

*KERN COUNTY AMBULANCE ASSOCIATION*  
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**Via Electroni Mail and Fed-Ex Delivery**

California EMS Authority  
1930 9<sup>th</sup> Street  
Sacramento, California 95811  
Attn: Tom McGinnis, Transportation Coordinator  
[tom.mcginis@emsa.ca.gov](mailto:tom.mcginis@emsa.ca.gov)

**Re: Kern County Ambulance Association's Comments On Proposed Amendments To Review Criteria and Policy for Transportation and Exclusive Operating Area Components of EMS Plan Guideline (# 141)**

Dear Mr. McGinnis:

The Kern County Ambulance Association ("KCAA") hereby provides its comments regarding the EMS Authority's ("EMSA") proposed "Review Criteria and Policy for Transportation and Exclusive Operating Area Components of the EMS Plan" (hereafter, the "Review Criteria").

**I. EMSA Has Not Identified Sufficient Grounds For Seeking To Impose The Extreme Changes Called For By The Review Criteria.**

**A. Historically EMSA Has Performed A Limited Role In The Development Of Local Transportation Plans.**

EMSA previously developed and issued *EMS Systems Standards and Guidelines* (EMSA # 101) and *Competitive Process for Creating Exclusive Operating Areas* (EMSA # 141). Both represent a decentralized approach that relies on counties to appropriately develop components of their emergency medical systems. They provide for EMSA to exercise a limited role in the development of local transportation plans.

The process for developing and implementing local EMS plans, and the creation of exclusive operating areas, has operated relatively smoothly as a result of this decentralized system. Historically, EMSA has respected the important economic role that exclusive operating areas have served in delivering emergency care that is high-quality and efficient. Over the ensuing thirty years since enactment of the EMS Act EMSA appropriately has refrained from issuing mandatory review criteria for transportation and exclusive operating area components of EMS plans.

Now, more than thirty years after enactment of the Act, EMSA seeks to issue mandatory standards that go far beyond its previous guidelines. The Review Criteria propose numerous changes to, and impose new requirements on, transportation planning and exclusive operating

areas that do not have any statutory support. According to the Review Criteria, these extreme changes are “intended to provide technical assistance to LEMSAs in developing and updating their EMS Transportation Plans, establishing and implementing ambulance operating areas or zones, and clarifying the Health and Safety Code sections relevant to EMS transportation.” (Section I.A, page 1, lines 24-28.) However, as will be shown throughout this letter, the Review Criteria do far more than just provide “technical assistance” to local EMS agencies. To the contrary, this document exhibits a never-before seen attempt by EMSA to overstep its statutory authority into nearly every facet of transportation planning. EMSA appears to justify the need for this additional “technical assistance” out of some overriding concern to ensure compliance with federal antitrust law. This is in stark contrast to the legal reality that state action immunity is implemented and conferred under federal anti-trust by the local EMS agencies. Thus, KCAA has serious concerns that through the Review Criteria, EMSA is attempting to devise a role for itself that is legally and practically unjustified and unnecessary.

**B. EMSA Does Not Have Authority To Write Mandatory Guidelines That Are Inconsistent With The Powers And Duties Granted To Local EMS Agencies.**

The California Supreme Court has taken the approach that local EMS agencies are the epicenter of the two-tiered system of regulating prehospital EMS services in California. (*County of San Bernardino v. City of San Bernardino*, 15 Cal.4th 909 (1997).) EMSA has a coordination responsibility, which it accomplishes in part by developing guidelines. However, EMSA’s guidelines must be consistent with local EMS agencies’ powers and duties to plan and implement an EMS system for its jurisdiction. The Review Criteria propose “guidelines” which severely interfere with local EMS agencies’ ability to control and predict the way in which EMS is delivered.

It is apparent that EMSA intends the Review Criteria to be more than mere “planning and implementation guidelines” pursuant to Health and Safety Code § 1797.103. EMSA admits as much in the statement that the Review Criteria are intended in part to “clarify” the Health and Safety Code sections relevant to EMS transportation. (Section I.A, page 1, lines 24-28.) However, guidelines are not the proper forum for EMSA to provide its interpretations of the EMS Act. EMSA’s efforts to clarify the EMS Act through these Review Criteria too often results in entirely new policies which have no statutory support. EMSA has not been delegated the responsibility to implement new policies with respect to EMS transportation planning and implementation. The legislative process is the only appropriate forum for EMSA to seek the policy changes reflected in the Review Criteria. Accordingly, provisions in the Review Criteria which purport to “clarify” the meaning of provisions in the EMS Act should be deleted.

Furthermore, the Review Criteria seeks to impose a number of mandatory requirements that would be legally enforceable only if they were promulgated as formal rules and regulations. EMSA “guidelines” are meant to provide guidance on broad principles of planning and implementing EMS systems. In contrast, the Review Criteria contain numerous and detailed mandatory criteria on nearly every level of developing and implementing transportation plans, thus going far beyond the limited function of guidelines. EMSA must therefore follow the formal process for adopting the Review Criteria as rules and regulations. (*See* Health & Safety Code § 1797.107.)

**C. The Review Criteria Mistakenly Assumes That State Action Immunity To The Federal Antitrust Laws Is Something For EMSA To Confer By Its Ongoing Direction Of Exclusive Operating Areas.**

The Review Criteria contain numerous references to the federal antitrust laws, and particularly the doctrine known as "state action immunity." (See Section I.E, pages 2-3; Section III.D, page 9, line 15; Section IV.C, page 15, lines 30-31; Section IV.D, page 18, lines 15-16.) The Review Criteria express the view that certain requirements proposed in the document, such as EMSA's approval of exclusive operating area designations, are necessary for state action immunity protection to apply. Specifically, at Section I.E, page 3, lines 6-8, the Review Criteria states: "Based upon the *Boulder* Decision, cities and counties maybe [sic] exempt for activities that are specifically authorized by the state and that are subject to active state oversight." As more fully explained, EMSA should delete this sentence, because neither the "Boulder Decision" (*Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982)), nor any subsequent authority holds that state action immunity applies to local governments only when the state agency is *actively* supervising the legislatively-sanctioned activities in circumstances involving "unilateral" governmental restraints such as that presented here under the EMS Act.

EMSA places unwarranted justification for the new Guidelines on the so-called "active state supervision" requirement announced thirty years ago by the Supreme Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980) (*Midcal*), reiterated in *Boulder*. Subsequent to the *Boulder* decision, the Supreme Court limited the applicability of the *Midcal* test when it clarified in *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986) that some types of regulation are entirely immune from the "active state supervision" analysis required under *Midcal* when the regulation merely imposes a "unilateral" restraint that causes "a coercive effect upon (private) parties who must obey the law."

The effect of the rule announced in *Fisher* has been more fully explored in the recent decision of the Ninth Circuit Court of Appeals in *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 887-892 (9<sup>th</sup> Cir.2008). As explained by the Court of Appeals, a "unilateral" restraint is one in which there is no degree of discretion delegated to private parties who are obligated to obey the law and the anticompetitive effects of the regulatory scheme is part-and-parcel of the legally imposed licensing restrictions of the governmental body, citing *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560 (1<sup>st</sup> Cir.1999). In other words, "the anti-competitive effect is not brought about by collusion or private action, but by legislative choice." In such circumstances, the requirement of active state supervision is displaced ("preempted") due to the absence of "concerted" private action under Section 1 of the Sherman Act. *Costco* 522 F.3d at 888 ("once we determine that a restraint is unilaterally imposed by the state as sovereign, *Parker* immunity applies without further inquiry").

Similarly, in the present circumstance, once the local EMS agency determination has been made regarding the licensing designation of an exclusive operating area under the EMS

Act, "there is no degree of discretion delegated to private parties by the ban (on other providers); any anticompetitive effect is complete once the band is imposed..." *Costco*, 522 F.3d at 891.

Therefore, EMSA should delete the following sections from the Review Criteria, all of which incorrectly assume that only EMSA can provide state action immunity: Section III.D, page 9, line 15; Section IV.C, page 15, lines 30-31; and Section IV.D, page 18, lines 15-16. Whether or not state action immunity applies to a local transportation plan's creation of exclusive operating areas is not something for EMSA to decide, confer or take away. In addition, Section I.A, page 1, line 20 of the Review Criteria cites to Health and Safety Code section 1797.6 as one of the provisions which defines the EMSA's role. The reference to section 1797.6 should be deleted. This provision does not grant EMSA any authority or give it an ongoing supervisory power to oversee or restrain the legislation's anticompetitive effects. Rather, it is a statement of legislative intent.

#### **D. Most Of The Review Criteria's "Definitions" Should Be Omitted.**

Section II of the Review Criteria, at pages 4 and 5, sets forth proposed "Definitions." The following should be omitted because they are duplicative of definitions in the EMS Act, and therefore unnecessary, and/or they conflict with the EMS Act and the way it has been interpreted by courts: "Advanced Life Support" (Section II, page 4, lines 3-5); "Basic Life Support" (Section II, page 4, lines 10-13); "Economic Distribution of Calls" (Section II, page 4, lines 25-31); "Emergency Medical Services (EMS)" (Section II, page 4, lines 33-39); "Exclusive Operating Area (EOA)" (Section II, page 4, lines 41-45); "Exclusive without a Competitive Process" (Section II, page 5, lines 1-6); "Limited Advanced Life Support" (Section II, page 5, lines 14-17); "Manner and Scope" (Section II, page 5, lines 23-26); "Periodic Interval" (Section II, page 5, lines 31-34).

#### **II. The Review Criteria Exceeds EMSA's Approval Power Over Transportation Plans.**

EMSA should delete those provisions in Section III of the Review Criteria which require local EMS agencies to submit separate local EMS plan updates whenever there are any changes to the local transportation system. (Section III.A, page 6, lines 14-16; Section III.C, page 8, lines 3-25; Section III.D, page 9, lines 12-15.) The EMS Act does not require or contemplate the submission of plan "updates" whenever the local transportation system experiences a change. The EMS Act only requires local EMS agencies to "annually submit an emergency medical services plan for the EMS area to the authority, according to EMS Systems, Standards, and Guidelines established by the authority."

For the following reasons, none of the "changes" that EMSA believes should be submitted in the form of plan updates require EMSA's approval:

- Intent to issue a competitive process (Section III.C, page 8, line 8) – Local EMS agencies are not statutorily required to submit a plan update every time they "intend" to issue a competitive process. They have an obligation to submit their competitive process as part of the *annual* plan submission only where they have "*elected*" to create an exclusive operating area through the competitive process. (Health & Safety Code § 1797.224.)

- A new provider begins service or a current provider terminates operations (Section III.C, page 8, lines 9-10) – There is no statutory authority for obtaining EMSA approval for such a change, and the requirement would be impractical and burdensome.
- Modifications to manner and scope of service provided in an exclusive operating area (Section III.C, page 8, lines 11-12) – The EMS Act does not give EMSA any control or approval power over the “grandfathering” process, and therefore EMSA has no right to be updated with respect to “modifications” to EMSA’s subjective set of “manner and scope” criteria. Furthermore, it is already settled that “manner and scope” in which services have been provided equates to the type of service, not the criteria proposed by EMSA. (*See County of San Bernardino v. City of San Bernardino*, 15 Cal.4th 909, 931-32 (1997).)
- Changes to the status of an area, from non-exclusive to exclusive or vice versa (Section III.D, page 9, lines 12-15) (Section IV.B, page 11, lines 18-20) – The EMS Act does not give EMSA the authority to determine if an operating area can be exclusive or non-exclusive. That authority is intended to be exercised at the county level. EMSA’s disapproval of a local plan does not dictate whether the area is exclusive or non-exclusive, or whether state action immunity applies.

In addition, please revise Section III.D, page 9, lines 8-10 of the Review Criteria to provide as follows:

**Exceptions:** A LEMSA may **not** create an exclusive area without a competitive process if it has previously selected a provider and executed a contract with said provider as a result of electing to create an exclusive area through the competitive process.

The revision is necessary to ensure that local EMS agencies have the ability to create an exclusive operating area through grandfathering when doing so will not jeopardize any contracts or the provision of services.

### **III. The Review Criteria Purports To Give EMSA Approval Power Over The "Grandfathering" Process That It Legally Does Not Possess.**

Many portions of the Review Criteria seek to inappropriately establish a role for EMSA in overseeing and controlling local EMS agencies’ ability to create exclusive operating areas through the so-called "grandfathering" process. (Section II, page 5, lines 31-34; Section III.A, page 7, lines 11-14; Section III.C, page 8, lines 11-25; Section IV.C, page 13, line 9 through page 14, line 26, and page 15, lines 16-31.) These provisions should be deleted.

#### **A. The EMS Act Gives Local EMS Agencies The Exclusive Authority Over The Creation Of Exclusive Operating Areas Via Grandfathering.**

California counties have historically relied on this provision to create exclusive operating areas through grandfathering with virtually no involvement by EMSA. In accordance with the

clear statutory language, determining change in manner and scope and uninterrupted service since 1981 has always been accomplished exclusively at the county level. The only role that EMSA has is to approve or disapprove of the *competitive process* that a local EMS agency develops for the creation of exclusive operating area through that mechanism. (Health & Safety Code § 1797.224.) EMSA cannot derive power over the appropriateness of grandfathering from Health & Safety Code section 1797.105, or any other provision of the EMS Act. Nor does EMSA have the ability to “withdraw” approval over grandfathered exclusive operating areas, because there is no approval power in the first instance for EMSA to withdraw.

**B. EMSA Lacks Authority To Establish "Manner and Scope" Criteria.**

EMSA should delete the Review Criteria’s definitions of “Manner and Scope” contained at Section II, page 5, lines 23-26; Section III.C, page 8, lines 11-25, and Section IV.C., page 13, line 1 through page 14, line 26. Under the EMS Act the central role to decide local EMS issues is given to local EMS agencies. They are well-positioned to determine whether a local plan will continue the use of existing providers operating within a local EMS area in the "manner and scope" in which the services have been provided without interruption since January 1, 1981.

Furthermore, the courts have already addressed the question of what is encompassed by "manner and scope," and have resolved it by concluding that “manner and scope” simply equates with the type of services being provided. (*See County of San Bernardino v. City of San Bernardino*, 15 Cal.4th 909, 931-32 (1997); *City of Petaluma v. County of Sonoma*, 12 Cal.App.4th 1239, 1247 (1993).)

**C. EMSA Cannot Ensure State Action Immunity By Seeking To Control The “Grandfathering” Process.**

Section IV.C, page 15, lines 30-31 of the Review Criteria states: “Once the EMS Authority has withdrawn its approval, the EMS Authority may not support a LEMSA involved in an EOA antitrust action.” This statement should be deleted, because state action immunity is not something that EMSA can provide or oversee. EMSA’s apparent desire to police the anticompetitive effects of grandfathering, and “open” previously closed counties up to competition by “withdrawing” its approval, could result in counties losing providers who have provided quality and cost-efficient services for decades. KCAA is deeply concerned that this will jeopardize not only the interests of its members, but also the interests of the residents who are served by its members.

**IV. EMSA’s Proposed Ten-Year Interval Requirement For The Competitive Process Is Contrary To The EMS Act, Is Unnecessary, And Ignores The Operational Realities Of LEMSAs And Providers.**

EMSA should delete those portions of the Review Criteria which require local EMS agencies to hold competitive bidding every ten years. (Section II, page 5, lines 31-34; Section IV.D, page 17, lines 3-4; Section IV.D, page 17, lines 28-40; Section V.H, page 24, lines 19-20, 24).

**A. The EMS Act Requires That Local EMS Agencies Determine The Periodic Intervals For Holding A Competitive Process.**

Neither Health and Safety Code section 1797.224, nor any other provision of the EMS Act, requires that ten years be the outer limit for periodically holding a competitive process. Had the Legislature intended a specific number of years for the periodic interval, it would have provided for such in the language of the statute. Thus, the plain language of the statute envisions that local EMS agencies will have the discretion and latitude to determine a "periodic interval" for their local plan. In contrast to local EMS agencies' expansive role, the role envisioned for the EMSA with respect to the creation and designation of exclusive operating areas and providers is an extremely narrow one.

EMSA clearly recognizes that the EMS Act does not require or even authorize EMSA to define an acceptable interval for use of a competitive process by a local EMS agency. The state *EMS System Standards and Guidelines* published in 1993 contain no definitions and other standards purporting to establish an acceptable interval for use of a "competitive process" by a local EMS agency or any other guidelines regarding RFP standards as used by a local EMS agencies. The state *Competitive Process for Creating Exclusive Operating Areas* published in 1997 states that the periodic interval should be established by local EMS agency policy, and makes no mention of an outer limit for an acceptable interval.

EMSA's reliance on the views of Assemblyman Bronzan is misplaced and improper. It is a well-established rule of statutory construction that the motives or understandings of individual legislators who drafted or authored the bill do not supplant the language of the enacted legislation.

**B. A Competitive Process Does Not Need To Be Held Every Ten Years For State Action Immunity To Apply.**

At Section IV.D, page 17, lines 31-40 of the Review Criteria, EMSA attempts to justify its arbitrary imposition of a ten-year interval by arguing that a periodic interval of more than ten years may result in an "anticompetitive environment." The Review Criteria goes on to provide that "[o]nce the EMS Authority has withdrawn its approval, the EMS Authority may not support the LEMSA involved in an EOA antitrust action." (Section IV.D, page 18, lines 15-16.) Both above-referenced provisions should be deleted from the Review Criteria.

State action immunity applies to the creation of exclusive operating areas by local EMS agencies even without EMSA imposing arbitrary requirements that do not appear in the EMS Act itself. State action immunity is not something that EMSA can confer or take away. EMSA has no legal ability or duty to ensure that a local EMS agency or its exclusive providers are not engaging in anti-competitive conduct. EMSA's apparent desire to police the anticompetitive effects of exclusive operating areas could result in counties losing well-established providers who have provided quality and cost-efficient services pursuant to exclusive contracts. KCAA is deeply concerned that this will jeopardize not only the interests of its members, but also the interests of the residents who are served by its members.

Moreover, EMSA has not offered any empirical studies or expert opinions to show why a ten-year interval for the competitive process is necessary to avoid having an exclusive operating area considered anticompetitive. Without such empirical support, EMSA's selection of ten years for the periodic interval is arbitrary and nonsensical. The Legislature's intent was not to avoid

an anticompetitive environment, but rather to achieve state action immunity for the anticompetitive environment naturally engendered by the creation of exclusive operating areas. It does not matter what period of time is viewed as being anticompetitive so long as the local plan calls for a competitive process held at *some* periodic interval. That is all the EMS Act requires for state action immunity to apply.

**C. Requiring A Finite Maximum Period For Exclusive Operating Area Contracts Ignores The Operational Realities Of Providing Emergency Medical Services At The Local Level.**

With its proposed ten-year maximum period for exclusive operating area contracts, the EMSA would seek to impose a one-size-fits all criteria for all counties in the state. However, a one-size-fits all criteria will prove unworkable and unduly costly at the county level, and is not what the Legislature envisioned when it gave local EMS agencies the power to create exclusive operating areas through a competitive process. There are numerous factors that must be taken into account when deciding to open a contract up for bidding, including the quality of the services currently being provided, capital investment and the cost of implementing the bidding process. To ensure that the provision of EMS services are economically viable, a local EMS agency must have the discretion to enter into exclusive operating area contracts that are appropriate to local circumstances and concerns. This may necessitate contract periods longer than ten years.

**V. Conclusion**

KCAA appreciates EMSA's attempts to provide technical assistance to local EMS agencies with the proposed Review Criteria. However, too much of the current draft of the Review Criteria permits EMSA to overstep its authority in areas where the EMS Act clearly gives the authority to local EMS agencies. In the Legislature's enactment of the EMS Act, and in the courts' interpretation of it, it has been made abundantly clear that emergency medical services in California are not delivered from a single statewide system with centralized authority. EMSA needs to respect the decentralization of this system, and respect the significant degree of control and discretion that must be exercised at the county level regarding transportation planning and the creation of exclusive operating areas. EMSA should continue the process of further revising the proposed Review Criteria based on KCAA's comments. KCAA stands ready, able and willing to be involved in the process of developing workable guidelines that will improve the efficient delivery of emergency medical services to the residents of Kern County and the State of California.

Very truly yours,

Peter Brandon, President  
KERN COUNTY AMBULANCE ASSOCIATION