

Evaluation of CAC's Proposed Regulation Revision Concepts

The California Association of Criminalists (CAC) submitted a number of concepts for revisions to the Department of Health Services' Title 17 regulations pertaining to forensic and breath alcohol analysis. The following is the Food and Drug Laboratory Branch, Forensic Alcohol Program's evaluation of CAC's proposed revisions.

1) Clarification of the requirement for continuous observation of the subject prior to the collection of a breath sample.

CAC proposed an amendment to the regulations to more accurately define the requirements for continuous observation of the subject prior to collection of a breath sample. CAC cited a recent Supreme Court ruling that permitted an officer's observation of the subject while in the back of the patrol vehicle to be considered as continuous observation. CAC suggested new language to require "continuous observation (at the instrument)" or to separately define continuous observation as "to watch or pay attention to" the subject prior to administration of the breath test."

A review of recent court cases did not reveal any Supreme Court rulings, but there have been several appellate court decisions concerning the continuous observation requirement (e.g., *Manriquez v. Gourley*, 2003, *Taxara v. Gutierrez*, 2003, *Hernandez v. Gutierrez*, 2003, etc.). It would appear appropriate for the committee to seek a legal review of these decisions before attempting to revise the regulations here.

2) Two-minute separation between replicate breath tests

CAC proposed an amendment to require a two-minute separation between replicate breath tests.

It would appear that this amendment could be easily accommodated.

3) Requirement for duplicate tests in a periodic determination of accuracy with acceptable limits determined to three decimal places

CAC proposed an amendment to require that the tests of a reference sample for a periodic determination of accuracy be performed in duplicate and to also require that the acceptable limits for these tests be expressed to three decimal places (+/- 0.010 grams %).

It would appear that this amendment could be easily accommodated, however, the amendment should probably employ the language, "at least duplicate analyses" in order to accommodate those laboratories that currently employ more than two analyses of the reference samples. The Department has administratively required laboratories to employ three decimal place known alcohol concentrations and acceptable limits when determining the accuracy of the instruments.

4) Require laboratories to take corrective action following two failed attempts at a periodic determination of accuracy.

CAC proposed an amendment to require a laboratory to conduct an investigation anytime an instrument requires more than two "attempts" to pass an accuracy check. CAC claimed that laboratories sometimes test an instrument six times, "hunting" for the correct value.

It would appear that this amendment could be easily accommodated. However, it should be noted that the Department reviews records of a laboratory's periodic determinations of accuracy during each site inspection and has not observed the activity described by CAC. Moreover, in approving a laboratory's written descriptions of the procedures for conducting periodic determinations of accuracy, the Department requires the laboratories to describe a corrective action taken after just one failed accuracy determination.

5) Require laboratories to maintain records of instrument maintenance.

CAC proposed an amendment to require laboratories to maintain records of instrument maintenance.

It would appear that this amendment could be accommodated, however the regulations should describe in some detail the information that must be maintained. It should be noted that the California Association of Crime laboratory Directors also proposed an amendment requiring the retention of maintenance records, but this requirement would apparently apply to law enforcement agencies.

6) Allow laboratories to use "NIST-Traceable dry gas standards" without independently establishing the known alcohol concentration. Disallow the use of the wet bath simulators.

CAC proposed an amendment allow laboratories to use the manufacturer's stated concentration values for dry-gas calibrating units without independently determining the sample alcohol concentration. CAC also suggested that the committee consider disallowing the use of wet-bath calibrating units.

It would appear that the first proposed amendment could be accommodated, but the committee would need to define "NIST traceable reference standards." The California Association of Crime laboratory Directors proposed a similar amendment and the forensic alcohol program has provided a more thorough response here.

The proposal to disallow wet-bath calibrating units is probably not appropriate. These devices are approved by DOT and are commonly used by California laboratories. In some respects they hold advantages over the dry-gas devices in that they more closely "simulate" an actual breath sample.

7) Reduce the lower limit of the range of alcohol concentrations for the reference samples employed in a laboratory's quality control program and to periodically determine the accuracy of breath testing instruments to 0.08%.

CAC proposed amendments to reduce the lower limit of the range of alcohol concentrations for the reference samples used for quality control of forensic alcohol methods (current Section 1220.3) and to periodically determine the accuracy of breath testing instruments [current Section 1221.4.(a)(2)(A)]. These limits would be reduced from 0.10 grams% to 0.08 grams%.

It would appear that this amendment could be easily accommodated and is needed to bring the Department's regulations into conformance with Vehicle Code Sections 23152(b), 23153(b), 13353.2(a)(1), 23610(a)(3), etc., which have lowered the blood alcohol concentrations at which drivers may be prosecuted from 0.10 grams % to 0.08 grams %. Current Section 1220.1.(a)(1), which describes the performance requirements for a forensic

alcohol method should also be revised to state the new lower concentration limit.

8) Require the laboratories to maintain complete breath test records with production of error code messages.

CAC proposed amendments to require laboratories to maintain complete breath testing records including error code messages in order to provide a fully accurate representation of instrument status during the test.

It would appear that this amendment could be accommodated, however the regulations should probably describe in some detail the information that must be maintained.

9) Annotate Title 17 with the effective dates for all approved changes.

The current format of California Code of Regulations requires that each section include a summary of the history as well as a citation of the specific law that authorizes an agency to adopt regulations and a reference to the statute, court decision, or other provision of the law that is being implemented, interpreted, or made specific by the proposed regulation.

10) Revise the requirements for training of breath instrument operators to permit "optional remote training of officers with direct proficiency testing administered by the laboratory."

CAC proposed amendments to permit "optional remote training of officers with direct proficiency testing administered by the laboratory." It is not completely clear exactly what this means. However, it should be noted that the former *ad hoc* Advisory Committee on Alcohol Determination, a group which included a representative from CAC, considered a proposal to permit specially qualified law enforcement personnel (breath test operator supervisors) to train other officers, but only after the operator supervisor had received special advanced training provided by the forensic alcohol laboratory. Representatives from the laboratories on the *ad hoc* committee agreed to develop a standardized operator supervisor training course covering the core competencies required for supervising breath instrument operators. The laboratories never completed this project.

11) Revise the requirements for record retention from 3 years to either 5 years or 7 years.

CAC proposed an amendment to require laboratories to "maintain breath alcohol records" for 5 years or 7 years.

It would appear that this amendment could be easily accommodated. However, the record retention requirements would most likely apply to both forensic and breath alcohol analysis records.

12) Eliminate references to "licensed forensic alcohol laboratory"

It would appear that this amendment could be easily accommodated.