



STATE OF WISCONSIN
Department of Justice

STATEMENT OF SCOPE OF PROPOSED EMERGENCY RULES

Rule No.: The proposed emergency rules will amend Jus 9.01, 9.05, and 9.09; repeal and recreate Jus 9.04, 9.06, 9.07, and 9.08; and create Jus 9.03(2m), (5) and (6) and 9.10.

Relating to: Procedures and standards for the submission of human biological specimens, the analysis of DNA in those specimens, the maintenance of a data bank of DNA analysis data, and the use and disposition of specimens and data in the data bank.

1. Description of the objectives of the rules:

The State of Wisconsin Department of Justice (“DOJ”) proposes to promulgate emergency administrative rules relating to the collection of human biological specimens, the submission of such specimens to the Department of Justice crime laboratories for DNA analysis, the analysis of specimens, the maintenance of a data bank of DNA analysis data, the use of the DNA data bank, the expungement of biological specimens and DNA analysis data, the confidentiality of some DNA data bank records, and the imposition of a DNA analysis surcharge in certain cases

The proposed rules will bring Wis. Admin. Code ch. Jus 9 into compliance and consistency with the provisions in 2013 Wisconsin Act 20 (“Act 20”) and 2013 Wisconsin Act 214 (“Act 214”) that amended various statutes related to the collection and handling of biological samples, the conduct of DNA analysis, and the handling of DNA analysis data.

The proposed emergency rules will correspond to and have the same scope as the proposed permanent rules that are in the process of being promulgated by DOJ. The scope of the proposed permanent rules was described in a scope statement that was approved by the Governor on July 28, 2014, published in the Administrative Register on August 15, 2014, and given final written approval by the Attorney General on August 25, 2014. The proposed permanent rules are being simultaneously submitted for the Governor’s approval under s. 227.185, Stats., on February 25, 2015.

These emergency rules are necessary because s. 9426 of Act 20 established an effective date of April 1, 2015, for the new requirements related to DNA specimen collection created by that act. Those requirements include requirements that DOJ promulgate administrative rules for carrying out its duties under ss. 165.76 and 165.77, Stats. In order to comply with those rulemaking

requirements, DOJ must have administrative rules in place for carrying out those statutory duties by the effective date of April 1, 2015.

DOJ is in the process of promulgating permanent administrative rules for that purpose. On February 25, 2015, the final draft of the proposed permanent rules and accompanying reports are being simultaneously submitted for the governor's review and approval, pursuant to Wis. Stat. § 227.185. The permanent rulemaking process, however, is not likely to be completed prior to the statutory deadline of April 1, 2015. The public welfare thus requires that emergency rules be promulgated, in order to ensure that there is no interruption in DOJ's ability to carry out all of its statutory responsibilities related to the collection, analysis, and handling of DNA specimens for law enforcement purposes. The rules proposed here would prevent such a discontinuity and ensure timely, continuous, and uniform operation of the DNA program through the completion of the permanent rulemaking process that is under way.

The proposed emergency rules will cover the same subject areas covered by the proposed permanent rules. The rules proposed here will not themselves establish new policies, but rather will carry into effect the legislative directives set forth in Acts 20 and 214 by providing specific procedures, time limits, and standards for carrying out various statutorily prescribed policy objectives. The such subject areas that will be covered by the proposed emergency rules are:

- Specifying to whom, by statute, the requirements of ch. Jus 9 apply.
- Setting forth what persons are required to submit biological specimens.
- Providing that a person required to supply a specimen shall do so upon the occurrence of the underlying event that triggers the requirement, without need for a court order.
- Setting forth the locations and times at which different categories of persons shall provide required biological specimens.
- Supplying procedures for the collection of human biological specimens by law enforcement agencies and for the timely submission of those specimens to the state crime laboratories.
- Providing procedures for avoiding the collection of unnecessary duplicate specimens from the same person.
- Requiring the collecting law enforcement agency to obtain a full set of fingerprints from the person whose biological specimen is being collected.
- Requiring the state crime laboratories to analyze the DNA in biological specimens submitted by law enforcement agencies and to maintain the resulting DNA data in a data bank.
- Authorizing the state crime laboratories to compare the DNA data from different biological specimens and to share DNA data and comparison data with the FBI and other

law enforcement agencies, and providing that DNA data and comparison data may be used in criminal and delinquency actions and proceedings, subject to applicable statutory requirements.

- Procedures and standards governing the expungement of DNA analysis data and the destruction of biological samples collected pursuant to these rules.
- Providing for the confidentiality of all DNA analysis data, except for the uses specified in these rules and in s. 165.77, Stats.
- Governing the administration of the DNA analysis surcharge as provided under s. 973.046, Stats.
- Requiring the department of corrections, the department of health services, county departments of social or human services, law enforcement agencies, tribal law enforcement agencies, and county sheriffs to cooperate fully with DOJ in meeting the requirements of these rules.
- Providing for reimbursing law enforcement and tribal law enforcement agencies for the collection and handling of biological specimens.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

In Act 20 and Act 214, the State of Wisconsin substantially revised existing statutes related to the requirement that certain persons submit biological specimens to the crime laboratories in DOJ for DNA analysis and that the resulting data be included in a DNA data bank. Acts 20 and 214 expanded the range of categories of persons who are required to submit DNA samples to law enforcement, required courts to order the submission of DNA samples by persons from whom samples were not obtained at the time of arrest or custody, expanded the categories of persons immune from civil or criminal liability arising out of the statutorily-mandated acquisition of DNA samples, authorized certain officials to use reasonable force in obtaining a DNA sample in some circumstances, and expanded the circumstances in which specimens and information in the data bank may or must be expunged.

Acts 20 and 214 also revised the administrative rulemaking requirements imposed on DOJ under s. 165.76(4), Stats. As revised, the statute requires DOJ to promulgate rules that accomplish a variety of enumerated tasks and that carry out all of DOJ's other duties under s. 165.76, Stats. Acts 20 and 214 also revised some of the statutory requirements related to DNA analysis and the maintenance of the DNA data bank in s. 165.77, Stats. Under s. 165.77(8), Stats., DOJ is required to promulgate rules to administer that statute, including its revised provisions.

The rules proposed here will not themselves establish new policies, but rather will carry into effect the legislative directives set forth in Acts 20 and 214 by providing specific procedures, time limits, and standards for carrying out various statutorily prescribed policy objectives.

3. Statutory authority for the rule (including the statutory citation and language):

A. Section 165.76(4), Stats.

The department of justice shall promulgate rules to do all of the following:

(a) Establish procedures and time limits for obtaining and submitting biological specimens under this section and ss. 51.20(13)(cr), 165.84(7), 938.21(1m), 938.30(2m), 938.34 (15), 970.02 (8), 971.17 (1m) (a), 973.047, and 980.063.

(b) Specify whether an individual who is required under this section or s. 51.20(13)(cr), 165.84(7), 938.21(1m), 938.30(2m), 938.34(15), 970.02(8), 971.17(1m)(a), 973.047, or 980.063 to provide a biological specimen for deoxyribonucleic acid analysis must provide a new biological specimen if the crime laboratories already have a biological specimen from the individual or if data obtained from deoxyribonucleic acid analysis of the individual's biological specimen are already included in the data bank under s. 165.77(3).

(c) Allow a biological specimen, or data obtained from analysis of a biological specimen, obtained under this section, under s. 51.20(13)(cr), 938.21(1m), 938.30(2m), 938.34(15), 970.02(8), 971.17(1m)(a), 973.047, or 980.063, or, if the specimen is required to be analyzed under s. 165.84(7)(am)1m., under s. 165.84(7)(ah), to be submitted for inclusion in an index established under 42 USC 14132(a) or in another national index system.

(d) Provide reimbursement from s. 20.455(2)(Lm) to a person in charge of a law enforcement agency or tribal law enforcement agency at a rate of \$10 per specimen except that, if the department already has a biological specimen, or data obtained from analysis of a biological specimen, from the individual, the department may not reimburse the person in charge of the agency.

(e) Carry out the department's duties under this section.

B. Section 165.77(8), Stats.

The department shall promulgate rules to administer this section.

C. Section 227.11(2)(a), Stats.

(2) Rule-making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following

apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Section 227.11(2)(a), Stats. expressly confers on DOJ the general power to determine whether administrative rules interpreting statutory provisions that are to be enforced or administered by DOJ are necessary to effectuate the purpose of those statutory provisions and, if such necessity is found, to promulgate such administrative rules, as long as those rules do not exceed the bounds of correct interpretation of the governing statutes.

DOJ finds that the rules here proposed are necessary to effectuate the statutory objective described in detail above.

DOJ further finds that the rules here proposed:

- do not exceed the bounds of correct interpretation of the pertinent statutes;
- are authorized by those statutes and are not based on authority derived from any other statutory or non-statutory statements or declarations of legislative intent, purpose, findings, or policy;
- are authorized as necessary interpretations of specific statutory requirements and are not based on authority derived from any other general powers or duties of DOJ; and
- do not impose any standards or requirements that are more restrictive than the standards and requirements contained in the pertinent statutes.

E. Section 227.24(1)(a), Stats.

The rules proposed here may be promulgated as emergency rules under s. 227.24(1)(a), Stats., which provides:

An agency may promulgate a rule as an emergency rule without complying with the notice, hearing and publication requirements under this chapter if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

DOJ finds that the public welfare necessitates promulgating the proposed rules as emergency rules under s. 227.24(1)(a), Stats. For the reasons already described in Section 1 above, in order to ensure that there is no interruption in DOJ's ability to carry out all of its statutory responsibilities related to the collection, analysis, and handling of DNA specimens for law enforcement purposes, it is necessary that DOJ have emergency rules in effect from the statutory effective date of April 1, 2015, until the permanent rulemaking process is completed. The preservation of such continuity and the avoidance of any disruption or confusion in the administration of the DNA program is plainly in the public interest. The public welfare thus necessitates that the proposed rules be promulgated as emergency rules under s. 227.24, Stats. While these emergency rules are in effect, DOJ will complete the permanent rulemaking process that is under way.

4. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

It is estimated that state employees will spend approximately 10 hours on the rulemaking process for the emergency rules proposed here, primarily for compliance with required rulemaking procedures.

5. Description of all entities that may be impacted by the rule:

The interests of those persons who are statutorily required to submit DNA samples to law enforcement will be directly affected by the provisions in the proposed rules governing:

- Procedures and time limits for obtaining and submitting DNA samples.
- Procedures and standards for identifying and notifying individuals who are required to provide a DNA sample but have not yet done so.
- Procedures and standards for determining whether a person who has previously provided a DNA sample may be required to provide another sample.
- Procedures and standards governing access to and use of DNA data bank records and the inclusion of such records in one or more national index systems.

- Procedures and standards governing the destruction of biological samples.
- Procedures and standards governing requests from an individual for DNA analysis of the individual's own specimen.
- Procedures and standards governing requests from an individual for expungement of the individual's DNA samples and data.

The interests of sexual assault victims may be affected by the provisions in the proposed rules governing the handling of DNA samples and data in sexual assault cases.

In addition, the proposed rules also indirectly affect the interest of the general public to the extent that the operation of the DNA program generally promotes public safety.

6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

The activities regulated by the proposed rules are also affected by the federal statutes and regulations that govern the Combined DNA Index System ("CODIS"), which is the program of support for state and local criminal justice DNA databases operated by the Federal Bureau of Investigation, pursuant to 42 U.S.C. § 14132 and 28 C.F.R. Part 28.

CODIS includes the National DNA Index System ("NDIS"), a national database that contains DNA analysis data contributed by forensic laboratories at the federal, state, and local levels. Under s. 165.76(4)(c), Stats., DOJ is expressly authorized to submit biological specimens or DNA analysis data for inclusion in NDIS.

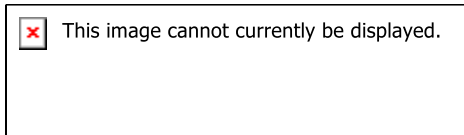
Forensic laboratories participating in NDIS are required to be accredited by a nationally recognized forensic science association, to undergo an external audit every two years to demonstrate compliance with quality assurance standards established by the FBI, and to disclose DNA samples or analyses only in accordance with federal privacy requirements. *See* 42 U.S.C. § 14132(b)(2) and (3). Access to NDIS is subject to cancellation if the quality control and privacy requirements are not met. 42 U.S.C. § 14132(c).

The proposed rules will include procedures and standards for submitting biological specimens and data to NDIS and for ensuring consistency with all applicable federal requirements.

7. Anticipated economic impact of proposed rules.

It is not anticipated that the proposed rules will have any economic impact on non-governmental persons and entities. The proposed rules will impose certain responsibilities on local units of government. However, kits for collecting biological samples will be supplied to local units of government by the state and local units of government will also receive a reimbursement from the state for each biological sample submission. Accordingly, it is anticipated that the proposed rules will not have any net economic impact on local units of government.

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Department Head (or Designee) Signature

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Date Submitted