifications established performance criteria and methods for testing alcohol screening devices to measure alcohol content. NHTSA established these specifications to support State law tolerance' laws) and the Department of Transportation's workplace alcohol testing procedures on December 2, 1994 (59 FR 61923; with a correction in 59 FR 65128). Five devices
On August 15, 1995, NHTSA amended its CPL of screening devices to measure alcohol by adding two additional devices to the list, thereby bringing the list to seven devices.

Since the publication of that list, five additional devices have been evaluated in Cambridge, MA and found to conform to the model specifications. Accordingly, these five devices are being added to the CPL. The first new listing is the "Alcohol TM" disposable by Inc., of Thorofare, NJ. These are disposable tubes that use a potassium dichromate catalyst. If the reading is above the 0.02 threshold. These devices passed all requirements of the model specifications. Hence, they are approved for use except under sodium vapor lighting conditions.

The second new listing is the Alco Check 9000 manufactured by Alco Check International. The Alco Check 3000 D.O.T. and the Alco Screen 3000 (the same device sold under two different names) are being added to the CPL. The Alco Check 3000 D.O.T. model specifications, and the added memory chip does not change the alcohol-measuring device. The new Alco Check 9000 to be retested before listing it on this CPL for screening devices.

The third new device on the CPL is the ABI (Alcohol Breath Indicator) manufactured by ABI. This is an electronic device with a two-digit numerical display that uses a semi-conductor.

The last two devices are the "PAS IIIa" and the "PAS Vr" manufactured by PAS. These are both electronic devices that use a fuel cell sensor with a two-digit numerical display.

of two different passive alcohol sensors made by the same company, but with a disposable sample can be obtained for breath measurements.

Two housekeeping items are also addressed in this notice. First, the company previously named OraSure Technologies, Inc. and the new CPL reflects the inclusion of the new product, the Q.E.D. A150 Saliva Alcohol Test, remains the same. Second, there is a change in the CPL for Evidential Breath Testers that frequently are used as screening devices. It is the same CPL for EBTs which was published on July 21, 2000 (65 FR 45419) that was tested against Evidential Testers (58 FR 48705) also fully meets the requirements of the Model Specifications for Evidential Testers. Both procedures evaluate the performance of instruments at the 0.020 BAC level.

The Conforming Products List is therefore amended as follows:
Conforming Products List of Alcohol Screening Devices

Manufacturer	Device(s)
Akers Laboratories, Inc., Thorofare, NJ.....	Alcohol™ \2\
Alco Check International\1\, Hudsonville, MI..	Alco Check 3000 D.O.T. Alco Screen 3000 Alco Check 9000
Chematics, Inc., North Webster, IN.....	ALCO-SCREEN 02™ \3\
Guth Laboratories, Inc., Harrisburg, PA.....	Alco Tector Mark X Mark X Alcohol Checker
Han International Co., Ltd., Seoul, Korea.....	A.B.I. (Alcohol Breath Indicator)
OraSure Technologies, Inc., Bethlehem, PA (Formerly STC Technologies, Inc.)	Q.E.D. A150 Saliva Alcohol Test
PAS Systems International, Inc., Fredericksburg, VA.	PAS IIIa PAS Vr
Repcos Marketing, Inc., Raleigh, NC.....	Alco Tec III
Roche Diagnostic Systems, Branchburg, NJ.....	On-Site Alcohol \4\
STC Technologies, Inc.....	Q.E.D. A150 Saliva Alcohol Test

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Sound Off, Inc.\1\, Hudsonville, MI.....	Digitox D.O.T. Alco Screen 1000
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\1\ The devices listed by these manufacturers are the same devices sold under different names.

\2\ It should be noted that the Alcohol disposable breath alcohol screening device manufactured by Akers Laboratories, Inc. passed the model specifications under all lighting conditions including sodium vapor lighting. The device is being listed on this CPL with the understanding that the user will specify in written instructions accompanying the product that the device should be used under sodium vapor lighting conditions. It passed the testing under all other conditions.

\3\ While the ALCO-SCREEN 02™ saliva-alcohol screening device manufactured by Chematics, Inc. meets the requirements of the model specifications when tested at 40 deg.C (104 deg.F), the device cannot exceed storage temperatures of 27 deg.C (80 deg.F). Instructions stated on all packaging accompanying the device. Accordingly, the device should not be stored above 27 deg.C (80 deg.F) and, if the device is stored at or below 27 deg.C (80 deg.F) for 10-15 minutes (i.e., within a minute), the devices met the model specifications and passed the testing. When these devices were stored at or below 27 deg.C (80 deg.F) and then tested at 40 deg.C (104 deg.F) for an hour prior to sample application, the devices failed to meet the model specifications. Storage at temperatures above 27 deg.C (80 deg.F), for even brief periods, resulted in false negative readings.

\4\ While this device passed all of the requirements of the model specifications, retesting is required after the time specified by the manufacturer. For valid readings, the user should follow the instructions. Readings should be taken one (1) minute after a sample is introduced into the device.

deg.F); readings should be taken after two (2) minutes at 18 deg.C-29 deg.C (64.4 readings should be taken after five (5) minutes when testing at temperatures at or deg.F). If the reading is taken before five (5) minutes has elapsed under the cold likely to obtain a reading that underestimates the actual saliva-alcohol level.

Note that the device made by Akers Laboratories, Inc. is a single-use, disposable Chematics, Inc., OraSure Technologies, Inc., Roche Diagnostic Systems, Inc., and STC alcohol test devices. The other devices listed are electronic breath testers. Those fuel-cell sensor, whereas those manufactured by Alco Check International, Guth Labor marketing, Inc., and Sound Off, Inc. use semi-conductor sensors.

Issued on: May 1, 2001.

Rose A. McMurray,

Associate Administrator for Traffic Safety Programs.

[FR Doc. 01-11318 Filed 5-3-01; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2004-18512]

Highway Safety Programs; Model Specifications for Devices To Measure Breath Alcohol

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice amends the Conforming Products List for instruments that conform to the Model Specifications for Evidential Breath Testing Devices (62 FR 62091).

EFFECTIVE DATE: July 14, 2004.

FOR FURTHER INFORMATION CONTACT: Dr. James F. Frank, Office of Research and Technology, Behavioral Research Division (NTI-131), National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590; Telephone: (202) 366-5593.

SUPPLEMENTARY INFORMATION: On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (38

FR 30459). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974 (39 FR 41399).

On December 14, 1984 (49 FR 48854), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices, and published a Conforming Products List (CPL) of instruments that were found to conform to the Model Specifications as Appendix D to that notice (49 FR 48864).

On September 17, 1993, NHTSA published a notice (58 FR 48705) to amend the Model Specifications. The notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC; added a test for the presence of acetone; and expanded the definition of alcohol to include other low molecular weight alcohols including methyl or isopropyl. On October 3, 2002, the most recent amendment to the Conforming Products List (CPL) was published (67 FR 62091), identifying those instruments found to conform with the Model Specifications.

Since the last publication of the CPL, two (2) instruments have been evaluated and found to meet the model specifications, as amended on September 17, 1993, for mobile and non-mobile use. In alphabetical order by company, they are: (1) The Alcotest 6510 manufactured by Draeger Safety, Inc., Durango, CO. This is a hand held device intended for use in stationary or roadside operation and is powered by an internal battery. It uses a fuel cell sensor. (2) The Alco-Sensor FST manufactured by Intoximeters, Inc., St. Louis, MO. This is a hand held device intended for use in stationary or roadside operation and is powered by an internal battery. It uses a fuel cell sensor. Finally, a technical correction has to be made in the name of one device on the CPL. The current CPL lists the "Intox EC/IR 2" manufactured by Intoximeters, Inc., St. Louis, MO, but the device should be listed as "Intox EC/IR II."

The CPL has been amended to add the two instruments identified above to the list, and to make the one technical correction indicated.

In accordance with the foregoing, the CPL is therefore amended, as set forth below.

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer and model	Mobile	Nonmobile
Alcohol Countermeasure Systems Corp. Mississauga, Ontario, Canada:		
Alert J3AD*	X	X
Alert J4X.ec	X	X
PBA3000C	X	X
BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer*	X	X
CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer*	X	X
CMI, Inc., Owensboro, KY:		
Intoxilyzer Model:		
200	X	X
200D	X	X
300	X	X
400	X	X
400PA	X	X
1400	X	X
4011*	X	X
4011A*	X	X
4011AS*	X	X
4011AS-A*	X	X
4011AS-AQ*	X	X
4011 AW*	X	X
4011A27-10100*	X	X
4011A27-10100 with filter*	X	X
5000	X	X
5000 (w/Cal. Vapor Re-Circ.)	X	X
5000 (w/3/8" ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
8000	X	X
PAC 1200*	X	X
S-D2	X	X
S-D5	X	X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
Draeger Safety, Inc., Durango, CO:		
Alcotest Model:		
6510	X	X
7010	X	X
7110	X	X
7110 MKIII	X	X
7110 MKIII-O	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
800	X	X
900A	X	X
800BG	X	X
7410	X	X
7410-II	X	X
Gall's Inc., Lexington, KY: Alcohol Detection System—A.D.S. 500		
Intoximeters, Inc., St. Louis, MO:		
Photo Electric Intoximeter		X
GC Intoximeter MK II	X	X
GC Intoximeter MK IV	X	X
Auto Intoximeter	X	X
Intoximeter Model:		
3000	X	X
3000 (rev B1)	X	X
3000 (rev B2)	X	X
3000 (rev B2A)	X	X
3000 (rev B2A) w/FM option	X	X
3000 (Fuel Cell)	X	X
3000 D	X	X
3000 DFC	X	X
Alcomonitor		X
Alcomonitor CC	X	X
Alco-Sensor III	X	X
Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000)	X	X
Alco-Sensor IV	X	X
Alco-Sensor IV-XL	X	X
Alco-Sensor AZ	X	X
Alco-Sensor FST	X	X
RBT-AZ	X	X
RBT III	X	X
RBT III-A	X	X
RBT IV	X	X
RBT IV with CEM (cell enhancement module)	X	X
Intox EC/IR	X	X
Intox EC/IR II	X	X
Portable Intox EC/IR	X	X
Komoyo Kitagawa, Kogyo, K.K.:		
Alcoalyzer DPA-2	X	X
Breath Alcohol Meter PAM 101B	X	X
Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, CO:		
PBA 3000B	X	X
PBA 3000-P	X	X
PBA 3000C	X	X
Alcohol Data Sensor	X	X
Phoenix	X	X
FC 10	X	X
FC 20	X	X
Lion Laboratories, Ltd., Cardiff, Wales, UK:		
Alcolmeter Model:		
300	X	X
400	X	X
SD-2	X	X
EBA	X	X
Intoxifyzer Model:		
200	X	X
200D	X	X
1400	X	X
5000 CD/FG5	X	X
5000 EN	X	X
Luckey Laboratories, San Bernadino, CA:		
Alco-Analyzer Model:		
1000		X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
2000*		X
National Draeger, Inc., Durango, CO:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII-C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
900*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410-II	X	X
National Patent Analytical Systems, Inc., Mansfield, OH:		
BAC DataMaster (with or without the Delta-1 accessory)	X	X
BAC Verifier DataMaster (with or without the Delta-1 accessory)	X	X
DataMaster edm (with or without the Delta-1 accessory)	X	X
Omicron Systems, Palo Alto, CA:		
Intoxilyzer Model:		
4011*	X	X
4011AW*	X	X
Plus 4 Engineering, Minturn, CO: 5000 Plus4*	X	X
Seres, Paris, France:		
Alco Master	X	X
Alcopro	X	X
Siemens-Allis, Chery Hill, NJ:		
Alcomat*	X	X
Alcomat F*	X	X
Smith and Wesson Electronics, Springfield, MA:		
Breathalyzer Model:		
900*	X	X
900A*	X	X
1000*	X	X
2000*	X	X
2000 (non-Humidity Sensor)*	X	X
Sound-Off, Inc., Hudsonville, MI:		
AlcoData	X	X
Seres Alco Master	X	X
Seres Alcopro	X	X
Stephenson Corp.: Breathalyzer 900*	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, CA:		
Alco-Analyzer 1000		X
Alco-Analyzer 2000		X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, NY:		
BAC Verifier*	X	X
BAC Verifier DataMaster	X	X
BAC Verifier DataMaster II*	X	X

Instruments marked with an asterisk () meet the Model Specifications detailed in 49 FR 48654 (December 14, 1994) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC). Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50 and 501.1)

Issued on: July 9, 2004.

Marilena Amoni,

Associate Administrator for Program Development and Delivery.

[FR Doc. 04-15970 Filed 7-13-04; 8:45 am]

BILLING CODE 4910-99-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2004-17623; Notice 2]

Cooper Tire & Rubber Company, Grant of Petition for Decision of Inconsequential Noncompliance

Cooper Tire & Rubber Company (Cooper) has determined that certain tires it manufactured during 2004 do not comply with S6.5(f) of Federal Motor

Vehicle Safety Standard (FMVSS) No. 119, "New pneumatic tires for vehicles other than passenger cars." Pursuant to 49 U.S.C. 30116(d) and 30120(h), Cooper has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, "Defect and Noncompliance Reports." Notice of receipt of a petition was published, with a 30-day comment period, on May 7, 2004 in the Federal

automated collection techniques or other forms of information technology.

Issued: December 10, 2007.

Ann M. Linnertz,
Associate Administrator for Administration.
[FR Doc. E7-24422 Filed 12-14-07; 8:45 am]
BILLING CODE 4910-57-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms, and Record Keeping Requirements Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and the expected burden. The Federal Register Notice with a 60-day comment period was published on April 27, 2007 (72 FR 21068-21069).

DATES: Comments must be submitted on or before January 16, 2008.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725-17th Street, NW., Washington, DC 20503, Attention: NHTSA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Alan Block at the National Highway Traffic Safety Administration, Office of Behavioral Safety Research (NTI-131), 202-366-6401, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: 2008 National Survey of Drinking and Driving Attitudes and Behavior.

OMB Number: 2127-New.

Type of Request: New information collection requirement.

Abstract: The National Survey of Drinking and Driving Attitudes and Behavior is conducted on a periodic basis for the National Highway Traffic Safety Administration to obtain a status report on attitudes, knowledge, and self-reported behavior related to alcohol-impaired driving. It is a national telephone survey administered to a

randomly selected sample of approximately 6,000 persons age 16 and older. Topics covered by the survey include drinking behavior, drinking and driving behavior, avoidance of drinking and driving, use of a designated driver, preventing others from drinking and driving, perceived risks to drinking and driving, perceptions and attitudes about enforcement of drinking and driving laws, knowledge of legal BAC limits, and perceived effectiveness of intervention strategies. The proposed survey is the eighth in the series, which began in 1991. The 2008 survey will repeat many of the questions included in the preceding surveys in order to monitor change over time. The survey will also include new questions that address emergent issues in the area of drinking and driving. The data will be applied to strategic planning to combat the drinking and driving problem, and provide guidance to current programs.

Affected Public: Randomly selected members of the general public aged sixteen and older in telephone households.

Estimated Total Annual Burden: 2,006 hours (18 pretest interviews averaging 20 minutes per interview, followed by 6,000 interviews averaging 20 minutes per interview administered to the final survey sample).

Comments Are Invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A Comment to OMB is most effective if OMB receives it within 30 days of publication.

Authority: 44 U.S.C. 3506(c)(2)(A).

Issued on: December 12, 2007.

Marilena Amoni,

Associate Administrator, Research and Program Development.

[FR Doc. E7-24379 Filed 12-14-07; 8:45 am]

BILLING CODE 4910-58-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration; Highway Safety Programs

[Docket No. NHTSA-2007-0028]

Conforming Products List of Evidential Breath Alcohol Measurement Devices

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice updates the Conforming Products List (CPL) published in the Federal Register on June 29, 2006 (71 FR 37159) for instruments that conform to the Model Specifications for Evidential Breath Testing Devices (58 FR 48705).

DATES: Effective Date: December 17, 2007.

FOR FURTHER INFORMATION CONTACT: For technical issues: Ms. De Carlo Ciccel, Behavioral Research Division, NTI-131, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; Telephone: (202) 366-1694. For legal issues: Ms. Allison Rusnak, Office of Chief Counsel, NCC-113, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; Telephone: (202) 366-1834.

SUPPLEMENTARY INFORMATION: On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (38 FR 30459). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974 (39 FR 41399).

On December 14, 1984 (49 FR 48854), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices (Model Specifications), and published a Conforming Products List (CPL) of instruments that were found to conform to the Model Specifications as Appendix D to that notice (49 FR 48864).

On September 17, 1993, NHTSA published a notice to amend the Model Specifications (58 FR 48705) and update the CPL. That notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC. These devices are identified on the CPL with an asterisk. Additionally, that notice includes a test for the presence of acetone and an expanded definition of

alcohol to include other low molecular weight alcohols; e.g., methyl or isopropyl. Thereafter, NHTSA has periodically updated the CPL with those breath instruments found to conform to the Model Specifications. The most recent update to the CPL was published June 29, 2006 (71 FR 37159).

The CPL published today adds 6 instruments that have been evaluated and found to conform to the Model Specifications, as amended on September 17, 1993, for mobile and non-mobile use. In alphabetical order by company, they are:

(1) Intoxilyzer 240 (aka: Lion Alcolmeter 400+, outside U.S.) manufactured by CMI, Inc., Owensboro, Kentucky. This is a handheld device intended for use in stationary or roadside operations. It uses a fuel cell sensor and is powered by 5 "AA" batteries.

(2) The "Alcotest 9510" manufactured by Draeger Safety, Inc., Durango, Colorado. This is a bench-top device intended for use in a stationary setting. It is AC-powered and has dual sensors. The Alcotest 9510 uses both a fuel cell

sensor and a 9-micron infra-red type sensor to measure mouth alcohol.

(3) The "AlcoQuant 6020" manufactured by EnviteC by Honeywell GmbH, Fond du Lac, Wisconsin. This is a handheld device intended for use in stationary or roadside operations. It uses a fuel cell sensor and is powered by 4 "AA" batteries.

(4) The "EC-IR-II (Enhanced with serial numbers above 10,000)" manufactured by Intoximeters, Inc., St. Louis, Missouri. This is a bench-top, dual sensor device intended for stationary operations, and it is AC powered. This EC-IR-II uses a fuel cell sensor to determine breath alcohol concentration. The device also uses an infra-red type sensor to screen for mouth alcohol. The original EC-IR-II design was modified to incorporate additional test memory capacity, additional hardware to allow recirculation of a wet bath simulator, and enhanced EMC and RFI immunity. This model with the enhancements has an external and internal printer production option available.

(5) The "Phoenix 6.0" manufactured by Lifeloc Technologies, Inc., Wheat Ridge, Colorado. This is a handheld device that uses a fuel cell sensor and is powered by an internal battery. It is intended for stationary or roadside operations. The Phoenix 6.0 has the same core electronics, fuel cell, pump, and algorithms as the Lifeloc EV30. Enhancements of the Phoenix 6.0 include high resolution display, wireless printing, barometric pressure sensor (to assist with dry gas calibrations), and Easy Mode™ software to guide the user through the DOT testing protocol.

(6) The "ALC-PRO II (US)", manufactured by Tokai-Denshi, Inc., Tokyo, Japan. This device is a handheld battery-powered breath tester with a fuel cell sensor. The breath tester is connected to a 10.5" by 7.5" by 5" AC powered analytical unit. It is intended for stationary or roadside operations.

The CPL has been updated to include the six instruments identified above.

In accordance with the foregoing, the CPL is therefore updated, as set forth below

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer and model	Mobile	Nonmobile
Alcohol Countermeasure Systems Corp, Mississauga, Ontario, Canada:		
Alert J3AD	X	X
Alert J4X.ec	X	X
PBA3000C	X	X
BAC Systems, Inc., Ontario, Canada:		
Breath Analysis Computer	X	X
CAMEC Ltd., North Shields, Tyne and Ware, England:		
IR Breath Analyzer	X	X
CMI, Inc., Owensboro, Kentucky:		
Intoxilyzer Model:		
200	X	X
200D	X	X
240 (aka: Lion Alcolmeter 400+ outside the U.S.)	X	X
300	X	X
400	X	X
400PA	X	X
1400	X	X
4011	X	X
4011A	X	X
4011AS	X	X
4011AS-A	X	X
4011AS-AQ	X	X
4011 AW	X	X
4011A27-10100	X	X
4011A27-10100 with filter	X	X
5000	X	X
5000 (w/Cal Vapor Re-Circ.)	X	X
5000 (w/3/8" ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
8000	X	X
PAC 1200	X	X
S-D2	X	X
S-D5 (aka: Lion Alcolmeter SD-5 outside the U.S.)	X	X
Draeger Safety, Inc. (aka: National Draeger) Durango, Colorado:		

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
Alcotest Model:		
6510	X	X
6810	X	X
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII-C	X	X
7410	X	X
7410 Plus	X	X
9510		X
Breathalyzer Model:		
900	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410-II	X	X
EnviteC by Honeywell GmbH, Fond du Lac, Wisconsin:		
AlcoQuant 6020	X	X
Gall's Inc, Lexington, Kentucky:		
Alcohol Detection System-A.D.S. 500	X	X
Guth Laboratories, Inc., Harrisburg, Pennsylvania:		
Alcotector BAC-100	X	X
Alcotector C ₂ H ₅ OH	X	X
Intoximeters, Inc., St. Louis, Missouri:		
Photo Electric Intoximeter*		X
GC Intoximeter MK II*	X	X
GC Intoximeter MK IV*	X	X
Auto Intoximeter*	X	X
Intoximeter Model:		
3000	X	X
3000 (rev B1)*	X	X
3000 (rev B2)*	X	X
3000 (rev B2A)*	X	X
3000 (rev B2A) w/FM option*	X	X
3000 (Fuel Cell)*	X	X
3000 D*	X	X
3000 DFC*	X	X
Alcomonitor		X
Alcomonitor CC	X	X
Alco-Sensor III	X	X
Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000)	X	X
Alco-Sensor IV	X	X
Alco-Sensor IV-XL	X	X
Alco-Sensor AZ	X	X
Alco-Sensor FST	X	X
EC/IR	X	X
EC/IR II	X	X
EC/IR II (Enhanced with serial number 10,000 or higher)		X
Portable EC/IR II	X	X
RBT-AZ	X	X
RBT-III	X	X
RBT III-A	X	X
RBT IV	X	X
RBT IV with CEM (cell enhancement module)	X	X
Komyo Kitagawa, Kogyo, K.K., Japan:		
Alcolyzer DPA-2*	X	X
Breath Alcohol Meter PAM 101B*	X	X
Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, Colorado:		
PBA 3000B	X	X
PBA 3000-P*	X	X
PBA 3000C	X	X
Alcohol Data Sensor	X	X
Phoenix	X	X
Phoenix 6.0	X	X
EV 30	X	X
FC 10	X	X
FC 20	X	X
Lion Laboratories, Ltd., Cardiff, Wales, United Kingdom:		
Alcolmeter Model:		
300	X	X
400	X	X
400+ (aka: Intoxilyzer 240 in the U.S.)	X	X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
SD-2*	X	X
SD-5 (aka: S-D5 in the U.S.)	X	X
EBA*	X	X
Intoxilyzer Model:		
200	X	X
200D	X	X
1400	X	X
5000 CD/FG5	X	X
5000 EN	X	X
Luckey Laboratories, San Bernardino, California:		
Alco-Analyzer Model:		
1000*		X
2000*		X
National Patent Analytical Systems, Inc., Mansfield, Ohio:		
BAC DataMaster (with or without the Delta-1 accessory)		
BAC Verifier DataMaster (w/ or without the Delta-1 accessory)	X	X
DataMaster cdm (w/ or without the Delta-1 accessory)	X	X
DataMaster DMT	X	X
Omicron Systems, Palo Alto, California:		
Intoxilyzer Model:		
4011*	X	X
4011AW*	X	X
Plus 4 Engineering, Minturn, Colorado:		
5000 Plus 4*	X	X
Seres, Paris, France:		
Alco Master	X	X
Alcopro	X	X
Siemens-Allis, Cherry Hill, New Jersey:		
Alcomat*	X	X
Alcomat F*	X	X
Smith and Wesson Electronics, Springfield, Massachusetts:		
Breathalyzer Model:		
900*	X	X
900A*	X	X
1000*	X	X
2000*	X	X
2000 (non-Humidity Sensor)*	X	X
Sound-Off, Inc., Hudsonville, Michigan:		
AlcoData	X	X
Seres Alco Master	X	X
Seres Alcopro	X	X
Stephenson Corp:		
Breathalyzer 900*	X	X
Tokai-Denshi Inc., Tokyo, Japan:		
ALC-PRO II (US)	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, California:		
Alco-Analyzer 1000		X
Alco-Analyzer 2000		X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, New York:		
BAC Verifier*	X	X
BAC Verifier Datamaster	X	X
BAC Verifier Datamaster II*	X	X

Instruments marked with an asterisk () meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(Authority: 23 USC 403; 49 CFR 150; 49 CFR Part 501).

Marilena Amoni,

Associate Administrator for the Office of
Research and Program Development.

[FR Doc. 07-6040 Filed 12-14-07; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-364 (Sub-No. 11X)]

Mid-Michigan Railroad, Inc.— Abandonment Exemption—In Kent and Montcalm Counties, MI

On November 27, 2007, Mid-Michigan
Railroad, Inc. (MMRR or petitioner),

filed with the Surface Transportation
Board a petition under 49 U.S.C. 10502
for exemption from the provisions of 49
U.S.C. 10903 to permit the
abandonment of a 24.70-mile rail line
located between milepost 103.20 in
Lowell and milepost 78.50 in Greenville
at the end of the line, in Kent and
Montcalm Counties, MI. The line
traverses U.S. Postal Service Zip Codes
48809, 48838, 48887, and 49331, and



U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**



DOT HS 810 827

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Digest of Impaired Driving and Selected Beverage Control Laws

Twenty-Fourth Edition

Current as of January 1, 2007

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INTRODUCTION

PURPOSE

This digest reports the status of State laws that are concerned with impaired driving offenses and alcoholic beverage control. Unless otherwise indicated, the status of the laws reported is January 1, 2007.

STRUCTURE OF DIGEST

The Digest of Impaired Driving and Selected Alcohol Beverage Control Laws is designed to be an easily accessible reference to all States' current laws on alcohol and other issues of impaired driving. The digest contains a selection of the most utilized laws for each State, compiled in a consistent format to make research simpler. Each State entry includes: Basis for a DWI Offense; Chemical Breath Tests for Alcohol Concentration; Adjudication of DWI charges; Sanctions; Administrative Licensing Actions; DWI offenses and Commercial Motor Vehicles; Other Criminal Actions Related to DWI; Minimum Age Alcohol Laws, Dram Shop Laws and Related Actions, and others.

This compilation is extensively footnoted and contains comprehensive information on critical impaired driving laws for all 50 States and the District of Columbia. This volume is available in CD-ROM format, in print version, and on the Web site of the National Committee on Uniform Traffic Laws and Ordinances (NCUTLO.org)

DEFINITIONS

Administrative Per Se Law:

An "administrative per se law" allows a State's driver licensing agency to either suspend or revoke a driver's license based either on a specific blood alcohol concentration or on some other criteria

related to alcohol or drug use and driving. Such action is completely independent of any licensing action related to a driver's conviction for an impaired driving offense. These laws usually cover both resident and nonresident drivers. However, for nonresident drivers, the action would be limited to denying driving privileges in the sanctioning State.

Commercial Motor Vehicle: For impaired driving offense purposes, most States define a "commercial motor vehicle" (CMV) as one that (1) has a gross vehicle weight \geq 26,001 pounds, (2) is designed to transport 16 or more persons including the driver, or (3) transports hazardous materials.

Dram Shop Laws: Statutory or case law which provides that a person who serves alcoholic beverages to an intoxicated individual may be liable for the damages caused by such individual. In some states, a server may also be liable for injuries sustained by the intoxicated individual.

DWI, DUI, and Impaired Driving Offense: These are generally "non-legal" terms that refer to any criminal action related to driving a motor vehicle either (1) while "illegal per se" or (2) while either impaired by, under the influence of or intoxicated by alcohol or other drugs.

Happy Hour Laws: For the purposes of this Digest, this is either a statute or regulation that prohibits the sale of alcoholic beverages below the price per quantity normally charged for such beverages.

Vehicular Homicide: "Vehicular homicide" is the unlawful and unintentional death caused by a person while violating laws related to motor vehicle operation.

Illegal Per Se Law: A State law that makes it a criminal offense to operate a motor vehicle (1) at or above a specified alcohol

concentration in either the blood, breath, or urine or (2) with any amount of a drug, usually a controlled (illegal) substance, in the body.

Implied Consent Law: This type of law provides that a person gives implied consent to submit to a test for either an alcohol or drug content in his/her body if he/she is arrested or otherwise detained for a DWI offense. If the person refuses to submit to such a test, the law usually provides that his/her driving privileges will be either suspended or revoked. The results obtained from such a test are usually admissible into evidence at a DWI trial.

Intoxicating Liquor: A number of State laws provide that it is illegal to operate a vehicle while under the influence of "intoxicating liquor" (instead of under the influence of alcohol). However, the term "intoxicating liquor" is not defined in many of the State motor vehicle codes that provide for this type of impaired driving offense. Nevertheless, such term usually refers to all types alcoholic beverages (i.e., beer, wine and distilled spirits). See the definitions of "alcoholic liquor," "intoxicating liquor" and "liquor" in Black's Law Dictionary, Sixth Edition, West Publishing Company.

Mandatory Sanctions: A "mandatory sanction" means either a criminal sanction (e.g., jail, fine or community service) or an administrative licensing action (e.g., license suspension or revocation) must be imposed by either a court or an administrative agency. That is, statutory law specifically requires that such sanction be imposed.

Preliminary Breath Test. A "preliminary breath test" (PBT) refers to a breath test given by a law enforcement officer to a suspected impaired driver prior to an arrest for an impaired driving offense. The results of this test are used along with other evidence by the officer to determine if there is "probable cause" to arrest the driver for

such an offense. Usually, the results of a PBT cannot be admitted into evidence.

Pre-Sentence Investigation Law: As used in this publication, this term means a law that provides that a person who has been convicted of an impaired driving offense undergo an evaluation to determine if he/she has either an alcohol or drug abuse problem.

Presumption: The term "presumption" under "Basis for a DWI Charge" refers to a specific alcohol concentration in a driver's blood, breath, or urine at or above which it may be presumed that he/she was driving in violation of the "Standard DWI Offense".

Comments and Historical Notes: Comments and historical notes have been included to alert the reader to either situations or past events that may be of significance.

Off-Highway Vehicles: Not reported in this digest are State laws that prohibit the operation of non-highway vehicles (e.g., snowmobiles, an all-terrain vehicles (ATVs) or other off-road vehicles (ORVs) either while under the influence of alcohol or drugs or at or above a specific blood alcohol concentration.

Sanctions: Unless otherwise stated, the sanctions are the same for all alcohol and drugged driving offenses (e.g., driving while under the influence of either alcohol or drugs, illegal *per se*, et al.).

The sanctions listed in the digest for criminal offenses are those that would normally apply to adult offenders. However, it should be noted that for juvenile offenders (persons under 18 years old), the law may limit a court's ability to assign such punishment. Such offenders also may be subject to other sanctions for a violation of criminal laws that may not be listed in this digest.

Nevertheless, this digest does report the sanctions (criminal or administrative) related

Inability to complete the One-Leg Stand test occurs when the suspect:

- o puts the foot down three or more times, during the 30-second period;
- o cannot do the test.

The original research shows that, when the suspect produces two or more clues or is unable to complete the test, it is likely that the BAC is above 0.10. This criterion has been shown to be accurate 65 percent of the time.

PRELIMINARY BREATH TESTING

The basic purpose of preliminary breath testing (PBT) is to demonstrate the association of alcohol with the observable evidence of the suspect's impairment. The suspect's impairment is established through sensory evidence: what the officer sees, hears and smells. The PBT provides the evidence that alcohol is the chemical basis of that impairment by yielding an on-the-spot indication of the suspect's blood alcohol concentration (BAC). The PBT provides direct indication of the BAC level. It does not indicate the level of the suspect's impairment. Impairment varies widely among individuals with the same BAC level.

Preliminary breath testing, like psychophysical testing, is a stage in the pre-arrest screening of a DWI suspect. Usually the suspect is not yet under arrest when requested to submit to the preliminary breath test. The DWI incident remains at the investigative stage; the accusatory stage has not yet begun. The PBT result is only one of many factors the officer considers in determining whether the suspect should be arrested for DWI. It should never be the sole basis for a DWI arrest. The PBT result is an important factor because it provides direct indication of alcohol impairment. All other evidence, from initial observation of the vehicle in operation through formal psychophysical testing, indicates alcohol impairment.

ADVANTAGES OF PBT

A PBT offers several important advantages for DWI detection. It may:

- o corroborate other evidence by demonstrating that the suspicion of alcohol impairment is consistent with the officer's observations of the suspect's mental and physical impairment.
- o confirm the officer's own judgment and help gain confidence in evaluating alcohol impairment accurately, based on observations and psychophysical tests. (Many officers experienced in DWI enforcement find that they rely less and less on the PBT as their confidence in their own powers of detection increases.)

- o disclose the possibility of medical complications or impairment due to drugs other than alcohol. (The PBT can confirm or deny that alcohol is the cause of the observed impairment. For example, observed psychophysical impairment coupled with a PBT result showing a very low BAC indicates an immediate need to investigate the possibility that the suspect has ingested a drug other than alcohol or suffers from a medical problem.)
- o help to establish probable cause for a DWI arrest. (The role of the PBT in establishing probable cause may be affected by the evidentiary value of PBT results in your state. Consult your specific PBT law, your supervisor, or the local prosecutor for clarification, if necessary.)

LIMITATIONS OF PBT

Preliminary breath testing may have both evidentiary limitations and accuracy limitations. Evidentiary limitations vary with specific laws. In some states PBT results are admissible as evidence; in other states they are not admissible. Where the results are admissible, there may be differences in the weight or value they are given. Consult your state PBT law, your supervisor or your local prosecutor, as necessary, for clarification.

PBT instruments have accuracy limitations. Although all PBT instruments currently used by law enforcement are reasonably accurate, they are subject to the possibility of error, especially if they are not used properly. There are factors that can affect the accuracy of preliminary breath testing devices. Some of these factors tend to produce "high" test results; others tend to produce "low" results.

There are two common factors that tend to produce high results on a PBT.

- o Residual mouth alcohol. After a person takes a drink, some of the alcohol will remain in the mouth tissues. If the person exhales soon after drinking, the breath sample will pick up some of this left-over mouth alcohol. In this case, the breath sample will contain an additional amount of alcohol and the test result will be higher than the true BAC.

It takes approximately 15 minutes for the residual alcohol to evaporate from the mouth.

The only sure way to eliminate this factor is to make sure the suspect does not take any alcohol for at least 15 to 20 minutes before conducting a breath test. Remember, too, that most mouthwashes, breath sprays, cough syrups, etc., contain alcohol and will produce residual mouth alcohol. Therefore, it is always best not to permit the suspect to put anything in their mouth for at least 15 to 20 minutes prior to testing.

- o Breath Contaminants. Some types of preliminary breath tests might react to certain substances other than alcohol. For example, substances such as ether, chloroform, acetone, acetaldehyde and cigarette smoke conceivably could produce a positive reaction on certain devices. If so, the test would be contaminated and its result would be higher than the true BAC. Normal characteristics of breath samples, such as halitosis, food odors, etc., do not affect accuracy.

There are two common factors that tend to produce low PBT results.

- o Cooling of the breath sample. If the captured breath sample is allowed to cool before it is analyzed, some of the alcohol vapor in the breath may turn to liquid and precipitate out of the sample. If that happens, the subsequent analysis of the breath sample will produce a low BAC result.
- o The composition of the breath sample. Breath composition means the mixture of the tidal breath and alveolar breath. Tidal breath is breath from the upper part of the lungs and the mouth. Alveolar breath is deep lung breath. Breath testing should be conducted on a sample of alveolar breath, obtained by having the subject blow into the PBT instrument until all air is expelled from the lungs.

THE ARREST DECISION

Your arrest/no arrest decision is the culmination of the DWI detection process. Your decision is based on all the evidence you have accumulated during each detection phase.

PHASE ONE:

- o initial observation of vehicle in motion;
- o observation of the stop.

PHASE TWO:

- o face-to-face observation and interview;
- o observation of the exit.

PHASE THREE:

- o SFSTs;
- o preliminary breath tests.

Your decision involves a careful review of each of the observations you have made. Conduct a "mental summary" of the evidence collected during vehicle in motion, personal contact and pre-arrest screening. If all of the evidence, taken together, establishes probable cause to believe that DWI has been committed, you should arrest the suspect for DWI.



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Ted Strickland / Governor

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August 25, 2008

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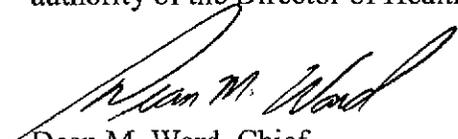
Re: 3rd District Court of Appeals decision on **Pre Breath Testers (PBT's)**

Mr. Scoles;

Prior to 1990 PBT's were not listed in Administrative Code. Effective 05/05/1990, the Alco-Sensor "two digit display" model and the Alco-Sensor "pass, warn, fail light" model were added to Administrative Code §3701-53-02 (D) as "**non-evidential**" (*i.e. probable cause*) preliminary breath testing instruments. Both PBT's remained in Administrative Code until the effective rule date of 07/07/1997, when PBT's were removed. The removal of PBT's from Administrative Code in 1997 did not imply that the Department of Health did not recognize or sanction the use of a PBT for probable cause determination, but that PBT's were not under the "**evidential**" regulative authority of the Director.

Under Revised Code §3701.143: "*For purposes of section 4511.19 of the Revised Code, the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's blood, urine, breath, or other bodily substance in order to ascertain the amount of alcohol, a drug of abuse, or alcohol and a drug of abuse in the person's blood, urine, breath, or other bodily substance. The director shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing them to perform such analyses. Such permits shall be subject to termination or revocation at the discretion of the director.*"

As **permits are not issued** by the Director of Health for "**non-evidential**" purposes under Administrative Code §3701-53-09, PBT's were determined not to be under the regulative authority of the Director of Health, and removed from Administrative Code §3701.53.


Dean M. Ward, Chief
Bureau of Alcohol and Drug Testing

APPENDIX 12