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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

LIVING RIVERS COUNCIL,

Plaintiff and Respondent,

A138723

v.

**(Alameda County
Super. Ct. No. RG10543923)**

**STATE WATER RESOURCES
CONTROL BOARD,**

Defendant and Appellant.

_____ /

The California State Water Resources Board (Board) adopted a “Policy for Maintaining Instream Flows in Northern California Coastal Streams” (Policy) as required by Water Code section 1259.4. The Policy’s main objective was to ensure “the administration of water rights occurs in a manner that maintains instream flows needed for the protection of fishery resources.” In connection with the adoption of the Policy, the Board certified a Substitute Environmental Document (SED) indicating the Policy may cause, among other things, depletion of instream flows because of increased groundwater extraction and use.

In a petition for writ of mandate, Living Rivers Council (Living Rivers) — an association “dedicated to . . . protecting the Napa River in its natural and ‘living’ condition” and to “maintaining instream flows to protect fish and wildlife habitat” —

alleged, among other things, the SED and Policy violated the California Environmental Quality Act (CEQA, Pub. Resources Code, § 21000, et seq., Cal. Code Regs., tit. 23, § 3775, et seq.) by failing to identify, analyze, and disclose mitigation measures for the Policy’s environmental impacts. The trial court granted the operative petition for writ of mandate and, among other things, directed the Board to vacate the Policy.

The court awarded Living Rivers \$445,005 in attorney fees pursuant to Code of Civil Procedure section 1021.5.¹ The Board appeals the order awarding attorney fees. It contends: (1) Living Rivers was not a “successful party[;]” (2) the litigation did not confer “a ‘significant nonpecuniary benefit on the general public[;]’” (3) the litigation was not “necessary” to achieve the results Living Rivers actually obtained; and (4) the court’s reduction of the lodestar was insufficient and its application of a multiplier was an abuse of discretion.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The SED and Policy

Groundwater is the primary source of water for stream flow in Northern California coastal streams. “[A]nadromous salmonids (e.g., steelhead trout, coho salmon, and chinook salmon)” depend on winter stream flows for migration, spawning, incubation, and winter rearing. “Degradation and loss of freshwater habitat is one of the leading causes for the decline of salmonids in California[.]”

The Board is a regulatory agency “responsible for the administration of California’s water resources.” (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 700.) Water Code section 1259.4 requires the Board to “adopt principles and guidelines for maintaining instream flows” on northern California coastal streams “for the purposes of water right administration.” (Wat. Code, § 1259.4, subd. (a)(1).) Pursuant to that statute, the Board noticed and distributed a draft Policy

¹ Unless noted, all further statutory references are to the Code of Civil Procedure.

and SED² focusing “on measures that protect native fish populations, with a particular focus on anadromous salmonids.”

The SED described the basic background principles of surface water rights and administration, and groundwater rights. It explained the Board “has permitting authority over subterranean streams flowing in known and definite channels,” and noted “[g]roundwater classified as percolating groundwater is not subject to the . . . Board’s permitting authority.” The SED stated the Board had limited and discretionary enforcement authority over percolating groundwater to prevent waste and unreasonable use.

The SED also described the existing regulatory mechanisms for five affected counties: Marin, Humboldt, Sonoma, Napa, and Mendocino. The SED concluded “[t]o the extent that the land use and water development projects are not regulated by the . . . Board, they are within the purview of local governments and those entities can and should avoid or mitigate their significant environmental review.” The SED stated the “Board and other state and local agencies will need to address potential cumulative impacts in project-specific documentation. Individual projects will be subject to the appropriate level of environmental review at the time they are proposed, and mitigation would be identified to avoid or reduce the adverse effects of potentially significant effects, prior to any project-level action.”

The Board received comments on the draft Policy and SED from various entities, including Living Rivers. During the administrative review process, an engineering firm prepared a technical report at the Board’s behest. The report provided a methodology to identify subterranean streams where groundwater use could deplete stream flows

² For reasons not relevant to the issues on appeal, the Board prepared an SED instead of an Environmental Impact Report (EIR). (See *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1421-1422.) Where a SED identifies a potential impact, the SED must identify measures to mitigate or avoid the significant environmental effects, or identify specific considerations making mitigation measures or alternatives infeasible. (See Pub. Resources Code, § 21081, Cal. Code Regs., tit. 23, § 3779.5, subd. (c).)

(Groundwater Delineations or delineations) and contained maps of potential stream depletion areas. Living Rivers and others commented on the connection between ground and surface water and urged the Board to “conduct studies of subterranean streams to determine the areas where groundwater extraction may affect surface flows” and to “publish these analyses and related maps for use by groundwater users, permittees, decision makers and the public.” Others noted the SED “identifies numerous potentially significant direct, indirect, and cumulative environmental impacts that would result from the adoption of the Policy. Yet, the SED does not contain a single mitigation measure to mitigate these impacts. CEQA requires public agencies to analyze and mitigate, where feasible, all potentially significant direct, indirect, and cumulative impacts caused by the project. [Citations.] The SED fails to do this. Thus, the SED is entirely inadequate and must be redrafted to analyze and consider all potentially feasible mitigation measures.”

In response to these comments, the Board disclosed the existence of the Groundwater Delineations but declined to incorporate them into the Policy. The Board also briefly examined “some examples of potentially significant indirect impacts of the Policy and the regulatory requirements and mitigation measures for these impacts” and listed terms and conditions the Board “may” incorporate into future permits. The Board, however, did not incorporate the mitigation measures into the Policy. After correcting the Policy, holding public hearings, and receiving additional comments (including from Living Rivers) the Board approved the Policy and it became effective in September 2010.

Among other things, the Policy establishes “principles and guidelines for maintaining instream flows for the protection of fishery resources, while minimizing the water supply impacts of the [P]olicy on other beneficial uses. . . .” These principles: (1) “seasonally limit[]” water diversions “to periods in which instream flows are naturally high to prevent adverse effects to fish and fish habitat;” (2) allow water diversion “only when streamflows are higher than the minimum instream flows needed for fish spawning, rearing, and passage;” (3) provide that “[t]he maximum rate at which water is diverted in a watershed shall not adversely affect the natural flow variability needed for maintaining adequate channel structure and habitat for fish;” (4) require consideration and

minimization of the “cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat;” and (5) restrict “[c]onstruction or permitting of new onstream dams[.]”

The Policy “requires limitations on diversions which could lead some affected parties to take actions that could in turn result in indirect environmental impacts” and identifies the following “potentially significant indirect environmental impacts as a result of the following activities that third parties might take in response to the policy: (1) increased groundwater pumping, (2) increased diversions under riparian rights, (3) increased reliance on alternative water sources, (4) modification or removal of onstream dams, and (5) construction of offstream storage facilities.” The Policy states it “is impossible to predict which affected parties will take any of these actions, or exactly how many affected parties will take any of those actions. Accordingly, the SED evaluates indirect environmental impacts at a programmatic level.”

The Litigation

In an October 2010 petition for writ of mandate, Living Rivers alleging the SED disclosed 58 “significant adverse environmental impacts, including reduction of instream flows as a result of increase groundwater extraction and use” but failed to “identify, analyze, and disclose mitigation measures for the significant indirect environmental impacts identified in the SED.” Living Rivers sought a writ of mandate directing the Board to vacate the Policy and a judicial declaration that the Board failed to comply with CEQA before adopting the Policy. From late 2010 until April or May 2011, the parties attempted, unsuccessfully, to settle the litigation (Pub. Resources Code, § 21167.8).

In early 2011, Living Rivers began to prepare the CEQA record (Pub. Resources Code, § 21167.6) and the Board began to prepare a record for the Office of Administrative Law’s review of the Policy (Gov. Code, § 11353). Throughout 2011, the parties disagreed about the Board’s obligation to produce documents for inclusion in the CEQA record. Living Rivers moved to compel the Board to produce various documents, including documents related to Groundwater Delineations, specifically groundwater delineation maps. The Board eventually produced some documents voluntarily and some

pursuant to a court order. Living Rivers amended its petition for writ of mandate in late 2011.

In its trial brief, Living Rivers argued the SED identified numerous “significant adverse impacts resulting from six types of actions that people are likely to take in response to the Policy” but claimed the SED failed to identify or analyze mitigation measures for the adverse impacts. As Living Rivers explained, “[t]he Draft SED’s mitigation analysis thus relies almost entirely on future CEQA reviews, assumed applicability of and compliance with other regulations, and the possibility that the Board may include terms and conditions in permits issued pursuant to the Policy. Nowhere does the Draft SED analyze mitigation measures specific to any particular impact . . . [nor] provide any explanation or support for its conclusion that ‘mitigation measures’ will reduce Policy impacts to a level of insignificance.”

According to Living Rivers’s trial brief, the SED failed to: (1) “disclose the possible mitigation measures based on the Groundwater Delineations[;]” (2) “adopt mitigation measures to substantially reduce the Policy’s significant impacts caused by increased groundwater pumping[;]” and (3) “disclose or adopt mitigation measures” to reduce “impacts caused by modification or removal of onstream dams and construction of offstream storage.” Living Rivers argued the SED’s failure to make a separate finding for each significant impact violated CEQA. In a supplemental brief, Living Rivers discussed the lack of groundwater regulation in Humboldt, Marin, Mendocino, and Sonoma counties.

Final Statement of Decision, Judgment, and Writ of Mandate

Following a hearing, the court issued a final statement of decision determining the Board failed to adequately disclose: (1) Groundwater Delineations was a potential mitigation measure for the anticipated increased use of percolating groundwater; and (2) there likely would be little or no CEQA review of the anticipated increased use of

percolating groundwater in four of five affected counties.³ The court directed the Board to vacate the Policy, evaluate “‘Groundwater Delineations’ as a potentially feasible mitigation measure for the anticipated increased use of percolating groundwater and make appropriate disclosures regarding that evaluation and resulting decision.” The court also directed the Board to “present sufficient information to enable the decision makers and the public to understand and to consider meaningfully” the legal framework for mitigating “the expected increase in the use of percolating groundwater[.]” Among other things, the revised SED concluded: (1) the potential switch to groundwater pumping due to the Policy was unlikely to cause a significant reduction in surface water flows; (2) adopting delineations was not a feasible mitigation measure; and (3) four of five counties affected by the Policy were unlikely to regulate any increased groundwater use.

The court entered judgment and issued a writ of mandate. The Board did not appeal the judgment on the merits. Instead, it revised the SED.

Order Awarding Section 1021.5 Attorney Fees

Living Rivers moved for \$602,211.23 in section 1021.5 attorney fees and supported its motion with declarations regarding the reasonableness of counsel’s hourly rates, the quality of counsel’s work, and the significance of the results achieved. The Board opposed the motion.

Following a hearing, the court partially granted the motion. The court determined: (1) Living Rivers was the prevailing party; (2) “Living Rivers succeeded in enforcing an important right of public disclosure” under CEQA and “conferred a significant nonpecuniary benefit on the general public[;]” and (3) there was a clear need for private enforcement because “the action proceeded against the governmental agency” responsible for enforcing the Policy. The court calculated the fees lodestar amount at \$45,000 and the merits lodestar amount at \$324,120. The court decreased the merits

³ The court also determined: (1) the Policy did not violate Water Code section 1259.4; (2) the Board’s decision not to disclose a mitigation measure requiring groundwater pumpers to report to the Board did not violate the Board’s disclosure obligations; and (3) the Board adequately disclosed the Policy might lead to dam removal and construction of offstream storage reservoirs.

lodestar by \$57,450 to “account for [the] partial nature” of Living Rivers’s success. The court applied a 1.5 multiplier based on the contingent risk Living Rivers’s counsel assumed in taking the case and the resolution of the case on the merits. The court awarded Living Rivers attorney fees of \$445,005.

DISCUSSION

“[S]ection 1021.5 is an exception to the general rule in California, commonly referred to as the American rule and codified in section 1021, that each party to a lawsuit must ordinarily pay his or her own attorney fees.”⁴ (*Azure Ltd. v. I-Flow Corp.* (2012) 207 Cal.App.4th 60, 66.) “Section 1021.5 authorizes an award of fees when (1) the action ‘has resulted in the enforcement of an important right affecting the public interest,’ (2) ‘a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons . . . ,’ and (3) ‘the necessity and financial burden of private enforcement . . . are such as to make the award appropriate’” (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1026 (*Serrano*)). “‘The burden is on the claimant to establish each prerequisite to an award of attorney fees under section 1021.5.’” (*Samantha C. v. State Dept. of Developmental Services* (2012) 207 Cal.App.4th 71, 78.)

“On appeal from an award of attorney fees under section 1021.5, “‘the normal standard of review is abuse of discretion.’” (*Serrano, supra*, 52 Cal.4th at p. 1025.) This case does not, as the Board suggests, warrant application of a de novo standard of review. Whether Living Rivers has satisfied the criteria for an award of section 1021.5 attorney fees does not “‘amount[] to statutory construction and a question of law.’” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) Our review is deferential: we

⁴ The private attorney general statute, section 1021.5 provides in pertinent part: “Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, [and] (b) the necessity and financial burden of private enforcement, . . . are such as to make the award appropriate”

determine “whether there was a reasonable basis for the decision.” (*Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 391.)

I.

Living Rivers Was a Prevailing Party under Section 1021.5

The Board contends the court erred by concluding Living Rivers was a “successful party” under section 1021.5. The court determined Living Rivers was the prevailing party in the litigation “as it sought to compel the Board to explain how [it] and other agencies planned to mitigate the adverse impacts of the increased use of groundwater that could result from the Policy. . . . The judgment addresses this concern in that it requires the Board to evaluate the Groundwater Delineations as a potential mitigation measure and to explain how groundwater use is regulated and how the regulatory structure affects the ability to mitigate the potential increase in groundwater use.”

“A party seeking an award of section 1021.5 attorney fees must first be ‘a successful party.’ A favorable final judgment is not necessary; the critical fact is the impact of the action. [Citation.] Plaintiffs may be considered successful if they succeed on any significant issue in the litigation that achieves some of the benefit they sought in bringing suit. [Citation.] . . . [I]n determining whether a party is successful, the court must critically analyze the surrounding circumstances of the litigation and pragmatically assess the gains achieved by the action. [Citation.]” (*Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2010) 187 Cal.App.4th 376, 381-382.)

The Board claims Living Rivers was not the prevailing party because the court, not Living Rivers, originated the legal theories on which Living Rivers prevailed, specifically that four of the five counties in the Policy area were unlikely to regulate an increase in groundwater pumping. The Board is incorrect. In a supplemental trial court brief, Living Rivers discussed the lack of groundwater regulation in Humboldt, Marin, Mendocino, and Sonoma counties. Moreover, even if we assume for the sake of argument Living Rivers prevailed on “something that was the idea of the trial court[,]” the Board’s argument fails. A party need not make the “particular legal arguments which vindicated the public right affecting the public interest. It is enough that but for

the party's legal action the right would not have been vindicated.' [Citation.]" (*Protect Our Water v. County of Merced* (2005) 130 Cal.App.4th 488, 495 (*Protect Our Water*)). Here, but for Living Rivers's petition for writ of mandate, the court would not have concluded the Board failed to disclose there would be little or no CEQA review of the anticipated increased use of percolating groundwater in four of the five affected counties.

The Board also claims Living Rivers was not a prevailing party because it did not raise the issue of Groundwater Delineations until its trial brief. We are not persuaded for several reasons. First, the Board cites no authority requiring a party to raise an issue during the administrative process or in its initial filing to be considered a prevailing party under section 1021.5. (*Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451, 461 [treating as "abandoned" an argument unsupported authority].) Second, substantial evidence supports the court's determination that Living Rivers could not raise the "possibility that stream delineations" could be "an effective mitigation measure" during the administrative process because the Board delayed production of documents related to Groundwater Delineations until after it adopted the Policy. In any event, the precise point at which Living Rivers identified these issue is not dispositive because — as the Board concedes — the issue was raised during "the public comment period" and in the trial court.

We decline to adopt the Board's narrow definition of prevailing party. Courts take "a broad, pragmatic view of what constitutes a 'successful party'" for purposes of a section 1021.5 fee award (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 (*Graham*)) and do not require a party to obtain the "primary" or "central" relief sought. (See *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1346-1347 (*Lyons*)). "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153, quoting *Hensley v. Eckerhart* (1983) 461 U.S. 424, 433.) Here, a significant issue in the litigation was whether the Board failed to identify, analyze, and disclose mitigation measures for the Policy's significant groundwater related impacts.

The judgment required the Board to explain how it “planned to mitigate the adverse impacts of the increased use of groundwater that could result from the Policy.” As a result, Living Rivers was a prevailing party under section 1021.5. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 291 (*Santee*) [party successful where it partially prevailed on a petition for writ of mandate alleging noncompliance with CEQA]; *RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 783 (*RiverWatch*) [plaintiffs were successful parties where trial court partially granted petitions for writ of mandate alleging plan to approve a waste facility did not comply with CEQA].)

We reject the Board’s argument that “catalyst” cases provide “guidance” on whether Living Rivers was a prevailing party under section 1021.5. The catalyst theory “provides that a plaintiff is successful for purposes of an attorney fee award under . . . section 1021.5, despite the lack of a favorable judgment or other court action, if the lawsuit was a catalyst in motivating the defendant to provide the primary relief sought.” (*Garcia v. Bellflower Unified School Dist. Governing Bd.* (2013) 220 Cal.App.4th 1058, 1066; *Lyons, supra*, 136 Cal.App.4th at p. 1346 [issue in catalyst cases “is whether a party who has not obtained *any* judicial relief is nevertheless entitled to fees”].) Here, Living Rivers obtained judicial relief: a writ of mandate setting aside the Policy and directing the Board to “evaluate the ‘Groundwater Delineations’ as a potentially feasible mitigation measure for the anticipated increased used of percolating groundwater and make appropriate disclosures regarding that evaluation and resulting decision.” The court also directed the Board to “present sufficient information to enable the decision makers and the public to understand and to consider meaningfully” the legal framework for mitigating “the expected increase in the use of percolating groundwater[.]” As a result, this is not a catalyst case and Board’s reliance on catalyst cases is misplaced. (*Lyons, supra*, 136 Cal.App.4th at p. 1347.)

“[T]he question of whether a party is a prevailing party is best left to the trial courts.” (*Protect Our Water, supra*, 130 Cal.App.4th at p. 494.) The Board has not

demonstrated the court abused its discretion by concluding Living Rivers prevailed for purposes of section 1021.5.

II.

The Litigation Conferred a Significant Nonpecuniary Benefit on the General Public

The Board challenges the court's determination that the litigation conferred "a significant nonpecuniary benefit on the general public" pursuant to section 1021.5, subdivision (a). According to the Board, a "limited remand based on technical violations for minor revisions is not sufficiently significant to support an award under 1021.5."

The court concluded the litigation "conferred a significant nonpecuniary benefit on the general public." As the court explained, the "SED acknowledged that the Policy was likely to cause an increase in groundwater use, but failed to clearly disclose that the Board's permitting authority did not exten[d] to groundwater and that the regulatory structure in four of the five affected counties do not appear to monitor or mitigate most groundwater use."⁵ Additionally, the court noted the Board's "post-remand disclosures appear . . . to provide substantially more information regarding both the regulatory structure . . . and the hydrology issues This is not a case where the court's decision resulted in little more than an 'augmented explanation' of the agency's decision."

We agree with the Board that not every statutory violation authorizes an award of section 1021.5 attorney fees. We cannot, however, conclude the court's conclusion with respect to the significance of the benefit conferred is an abuse of discretion, particularly where the Board seems to acknowledge the remand in this case "furthered the policy of public disclosure." "[C]ourts have not narrowly construed the significant benefit factor." (Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2014) § 3.51, p. 3-45 (Pearl).) "[T]he 'significant benefit' that will justify an attorney fee award need not represent a 'tangible' asset or a 'concrete' gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy." [Citations.] "[T]he

⁵ The SED stated, "[t]he proposed Policy requires certain measure that *may* lead affected persons to take actions that *could* result in indirect environmental impacts."

benefit may be conceptual or doctrinal and need not be actual or concrete; further, the effectuation of a statutory or constitutional purpose may be sufficient.’ [Citation.] Thus, successful CEQA actions often lead to fee awards under section 1021.5. [Citations.] Moreover, the extent of the public benefit need not be great to justify an attorney fee award. [Citation.]” (*RiverWatch, supra*, 175 Cal.App.4th at p. 781.)

Courts have held that identifying flaws in an EIR and compelling the responsible agency to “reconsider what it must do to comply with CEQA . . . results in the enforcement of important public interest laws and confers a significant benefit on the general public.” (*Santee, supra*, 210 Cal.App.4th at p. 291.) Other courts have concluded actions requiring a governmental agency to analyze or reassess impacts associated with a proposed project confer a significant benefit. (See *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (2010) 190 Cal.App.4th 217, 235 (*EPIC*) [litigation conferred significant benefit where resubmitted sustained yield plan would “more accurately analyze the impacts of the proposed logging on individual planning watersheds”]; *RiverWatch, supra*, 175 Cal.App.4th at p. 781 [action requiring agencies to assess traffic impacts associated with project conferred significant benefit]; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 895 (*San Bernardino*) [rejecting waste compositing facility’s “attempt to minimize the benefits the CEQA litigation [] conferred on the general public”].) These cases support our conclusion that the court did not abuse its discretion by determining the litigation conferred a significant benefit under section 1021.5. Here, the court did not determine the significance of the action derived solely from a statutory violation. Instead, the court determined the public would significantly benefit from the disclosure of additional information necessary to assess the legal framework for mitigating “the expected increase in the use of percolating groundwater[.]”

The Board’s reliance on *Concerned Citizens of La Habra v. City of La Habra* (2005) 131 Cal.App.4th 329 (*La Habra*) does not alter our conclusion. There, the petitioner presented a CEQA challenge to the city’s approval of a warehouse facility. (*Id.* at p. 331.) The trial court agreed there was one CEQA defect and issued a writ

rescinding approval of the project until a revision was made. (*Id.* at pp. 331-332.) The trial court denied the petitioner’s request for section 1021.5 attorney fees after assessing “the circumstances of the case and determin[ing] the gains obtained by [the petitioner] did not confer a significant benefit on a large class of people.” (*Id.* at p. 335.) The appellate court upheld the denial of fees. It observed an appellate court must defer to the trial court’s realistic and pragmatic evaluation of the significance of the benefit the litigation has conferred unless the appellate court is convinced the trial court was “clearly wrong.” (*Id.* at p. 334.) In upholding the denial of attorney fees, the *La Habra* court commented the trial court “felt the [CEQA] inadequacy was a ‘minute blemish’ that could be repaired,” and that the petitioner “did not establish a precedent that applied statewide; rather, it successfully asserted a defect in CEQA’s process, the correction of which was not likely to change the project.” (*Id.* at p. 335.)

Here and in contrast to *La Habra*, the court did not find a “minute blemish” that could be remedied without the preparation of a SED or EIR. (*La Habra, supra*, 131 Cal.App.4th at p. 335.) Instead, the court explicitly determined “[t]his is not a case where the court’s decision resulted in little more than an ‘augmented explanation’ of the agency’s decision.” Moreover, opinions like *La Habra* — where the appellate court affirms a discretionary ruling — “do not compel the conclusion that the ruling here was an abuse of discretion.” (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158.) Here, the court “determine[d] the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case.” (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 939-940 (*Woodland Hills*).

As the *La Habra* court observed, we must defer to the trial court’s evaluation of the significance of the benefit the litigation has conferred unless we are convinced the court was “clearly wrong.” (*La Habra, supra*, 131 Cal.App.4th at p. 334.) Under the circumstances of this case, we cannot conclude the court’s conclusion regarding the significance of the litigation was “clearly wrong.” The Board is simply not correct that the “only reasonable conclusion that the trial court could draw was that the limited

remand . . . was not sufficiently significant” to justify an award of section 1021.5 attorney fees.⁶

III.

The Necessity of Private Enforcement Made the Attorney Fee Award Appropriate

Next, the Board argues the court erred by concluding the “necessity . . . of private enforcement” made the attorney fee “award appropriate” under section 1021.5, subdivision (b). The court concluded there was a clear need for private enforcement because “the action proceeded against the governmental agency” responsible for enforcing the Policy. The court also determined the litigation was ““necessary.”” In reaching this conclusion, the court considered Living Rivers’s attempts to resolve the matter without litigation and determined it made reasonable efforts “to resolve its claims regarding whether the Policy had appropriate mitigation for the potential increase in groundwater use.” The court declined to “require Living Rivers to prove that it made pre-litigation requests for exactly the relief it ultimately obtained.” As the court explained, where writs of mandate “are concerned there will usually be some disconnect between pre-litigation settlement negotiations and final judgments” and limiting fee relief where a plaintiff obtained exactly the same relief sought in prelitigation “would create a

⁶ Additional authorities cited by the Board — *Center for Biological Diversity v. California Fish & Game Com.* (2011) 195 Cal.App.4th 128, 140 and *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 366, 367-369 (*Karuk*) — are distinguishable and do not persuade us the court’s determination was an abuse of discretion. In *Center for Biological Diversity v. California Fish & Game Com.*, *supra*, 195 Cal.App.4th at page 140, the trial court issued a “purely procedural” remand and “took pains to avoid reaching the merits of the petition[.]” In contrast, the court here reached the merits of Living Rivers’s writ petition. In *Karuk*, *supra*, 183 Cal.App.4th at pages 367-369, the regional water quality control board was not statutorily required to provide an explanation for its administrative decisions and, as a result, compelling it to provide a more detailed explanation did not qualify as either a ““significant benefit”” or enforcement of an ““important right affecting the public interest”” under section 1021.5. Here, the Board was statutorily required to identify and analyze mitigation measures for potential environmental impacts, or to identify specific considerations making mitigation measures or alternatives infeasible. (See fn. 2, *infra*.)

perverse incentive” to “make overbroad pre-litigation settlement demands just to make a record for potential fee applications.”

Section 1021.5, subdivision (b) requires the party seeking attorney fees to demonstrate “the necessity and financial burden of private enforcement are such as to make the award appropriate.” (*Woodland Hills, supra*, 23 Cal.3d at p. 939.)⁷ “The ‘necessity’ of private enforcement ““looks to the adequacy of public enforcement and seeks economic equalization of representation in cases where private enforcement is necessary.” [Citations.]” [Citation.]” (*Whitley, supra*, 50 Cal.4th at p. 1215.) “When an action is brought against governmental agencies, the need for private enforcement is clear.” (Pearl, *supra*, § 3.61, p. 3-59, citing *Woodland Hills, supra*, 23 Cal.3d at p. 941.) Here, the need for enforcement is clear because the action proceeded against the Board, the governmental agency responsible for enforcing the Policy.

The Board argues the litigation was not necessary to achieve the results obtained because Living Rivers did not — during settlement discussions — indicate “it sought to have the Board adopt or consider adopting subterranean stream delineations, or improve its disclosure of the counties’ ground water regulation.” According to the Board, the litigation was somehow unnecessary because Living Rivers did not, during the administrative process or during settlement discussions, specifically request the relief it ultimately obtained: Living Rivers did not assert the SED was inadequate for failing to analyze mitigation measures or request the Board analyze Groundwater Delineations in the SED. To support this argument, the Board relies on *EPIC*, where we noted a plaintiff in a catalyst case must “notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time.” (*EPIC, supra*, 190 Cal.App.4th at p. 236, quoting *Graham, supra*, 34 Cal.4th at p. 577.)

⁷ The “necessity and financial burden requirement “really examines two issues: whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party’s attorneys.” [Citations.]” (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214 (*Whitley*)). Only the first element — “whether private enforcement was necessary” — is at issue here.

As we have explained, this is not a catalyst case, and our reference in *EPIC* to settlement negotiations in catalyst cases has no application here.

“[P]relitigation settlement negotiations [are not] a prerequisite to an award of attorney fees under section 1021.5 in noncatalyst cases” but “settlement efforts (or their absence) are relevant *in every case*” where a court seeks to determine whether an action was necessary within the meaning of section 1021.5. (*EPIC, supra*, 190 Cal.App.4th at p. 236, quoting *Vasquez v. State of California* (2008) 45 Cal.4th 243 (*Vasquez*).)⁸ As our high court has explained, section 1021.5 “does not expressly or by necessary implication require that the plaintiff have attempted to settle the dispute; it requires, instead, only that the court determine that private enforcement was sufficiently necessary to justify the award. To be sure, failed attempts to settle can help to demonstrate that litigation was necessary, but the absence of settlement attempts does not logically or necessarily demonstrate the contrary. Depending on the circumstances of the case, attempts to settle may have been futile, exigent circumstances may have required immediate resort to judicial process, or prior efforts to call the problem to the defendant’s attention—perhaps by other parties or in other proceedings—may have been rebuffed. The language of section 1021.5 is sufficiently flexible to permit courts to consider these and all other relevant circumstances in determining whether private enforcement was sufficiently necessary to justify awarding fees.” (*Vasquez, supra*, 45 Cal.4th at pp. 251-252, fn. omitted.)

Here, the court exercised “its equitable discretion in light of all the relevant circumstances” (*EPIC, supra*, 190 Cal.App.4th at p. 236) and determined Living Rivers “made reasonable efforts to raise and resolve its concerns before incurring substantial attorneys’ fees.” We applaud the Board’s settlement efforts and are sympathetic to its concerns regarding litigation costs and exposure to section 1021.5 attorney fees. But the Board’s disagreement with the court’s conclusions regarding the settlement negotiations does not establish an abuse of discretion. As we have explained, our review of the

⁸ CEQA requires settlement negotiations. (Pub. Resources Code, § 21167.8.)

court's ruling on the section 1021.5 motion is deferential. "We will reverse the trial court's decision" on a section 1021.5 motion "only if there has been a prejudicial abuse of discretion, i.e., when there has been a manifest miscarriage of justice or "where *no reasonable basis* for the action is shown." [Citation.]" (*Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1767, italics added.) We cannot conclude the court's determination that the litigation was necessary lacked a reasonable basis.

IV.

The Amount of Fees Awarded Was Within the Court's Discretion

The Board claims the court's reduction of the merits lodestar was insufficient and urges this court to reduce the hours claimed by "at least 80 percent to reflect the lack of success on the merits." The Board also contends the court abused its discretion in applying a multiplier.

The court concluded counsel for Living Rivers spent 980 hours on the merits of the lawsuit at rates ranging from \$140 to \$625, yielding a merits lodestar of \$324,120. In determining whether to reduce the lodestar and/or apply a multiplier, the court found: (1) the case did not involve exceptionally difficult CEQA issues; (2) Living Rivers's counsel's hourly rates reflected the skill counsel displayed in arguing case; (3) Living Rivers's counsel assumed risk in undertaking the case on a contingent basis, but that risk was reduced by \$70,000 Living Rivers paid counsel as a "base fee[.]" (4) Living Rivers prevailed on only one of the three primary claims it asserted;⁹ and (5) the case was litigated through trial. The court declined to consider the "fact that a government entity will be paying the fees[.]" The court decreased the merits lodestar by \$57,450 "to account for [the] partial nature" of Living Rivers's success because "the Board prevailed on the Water Code [section] 1259.4 issue and the dams issue." The court applied a 1.5

⁹ As described above, the court concluded Living Rivers prevailed on its claim that "the Board failed to identify and disclose feasible mitigation measures to reduce the impact of the anticipated increase in groundwater use." The court determined "[t]his claim was the central focus of the petition. Although the lawsuit might not lead to any substantive change in the post-remand Policy, the judgment requires disclosures that will permit an informed public discussion about legally feasible mitigation options."

multiplier based on the contingent risk Living Rivers’s counsel assumed and the resolution of the case on the merits.

“A court assessing attorneys’ fees must begin with a lodestar figure based on the time spent and the reasonable hourly rate of each attorney involved in the presentation of the case. [Citations.] The lodestar essentially sets a basic fee for comparable legal services in the community. It may be adjusted by the court in order to ‘*fix a fee at the fair market value* for the particular action.’ [Citation.] In short, the court’s task is to determine whether the litigation before it involved elements ‘justifying augmentation [(or diminution)] of the unadorned lodestar in order to *approximate the fair market value for such services.*’ [Citations.] ‘If there is no reasonable connection between the lodestar figure and the fee . . . awarded, the fee does not conform to the objectives established in *Serrano* ([*v. Priest* (1977) 20 Cal.3d 25 (*Serrano III*)], and may not be upheld.’ [Citation.]” (*Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1329 (*Rogel*).)

Among the factors a trial court may consider when adjusting the lodestar are: ““(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; [and] (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they [were] employed. . . .”” (*Rogel, supra*, 194 Cal.App.4th at p. 1329, quoting *Serrano III, supra*, 20 Cal.3d p. 49.)

The Board contends the lodestar should be reduced because Living Rivers did not prevail on the mitigation issue and because the benefit conferred by the litigation was “‘limited.’” We have already rejected these arguments for the reasons explained above. The Board’s disagreement with the court’s conclusion that Living Rivers prevailed on its

claim that “the Board failed to identify and disclose feasible mitigation measures to reduce the impact of the anticipated increase in groundwater use” does not demonstrate an abuse of discretion. Here, the court applied the proper legal standards and had a reasonable basis for its decision. “On this record, the trial court did not abuse its discretion by declining to further reduce the lodestar.” (*Pellegrino v. Robert Half Internat., Inc.* (2010) 182 Cal.App.4th 278, 292 (*Pellegrino*)].)

The cases the Board cites do not persuade us the court abused its discretion by declining to further reduce the lodestar. In *State Water Resources Control Bd. Cases* (2008) 161 Cal.App.4th 304, the reduction of the lodestar was not at issue on appeal. In *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19 (*San Diego POA*), the appellate court affirmed the trial court’s application of a negative multiplier based on a variety of factors. And *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819 (*Thayer*), the appellate court affirmed the application of a negative multiplier because the record demonstrated the prevailing parties’ lawyers did little more than duplicate pleadings filed in other, related cases. None of these cases applies here. Indeed, in *San Diego POA* and *Thayer*, the appellate courts affirmed the trial court’s exercise of its discretion, albeit under very different circumstances.

The Board claims the contingency risk did not provide a basis for the award of a 1.5 multiplier. According to the Board, the payment of \$70,000 to counsel for Living Rivers “completely diminished” the contingency risk and does not support the award of a multiplier. We disagree. As we have already discussed at some length, the Board’s disagreement with the court’s conclusion does not demonstrate an abuse of discretion, particularly where the Board cites no authority to support its argument. Here, the court’s consideration of the contingent risk assumed by counsel for Living Rivers was not an abuse of discretion. ““An enhancement of the lodestar amount to reflect the contingency risk is “[o]ne of the most common fee enhancers. . . .” [Citation.]” (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 623.) Numerous courts have authorized the enhancement of a fee based on the contingent risk factor. (See *Cates v. Chiang* (2013) 213 Cal.App.4th 791, 823 [trial court’s reliance

contingent risk “factor for the fees incurred during the merits litigation was reasonable and appropriate”]; *Pellegrino, supra*, 182 Cal.App.4th at p. 292 [enhanced fee award proper where legal work was done on contingency basis]; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 646 [contingent nature of case may warrant enhancing lodestar]; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1216 [in adjusting lodestar upward, court may consider contingent nature of fee award].)

The Board also argues the court erred by failing to “consider the countervailing factor that any fee would be paid by public money to private lawyers.” As we have explained, the California Supreme Court has identified several factors a trial court may consider when awarding section 1021.5 attorney fees, one of which is whether an award of such fees “against [a public entity] would ultimately fall upon the taxpayers[.]” (*Serrano III, supra*, 20 Cal.3d at p. 49.) Our high court, however, has never held “a public entity should not fully compensate plaintiffs’ attorneys when litigation has been necessary” to vindicate an important right. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 400 (*Horsford*)). Moreover, our high court in *Serrano III* “was not called upon to expound on issues such as when the taxpayer factor could properly be considered and to what extent the factor could be calculated into the attorneys’ fees determination. Indeed, in *Serrano III*, the court affirmed an award against governmental defendants based on a positive multiplier applied to the lodestar.” (*Rogel, supra*, 194 Cal.App.4th at p. 1331.)

That a governmental or public entity will pay the section 1021.5 attorney fees does not necessarily justify a reduction in the amount of fees awarded.¹⁰ (See *Horsford, supra*, 132 Cal.App.4th at p. 400 [relying on defendant’s public-entity status “to completely deny an enhancement multiplier . . . was an abuse of discretion”]; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 231; see also *Schmid v. Lovette*

¹⁰ We assume for the sake of argument the Board, “as a governmental entity reliant on tax increment financing, has some measure of connection to taxpayers. It is not altogether clear to us, however, that the [Board’s] burden to pay attorneys’ fees to [Living Rivers] will necessarily mean that an additional tax burden will be imposed on taxpayers.” (*Rogel, supra*, 194 Cal.App.4th at p. 1330, fn. 5.)

(1984) 154 Cal.App.3d 466, 476 (*Schmid*) [no “special circumstance” exempting appellant from attorney fees awarded under federal statute; “[t]he fact that the fee award must be paid from the limited budget of the district and that the financial burden will therefore fall upon the taxpayers also does not constitute a special circumstance rendering the fee unjust”].)

Rogel is instructive. There, the appellate court reversed the trial court’s application of “a negative multiplier based on the factor that payment of lodestar attorneys’ fees would not be the ‘better’ use” of the redevelopment agency’s money. (*Rogel, supra*, 194 Cal.App.4th at p. 1331.) The *Rogel* court held “a trial court is not permitted to use a public entity’s status to negate a lodestar that would otherwise be appropriate” and explained, “[i]n our view, *Serrano III*, *Horsford* and *Schmid* preclude a rule which awards less than the fair market value of attorneys’ fees merely because the case was filed against a government agency. We also see a strong public policy against such a rule. Allowing properly documented attorneys’ fees to be cut simply because a losing party is a governmental entity would defeat the purpose of the private attorney general doctrine codified in . . . section 1021.5 and would also incentivize governmental entities to negligently or deliberately run up a claimant’s attorneys’ fees, without any concern for consequences.” (*Rogel, supra*, 194 Cal.App.4th at pp. 1331, 1332.)

The Board’s reliance on *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841 (*Northwest*) and *San Diego POA, supra*, 76 Cal.App.4th 19 is misplaced. In *Northwest*, the trial court adjusted a section 1021.5 lodestar upward but this court reversed, in part because the factors the trial court listed did “not provide a persuasive justification for adjusting the lodestar upward.” (*Northwest, supra*, 159 Cal.App.4th at p. 880.) This court determined each factor listed by the trial court was unpersuasive, and noted “other factors suggest that an upward adjustment of the lodestar is inappropriate. One such factor . . . is the *source* from which an attorney fee award would be paid. [Citation.] Here, the attorney fees award would not be paid out of a common fund or be borne by a private wrongdoer, but would ultimately fall upon the shoulders of California taxpayers.” (*Id.* at p. 881.)

In *San Diego POA*, the trial court applied a negative multiplier because the police officers association “had achieved very limited success; the portion of its writ petition on which it prevailed . . . did not involve complex issues of law; the case did not preclude [the police officers association] attorneys from working on other matters and did not involve a contingency fee; and the award of fees would ultimately be borne by the taxpayers.” (*San Diego POA, supra*, 76 Cal.App.4th at p. 24.) The appellate court concluded the trial court did not abuse its discretion in applying a negative multiplier, stating: “[t]he court’s reasons for reducing the award were based on the proper criteria and are amply supported by the record. [Citations.] The vast majority of [the officers association’s] time and effort was clearly spent on issues upon which the Police Department prevailed. The award of attorney fees was well within the trial court’s discretion, and we affirm it.” (*Ibid.*)

Northwest and *San Diego POA* do not assist the Board, because neither case requires a trial court to consider whether the award of attorney fees will be borne by the taxpayer. We agree with *Rogel* and the authorities cited above and conclude the court’s refusal to consider the source from which an attorney fee will be paid when setting the multiplier was not an abuse of discretion.

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.