

Proposed

State of Kansas

Department of Health and Environment

Notice of Public Hearing on Proposed Administrative Regulations

The Kansas Department of Health and Environment (KDHE), Kansas Health and Environmental Laboratory, Quality, Preparedness and Certification Section, Breath Alcohol Laboratory Program, will conduct a public hearing at 10:00 a.m. Thursday, February 22, 2018, in the Flint Hills Conference Room, third floor, Curtis State Office Building, 1000 SW Jackson, Topeka, Kansas, to consider the adoption of proposed amended regulation K.A.R. 28-32-11 regarding evidential breath alcohol test device (EBAT device) certification. This regulation is being proposed as a temporary regulation and as a permanent regulation.

A summary of the proposed regulation and the estimated economic impact follows:

Summary of Regulation:

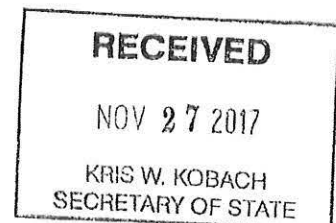
K.A.R. 28-32-11. EBAT device certification. KDHE proposes to amend this regulation to eliminate ambiguity created by the existing requirement that EBAT devices be included on a 2006 National Highway Traffic Safety Administration (NHTSA) list. NHTSA publishes its list infrequently, which creates difficulties ensuring that up-to-date equipment is available to law enforcement agencies and officers. The amended regulation will remove that discrepancy.

Economic Impact:

Cost to individuals: There is no increase in costs to private citizens or other private entities.

Cost to the agency: There is no additional cost to the agency. Any costs will be absorbed in the current budget.

Cost to other governmental agencies or units: There is no known additional cost to other



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governmental agencies or units to implement this proposed amended regulation.

The time period between the publication of this notice and the scheduled hearing constitutes a 60-day public comment period for the purpose of receiving written public comments on the proposed regulation. All interested parties may submit written comments prior to 5:00 p.m. on the day of the hearing to Christine Houston, KDHE, 6810 SE Dwight St., Topeka, KS 66620, by email to Christine.Houston@ks.gov, or by fax to 785-296-8068. During the hearing, all interested parties will be given a reasonable opportunity to present their views orally on the proposed regulation as well as an opportunity to submit their written comments. In order to give each individual an opportunity to present their views, it may be necessary for the hearing officer to request that each presenter limit an oral presentation to an appropriate time frame.

Complete copies of the proposed regulation and the corresponding economic impact statement may be obtained from the KDHE Breath Alcohol Laboratory Program website at <http://www.kdheks.gov/lipo/alcohol.html> or by contacting Christine Houston at the address above, 785-230-1727 or fax 785-296-8068.

Questions pertaining to the proposed regulation should be directed to Christine Houston at the contact information above.

Any individual with a disability may request accommodation in order to participate in the public hearing and may request the proposed regulation and the economic impact statement in an accessible format. Requests for accommodation to participate in the hearing should be made at least five working days in advance of the hearing by contacting Christine Houston.

Susan Mosier, MD, MBA, FACS

Secretary and State Health Officer



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28-32-11. EBAT device certification. (a) Application. Each agency custodian seeking EBAT device certification shall submit an application on forms provided by the department for certification of each EBAT device that the certified agency intends to use in the certified agency's EBAT program.

(b) ~~EBAT device list. The "conforming products list of evidential breath measurement devices" (CPL) established by the national highway traffic safety administration (NHTSA) and published in 71 fed. reg. 37159-37162 (2006) is hereby adopted by reference. Only an EBAT device listed on the CPL shall be submitted to the secretary for consideration for certification as an EBAT device.~~

(c) ~~Initial certification requirements. Each EBAT device shall be certified by the secretary if the secretary determines that the EBAT device meets NHTSA's performance criteria when operated according to the manufacturer's instruction manual before being used by an agency.~~

(d) (c) Inspection. Once an EBAT device is certified, an inspection of the EBAT device may be made by the secretary at any time. Any EBAT device may be removed from service at the time of the inspection if deemed necessary.

(e) (d) Device Maintenance. Each EBAT device shall be maintained by the device custodian or the device custodian's designee as directed by the secretary.

(f) (e) Device Repair. Each EBAT device removed from service for repair shall be repaired by the manufacturer or the manufacturer's authorized repair service. When the EBAT device is returned to the agency, the EBAT device shall be tested for accuracy by the device custodian or the device custodian's designee. The device custodian or the device custodian's

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designee shall notify the department of the date on which the instrument is placed back into service.

(~~g~~) (f) ~~Device~~ Modification. No modification shall be made to any EBAT device without the prior written consent of the secretary. For purposes of this regulation, “modification” shall mean any change in the operating software of or any physical change to a certified EBAT device that alters the accuracy or precision of the EBAT device. (Authorized by and implementing K.S.A. 2006 2017 Supp. 65-1,107; effective March 14, 2008; amended, T-_____, _____; amended P-_____.)

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November 15, 2017

Kansas Department of Health and Environment

ECONOMIC IMPACT STATEMENT

Pursuant to the requirements of K.S.A. 7-416, and amendments thereto, the Kansas Department of Health and Environment (KDHE) submits the following economic impact statement for an amended Article 32 regulation concerning testing human breath for law enforcement purposes. This regulation is being promulgated as both a temporary and permanent regulation.

1. Regulation to be amended:

K.A.R. 28-32-11 EBAT device certification

2. Brief description of each regulation and what is intended to be accomplished by adoption.

K.A.R. 28-32-11. This regulation identifies the Evidential Breath Alcohol Test (EBAT) certification process and defines the scope of KDHE's role in authorizing breath alcohol equipment for the state of Kansas and its respective law enforcement agencies.

The proposed amendment will allow the flexibility needed to eliminate legal ambiguity as to EBAT equipment certified by KDHE and approved by the National Highway Traffic Safety Administration (NHTSA) but not clearly listed on the 2006 "conforming products list of evidential breath measurement devices" issued by NHTSA, as required by the current regulation.

The proposed amendment also will enable KDHE to update certified equipment without the necessity to wait on a federal list that is published inconsistently, sometimes decades apart.

3. Is this regulation mandated by federal law as a requirement for participating in or implementing a federally subsidized or assisted program?

Yes _____ No X

If yes, please explain.

4. Does this proposed regulation exceed the requirements of applicable federal law?

Yes _____ No X

If yes, please explain.

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5. **Description of Costs:**

(a) **Cost to the agency:**

There is no additional cost to the agency. Any costs will be absorbed in the current budget.

(b) **Cost to persons who will bear the costs and those who will be affected (i.e., private citizens and consumers of the products or services) and are subject to the proposed rules and regulations or the enforcement:**

There is no known increase in costs.

(c) **Costs to other governmental agencies or units:**

There is no known additional cost to other governmental agencies or units to implement this proposed amended regulation.

6. **Description of any less costly or less intrusive methods that were considered by the agency for the purpose of the rules and regulations and why such methods were rejected in favor of the proposed rules and regulations.**

No less costly or intrusive methods were identified.

7. **Verification of economic impact statement with League of Kansas Municipalities, Kansas Association of Counties and the Kansas Association of School Boards.**

The above mentioned amended regulations were determined as appropriate for consultation as to the economic impact with the League of Kansas Municipalities, Kansas Association of Counties, and the Kansas Association of School Boards, pursuant to K.S.A. 77-416, and amendments thereto.

Yes X

No

If yes:

Date contacted and by what means (i.e., letter, FAX, etc.): The three organizations will be contacted electronically with attached copies of the proposed regulation, economic impact statement and notice of hearing at the time the notice of hearing for the permanent regulation is published in the *Kansas Register*.

Response and comments received by:

League of Kansas Municipalities:

Kansas Association of Counties:

Kansas Association of School Boards:

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