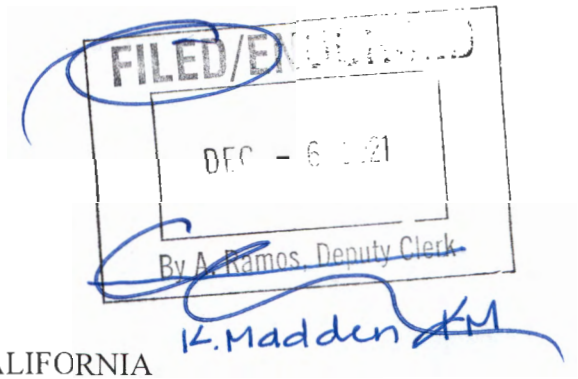

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

GRANT PARK NEIGHBORHOOD ASSOCIATION ADVOCATES, et al.,

Petitioners/Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, et al.,

Respondents/Defendants.

Case No.: 34-2020-80003551

ORDER AFTER HEARING ON PETITION FOR WRIT OF MANDATE

BACKGROUND

Petitioners are the Grant Park Neighborhood Association Advocates and four residents of Santa Cruz County and/or the City of Santa Cruz. By this action, they challenge a syringe exchange program (or "SEP") authorized by Respondent Department of Public Health ("the Department") and operated by Real Party in Interest Harm Reduction Coalition of Santa Cruz County ("the Coalition"). Petitioners challenge the Department's authorization of the SEP and the SEP itself on numerous grounds. Their lawsuit contains six causes of action: four seeking a writ of mandate ordering the Department to set aside its authorization of the Coalition's application to operate a SEP; a related cause of action for injunctive and declaratory relief; and a public nuisance cause of action. This ruling concerns only the writ causes of action.[1] In the first writ cause of action, Petitioners allege the Department violated the California Environmental Protection Act ("CEQA") by authorizing the SEP without conducting any environmental review.

[1] It also effectively disposes of the related portions of the cause of action for injunctive and declaratory relief.

In the remaining three writ causes of action, Petitioners allege the Department failed to comply with Health and Safety Code section 121349 (hereafter "section 121349") and its implementing regulations when it authorized the SEP.

On September 23, 2021, the Court issued a tentative ruling granting the petition. Briefly, the Court found the Department erred in determining its authorization of the SEP was categorically exempt from CEQA. It also found the Department failed to comply with a regulation that required a 90-day public comment period prior to approving an application to operate a SEP (the Department provided only 45 days). Finally, it found the Department failed to comply with a requirement that it provide written notice to the chiefs of police in all jurisdictions in which the SEP would operate, including Scotts Valley, Watsonville, and Capitola. On September 29, the Court held a hearing on the petition via Zoom. Petitioners were represented by David J. Terrazas, Gabrielle J. Korte, and Aaron J. Mohamed; the Department was represented by Deputy Attorneys General Kirin K. Gill and Matthew J. Goldman; and the Coalition was represented by Babak Naficy. At the conclusion of the hearing, the Court took the matter under submission.

On or about October 4, less than a week after the hearing, the Governor signed Assembly Bill 1344, exempting syringe exchange programs from CEQA. By order dated October 14, the Court asked the parties to submit supplemental briefs addressing (1) the effect of AB 1344 on this case, and (2) the appropriate remedy for the remaining writ claims. Supplemental briefs were due November 12.

Also on October 14, the Department notified the Court that, effective October 4, the regulation governing the public comment period was amended to shorten the period from 90 days to 45 days. By order dated October 29, the Court invited the parties to address this regulatory change in their supplemental briefs as well.

Having now considered all of the written and oral arguments, the Court issues the following final ruling denying the petition.

LEGAL BACKGROUND

Section 121349 was enacted in 2005 to help stop the spread of HIV among injection drug users by authorizing clean needle and syringe exchange programs. In enacting section 121349, the Legislature found and declared "that scientific data from needle exchange programs in the

United States and in Europe have shown that the exchange of used hypodermic needles and syringes for clean hypodermic needles and syringes does not increase drug use in the population, can serve as an important bridge to treatment and recovery from drug abuse, and can curtail the spread of human immunodeficiency virus (HIV) infection among the intravenous drug user population." (§ 121349, subd. (a).) In order to reduce the spread of HIV and other bloodborne infections among intravenous drug users, the Legislature gave cities and counties the authority to authorize SEPs within their jurisdictions. (*Id.*, subd. (b).)

In 2011, section 121349 was amended to give the Department authority to authorize entities to provide syringe exchange services in cities and counties if certain conditions existed. As relevant here, the Department may authorize SEPs as follows:

> [T]he State Department of Public Health may, notwithstanding any other law, authorize entities…to apply for authorization under this chapter to provide hypodermic needle and syringe exchange services consistent with state standards in any location where the department determines that the conditions exist for the rapid spread of HIV, viral hepatitis, or any other potentially deadly or disabling infections that are spread through the sharing of used hypodermic needles and syringes. Authorization shall be made after consultation with the local health officer and local law enforcement leadership, and after a period of public comment…. In making the determination, the department shall balance the concerns of law enforcement with the public health benefits.

(*Id.*, subd. (c).) An entity seeking authorization from the Department to operate a SEP must demonstrate that it "provides, directly or through referral, all of the following services: (A) Drug abuse treatment services. (B) HIV or hepatitis screening. (C) Hepatitis A and hepatitis B vaccination. (D) Screening for sexually transmitted infections. (E) Housing services for the homeless, for victims of domestic violence, or other similar housing services. (F) Services related to provision of education and materials for the reduction of sexual risk behaviors, including, but not limited to, the distribution of condoms." (*Id.*, subd. (d)(1).) It must also demonstrate that it has adequate funding to, among other things, "[p]rovide for the safe recovery and disposal of used syringes and sharps waste from all of its participants." (*Id.*, subd. (d)(3)(C).)

If an application is provisionally deemed appropriate by the Department, it must provide for a public comment period of at least 45 days. (*Id.*, subd. (e).) It must also post information about the application on its website, and send written and email notice to the local health officer,

and to the chief of police and the sheriff of the jurisdiction(s) in which the SEP will operate. (*Id.*) "If the department, in its discretion, determines that a state authorized syringe exchange program continues to meet all standards set forth in subdivision (d) and that a public health need exists, it may administratively approve amendments to a program's operations including, but not limited to, modifications to the time, location, and type of services provided, including the designation as a fixed site or a mobile site. The amendment approval is not subject to the noticing requirements of subdivision (e)." (*Id.*, subd. (h).)

The Department has promulgated regulations regarding SEPs. As relevant here, those regulations provide an application to operate a SEP shall contain, among other things, "Contact name, phone number and email for the neighborhood association of the location, if one exists." (17 Cal. Code Regs § 7002, subd. (a)(12).) The regulations also provide the Department "shall" reject an application if "[i]nformation submitted in the application is incorrect or incomplete." (17 Cal. Code Regs § 7004, subd. (a).)

FACTUAL BACKGROUND

As just noted, section 121349 allows cities and counties to authorize SEPs. Pursuant to this authority, Santa Cruz County has operated a syringe services program (referred to as the "County SSP") since 2013. (Pet., ¶ 42.) The County SSP currently has two fixed locations – one in Santa Cruz and one in Watsonville. It also has a "one-to-one" exchange policy, which means that participants are required to return one used syringe in order to obtain one new syringe. (*Id.*)

In March 2019, the Coalition submitted an application to the Department to operate a SEP at four locations in Santa Cruz County: one in Santa Cruz; one in Felton; and two in Watsonville.[2] (AR 958-59.) Unlike the County SSP, the Coalition's SEP would not have a one-to-one exchange policy. Instead, the Coalition would encourage clients to return used syringes and/or dispose of them properly, but would not condition providing new syringes on returning old ones. The Coalition would also provide clients with as many syringes as they needed in order to have a new sterile syringe for each injection. (AR 957.) This is part of a strategy known as harm reduction, which seeks to reduce drug-related harm without requiring the drug user to cease or modify his or her drug use prior to taking action to reduce harm. (See Dept. RJN, Ex. 2,

[2] Felton is a small town and Watsonville is a city in Santa Cruz County.

p. 14.) As described by the Coalition in its application, harm reduction strategies acknowledge that a behavior will take place (here, injecting drugs), and take steps to minimize the harm to the individual and the community as a result of that behavior (here, by providing clean needles to stop the spread of disease).[3] (AR 952.)

In May 2019, the Coalition decided to withdraw its application in response to community opposition and to resubmit it. (AR 3574; see also AR 43.)

On November 20, 2019, the Coalition submitted a second application to operate a SEP. (AR 1-15.) This time, the SEP would "largely be a home delivery service. … Our home delivery services will be available to people across the entire county,[4] and the services will be provided where the participants live. We will schedule appointments on request for participants on Mondays, Wednesdays, and Fridays at times of day that are determined based on need. Volunteers will primarily use cars to travel to meet with participants." (AR 10-11.) On Sundays between the hours of 9 a.m. and 11 p.m., services would also be provided at a location in Santa Cruz on "a stretch of public property on the part of Coral St that is between Limekiln St and River St." (*Id.*) The Court will refer to this as the Coral Street location. The Coalition had been using the Coral Street location to provide "secondary exchange services in collaboration with Santa Cruz County's SSP for almost 18 months." (AR 10.) In its application, the Coalition estimated it would dispense 150,000 syringes and collect 160,000 syringes per year. (AR 2.)

The Coalition explained that it had made changes to its program in response to feedback received on its first application: "Based on some of the feedback we received during our last application process, we have altered our planned program in multiple ways. Most notably, we have removed two of the proposed service locations and included a home delivery component." (AR 43.) The Coalition also addressed concerns about syringe litter:

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[3] The Court notes that the Coalition's harm reduction strategy complies with SEP Guidelines promulgated by the Department, while the County's one-to-one exchange policy does not. (AR 6548-49.)

[4] Petitioners seek to augment the administrative record with verified discovery responses that confirm the Coalition is distributing syringes throughout the County, including in cities other than Santa Cruz. The request is denied as unnecessary. It is clear from the Coalition's application that it would provide home delivery services "across the entire county," which would include cities other than Santa Cruz. Assuming without deciding that extra-record evidence may be admissible in a case like this, it is generally only admissible "if the facts are in dispute." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576.) The fact that the Coalition provides home delivery services through the County is not in dispute.

> We are also committed to lessening the amount of syringe litter throughout our county. We follow evidence-based practices that ensure that we are always having a positive impact on this issue by providing our participants with a convenient and safe way to dispose of used syringes along with the proper sharps containers for them to keep their used syringes in. Our volunteers are regularly spending time collecting used syringes from the ground every single week. Lastly, our website also provides an easy explanation of how to report a used syringe they have found so that it can be cleaned up safely.

(AR 6.) In response to a question on the application as to whether there was "a neighborhood association affiliated with the location(s) of your proposed SEP site(s)," the Coalition answered "No." (AR 2.)

On December 6, 2019, the Department posted the Coalition's application on its website and initiated a 45-day public comment period. (AR 792.) On December 11, 2019, the Department sent emails to the Santa Cruz County Sheriff, the Santa Cruz Chief of Police, and the Santa Cruz County Health Officer notifying them of the Coalition's application and asking for their input or comments. (AR 168-236.) All three responded. (AR 227-234.) The Sheriff opposed the application because, among other things, "[a] secondary program, with little to no oversight and no services other than handing out syringes, is not needed and will only exasperate our syringe waste problem." (AR 227.) The Chief of Police also opposed the application, although he did acknowledge that "Harm Reduction makes sense from a public health, public finance and community safety policy perspective." He also noted, however, that "Syringe litter is a problem. Any proposal to distribute additional needles must include a method to further reduce needle litter and provide local community oversight." (AR 231.) The Health Officer neither supported nor opposed the application, but noted both (1) that SEPs decrease the transmission of HIV and Hepatitis C, do not increase drug use, and "are NOT associated with an increase in unsafe needle disposal," and (2) that SEPs "though grounded in evidence, are controversial" and that they raise concerns about "syringe litter and public safety issues." (AR 233-24.)

All told, the Department received 667 public comments, of which 211 were in support and 456 were in opposition.[5] (AR 883.) It prepared a summary of public comments in

[5] Although the Department notes that approximately 80 percent of the letters in opposition were form letters.

opposition to the SEP, and a response to those comments. Many comments involved concerns about syringe litter. The Department responded to these comments as follows (and because syringe litter is the focus of this case, the Court quotes the Department's response in full):

> **[1]** The Santa Cruz County Health Services Administration collaborated with survey interviewers and the Downtown Streets Team to conduct a visual inspection of syringe litter throughout the county during a two week observation period in October 2019. During the two-week inspection period of cross-sectional data collection, observation teams found 310 syringes (includes syringes with intact needles as well as syringe barrels without needles) and 506 pieces of non-sharp injection equipment. The observation area was throughout the county, not including Aptos and Watsonville. Syringe litter was not proportionately located throughout the community during the inspection period; it was often aggregated into piles and found near encampments, away from public bystanders. Overall, the amount of syringes that are disposed of safely vastly outnumbered the amount of syringe litter in the community.
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> **[2]** One of the issues facing Santa Cruz is an increase in the number of unhoused people. The 2019 Santa Cruz County Point-in-Time Count was a community-wide effort conducted on January 31st, 2019. The count identified 2,167 unhoused individuals. In the weeks following the street count, a survey was administered to 399 unsheltered and sheltered individuals experiencing homelessness in order to profile their experience and characteristics.
>
> **[3]** Data from the report shows the percentage of respondents of the survey who indicated they were staying outdoors on the night of the count has steadily increased since 2013, reaching a high of 44% in 2019. The percentage staying in shelters has seen a decrease from nearly half in 2013 to 20% in 2019. Six percent (6%) reported staying in a structure or indoor area not intended for human habitation, 9% were staying in a motel or hotel, and 15% were in a vehicle.
>
> **[4]** With an increase of people living in places like encampments and other places not designed for human habitation there is an increase of residential waste. Homeless encampments do not have weekly garbage pickup. Additionally, when people are forced to vacate their living spaces, as over 200 were forced to do in May, 2019 when the Ross Homeless Camp was closed, they are unable to bring their belongings with them. As a result there is an increase of residential waste which can include legally obtained syringes. In reports about syringe litter, the media frequently conflate records of uncollected sharps waste found in homeless

> encampments with individual syringes discarded improperly in public spaces. Additionally, the sources of syringe litter are often unclear. Santa Cruz County Parks and Recreation Director Tony Elliot recently reported that syringes found on Santa Cruz's beaches likely originate from waste receptacle contents washed down the San Lorenzo River to the shore, rather than from people living in tents on the beaches.

(AR 885, bracketed numbers added to facilitate discussion.) The Court notes that the first paragraph demonstrates, at best, that most *but not all* syringes are disposed of properly. The second and third paragraphs demonstrate that Santa Cruz County has experienced an increase in homelessness but do not directly address syringe litter. And the fourth paragraph demonstrates, again at best, that homeless encampments or people experiencing homelessness *may* be a disproportionately high source of syringe litter for a variety of reasons, and that the source of syringe litter is often unclear. What this lengthy response does not demonstrate is that syringe exchange programs like the Coalition's do not generate syringe litter.

The Department also responded to a public comment that approving the application "would violate [CEQA] because environmental impacts to public health and safety have not been addressed through CEQA environmental review." (AR 3927.) The Department noted the Coalition would provide services once a week on Sundays at the Coral Street location and it described the location. It also noted, "The proposed home delivery would include provision of sterile supplies and collection of used syringes, and is expected to diminish, rather than increase, improper disposal." (AR 888.) Finally, it noted it had completed a CEQA checklist, which memorializes the Department's determination that the project was categorically exempt from CEQA. (*Id.*; see also AR 237-45 [checklist].)

The Department approved the Coalition's application on August 7, 2020. (AR 943-45.) In order to address concerns about syringe litter, the Department provided the Coalition with a grant to address syringe litter; specified it could not provide services in any parks; required it to conduct weekly syringe litter clean-up and to respond to requests for clean-up made by the general public via a publically accessible email address; and required it to distribute personal sharps containers to all participants. (AR 943-44.)

DISCUSSION

1. The CEQA Claim[6]

Petitioners contend the Department violated CEQA because it approved the Coalition's application to operate a SEP without preparing either an initial study or an environmental impact report or "EIR." Petitioners further contend that the SEP will have an adverse impact on the environment because it will generate syringe litter (and the Court notes that syringe litter is the only environmental impact that Petitioners raise in this action).[7] (See Opening at 9:16-17 [environmental review required to consider impact of "distribution of hundreds of thousands of syringes"]; 10:4-5 ["Syringes are…used and publicly discarded as biohazardous waste throughout the community."]; 17:10-12 [SEP "has the potential to significantly affect the environment by substantially increasing the amount of biohazardous syringe waste being littered in the community."]; 19:19-21 ["discarded syringes…are biohazardous waste capable of causing a direct or reasonably foreseeable indirect physical change in the environment, as dirty needles are regularly discarded in the community."]; 22:2-3 ["discarded syringes can…make permanent changes to the environment, even necessitating soil remediation."].)

The Department acknowledges it did not prepare an initial study or an EIR, but it contends it was not required to do so because it properly concluded the project was categorically exempt from CEQA. In particular, the Department contends the project comes within the "Class 4" categorical exemption, which "consists of *minor* public or private *alterations in the condition of land*, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry and agricultural purposes." (Guidelines, § 15304, emphasis added.) The Class 4 exemption lists nine non-exclusive examples, (a) through (i), including grading; new gardening or landscaping; filling of earth into previously excavated land; minor alterations in land, water or vegetation in existing wildlife management areas or fish production facilities; minor trenching and backfilling; maintenance dredging; the creation of bicycle lanes; and fuel management activities to reduce the volume of flammable vegetation. (*Id.*) The example the

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[6] CEQA is found at Public Resources Code section 21000 et seq. Interpretive regulations for implementing CEQA, known as the CEQA Guidelines, are located in title 14, sections 15000 et seq., of the California Code of Regulations. A citation to "Guidelines, § 15060" refers to title 14, section 15060, of the California Code of Regulations.

[7] Petitioners have many complaints about the SEP, including that it lacks local control and oversight, and that it competes with, and draws participants away from, the County SSP, which Petitioners believe is a better program. Their CEQA claim, however, is based solely on the SEP's potential to adversely impact the physical environment.

Department relies on is (e) – "Minor temporary use of land having negligible or no permanent effects on the environment, including carnivals, sales of Christmas trees, etc." (*Id.*, subd. (e).)

As briefly noted above, in its tentative ruling, the Court found that the project was not categorically exempt from CEQA. The Court does not repeat that discussion here. As also briefly noted above, on October 4, 2021, after the Court issued its tentative ruling, the Governor signed Assembly Bill 1344, exempting syringe exchange programs from CEQA. The law goes into effect on January 1, 2022. AB 1344 will add the following provision to section 121349:

> (h) (1) Needle and syringe exchange services application submissions, authorizations, and operations performed pursuant to this chapter shall be exempt from review under the California Environmental Quality Act....
>
> (2) This subdivision is intended to be declaratory of existing law.

The enactment of AB 1344 raises three potential questions. First, is AB 1344 "declaratory of existing law," as stated by the Legislature?[8] If it is, then the Department's approval of the SEP was *always* exempt from CEQA, and the CEQA claim must be denied. (See, e.g., *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243-44.) Second, if AB 1344 changes the law rather than merely clarifies it, does the change apply retroactively to the Department's approval of the Coalition's application, or does it only apply prospectively to applications submitted after January 1, 2022? (See, e.g., *McClung*, *supra*, 34 Cal.4th at 475-77 [noting general rule that "statutes operate prospectively only" unless the Legislature clearly provides otherwise and there are no constitutional objections to retroactive application]; see also *Western Security Bank*, *supra*, 15 Cal.4th at 244 [where statute provides it "clarifies or declares existing law," this "may...effectively reflect the Legislature's purpose to achieve a retrospective change."].) Third, and finally, even if AB 1344 changes the law and does not apply retroactively, has it effectively mooted the CEQA claim? "A case is considered moot when the question addressed was at one time a live issue in the case, but has been deprived of life because

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[8] As the Court noted in its request for supplemental briefing, it is not bound by the Legislature's declaration that AB 1344 is declaratory of existing law, because "the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472.) However, "if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration." (*Id.* at 473.) Because no appellate court has conclusively held syringe exchange programs either are or are not exempt from CEQA, the Legislature's declaration that they have always been exempt is at least "a factor" to consider, even if it is "neither binding nor conclusive." (*Id.*)

of events occurring after the judicial process was initiated. … The pivotal question in determining if a case is moot is…whether the court can grant the plaintiff any effectual relief." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574, internal quotes omitted.) For the reasons stated below, the Court finds that AB 1344 has effectively mooted the CEQA claim, and that it thus need not determine whether AB 1344 clarifies the law or whether it applies retroactively.

Petitioners allege the Department was required by CEQA to conduct environmental review before approving the Coalition's application to operate a SEP, and they seek a writ of mandate requiring the Department to conduct such review. (Second Amended Petition ["Pet."], ¶ 147.) Similarly, Petitioners allege the Department's failure to conduct environmental review "should be corrected by a…writ of mandate as prayed for herein." (*Id.*) Finally, they pray for a writ of mandate commanding the Department "to prepare, circulate and consider appropriate environmental documentation to comply with CEQA." (*Id.*, Prayer, ¶ 4.) Effective January 1, 2022, however, which is less than a month away, it is undisputed that the Department need not comply with CEQA before approving the Coalition's application to operate a SEP. The Court thus cannot realistically grant Petitioners the primary relief they seek, which means the CEQA claim is moot. Viewed another way, issuing a writ of mandate ordering the Department to comply with CEQA before approving the Coalition's application would be an idle act, and "[t]he law neither does nor requires idle acts." (Civ. Code § 3532; see also *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1255, fn.12 [applying new version of CEQA Guidelines to existing case because any other result would simply "delay the inevitable, at great cost to all parties."].)

This case is similar to *Citizens for Positive Growth & Preservation v. City of Sacramento* (2019) 43 Cal.App.5th 609. There, the plaintiff challenged a city's certification of an EIR for its 2035 General Plan, arguing the EIR's analysis of traffic impacts failed to comply with CEQA. The EIR analyzed the General Plan's impact on traffic in terms of level of service (or "LOS"), which describes traffic congestion or automobile delay. (*Id.* at 623-25.) "An LOS can range from A, representing free flow conditions, to F, representing jammed conditions." (*Id.* at 623, fn.5.) The 2035 General Plan allowed levels of service of E and F on particular roadways and at particular intersections. The EIR concluded traffic would increase "between now and 2035 due to future population and employment growth," but that the impact on traffic would not be

significant for CEQA purposes because it would not exceed the level of service standards identified in the General Plan (i.e., LOS E and F). The plaintiff challenged that conclusion, arguing, among other things, that it was not supported by substantial evidence and that the city did not adequately analyze and mitigate the General Plan's traffic impacts. The challenged EIR was approved in 2015 and the plaintiff filed its lawsuit that same year. In December 2018, a new CEQA Guideline was enacted that provides a project's impact on automobile delay, as measured by level of service, "shall not constitute a significant environmental impact," and that vehicle miles traveled was the most appropriate measure of a project's transportation impacts. (*Id.* at 6253.) Although the new Guideline applied prospectively only, the court held that it rendered the plaintiff's traffic impacts argument moot. The court noted that in a mandate proceeding, it applied the law in existence at the time of its decision rather than at the time of the challenged approval. (*Id.* at 626.) Because the court issued its decision after the new Guideline went into effect, "existing law is that automobile delay, as described solely by level of service or similar measures of vehicular capacity or traffic congestion, shall not be considered a significant impact on the environment under CEQA.... Accordingly, the 2035 General Plan's impacts on LOS (i.e., automobile delay) cannot constitute a significant environmental impact, as [the plaintiff] argues, rendering [the plaintiff's] traffic impacts arguments moot." (*Id.*, internal quotes omitted.) So, too, in this case. Although the Court is issuing this decision several weeks before AB 1344 goes into effect, by the time the writ is issued, existing law will be that syringe exchange programs are exempt from CEQA, which will render all of Petitioners' CEQA arguments moot.[9]

Moreover, even if a writ were to be issued a few weeks *before* AB 1344 goes into effect, granting the petition would simply delay the inevitable. In this regard, this case is similar to *Fairbank*, *supra*, 75 Cal.App.4th 1243. In that case, the plaintiff challenged the city's determination that its approval of a commercial building project was exempt from CEQA pursuant to the so-called "Class 3" categorical exemption for small commercial structures. The

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[9] When the Court grants a petition for writ of mandate, its practice is to direct the petitioner to prepare a writ, submit it to opposing counsel for approval as to form, and thereafter submit it to the Court for entry. In the Court's experience, it generally takes several weeks between the time it issues a final order granting the petition and the time the writ is actually issued. Moreover, environmental review under CEQA takes time. Given this, and assuming the Court were to issue a writ directing the Department to complete environmental review before approving the Coalition's application, it would be next to impossible for the Department to complete environmental review before January 1, 2022.

Class 3 exemption is found in section 15303(c) of the CEQA Guidelines. After the lawsuit was filed, section 15303(c) was amended. The court found the project was "almost certainly" *not* subject to the Class 3 exemption as it read at the time the project was approved, but that it *was* subject to the current version of the Class 3 exemption. (*Fairbank*, *supra*, 75 Cal.App.4th at 1251, 1254-55.) Citing a regulation that provides amendments to categorical exemptions apply prospectively only, the plaintiff argued the court should apply the version of the exemption that was in effect when the city approved the project. (*Id.* at 1255, fn.12, citing CEQA Guidelines, § 15007(b) ["Amendments to the guidelines apply prospectively only."].) The court disagreed:

> [E]ven if as a general matter amendments to the CEQA Guidelines should apply "prospectively only" (Guidelines, § 15007(b)), "[f]airness and the need for finality" [Citation] militate in favor of retroactive application of the 1998 version of Guidelines section 15303(c) in the circumstances of this case. Indeed, it would make little or no practical sense for this court to hold that the exemption found in the current version of Guidelines section 15303(c) does not apply to the project as approved in this case. Were we to construe section 15007(b) to require us to so hold, we would reverse the judgment of the trial court and remand for further proceedings before the administrative agency. At that time, real parties in interest could simply resubmit their project application, and Guidelines section 15303(c) – as amended in 1998 – would govern any additional "steps in the CEQA process not yet undertaken when agencies must comply with the amendments." (Guidelines, § 15007(b).) As the city has already clearly staked out the position that the 1998 version of Guidelines section 15303(c) provides an exemption for the project, it would again approve the project and the case would soon be back before this court in essentially the same posture. Nothing would be accomplished except to delay the inevitable, at great cost to all parties.

(*Id.*) Although the timing of the amendment in this case is slightly different, the end result would be the same. Were the Court to hold that the exemption enacted by AB 1344 does not (yet) apply in this case, it would remand this case to the Department for further proceedings, and, effective January 1, 2022, the Department could again approve the project without conducting CEQA review, which would accomplish nothing except delaying the inevitable, at great cost to all parties.

Petitioners disagree. Citing *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, they argue that even if the law has changed during the pendency of

litigation, a CEQA case will not be found moot where the petitioner can still be awarded the relief it seeks.[10] Petitioners then argue they can still be awarded a writ of mandate ordering the Department to set aside its approval of the Coalition's application, even though they tacitly acknowledge they cannot be awarded a writ ordering the Department to comply with CEQA before approving the Coalition's application. The Court finds the *Union of Medical Marijuana Patients* case is distinguishable. At issue in that case was a city ordinance authorizing the establishment of medical marijuana dispensaries, capping their number, specifying where they could be located, requiring a conditional use permit regardless of location, and imposing basic conditions on their operation. Because the city found that adoption of the ordinance did not constitute a project for purposes of CEQA, it did not conduct any environmental review. The petitioner challenged the city's failure to conduct environmental review, the trial court denied the petition, the appellate court affirmed, and our Supreme Court reversed.

Most of the court's discussion is not applicable because it deals with what constitutes a project for purposes of CEQA, which is not at issue in this case. In a footnote, however, the court briefly noted the city's argument that the appeal should be dismissed as moot because of a new law that exempted from CEQA a public agency's enactment of an ordinance that requires discretionary review of licenses to engage in commercial cannabis activity. (*Union of Medical Marijuana Patients*, *supra*, 7 Cal.5th at 1190, fn.7.) The city argued the petitioner "can no longer be granted effective relief because the City could reenact the Ordinance without environmental review." (*Id.*) The court rejected that argument "because the trial court can still grant some of the relief requested by UMMP by vacating the City's approval of the Ordinance, *if such relief is appropriate*." (*Id.*, emphasis added.) That single sentence is the entirety of the court's discussion of the issue, and the Court finds it is simply too slim a reed on which to hang Petitioners' argument that this case is *not* moot. Alternatively, the Court finds that it would *not* be appropriate in this case to issue a writ of mandate vacating the Department's approval of the SEP because the basis for granting such relief – i.e., that the Department failed to conduct environmental review required by CEQA – will evaporate as of January 1, 2022.

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[10] They also cite, but do not discuss, *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. Because *Save Tara* did not involve an intervening change in the law, the Court finds it is not particularly relevant.

Petitioners also cite *Woodward Park Homeowners Association v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 890, for the proposition that a party cannot render a case moot by "amend[ing] its own municipal code provisions[.]" Here, however, the Department did not enact AB 1344 or otherwise amend section 121349 – the Legislature did. *Woodward Park* is thus not applicable.

Finally, Petitioners argue this case falls within an exception to the mootness doctrine where a case presents an issue of broad public interest that is likely to recur. (See *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479 [discussing exceptions to mootness doctrine].) The Court disagrees, for two reasons. First, the exception is inapplicable because the precise issue in this case – i.e., whether SEP applications and operations are subject to CEQA – is *not* likely to recur because AB 1344 has conclusively resolved that issue once and for all. Second, the exception is "discretionary" rather than mandatory, and the Court, in its discretion, declines to decide this case despite its mootness. (*Id.*)

For all the reasons stated above, the Court denies Petitioners' CEQA claim.

2. The Remaining Writ Claims

In the remaining writ claims, Petitioners contend the Department failed to comply with Health and Safety Code section 121349 and its implementing regulations when it approved the Coalition's application, and they seek a writ of mandate pursuant to Code of Civil Procedure section 1085 ordering the Department to rescind its approval. Under Code of Civil Procedure section 1085, the Court may issue a writ for two reasons: (1) to compel the agency to perform an act required by law; or (2) to correct an abuse of discretion. (Code Civ. Proc. § 1085; *Young v. Gannon* (2002) 97 Cal.App.4th 209, 221; *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 105.) The bulk of the remaining writ claims are based on Petitioners' contention that the Department failed to perform several acts required by law. In such a case, Petitioners must demonstrate the Department failed to perform a purely ministerial duty involving no discretion. (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1180; *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700-701.) A duty is ministerial if it is one the agency is "required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to [its] own judgment or opinion concerning such act's propriety or impropriety." (*AIDS*

Healthcare Foundation, supra, 700 Cal.App.4th at 700.) Petitioners also claim that the Department abused its discretion when it approved the Coalition's application. As to that claim, the Court's inquiry is limited to whether the Department's action was "arbitrary, capricious, or entirely without evidentiary support." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004.) The scope of review on such an inquiry is limited "out of deference to the agency's authority and presumed expertise." (*California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 567; see also *Khan*, *supra*, 187 Cal.App.4th at 106 [such cases "are accorded the most deferential level of judicial scrutiny."].) The Court may not substitute its judgment for that of the agency, or force the agency to exercise its discretion in any particular manner. (*Id.*; *Young*, *supra*, 97 Cal.App.4th at 221.) In either case, Petitioners bear the burden of proof, and must establish the Department either failed to perform an act it was required to perform, or abused its discretion in some way. (*Khan*, *supra*, 187 Cal.App.4th at 106; *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170 [petitioner "has burden of proof to show that the decision is unreasonable or invalid as a matter of law"].)

A. The public comment period

It is undisputed that the Department only allowed a 45 day public comment period. Petitioners contend the Department was required by law to allow a 90 day public comment period. The law on the length of the public comment period changed several years ago. As originally enacted in 2011, section 121349, subdivision (e), required the Department to provide a public comments of "at least 90 days" prior to approving an application to operate a SEP. (2011 Cal Stats ch. 744.) In 2018, the Legislature reduced the comment period to "at least 45 days," effective June 27, 2018. (2018 Cal Stats. ch. 34.)

In 2013, the Department promulgated regulations regarding SEP applications. Consistent with the law in effect at the time, those regulations specified a 90-day public comment period. (See 17 Cal. Code Regs § 7000, subd. (a)(22) ["'Public Comment Period' means a 90-day period, commencing from the date the department posts information about an application on its website, in which the public may use the website to comment on an application for SEP certification."], § 7002, subd. (b) ["The public may comment online about an application during the 90-day public comment period"].) In February 2021, the Department began the process of

amending the regulations to change the comment period to 45 days, based on the change in law. (Dept. RJN, Ex. 1, p. 4.) It is undisputed that the regulations had not been amended when the Court issued its tentative ruling, and that the amendment process had not even begun when the Department considered and approved the Coalition's application in 2020.

As the Court noted in its tentative ruling, regulations "have the force of law." (*Zumwalt v. Trustees of Cal. State Colleges* (1973) 33 Cal.App.3d 665, 675.) And as Petitioners accurately note, "A public entity has a ministerial duty to comply with its own rules and regulations where they are valid and unambiguous." (*Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 595 see also *Galzinski v. Somers* (2016) 2 Cal.App.5th 1164, 1170.) When the Department approved the Coalition's application, its regulations provided that the public comment period was 90 days. (17 Cal. Code Regs § 7000, subd. (22) and § 7002, subd. (b).) Moreover, there is no conflict between that regulation and the recent amendment to the law, which provides the public comment period must be "*at least* 45 days," because 90 days is at least 45 days. (§ 121349, subd. (e), emphasis added.). The Department thus cannot rely on the rule that "[t]o the extent a regulation conflicts with a statute, it is well settled that the statute controls."[11] (*California Teachers Assn. v. California Com. on Teacher Credentialing* (2003) 111 Cal.App.4th 1001, 1011.) The Court thus held in its tentative ruling that, unless and until the regulation is amended, the Department is bound by the 90 day public comment period.[12]

On October 4, 2021, however, less than two weeks after the tentative ruling was issued, the regulation was amended and the public comment period was reduced to 45 days. (Dept. Third Supp. RJN, Ex. 5.) As noted above, the Department has already provided a 45-day public comment period in this case. Thus, if the Court were to grant the petition on the ground that the

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[11] The Department cites a different rule – that "When two acts governing the same subject matter cannot be reconciled, the later in time will prevail over the earlier." (*Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178.) Here, in contrast, we have a statute and a regulation rather than two acts, and the statute and the regulation can be reconciled.

[12] In the "Statement of Facts" section of its opening brief, Petitioners complain the Department also ignored unfavorable public comments and considered one comment submitted a day late, and that its website was not working and was unable to accept public comments for a period of time. (Opening at 13-15.) It does not mention these irregularities in the "Argument" section of its brief, however, and the Court did not consider issues that were not addressed in the Argument section. (See, e.g., *Hollingsworth v. Heavy Transport, Inc.* (2021) 66 Cal.App.5th 1157, 1172, fn.3 ["arguments not included in the argument section of plaintiff's opening brief…have been forfeited."].)

Department failed to comply with the 90-day public comment period that was in effect when it approved the Coalition's application, it would effectively be requiring the Department to provide a second public comment period that is exactly the same length as the first. Similar to AB 1344's effect on this case, the new regulation has arguably rendered this particular claim moot. Alternatively, and as discussed above, the Court finds that requiring the Department to provide a second 45-day comment period would be an idle act or would merely "delay the inevitable, at great cost to all parties." (*Fairbank, supra*, 75 Cal.App.4th at 1255, fn.12; see also Civ. Code § 3532 ["The law neither does nor requires idle acts."].)

B. Notice to law enforcement

Section 121349 provides that, if the Department provisionally deems an application appropriate, it "shall" "[s]end a written and an email notice to the chief of police, the sheriff, or both, as appropriate, of the jurisdictions in which the program will operate." (§ 121349, subd. (e)(3).) Petitioners argue the Department failed to comply with this requirement because the SEP's home delivery service is authorized to operate anywhere in Santa Cruz County, but it only sent notices to the County Sheriff and the Santa Cruz chief of police, and it did not send notices to the chiefs of police of Scotts Valley, Watsonville or Capitola, which are all cities in Santa Cruz County.

The Department argues it complied with section 121349, because "[t]he proposed Coral Street location for which the Coalition sought approval to operate a once-a-week mobile site…is located entirely in the City of Santa Cruz." (Opp. at 29:25-27.) This is true, but it ignores the fact that the Coalition's application states the program "will largely be a home delivery service" that "will be available to people across the entire county." (AR 6-7.) If the SEP will "largely be a home delivery service" that is "available to people across the entire county," then section 121349 required the Department to notify all chiefs of police in the county, which would include the chiefs of police of Scotts Valley, Watsonville, and Capitola. By failing to notify those chiefs, the Department technically failed to comply with the law.

Although the Court agrees the Department failed to send written notice to the Scotts Valley, Watsonville, and Capitola chiefs of police as required by section 121349, it also finds all three chiefs had actual notice. In its opposition, the Coalition notes the Watsonville chief of police clearly had actual notice of its application because he submitted a comment letter

opposing it. (AR 401-02.) Moreover, in their supplemental briefs, the Coalition and the Department note that Petitioners allege (and thus admit) the Scotts Valley, Watsonville, and Capitola chiefs of police participated in the administrative process by submitting letters in opposition to the application, and/or clearly had actual notice of it. (Pet., ¶¶ 91, 97-99; see also AR 489 [opposition letter from Scotts Valley mayor]; 4963 [opposition letter from Capitola chief of police]; 378-556 [numerous opposition letters copying Scotts Valley chief of police].) Thus, even though the Department did not provide written notice to these three chiefs, they had actual notice.

"When a party seeking a writ of traditional mandamus has established an abuse of discretion, the issuance of the writ is not automatic. That party also must show prejudice resulted from the public agency's action." (*California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1439.) Here, Petitioners fail to show prejudice resulted from the Department's failure to provide written notice to the Scotts Valley, Watsonville, and Capitola chiefs of police, because all three chefs had actual notice and, perhaps more importantly, participated in the administrative process by submitting letters in opposition to the Coalition's application. The purpose of requiring notice is "to secure public comment and promote accountability among decision makers[.]" (*Mission Hospital Regional Medical Center v. Shewry* (2008) 168 Cal.App.4th 460, 488; see also *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 942 ["prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation"]; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 708-10 [failure to comply with disclosure requirements may be prejudicial if it "precludes relevant information from being presented to the public agency"], disapproved on other grounds in *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1194, fn.10.) Here, all three cities provided comments on the Coalition's application, and the lack of formal written notice was thus not prejudicial. The cases cited by Petitioners where the failure to give notice was deemed prejudicial are all distinguishable because the lack of notice denied people the opportunity to participate in the administrative process and be heard. (See, e.g., *Mission Hospital Regional Medical Center*, *supra*, 168 Cal.App.4th at 488 [failure to comply with notice requirement may be excused where plaintiffs received actual notice]; *Sounhein v. City of San Dimas* (1992) 11 Cal.App.4th 1255, 1260-61 ["the other residents of the city affected by the

ordinance were not given notice and an opportunity to be heard"].) Again, that is not the case here. In their supplemental brief, Petitioners argue the failure to give written notice "affected an indisputably important public policy relating to law enforcement and public input in a government process." (Pet. Supp. Brief at 6:12-13.) Again, however, law enforcement and the public *did* provide input into the process. The Court thus finds that although the Department technically failed to comply with the law, the failure was not prejudicial, and Petitioners thus fail to demonstrate they are entitled to a writ of mandate.

C. Consultation with local law enforcement

Section 121349 provides, "Authorization [to operate a SEP] shall be made after *consultation with...local law enforcement leadership*.... In making the determination, the department shall *balance the concerns of law enforcement* with the public health benefits." (Emphasis added.) Petitioners argue the Department failed to comply with this requirement because it did not truly consult with local law enforcement or attempt to balance their concerns with the public health benefits because it had already made up its mind to approve the SEP before notifying local law enforcement of the application. The Court disagrees.

To support their argument, Petitioners cite a May 22, 2019, email to the Department from the Coalition's Coordinator (Denise Elerick) withdrawing the first application. In that email, Elerick stated: "As much as we absolutely disagree with the attacks being made we would like to out maneuver the hateful mob. [¶] I'd like to withdraw and resubmit our application." (AR 3574.) She also stated, "I like our Sheriff but maybe he should focus on cleaning up his department and stop killing 15 year old boys and stop having jail staff that have sex with inmates. Having him weigh in on [the Coalition's application] is stupidly out of line." (AR 3575.) Petitioners also cite an email Elerick sent to the Department two days earlier (on May 20, 2019) with the "Subject" identified as "The privileged patriarchy is pouring it on," apparently in reference to statements made by the Sheriff and the Mayor of Santa Cruz. (AR 3575.) Petitioners fail to convince that emails from or statements by *Elerick* demonstrate *the Department* had already made up its mind to approve the Coalition's second application before notifying local law enforcement or that it failed to consult with local law enforcement.

Petitioners also cite a comment that someone from the Department appears to have made regarding a concern raised by Santa Cruz Police Chief Andy Mills to the Coalition's application.

On December 11, 2019, Chief Mills sent an email to the Department stating (among other things), "Syringe litter is a problem. Any proposal to distribute additional needles must include a method to further reduce needle litter and provide local community oversight. *I need to see an actual thoughtful procedure, not a simple reference to an evidence based practice*." (AR 231, emphasis added.) The administrative record contains a document that appears to be the Department's response to the concerns raised by Chief Mills; regarding the italicized sentence, the Department commented, "No need to respond. *[The Coalition's] procedure will never be 'thoughtful' enough for this imbecile*. Don't give his statement power." (AR 5061.) Although the italicized portion of this response may not be the Department's finest hour, it does not demonstrate that the Department failed to consult with local law enforcement or to consider its concerns, or that it had already made up its mind to approve the SEP before notifying local law enforcement and regardless of any concerns that they raised.

Petitioners also cite a September 9, 2019, email from the Coalition to the Department that includes a list of things that will be discussed at an upcoming meeting, including "overall media & political strategy before and after we submit our application," "how to approach planning a press conference for when we go public with the new application," and "funding." (AR 4018.) Someone from the Department responded, "I could facilitate the media & politics planning as a kind of informal workshop where we lay out some concrete details for how you all will do it." (*Id.*) This email does not demonstrate the Department failed to consult with local law enforcement or attempt to balance their concerns with the public health benefits of the SEP and it does not demonstrate the Department had already made up its mind to approve the SEP before notifying local law enforcement of the application.

Contrary to Petitioners' contention, the Court finds the evidence shows the Department *did* consider and attempt to address and balance at least some of the concerns of law enforcement. For example, the Santa Cruz Chief of Police and the County Sheriff both raised concerns about "dirty needles," "syringe litter," and the lack of "a plan to reduce discarded needles." (AR 229, 231.) The County Sheriff also raised concerns about the Coalition "using local parks as a dispersal point," and he noted that although the Coalition's application stated it would not operate in local parks, "there does not appear to be legal prohibition from the state that restricts services in public parks and open spaces." (AR 229.) The Department did not ignore those concerns. Instead, it addressed them when it approved the Coalition's application by

imposing amendments to its operations, including expressly prohibiting the Coalition from providing services in parks; providing it with a grant to address syringe litter; requiring it to conduct syringe clean up at least weekly; requiring it to respond to requests for syringe clean up made by the general public; and requiring it to distribute personal sharps containers for participants. (AR 943-44.)

Did the Department address *all* of the concerns raised by law enforcement to Petitioners' satisfaction? No – but it was not required to. To the extent Petitioners' real complaint is that the Department rejected law enforcement's request that it deny the application, the Court notes only that consultation does not require acquiescence. Although the Legislature directed the Department to consider the concerns of law enforcement, it also gave the Department the ultimate decision about whether to approve a SEP despite those concerns.

D. Allegedly false information in application

Regulations promulgated by the Department provide it "shall" reject an application if "[i]nformation submitted in the application is incorrect or incomplete." (17 Cal. Code Regs § 7004.) Regulations also provide the application shall contain the following information: "Contact name, phone number and email for the neighborhood association of the location, if one exists." (17 Cal. Code Regs § 7002, subd. (a)(12).) Petitioners contend the Coalition's application contained false information, and that the Department was thus required by its own regulations to reject it. What false information did the application allegedly contain? The application contains the following question: "Is there a neighborhood association affiliated with the location(s) of your proposed SEP site(s)?" The Coalition answered this question by checking the "No" box. (AR 2.) Petitioners argue this is false, because there are numerous neighborhood associations in Santa Cruz County, and that the Department knew or should have known about them.[13]

Before addressing Petitioners' argument, it may be helpful to examine the application itself in more detail. Immediately before asking about neighborhood associations at the

[13] It appears that even Petitioners would agree that the Department is not required to reject an application unless it knows or has reason to know that it contains incorrect or incomplete information, because they contend the Department "was aware of the neighborhood groups because they had received objections from such groups in connection with the first…application." (Opening at 34:4-5.)

"proposed SEP site(s)," the application asks whether the services will be provided at a "fixed site," a "mobile site," or "both fixed and mobile sites." (AR 2.) Those terms are defined by regulation as follows. A fixed site is "a building or single location, not a mobile site, where syringe exchange services are provided on a regular basis," and a mobile site is "a location where syringe exchange is conducted using a vehicle such as a van, or by foot in a location that is not a fixed indoor setting." (17 Cal. Code Regs § 7000, subd. (8) and (14).) The Coalition checked the "mobile site" box on its application.[14] (AR 2.) In an attachment describing the SEP's location(s), the Coalition stated, "The location of [the] mobile outreach is…a stretch of public property on the part of Coral St that is between Limekiln St and River St." (AR 7.) It also noted it would provide home delivery services "on request." (*Id.*) Obviously, it could not identify the location of home delivery services, because those services had not yet been requested or provided, and it is far from clear to the Court that the location of a home that requested home delivery would even be considered a "site."

The Department interpreted its own regulation and application as requiring the Coalition to identify any neighborhood associations affiliated with Coral Street location, because that is the only location that was (or could be) known and it is the only location that would be regularly used. The Department received at least one public comment stating the application contained false information because it stated "there are no neighborhood associations affiliated with the proposed SEP locations." (AR 883.) In response to this comment, the Department noted:

> [The Department] requires the applicant [to] provide information on neighborhood association[s] *at a fixed location or a mobile SEP with a consistent location. No neighborhood association exists in the Coral Street area where [the Coalition] proposes to continue their outreach services.* The groups characterized as "neighborhood associations" by some writers were groups on websites such as Nextdoor or business associations, which are not neighborhood associations.

(*Id.*) Given that the Department is interpreting both its own regulations and an application that it created, the Court cannot say that this interpretation is unreasonable. (See *American Chemistry Council v. Office of Environmental Health Hazard Assessment* (2020) 55 Cal.App.5th 1113, 1139 ["As a general matter, courts will be deferential to govern agency interpretations of their own

[14] As noted above, the Coalition has no fixed site as that term is defined by the regulations. They have a home delivery service and under the definition provided in the regulation, they have a mobile site.

regulations, particular when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate."] [internal quotes omitted]; *Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 840 [agency's "interpretation of its own regulations and decisions is entitled to consideration and respect by the courts" and court "is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another."] [internal quotes omitted].) Thus, to the extent Petitioners contend the Coalition was required to identify *every* neighborhood association located anywhere within Santa Cruz County on the theory that home delivery services were authorized throughout the County, the Court rejects that interpretation as too broad and as inconsistent with the Department's narrower, and reasonable, interpretation.

Petitioners contend the Coalition should, at a minimum, have identified "one specific long term neighborhood group" in the Harvey West neighborhood, which is near the Coral Street location. (Opening at 33:27.) To support their contention, they seek to augment the administrative record with a declaration from Deborah Elston, the founder of Santa Cruz Neighbors, which is an organization representing a network of neighborhoods. According to its website, a "Neighborhood Association is comprised of a group of residents and business representatives who devote their time and energy to improve and enhance a well-defined geographic area where they and others live." (www.santacruzneighbors. com.) It is unclear whether Santa Cruz Neighbors is a neighborhood association, or something akin to an umbrella organization for neighborhood associations (although it appears it is the latter). According to Elston, there are over 60 neighborhood associations in Santa Cruz, including the Harvey West Neighborhood Association. Elston states the Coral Street location is located within the boundaries of the Harvey West Neighborhood Association. (Elston Decl., ¶ 6.) Arguably, then, the Coalition *might* have been required to identify this neighborhood association in its application *had it known about it*. The Court says "might" have been required because it is entirely unclear how the Coalition would have identified the Harvey West Neighborhood Association. The application asks only for a contact name, phone number, and email address for any neighborhood associations affiliated with the SEP site. (See AR 2.) As the Department notes, Elston does not state she is a member of the Harvey West Neighborhood Association and

she does not provide any contact information for the Harvest West Neighborhood Association. A Google search returns nothing on the Harvey West Neighborhood Association and there is no contact information for it on the Santa Cruz Neighbors' website. Even assuming it knew about it, how was the Coalition supposed to provide contact information for the Harvest West Neighborhood Association on its application?

Perhaps more importantly, Petitioners fail to convince that the Coalition or the Department knew about the Harvey West Neighborhood Association. As noted above, Denise Elerick is one of the Coalition's founders, and the person who signed the Coalition's application. Petitioners contend Elerick "herself was personally aware of these neighborhood association groups at the time she falsely claimed there were none." (Opening at 34:2-3.) As evidence, they cite Elston's declaration that Elerick has attended Santa Cruz Neighbors meetings in the past, and that, based on her attendance at these meetings, "Elerick would have known there are several neighborhood associations that operate in Santa Cruz." (*Id.*, ¶ 5.) Elston does not state, however, that Elerick would have known about the Harvey West Neighborhood Association. Simply put, Elston's declaration does not demonstrate that Elerick was aware of either the existence of the Harvey West Neighborhood Association or the fact that the Coral Street site is within its boundaries.[15] Thus, Elston's declaration does not actually prove the fact that Petitioners proffer it for. The request to augment the administrative record with her declaration is thus denied.[16]

What about the Department? Petitioners contend the Department was aware of at least some neighborhood groups because it had received comments from them, and it thus should have known the application contained false information when it stated there were no neighborhood associations affiliated with the SEP site. Petitioners cite three pieces of evidence to support its contention.[17] The first is a letter to the Department from two Assembly members offering the following comment on the Coalition's first application:

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[15] And Petitioners do not suggest the administrative record contains any evidence that she was aware of either fact, which is presumably why they sought to augment the administrative record.

[16] The Court will, however, assume for the sake of argument that the Coral Street location is within the boundaries of the Harvey West Neighborhood Association.

[17] It actually cites four, but the fourth – "AR 0019310" – does not exist, as the administrative record contains only 6654 pages.

> Whether the current...application is deemed a potentially successful harm reduction model is left up to the discretion of [the Department]. Our comments, therefore, are not directed at the proposal itself. Instead, we are writing to express concerns about the applicant's failure to engage with local stakeholders and solicit community buy-in prior to submitting the...application.

(AR 3424.) This letter does not mention any neighborhood associations at all, and certainly does not demonstrate the Department knew the Coral Street location was in the Harvey West Neighborhood Association's boundaries. The second piece of evidence is a January 20, 2020, letter to the Department from Grant Park Neighbors,[18] which identifies itself as an "organized neighborhood group...with just over 100 members and roughly 30 active stakeholders that meet every two weeks in Grant Park." (AR 385.) It is not clear to the Court precisely where Grant Park is, but it appears that the Coral Street location is not located within the boundaries of Grant Park Neighbors (unless the boundaries of Grant Park Neighbors overlap with the boundaries of the Harvey West Neighborhood Association).[19] The third and final piece of evidence is a January 14, 2020, letter to the Department from the Watsonville Chief of Police that states, "The applicant has indicated that there are no neighborhood associations affiliated with the proposed SEP sites. However, the SEP proposes home delivery services throughout the entire county. In Watsonville there are countless neighborhood associations (Bay Village, Pajaro Village, Portola Heights, and Pajaro Vista to name a few) who should be consulted." (AR 401.) Again, this letter does not demonstrate the Department knew, or should have known, about the Harvey West Neighborhood Association (and, as stated above, the Court finds the Coalition was not required to identify every neighborhood association in Santa Cruz County). Moreover, and perhaps more importantly, Petitioners cite nothing in the administrative record that demonstrates the Department received any public comments from the Harvey West Neighborhood Association or from anyone identifying themselves as a member thereof.

E. Alleged lack of a network of comprehensive services

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[18] It is not clear whether Grant Park Neighbors is the same as, or related to, Petitioner Grant Park Neighborhood Association Advocates.

[19] Petitioners have asked the Court to judicially notice several maps, but it does not clearly explain the significant of those maps or what they show.

Petitioners' final argument is that the Department abused its discretion in approving the Coalition's application because it does not provide a "network of comprehensive services, including treatment services, to combat the spread of HIV and bloodborne hepatitis infection among injection drug users." The quote is from section 121349.1, which is dense, and which provides in full:

> The State Department of Public Health or a city, county, or a city and county with or without a health department, that acts to authorize a clean needle and syringe exchange project pursuant to this chapter shall, in consultation with the State Department of Public Health, authorize the exchange of clean hypodermic needles and syringes, as recommended by the United States Secretary of Health and Human Services, subject to the availability of funding, *as part of a network of comprehensive services, including treatment services, to combat the spread of HIV and bloodborne hepatitis infection among injection drug users*. Staff and volunteers participating in an exchange project authorized by the state, county, city, or city and county pursuant to this chapter shall not be subject to criminal prosecution for violation of any law related to the possession, furnishing, or transfer of hypodermic needles or syringes or any materials deemed by a local or state health department to be necessary to prevent the spread of communicable diseases, or to prevent drug overdose, injury, or disability during participation in an exchange project. Program participants shall not be subject to criminal prosecution for possession of needles or syringes or any materials deemed by a local or state health department to be necessary to prevent the spread of communicable diseases, or to prevent drug overdose, injury, or disability acquired from an authorized needle and syringe exchange project entity.

To the extent the Coalition contends section 121349.1 requires that any entity authorized to operate a SEP must also provide comprehensive services, including treatment services, to combat the spread of HIV and hepatitis, the Court disagrees. Section 121349.1 merely provides that SEPs shall be part of a network of comprehensive services – not that each individual SEP must provide such comprehensive services.

Petitioners also note section 121349 provides:

> (d) In order for an entity to be authorized to conduct a project pursuant to this chapter, its application to the department shall demonstrate that the entity complies with all of the following minimum standards:

> (1) The entity provides, directly or through referral, all of the following services:
>
> (A) Drug abuse treatment services.
>
> (B) HIV or hepatitis screening.
>
> (C) Hepatitis A and hepatitis B vaccination.
>
> (D) Screening for sexually transmitted infections.
>
> (E) Housing services for the homeless, for victims of domestic violence, or other similar housing services.
>
> (F) Services related to provision of education and materials for the reduction of sexual risk behaviors, including, but not limited to, the distribution of condoms.

Petitioners contend the Coalition failed to "make any good faith showing of the ability to provide all required services," and they argue the Department thus abused its discretion in approving the application. (Opening at 35:16-17.) Clearly, the Coalition itself does not have to provide all of the listed services, because section 121349 provides it may provide those services either "directly *or through referral*." (§ 121349, subd. (d)(1), emphasis added.) In its application, the Coalition states it will directly provide risk reduction education and distribution of condoms, and that it will provide the remaining services (i.e., drug abuse treatment services, HIV and hepatitis screening, Hepatitis vaccination, screening for sexually transmitted diseases, and housing services) via referral. (AR 1; see also AR 4, 5.) Petitioners complain the Coalition "fail[ed] to make a good faith showing of the ability to provide all required services," and that the administrative record does not support the conclusion that it is "capable of actual compliance with the state provisions of the law." (Opening at 35:16-20.) That is the extent of Petitioners' argument, and the Court notes it contains no citation to the administrative record.

As noted above, as to Petitioners' claim that the Department abused its discretion in approving the Coalition's application, the scope of review is limited "out of deference to the agency's authority and presumed expertise." (*California Hospital Assn.*, supra, 188 Cal.App.4th at 567.) Indeed, such cases "are accorded the most deferential level of judicial scrutiny." (*Khan, supra*, 187 Cal.App.4th at 106.) Moreover, Petitioners bear the burden of proof, and must establish the Department abused its discretion in some way. (*Khan, supra*, 187 Cal.App.4th at 106; *City of* Arcadia, supra, 191 Cal.App.4th at 170.) The burden is not on the Department or the Coalition to demonstrate the Coalition is capable of providing all required services. Instead, the burden is on Petitioners to demonstrate – by citation to the administrative record – that the

Department abused its discretion in concluding otherwise. With their brief argument on this issue, and with no citation to the administrative record, Petitioners do not come close to meeting their burden.

CONCLUSION

For the reasons stated above, the petition is denied.

The parties should contact the clerk in Dept. 23 for available hearing dates for the demurrer that was scheduled for hearing on November 5, 2021.

Dated: DECEMBER 6, 2021

Laurie M. Earl
Judge of the Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY EMAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **ORDER** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, 95814 each of which envelopes was addressed respectively to the persons and addresses shown below.

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

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Dated: December 6, 2021

Superior Court of California, County of Sacramento

By: K. Madden

K.Madden, Deputy Clerk