



CAL CHIEFS ANNUAL CONFERENCE

October 17-19, 2023 | Ontario, California





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Chapter 13: A Major EMS Initiative for CalChiefs

Disclaimer



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This presentation is for educational purposes only.

The statements during this presentation do not necessarily reflect the views of CalChiefs.

Do not rely on this presentation for legal advice.

Nothing in this presentation is intended to create an attorney-client relationship between you or your organization and me.

Remember that real problems are fact specific and complex.

Please ask hypothetical questions only.



Relevant Experience

CalChiefs v. Emergency Med. Svcs. Auth., No. 34-2019-80003163 (Sacramento Cnty. 2019)

- Successfully petitioned for writ of mandate invalidating, and commanding EMSA to cease using and enforcing, “underground regulations” interpreting and applying Health & Safety Code §§ 1797.201 and 1797.224.

Other relevant experience

- *United Nat'l Maint., Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002 (9th Cir. 2014)
 - Successfully defended local public entity against Sherman Act §§ 1 and 2 claims on state-action antitrust immunity grounds.
- *AmeriCare MedServices, Inc. v. City of Anaheim*, 735 F. App'x 473 (9th Cir. 2018)
 - Submitted amicus brief on behalf of CalChiefs in support of twelve Orange County cities’ successful assertion of state action antitrust immunity for providing exclusive ambulance services pursuant to Health & Safety Code § 1797.201.
- *CalChiefs v. Emergency Med. Svcs. Auth. et al.*, No.: RG18890846 (Alameda Cnty. 2018)
 - Successfully petitioned for writ of mandate invalidating anticompetitive specifications in EMSA-approved RFP seeking emergency ambulance providers for county’s Health & Safety Code § 1797.224 exclusive operating area.
- *S. San Joaquin County Fire Auth., v. San Joaquin County EMS Agency*, No. MSRA20-07 (Contra Costa Cnty. 2020)
 - Obtained a partial judgment in favor of city, fire district, and joint powers authority in litigation against county and LEMSA over their Health & Safety Code § 1797.201 rights and duties related to non-transport, first response EMS and the validity of certain LEMSA policies.
- *City of Oxnard v. County of Ventura, et al.*, No. 56-2021-00552428 (Ventura Cnty. 2021)
 - Represented city in litigation against county and LEMSA over city’s control of, and rights and duties related to, emergency ambulance services under Health & Safety Code § 1797.201.
- *Sonoma County Fire District, et al v. County of Sonoma, et al.*, No. SCV-269745 (Sonoma Cnty. 2021)
 - Obtained a favorable settlement regarding a county’s and LEMSA’s creation of a “grandfathered” exclusive operating area under Health & Safety Code § 1797.224 that infringed upon a fire district’s emergency ambulance service rights under Health & Safety Code § 1797.201.



Chapter 13: What is it?

EMSA's forthcoming regulations for planning, managing, and evaluating local (i.e., county or regional) EMS systems



EMS and Ambulance is a heavily regulated industry

- Federal level
 - Medicare
 - EMTALA
 - HIPAA
- State level
 - EMS Act
 - CHP permits and licenses
- Local level
 - EMS Act
 - Local permitting and licensing ordinances





State and Local Ambulance Regulation

EMS

- EMS Act
- Regulators
 - State: EMSA
 - Local: LEMSAs
 - 1797.201 Agencies (limited)

Ambulance Business

- Vehicle Code
- Regulators
 - State: CHP
 - Local: “Local authorities”



Chapter 13: Who and What?

Impacted Entities

- EMSA
- LEMSAs
- Counties
- Public EMS Providers
- Private EMS Providers
- Other EMS stakeholders

Subject Matter & Issues

- LEMSA development of local EMS plans
 - Other data or materials submitted to EMSA?
- EMSA review of local EMS plans
 - Scope of EMSA review
- Scope of LEMSA & EMSA control over EMS systems
 - Medical control
 - Operational control?
 - System roles and responsibilities
 - System requirements
- Rules and regulations for:
 - Section 1797.201 agency administration
 - Section 1797.224 EOAs
- Transport and non-transport EMS provider rights
- “General EMS administration”



Chapter 13: Why now?

What a long, strange trip it's been.

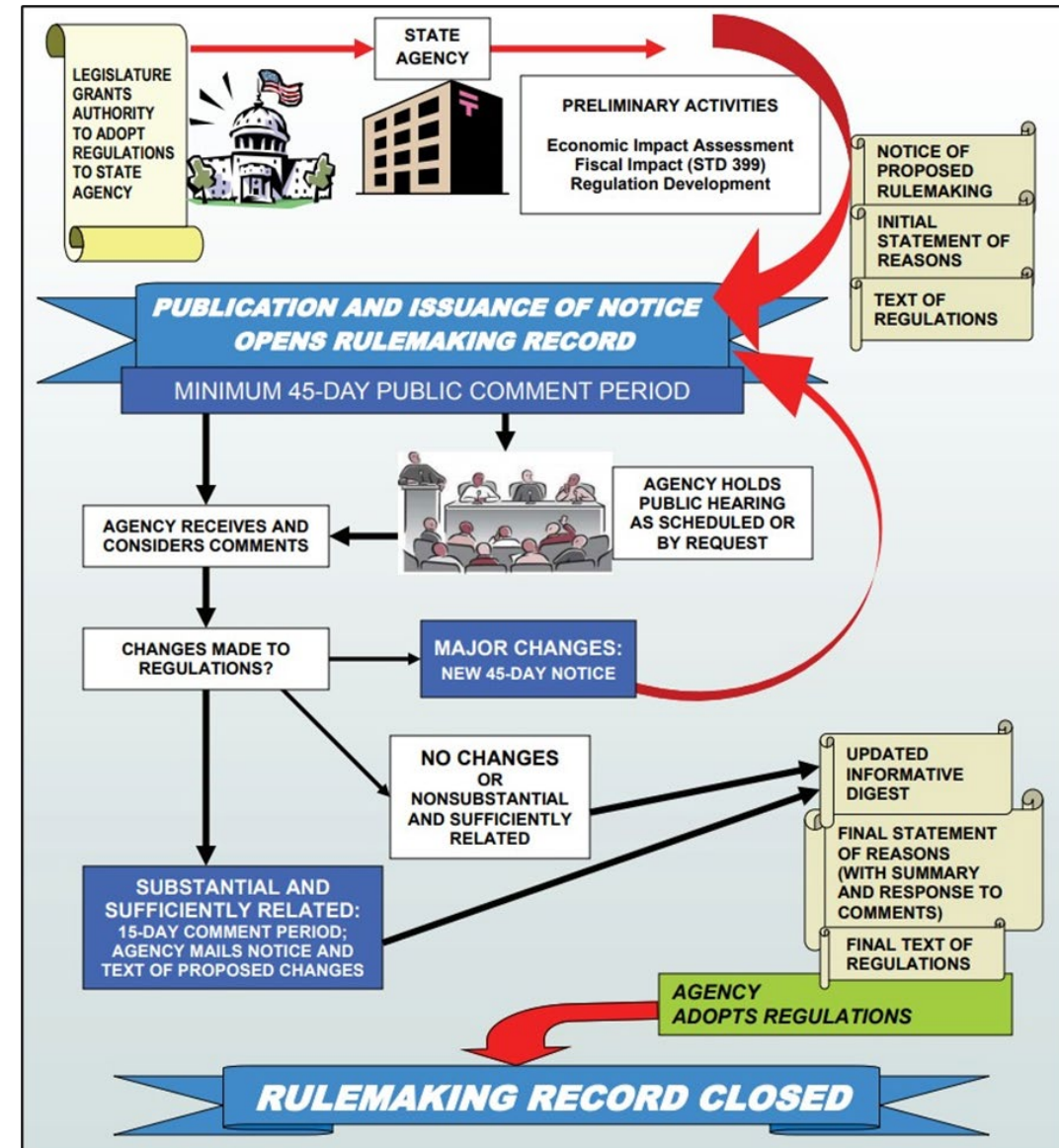


The Chapter 13 Process

EMSA must adopt regulations
Administrative Procedures Act

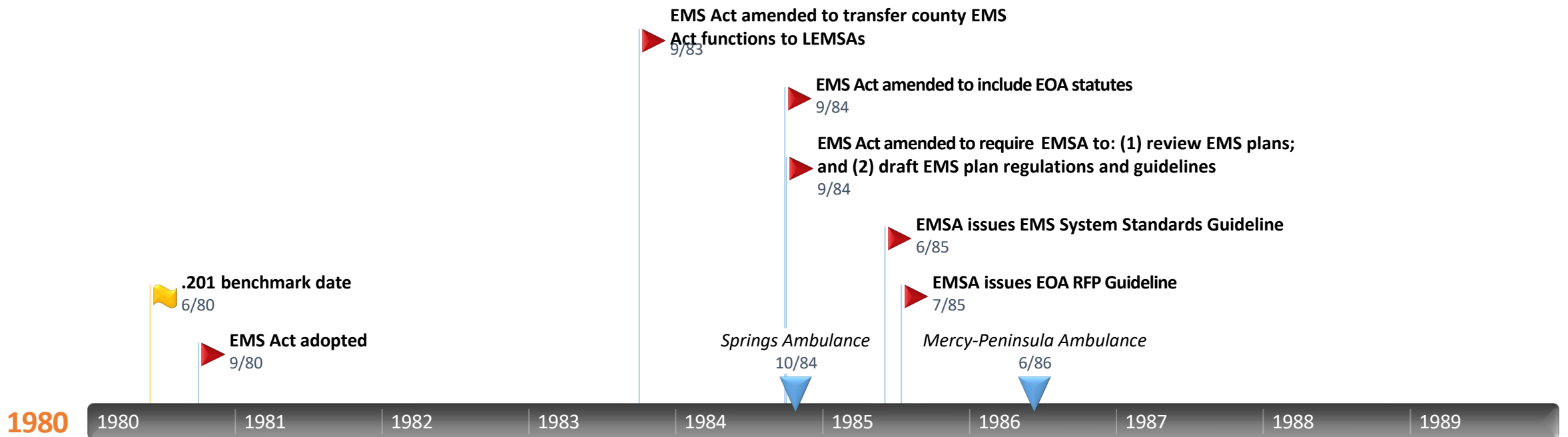
- Mandatory procedures for rulemaking
- Economic and fiscal impacts reviewed by Department of Finance
- Compliance with rulemaking standards reviewed by Office of Administrative Law

Regulations must also be approved
by EMS Commission



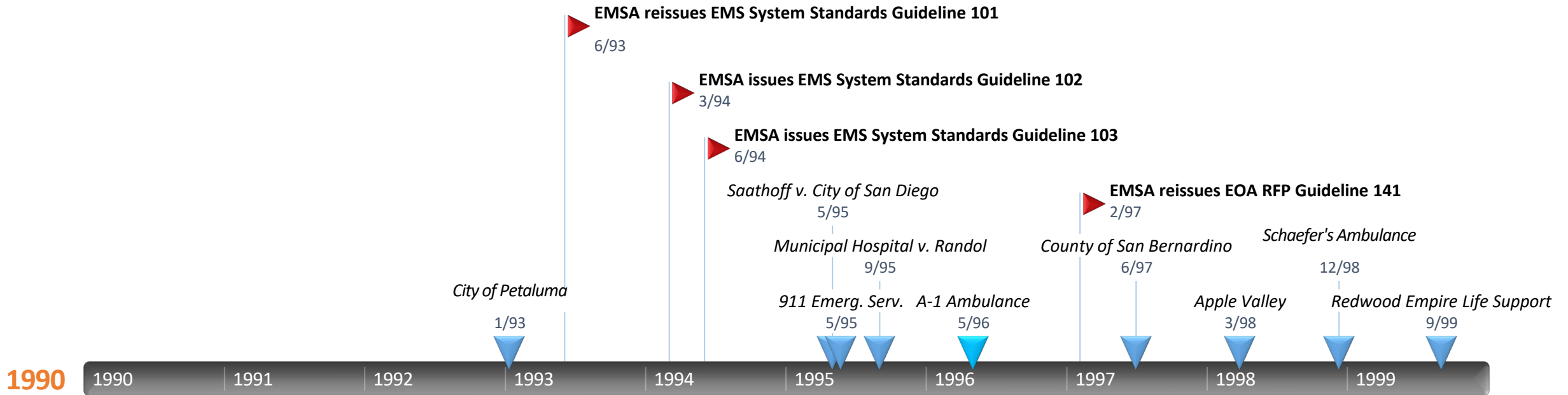


Chapter 13 Timeline: 1980-1989





Chapter 13 Timeline: 1990-1999



1990

1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999



EMSA adopts Guidelines instead of Chapter 13

The EMS Act requires EMSA to adopt “standards” or “minimum standards” in regulations that implement the EMS Act

From 1983 to 2010, EMSA did not adopt any regulations for EMS system plans, as required by the EMS Act

Instead, EMSA issued and/or used “guidelines” and policy and interpretation letters to LEMSAs

- EMS system and local EMS plan standards and requirements in EMSA Guidelines 101, 102, and 103
- Rules, criteria, and interpretations of 1797.201 and 1797.224 in EMSA Guidelines 141, 141B, and 310-01



What are regulations, guidelines, and underground regulations?

The APA defines “regulation” to mean “every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” Gov. Code § 11342.600

An “underground regulation” is “any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule” that is a “regulation” under the APA that a state agency did not properly adopt by using the mandatory process in the APA. CCR, tit. 1, § 250(a)

- Underground regulations are invalid and may not be enforced. *Morning Star Co. v. State Bd. of Equalization*, 38 Cal.4th 324, 333 (2006).

Difference between “regulations” and “guidelines”

- Regulations have the force of law
- Guidelines are suggestions, recommendations, or best practices
- An EMSA “guideline” is a “regulation” if EMSA enforces it like one. 86 Ops. Cal. Atty. Gen. 153 (2003)



Courts invalidate EMSA underground regulations and EMSA starts Chapter 13 process

County of Butte v. EMSA (2010)

- Court of Appeal invalidated EMSA's "scope and manner" criteria for "grandfathered" 224 EOAs as "underground regulations"

EMSA responded by trying to adopt the Chapter 13 Regulations in 2011 and 2012-2016, but continued using and enforcing

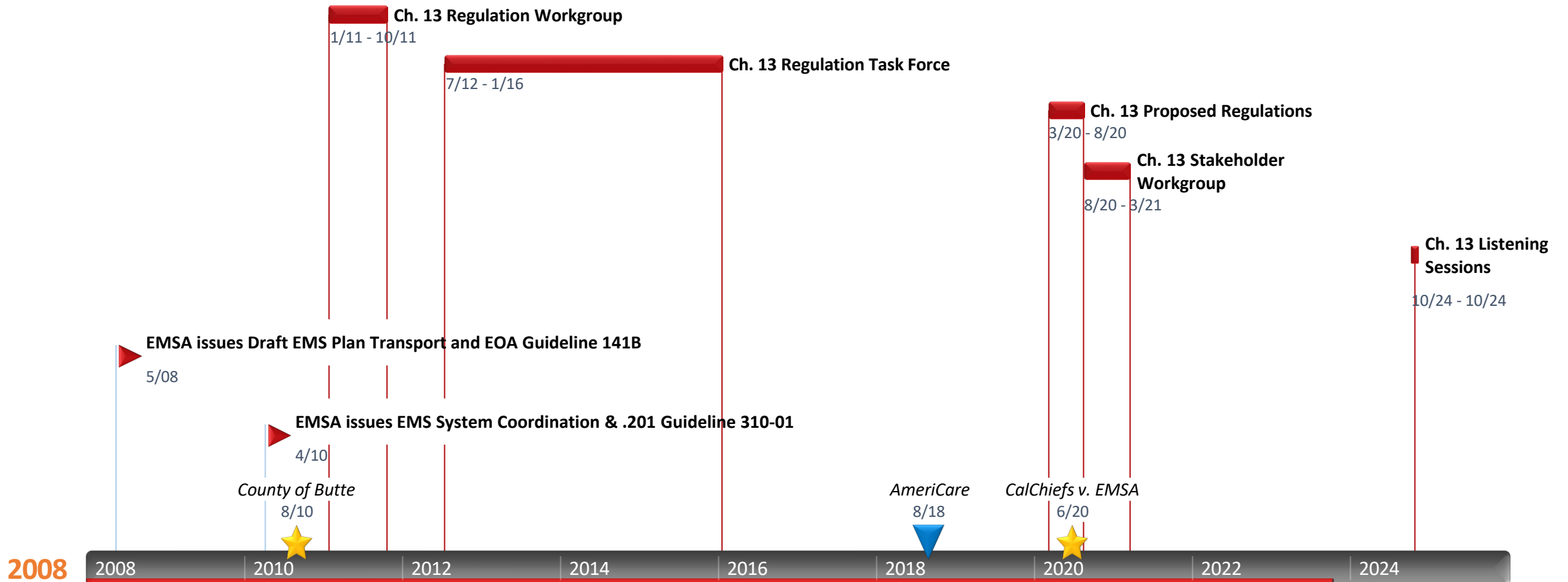
CalChiefs v. EMSA (2020)

- Sacramento Superior Court declared EMSA Guidelines 141, 141B, and 310-01 to be "underground regulations" and commanded EMSA to not use or enforce them until they are adopted properly under the APA

EMSA responded by trying to adopt the Chapter 13 Regulations in 2020 and 2020-2021



Chapter 13 Timeline: 2000-2024





EMSA limits CalChiefs' participation in Chapter 13

2011 Chapter 13 Regulatory Workgroup

- 16 meeting; CalChiefs representatives removed from 9 meetings

2012-2016 Chapter 13 Task Force

- Unwritten task force rules developed in 1st meeting, CalChiefs not in attendance because EMSA had not approved CalChiefs representative
- 30 meetings
- Suspended, then cancelled, after CalChiefs sued Backer, Smiley

2020 Draft Chapter 13 Regulations Published

- EMSA publishes draft regulations to moot CalChiefs' underground regulations lawsuit
 - EMSA unsuccessful: court uses materials in draft to find EMSA is enforcing underground regulations
- EMSA receives public comment from CalChiefs, other fire associations, other fire agencies
- EMSA withdraws 2020 draft Chapter 13 regulations

2020-2021 Chapter 13 Stakeholder Workgroup

- Each organization has 1 primary and 1 secondary representative to group
- EMSA removed CalChiefs' secondary (K. Henke) and CSFA's primary (S. Clough) and secondary (R. Ramirez)
- CalChiefs, CSFA boycotted, while FDAC not given zoom link for first meeting
- Workgroup met 5 times, reviewing and discussing draft

Chapter 13: Why so difficult?

The Chapter 13 workgroups and task forces in 2011, 2012-2016, and 2020-2021 did not progress past the second step on the diagram.

The proposed 2020 Chapter 13 regulations never made it past the first public comment period.

Possible explanations:

- EMSA's draft regulations were inconsistent with EMS Act and case law
- EMSA did not want to show the economic and fiscal impacts
- The process was hijacked by players on the various workgroups
- EMSA has limited bandwidth and was too busy with pandemic

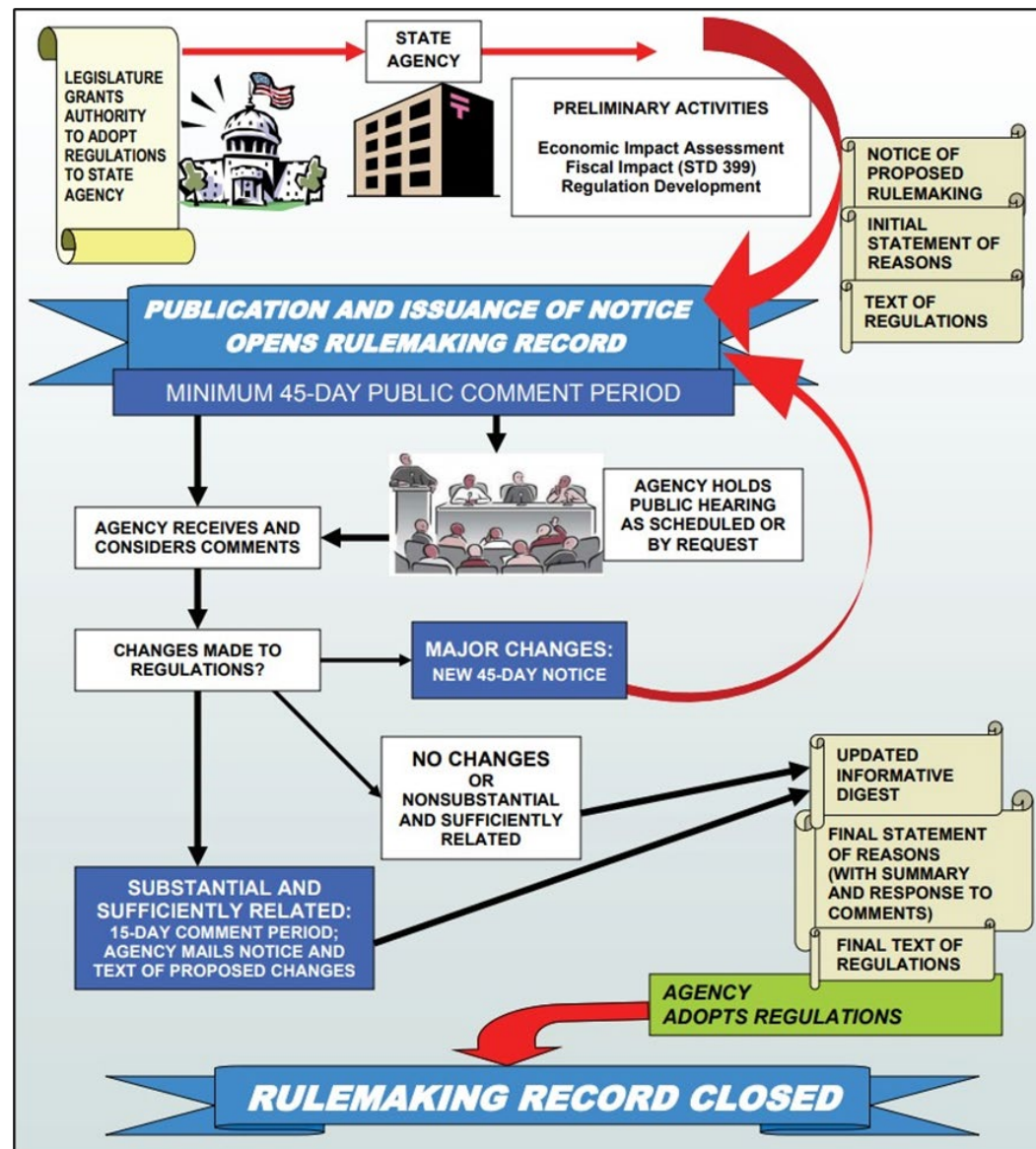
2011, 2012-16, and 2020-21 groups



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2020 draft



Chapter 13: Why should I care?

You might not be interested in Chapter 13, but Chapter 13 is interested in you



The Chapter 13 regulations will impact your EMS operations

Reasons why you need to be stay on top of Chapter 13:

- Poorly drafted regulations lead to litigation
- Massive authority granted LEMSAs and EMSA in drafting and reviewing EMS plans
- Earlier Chapter 13 drafts impacted both transport *and* non-transport EMS
- Binding interpretations of EMS Act, including 1797.201 and 1797.224
- No participation in the EMS plan process
- EMS Commission's roles and responsibilities limited and not defined



Poorly drafted regulations lead to litigation

- Poorly drafted regulations lead to litigation
 - EMSA reissued or issued Guidelines 101, 102, 103 and 141 in 1993-1994 and 1997
 - Resulted in ambulance-related litigation throughout 1990s, including 8 appellate decisions
- Example: 2020 draft § 100450.48(a)(10)(D) required local EMS plans to “include a listing of response and transportation providers . . . that have been integrated into an EMS system”
 - Integrated not defined and some interpret an “integrated” public provider to mean it does not qualify for 1797.201
 - If the LEMSA identifies your agency in the local EMS plan, did the LEMSA just determine that your agency no longer qualifies for 1797.201?
- Example: 2020 draft § 100450.59(c) required LEMSAs to submit Ambulance Zone Summary (AZS) forms for each area in the system
 - AZS forms are limited to non-exclusive areas or 1797.224 EOAs
 - If the AZS form identifies a 1797.201 jurisdiction as “non-exclusive,” is it binding?



Scope of LEMSA and EMSA authority

Earlier drafts of Chapter 13 purported give LEMSAs broad, unchecked, and potentially unlawful authority over EMS system and EMS providers, including the power to:

- Authorize, and assign roles to, EMS providers (2020 Draft § 100450.54(c), (f)(2));
- Determine whether a city or fire district qualifies for 1797.201 (2020 Draft §§ 100450.54(f)(4), 100450.90);
- Establish service areas, including EMS types and levels, and system status management plans for entire EMS system (2020 Draft §§ 100450.54(a), (b), (i));
- Define the scope of operations for EMS providers, including developing new types of and levels of exclusive services in EOAs (2020 Draft §§ 100450.59(c)(5)(G)); and
- Ignore or overrule the results of LAFCO Act changes of organization and reorganizations (2020 Draft §§ 100450.91(a).

Earlier drafts of Chapter 13 also purported give EMSA ability to approve or disapprove all the above, regardless of whether it has that power under the EMS Act.



Impact to Transport and Non-Transport EMS

Transport EMS:

- Establish transport provider's service areas and types and levels of services "based on community needs," "utilization of appropriate resources," and "optimal system design." (2020 Draft § 100450.54(a), (f), (f)(1)).

Transport and non-transport EMS:

- "Develop response time standards for emergency medical responses to effectively meet the needs of the persons served. Emergency medical service areas or subareas shall be designated, and response times established, for urban, rural, and wilderness areas as appropriate to the LEMSA's jurisdiction." (2020 Draft §§ 100450.54(e)).
- Example: in 2017, the City of San Diego Independent Budget Analyst determined that increasing SD Fire & Rescue's non-transport EMS 7:30 minute fractile response time from 74.7% to 90% would require one-time capital investment of \$91M and new annual operating costs of at least \$18.7M.

In other words, earlier versions of Chapter 13 would have given LEMSAs effective control over your agencies' transport and non-transport EMS and budgets.



Binding Interpretations of EMS Act

Regulations are crucial for interpreting ambiguous statutes, and are particularly need for EMS Act, example 1:

- LEMSAs create a type of EOAs under Section 1797.224 using a “competitive process for selecting providers and determining the scope of their operations,” which must be “held at periodic intervals.”
- But the EMS Act does not define key terms in the statute, so EMSA defines them as follows:
 - “Competitive process” means a “request for proposals” approved by EMSA to select EOA providers (2020 Draft § 100450(h)).
 - “Scope of operations” means “the range of services identified by the LEMSA in a local EMS plan that are being furnished by each provider of ground ambulance or EMS aircraft in an EMS area or subarea that has been designated as an exclusive operating area with or without a competitive process, or a non-exclusive area.” (2020 Draft § 100450(dd)).
 - “Periodic intervals” means “the timeframe between competitive processes established by a LEMSA as part of an EMS plan,” which “shall not exceed ten (10) years except when . . . A LEMSA has made a substantial investment of system reconfiguration that
- Agree or disagree, you’re stuck with these definitions when they are finally adopted



Binding Interpretations of EMS Act, cont'd

Regulations are crucial for interpreting ambiguous statutes, and are particularly need for EMS Act, example 2:

- In the draft Chapter 13 regulations, EMSA tries to fill gaps in 1797.201 as follows:
 - “A LEMSA shall identify all cities and fire districts administering prehospital EMS that contracted for, or provided, as of June 1, 1980, ambulance services, ALS, or LALS pursuant to [1797.201].” (2020 Draft § 100450.90(a)).
 - If a 1797.201 city or fire district did not provide non-transport ALS or LALS on June 1, 1980, the LEMSA must approve it to provide those services, and the city or fire district must satisfy the LEMSA’s requirements for those services and enter an agreement with the LEMSA “directly for the provision of [ALS or LALS] services.” (2020 Draft § 100450.90(e)(2), (3)).
 - If a 1797.201 city or fire district contracted for or provided emergency ambulance services as of June 1, 1980, those services can be exclusive only if the LEMSA creates a “grandfathered” EOA for it, the city or fire district requests and agreement with the LEMSA, and the LEMSA “may allow for the continued administration of prehospital EMS by the city or fire district.” (2020 Draft § 100450.90(d), (d), (d)(2), (d)(4)).
- This is contrary to court and AG opinions, which say
 - 1797.201 gives a city or fire district that contracted for or provided, as of June 1, 1980, prehospital EMS, the right and duty to continue contracting for, providing, and administering such prehospital EMS, without from contravention by the county or the LEMSA
 - 1797.201 cities and fire districts may increase their level of service from BLS to LALS or ALS without entering an agreement with the county or LEMSA
 - The city or fire district retains its 1797.201 rights and duties until it requests and enters an agreement with the county “regarding the provision of prehospital EMS,” which concedes it authority to the county.
- Agree or disagree, you’re stuck with these definitions when they are finally adopted



The EMS plan process: no participation or oversight

EMSA's current and draft Chapter 13 regulations do not provide a role in the LEMSAs' process for developing EMS plans for:

- Public or private EMS providers
- Other EMS system stakeholders
- Local governments (e.g., cities, fire districts, other special districts)
- Emergency Medical Care Committees
- Counties (including Boards of Supervisors)

Under EMSA's current and draft Chapter 13 regulations, only the LEMSA participates in EMS plan reviews and appeals

What this means:

- No public participation
- No elected official oversight
- No due process for entities whose rights may be affected



The EMS Commission's roles and responsibilities

Under the EMS Act, the EMS Commission:

- Reviews and approves EMSA regulations, guidelines, and standards
- Advises EMSA on data collection, EMS & facilities assessments, EMS system components
- Recommends development and future direction of EMS in state
- Hears appeals of EMSA denials of local EMS plans and approve or overrule denial

Under EMSA's current and draft Chapter 13 regulations:

- A LEMSA may appeal EMS plan disapproval, suspension, or revocation to EMS Commission
- An ALJ hears appeal and recommends EMS Commission approve or overrule denial
- The EMS Commission can: (a) adopt, (b) not adopt, or (c) return ALJ recommendation for rehearing

Otherwise, no formal rules or regulations exist for EMS Commission

Chapter 13: What's next?

It's coming, but we don't really know what it will look like



EMSA restarts Chapter 13 process

- 03/2023—EMSA reports to EMS Commission that it is reviewing all comments to prior Chapter 13 draft and developing a new Chapter 13 draft for “review” by Q2 2023
- 06/2023—EMSA reports to EMS Commission that it will convene a new Chapter 13 workgroup because it cannot obtain all the information it needs using the regular APA public comment process
- 07/2023—EMSA asks CalChiefs to appoint two representatives to the new workgroup
- 09/2023—EMSA reports to EMS Commission that it will hold “listening sessions” with key stakeholders to understand stakeholder’s history with Chapter 13, proposed ideas for Chapter 13, and input regarding ideas
- 10/2023—EMSA holds listening sessions during October 2023



CalChiefs' Chapter 13 activities so far

- 07/11/2023—CalChiefs forms internal Chapter 13 group
 - Chiefs Hartwig and Peterson appointed as CalChiefs reps to EMSA workgroup
 - Ray Ramirez and Andrew Schouten to support
- 10/11/2023—CalChiefs' "listening session" with EMSA
 - Positive meeting, discussion of key issues for fire service
 - EMSA unsure of next steps
 - Draft Chapter 13 regulations are not ready
 - No scheduled workgroup meetings—yet
 - May hold additional "listening sessions"

Chapter 13: What do I do?

Get involved and stay engaged



What you should be doing

- Stay engaged
 - Review 2020 draft Chapter 13 regulations
 - Note: we do not know if EMSA will reissue or start fresh
- Brief governing bodies and EMCC and keep them updated
 - Public opposition from governing bodies was key to defeating 2020 draft
- Work with and through your CalChiefs sections
 - Raise questions
 - Report what you're hearing from LEMSA, system stakeholders
 - Develop and share ideas and identify concerns
 - Don't worry about language—focus on issues, facts, examples, and outcomes
 - Sections will then pass along information to CalChiefs e-Board & Chapter 13 group
- Educate and cooperate with system stakeholders
 - Keep open mind
 - Minimize gossip, rumor, and speculation
 - Necessary to prevent misinformation and misunderstanding



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Questions?



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