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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

DEPARTMENT OF WATER RESOURCES ENVIRONMENTAL IMPACT CASES.	C100302 (JCCP No. 4942) (Sacramento Super. Ct. Nos. 34-2017-00215965, 34-2017-80002666, 34-2017-80002665, 34-2017-80002674, 34-2017-80002676, 34-2017-80002677-CU-WM-GDS, 34-2017-80002678); San Joaquin Superior Court Case No.STK-CV-UWM-2017-0008624)

This is the second appeal arising out of plaintiffs' challenges to the California WaterFix, a proposal by defendant Department of Water Resources (DWR) to improve the state's water supply infrastructure by constructing two tunnels to convey fresh water from the Sacramento River to pumping stations in the Sacramento-San Joaquin Delta

(Delta). The plaintiffs in this appeal of the coordinated proceeding are the California Sportfishing Protection Alliance, North Coast Rivers Alliance, Public Agencies,[1] North Delta Water Agency, and Save the California Delta Alliance. Their lawsuits sought to compel DWR to rescind the WaterFix approvals, decertify the environmental impact report (EIR), and suspend activities related to the project. Some plaintiffs also opposed a separate validation action filed by DWR to validate the project's bond financing.

In 2019, Governor Newsom announced that he did not support the WaterFix project, and directed DWR to abandon it in favor of a single-tunnel conveyance. Shortly thereafter, DWR decertified the WaterFix EIR and rescinded the project approvals, and the lawsuits and validation suit were dismissed. Plaintiffs filed motions for attorney fees under Code of Civil Procedure section 1021.5, which the trial court denied.[2]

In May 2022, this court reversed the trial court's decision. (*Department of Water Resources Environmental Impact Cases* (2022) 79 Cal.App.5th 556 (*DWR Environmental Impact Cases*).) We concluded the trial court had erred in characterizing the Governor's decision as a superseding intervening cause of DWR's decisions to decertify the WaterFix EIR and rescind the bond approvals without considering whether plaintiffs' lawsuits substantially motivated the Governor's policy change, and had improperly failed to determine whether the lawsuits substantially motivated DWR's decisions, instead

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[1] Plaintiff Public Agencies includes County of Sacramento, Sacramento County Water Agency, City of Stockton, County of San Joaquin, County of Contra Costa, Contra Costa County Water Agency, County of Solano, County of Yolo, Central Delta Water Agency, County of Butte, County of Plumas, Plumas County Flood Control and Water Conservation District, and Local Agencies of the North Delta. Plaintiffs California Sportfishing Protection Alliance and North Coast Rivers Alliance also include numerous other groups.

[2] Further undesignated statutory references are to the Code of Civil Procedure.

finding that DWR's decisions were "expected" outcomes of the Governor's directive to pursue a single tunnel.

On remand, the trial court again denied plaintiffs' motions for attorney fees; plaintiffs appeal from that decision. We conclude the trial court applied the appropriate legal standard, and substantial evidence supports its factual findings. Accordingly, we affirm the order denying plaintiffs' motions for attorney fees.

FACTS AND PROCEEDINGS

The underlying facts are set forth in greater detail in our prior opinion, *DWR Environmental Impact Cases, supra*, 79 Cal.App.5th 556. We summarize those facts only briefly herein to provide context for the current appeal.

The Delta

The Delta is formed by the confluence of the state's two largest rivers, and provides habitat for a variety of species, sustains a productive agricultural landscape, and serves as the hub of the state's water supply infrastructure. (*DWR Environmental Impact Cases, supra*, 79 Cal.App.5th at pp. 564-565.) Two sets of pumps located on the southeast edge of the Delta divert for urban and agricultural use approximately half of the water--millions of acre feet--that historically flowed into and through the Delta. (*Id.* at p. 565.) Increasing and competing demands for the Delta's water have left both the Delta and the state's water supply infrastructure in a state of crisis. (*Ibid.*)

WaterFix Project

In approximately 2006, DWR began working on a proposal to modify and improve the existing Delta water conveyance system, including a two-tunnel water conveyance facility, and a long-term Delta conservation plan. (*DWR Environmental Impact Cases, supra*, 79 Cal.App.5th at pp. 565-566.) In 2013, DWR and others issued a draft EIR for the two-tunnel project under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; Cal. Code Regs., tit. 14, § 15000 et seq.) (CEQA). (*DWR Environmental Impact Cases*, at p. 566.) In 2015, in response to

comments on the draft EIR, DWR replaced the proposed project with the WaterFix project, which left the proposed facilities essentially unchanged, and in July it issued a partially recirculated draft EIR for the project. (*Ibid.*) In July 2017, DWR certified a final EIR and approved the WaterFix project, and it adopted resolutions authorizing revenue bond financing and filed a validation action to confirm its validity. (*Ibid.*)

Plaintiffs' Lawsuits

In 2017, plaintiffs and others filed lawsuits challenging DWR's certification of the final EIR and approval of the WaterFix project, alleging that DWR violated CEQA, the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.), the public trust doctrine, and the California Endangered Species Act (Fish & G. Code, § 2050 et seq.). (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 567.) The lawsuits sought to compel DWR to rescind the project approvals, decertify the EIR, and suspend all activities related to the project until DWR complied with applicable law. (*Ibid.*) Most plaintiffs also opposed DWR's validation action based on DWR's alleged failure to comply with CEQA and other laws. (*Ibid.*)

Delta Stewardship Council Proceedings

In 2018, DWR filed a certification of consistency with the Delta Stewardship Council (Stewardship Council), a prerequisite to implementation of the WaterFix project (Wat. Code, § 85225), which several plaintiffs appealed on the basis that the WaterFix project was not consistent with local land use plans or the Delta Plan adopted by the Stewardship Council (*id.*, §§ 85001, subd. (c), 85053, 85059, 85300). (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 567.) In November 2018, Stewardship Council staff released a draft determination identifying several deficiencies in the certification and concluding that the record before it did not include substantial evidence to support a finding that WaterFix was consistent with the Delta Plan. On December 7, 2018, DWR withdrew its consistency determination for WaterFix. (*DWR Environmental Impact Cases*, at p. 568.)

Governor Newsom's Policy Directive

In November 2018, newly elected Governor Newsom signaled his doubts about a two-tunnel solution, stating: " 'I think if we walk down the path of two tunnels, we're in litigation and no project.' " (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 568.) In February 2019, the Governor announced during his first "State of the State" address that he did not support the WaterFix program, but rather supported a single-tunnel approach to addressing the state's water crisis. (*Ibid.*)

After the Governor's State of the State address, counsel for DWR informed the court that it was still assessing the effect of the Governor's declaration on the WaterFix project, but work on the CEQA record should continue because it would be part of any future CEQA record regardless of whether DWR ultimately issued a subsequent or supplemental EIR, or issued a new EIR. (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 568.) Similarly, DWR argued the validation action should continue because the validity of the revenue bond financing was not dependent on whether the water conveyance facilities included one tunnel or two. (*Ibid.*)

On April 29, 2019, Governor Newsom issued Executive Order No. N-10-19 (Executive Order), which directed DWR to " 'inventory and assess' the '[c]urrent planning to modernize conveyance through the Bay Delta with a new single tunnel project.' " (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 568.) A few days later, DWR decertified the WaterFix EIR, vacated its findings, rescinded the project approvals, and rescinded the bond resolutions that were the subject of the validation action. (*Ibid.*)

Attorney Fee Motions and First Trial Court Order

Plaintiffs' lawsuits were voluntarily dismissed after DWR rescinded the project approvals and decertified the EIR. (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 569.) Plaintiffs then filed motions for attorney fees under section 1021.5, arguing their lawsuits were a " 'catalyst' " motivating DWR to voluntarily

provide the primary relief sought by their lawsuits. (*DWR Environmental Impact Cases*, at pp. 569-570.)

DWR opposed the motions, relying heavily on testimony by the Director of DWR, Karla Nemeth, that the Governor's policy directive, not the litigation, motivated her to rescind WaterFix. (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 570.) DWR presented no evidence regarding the Governor's motivation for the change in policy other than the Executive Order. (*Ibid.*) The trial court denied the fee motions on the basis that DWR's actions were motivated by the Governor's policy change directive. (*Ibid.*)

DWR Environmental Impact Cases

On May 11, 2022, we reversed the trial court's order and remanded for further proceedings. (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th 556.) We concluded the court erred by treating the Governor's policy directive as an external, superseding cause of DWR's actions without considering whether plaintiffs' lawsuits were a substantial factor or significant catalyst in the Governor's decision. (*Id.* at p. 574.)

We also concluded that the trial court erred when it assumed that decertification of the WaterFix EIR and rescission of the bond resolutions was "to be expected" given the purported obsolescence of the WaterFix EIR. (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 575.) We noted CEQA neither prohibited nor required DWR to decertify the EIR when it was replaced by an alternative,[3] and the Executive Order directed DWR to " 'inventory and assess" "[c]urrent planning to modernize conveyance

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[3] Instead, "an EIR may remain in place even if the underlying project [were] abandoned or withdrawn," and an agency was required to prepare a new EIR (rather than preparing a subsequent or supplemental EIR to make the original EIR adequate) only where the original EIR retained no informational value to the ongoing decisionmaking process and therefore was " 'wholly irrelevant.' " (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 576.)

through the Bay Delta with a new single tunnel project." (*DWR Environmental Impact Cases*, at p. 576.) We further observed that, following the Governor's State of the State address, DWR's attorneys advised the trial court that DWR had options as to how to proceed under CEQA, including a supplemental or subsequent EIR, and argued that the validation action should continue. (*Id.* at pp. 576, 577.)

Evidence Submitted on Remand

On remand and in support of its opposition to plaintiffs' fee motions, DWR submitted numerous publicly-available news articles purporting to establish the Governor's motivation for pivoting away from the WaterFix project,[4] and documents related to the new single-tunnel project, known as the Delta Conveyance Project (DCP). DWR also submitted a declaration of Director Nemeth, which included her subjective considerations regarding the actions taken with respect to the WaterFix project, and exhibits that "memorialize[d] [her] thinking at the time they were written."

Second Trial Court Order

On December 26, 2023, the trial court issued a second order denying plaintiffs' motions for attorney fees. After finding that plaintiffs had achieved the primary relief sought in their lawsuits, and that their claims were not frivolous, unreasonable, or groundless, the court turned to the causal connection between plaintiffs' lawsuits and the relief obtained.

Governor Newsom's Motivation

Regarding the Governor's motivation to downsize WaterFix to a single tunnel, the trial court observed plaintiffs' reliance on an inference of causation based on the chronology of events following the filing of their lawsuits. The court pointed to two

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[4] These articles were attached to a declaration that included a professor's opinion about the Governor's motivation; the trial court sustained objections to the opinion but determined the articles were admissible.

statements plaintiffs relied upon to establish that the Governor recognized and was concerned about the merits of the lawsuits. First, Newsom's November 2018 statement: " 'I think if we walk down the path of two tunnels, we're in litigation and no project. . . . I'd like to see a more modest proposal, but I'm not going to walk away. . . . Doing nothing is not an option. . . . The status quo is not helping salmon.' " Second, Newsom's statement during his February 2019 State of the State address: "I do not support the WaterFix as currently configured. Meaning I do not support the twin tunnels. But we can build on the important work that's already been done. That's why I do support a single tunnel."[5]

The trial court found the Governor's statements did not "reflect a concern about the legal merits of [plaintiffs'] claims under CEQA and other laws." Rather, the Governor's "statements and positions focus[ed] on the development of strategies to meet California's massive water challenges with an emphasis on cooperation and collaboration across state agencies and regional groups and leaders, not adversarial litigation based on the provisions of CEQA or other laws raised in [plaintiffs'] lawsuits and answers to DWR's validation action." In support, the court summarized evidence offered by DWR

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[5] For context, the Governor stated: "We also need a fresh approach when it comes to meeting California's massive water challenges. [¶] We have a big state with diverse water needs. Cities that need clean water to drink, farms that need irrigation to keep feeding the world, fragile ecosystems that must be protected. [¶] Our water supply is becoming less reliable because of climate change. And our population is growing because of a strong economy. That means a lot of demand on an unpredictable supply. There are no easy answers. But let me be direct about where I stand: [¶] I do not support the Water Fix as currently configured. Meaning, I do not support the twin tunnels. But we can build on the important work that's already been done. That's why I do support a single tunnel. [¶] The status quo is not an option. [¶] We need to protect our water supply from earthquakes and rising sea levels, preserve [D]elta fisheries, and meet the needs of cities and farms. [¶] We have to get past the old binaries, like farmers versus environmentalists, or North versus South. Our approach can't be 'either/or.' It must be 'yes/and.' "

of various statements made by the Governor before taking office. Specifically, in February 2015, then-Lieutenant Governor Newsom stated that the WaterFix project was " 'too aggressive' " and voiced his preference for an alternative that was " 'substantially more modest and substantially less impactful' to the environment." The following month, Newsom met with two groups of stakeholders, one in opposition to and one in support of the WaterFix project.[6]

In April 2018, Newsom--while running for Governor--reiterated his support for a single tunnel, and was reported to have said: " 'There is room for cooperation and compromise around a single tunnel" . . . . [¶] 'The status quo is unacceptable' . . . . 'The issue of responsible water conveyance -- one that protects and advances the health of the [D]elta -- has to be a priority of the next [G]overnor. [¶] 'But that can't be our only approach. I strongly believe California must work to reduce our dependence on the [D]elta by focusing on regional solutions, investing in critical water infrastructure like recycling and groundwater replacement and conservation.' "[7] The court then pointed to Governor Newsom's February 2019 State of the State address, and the Executive Order.

The trial court found the Governor "gave no indication that he was concerned about or even familiar with [plaintiffs'] specific claims under CEQA and other laws on which they based their lawsuits challenging WaterFix and on which basis they were challenging the bond resolutions in DWR's validation action," adding that the Governor neither explicitly nor implicitly referenced CEQA, nor suggested that litigation was a

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[6] The news article recounting the meeting reported that Newsom "has said he is skeptical of the tunnels project but is 'open to argument.' " When recalling being lobbied by the group opposed to the twin-tunnels project, Newsom reportedly said, " 'I'm here to listen, so bring it on.' "

[7] The news article that was the source of this quote by Newsom indicated that none of the candidates to replace then-Governor Brown supported the WaterFix project, and that each would "[a]t the least . . . hit the pause button."

viable method by which plaintiffs could vindicate their legal claims. Instead, the court found, the Governor "focused on the planning and implementation of a collaborative process to provide water to meet the diverse and competing needs" of various stakeholders, and he decided to reject WaterFix in favor of a single-tunnel approach to bring competing interests together to achieve mutually beneficial solutions.

The trial court summarized: "Simply put, the inference drawn by [plaintiffs] from the chronology of events following the filing of their lawsuits is rebutted by (1) the lack of any explicit or implicit sign that Governor Newsom was aware of and attentive to the specific claims in [plaintiffs'] lawsuits, and (2) his virtually undivided focus on the development of a water resilience portfolio of actions to collaboratively resolve California's water challenges, including a single tunnel conveyance to improve the reliability of water supply deliveries to Central Valley farmers and southern California." The court concluded that plaintiffs had failed to meet their ultimate burden to show that their lawsuits were a substantial factor motivating Newsom's decision to downsize WaterFix to a single tunnel.

Director Nemeth's Motivation

The trial court then turned to Director Nemeth's motivation to withdraw WaterFix project approvals, decertify the WaterFix EIR, and rescind the bond approvals, noting plaintiffs' reliance on an inference of causation established by the chronology of events. The court noted plaintiffs based their contention that Nemeth "recognized the likelihood that [plaintiffs] would prevail on their claims" on evidence at hearings conducted by the Water Board on DWR's change petition, proceedings before the Stewardship Council, and Nemeth's various statements indicating "that DWR may not have adequately analyzed the potential impacts of WaterFix and the mitigation of those impacts in the WaterFix EIR." The court also noted plaintiffs' argument that Nemeth inappropriately decertified the WaterFix EIR because the EIR retained relevant informational value, decertification was not compelled by the Executive Order, and decertification was

contrary to the Governor's stated intent to " 'build on the important work that had been done.' "

The trial court rejected plaintiffs' arguments. It found no evidence that the Water Board was likely to deny DWR's petition, which DWR withdrew when it withdrew the WaterFix approvals. Regarding the proceedings before the Stewardship Council, the court found that statements made by the council chair and another member of the council clearly implied that the inconsistencies identified in the draft determination "could be repaired with additional work by DWR in early consultation with [the Stewardship Council]." The court added DWR's indication that it intended to work with the Stewardship Council to resolve issues related to its certification of consistency, and its plan to submit a revised certification.

Analyzing various statements made by Nemeth, the trial court found that Nemeth discussed how the EIR being prepared for the DCP would lead to improved analysis of impacts and mitigation, but were not admissions that the WaterFix EIR was inadequate under CEQA.

Regarding Nemeth's decertification of the WaterFix EIR and commencement with a new EIR, the trial court characterized *DWR Environmental Impact Cases* as recognizing Nemeth's discretionary authority to decertify the EIR after completing the assessment required by the Executive Order, and it found that Nemeth had a "reasonable basis for exercising that discretionary authority." Specifically, the court found that Nemeth was "seeking a fresh start within the context of the new water policy" due to the WaterFix EIR's various and conflicting incarnations, and a CEQA finding that a single-tunnel alternative to WaterFix identified in the WaterFix EIR was not feasible.[8] The

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[8] The CEQA findings of fact concluded that compared to the WaterFix project, alternative 5A--the single-tunnel alternative analyzed in the EIR--"would provide fewer benefits for fish species in the Delta and would not be capable of meeting key project

court found, "[Plaintiffs] have produced no evidence to support a contrary finding that Director Nemeth decertified the WaterFix [final] EIR based on a recognition that [plaintiffs] would prevail in their lawsuits and would successfully secure an adjudication of their claims and an award of attorney fees pursuant to . . . section 1021.5."

Finally, the trial court determined that DWR's issuance of the DCP draft EIR and plaintiffs' responses thereto demonstrated that Nemeth neither believed plaintiffs would prevail on the merits of their claims against WaterFix, nor withdrew WaterFix approvals and decertified the WaterFix EIR as a result of that belief. The court recognized that the two projects were distinct, and clarified that it was not "seeking to blur the procedural boundaries between the two processes," but observed that plaintiffs challenged the DCP draft EIR on the same or similar bases as they had challenged the WaterFix EIR. The court found that Nemeth "had not been discouraged by [plaintiffs'] WaterFix litigation claims from pursuing the DCP, a single-tunnel conveyance with elements that were very similar to WaterFix and were likely to generate claims by [plaintiffs] of comparable violations under CEQA and other laws."

The trial court determined that "any inference that [plaintiffs'] lawsuits caused [Nemeth] to recognize the illegality of WaterFix under CEQA and led her to take actions to end the WaterFix project" had been rebutted, and found it to be "[m]ore likely" that "Nemeth was attempting to follow Governor Newso[m]'s direction for a downsized tunnel conveyance which was coordinated with other components of a water resilience portfolio -- 'to take a fresh look at Delta conveyance and to advance a project with a

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goals and alternatives." Additionally, alternative 5A "would not meet the project objective of 'develop[ing] projects that restore and protect water supply and ecosystem health and reduce other stressors on the ecological functions of the Delta in a manner that creates a stable regulatory framework . . . .' " Further, alternative 5A "would also provide less operational flexibility compared to the [WaterFix] Project." DWR determined that the WaterFix project "will better achieve the State's coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem, compared to [alternative 5A]."

renewed focus.' " Accordingly, the court concluded that plaintiffs had failed to satisfy their burden to show that the lawsuits were a substantial factor in Nemeth's decision to withdraw WaterFix approvals and decertify the WaterFix EIR.

Plaintiffs timely filed notices of appeal. The case was fully briefed in June 2025 and assigned to the current panel the following month.

DISCUSSION

Plaintiffs take somewhat different approaches in this appeal,[9] but their arguments can generally be categorized as follows: (1) the trial court applied the incorrect legal standard; (2) DWR failed to present evidence to rebut the inference of causation as to the Governor's motivation for his policy change directive; (3) DWR failed to present evidence to rebut the inference of causation as to Nemeth's decision to decertify the WaterFix EIR and the bond resolutions; and (4) plaintiffs carried their burden to prove causation. We will address plaintiffs' arguments in terms of those categories, recognizing that not all plaintiffs raise the same issues. As we will explain, we conclude plaintiffs have failed to demonstrate that the trial court applied the incorrect legal standard, and substantial evidence supports the court's findings.

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[9] For example, Public Agencies argue that reversal is required because the trial court improperly found that DWR rebutted the inference of causation as to the Governor's motivation for his policy change directive, and that Nemeth's motivation for decertifying the WaterFix EIR and rescinding the bond approvals was irrelevant because she expressly declared that her actions were motivated by the Governor's policy change directive. Conversely, plaintiff North Coast Rivers Alliance (NCRA) contends the trial court erred by treating the Governor's policy directive as an external, superseding cause of the relief obtained, and argues that the court failed to evaluate the causative effect of NCRA's participation in the proceedings before the Stewardship Council on Nemeth's decision to decertify the EIR and rescind the bond approvals, and that Nemeth's decision to decertify the EIR and rescind the bond approvals tacitly conceded their unlawfulness.

I

Background Law

Section 1021.5 is an exception to the general rule that litigants bear their own attorney fees. (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 570; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 (*Graham*).) "To qualify for fees under the statute, a plaintiff must show that (1) it is a successful party; (2) the action resulted in the enforcement of an important right affecting the public interest; (3) a significant benefit was conferred on the general public or a large class of persons; and (4) the necessity of private enforcement and the attendant financial burden make an award of fees appropriate." (*DWR Environmental Impact Cases*, at p. 571, citing *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2015) 238 Cal.App.4th 513, 520-521 (*Yucaipa*).)

To be deemed successful under section 1021.5, a party need not obtain a judgment in its favor. Instead, it may be considered a successful party under the " 'catalyst theory' " "if the defendant voluntarily changes its behavior substantially because of, and in the manner sought by, the litigation." (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 571.) To establish entitlement to fees under the catalyst theory, the moving party "must establish that (1) its 'lawsuit was a catalyst motivating the defendants to provide the primary relief sought'; (2) 'the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense'; and (3) it 'reasonably attempted to settle the litigation prior to filing the lawsuit.' " (*Id.* at pp. 571-572, fn. omitted, quoting *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608.)

For purposes of the first (causation) prong, "a plaintiff's lawsuit is a 'catalyst' if it induces the defendant to voluntarily provide the relief sought. [Citation.] A lawsuit induces such relief if it is 'a "material factor" ' in motivating the defendant, or if it ' "contribute[s] in a significant way" to the result achieved.' " (*Skinner v. Ken's Foods,*

Inc. (2020) 53 Cal.App.5th 938, 946.) However, the plaintiff need not show the litigation was the only cause of defendant's acquiescence; rather, "the plaintiff's lawsuit need only be a 'substantial factor' in motivating the defendant." (*Ibid.*) " 'Put another way, courts check to see whether the lawsuit initiated by the plaintiff was "demonstrably influential" in overturning, remedying, or prompting a change in the state of affairs challenged by the lawsuit.' " (*Cates v. Chiang* (2013) 213 Cal.App.4th 791, 808, quoting *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 363.)

It can be difficult to prove causation where plaintiffs seek to recover on a catalyst theory. (*Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 968 (*Kizer*).) Our Supreme Court has recognized that in catalyst cases, the defendant "knows better than anyone why it made the decision that granted the plaintiff the relief sought, and the defendant is in the best position to either concede that the plaintiff was a catalyst or to document why the plaintiff was not." (*Graham*, *supra*, 34 Cal.4th at p. 573.) Accordingly, " '[w]hen, after litigation is initiated, a defendant has voluntarily provided the relief a plaintiff is seeking, the chronology of events may raise an inference that the litigation was the catalyst for the relief.' " (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 572, citing *Yucaipa*, *supra*, 238 Cal.App.4th at p. 522.)

When the chronology of events establishes an inference of causation, the burden shifts to the responding party to produce evidence to rebut the inference. (*Kizer*, *supra*, 211 Cal.App.3d at p. 968.) "A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.' " (*Farr v. County of Nevada* (2010)

187 Cal.App.4th 669, 680.) As such, the burden of producing evidence " 'is merely a preliminary assumption in the absence of contrary evidence.' " (*Id.* at p. 681.)

A government affidavit showing that the filing of a lawsuit had no effect on an agency's action, if credible, may successfully rebut the inference of causation. (*Kizer, supra*, 211 Cal.App.3d at pp. 968, 969.) Contemporaneous evidence of the defendant's actual motivations, independent of the lawsuit, for voluntarily providing relief may also rebut the inference of causation. (See, e.g., *Yucaipa, supra,* 238 Cal.App.4th at p. 522.) However, the ultimate burden of proof to establish each element of the statute remains on the claimant. (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 573.)

Our Supreme Court imposed the second (merit) and third (attempt to settle) prongs to discourage extortionate lawsuits "without putting a damper on lawsuits that genuinely provide a public benefit"; the second prong requires the trial court to determine that the lawsuit is "not 'frivolous, unreasonable, or groundless.' " (*Graham, supra,* 34 Cal.4th at p. 575.)

II

Standard of Review

"[W]hether a party has met the statutory requirements for an award of attorney fees is best decided by the trial court, whose decision we review for abuse of discretion." (*Yucaipa, supra*, 238 Cal.App.4th at p. 519.) We review the entire record, "paying particular attention to the trial court's stated reasons in denying or awarding attorney fees and whether it applied the proper standards of law in reaching its decision." (*Id.* at pp. 519-520.) We draw all reasonable inferences in support of the trial court's findings and view the record in the light most favorable to the trial court's conclusion. (*Cates v. Chiang, supra,* 213 Cal.App.4th at p. 810.) We affirm if substantial evidence supports the trial court's finding. (*DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at p. 573; *Yucaipa,* at p. 522). "To be ' "substantial," ' evidence must be reasonable, credible, and of solid value." (*DWR Environmental Impact Cases*, at p. 573.) "We will reverse

only if there is ' "no reasonable basis" ' for the court's conclusion." (*Skinner v. Ken's Foods, Inc.*, *supra*, 53 Cal.App.5th at p. 946.)

"However, we will find an abuse of discretion if the trial court based its decision on improper criteria or an incorrect legal standard, or if factual findings critical to the decision are not supported by substantial evidence." (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 573.) "The determination of the correct legal standard to be applied presents a question of law, which we review de novo." (*Id.* at p. 574.)

"This standard of review affords considerable deference to the trial court provided that the court acted in accordance with the governing rules of law. We presume that the court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise." (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158.)

Plaintiffs California Sportfishing Protection Alliance (CSPA) and North Delta Water Agency (NDWA) urge us to apply the de novo standard of review, rather than the abuse of discretion standard, because the facts are undisputed, and this appeal centers on statutory construction of CEQA. We decline to do so. It is well established that the abuse of discretion standard applies in reviewing a trial court's decision whether to award a plaintiff attorney fees under section 1021.5. (*Graham*, *supra*, 34 Cal.4th at p. 578; *Carian v. Department of Fish & Wildlife* (2015) 235 Cal.App.4th 806, 816.) De novo review of an attorney fee award is appropriate " 'where the determination of whether the criteria for an award of attorney fees and costs in [the present] context have been satisfied amounts to statutory construction and a question of law.' " (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175 [applying de novo standard of review where sole issue on appeal was whether "opposing party" attorney fees could be awarded against an amicus curiae under § 1021.5]; see *Vosburg v. County of Fresno* (2020) 54 Cal.App.5th 439, 460 [whether party was a de facto intervener, and thus a " 'party' " for purposes of § 1021.5, subject to de novo review].) This case, however, does not center on statutory

construction. Accordingly, "[e]ven assuming the underlying facts are undisputed, it remains the trial court's duty to consider those facts and the circumstances of the case and exercise its discretion in determining whether the requirements were satisfied for an award of attorney fees under section 1021.5, and we can reverse the court's determination only if there is no reasonable basis for it." (*Carian v. Department of Fish & Wildlife,* at p. 816.) Thus, although many of the underlying facts are undisputed in this case, we defer to the trial court's characterization of those facts where that characterization is reasonable.[10]

III

Challenges to Trial Court's Application of the Legal Standard

Plaintiffs argue that reversal is required because the trial court applied an improper legal standard when it determined that plaintiffs' lawsuits did not substantially motivate the Governor's policy change directive or Director Nemeth's decision to decertify the EIR and rescind the bond approvals. We disagree. As we will explain, the trial court

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[10] CSPA urges us to not defer to the trial court's factual findings, but rather to exercise our independent judgment, because the facts here derive entirely from written declarations and other documents, relying on *People v. Vivar* (2021) 11 Cal.5th 510. *Vivar* held in the context of a motion to vacate a plea under Penal Code section 1473.7 that a court should apply its independent judgment where "the facts derive entirely from written declarations and other documents" because, in that circumstance, the trial court and appellate courts " 'are in the same position in interpreting written declarations.' " (*Vivar,* at p. 528.) However, the *Vivar* court expressly cautioned that its decision "addresses only the independent standard of review under [Penal Code] section 1473.7," and clarified, "[n]othing we say here disturbs a familiar postulate: when reviewing a ruling under the substantial evidence standard, 'an appellate court should defer to the factual determinations made by the trial court,' regardless of 'whether the trial court's ruling[s are based] on oral testimony or declarations.' " (*Id.* at p. 528, fn. 7.) Accordingly, we decline to apply the independent review standard here.

identified the applicable legal standard, and plaintiffs fail to demonstrate that the court did not apply the standard it identified.[11]

A. *Trial Court Identified the Legal Standard*

In its order denying attorney fees, the trial court set forth the catalyst theory, and noted that each plaintiff had the burden to demonstrate that the claims in their respective lawsuits challenging the WaterFix project, and their answers challenging DWR's validation action, were a catalyst for a change in the Governor's and Director Nemeth's conduct. The court found that plaintiffs had established that they achieved the primary relief sought by their lawsuits, and that their lawsuits were not frivolous, unreasonable, or groundless (e.g. the lawsuits had merit). The court further recognized that the chronology of events may raise an inference of causation, shifting the burden to the defendant to produce evidence to rebut the inference, and that plaintiffs relied on such inferences of causation in this case. The court then found that DWR successfully rebutted the inference of causation as to both the Governor's motivation for his policy change directive, and Nemeth's motivation to withdraw WaterFix approvals and decertify the WaterFix EIR. Finally, the court found that plaintiffs "failed to meet their ultimate burden to show that their lawsuits were a substantial factor contributing to, or otherwise motivating," the Governor's decision to downsize WaterFix to a single tunnel, or Nemeth's decision to withdraw pending WaterFix approvals and to decertify the WaterFix EIR.

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[11] Plaintiffs argue the trial court failed to follow the law of the case as established by *DWR Environmental Impact Cases*, in which we observed that plaintiffs had established a rebuttable inference of causation based on the chronology of events that shifted to DWR the burden to rebut the inference. (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 575.) We disagree; here the trial court recognized that plaintiffs relied on an inference of causation and found that DWR had successfully rebutted the inference.

Recognizing that the trial court identified the proper legal standard, we turn to plaintiffs' arguments that the court failed to apply it.

B. *Relying on Defendants' Statements*

Initially, plaintiffs argue that the trial court improperly relied on the Governor's and Nemeth's statements to determine causation. Plaintiffs rely on *Graham*, *supra*, 34 Cal.4th at page 575, for the proposition that "the court is to inquire not into a defendant's subjective belief about the suit," and our recognition that "defendants usually are reluctant to concede that litigation induced them to provide the relief sought" (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 572). But the principle expressed in *Graham* concerned the court's analysis of the second (merit) prong, not the first (causation) prong. (*Graham*, at p. 574.) Further, while we recognized in *DWR Environmental Impact Cases* that the inference of causation arises in part from the understanding that defendants usually are reluctant to concede causation, we did not conclude that a trial court is prohibited from considering a defendant's statements in determining whether the inference of causation has been rebutted. Indeed, affidavits presented by the government may rebut the inference of causation. (*Kizer*, *supra*, 211 Cal.App.3d at pp. 968-969.) Accordingly, while a trial court *may* reasonably reject a defendant's statements regarding causation where such statements are made at a time when the defendant is aware they were facing the prospect of attorney fees (see *The Kennedy Com. v. City of Huntington Beach* (2023) 91 Cal.App.5th 436, 459; *Cates v. Chiang*, *supra*, 213 Cal.App.4th at pp. 808-810), a trial court is not prohibited from considering a defendant's statements as evidence of its motivation for making a particular decision, and we do not substitute our credibility determinations for those of the trial court. (See *Skinner v. Ken's Foods, Inc.*, *supra*, 53 Cal.App.5th at p. 947 [reviewing court "cannot substitute a contrary view for that of the court below"].) The trial court

was authorized to consider and weigh evidence of the Governor's and Nemeth's statements in determining whether the inference of causation had been rebutted.[12]

C. *The Legal Standard Applied to the Governor's Motivation*

Plaintiff Public Agencies contend the trial court committed three legal errors when it determined plaintiffs' lawsuits did not substantially motivate the Governor's policy change directive. First, they assert the trial court improperly found the inference of causation rebutted by an *absence* of evidence, and argue the inference could be rebutted only by affirmative evidence establishing that the inferred fact is false. (See *Farr v. County of Nevada*, *supra*, 187 Cal.App.4th at p. 680 ["A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption' "]; *Kizer*, *supra*, 211 Cal.App.3d at pp. 968-969 [inference of causation successfully rebutted where government presented affidavits "showing that the agency was complying with the request and the filing of the suit had no impact upon its action"].)

The trial court did not base its finding that the inference of causation had been rebutted solely on an absence of evidence that the lawsuits motivated the Governor's policy change directive. Rather, the court considered affirmative evidence offered by DWR to support the finding that the Governor was motivated by "his virtually undivided focus on the development of a water resilience portfolio of actions to collaboratively resolve California's water challenges, including a single tunnel conveyance to improve the reliability of water supply deliveries to Central Valley farmers and southern

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[12] Indeed, CSPA and NDWA argue that DWR failed to rebut the inference of causation in part by failing to obtain a declaration from the Governor explaining his motivation for replacing the WaterFix project.

California." In addition to that affirmative evidence, the court also found an absence of any explicit or implicit indication that the Governor was motivated by plaintiffs' lawsuits. The affirmative evidence of the Governor's motivation, combined with the absence of any indication that the Governor was motivated by the lawsuits, supports the finding that the Governor was *singularly* motivated by his desire to develop a water resilience portfolio to address the state's water crisis, to the exclusion of all other motivations. Thus, the inference was rebutted by evidence that the Governor was singularly motivated by his policy disagreement with the twin tunnel project, rather than any concern about the "threat of victory" posed by the lawsuits.[13]

Second, Public Agencies argue that the trial court erred by requiring them to produce evidence that the Governor was explicitly or implicitly aware of and attentive to the specific claims raised by the lawsuit. Similarly, CSPA argues that the court improperly observed that the Governor did not "link his support for a downsized tunnel to any specific claims made by [plaintiffs] under CEQA or other laws." Initially, the court's statement that there was a "lack of any explicit or implicit sign that Governor Newsom was aware of and attentive to the specific claims in [plaintiffs'] lawsuits" referred to the evidence rebutting the inference of causation, not to plaintiffs' burden of proof. Additionally, the court's statements were not erroneous. Implicit in the court's finding that there was a complete lack of evidence that the Governor was aware of or attentive to the claims in the litigation was the determination that the Governor's policy change directive could not have been motivated by the threat of victory posed by plaintiffs' lawsuits if he were neither aware of nor attentive to the claims raised therein. The court's

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[13] We note Public Agencies' argument that Nemeth's declaration did not constitute substantial evidence rebutting the inference of causation as to her motivation because it constituted a self-serving, post-hoc justification for DWR's actions. It stands to reason that Public Agencies would have the raised a similar argument had the Governor filed a declaration setting forth his motivation for his policy change directive.

observation that the Governor did not link his support for a downsized tunnel project to claims made by the plaintiffs supported its finding that the Governor was neither aware of nor attentive to the lawsuits' claims.

Third, Public Agencies contend that the trial court erred by addressing only whether plaintiffs' lawsuits were *the* factor motivating the Governor's policy change, and not *a* motivating factor. (See *DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 572 ["plaintiff need not show the litigation was the only cause of defendant's acquiescence," only a substantial factor contributing to defendant providing the primary relief sought in the litigation].) Similarly, NDWA argues the court erred by focusing on the Governor's alternative motivations, and by impliedly rejecting without evidence that the Governor might have had multiple motivations. But as we have discussed, the court relied on affirmative evidence of the Governor's motivation and the absence of any indication that the Governor was motivated by the lawsuits to support its determination that the Governor was *solely* focused on the development of a water resilience portfolio of actions to resolve the state's water challenges. In other words, the court did not conclude that the Governor was motivated only by his desire to create a water resilience portfolio, but also that he was singularly motivated to the exclusion of all other motivations.

Based on the foregoing, plaintiffs have failed to demonstrate that the trial court applied an incorrect legal standard when determining whether the inference of causation had been rebutted as to the Governor's motivation to change policy.

D. *The Legal Standard Applied to Director Nemeth's Motivation*

Public Agencies, CSPA, and NDWA contend the trial court improperly addressed and rejected plaintiffs' arguments without considering whether DWR had met its burden of production as to Nemeth's motivation for decertifying the WaterFix EIR and rescinding the bond approvals. They point to the court's finding, made in the context of its discussion of Director Nemeth's motivation: "[Plaintiffs] have produced no evidence

to support a contrary finding that Nemeth decertified the WaterFix [final] EIR based on a recognition that [plaintiffs] would prevail in their lawsuits and would successfully secure an adjudication of their claims and an award of attorney fees pursuant to Code of Civil [P]rocedure section 1021.5."

Plaintiffs fail to demonstrate that the trial court applied the incorrect legal standard. First, while we recognize that the inference of causation must be rebutted before holding plaintiffs to their ultimate burden of proof, there is no requirement that the court's written order must separately consider the evidence rebutting the inference of causation before analyzing the evidence bearing on the ultimate issue of causation. The court expressly recognized DWR's burden of production and expressly found that the inference of causation had been successfully rebutted. We presume the trial court properly applied the law. (*Mejia v. City of Los Angeles, supra,* 156 Cal.App.4th 158.)

Second, the trial court appropriately considered the evidence in the record to determine whether the inference of causation had been rebutted, and whether plaintiffs had satisfied their ultimate burden of proof. The court considered evidence of the proceedings before the Water Board and the Stewardship Council, statements made by Nemeth that plaintiffs contended constituted concessions that DWR did not adequately analyze the potential effects of WaterFix and the mitigation of those effects in the WaterFix EIR, Nemeth's reasoning for decertifying the EIR and rescinding the project approvals, and plaintiffs' responses to the DCP draft EIR. Throughout its consideration of plaintiffs' arguments that their lawsuits substantially motivated DWR's actions, the trial court considered evidence that was contrary to the preliminary assumption that the lawsuits were a catalyst motivating DWR to voluntarily provide the relief sought. (See *Farr v. County of Nevada, supra,* 187 Cal.App.4th at pp. 681-682 ["A rebuttable presumption affecting the burden of producing evidence 'is merely a preliminary assumption in the absence of contrary evidence' " and " 'requires the ultimate fact to be found from proof of the predicate facts in the absence of other evidence' "].) Thus, while

the court observed, "[Plaintiffs] have produced no evidence to support a contrary finding that Director Nemeth decertified the WaterFix [final] EIR based on a recognition that [plaintiffs] would prevail in their lawsuits and would successfully secure an adjudication of their claims and an award of attorney fees pursuant to Code of Civil [P]rocedure section 1021.5," that observation was preceded by the court's discussion of evidence it determined was sufficient to rebut the inference of causation.

CSPA further argues that the trial court did not determine "whether the lawsuit was a material factor or contributed in a significant way to" the voluntary relief provided by DWR, as required by *DWR Environmental Impact Cases, supra,* 79 Cal.App.5th at page 572, but rather determined only that the lawsuits did not "cause[] [Nemeth] to recognize the illegality of WaterFix under CEQA and [lead] her to take actions to end the WaterFix project," and that it was "[m]ore likely" that Nemeth was following the Governor's policy change directive. Initially, the finding CSPA points to was made in the context of the court's finding that the inference of causation had been rebutted, not in the context of its ultimate finding. Additionally, as we have discussed, the court was required to determine whether Nemeth's actions were motivated by the "threat of victory" posed by the lawsuits. The court's statement reflected the finding that any threat of victory posed by the lawsuits did not motivate Nemeth to end the WaterFix project.[14]

IV

Substantial Evidence Challenges

In addition to their challenges to the trial court's application of the legal standard, plaintiffs contend no substantial evidence supports the determination that DWR successfully rebutted the inference of causation as to the Governor or as to Nemeth, and

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[14] NCRA contends the trial court applied an incorrect legal standard because it failed to consider all the evidence before it. We will address NCRA's arguments in the context of our discussion on plaintiffs' challenges to the sufficiency of the evidence, *post.*

that substantial evidence demonstrates plaintiffs carried their ultimate burden of proof. As we will explain, we conclude substantial evidence supports the court's findings.

A. *Rebutting the Inference of Causation as to Governor Newsom*

Public Agencies and NDWA contend the newspaper articles offered by the State failed to rebut the inference of causation as to the Governor's motivation for his policy change directive. They argue (1) at the time Newsom announced his opposition to the project in 2015, they had already participated in administrative proceedings regarding the project; (2) evidence of Newsom's preference for a single-tunnel conveyance was consistent with claims raised by the lawsuits and did not preclude the possibility hispreference was motivated by plaintiffs' opposition to the dual-tunnel project; and (3) in the absence of legal opposition to the project, Newsom would not have commented on the need for "cooperation and compromise around a single tunnel" or expressed hope for reaching a "deal" regarding the water tunnel project, and he would not have said, "if we walk down the path of two tunnels, we're in litigation and no project."

These contentions fail to persuade. The trial court found that Newsom--both as the Governor and earlier as the Lieutenant Governor--had repeatedly and consistently voiced his objection to the WaterFix project as a solution for California's water crisis, and he did so on policy grounds, not based on the "threat of victory" posed by legal challenges to the project. (See *DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 577 [plaintiffs' lawsuits must achieve catalytic effect by threat of victory].) Specifically, in 2015, then-Lieutenant Governor Newsom declared the WaterFix project to be " 'too aggressive' " and voiced his preference for a tunnel that was more modest and less impactful to the environment. The following month, Newsom met with two groups, one of which favored the project and the other opposed to it, and a newspaper article indicated that Newsom was "skeptical of the tunnels project" but was " 'open to argument.' " Newsom expressly welcomed lobbying from groups opposed to the project, stating that he was " 'here to listen.' "

In April 2018, while running for Governor, Newsom reiterated his support for a single tunnel, noting there was room for compromise among stakeholders around a single tunnel and that " '[t]he issue of responsible water conveyance -- one that protects and advances the health of the delta -- has to be a priority of the next [G]overnor." The article reporting Newsom's quote added that none of the candidates for Governor supported the WaterFix project, and each would "[a]t the least . . . hit the pause button."

In his 2019 State of the State address, Governor Newsom indicated the need for a "fresh approach when it comes to meeting California's massive water challenges." He noted California's diverse and growing need for water, an increasingly unreliable and unpredictable water supply, and the lack of easy answers to the challenges facing the state. He then expressly rejected the WaterFix project, but indicated that the status quo "is not an option" and stated his support for a single tunnel to "protect our water supply from earthquakes and rising sea levels, preserve delta fisheries, and meet the needs of cities and farms." Noting the need to "get past the old binaries, like farmers versus environmentalists, or North versus South," the Governor indicated the need for a " 'yes/and' " approach.

The Governor subsequently issued the Executive Order, which again recited the myriad challenges facing the state in meeting its current and future water demand, including climate change, a growing population, unsafe drinking water across the state, flood risks, depleted groundwater aquifers, agricultural communities facing uncertain water supplies, and native fish populations threatened with extinction. The Governor opined that the state's prosperity depended on tackling these challenges and that overcoming them "is both necessary and possible," but required "a broad portfolio of collaborative strategies between government, sovereign tribes, local communities, water agencies, irrigation districts, environmental conservationists, academia, business and labor leaders, and other stakeholders."

The trial court reviewed the evidence and determined the inference raised by the chronology of events had been rebutted by affirmative evidence of the Governor's "virtually undivided focus on the development of a water resilience portfolio of actions to collaboratively resolve California's water challenges, including a single tunnel conveyance to improve the reliability of water supply deliveries to Central Valley farmers and southern California," and the complete absence of any implicit or explicit indication that he was motivated to change policies by the lawsuits challenging the WaterFix project. Even if the Governor's opposition to the WaterFix project was broadly consistent with the claims asserted in plaintiffs' lawsuits, the evidence demonstrated that the Governor was motivated by his desire to implement a workable public policy to address the state's water crisis rather than by the threat of victory posed by the lawsuits brought to stop the project.

Nor are we persuaded by the argument that the lawsuits were necessarily a substantial factor in causing the Governor's policy change on the basis that he expressly mentioned litigation as a reason for advocating a pivot away from the two-tunnel project. The trial court found that the Governor's statements referencing litigation did not reflect a concern about the legal merits of plaintiffs' claims, but rather reflected his focus on the development of strategies to meet the state's water challenges with an emphasis on collaboration and cooperation amongst stakeholders. Substantial evidence supports that finding. The Governor's statements alluding to litigation, compromise, and a "deal," did not expressly indicate that he advocated a single-tunnel project because of the threat of victory posed by lawsuits filed in opposition to the WaterFix project, but rather that he advocated for a different project that would meet the state's needs while considering the positions and perspectives of stakeholders. That he preferred a workable solution to the ongoing differences of opinion as to how to address the water crisis, as opposed to any solution being bogged down in litigation, does not demonstrate that the Governor was

motivated by the threat of victory posed thereby. We defer to the trial court's finding on that issue. (See *Skinner v. Ken's Foods, Inc.*, *supra*, 53 Cal.App.5th at p. 947.)

Public Agencies further argue that Newsom's statements between 2017 and 2019 do not rebut the inference of causation because, in the absence of plaintiffs' lawsuits, the WaterFix EIR would have been deemed final, and the bond resolutions validated, all before Newsom took office in 2019. Accordingly, they argue, their lawsuits were necessarily a but-for cause of hispolicy change directive because he would not have had the opportunity to change policy in their absence. However, the mere fact that the lawsuits were pending at the time Newsom took office, providing him with the opportunity to act on his policy disagreement with the WaterFix project by issuing the Executive Order, does not also mean that the he was motivated to change policies due to the threat of victory posed by the lawsuits.

Finally, CSPA argues that other evidence submitted by DWR contradicted the trial court's finding regarding the effect of the lawsuits on the Governor. They point to Newsom's statement praising then-Governor Brown's "openness to scaling back the water conveyance project to a single tunnel, which he said he hoped would lead to a deal," Newsom's statement while running for Governor that "with less capacity . . . northerners might have some 'trust' that the dominant Metropolitan Water District of Southern California wouldn't get too greedy," and Newsom's statement after being elected, "I think if we walk down the path of two tunnels, we're in litigation and no project . . . I'd like to see a more modest proposal, but I'm not going to walk away." But the issue before us is whether substantial evidence supports the trial court's findings, not whether there is other evidence in the record that could possibly support a contrary finding. (See *Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 582 ["Our job is only to see if substantial evidence exists to support the verdict in favor of the prevailing party, not to determine whether substantial evidence might support the losing party's version of events"].)

B. *Rebutting the Inference of Causation as to Director Nemeth*

Plaintiffs contend DWR failed to rebut the inference of causation as to Nemeth's motivation to rescind the project approvals and decertify the EIR. They raise multiple arguments, including that there were various warning signs that the WaterFix EIR was legally inadequate, the proceedings before the Water Board demonstrated the credibility of plaintiffs' CEQA claims, Nemeth's statements demonstrated that plaintiffs' lawsuits affected her decisionmaking, DWR should have prepared a subsequent EIR rather than decertifying the EIR had it been legally adequate, and the trial court improperly considered plaintiffs' comments on the DCP draft EIR.

We begin with the argument by CSPA and NDWA that while the trial court found that Nemeth had a *reasonable basis* for decertifying the WaterFix EIR, the court failed to examine *why* Nemeth made that choice, and there was no logical reason for her to decertify the EIR other than the litigation. CSPA argues that had the WaterFix EIR been legally adequate, the proper procedure would not have been to decertify it, but rather to prepare a subsequent EIR pursuant to Public Resources Code section 21166. Public Resources Code section 21166 provides that when an EIR has been prepared for a project, "no subsequent or supplemental [EIR] shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs: [¶] (a) Substantial changes are proposed in the project which will require major revisions of the [EIR]. [¶] (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the [EIR]. [¶] (c) New information, which was not known and could not have been known at the time the [EIR] was certified as complete, becomes available."

In *DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at pages 575-576, we recognized that nothing in CEQA required DWR to decertify the WaterFix EIR, but instead if further environmental review were required due to changes in a project, the agency could prepare a subsequent or supplemental EIR to make the previous EIR

adequate. We further recognized that an agency "may proceed under CEQA's subsequent review provisions" when "the original environmental document retains some informational value relevant to the ongoing decision making process." (*Id.* at p. 576, citing *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 951-952.) In other words, an agency *must* start anew only where the previous environmental document is " 'wholly irrelevant.' " (*DWR Environmental Impact Cases*, at p. 576.) Accordingly, we concluded that decertification of the WaterFix EIR was not "to be expected" following the Executive Order (*id.* at p. 575), and noted that the trial court's first order had failed to address the issue of why DWR decided "to abandon its yearslong environmental review and begin the process anew" (*id.* at p. 576).

On remand, the trial court analyzed why DWR decided to decertify the EIR, and it found that Nemeth had a logical reason and reasonable basis for decertifying the EIR, *and* that she was motivated to decertify the EIR for reasons other than plaintiffs' lawsuits. Specifically, the court recognized our observation in *DWR Environmental Impact Cases* that Nemeth had discretionary authority to decertify the WaterFix EIR, and to commence a new EIR for the single tunnel conveyance after completing the assessment required by the Governor's new policy. (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 576.) It then found that Nemeth was motivated to decertify the EIR after the Governor indicated his desire for a " 'fresh approach . . . to meeting California's massive water challenges.' " The court found Nemeth to be "seeking a fresh start within the context of the new water policy and separate from an EIR that had 'started to have a Winchester Mystery House aspect to it' because of its various [and conflicting] incarnations since its origins in the Bay Delta Conservation Plan . . . and a CEQA finding that a single tunnel alternative to WaterFix identified as 5A was not feasible because of its lesser operational flexibility and its greater adverse impacts in comparison with

WaterFix's flexibility and impacts."[15] The court subsequently reiterated its finding that Nemeth "was seeking 'an opportunity to take a fresh look at Delta conveyance and to advance a project with renewed focus' consistent with Governor Newsom's new policy directive." Accordingly, while CSPA argues DWR should have followed the subsequent review procedure set forth in Public Resources Code section 21166 if the WaterFix EIR were legally adequate, nothing *required* DWR to do so; Public Resources Code section 21166 only prohibits a public agency from requiring the preparation of a subsequent EIR in the absence of certain specified events. (See *DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 576 ["CEQA does not prohibit an agency from decertifying an EIR when an approved project is modified or replaced by an alternative"].) And here, the record includes evidence as to why Nemeth decided not to.

NDWA and CSPA contend DWR failed to rebut the inference of causation because the record demonstrates that they were reasonably likely to prevail on their CEQA claims, and therefore their lawsuits must have motivated Nemeth to grant the relief sought therein. NDWA argues that the proceedings before the Water Board lent credibility to its CEQA claims, and it asserts the trial court misconstrued its argument when it found no evidence that the Water Board was likely to deny DWR's petition. But NDWA's belief in the merits of its lawsuit does not demonstrate that Nemeth was motivated to decertify the WaterFix EIR based on the evidence presented to the Water Board.

CSPA argues there were several "vivid warning signs that the WaterFix EIR might very well be found inadequate during judicial review." They point to a "failing grade" provided by the United States Environmental Protection Agency (EPA) for the

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[15] The Winchester Mystery House in San Jose was renovated and augmented nonstop for 38 years, resulting in a 160-room Victorian-style mansion. (*Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 584.)

Supplemental Draft Environmental Impact Statement in 2015, the trial court's overruling of DWR's demurrer to validation answers raising CEQA affirmative defenses, and a rider to an appropriations bills passed by federal House of Representatives exempting the project from judicial review that it argues demonstrated the government's concern about the merits of the lawsuits. CSPA further argues that the WaterFix EIR was inadequate because it failed to consider a reasonable range of alternatives.

The "warning signs" to which CSPA points do not convince us that the trial court's order constituted an abuse of discretion. A 2015 assessment by the federal EPA is far too attenuated to have influenced DWR's decision in 2019, and the overruling of a demurrer in January 2018--more than a year before DWR decertified the EIR and rescinded the bond approvals--does not convince us that DWR was motivated by that ruling to voluntarily provide the relief sought by the lawsuits. Similarly, CSPA's speculation about a budget rider on a federal appropriations bill that was passed by the House of Representatives in July 2018 does not demonstrate that DWR was aware of the inadequacy of the WaterFix EIR, such that the trial court's order was an abuse of discretion. Further, as in NDWA's argument, CSPA's belief in the merits of its CEQA claims does not demonstrate that Nemeth was motivated by the threat of victory posed by the lawsuits to decertify the EIR.

Next, NDWA argues that the trial court misconstrued its argument regarding Nemeth's statements, made contemporaneously with her decision to decertify the EIR and rescind the bond approvals. The court considered multiple statements made by Nemeth, in which she indicated "that a single tunnel would reduce environmental impacts which previous proposals may not have fully acknowledged and mitigated . . . ; that giving Delta stakeholders a more prominent role in expressing localized impacts would create better environmental impact reports, create the opportunity to mitigate through improved engineering and design, and help describe a project that was more precise in its impacts and therefore more precise in its mitigation . . . ; and that construction impacts

should be accounted for and designs potentially realigned to reduce community disruptions during 10 years of construction . . . ." The court found, however, that while Nemeth's statements discussed how the new DCP draft EIR "would lead to a better or improved analysis of impacts and mitigation," Nemeth did not concede that the WaterFix EIR was inadequate under CEQA. NDWA argues that it pointed to Nemeth's statements not to demonstrate her belief that the WaterFix EIR was legally inadequate, but rather to demonstrate that the lawsuits affected her decisionmaking. But to have affected Nemeth's decisionmaking in a relevant manner, Nemeth must have been motivated by the threat of victory posed by the lawsuits to decertify the EIR and rescind the bond approvals. Whether Nemeth was affected by the lawsuits in some other way is irrelevant.

Plaintiffs argue the trial court improperly considered their comments on the DCP draft EIR--which succeeded the WaterFix project--in analyzing whether their lawsuits constituted a substantial factor in motivating the DWR to decertify the WaterFix EIR and rescind the bond approvals. We disagree. In its decision, the court found that DWR's issuance of the Delta Conveyance Project draft EIR and plaintiffs' response thereto constituted "strong evidence" that plaintiffs' lawsuits "did not lead Director Nemeth to believe that [plaintiffs] would prevail on the merits of their legal claims against WaterFix and, as a result, withdraw WaterFix approvals and decertify the WaterFix [final] EIR." The court noted that plaintiffs had raised the same or similar concerns--or, stated differently, repeated "and acknowledged they were repeating" the same or similar CEQA claims--regarding the DCP draft EIR that they had raised regarding the WaterFix EIR. In making that observation, the court recognized that plaintiffs' comments on the DCP were "part of a review process separate from the review process conducted earlier on WaterFix, and the Court is not seeking to blur the procedural boundaries between the two processes. Instead the Court is only noting the similarities between the two sets of comments."

Contrary to plaintiffs' arguments, the trial court's observation that plaintiffs had raised the same or similar issues as to the DCP project as they had regarding the WaterFix project was not improper. The court's findings regarding plaintiffs' comments to the DCP project were narrowly limited to its reasonable observation that if Nemeth had been motivated to decertify the EIR and rescind the bond approvals due to her belief in the merit of plaintiffs' lawsuits (see *DWR Environmental Impact Cases, supra*, 79 Cal.App.5th at p. 577 [attorney fees award only appropriate if the lawsuit "achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense"]), then it is unlikely she would have subsequently advanced a project subject to the same or similar legal challenges. In other words, the trial court expressly acknowledged that the projects and their applicable review processes were distinct.

Finally, we note Public Agencies' argument that Nemeth's subjective motivations are irrelevant because she acknowledged that her actions stemmed directly from the Governor's policy change.[16] They point to Nemeth's declaration, which stated: "As Director of DWR, I made the decision for DWR to [rescind the WaterFix project approvals, rescind the bond resolutions, and decertify the EIR] to implement Governor Newsom's Executive Order N-10-19 and the Governor's position on WaterFix articulated in his February 12, 2019, State of the State address as I understood them." Accordingly, they assert that Nemeth's subjective motivation was irrelevant because her actions "*flowed directly and unequivocally* from Governor Newsom's decision." But while Nemeth's actions were intended to implement the Governor's policy change directive, neither the Governor's State of the State address nor the Executive Order compelled DWR to rescind the WaterFix approvals, decertify the WaterFix EIR, or rescind the bond

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[16] We note that this argument is directly contrary to NCRA's argument that the trial court erred by determining that the Governor's policy change was an external, superseding cause of DWR's actions.

approvals. Indeed, in *DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at page 575, we recognized that DWR's decertification of the WaterFix EIR and the rescission of the WaterFix bond resolutions was *not* necessarily expected following the Governor's policy change directive.[17]

C. *Argument that Substantial Evidence Supports Finding of Causation*

NCRA and plaintiff Save the California Delta Alliance (SCDA) argue the trial court abused its discretion in determining that they had failed to carry their ultimate burden to prove their lawsuits were a catalyst in motivating Nemeth to voluntarily grant them the relief sought in the litigation. They argue DWR's conduct tacitly conceded the inadequacy of the WaterFix EIR by decertifying the EIR rather than using it for tiering, DWR's statements contemporaneous with its rescission of its project approvals tacitly acknowledged its previous errors under CEQA and the Delta Reform Act, and the proceedings before the Stewardship Council actually prevented WaterFix.

1. *Tiering*

NCRA argues that DWR's decertification of its EIR and rescission of its bond resolutions tacitly conceded their unlawfulness because CEQA directs agencies to not decertify valid EIR's that could be used for tiering for future projects. " 'Tiering' refers to using the analysis of general matters contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIR's and negative declarations on narrower projects; incorporating by reference the general discussions from the broader EIR; and concentrating the later EIR or negative declaration solely on the issues specific to the later project." (Guidelines for the Implementation of Cal. Environmental Quality Act (CEQA Guidelines), Cal. Code Regs., tit. 14, § 15152, subd. (a).) Thus, "[t]iering is

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[17] Moreover, we have concluded that substantial evidence supports the trial court's finding that the Governor's policy change directive was not substantially motivated by plaintiffs' lawsuits.

appropriate when the sequence of EIR's is: [¶] (a) From a general plan, policy, or program EIR to a program, plan, or policy EIR of lesser scope or to a site-specific EIR. [¶] (b) From an EIR on a specific action at an early stage to a subsequent EIR or a supplement to an EIR at a later stage. Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." (*Id.*, § 15385.) In other words, CEQA "permits the environmental analysis for long-term, multipart projects to be 'tiered,' so that the broad overall impacts analyzed in an EIR at the first-tier programmatic level need not be reassessed as each of the project's subsequent, narrower phases is approved." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 429.) The Legislature has found that tiering of EIR's will promote construction by streamlining regulatory procedures, avoiding repetitive discussions of the same issues in successive EIR's, and ensuring that EIR's prepared for later projects concentrate on environmental effects related to that project. (Pub. Res. Code, § 21093, subd. (a).) EIR's "shall be tiered whenever feasible, as determined by the lead agency." (*Id*., subd. (b).)

Tiering does not apply to the WaterFix EIR. The WaterFix EIR was not a "broader EIR," "such as one prepared for a general plan or policy statement," the analysis of which was intended to be used "on narrower projects." (CEQA Guidelines, § 15152, subd. (a).) There is nothing to indicate that the DCP was a "narrower project" that could use the analysis of "general matters contained in" the WaterFix EIR as "a broader EIR." (*Ibid.*) While NCRA observes that tiering is intended to "eliminate repetitive discussions of the same issues and focus the later EIR or negative declaration on the actual issues ripe for decision at each level of environmental review" (*id.*, § 15152, subd. (b)), it remains the case that the WaterFix EIR was not a general, broad EIR that was intended to streamline the process for environmental review of increasingly narrow projects.

Similarly, NCRA argues that DWR's actions conceded the WaterFix EIR was unlawful because CEQA Guidelines authorize--and recommend--an agency to use a previously prepared EIR to analyze a new project where the previously prepared EIR "adequately addresses the proposed project" (CEQA Guidelines, §§ 15006, subd. (f)) or where "the circumstances of the projects are essentially the same" (*id.*, § 15153, subd. (a)), provided a subsequent or supplemental EIR were not required (see *id.*, §§ 15153, subd. (d); 15162). But as we discussed *ante*, the trial court found that Nemeth was motivated by her desire to implement the Governor's new policy while seeking to distance that new project from the original project that had taken on a "Winchester Mystery House" feeling to it; the general recommendation that an agency use a previously prepared EIR to analyze a new project does not demonstrate that Nemeth conceded the unlawfulness of the WaterFix EIR.

2. *DWR's Statements*

NCRA argues that the trial court failed to consider DWR's statements made contemporaneously with its rescission of its project approvals, which it argues tacitly acknowledged DWR's previous errors under CEQA and the Delta Reform Act. Specifically, NCRA points to DWR's public pronouncements it asserts "confirm that DWR realized it had to correct the mistakes in its environmental review that had triggered such broad public and agency criticism and opposition," and include "acknowledgements that DWR needed to do a better job of addressing the unique circumstances in the vulnerable Delta communities that the Project would most directly impact." As we discussed *ante*, the trial court considered Nemeth's statements, and we defer to the court's interpretation thereof. (See *Skinner v. Ken's Foods, Inc.*, *supra*, 53 Cal.App.5th at p. 947.)

3. *Stewardship Council Proceedings*

NCRA and SCDA argue that the Stewardship Council proceedings prevented the WaterFix project, and therefore their lawsuits motivated DWR to abandon the project.

The trial court rejected that argument on the basis that, although the draft determination found that substantial evidence did not support DWR's certification of consistency, the chair of the council and another member recommended resuming early consultation, indicating that the deficiencies identified in the draft determination could be resolved. The court also observed that DWR subsequently stated its intent to continue working with the Stewardship Council to resolve the issues identified.

NCRA contends substantial evidence does not support the trial court's determination because, it argues, the inconsistencies the draft determination documented "were substantive and fundamental," there was no evidence that Stewardship Council staff suggested their findings were erroneous, and DWR never identified any inconsistency that could be repaired. It argues the court abused its discretion by not engaging with the inconsistencies enumerated by the draft determination, and instead merely speculated that a different, future record might resolve the documented inconsistencies. SCDA adds that the purpose of early consultation with the Stewardship Council was to implement the measures of specific relief that it sought.

We disagree with plaintiffs' arguments. Rather than speculating about whether the inconsistencies identified by the draft determination could be cured by a future submission by DWR, as NCRA contends, the trial court appropriately relied on the evidence in the record before it, including statements by the chair of the Stewardship Council that the parties should "resume early consultation," and statements by another member of the council that the parties should "immediately resume early consultation," and that "all sides of this debate have a responsibility to find a path forward." The court's role was not to determine whether the inconsistencies identified by the draft determination could be resolved, but rather whether the proceedings before the Stewardship Council substantially motivated DWR to voluntarily grant the relief sought by plaintiffs' lawsuits. Based on the statements in the record, the court found that they did not.

We are not persuaded by SCDA's argument that the purpose of early consultation with the Stewardship Council was to implement the measures of specific relief that it sought. While SCDA points to the draft determination's statement that DWR could have addressed traffic and construction impacts by considering an eastern tunnel alignment, as proposed by SCDA, that does not demonstrate that the purpose of early consultation was to implement the specific measures sought by plaintiffs, or that the proceedings before the Stewardship Council substantially motivated DWR to voluntarily provide the relief sought by plaintiffs' lawsuits.

4. *Bond Resolutions*

Finally, NCRA argues the trial court did not address DWR's decision to rescind the bond approvals. NCRA points to *DWR Environmental Impact Cases*, in which we concluded that the Executive Order did not compel DWR to rescind the bond approvals (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 576), and to DWR's acknowledgement that rescinding the bond approvals was not necessary: " '[T]he validity of the revenue bond financing DWR authorized in connection with the California WaterFix is not dependent on the physical attributes of the underlying project, as referenced in Governor Newsom's February 12[, 2019] address. DWR's validation action seeks to confirm its authority under the Central Valley Project Act (CVP Act) (Wat. Code, §§ 11000 et seq.) to issue revenue bonds to pay for the planning and construction of water conveyance facilities that transport water below the natural waterways of the Delta. Whether these facilities involve one tunnel or two tunnels is not determinative of whether the CVP Act authorizes DWR to issue revenue bonds to finance those conveyance facilities."[18]

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[18] The Central Valley Project Act "is a federal reclamation project built within the major watersheds of the Sacramento and San Joaquin River systems and the Sacramento-San Joaquin Delta . . . , providing water storage and distribution to the Central Valley of

The trial court's findings and conclusions, which expressly referred to Nemeth's decisions to decertify the WaterFix EIR and withdraw pending WaterFix approvals, are equally applicable to the bond resolutions. In *DWR Environmental Impact Cases*, we observed that the trial court had erroneously failed to consider Nemeth's explanation that she had rescinded the bond approvals "to ensure 'maximum flexibility' with respect to financing a single tunnel conveyance" because it concluded that the only evidence material to its decision was Nemeth's declaration that she rescinded the bond resolutions to implement the Governor's policy directive. (*DWR Environmental Impact Cases*, *supra*, 79 Cal.App.5th at p. 577.) On remand, the court examined evidence of Nemeth's motivation for her actions, and it concluded that she was motivated not by the threat of victory posed by the lawsuits, but rather by her desire for a fresh look at Delta conveyance with renewed focus consistent with the Governor's policy directive. NCRA's argument fails.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/s/
Duarte, Acting P. J.

We concur:

/s/
Renner, J.

/s/
Krause, J.

California." (*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 840.)