**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SACRAMENTO**

CALIFORNIA FIRE CHIEFS ASSOCIATION, INC., a nonprofit corporation,

Petitioner and Plaintiff,

vs.

CALIFORNIA EMERGENCY MEDICAL SERVICES AUTHORITY, a department of the State of California,

Respondent and Defendant.

Case No.: 34-2019-80003163-CU-WM-GDS

**[~~PETITIONER'S PROPOSED~~] JUDGMENT FOR PETITIONER** LME

Dept: 23
Judge: Hon. Laurie M. Earl

Petition filed: June 7, 2019

This cause came on regularly for hearing before this Court on March 13, 2020, before the Honorable Laurie M. Earl in Department 23 of the Sacramento County Superior Court, pursuant to the verified petition of Petitioner California Fire Chiefs Association, Inc. ("the Association").

Andrew E. Schouten of Wright, L'Estrange & Ergastolo appeared as attorney for the Association. Brenda A. Ray, Deputy Attorney General, appeared as attorney for Respondent California Emergency Medical Services Authority ("EMSA").

On March 16, 2020, the Court requested supplemental briefing from the parties. On May 5, 2020, after the Court reopened following closures due to the COVID-19 pandemic, the parties filed their supplemental briefs.

After considering all the pleadings and records on file in this action, the moving, opposition, and reply papers submitted by the parties in conjunction with the merits hearing, the arguments of counsel at the merits hearing, and the parties' supplemental briefing:

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

1. The Association shall have judgment against EMSA based on the findings of fact and conclusions of law set forth in the Court's June 22, 2020 Order, which is attached hereto as Exhibit "A" and incorporated herein by reference.

2. The following EMSA guidelines and rules, criteria, and interpretations contained therein are underground regulations: (1) Guideline 141 issued in 1985 and reissued in 1997 and titled "Competitive Process for Creating Exclusive Operating Areas"; (2) Guideline 141-B issued in 2008 and titled "Review Criteria and Policy for Transportation and Exclusive Operating Area Components of the EMS Plan"; and (3) Guideline 310-01 issued in 2010 and titled "EMS System Coordination and HS 1797.201 in 2010" (collectively, "the Challenged Guidelines").

3. A peremptory writ of mandate shall issue under seat of this Court commanding EMSA not to use or enforce the Challenged Guidelines unless and until it promulgates them as regulations in compliance with the Administrative Procedure Act, Cal. Gov't Code §§ 11340 et seq., 11370 et seq.

4. In accordance with Code of Civil Procedure section 1033, and California Rules of Court, the Association may claim its trial court costs, and EMSA may contest such costs.

5. The Association may seek, pursuant to appropriate noticed motion, an award of its attorneys' fees, and this Court reserves and retains jurisdiction to determine the amount of such fees, if any. If such a motion is granted, this judgment will be amended to award the amount of $_____ [to be determined] in attorneys' fees.

6. The Court shall reserve and retain jurisdiction over this matter until such time as EMSA files a return evidencing that it has fully complied with the peremptory writ of mandate issued pursuant to this judgment.

DATED: 7-15-2020

Judge of the Superior Court
LAURIE M. EARL

# EXHIBIT A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

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| CALIFORNIA FIRE CHIEFS ASSOCIATION, INC.,<br><br>Petitioner,<br>v.<br><br>CALIFORNIA EMERGENCY MEDICAL SERVICES AUTHORITY,<br><br>Respondent. | Case No.: 34-2019-80003163<br><br>ORDER AFTER HEARING GRANTING, *IN PART*, PETITION FOR WRIT OF MANDATE AND RELATED REQUEST FOR DECLARATORY RELIEF |

On March 13, 2020, a hearing was held on the petition for writ of mandate and related request for declaratory relief. Following the hearing, the Court requested supplemental briefs on a discrete issue (discussed below). Having now considered all of the briefs and the arguments made at the hearing, the Court now issues the following final order and statement of decision granting, *in part*, the request for declaratory and mandate relief.

## INTRODUCTION

By this action, Petitioner California Fire Chiefs Association ("the Association") seeks a judicial declaration that (1) certain "Guidelines" promulgated by Respondent Emergency Medical Services Authority ("EMSA") constitute underground regulations, and are thus void and unenforceable, and (2) all determinations made by EMSA pursuant to these Guidelines are void. The Association also seeks a writ of mandate ordering EMSA to stop using or enforcing the

Guidelines and to set aside any determinations made pursuant to the Guidelines.[1]

EMSA argues this case is moot because it stopped using and enforcing the Guidelines in April 2019 – several months *before* this lawsuit was filed. As explained in more detail below, the Court is not convinced this case is moot. As also explained in more detail below, the Court agrees that the Guidelines are underground regulations. It will thus issue a judicial declaration so stating, and a writ of mandate ordering EMSA to stop using or enforcing the Guidelines. All other requests for declaratory and mandate relief are denied.

## BACKGROUND

***The Emergency Medical Services Act***

In order to understand this case, a brief description of the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act ("the EMS Act" or "the Act") is in order. (Health & Saf. Code § 1797 et seq.)[2] The EMS Act established "a statewide system for emergency medical services" which is administered through a "two-tiered" system of regulation – one at the state level, and the other at the local level. (§ 1797.7; *County of San Bernardino v City of San Bernardino* (1997) 15 Cal.4th 909, 915.) At the state level, the Act established a new state agency – EMSA – and made it "responsible for the coordination and integration of all state activities concerning emergency medical services." (§ 1797.7.) At the local level, the Act empowered counties to "develop an emergency medical services program. Each county developing such a program shall designate a local EMS agency[.]" (§ 1797.200.)

The Act assigns different duties and functions to EMSA and to local EMS agencies (which are sometimes referred to as "LEMSAs"). The local EMS agency is responsible for: (1) planning, implementing, and evaluating an "emergency medical services system . . . consisting of an organized pattern of readiness and response services based on public and private agreements and operational procedures;" (2) developing an "emergency medical services plan" for the system in accordance with EMSA guidelines, and (3) submitting the plan to EMSA on an annual basis. (See §§ 1797.76, 1797.204, 1797.250, 1797.254; see also *County of San Bernardino*, *supra*, 15 Cal.4th at 916.) Among other things, the plan must address transportation of

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[1] It also seeks injunctive relief that essentially mirrors its request for mandate relief. The Court does not separately discuss the request for injunctive relief.

[2] Further undesignated statutory references are to the Health and Safety Code.

emergency medical patients. (§§ 1797.76, 1797.103, subd. (c); see also *County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175, 1191.) EMSA, for its part, reviews these plans, and may reject a plan if it "determines that the plan does not effectively meet the needs of the persons served and is not consistent with the coordinating activities in the geographical area served, or that the plan is not concordant and consistent with applicable guidelines and regulations[.]" (§ 1797.105; see also *County of Butte*, supra, 187 Cal.App.4th at 1198.)

***Section 1797.201 – Cities and Fire Districts.*** Although EMSA and local EMS agencies are primarily responsible for implementing the Act, cities and fire districts that provided emergency medical services prior to the passage of the EMS Act may also play a role. Section 1797.201 provides:

> Upon the request of a city or fire district that contracted for or provided, as of June 1, 1980, prehospital emergency medical services, a county shall enter into a written agreement with the city or fire district regarding the provision of prehospital emergency medical services for that city or fire district. Until such time that an agreement is reached, prehospital emergency medical services shall be continued at not less than the existing level, and the administration of prehospital EMS by cities and fire districts presently providing such services shall be retained by those cities and fire districts[.]

(§ 1797.201.) Pursuant to section 1797.201, if cities or fire districts provided emergency medical services as of June 1, 1980, they may continue to provide and administer those services. EMSA refers to such cities and fire districts as ".201 providers." In *County of San Bernardino, supra*, our Supreme Court held that although it was "manifest" the Legislature anticipated that .201 cities and fire districts would eventually enter into agreements with counties regarding the provision of emergency medical services, it did not require that they do so. (*County of San Bernardo, supra*, 15 Cal.4th at 922.) The court thus concluded, "under section 1797.201, a county may not contravene the authority of eligible cities and fire districts to continue the administration of their prehospital EMS without the latter's consent, either through acquiescence or through formal agreement." (*Id.* at 924; see also 97 Ops. Cal. Atty. Gen. 90 (2014) [concluding .201 providers are not required to have written agreement with county or local EMS agency in order to participate in EMS system].)

***Section 1797.224 – Exclusive Operating Areas.*** The Act authorizes local EMS agencies to create "exclusive operating areas," which are defined as areas "for which a local EMS agency . . . restricts operations to one or more emergency ambulance services or providers of limited advanced life support or advanced life support." (§ 1797.85.) Properly created exclusive operating areas immunize local EMS agencies from liability under federal antitrust laws. (*County of San Bernardino, supra*, 15 Cal.4th at 917-18; see also § 1797.6, subd. (b) ["It is the intent of the Legislature . . . 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 governmental entities in carrying out their prescribed functions under this division."].) In other words, local EMS agencies may effectively grant a monopoly to certain providers through the creation of exclusive operating areas.

Pursuant to section 1797.224, there are two different ways to create an exclusive operative area. The first way is by utilizing a "competitive process."

> A local EMS agency may create one or more exclusive operative areas . . . if a *competitive process* if utilized to select the provider or providers . . . . A local EMS agency which elects to create one or more exclusive operating areas . . . shall develop and submit for approval to [EMSA], as part of the local EMS plan, its *competitive process* for selecting providers and determining the scope of their operations. This plan shall include provisions for a *competitive process* held at periodic intervals.

(§ 1797.224, emphasis added.) The Act does not define the term "competitive process" or state what such a process must include. The second way to create an exclusive operating area is by what is known as "grandfathering." (See *County of Butte, supra*, 187 Cal.App.4th at 1182.; *Memorial Hospitals Assn. v. Randol* (1995) 38 Cal.App.4th 1300, 1309.) "No competitive process is required if the local EMS agency develops or implements a local plan that continues 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." (*Id.*) Thus, if an EMS provider (including a city or fire district) has been continuously operating within a local EMS area since January 1, 1981, the local EMS agency may designate it the area's exclusive provider without utilizing a competitive process.

***The Challenged Guidelines***

By this action, the Association challenges what it refers to as three "Guidelines" that EMSA issued between 1985 and 2010. The first Guideline (which the Association refers to as "Guideline 141") was issued in 1985 and reissued in 1997 and is titled "Competitive Process for Creating Exclusive Operating Areas." (Exs 2, 3.) As the title suggests, it contains requirements regarding the competitive process for creating exclusive operating areas pursuant to section 1797.224. Among other things, it provides the competitive process must include formal advertising of the opportunity to compete, a request for proposals (RFP), and a responders' conference, and it includes requirements regarding the contents of the RFP, the submission of proposals, the receipt and evaluation of proposals, the rejection of proposals, contract periods, protest procedures, and cancelling the procurement process.[3] (Ex. 3.)

The second Guideline (which the Association refers to as "Guideline 141-B") was issued in 2008 and is titled "Review Criteria and Policy for Transportation and Exclusive Operating Area Components of the EMS Plan." (Ex. 4.) This document – which is stamped "draft" on every page – expands on the competitive process requirements contained in Guideline 141, and includes a new requirement that exclusive contracts may not extend beyond 10 years. (*Id.*, pp. 18, 24.) This document also contains requirements for establishing exclusive operating areas through grandfathering, as permitted by section 1797.224, and specifies certain "criteria" that EMSA will use to determine whether an existing provider is operating in the same "manner and scope" in which it has provided services without interruption since January 1, 1981. (*Id.*, pp. 13-14.) Finally, this document states that .201 providers may not "enhance" the services they provided prior to June 1, 1980, and that section 1797.201 "does not by itself allow for exclusivity. Exclusivity cannot be granted unless the requirements established in Section 1797.224 are also met." (*Id.*, p. 15.)

Finally, the third Guideline (which the Association refers to as "Guideline 310-01") was issued in 2010 and is titled "EMS System Coordination and HS 1797.201 in 2010." (Ex. 10.) This document essentially explains EMSA's interpretation of section 1797.201.

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[3] The Guideline also recognizes that "[a] competitive process is not required if the local EMS agency implements a plan 'that continues the use of existing providers operating within the local EMS area in the manner and scope in which services have been provided without interruption since January 1, 1981.' (Section 1797.224)." (Ex. 3, § 1.)

***The APA/Underground Regulations***

The Administrative Procedure Act ("APA") establishes detailed procedural requirements that state agencies must follow when adopting regulations. (Gov. Code § 11346, subd. (b).) An agency must: (1) give the public notice of the proposed regulation; (2) prepare a statement of reasons for the proposed regulation; (3) give interested parties an opportunity to comment on the proposed regulation; (4) respond in writing to public comments; and (5) forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, which then reviews the regulation for consistency with the law, clarity, and necessity. (See generally Gov. Code §§ 11346.2, 11346.4, 11346.5, 11346.8, 11346.9, 11347.3, 11349.1, 11349.3) As our Supreme Court explains:

> One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation . . . . The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.

(*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568-69 ["*Tidewater*"]; see also *Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 908 ["The APA is intended to advance meaningful public participation in the adoption of administrative regulations by state agencies"].)

The APA defines a "regulation" very broadly to include "every rule, regulation, order, or standard of general application or amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure[.]" (Gov. Code § 11342, subd. (g).) A rule subject to the APA thus has two identifying characteristics: (1) the agency must intend for the rule to apply generally, rather than to a specific case; and (2) the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern its procedure." (*Id.*; see also *Tidewater*, *supra*, 14 Cal.4th at 571.) A rule that meets the APA's definition of a regulation but that is not adopted pursuant to the APA is known as an "underground regulation" – and this is true even if the agency calls it something different like a

"guideline," a "policy," or a "bulletin."[4] (See *Bollay v. Office of Administrative Law* (2011) 193 Cal.App.4th 103, 106; *People v. Medina* (2009) 171 Cal.App.4th 805, 814; 1 Cal. Code Regs § 250, subd. (a).)

The APA expressly provides that "[a]ny interested person may obtain a judicial declaration as to the validity of any regulation . . . by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure." (Gov. Code § 11350, subd. (a).) Pursuant to this provision, an interested person may obtain a judicial declaration that a particular rule is an underground regulation and thus invalid. (See *Bollay, supra*, 193 Cal.App.4th at 106-07.) An interested person may also obtain a writ of mandate ordering an agency to refrain from utilizing or enforcing an underground regulation. (*Id.* at 113.) The Association seeks both type of relief here.

In addition to seeking judicial relief, an interested person may submit a petition to the Office of Administrative Law ("OAL") seeking a "determination as to whether [an agency] guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation" as defined by the APA. (Gov. Code § 11340.5, subd. (b); see also 1 Cal. Code Regs § 260 [outlining petition procedure].) "Any action of OAL . . . in connection with a petition shall be suspended if OAL receives a certification from the agency that it will not issue, use, enforce, or attempt to enforce the alleged underground regulation[.]" (1 Cal. Code Regs § 280, subd. (a).)

***The Association's OAL Petition***

In February 2019, the Association submitted three petitions to OAL seeking a determination that the Guidelines are underground regulations. (Exs. 1, 9, 13.) In response, on or about April 4, 2019, EMSA submitted a certification to OAL stating it would "not issue, use, enforce, or attempt to enforce" the Guidelines. (Ex. 18.) The Court will generally refer to this as EMSA's OAL certification. This certification suspended – and effectively mooted – the OAL petitions.

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[4] The fact that EMSA is statutorily authorized to issue "guidelines" is thus beside the point. (§ 1797.102.) If such guidelines otherwise meet the definition of a regulation, they must be adopted pursuant to the APA.

*The Present Action*

The Association contends the Guidelines are underground regulations. It also contends that EMSA, contrary to its OAL certification, continues to use and enforce the Guidelines. It thus brought the present action seeking declaratory and mandate relief. In particular, it seeks a judicial declaration that (1) the Guidelines are underground regulations, and (2) all determinations made by EMSA pursuant to the Guidelines are void. It also seeks a writ of mandate ordering EMSA: (1) to comply with its OAL certification and to stop using or enforcing the Guidelines; (2) to set aside all determinations made pursuant to the Guidelines; (3) to remove all such determinations from its website, including, in particular, a document titled "Ambulance Zones, Ground: Exclusive Operating Areas Status Determinations By EMSA;" and (4) to "begin promulgating local EMS system regulations in compliance with the APA."

After this action was filed, and immediately before the hearing on the merits, EMSA proposed regulations that incorporate many elements of the Guidelines.[5] The "initial statement of reasons" for the proposed regulations explains that after EMSA certified to the OAL that it would not use or enforce the Guidelines, it "began the process of promulgating regulations to cover the [G]uidelines[.]" (ISOR, p. 2.) In other words, EMSA would stop using and enforcing the Guidelines until they were properly promulgated as regulations.

The Court requested supplemental briefing on (1) what effect, if any, the proposed regulations have on this action, and (2) whether the Court should wait for EMSA to finish the regulatory process before deciding this case. The parties agree that the Court may decide this case before the regulatory process is complete. (EMSA Supp. Brief at 4:2-4; EMSA Supp. Brief at 1:23-24.)

In addition to acknowledging the Court may decide this case before the regulatory process is complete, EMSA also argues the regulatory process "is further evidence that petitioner's claims are moot" and/or that those claims "will be mooted once the rulemaking process is complete." The Court disagrees – at least at this early stage of the regulatory process. As the Association notes, it is not known how long the process will take, whether the proposed regulations will actually be adopted, and if they are adopted, what the final regulations will look

[5] Both sides have asked the Court to judicially notice these proposed regulations. The request is granted.

like.[6] The Court thus finds that the *proposed* regulations are just that – i.e., *proposals* – and that they do not moot this action.

The Association argues that the proposed regulations are both substantively and procedurally deficient. Because the Association does not challenge the proposed regulations, the Court need not consider this argument. The Association will have the opportunity to challenge the substance of the proposed regulations when if and when they are adopted.

## ANALYSIS

### 1. What This Case Is About

Before turning to the merits, the Court briefly discusses what this case is, and is not, about.

It appears from the parties' briefs that the Association and EMSA have different views of what sections 1797.201 and 1797.224 mean, although the precise nature of their dispute is unclear. Ultimately, however, the Court need not decide who is correct, because the Association's lawsuit is based *solely* on its contention that the Guidelines are regulations that were not properly promulgated pursuant to the APA. (See, e.g., Pet., ¶¶ 2, 3, 5, 8, 9, 33, 36, 66, 70.) In its petition, the Association does not contend that EMSA's interpretation of sections 1797.201 and 1797.224 is legally erroneous or contrary to the EMS Act, and it does not contend that EMSA would lack the authority to adopt regulations like the Guidelines so long as it complied with the APA.[7] The only question presented by this case is thus whether the

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[6] This process may also be delayed due to the ongoing COVID-19 pandemic.

[7] The Association clearly believes the Guidelines, or at least portions thereof, are legally erroneous, etc. For example, it states in its opening brief that the Guidelines are "substantively erroneous, conflict with federal and state law, and/or arrogate to EMSA authority it does not possess under the EMS Act or other law." (MPA at 1:19-21.) This statement, however, is accompanied by no argument or citation to authorities. (See *Woods v. Horton* (2008) 167 Cal.App.4th 658, 677 ["A court need not consider an issue where reasoned, substantial argument and citation to supporting authorities are lacking."].) The Association also states – again, with no reasoned argument or citation to authorities – the Guidelines "depart" from or are "contrary to" the EMS Act. (MPA at 22:18, 24:7-8, 24:19-20.) As noted, however, the petition and complaint is based *solely* on the allegation that the Guidelines are underground regulations and are thus void – and not on the allegation that the Guidelines misinterpret or conflict with the Act or any other federal or state law, or are substantively erroneous, or exceed EMSA's authority. (See, e.g., Pet., ¶¶ 2, 3, 5, 8, 9, 33, 36, 46, 54, 60, 64, 66, 70.)

Guidelines are regulations as defined by the APA, not whether the Guidelines are legally correct or defensible.

Moreover, although the Association seeks a judicial declaration that *all* determinations made by EMSA pursuant to the Guidelines are void, it does not actually challenge any particular determination.[8] Instead, it cites a few determinations merely to demonstrate that EMSA continues to use and/or enforce the Guidelines.

For example, the Association frequently cites a determination made by EMSA regarding the Contra Costa County EMS Agency's attempt to establish exclusive operating areas for ambulance services by utilizing a competitive process. In 2015 or 2016, the Agency issued a request for proposals and ultimately awarded and entered into an exclusive contract with an entity that was some type of alliance or joint venture between the Contra Costa Fire Protection District and American Medical Response.[9] (Ex. 8.) In response to a complaint from the California Ambulance Association, EMSA investigated the circumstances surrounding the competitive process and found, among other things, that it was not fair, it stifled competition, and the outcome was impermissibly influenced by the County Board of Supervisors. (Ex. 8.) In particular, EMSA found that the Agency "actively and directly colluded with the Contra Costa Fire Protection District and American Medical Response to ensure that the 'Alliance' was the winning bidder," and that these "competitors had colluded in advance to capture the marketplace and allowed bid rigging to occur." (*Id.*, p. 2.) EMSA also found "the private incumbent ambulance provider (American Medical Response), submitting the joint bid with the Contra Costa County Fire District, agreed in advance not to compete against the fire district for the EMS contract." (*Id.*, p. 3.) Finally, it found the Agency "relied upon direction from the County Board of Supervisors in . . . selecting the providers in advance of the competitive process," even though the "individuals awarding the contract (the County Board of Supervisors) were also the same individuals (the governing board of the fire district) competing for the contract, creating a situation that had a chilling effect on all other competition." (*Id.*) Based on these findings, EMSA told the Agency it had to conduct a new competitive process if it wanted its ambulance

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[8] The general rule cited by EMSA that "an action for declaratory relief is not appropriate to review an administrative decision" is thus not applicable here. (*Walter Leimert Co. v. Calif. Coastal Comm.* (1993) 149 Cal.App.3d 222, 230.)

[9] The details of the contract and precisely who it was awarded to are not clear.

zones to remain exclusive, and if it failed to do so, those zones would be deemed non-exclusive. (Exs. 8, 33.)

The Association does not challenge any of EMSA's factual findings or legal conclusions regarding the Agency's attempt to establish exclusive operating areas via a competitive process. Instead, its sole argument is that those findings and conclusions are based (at least "in part") on underground regulations (i.e., the Guidelines), and hence are void. (MPA at 11:2-3.) That argument, in turn, appears to be based on the fact that in a lengthy letter to the Agency outlining its findings and conclusions on the issue, EMSA cited Guideline 141. (*Id.*, p. 3.) The portion of the Guideline that EMSA cited states:

> The procurement process may be canceled after opening, but prior to award, when the contracting officer determines in writing that cancellation is in the best interest of the agency for reasons such as those listed below.
>
> . . . .
>
> d. The proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith.

(Ex. 3, § XI(1)(D).) After citing this Guideline, EMSA stated, "the Contra Costa EMS agency knew or should have known that the competitive process was flawed and should have canceled the procurement." (Ex. 8, p. 3.) Other than arguing EMSA's determination regarding the competitive process and the resulting contract was "based in part" on the Guidelines, (MPA at 11:2), the Association makes no attempt to explain why that determination is legally incorrect or somehow conflicts with or misinterprets the EMS Act.

This case is thus unlike our Supreme Court's decision in *Tidewater, supra*. There, several maritime employers challenged a determination by the Department of Labor Standards Enforcement ("DLSE") that two wage orders promulgated by the Industrial Welfare Commission ("IWC"), which required overtime pay for employees who worked more than eight hours in any twenty-four hour period, applied to maritime employees working in the Santa Barbara Channel.[10] This determination was incorporated into an "Operations and Procedures Manual" ("the

[10] One of the wage orders applied to employees "in . . . technical, . . . mechanical, and similar occupations," and the other applied to employees in "any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another . . . by . . . water, and all operations and services in connection therewith[.]" (*Tidewater, supra* 14 Cal.4th at 562.) The plaintiffs did not challenge the wage orders themselves – just the DLSE's interpretation that the wage orders applied to maritime employees in the Santa Barbara Channel.

Manual") prepared by DLSE. The purpose of the Manual was to establish DLSE's "interpretive and enforcement policies," and to "achieve some measure of uniformity from one office to the next." (*Tidewater*, *supra*, 14 Cal.4th at 562.) The Manual was available publicly, but was prepared without compliance with the APA.

Some of the plaintiffs' employees who worked on boats operating in the Santa Barbara Channel began filing lawsuits seeking overtime pay.[11] In response, the plaintiffs filed a lawsuit seeking an injunction barring application of the wage orders to their employees. They argued (1) the wage orders did not apply because portions of the Santa Barbara Channel were beyond California's boundaries as defined by federal law; (2) federal law preempted all state laws that regulated overtime pay for seamen; and (3) the Manual, which interpreted the wage orders, was an underground regulation and thus void. The trial court granted the injunction,[12] but the appellate court reversed, holding, among other things, that the relevant portion of the Manual was *not* a regulation subject to the APA.

Our Supreme Court disagreed. It found the Manual's interpretation of the wage orders met the APA's definition of a regulation because (1) it was intended to apply generally to a class of cases rather than to a specific case, (2) it declared how that class of cases would be decided, and (3) it interpreted the law (i.e., the wage orders) enforced by the DLSE. (*Id.* at 571-74.) It thus held the Manual's interpretation was void because it was not adopted in accordance with the APA. (*Id.* at 561, 577.) It nonetheless *affirmed* the appellate court, explaining as follows:

> [W]hile we do not defer to the DLSE's interpretation of the IWC wage orders, we do not necessarily reject its decision to apply the wage orders to maritime employees working in the Santa Barbara Channel. If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA, then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations. Here, for example, if [the plaintiffs] violate applicable IWC wage orders, they should not be immune from suit simply because the DLSE adopted an invalid policy. The DLSE's policy may be void, but the underlying wage orders are *not* void. Courts

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[11] The employees worked 12-hour shifts, but were paid a flat daily rate without additional compensation for overtime. (*Id.* at 561.)

[12] We are not told on what grounds.

> must enforce those wage orders just as they would if the DLSE had never adopted its policy.

(*Id.* at 577, italics in original.) Thus, if DLSE's interpretation of the wage orders "was correct," it would be upheld even though that interpretation was expressed in an underground regulation.[13] (*Id.*)

So, too, in this case. Even if the Court were to conclude the Guidelines are regulations and thus void for failure to comply with the APA, it would not necessarily reject any and all determinations that EMSA made based on those Guidelines. Instead, like the court in *Tidewater*, it would uphold those determinations if they were based on a proper interpretation of the EMS Act. As noted above, however, the Association makes no attempt to argue that any particular determination made by EMSA is based on an improper interpretation of the Act or is otherwise legally incorrect. The Court has thus been presented with no reason to void any particular determination.

With this in mind, we turn to the merits.

**2. EMSA's Answer Need Not Be Verified**

The Association's first argument is easily disposed of. It argues the petition should be granted because EMSA failed to verify its answer. A public entity like EMSA, however, is not required to verify its answer, even if the complaint against it was verified. (Code Civ. Proc. § 446 ["if the state, any . . . public agency, or public corporation . . . is defendant, its . . . answer need not be verified."]; *Trask v. Superior Court* (1994) 22 Cal.App.4th 346, 350, fn.3 ["a public agency, unlike a private citizen, need not verify its answer to a verified petition (Code Civ. Proc., § 446, 1109) but may instead rebut the petitioner's allegations by proof presented by way of declaration or at a hearing."].)

**3. Mootness**

On the merits, the Association argues (1) the Guidelines are underground regulations, and (2) EMSA continues to use and enforce them despite its certification to OAL that it would not.

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[13] The *Tidewater* court ultimately determined DLSE's interpretation was correct, because the Labor Code applies to California wage earners, and under California law, the entire Santa Barbara Channel is in California. (*Id.* at 577-79.)

EMSA disputes the second argument. It states that it has not used or enforced the Guidelines since its OAL certification in April 2019. Tom McGinnis, the chief of EMSA's EMS Systems Division, states under penalty of perjury that all three Guidelines and related documents have been removed from EMSA's website,[14] and, more importantly, that EMSA "is not requiring compliance with anything stated within the documents that is not otherwise based upon statute, regulations, or case law. Further, [EMSA] is basing its review of local EMS plans on existing statute, regulations, and case law without referencing any of the three documents." (McGinnis Decl., ¶¶ 3-4.) EMSA thus argues this action is moot.

Mootness is a justiciability doctrine that embodies the principle "that courts will not entertain an action which is not founded on an actual controversy." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) A moot case is one in which an actual controversy existed at one point, but has since ceased to exist due to either the passage of time or a change in circumstances. (*Id.*) "The pivotal question in determining if a case is moot is . . . whether the court can grant the plaintiff any effectual relief. [Citations.] If events have made such relief impracticable, the controversy has become . . . moot." (*Id.* at 1574; see also *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1445 ["A case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief."].) Similarly, "Declaratory relief is appropriate [only] where there is a justiciable controversy, but not where the dispute is moot[.]" (*City of Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 481.)

Here, the Association seeks a judicial declaration that the Guidelines are underground regulations and a writ of mandate ordering EMSA to stop using and/or enforcing them. EMSA, however, states that it stopped using and enforcing the Guidelines in April 2019, several months before this lawsuit was filed, and that it is no longer requiring local EMS agencies to comply

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[14] The mere fact the Guidelines have been removed from EMSA's website is clearly insufficient in and of itself to establish it no longer uses or enforces them. In *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, for example, the court held a generally applicable policy need not be written in order to constitute an underground regulation. (*Id.* at 336 ["We decline to endorse an approach that would allow an agency to avoid APA requirements simply by driving its regulations further underground," i.e., by failing to promulgate a written policy].) Similarly, a generally applicable policy need not be posted on an agency's website in order to constitute an underground regulation.

with them. It thus argues that a judicial declaration that the Guidelines are underground regulations and a writ of mandate ordering it not to use them would have no practical effect.

The Association claims EMSA is still using and enforcing the Guidelines, even though it is no longer citing them. In light of McGinnis' unambiguous statement under penalty of perjury that it is not, the Association must present clear evidence that it is. It gives four examples of such continued use and enforcement. As the Court explained in its tentative ruling, none of the examples are particularly convincing. The Court notes, however, that it does appear EMSA is still disapproving plans by citing prior disapprovals which are expressly based on the Guidelines. (Compare Ex. 8 [April 13, 2018, disapproval citing Guideline 141] with Ex. 33 [August 2019 disapproval citing April 13, 2018, disapproval].) Arguably, by citing prior disapprovals which are expressly based on the Guidelines, EMSA continues to use those Guidelines. Moreover, as the Court noted in its tentative ruling, it appears EMSA may still be enforcing a requirement in the Guidelines that an exclusive contract may not exceed ten years.[15] Although the evidence is more equivocal the Association suggests, the Court finds there is *some* evidence that EMSA has continued to use and enforce the Guidelines after its OAL certification, and that this case is not moot.

Even if the Court were convinced that EMSA is no longer using the Guidelines, it recognizes "the general principle that *voluntary cessation* of allegedly illegal conduct ... does not make the case moot[.]" (*TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 151, italics added, internal quotes omitted; see also *Friends of the Earth, Inc. v. Laidlaw Envt. Servs. Inc.* (2000) 528 U.S. 167, 189 ["[it] is well settled that a defendant's voluntary cessation" of challenged behavior does not render a case moot]; *Pittenger v. Home Savings & Loan Assn.* (1958) 166 Cal.App.2d 32, 37 ["voluntary discontinuance of allegedly wrongful conduct does not destroy the justiciability of a controversy based upon such conduct."].) Voluntary cessation ordinarily does not render a claim moot because of the risk that the

[15] In the tentative ruling, the Court discussed the Association's argument that EMSA continues to apply the requirement in Guideline 141-B that an exclusive contract may not exceed ten years, while the EMS Act states only that the competitive process shall be "held at periodic intervals." (Compare Ex. 4, p. 24 [competitive process "must be repeated at periodic intervals" "not greater than ten years"] with § 1797.224 [EMS plan "shall include provisions for a competitive process held at periodic intervals."].) The Court also noted that EMSA did not respond to this argument in its opposition, and it invited EMSA to do so at the hearing. Despite the invitation, EMSA never responded to this argument.

defendant could stop the challenged practice just long enough for the case to be dismissed and then resume the practice. (*Friends of the Earth, supra*, 528 U.S. at 189.) Moreover, even if a case is moot, the Court has inherent discretion to decide it if it raises an issue of public interest that is likely to recur. (See *In re William M.* (1970) 3 Cal.3d 16, 23; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 432, fn. 14 ["If the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest."].) The Court finds this is such a case and thus proceeds to consider the merits.

**4. The Guidelines Are Underground Regulations**

As noted above, a regulation how two defining characteristics: (1) it must apply generally, rather than to a specific case; and (2) it must interpret or make specific the law enforced by the agency or govern its procedures. (Gov. Code § 11342, subd. (g); *Tidewater, supra*, 14 Cal.4th at 571.) The Guidelines have both characteristics – they apply generally rather than to a specific case and they interpret the EMS Act.

For example, Guideline 310-01 appears to be what our Supreme Court has called an "interpretive regulation," i.e., a statement explaining the agency's interpretation of the law it is charged with implementing. (*Tidewater Marine Western, supra*, 14 Cal.4th at 574-75.) EMSA's argument that Guideline 310-10 is not a regulation is thus not persuasive.

Equally unpersuasive is EMSA's argument that the Guidelines are not regulations because they were not intended to apply generally to a class of cases. EMSA cites *Capen v. Shewry* (2007) 155 Cal.App.4th 378 for the following proposition: "If [an] interpretation arises in the course of an enforcement proceeding involving the adjudication of a specific case it is not a regulation subject to the APA." (*Id.* at 387.) True. But the Guidelines are not interpretations that arose in the course of specific enforcement proceedings. Guidelines 141 and 141-B, for example, establish criteria that apply whenever a local EMS agency decides to create an exclusive operating area – they do not apply to a specific local EMS agency or a specific plan to create an exclusive operating area. *Capen* is thus wholly inapplicable to the facts of this case.

EMSA also argues the Guidelines are merely recommendations and are not binding. In other words, it argues the Guidelines are just that – *guidelines* and not *rules of general applicability*. The Court disagrees. Despite their name, the Guidelines clearly impose generally applicable requirements. For example, Guideline 141 states an RFP "shall" be developed if a

local EMS agency decides to create EOAs, and it contains 13 "requirements" for RFPs, and states an RFP should "require responders" to submit 16 specific items. (Ex. 3, § I.) ., §§ II, IV.) These are thus requirements that apply generally to all cases where a local EMS agency decides to create an EOA, and to all RFPs.

One of the most persuasive pieces of evidence that the Guidelines are regulations is actually a court case: *County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175. There, the Third District Court of Appeal analyzed several statements by EMSA that explained its interpretation of section 1797.224's "manner and scope" language. The court found those statements – which are almost identical to statements found in Guideline 141-B – are regulations subject to the APA. (Compare *County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175, 1201-02 [quoting declaration from EMSA's deputy director explaining EMSA's interpretation of section 1797.224's "manner and scope" language and finding that interpretation "is a generally applicable policy subject to the rulemaking procedure of the APA"] with Guideline 141-B, pp. 13-14 [outlining "manner and scope evaluation criteria" using language similar to declaration quoted in *County of Butte* and found to be regulation subject to APA].) Indeed, given the *County of Butte* court's finding, it is difficult to see how EMSA can argue in good faith that the Guidelines not regulations.[16]

Finally, although not dispositive, the Court notes that EMSA's statement of reasons for recently proposing regulations supports the finding that the Guidelines are regulations. In its "initial statement of reasons" (or "ISOR"), EMSA explains that it developed and revised the Guidelines over the years with input from stakeholders, "but [they] were never formally adopted as regulations." (ISOR, p. 2.) In 2012, it began the process of updating the Guidelines and drafting regulations, but the process was abandoned in 2015 after the Association filed a lawsuit. In 2019, in response to the Association's OAL petitions, EMSA certified that it would not use or enforce the Guidelines, and it "subsequently began the process of promulgating regulations to cover the [G]uidelines[.]" (*Id.*) In the initial statement of reasons EMSA also explains:

- "[A] number of lawsuits over the years have resulted from the lack of specificity in [the] statute concerning EMS issues, most specifically involving HSC 1797.201 and 1797.224. Those lawsuits have resulted in decisions that have only partially clarified the lack of specificity and clarity in the statutes." (ISOR, p. 3.)

[16] Or at least how it can argue that those portions of the Guidelines that are essentially identical to the statements in *County of Butte* are not regulations.

- "The EMS Act lacks clarity regarding what constitutes a 'reduction in the level of service' for emergency ground ambulance transportation or what constitutes a change in 'manner and scope' of existing services." (ISOR, p. 3.)
- "[T]he proposed regulations will clarify and make specific the criteria for determining whether a city or fire district that has contracted for or provided prehospital EMS as of June 1, 1980, has consistently provided that service since June 1, 1980 without any reduction in the level of service since that time. The proposed regulations will also make specific the criteria for determining when an exclusive operating area may be created without a competitive process and will also make specific the process to be used when awarding an exclusive operating area by way of a competitive process." (ISOR, p. 3.)
- "These regulations will . . . assist in eliminating the current lack of specificity in HSC . . . 1797.201 and 1797.224[.]" (ISOR, p. 3.)
- "The procedures and provisions for carrying out the responsibilities [i.e., developing and implementing local EMS systems] have been specified in state guidelines [i.e., the Guidelines] and county policies and procedures adhered to voluntarily over the hears. [EMSA] is now proposing to put these guidelines in regulations to adhere to the Administrative Procedures Act . . . . These regulations continue existing practices[.]" (ISOR, p. 25.)
- "The regulations being proposed by EMSA are intended to place the substance of the[] guidelines into regulations in order to . . . achieve compliance with statute and the Administrative Procedure Act." (ISOR, p. 28.)

These statements strongly suggest that EMSA recognizes the Guidelines have both of the identifying characteristics of a regulation: (1) they apply generally, rather than to a specific case, and (2) they make specific the law enforced or administered by the agency. (§ 11342, subd. (g); *Tidewater*, supra, 14 Cal.4th at 571.) These statements also strongly suggest that EMSA recognizes the Guidelines are regulations that must be promulgated in accordance with the APA.

EMSA tries to argue the Guidelines are exempt from the APA's procedural requirements. Those requirements do not apply to "[a] regulation that embodies the only legally tenable interpretation of a provision of law." (§ 11340.9, subd. (f).) This exception recognizes that there is no duty to promulgate a regulation that merely reiterates the law. (*Morning Star*, *supra*, 38 Cal.4th at 336.) With little to no discussion, EMSA asserts that the Guidelines, in their entirety, simply reiterate the law. The Court disagrees. To give just one example, the EMS Act provides the competitive process utilized to select an exclusive provider shall be held at "periodic intervals," but it does not define that phrase. (§ 1797.224.) Guideline 141-B states the competitive process "must be repeated at periodic intervals" "not greater than ten years."

(Guideline 141-B, p. 24.) Although "not greater than ten years" is certainly *a* legally tenable interpretation of "at periodic intervals," it is not *the only* legally tenable interpretation.

The Court thus finds the Guidelines are underground regulations and it will issue (1) a judicial declaration so stating, and (2) a writ of mandate ordering EMSA not to utilize the Guidelines unless and until it promulgates them as regulations in compliance with the APA.

**5. The Court Will Not Void Prior Determinations**

The Association also seeks (1) a judicial declaration that all determinations made by EMSA pursuant to the Guidelines are void, and (2) writ of mandate or an injunction ordering EMSA to set aside all such determinations. (See Pet., Prayer; Not of Hearing, 2:8-11.) At the hearing, the Association confirmed that it wants the Court to set aside ***all*** determinations that EMSA made prior the OAL certification – i.e., all determinations made prior to April 4, 2019. This raises as many questions as it answers, primarily because the Association does not specify precisely what determinations it wants the Court to order EMSA to set aside. How far back does it want the Court to go? To 1985, when Guideline 141 was first issued? To 1997, when it was reissued? To 2008, when Guideline 141-B was issued? To 2010, when Guideline 310-01 was issued? Some other date? Assuming the Association wants the Court to invalidate all determinations going back to 1985, it cites no authority for the proposition that the Court can effectively undo 34 years of EMSA's work (or 23 years, or 12 years, or 10 years) if it concludes the Guidelines are underground regulations.

Because the Association does not identify which particular determinations it wants the Court to invalidate, this case is not like *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, which was cited by the Association at the hearing. There, an association brought an action on behalf of its members challenging particular audits done by the Department of Health Services ("DHS"). For a number of years, DHS had conducted audits of Medi-Cal providers by taking a small random sample of claim, determining the error rate of that sample, and then extrapolating that error rate over the period covered by the audit. The association argued this "sampling and extrapolation" audit method was an underground regulation. Shortly after the action was filed, DHS promulgated a regulation allowing sampling and extrapolation. The court agreed that audits done *prior* to DHS's promulgation of the regulation were invalid because they were based on an underground regulation. (*Id.* at 496-502.) The remaining issue

was whether the association's members could seek reimbursement of funds paid pursuant to the invalid audits. The court held they could, but only so long as a member seeking reimbursement filed suit within the applicable statute of limitations. (*Id.* at 504.) The court thus effectively invalidated only those audits that were timely challenged by the association's members – not *all* audits conducted pursuant to the underground regulation, or all audits done prior to DHS's promulgation of a regulation allowing sampling and extrapolation. Here, in contrast, the Association asks the Court to invalidate "all" decisions made by EMSA prior to April 4, 2019, with no identification of any particular decision and no explanation of how (or when) any particular member of the Association has been harmed – or even effected – thereby, and no discussion of statute of limitations issues.

The Association's request for mandate and injunctive relief raises other issues as well. For example, voiding determinations regarding local governments' rights to provide and administer emergency ambulance services on an exclusive or non-exclusive basis will necessarily affect the rights of those local governments, the entities that currently provide ambulance services, and the relevant local EMS agencies, yet these entities are not parties to this action and they are thus not able to protect their rights or interests. (See, e.g., Code Civ. Proc. ¶ 389, subd. (a) [person should be joined as party if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."].)

The Court thus declines to issue a judicial declaration or a writ of mandate voiding "all" determinations made by EMSA pursuant to the Guidelines.

**6. The Ambulance Zones List**

The Association wants the Court to order EMSA to remove from its website a document titled "Ambulance Zones, Ground, Exclusive Operating Areas (EOA) Status Determinations by EMSA." (Ex. 24.) The Association claims the document includes "void determinations" based on underground regulations (i.e., the Guidelines). (Pet., Prayer, ¶¶ B, C.) The Court declines to order EMSA to remove this document from its website.

According to EMSA, "This document is a compilation created from approved local EMS

agency EMS plans provided to [EMSA] by the LEMSAs. [EMSA] does not create or designate ambulance zones, that being the purview of the LEMSAs. The information contained in this document, which is periodically updated, is compiled from the current approved local EMS plans submitted [EMSA]. As such, the information contained in the document is public information and is posted in the interests of transparent and open government." (McGinnis Decl., ¶ 6.)

The document is 77 pages long and contains a list of all emergency ambulance zones in the state, broken out by local EMS agency. There are over 300 zones on this list. For each zone, the document identifies the current ambulance service provider(s), states whether the zone is "exclusive" or "non-exclusive," states whether exclusivity was created by a "non-competitive process" or a "competitive process," and describes the "type of exclusivity" and "scope of operations for exclusivity." It also identifies the "date of last approved EMS plan/update." Here is one example, chosen solely because it is the first zone on the list. The Alameda EMS Agency has created an ambulance zone in Alameda County consisting of the "City of Alameda including the property known as Coast Guard Island." The current provider in this zone is the "Alameda Fire Department," the zone is "exclusive" for "emergency ambulance services," and exclusivity was established via a non-competitive process.[17] (Ex. 24, p. 1.) There is *no* suggestion that there is anything amiss about (1) this particular ambulance zone, (2) the fact that it is exclusively served by the Alameda Fire Department, or (3) the fact that its exclusivity was established without a competitive process. There is also *no* suggestion that any determination EMSA has made regarding this zone is based on the Guidelines. The Association thus provides *no* reason for the Court to order EMSA to remove information about this zone from its website.

Why, then, does the Association contend the Court should order the *entire* document removed? Primarily because a header on the document states, "EMSA *Determinations* as of 10/23/19," and a footer states, "Based on current EMS Plan *approval* by EMSA." (Emphasis added.) The Association contends EMSA is necessarily applying the Guidelines when determining whether any particular ambulance zone is exclusive or non-exclusive and/or approving plans.

[17] Presumably this means the Alameda Fire Department had been providing emergency ambulance services without interruption since January 1, 1981, and that no competitive process was necessary in order to establish an exclusive operating area pursuant to section 1797.224.

The Association fails to convince the Court that any particular determination reflected on the document is based on the Guidelines. As noted, the document lists the "date of last approved EMS plan/update" for each local EMS agency. (Ex. 24.) Of the more than 30 local EMS agencies, only five (Monterey County, Mountain Valley, Orange County, San Mateo, and Yolo) had a plan or update that was approved after EMSA's OAL certification. Thus, most of the entries on the document occurred *before* EMSA's OAL certification, and thus fail to demonstrate that EMSA has continued to use and/or enforce the Guidelines *after* its certification.

As for the five agencies whose plans were approved after EMSA's OAL certification, the Association makes no attempt to explain why any of EMSA's determinations regarding these agencies or their plans are either legally incorrect or based on the Guidelines. To give one example, Yolo County has one emergency ambulance zone which encompasses the entire county, and AMR is the exclusive provider in that zone. The Yolo County EMS agency last held a competitive process in 2013, and its plan was most recently approved in October 2019. (Ex. 24, p. 77.) What about this violates the EMS Act such that EMSA should be ordered to remove this information from its website? Moreover, how is this based on the Guidelines? The Association makes no attempt to answer these questions, and thus fails to convince the Court that it should order EMSA to remove the document from its website.

**7. The Court Will Not Order EMSA To Adopt Regulations**

The Association also seeks a writ of mandate ordering EMSA to "begin promulgating local EMS system regulations in compliance with the APA and the EMS Act." (Pet., Prayer, ¶ B.) It fails to convince that EMSA has a mandatory duty to do so that may be enforced by a writ of mandate. (See generally *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700-701 [a writ of mandate under Code of Civil Procedure section 1085 is generally only available if the agency failed to perform a purely ministerial duty involving no discretion].)

Section 1797.107 provides EMSA "*shall* adopt, amend, or repeal . . . such rules and regulations *as may be reasonable and proper* to carry out the purposes and intent of [the Act] and to enable [it] to exercise the powers and perform the duties conferred upon it by [the Act] not inconsistent with any provisions of any statute in this state." (Emphasis added.) This provision does not absolutely require EMSA to adopt regulations on any particular subject; instead, it

requires EMSA to adopt regulations "as may be reasonable and proper" to carry out the Act. The Court interprets this provision as giving EMSA discretion to decide when and if regulations on a particular subject are reasonable and proper.

This case is distinguishable from *Newland v. Kizer* (1989) 209 Cal.App.3d 647 – which is the only case cited by the Association to support its argument. There, the court held the Department of Health Services had a mandatory duty to adopt regulations regarding the temporary operation of long-term health care facilities by receivers, where a statute (Health and Safety Code section 1335) provided it "shall adopt regulations for the administration of this article." (*Newland, supra*, 209 Cal.App.3d at 654, quoting section 1335.) The *Newland* court also cited a more general statute (Health and Safety Code section 1275) that provided, "The state department shall adopt, amend, or repeal . . . such reasonable rules and regulations as may be necessary or proper to carry out the purposes and intent of this chapter [§§ 1250-1339] and to enable the state department to exercise the powers and perform the duties conferred upon it by this chapter." (*Newland, supra*, 209 Cal.App.3d at 654, quoting section 1275.) The Court pauses here to note that section 1797.107 is almost identical to Health and Safety Code section 1275 – both sections provide an agency "shall" adopt regulations "as may be reasonable and proper" (§ 1797.107) or "as may be necessary or proper" (§ 1275) "to carry out the purposes and intent" of the relevant law. The *Newland* court concluded "section 1335 specifically requires the Department to adopt regulations. Section 1335's specific mandatory language prevails over any more general language in section 1275." (*Newland, supra*, 209 Cal.App.3ed at 654.) This holding strongly suggests that general language like that found in section 1797.107 is insufficient, standing alone, to impose a mandatory duty on an agency to adopt regulations on a particular subject.

Moreover, EMSA has already adopted numerous regulations pursuant to the authority granted by section 1797.107. (See generally Division 9 of Title 22 of the California Code of Regulations.) The Association fails to convince that EMSA has a mandatory duty to adopt additional regulations.

## CONCLUSION

For the reasons stated above, the requests for declaratory and mandate relief are granted, in part, and the Court will issue (1) a judicial declaration that the Guidelines are underground

regulations, and (2) a writ of mandate ordering EMSA not to use or enforce the Guidelines unless and until it promulgates them as regulations in compliance with the APA. In all other respects, the requests for declaratory and mandate relief are denied.[18]

Counsel for the Association is directed to prepare a judgment and writ, incorporating this order as an exhibit; submit it to opposing counsel for approval as to form; and thereafter submit it to the Court for signature and entry of judgment in accordance with Rule of Court 3.1312.

Dated: JUNE 22, 2020

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

[18] Petitioners have requested attorney's fees. The Court prefers to decide that issue on a motion for attorney's fees.

**CASE NUMBER: 34-2019-80003163** **DEPARTMENT: 23**
**CASE TITLE: CAL. FIRE CHIEFS ASSOCIATION, INC. VS CAL. EMSA**

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

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled minute order in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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Dated: June 22, 2020

Superior Court of California,
County of Sacramento

By: E. Bernardo,
Deputy Clerk

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**PAGE :**
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**County of Sacramento**

**BY: E. BERNARDO,**
**Deputy Clerk**