

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

ENDORSED FILED
IN THE OFFICE OF

In re:) 1987 OAL Determination No. 141987
Request for Regulatory)
Determination filed) [Docket No. 87-003]
by William T. Mayo,)
concerning two Department)
of Motor Vehicles')
publications, (1) Chapter)
12 of the "Driver Safety)
Manual" and (2) "Peace)
Officer's Guide to the)
Implied Consent Law"¹)
Determination Pursuant to
Government Code Section
11347.5; Title 1,
California Administrative Code
Chapter 1, Article 2

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SECRETARY OF STATE
OF CALIFORNIA

Determination by:



JOHN D. SMITH

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SYNOPSIS

The issue presented to the Office of Administrative Law was whether two Department of Motor Vehicles' publications, (1) the "Driver Safety Manual," Chapter 12 (entitled "Implied Consent Hearings"), and (2) the "Peace Officer's Guide to the Implied Consent Law," are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Department of Motor Vehicles has unlawfully established rules and procedures² that interpret or supplement the implied consent statute. The Office of Administrative Law further concludes, however, that the bulk of the above-noted publications are either non-regulatory, or are restatements of existing statutes, regulations, or case law.

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THE ISSUE PRESENTED ³

The Office of Administrative Law ("OAL") has been requested to determine whether two Department of Motor Vehicles' ("Department") publications, (1) the "Driver Safety Manual" ("Manual"), Chapter 12, entitled "Implied Consent Hearings," and (2) the "Peace Officer's Guide to the Implied Consent Law" ("Peace Officer's Guide"),⁴ are "regulations" as defined in Government Code section 11342, subdivision (b), and (3) are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the Administrative Procedure Act ("APA").

THE DECISION ^{5, 6, 7, 8}

The Office of Administrative Law finds that:

- I. Certain provisions of Chapter 12⁹, which establish rules and procedures that interpret and supplement the implied consent statute, (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.¹⁰
- II. Two parts of the Peace Officer's Guide [page 20, part II, section E, under the category "Type of Test," which gives an example of who is not exempt from the breath test, and page 29, part IV, under the category "The Implied Consent (Suspension) Hearing," which establishes the order of presenting evidence at implied consent hearings] (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.
- III. The remainder of Chapter 12 of the Manual and the Peace Officer's Guide (1) is not a "regulation" as defined in the APA, and (2) is not subject to the requirements of the APA.

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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The California Department of Motor Vehicles was created in 1931.¹¹ It is responsible for protecting the public interest and promoting public safety on the state's roads and highways. It also administers and enforces California Vehicle Code provisions concerning the granting, denying, suspending or revoking of drivers' licenses.¹²

Authority ¹³

Vehicle Code section 1651 provides:

"The director [of the Department of Motor Vehicles] may adopt and enforce rules and regulations as may be necessary to carry out the provisions of this [Vehicle] code relating to the department.

"Rules and regulations shall be adopted, amended, or repealed in accordance with the [APA]"
[Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁴ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.¹⁵

In any event, section 1651 of the Vehicle Code, quoted above, specifies that the Department's rulemaking is subject to the APA.

Background

The following undisputed facts and circumstances have given rise to the present determination.

A Request for Determination was filed with OAL on March 18, 1987, by William T. Mayo. This Request concerns two separate departmental publications: (1) Chapter 12, (entitled "Implied Consent Hearings") of the "Driver Safety Manual," and (2) the "Peace Officer's Guide to the Implied Consent Law." Mr. Mayo has also submitted a second Request for Determination (Docket No. 87-006) concerning the entire "Driver Safety Manual," which is 720 pages in length. This Determination is concerned only with (1) Chapter 12 of the Manual, which is 67 pages in length, and (2) the Peace Officer's Guide, which is 36 pages in length. The Peace Officer's Guide is described as "a training and information

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guide for peace officers in the enforcement of the Implied Consent Law."¹⁶

On September 21, 1987, the Department filed a Response to the Request with OAL. In this Response, the Department declared that the documents in question "are a reiteration of relevant statutes, case law interpretations, and procedural instructions necessary to assure that the [Department] and law enforcement agencies have legally sufficient guidelines to follow in carrying out the intent of the implied consent laws of California."¹⁷ (Emphasis added.)

The implied consent law is contained in section 23157 of the Vehicle Code. Section 23157 provides in part:

"(a)(1) Any person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood, breath, or urine for the purpose of determining the alcoholic content of his or her blood, . . . if lawfully arrested for any offense allegedly committed in violation of Section 23152 or 23153. The testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23152 or 23153. The person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine and (A) mandatory imprisonment . . . , (B) the suspension of the person's privilege to operate a motor vehicle for . . . six months, (C) the revocation of the person's privilege to operate a motor vehicle for . . . two years . . . , or (D) the revocation of the person's privilege to operate a motor vehicle for . . . three years" [Emphasis added.]

Vehicle Code section 13353 mandates the Department to suspend or revoke a person's privilege to drive a motor vehicle if the "person refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23157." (Emphasis added.) Section 13353 also provides the Department with the authority to conduct an implied consent hearing if the person whose driving privilege is at issue requests one.¹⁸ Section 13353 provides that the implied consent hearing covers the following issues:

"[W]hether the peace officer had reasonable cause to believe the person had been driving a motor vehicle in violation of sections 23152 or 23153, whether the person was placed under

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arrest, whether the person refused to submit to, or did not complete, the test or tests after being requested by a peace officer, and whether, except for the persons described in subdivision (a) of section 23157 who are incapable of refusing, the person had been told that his or her driving privilege would be suspended or revoked if he or she refused to submit to, or did not complete, the test or tests."¹⁹ [Emphasis added.]

Vehicle Code section 13353 also requires the implied consent hearing to be conducted in the same manner and under the same conditions as provided in sections 14100-14112 of the Vehicle Code.

Vehicle Code section 14100 provides for an informal or formal implied consent hearing at the option of the driver. Section 14104 states that an informal hearing²⁰

"shall be conducted in a completely informal manner, the only requirement being that the . . . licensee shall have the opportunity to make or file a written answer or statement in which he may controvert any point at issue or present any evidence or arguments . . . , or the person may present orally to the department any evidence or statement pertinent to the question and submit the question for determination by the department." [Emphasis added.]

Vehicle Code section 14112 provides in part that

"All matters in a formal hearing not covered by [sections 14107-14112] shall be governed, . . . by the provisions of the Government Code relating to administrative hearings, and particularly by Chapter 5 [sections 11500-11528 of the APA]." [Emphasis added.]

II. DISPOSITIVE ISSUES

There are two main issues before us:²¹

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

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FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

With respect to Chapter 12 of the Manual, the answer is "no," except for the chapter sections listed below and in note 23. With respect to the Peace Officer's Guide the answer is "no," except for the rule stated on page 20, part II, section E, and the procedures concerning the presentation of evidence at the hearing described on page 29, part IV.

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For purposes of discussion, we will first address the sections in Chapter 12, then we will turn to the Peace Officer's Guide.

Chapter 12 of the "Driver Safety Manual"

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²² The provisions of Chapter 12 are just such rules. Whenever any person, whose privilege to operate a motor vehicle is suspended or revoked pursuant to Vehicle Code section 13353, is granted a hearing by the Department, the hearing procedures are governed by the provisions of Chapter 12 of the Manual. Therefore, the provisions of Chapter 12 are standards that are applied generally to all implied consent hearings.

Chapter 12 also implements, interprets, or makes specific the implied consent law enforced or administered by the Department. For purposes of analysis, we will focus on three particular provisions of Chapter 12, as examples of the numerous regulatory provisions in the chapter.²³

Example No. 1 -- Section 12.041

Section 12.041 of Chapter 12 states that

"Formal and informal Implied Consent hearings are scheduled and conducted the same way; both follow formal procedures." [Emphasis added.]

Vehicle Code sections 14104-14106 specifically govern informal hearings. Formal hearings are governed (1) by Vehicle Code sections 14107-14112, and (2) by APA provisions relating to formal quasi-adjudicatory administrative hearings.²⁴ Section 14112 states that the APA provisions are applicable to formal hearings only. The APA provisions do not apply to informal hearings of the Department.²⁵

Section 14104 states that the only requirements of an informal hearing are that it be "conducted in a completely informal manner" (emphasis added) and that the licensee have the opportunity to be heard. Hence, applying the formal procedural requirements of sections 14107-14112 and the administrative adjudication provisions of the APA to informal implied consent hearings supplements sections 14104-14106 of the Vehicle Code, and is therefore regulatory.

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Example No. 2 -- Section 12.929

Section 12.929 reads as follows:

"Minors are subject to the Implied Consent Law. A minor does not need parents' permission to have blood drawn for a chemical test under the Implied Consent Law. [Rule No. 1:] If a parent interferes with the blood test, or causes the minor to not take the test, after the minor chose it, the minor's failure to complete the blood test is a refusal, unless the minor takes one of the other chemical tests. [Rule No. 2:] If medical personnel require signed consent from the minor's parents, and they are unavailable or refuse to sign, it is not a refusal under Implied Consent, provided the minor takes another test." [Emphasis added.]

Section 12.929 interprets Vehicle Code section 23157. Vehicle Code section 23157 states that "[t]he person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine" and his or her privilege to operate a motor vehicle will be suspended or revoked. Section 12.929 states two rules, or gives two "examples," of what would constitute a "failure to complete," and thereby violate the implied consent law.

Section 12.929 also interprets the law (Vehicle Code section 13353) administered by the Department. Vehicle Code section 13353 states "If any person refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23157 . . . the [D]epartment shall" suspend or revoke the person's privilege to operate a motor vehicle. In each of the two rules of section 12.929, the minor chose (submitted to) the blood test. The Department has interpreted an intervention by the parents, or the parents' absence or refusal to sign a required medical release, as a "fail[ure] to complete" the required chemical test or tests by the minor pursuant Vehicle Code section 23157.

We found in an earlier Determination that in some instances, "examples" provided greater specificity and interpreted existing statutes or regulations, and therefore were underground regulations.²⁶

We conclude that section 12.929 of Chapter 12 is an underground regulation.

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Example No. 3 -- Section 12.941

Section 12.941 reads as follows:

"In one case, the driver requested a breath test. The officer refused to give it on previous medical advice that the breath test should not be given to a driver with a known 'heart condition.' It was not a refusal; there is no legal authority to refuse the breath test to a driver who insists upon it."
[Emphasis added.]

In reply to the allegation that section 12.941 is an underground regulation, the Department argued that this section is only a "Legal interpretation by [the Department's] Chief Counsel (Mateer, DMV, 4-9-75)."27 (Emphasis added.)

Section 12.941 gives an "example" of a situation that would not meet the criteria of a "person refus[ing] . . . to submit to, or fail[ing] to complete a chemical test or test pursuant to Section 23157" (emphasis added) under Vehicle Code section 13353.28 According to section 12.941, the driver in this situation has not "refuse[d] to submit" to the required chemical test pursuant to the implied consent law; and therefore, his or her license will not be suspended or revoked by the Department.

The rule stated in section 12.941 is that a driver with a "heart condition" is not exempt from the breath test, and that if he chooses a breath test he must be given that test. If the officer declines to give the breath test, then it does not constitute a "refusal" on the part of the driver. This rule interprets Vehicle Code section 13353.

This rule also supplements Vehicle Code section 23157. Section 23157, subdivisions (b) and (c) list two types of people who are for medical reasons exempt from the blood test required by Section 23157.29 Section 12.941 supplements these statutory provisions by identifying a class of persons not exempt from the required breath test.

We conclude that Chapter 12, section 12.941, is an informal rule that interprets or supplements sections 13353 and 23157 of the Vehicle Code.

"Peace Officer's Guide to the Implied Consent Law"

The Peace Officer's Guide meets the first part of the two-part inquiry set out above -- it is a standard of general application. It is a booklet that is described as "a training and information guide for peace officers in the enforcement of the Implied Consent Law."³⁰ (Emphasis added.) This booklet contains "guidelines" for a peace officer to follow whenever he or she enforces the implied

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consent law. These "guidelines" are standards that are applied generally when a peace officer arrests a person for violating Vehicle Code sections 23152 or 23153. Therefore, these "guidelines" are standards of general application.

We note that all the "guidelines" in the booklet do not implement, interpret, or make specific the law enforced by the Department. Most of the booklet contains either (1) non-regulatory material, or (2) restatements of statutes, regulations, or case law. However, we have found two "guidelines" in the booklet to be underground regulations; they are addressed separately below.

Guideline No. 1

Guideline No. 1 is located on page 20, under the category "Type of Test," part II, section E. Section E is entitled "Heart Condition -- Test Must Be Administered If Subject Insists." (Emphasis added.) Section E reads as follows:

"Subject requested breath test. Officer refused to administer test on previous medical advice that the breath test should not be administered to a person with a known 'heart condition.' There is no statutory authority for refusing to administer the breath test to a person who insists upon it." [Emphasis added.]

Clearly, section E is the same informal rule addressed above in our discussion of Chapter 12, section 12.941. For the same reasons we noted in section 12.941, we find that section E also interprets or supplements Vehicle Code sections 13353 and 23157.

Guideline No. 2

Guideline No. 2 is located on page 29, under the category "The Implied Consent (Suspension) Hearing," in part IV. Part IV is entitled "Mechanics of Hearing." It specifies the order in which evidence will be presented at the hearing.

As explained by the Department in the Peace Officer's Guide, the hearing referee wears many "hats" during the hearing.³¹ The hearing referee is "required to present the department's case"³²; question the peace officer, the driver, and any witnesses; protect the peace officer's rights; if the driver is not represented by counsel, assist the driver in presenting his or her case;³³ and finally, be the decisionmaker.

Neither the Vehicle Code nor the applicable provisions of the APA³⁴ prescribe the manner in which the hearing will be conducted. Government Code section 11513, subdivision (c), provides that administrative hearings "need not be conducted according to technical rules relating to evidence or

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witnesses." Government Code section 11512 provides that "[w]hen the hearing officer alone hears a case he shall exercise all powers relating to the conduct of the hearing." Thus, based on these two statutes and Vehicle Code section 14122 (which incorporates APA administrative procedures), "the order of procedure [is] properly a matter addressed to the discretion of the hearing officer."³⁵

In contrast, part IV of the Peace Officer's Guide sets forth the manner in which the hearing referee is to receive the evidence; it is not left up to his or her discretion.³⁶ This further implements and makes specific Vehicle Code hearing procedure requirements and APA hearing procedure provisions applied to departmental hearings through Vehicle Code section 14112.

WE CONCLUDE THAT (1) CERTAIN PROVISIONS OF CHAPTER 12 (LISTED IN PART II AND NOTE 23 OF THIS DETERMINATION), AND (2) THE PEACE OFFICER'S GUIDE, PART II, SECTION E ON PAGE 20 AND PART IV ON PAGE 29, ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CCODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.³⁷ However, none of the recognized exceptions (set out in footnote 37) apply to the provisions of Chapter 12 or the Peace Officer's Guide that have been found to be regulatory.

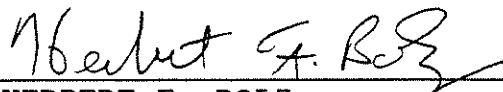
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III. CONCLUSION

For the reasons set forth above, OAL finds that the

- I. Certain provisions of the Department's "Driver Safety Manual," Chapter 12, which establish rules and procedures concerning the implied consent law, (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.
- II. Two parts of the "Peace Officer's Guide to the Implied Consent Law" [page 20, part II, section E, under the category "Type of Test," which gives an example of who is not exempt from the breath test, and page 29, part IV, under the category "The Implied Consent (Suspension) Hearing," which establishes the order of presenting evidence at implied consent hearings] (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.
- III. The remainder of Chapter 12 of the Manual and the Peace Officer's Guide (1) are not regulations as defined in the APA, and (2) are not subject to the requirements of the APA.

DATE: October 26, 1987


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- 1 This Request for Determination was filed by William T. Mayo, Attorney-at-Law, 660 Market Street, Suite 300, San Francisco, CA 94104, (415) 392-2800. The Department of Motor Vehicles was represented by Marilyn Schaff, Assistant Chief Counsel, 2415 First Street, Sacramento, CA 95818, (916) 732-7630.

- 2 These procedures are set out in Chapter 12 of the "Driver Safety Manual" (see Determination, pp. 6-9, and note 22), and in the "Peace Officer's Guide to the Implied Consent Law," under the categories (1) "Type of Test," page 20, part II, section E, and (2) "The Implied Consent (Suspension) Hearing," page 29, part IV (see Determination, pp. 9-11).

- 3 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-011), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, ___, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.

- 4 The "Peace Officer's Guide to the Implied Consent Law"

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(January 1983) was prepared jointly by the Department of Motor Vehicles and the California Highway Patrol (CHP). The Requester did not name the CHP as the responsible rulemaking agency.

5 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-2, June 13, 1986, p. B-22; type-written version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall . . . be made available to . . . the courts." (Emphasis added.)

6 No public comments were received concerning this Request for Determination. The Department timely submitted a formal Response to the Request for Determination and it was considered in making this Determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7 An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.

8 Pursuant to Title 1, CAC, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State.

9 See Determination, pp. 6-9 and note 23, below.

10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government

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Code, sections 11340 through 11356.

11 Stats. 1931, c. 478, sec. 1.

12 See Division 6 (Drivers' Licenses), sections 12500-15028 of the Vehicle Code.

13 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Administrative Code, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation.
(Gov. Code, sec. 11349.1.)

14 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

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- 15 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 16 "Peace Officer's Guide to the Implied Consent Law," January 1983, p. 1.
- 17 Agency's Response, cover letter.
- 18 The Peace Officer's Guide, in the January 1983 edition, identifies Vehicle Code section 13353 as the Implied Consent Law (pages 5-6), and section 13354 as the Chemical Test Procedure law (pages 8-9). The Legislature has renumbered these two sections as Vehicle Code sections 23157 and 23158, respectively. (Stats. 1985, c. 735, sec. 2 and sec. 5.)
- 19 See Vehicle Code section 13353, subdivision (b).
- 20 Vehicle Code sections 14104-14106 govern the conduct of an informal implied consent hearing.
- 21 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 3 to today's Determination.
- 22 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 23 Chapter 12 contains numerous regulatory provisions. Each of the regulatory provisions listed below meets both prongs of the statutory definition of "regulation."

Section 12.021 - Request Must Be Timely. Specifies the deadline for receiving hearing requests and the exception that the Department may approve a late request if the driver has a good reason. This rule supplements and makes specific Vehicle Code sections 14100 and 14103.

Section 12.101 - Driver Or Representative Fails To Appear. Specifies that the referee must still conduct the hearing, introduce and receive exhibits into evidence, question the

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officer if necessary, and prepare a decision.

Section 12.105 - Driver Or Representative Requests A Continuance. Specifies the referee may approve a continuance for a good reason. A request for a continuance of a formal hearing may be approved for "good cause" pursuant to the APA (Government Code section 11524) and Vehicle Code section 14112, but such a procedure is not provided for during informal hearings. Section 12.105 is a "regulation" when applied to informal hearings.

Section 12.109 -- Officer Fails to Appear. Specifies when to grant a continuance of the hearing if the officer fails to appear.

Section 12.113 - Driver Submits Written Evidence Instead of Appearing. Specifies for the driver the procedures for submitting written evidence. Specifies that the driver must submit the evidence before the hearing and that if the driver "does not appear at the hearing, he or she gives up or waives the right to appear."

Section 12.117 - Driver Requests Hearing Be Cancelled. Specifies that the cancellation request should be in writing, and if the request is received by telephone, the driver should confirm the request in writing within 10 days.

Section 12.121 - Credit After Cancellation. If a driver cancels a hearing or withdraws a hearing request, he or she may ask that the suspension or revocation begin right away. This section states that if the driver submits a valid license at the same time, the driver will receive credit for the number of days between surrendering his or her license and the date the driver receives proper notice of the suspension or revocation. The credit is always applied to the end of the suspension or revocation. Section 12.121 also lists other factors affecting credit. We were unable to locate any statutory or regulatory authority which allowed for this type of crediting.

Section 12.209 - Receiving Documents. This section specifies that all the evidence received during the hearing must be retained for six months, along with the hearing tape. It also provides for specific guidelines for presenting evidentiary documents by the hearing referee on behalf of the Department and the driver or the representative. The Department's policy that the hearing referee act as both the prosecutor and the decisionmaker is an underground regulation.

Section 12.213 - Hearing Testimony. This section states that the hearing procedure for receiving testimony will follow the formal pattern: direct examination, cross-examination, re-

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direct, and re-cross. This section is similar to the Peace Officer's Guide, part IV, which is discussed in the text of this Determination. For the same reasons we found part IV to be an underground regulation, we also find section 12.213 to be an underground regulation.

Section 12.217 -- Objections. Specifies when and how to rule on objections raised during the hearing. Gives examples of objections that are to be overruled.

Section 12.221 -- Stipulations. Specifies the criteria for acceptance of stipulations from a driver who is not represented by counsel.

Section 12.225 -- Using The Hearing Script. The hearing script is described as a "guide" to conduct an implied consent hearing. Section 12.225 specifically requires that the script be "[f]ollowed . . . at both formal and informal hearings." The script follows the required procedures for presenting evidence and testimony as stated in sections 12.209 and 12.213. The script is set out in section 12.229.

Section 12.765 -- Special Communication Problems. Specifies when an interpreter will be required in order for the officer to give a proper admonition pursuant to Vehicle Code section 23157 and when an interpreter is required during the implied consent hearing.

Section 12.953 -- Amount Of Time To Allow For First Void. This section states the informal rule "Fifteen minutes of unsuccessful effort clearly show[s] the driver's inability to take the chosen [urine] test." This interprets Vehicle Code section 23157 language -- "failure to complete."

- 24 Vehicle Code section 14112 provides in part that "[a]ll matters in a formal hearing not covered by [sections 14107-14112] shall be governed, . . . by the provisions of the Government Code relating to administrative hearings . . . [of the APA]."
- 25 Even though Vehicle Code section 14112 provides that "all matters in a formal hearing not covered by [the Vehicle Code] shall be governed [by the APA]," departmental hearings are controlled by the Vehicle Code provisions because the provisions specify hearing procedures. (See Lacy v. Orr (1969) 276 Cal.App.2d 198, 81 Cal.Rptr. 276; see also Fankhauser v. Orr (1968) 268 Cal.App.2d 418, 74 Cal.Rptr. 61 (APA administrative hearing provisions are not applicable to departmental informal hearings either).)
- 26 1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), California Administrative Notice Register 87, No. 42-Z, October 16, 1987; typewritten version, p. 13.

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version, p. 13.

- 27 See Goleta Valley Community Hospital v. State Department of Health Services (1983) 149 Cal.App.3d 1124, 197 Cal.Rptr. 294 (agency's issuance of a letter, by the agency's staff attorney to the chief hearing officer, "interpreting" agency regulations was itself a "regulation," which was required to comply with the APA before it could be adopted).
- 28 Vehicle Code section 13353 provides in part that:
- "(a) If any person refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23157, . . . the department shall (1) suspend the person's privilege to operate a motor vehicle for . . . six months, (2) revoke the persons's privilege . . . for . . . two years . . . , or (3) revoke the person's privilege . . . for . . . three years" [Emphasis added.]
- 29 Vehicle Code section 23157, subdivision (b) exempts hemophiliacs, and subdivision (c) exempts any person who has a heart condition and is using an anticoagulant under the direction of a licensed physician and surgeon.
- 30 Peace Officer's Guide to the Implied Consent Law, p. 1.
- 31 Id. at p. 27.
- 32 Id.
- 33 Id.
- 34 Made applicable to departmental hearings by Vehicle Code section 14112.
- 35 Ehrlich v. McConnell (1963) 214 Cal.App.2d 280, 287, 20 Cal.Rptr. 283.
- 36 This manner of receiving evidence during the hearing (set out in part IV) is also set out in Chapter 12 of the Manual, section 12.213. See note 23, supra.

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37 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning APA exceptions is contained in a number of previously issued OAL determinations. The Index of OAL

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Regulatory Determinations (available from OAL, (916) 323-6225) is a helpful guide for locating such information.