

**Johnathan Jones**

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**From:** Barry Fisher [Barry.Fisher@ventura.org]

**Sent:** Friday, May 30, 2008 9:27 AM

**To:** Donna Nicolaus

**Cc:** board@emsaac.com; Dan Smiley

**Subject:** Response to EOA Review

Donna,

Thank you for the opportunity to provide input into your draft document.

1. H&S Code 1797.224, which states the "grandfathering" rule for exclusive operating areas, says that the "local EMS agency" can create exclusive operating areas, subject to the rule. Nothing says the state EMSA has authority to determine when a local agency can use the "grandfathering" approach versus a competitive process. In fact, the statute specifically says that the only thing the local EMS agency has to submit for state EMSA approval is the "competitive process" it would use if it decides to select providers via competitive bidding.
2. There is no legal authority for the statement that "Establishing an EOA by competitive process is the preferred method of creating an exclusive operating area." In H&S Code 1797.6, the state legislature declared that the intent of H&S Code 1797.224 was to "prescribe and exercise the degree of state direction and supervision over emergency medical services as will provide for state action immunity under federal antitrust laws for activities undertaken by local government entities in carrying out their prescribed functions ..." In other words, the legislature authorized local EMS agencies to establish exclusive operating areas so that the EMS agencies would be protected against antitrust lawsuits (the argument being that state policy discouraged competition in the provision of local EMS services). The legislature approved two different ways to select providers for the exclusive areas: a competitive selection process, or the grandfathering approach available for providers in place since 1981. The legislature did not state a preference between the two methods.
3. I have not found any other law that gives state EMSA authority to determine whether or when a local EMS agency can maintain exclusive operating areas under the grandfathering rule. H&S Code section 1797.107 gives state EMSA authority to promulgate regulations that are "reasonable and proper" to carry out its delegated functions. However, such regulations are subject to approval by the EMS Commission, and may only be adopted in accordance with the Administrative Procedures Act (Govt. Code 11340 et seq.). State EMSA has not enacted any regulations concerning exclusive operating areas. In addition, state EMSA has authority to issue "planning and implementation guidelines" for local EMS agencies under H&S Code 1797.103. However, these guidelines are not binding. Also, it's questionable whether the list of guidance topics permitted under H&S Code 1797.103 includes guidance on the grandfathering of providers in exclusive operating areas.
4. For these reasons, we feel the state EMSA lacks authority to issue definitions for terms such as "manner and scope" for purposes of H&S Code 1797.224, to require local agencies to provide a "verification of provider eligibility and unchanged manner of and scope of an operating area", or to threaten to withdraw approval for an exclusive operating area if it determines the local EMS Agency does not meet its standards. There is no reason why local agencies can't use their own legal counsel to determine if EMS services are being provided in the same "manner and scope" as in 1981.

Thank you again for allowing us to comment on the document.

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