

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 23.4.201, 23.4.212, 23.4.213,)
23.4.214, 23.4.215, 23.4.216, 23.4.217,)
23.4.218, 23.4.219, 23.4.220, and)
23.4.225, pertaining to drug and)
alcohol analyses)

TO: All Concerned Persons

1. On April 12, 2012 the Department of Justice published MAR Notice No. 23-4-228 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 681 of the 2012 Montana Administrative Register, Issue Number 7.

2. A public hearing was held on May 4, 2012.

3. The department has amended the above-stated rules as proposed.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

Comment #1: Concern that the proposed rules no longer require a "competency" test for certification of breath test specialists and that the rules will thereby prevent or at least inhibit challenges to the "competency" of breath-test specialists by the defense.

Response #1: The proposed rule amendments provide the same continuing requirement that in order to be initially certified, all prospective breath-test specialists must first complete an extensive 40-hour training course and then pass a final examination at the end of the training course. Once initially certified, the breath-test specialists must then possess a current permit at the time the subject breath test is administered.

The amendments do not inhibit challenges to breath tests. The requirements of initial certification and to maintain a valid, current permit remain the same. At trial, the state must still meet the same foundational requirements, which may include cross examination by the defense on competency and training of the breath-test specialist, before results of a breath test may be admitted into evidence. The rules are simply clarified to comply with the intent of the division regarding permit renewal. Further, a breath test is typically only one portion of other competent evidence obtained by law enforcement officers throughout the entire investigation of the offense.

The increased technical sophistication of the new Intoxylizer 8000, which the state of Montana currently uses, requires a simple procedure to operate, comparable

to starting a car. Consequently, there is no need to retrain a breath-test specialist every year. What is important, however, is that a breath-test specialist remain current concerning the legal and technical updates for a subject breath test, as provided for by the proposed rules.

Finally, the rules do not (and cannot) change the statutory requirement that at the time of the actual breath test, the subject of the breath test must be provided the opportunity to obtain an independent blood test by a medical professional.

Comment # 2: Request that all monthly calibration tests and any repair requirements for the "machines" be made public information.

Response # 2: The proposed rule amendments do not address whether the calibration tests are public, and thus this comment is beyond the scope of this rule change.

/s/ J. Stuart Segrest
J. Stuart Segrest
Rule Reviewer

/s/ Steve Bullock
Steve Bullock
Attorney General
Department of Justice

Certified to the Secretary of State July 2, 2012.