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# Air Resources Board

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TO: Robert H. Cross, Chief  
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THRU: Diane Moritz Johnston *dmj*  
General Counsel

FROM: Victoria E. Davis *VD*  
Staff Counsel

DATE: September 8, 2004

SUBJECT: PROPOSED PUBLIC FLEET AND UTILITIES REGULATION  
APPLICABILITY TO EMERGENCY VEHICLES, FEDERAL FACILITIES  
AND MILITARY TACTICAL VEHICLES

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The Air Resources Board (ARB) is currently developing a diesel particulate control measure for public fleets and utilities. You have requested an opinion on three issues related to the regulations being developed. Each issue will be examined below.

- 1 Does Vehicle Code section 27156.2 preclude the ARB from including emergency vehicles in the scope of the proposed public fleet and utilities rule?

**Conclusion:** Yes

**Discussion:** Vehicle Code section 27156.2 provides as follows:

Notwithstanding any other provision of law, any publicly owned authorized emergency vehicle operated by a peace officer, as defined in Section 830 of the Penal Code, any authorized emergency vehicle, as defined in Section 165 and used for fighting fires or responding to emergency fire calls pursuant to paragraph (2) of subdivision (b) or pursuant to subdivision (c) or (d) of that section, and any publicly owned authorized emergency vehicle used by an emergency medical technician-paramedic, as defined in Section 1797.84 of the Health and Safety Code, is exempt from requirements imposed pursuant to California law and the regulations adopted pursuant thereto for motor vehicle pollution control devices.

*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Website: <http://www.arb.ca.gov>.*

California Environmental Protection Agency

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In the absence of any vagueness or ambiguity in statutory language, we must take the language at face value. The language of Vehicle Code section 27156.2 is plain on its face; the listed emergency vehicles are exempt from laws and regulations for motor vehicle pollution control devices. This includes new and in-use vehicles, and would thus include retrofit devices.

In contrast, the smoke inspection program which operates pursuant to Health and Safety Code section 43701 does not make a specific reference to "motor vehicle pollution control devices." Rather, that section authorizes the adoption of standards, but does not mandate that those standards must be achieved by use of a "device." While the reasons for the initial enactment of Vehicle Code section 27156.2 in 1981 may no longer exist, until there is a change to the statute, the vehicles in question remain exempt.

2. May the proposed public fleet and utilities rule apply to federal agencies? Staff believes that the rule clearly applies to federal fleets, but has received several comment letters from the U.S. Postal Service stating that the ARB cannot regulate a federal agency until a similar regulation for private companies has been adopted.

**Conclusion:** The U.S. Postal Service (USPS) fleet and other federal fleets are subject to ARB's regulation.

**Discussion:** The U.S. Postal Service (USPS) attempts to carve for itself an exception to the federal Clean Air Act (CAA), but there is no basis for that exception.

Section 118(a) (42 U.S.C. 7148(a)) of the CAA provides, in pertinent part, that

"[e] Each ...agency... of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity."<sup>1</sup>

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<sup>1</sup> The text of section 118 (a) in its entirety reads: Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any

The USPS argument is essentially that while other governmental fleets may be regulated, the federal fleets like USPS may not be regulated unless privately-owned fleets are also regulated. This reading of the statute is not consistent with the statute itself and is also inconsistent with other provisions of the CAA. In cases regarding the applicability of state and local regulations to federal agencies, the courts have held that Congress has unambiguously waived sovereign immunity with respect to independent state or local air pollution requirements.<sup>2</sup> In other words, the federal government has affirmatively chosen to subject itself to state and local air pollution control laws and regulations.

*U.S. v. South Coast Air Quality Management District*, a case that USPS cites in support of its position, actually stands for the opposite of what USPS claims. In that case, the federal court upheld the South Coast Air Quality Management District's imposition of fees on federal facilities while exempting other government entities. The court held that the CAA requires federal governmental agencies to comply with local requirements. The court refused to read an exception into the CAA's waiver of sovereign immunity. There is no indication that the regulation of private entities is a prerequisite for regulating federal entities.

The USPS position is additionally unavailing because the regulation is proposed to apply to utilities that own and operate heavy-duty diesel vehicles; utilities are defined as privately owned companies that provide water, natural gas, and electricity. Also many municipalities contract with private entities for operation of certain fleets. Thus some private entities would be regulated under the proposed regulations, and the USPS argument that the regulation of private entities is a prerequisite for regulating federal entities becomes moot.

- 3 The ARB has developed this rule with the understanding that military tactical vehicles would be exempt. However, it would be beneficial to have the basis of this exemption clearly delineated by our legal office.

**Conclusion:** Federal law exempts military tactical vehicles from compliance with federal motor vehicle certification requirements.

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State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

<sup>2</sup> *U.S. v. South Coast Air Quality Management District* (C.D. Cal. 1990) 748 F.Supp 732; *Milwaukee County v. Veterans Administration Center* (E.D. Wis. 1973) 357 F.Supp. 192.

**Discussion:** The federal exemption for military tactical vehicles is stated in 40 CFR part 85, section 1703, which refines the definition of "motor vehicle" stated in section 216(2) (42 USCA 7550(2)) of the CAA:

(2) The term "motor vehicle" means any self-propelled vehicle designed for transporting persons or property on a street or highway.

40 CFR part 85, section 1703 states

a) For the purpose of determining the applicability of section 216(2), a vehicle which is self-propelled and capable of transporting a person or persons or any material or any permanently or temporarily affixed apparatus shall be deemed a motor vehicle, unless any one or more of the criteria set forth below are met, in which case the vehicle shall be deemed not a motor vehicle and excluded from the operation of the Act:

(3) The vehicle exhibits features which render its use on a street or highway unsafe, impractical, or highly unlikely, such features including, but not being limited to, tracked road contact means, an inordinate size, or features ordinarily associated with military combat or tactical vehicles such as armor and/or weaponry.

California recognizes the federal military tactical vehicle exemption in section 1905 of title 13 of the California Code of Regulations:

(a) For purposes of this chapter, military tactical vehicle means a motor vehicle owned by the U.S. Department of Defense and/or the U.S. military services and used in combat, combat support, combat service support, tactical or relief operations, or training for such operations.

(b) This chapter shall not apply to vehicles defined as military tactical vehicles or to engines used in military tactical vehicles. This includes all vehicles and engines:

(1) Excluded from regulation under 40 CFR Part 85, subpart R, section 85.1703, and

(2) Exempted from regulations under the federal national security exemption, 40 CFR, subpart R, sections 85.1702(a)(2), 85.1704(b), 85.1708, and 85.1710. It shall also not apply to those motor vehicles or motor vehicle engines covered by the definition of military tactical vehicle, including commercially available

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vehicles, for which a federal certificate of conformity has been issued under 40 CFR Part 86.

(c) On January 1, 1997, the U.S. Department of Defense shall submit to the ARB a list of all vehicle types that are excluded and or exempted under the above provisions and which are located in the State of California. If any additional vehicle types are added to the list during the previous 12 months, the U.S. Department of Defense shall update the list and submit it to the ARB by January 1 of the following year.

Please contact me at (916) 445-6426 if you have additional questions or need further clarification.