DEPARTMENT OF JUSTICE

28 CFR Part 28

[OAG 101I; A.G. Order No. 2464–2001]

RIN 1105–AA78

Regulations Under the DNA Analysis Backlog Elimination Act of 2000

AGENCY: Department of Justice.

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Justice is publishing this interim rule to implement section 3 and related provisions of the DNA Analysis Backlog Elimination Act of 2000. The rule specifies the federal offenses that will be treated as qualifying offenses for purposes of collecting DNA samples from federal offenders, sets forth the responsibilities of the Bureau of Prisons for collecting DNA samples from individuals in its custody, and sets forth related responsibilities of the Federal Bureau of Investigation for analyzing and indexing DNA samples.

DATES: *Effective Date:* This interim rule is effective June 28, 2001.

Comment Date: Written comments must be submitted on or before August 27, 2001.

ADDRESSES: Send comments to David J. Karp, Senior Counsel, Office of Legal Policy, Room 4503, Main Justice Building, 950 Pennsylvania Avenue NW., Washington, DC 20530.

FOR FURTHER INFORMATION CONTACT: David J. Karp, Senior Counsel, Office of Legal Policy, Room 4503, Main Justice Building, 950 Pennsylvania Avenue NW., Washington, DC 20530. Telephone: (202) 514–3273.

SUPPLEMENTARY INFORMATION: All 50 states authorize the collection and analysis of DNA samples from convicted state offenders, and entry of resulting information into the Combined DNA Index System (''CODIS''), which the Federal Bureau of Investigation (''FBI'') has established pursuant to 42 U.S.C. 14132. Until recently, however, there was no statutory authorization to collect DNA samples from convicted federal, military, and District of Columbia offenders. Congress acted to fill this gap in the DNA identification system through provisions of Public Law 106–546, the DNA Analysis Backlog Elimination Act of 2000 (the ''Act'').

Section 3 of the Act addresses the categories of federal offenders from whom DNA samples will be collected, the responsibility of the Bureau of Prisons (''BOP'') and federal probation offices to collect DNA samples from offenders in their custody or supervision, and the responsibility of the FBI to analyze and index DNA samples. This interim rule is issued pursuant to subsection (e) of section 3, which provides that, with the exception of the activities of the probation offices, the section shall be carried out under regulations prescribed by the Attorney General. The rule also addresses certain responsibilities of BOP and the FBI under other sections of the Act that are closely related to the matters addressed in section 3.

The rule adds a new part 28 to title 28 CFR relating to the DNA identification system. The new part contains subparts A and B, that relate respectively to the federal offenses for which DNA samples will be collected, and the responsibilities of BOP and the FBI in collecting, analyzing, and indexing DNA samples:

Subpart A—Qualifying Federal Offenses for Purposes of DNA Sample Collection

Subpart A of the rule specifies qualifying federal offenses for purposes of DNA sample collection. Section 3 of the Act, in part, requires BOP and probation offices to collect DNA samples from individuals in their custody or supervision who are, or have been, convicted of a ''qualifying Federal offense.'' Subsection (d) of section 3 of the Act states that qualifying federal offenses are those in a specified list ''as determined by the Attorney General.'' Since the statutory list is, for the most part, explicit about which code sections are covered, there is relatively little for the Attorney General to determine in the regulation. The specifications about covered federal offenses in section 3(d) of the Act, and their interpretation in subpart A of the new part 28 added by this rule, are as follows:

Paragraph (1)(A) of subsection (d) states that qualifying federal offenses include several offenses that involve or are related to homicide, identified by descriptive terms and code section citations—18 U.S.C. 1111, 1112, 1113, 1114, 1116, 1118, 1119, 1120, and 1121. The regulation accordingly lists offenses under these provisions as qualifying federal offenses. However, only offenses of voluntary manslaughter are covered under 18 U.S.C. 1112, because the statutory reference to ''voluntary manslaughter'' in connection with this section indicates a clear legislative intent not to include involuntary manslaughter.

Paragraph (1)(B) of subsection (d) states that qualifying federal offenses include most of the offenses in the sex offense chapters of the federal criminal code—18 U.S.C. 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2252, 2421, 2422, 2423, and 2425. The regulation accordingly lists offenses under these provisions as qualifying federal offenses.

Paragraph (1)(C) of subsection (d) provides that qualifying federal offenses include the offenses under the peonage and slavery chapter of the criminal code (chapter 77). The regulation accordingly states that offenses under that chapter are qualifying federal offenses.

Paragraph (1)(D) of subsection (d) includes offenses under the federal criminal code that amount to kidnapping as defined in 18 U.S.C. 3559(c)(2)(E). The federal criminal code offenses that correspond most closely to this definition are the general kidnapping offense (defined in 18 U.S.C. 1201), and the hostage-taking offense defined in 18 U.S.C. 1203, which is essentially a form of kidnapping in which the purpose is to coerce a third party or governmental organization. The regulation accordingly lists offenses under these provisions as qualifying federal offenses.

Paragraph (1)(E) of subsection (d) includes as qualifying federal offenses several offenses under the robbery and burglary chapter of the criminal code (chapter 103)—18 U.S.C. 2111, 2112, 2113, 2114, 2116, 2118, and 2119. The regulation accordingly lists offenses under these provisions as qualifying federal offenses.

Paragraph (1)(F) of subsection (d) includes as qualifying federal offenses several types of offenses under the major crimes act for Indian country (18 U.S.C. 1153). This is the provision under which the federal government has jurisdiction to prosecute most serious crimes committed in Indian country. The specific offense types referenced in paragraph (1)(F) are murder, manslaughter, kidnapping, maiming, felonies under the sexual abuse chapter of the criminal code (chapter 109A), incest, arson, burglary, and robbery. Where federal law provides a general definition for such an offense in areas subject to exclusive federal jurisdiction, the case is charged under the pertinent federal law provision, with jurisdiction premised on 18 U.S.C. 1153. This is true, in particular, of murder (18 U.S.C. 1111), manslaughter (18 U.S.C. 1112), kidnapping (18 U.S.C. 1201(a)(2)), maiming (18 U.S.C. 114), felony sexual abuse (various offenses under title 109A of title 18), arson (18 U.S.C. 81), and robbery (18 U.S.C. 2111). Where federal law provides no such definition, the case is charged under the law of the state where the offense occurred, with jurisdiction premised on 18 U.S.C. 1153.

This is true, in particular, of incest and burglary. The regulation accordingly includes the specified offenses as qualifying federal offenses, where jurisdiction is based on 18 U.S.C. 1153.

Paragraph (1)(G) of subsection (d) includes as qualifying federal offenses attempts and conspiracies to commit offenses that are otherwise covered. Many of the particular offense provisions that are listed in the regulation encompass attempted offenses—for example, 18 U.S.C. 1113, 1201(d), and 2241–43. Since there is no general attempt provision in the federal criminal code, there are no additional attempt offenses that could be listed in the regulation. Some of the particular offense provisions that are listed in the regulation also explicitly encompass conspiracies, such as 18 U.S.C. 1117 and 1201(c). In addition, however, there is a general conspiracy provision in the federal criminal code, 18 U.S.C. 371. The regulation accordingly includes offenses under 18 U.S.C. 371 as qualifying federal offenses where an object of the conspiracy was the commission of a qualifying federal offense.

Subpart B—DNA Sample Collection, Analysis, and Indexing

Section 28.11 in the rule provides definitions for ''DNA sample'' and ''DNA analysis'' that are taken verbatim from section 3(c) of the Act.

Section 28.12, in paragraph (a), directs BOP to collect a DNA sample from each individual in its custody who is, or has been, convicted of a qualifying federal offense, a qualifying military offense, or a qualifying District of Columbia offense. The requirement that BOP collect DNA samples from individuals convicted of qualifying federal offenses and qualifying military offenses appears in section 3(a)(1) of the Act. The requirement to collect samples from individuals convicted of qualifying District of Columbia offenses appears in section 4, rather than section 3, of the Act (specifically, section 4(a)(1)). It is included in this regulation for logical completeness in describing BOP's DNA sample collection responsibilities under the Act.

Section 28.12, in paragraph (b), qualifies paragraph (a)'s requirement by affording BOP discretion about taking a DNA sample from an individual who is already in CODIS, or from whom a DNA sample has been collected pursuant to the provisions for collection of DNA samples from military offenders by the Department of Defense. This discretionary authority, which BOP could utilize to avoid duplicative sample collection, tracks sections 3(a)(3) and 4(a)(3) of the Act.

Section 28.12, in paragraph (c), provides in part that individuals described in paragraph (a) shall cooperate in the collection of DNA samples by BOP. This obligation on inmates is correlative to BOP's legal duty to collect DNA samples from them, and arises directly from sections 3(a)(5) and 4(a)(5) of the Act, which prescribe criminal penalties for individuals who fail to cooperate in DNA sample collection authorized by the Act.

Section 28.12, in paragraph (c), further provides that BOP may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual described in paragraph (a) who refuses to cooperate in the collection of the sample. This is taken directly from sections 3(a)(4) and 4(a)(4) of the Act. While inmates will normally cooperate voluntarily in DNA sample collection, or be persuaded to do so by the prospect of disciplinary action if they refuse to cooperate, taking a sample involuntarily from a recalcitrant individual may occasionally be necessary. The involuntary taking of a blood sample may in some instances be required under existing procedures for other purposes, such as medical evaluation, see 28 CFR 549.13(a)(3), or compliance with a court order to take such a sample for evidentiary purposes. Existing regulations regarding the use of force where necessary to enforce institutional regulations or for other purposes will continue to apply in relation to inmates who refuse to cooperate in the collection of a DNA sample. See 28 CFR part 552, subpart C.

Section 28.12, in paragraph (d)—tracking sections 3(a)(4)(B) and 4(a)(4)(B) of the Act—states that BOP may enter into agreements with units of State or local government or with private entities to provide for the collection of DNA samples. This makes it clear, for example, that BOP can arrange to have DNA samples collected from inmates in contract facilities by contract facility personnel.

Section 28.12, in paragraph (e), directs BOP to furnish each DNA sample to the FBI (for purposes of analysis and indexing in CODIS). This is explicitly required by sections 3(b) and 4(b) of the Act.

Section 28.13 directs the FBI to carry out a DNA analysis on each DNA sample furnished to it pursuant to section 3(b) or 4(b) of the Act, and to include the results in CODIS. The cited statutory provisions explicitly require the FBI to carry out these functions. Section 28.5 further provides that the FBI must include in CODIS the results of analyses furnished by the Department of Defense, which is required by 10 U.S.C. 1565(b)(2). The FBI is not required to analyze the samples collected by the Department of Defense, because the Department of Defense is responsible for carrying out that function, as provided in 10 U.S.C. 1565(b)(1).

Good Cause Exception

The implementation of this rule as an interim rule, with provisions for post-promulgation public comments, is based on the ''good cause'' exceptions found at 5 U.S.C. 553(b)(3)(B) and (d)(3). The rule implements section 3 of Public Law 106–546, which requires that the Attorney General determine qualifying federal offenses for purposes of DNA sample collection not later than 120 days after enactment, that the collection of DNA samples from covered offenders commence not later than 180 days after enactment, and that the requirements of the section generally be carried out under regulations prescribed by the Attorney General. Given that section 3 requires that an initial determination of qualifying federal offenses be made within 120 days, Congress must have been aware that it would not be feasible within that time period to publish a proposed rule for notice and comment, as well as a subsequent final rule, and for the period of the final rule's delayed effective date to have run. Public Law 106–546 is explicit and comprehensive concerning the types of offenses that will be treated as qualifying federal offenses and concerning the powers and responsibilities of the Bureau of Prisons and other agencies in collecting, analyzing, and indexing DNA samples. In light of the short statutory time frame for the implementation of this law and the fact that the formulation of implementing regulations requires no significant exercises of discretion, it is impracticable and unnecessary to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d).

Moreover, the collection, analysis, and indexing of DNA samples as required by Public Law 106–546 furthers important public safety interests by facilitating the solution and prevention of crimes, see H.R. Rep. No. 900, 106th Cong., 2d Sess. 8–11 (2000) (House Judiciary Committee report), and delay in the law's implementation would thwart or delay the realization of these public safety benefits. Dangerous offenders who might be successfully identified through DNA matching may

be released from prison or reach the end of supervision before DNA sample collection can be carried out, thereby remaining at large to engage in further crimes against the public. Furthermore, delay in collecting, analyzing, and indexing DNA samples, and hence in the identification of offenders, may foreclose prosecution due to the running of statutes of limitations. Failure to identify, or delay in identifying, offenders as the perpetrators of crimes through DNA matching also increases the risk that innocent persons may be wrongfully suspected, accused, or convicted of such crimes. Therefore, it would be contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d).

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reasons: The regulation concerns the collection, analysis, and indexing by federal agencies of DNA samples from certain offenders.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 28

Crime, Law enforcement, Prisons, Prisoners, Probation and parole.

For the reasons stated in the preamble, the Department of Justice amends 28 CFR Chapter I by adding part 28, to read as follows:

PART 28—DNA IDENTIFICATION SYSTEM

Subpart A—Qualifying Federal Offenses for Purposes of DNA Sample Collection

Sec.
28.1 Purpose.
28.2 Determination of offenses.

Subpart B—DNA Sample Collection, Analysis, and Indexing

28.11 Definitions.
28.12 Collection of DNA samples.
28.13 Analysis and indexing of DNA samples.

Authority: 28 U.S.C. 509, 510; 42 U.S.C. 14132, 14135a, 14135b; 10 U.S.C. 1565; Pub. L. 106–546, 114 Stat. 2726.

Subpart A—Qualifying Federal Offenses for Purposes of DNA Sample Collection

§ 28.1 Purpose.

Section 3 of Public Law 106–546 (114 Stat. 2726) directs the collection, analysis, and indexing of a DNA sample from each individual in the custody of the Bureau of Prisons or under the supervision of a probation office who is, or has been, convicted of a qualifying Federal offense. Subsection (d) of that section states that the offenses that shall be treated as qualifying Federal offenses are offenses under title 18, United States Code, contained in a list of descriptive terms and code sections, as determined by the Attorney General.

§ 28.2 Determination of offenses.

The following offenses shall be treated for purposes of section 3 of Public Law 106–546 as qualifying Federal offenses:

(a) Any offense under section 1111, 1113, 1114, 1116, 1117, 1118, 1119, 1120, 1121, 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2252, 2421, 2422, 2423, 2425, 1201, 1203, 2111, 2112, 2113, 2114, 2116, 2118, or 2119 of title 18, United States Code.

(b) Any offense of voluntary manslaughter under section 1112 of title 18, United States Code.

(c) Any offense under chapter 77 of title 18, United States Code.

(d) Any offense of murder, manslaughter, kidnapping, maiming, incest, arson, burglary, or robbery, and any felony under chapter 109A of title 18, United States Code, where jurisdiction was based on section 1153 of title 18, United States Code.

(e) Any offense under section 371 of title 18, United States Code, in which an object of the conspiracy was the commission of an offense described in paragraph (a), (b), (c), or (d) of this section.

Subpart B—DNA Sample Collection, Analysis, and Indexing

§ 28.11 Definitions.

The following definitions apply to this part:

DNA sample means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

DNA analysis means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

§ 28.12 Collection of DNA samples.

(a) The Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of—

(1) A qualifying Federal offense as described in § 28.2;

(2) A qualifying military offense, as determined under 10 U.S.C. 1565; or (3) A qualifying District of Columbia offense, as determined under section 4(d) of Public Law 106–546.

(b) Notwithstanding paragraph (a) of this section, the Bureau of Prisons may, but need not, collect a DNA sample from an individual described in

paragraph (a) of this section if the Combined DNA Index System contains a DNA analysis with respect to that individual, or if a DNA sample has been collected from that individual under 10 U.S.C. 1565.

(c) Each individual described in paragraph (a) of this section shall cooperate in the collection of a DNA sample from that individual by the Bureau of Prisons. The Bureau of Prisons may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual described in paragraph (a) of this section who refuses to cooperate in the collection of the sample.

(d) The Bureau of Prisons may enter into agreements with units of State or local government or with private entities to provide for the collection of samples under this section.

(e) The Bureau of Prisons shall furnish each DNA sample collected under this section to the Federal Bureau of Investigation.

§ 28.13 Analysis and indexing of DNA samples.

(a) The Federal Bureau of Investigation shall carry out a DNA analysis on each DNA sample furnished to the Federal Bureau of Investigation pursuant to section 3(b) or 4(b) of Public Law 106–54, and shall include the results in the Combined DNA Index System.

(b) The Federal Bureau of Investigation shall include in the Combined DNA Index System the results of each analysis furnished to the Federal Bureau of Investigation pursuant to section 1565(b)(2) of title 10, United States Code.

Dated: June 21, 2001.

John Ashcroft,

Attorney General.

[FR Doc. 01–16171 Filed 6–27–01; 8:45 am]

BILLING CODE 4410–19–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD09–01–060]

RIN 2115–AA97

Safety Zone; Middle Bass Island, Lake Erie, Ohio

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone at Put-In-Bay, Middle Bass Island, Ohio. This safety zone is necessary to protect spectators and vessels from the hazards associated with fireworks displays. This zone is intended to restrict vessels from a portion of Put-In-Bay for the City of Put-In-Bay July 4, 2001, fireworks display.

DATES: This rule is effective from 5 p.m. until 11 p.m. on July 4, 2001.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket [CGD09–01–060] and are available for inspection or copying at U.S. Coast Guard Marine Safety Office Toledo, 420 Madison Ave, Suite 700, Toledo, Ohio, 43604 between 9:30 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LT Herb Oertli, Chief of Port Operations, Marine Safety Office, 420 Madison Ave, Suite 700, Toledo, Ohio 43604; (419) 418–6050.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM, and, under 5 U.S.C. 553(d)(3), good cause exists for making this rule it effective less than 30 days after publication in the **Federal Register**. The Coast Guard had insufficient advance notice to publish an NPRM followed by a temporary final rule. Publication of a notice of proposed rulemaking and delay of effective date would be contrary to the public interest because immediate action is necessary to prevent possible loss of life, injury, or damage to property. The Coast Guard has not received any complaints or negative comments with regard to this event.

Background and Purpose

This temporary rule is necessary to ensure the safety of spectators and vessels during the setup, loading and launching of a fireworks display in conjunction with the City of Put-In-Bay July 4, 2001 Fireworks. The fireworks display will occur between 5 p.m. and 11 p.m. on July 4.

This safety zone will encompass all waters and the adjacent shoreline of Put-In-Bay Middle Bass Island, Ohio, bounded by an arc of a circle with a 800-foot radius with its center in approximate position 41°40′15″ N, 082°48′35″ W. The Captain of the Port Toledo or his designated on scene representative may terminate this event.

All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on scene patrol personnel. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Toledo or his designated on scene representative. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that order. It is not ''significant'' under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). This finding is based on the historical lack of vessel traffic during this time of year.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in a portion of Put-In-Bay off Middle Bass Island, Ohio.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule will be in effect for only a few hours on one day and vessel traffic can pass safely around the safety zone.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. If the rule would affect your