SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

ANIMAL LEGAL DEFENSE FUND, et al., Petitioners/Plaintiffs, vs. MONTEREY COUNTY, Respondent/Defendant.	Case No.: 16CV001670 INTENDED DECISION

The Petition for Writ of Mandate by Petitioners/Plaintiffs Animal Legal Defense Fund, et al. (collectively, "Petitioners") came on for hearing before the Honorable Lydia M. Villarreal on May 12, 2017, at 9:00 a.m., in Department 1. Petitioners and Respondent Monterey County ("the County") were represented by their respective attorneys. The matter having been submitted, the court makes the following rulings:

I. Background

This California Environmental Quality Act ("CEQA") proceeding relates to the County's Integrated Wildlife Damage Management Program ("the IWDM Program"). Each year, the County's Agricultural Commissioner enters into an annual Work and Financial Plan ("Work Plan" or, collectively, "Work Plans") with U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services ("APHIS-WS"). Each Work Plan governs implementation of the IWDM Program for a 1-year period beginning July 1st and ending June 30th ("Annual Program" or, collectively, "Annual Programs"). In April 2016, the County's Agricultural Commissioner entered into the Work Plan ("2016 Plan") to implement the Annual Program for July 1, 2016 to June 30, 2017 ("2016 Program"). The next day, its Assistant

Agricultural Commissioner executed a notice of exemption ("2016 NOE") wherein the County asserted a ministerial exemption for the 2016 Plan.

Petitioners allege that the County failed to perform any environmental review for the IWDM Program, including an initial study and preparation of a negative declaration, environmental impact report ("EIR"), or other CEQA document. Petitioners further allege that the County improperly asserted a ministerial exemption in the 2016 NOE in an effort to avoid CEQA environmental review. Petitioners make clear they only challenge the CEQA compliance based on allegations that the County (1) improperly asserted a ministerial exemption for the 2016 Program/2016 Plan in the 2016 NOE; and (2) failed to perform CEQA environmental review for the 2016 Program before the approval in the 2016 Plan as required.

II. Procedural History

Petitioners commenced this action on June 1, 2016, and filed the operative verified first amended petition for writ of mandate and complaint ("FAP") on August 4, 2016.[1] In the FAP, Petitioners assert causes of action for: (1) Petition for Writ of Mandate Under CEQA; (2) Declaratory Relief With Respect to CEQA; (3) Petition for Writ of Mandate and Declaratory Relief to Set Aside the County's Project Approval as Contrary to CEQA; and (4) Declaratory Relief that the County Willfully Suppressed Records.

The County filed a statement of issues in September 2016.

Pursuant to the parties' stipulation, Petitioners submitted a joint administrative record that includes a deposition transcript and records that the County refused to certify.

On December 19, 2016, Petitioners timely filed an opening brief and their counsel's supporting declaration with attached exhibits. On February 17, 2017, the County timely filed an opposing brief that contained a request to dismiss the action and evidentiary objections to the declaration and exhibits filed with the opening brief. On March 20, 2017, Petitioners timely filed a reply brief and supporting declaration. On March 22, 2017, Petitioners filed a notice of the hearing previously set for May 12, 2016.

At the hearing on May 12, 2016, Petitioners and the County submitted oral arguments, and Petitioners agreed to voluntarily dismiss their claims for declaratory relief. Thereafter, the court took the matter under submission.

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[1] Contrary to the County's assertion, the verification attached to the FAP is adequate.

III. The County's Request for Dismissal in the Opposing Brief

The County's request for dismissal of the action effectively is a procedurally defective motion for renewal or reconsideration of a prior motion to dismiss. (See Code Civ. Proc., § 1008.) In any event, the request lacks merit. The County's request for dismissal is DENIED.

IV. Declaratory Relief Claims (Second & Fourth Causes of Action)

Since Petitioners agreed to dismiss the declaratory relief claims during the hearing on May 12, 2017, the second and fourth causes of action for declaratory relief are DISMISSED.

V. Petition for Writ of Mandate Under CEQA (First & Third Causes of Action)

All that remains is the petition for writ of mandate under CEQA (first and third causes of action). Before analyzing the merits of the petition, the court will address evidentiary issues and objections, summarize the evidence, and set forth the applicable CEQA principles.

A. Evidentiary Issues & Objections

The County's Evidentiary Objections: Extra-record evidence is admissible in this CEQA writ of mandate proceeding because Petitioners challenge an informal decision and claims of exemption. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576; see also *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 255-256.) Therefore, the County's extra-record evidence objection lacks merit. Its remaining objections also lack merit. Accordingly, the County's evidentiary objections are OVERRULED.

Deposition Transcript in the Joint Administrative Record: Although not addressed by the parties, the deposition transcript submitted as part of the stipulated/joint administrative record is not within the scope of the CEQA record of proceedings. (See Pub. Res. Code, § 21167.6, subd. (e).) That being said, the court may properly consider the deposition transcript as extra-record evidence because—as explained above—Petitioners challenge an informal decision and claim of a ministerial exemption.

Uncertified Records in the Joint Administrative Record: The County refused to certify certain records in the joint administrative record, despite stipulating to their inclusion in the record. The County does not dispute that the uncertified records are accurate and relevant. After reviewing the uncertified records, the court finds that they are properly included in the record of

proceedings. (See Pub. Res. Code, § 21167.6, subd. (e)(1)- (4), (6)-(8), & (10)-(11).) Therefore, the County's refusal to certify them does not affect the court's analysis.

Arguments re: Adverse Inference: Contrary to Petitioners' contention, an adverse inference is not warranted because they have not carried their burden to show that the County acted with a culpable state of mind. (See, *Reeves v. MV Transp., Inc.* (2010) 186 Cal.App.4th 666, 681-682.)

B. Evidence Submitted[2]

Initial Implementation of the IWDM Program: The County's Assistant Agricultural Commissioner Robert Roach ("AAC Roach") testified at his deposition that he believes the County first implemented the IWDM Program in or about 1993. (AR000418-657.)

2013 Work Plan: The Work Plan executed by the County's representative in February 2013 and APHIS-WS on March 6 and 21, 2013 ("2013 Plan") is the first record referring to the IWDM Program. (AR000011-14.)

Delegation of Authority in 2013: The County's Board of Supervisors ("Board") held a public meeting on May 21, 2013. (AR000004-6 & 32-65.) On May 22, 2013, the Board issued an order ("2013 Board Order") that delegated authority to enter into contracts with certain other agencies—including APHIS-WS—to the County's Agricultural Commissioner for a period of 3 years ending June 30, 2016. (AR000001.) Neither the 2013 Board Order nor the records relating to the Board meeting mention, approve of, or commit the County to carry out the IWDM Program or any particular agreement or activity involving APHIS-WS.

2013 Cooperative Services Agreement: In June 2013, without public notice, the County's Agricultural Commissioner and APHIS-WS executed a 5-year Cooperative Services Agreement ("CSA"). (AR000007-10.) The 2013 CSA does not include any details regarding implementation of the IWDM Program. Instead, the 2013 CSA contemplated that, each year, the County and APHIS-WS would negotiate and execute a Work Plan governing an Annual Program to implement the IWDM Program for a 1-year period. The 2013 CSA further contemplated that,

[2] The material evidence is summarized below. Petitioners submitted evidence that is not significant and warrants no further discussion. Specifically, Petitioners submit declarations by their counsel with attached exhibits to support their adverse inference argument and declaratory relief causes of action. (See Petitioners' counsel's opening declaration; see also Petitioners' counsel's reply declaration.) Since the argument lacks merit and declaratory relief claims have been dismissed, this evidence is immaterial to the court's analysis.

upon execution, each Work Plan would be incorporated into the 2013 CSA. The 2013 CSA allows any party to unilaterally terminate it upon 90 days' written notice.

2014 Work Plan: The Work Plan executed by the County's Agricultural Commissioner on April 14, 2014 and APHIS-WS on May 10 and 24, 2014 ("2014 Plan") pursuant to the 2013 CSA governs the Annual Program for July 1, 2014 to June 30, 2015, and sets forth details about features/aspects of the ongoing IWDM Program during that period. (AR00015-18.)

2015 Work Plan: The Work Plan executed by the County's Agricultural Commissioner on June 19, 2015 and APHIS-WS on June 25, 2015 and July 7, 2015 ("2015 Plan") pursuant to the 2013 CSA governs the Annual Program for July 1, 2015 to June 30, 2016, and sets forth details about features/aspects of the ongoing IWDM Program during that period. (AR00019-22.)

2015 Notice of Exemption: On June 30, 2015, the County filed a notice of exemption ("2015 NOE") with the County Clerk, stating that a project defined as a Work Plan is subject to a ministerial exemption because it was authorized by a previously approved Board action. (AR000023.) The 2015 NOE is the first CEQA document related to the IWDM Program identified in the County Clerk's CEQA Index.[3] (AR000403.)

2016 Work Plan: The 2016 Plan executed by the County's Agricultural Commissioner on April 26, 2016 and APHIS-WS on May 2 and 11, 2016 pursuant to the 2013 CSA governs the Annual Program for July 1, 2016 to June 30, 2017 (i.e. the 2016 Program), and sets forth details about features/aspects of the ongoing IWDM Program during that period. (AR00028-31.) The 2016 Plan is the only document containing details about the 2016 Program and the County's commitment to carry out the 2016 Program.

2016 Notice of Exemption: On April 27, 2016, the County's Agricultural Commissioner executed the 2016 NOE stating that the project—identified as a Work Plan defining objectives and a plan of action for implementation of the IWDM Program—is subject to a ministerial exemption because it "consists of a [Work Plan] that was authorized by a previously approved action of the [Board]." (AR000023.) The 2016 NOE is identified in County Clerk's CEQA Index.[4] (AR000414.)

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[3] The index erroneously refers to the 2015 NOE as a notice of determination.

[4] The 2016 NOE does not have the County Clerk's file stamp.

Delegation of Authority in 2016: Shortly before the execution of the 2016 Plan, but before the 2016 Plan came into effect, the Board held a public meeting on March 22, 2016. (AR000024-26 & 66-107.) On March 24, 2016, the Board issued an order ("2016 Board Order") that delegated authority to enter into contracts with other agencies—including APHIS-WS—to the County's Agricultural Commissioner for a period of 3 years ending on June 30, 2019. (AR000002-3.) The 2016 Board Order and records pertaining to the Board meeting refer to the IWDM Program's Work Plan without specifying any particular Work Plan or Annual Program.[5] The 2016 Board Order shows that the Board set the maximum annual budget for implementation of the IWDM Program and authorized the Agricultural Commissioner to spend up to the maximum budget to implement each Annual Program. These public records merely delegate authority to execute contracts to the County's Agricultural Commissioner without containing any commitment to carry out the IWDM Program, details about the IWDM Program, or identification of any Work Plan.

Retention of Contractor for CEQA Initial Draft Study: From February 1, 2016 to May 20, 2016, the County's Agricultural Commissioner and staff communicated with and ultimately retained a contractor to perform CEQA environmental review and prepare an initial study. (AR000108-350.) The engagement letter/agreement and early communications suggest that the County sought CEQA review for the 2016 Plan, but the draft initial study would not be ready before commencement of the 2016 Program on July 1, 2017. After the execution of the 2016 Plan, communications and other records indicated that the County sought CEQA review in anticipation of the renewal of the 2013 CSA in 2018.[6] The engagement letter/agreement and early communications also disclose that the County and its contractor did not complete the review and initial study before executing the 2016 Plan, or before commencement of this action.[7]

AAC Roach's Deposition Testimony: On September 20, 2016, Petitioners deposed Assistant Agricultural Commissioner Roach. (AR000418-657.) During his deposition, AAC Roach confirmed that the 2013 CSA had a 90 day termination clause, and contemplated later

[5] Notably, the 2016 Board Order's delegation of authority was not in effect at the time of the execution of the 2016 Plan (April 26, 2016) or commencement of the 2016 Program (July 1, 2017).

[6] Regardless of whether the County retained the contractor for CEQA review related to the 2016 Plan or the future renewal of the 2013 CSA, the record shows that there was no initial study or completed negative declaration, EIR, or other environmental document as required by CEQA as of the date of execution of the 2016 Plan.

[7] As discussed below, the County asserts that it completed the initial study after Petitioners commenced this proceeding. There is no record or extra-record evidence indicating that the initial study was ever completed.

execution of the Work Plans setting forth specific terms regarding implementation of the IWDM Program. When asked whether the County "approves the contract" with APHIS-WS and "chooses to implement the IWDM program by contracting with" APHIS-WS, AAC Roach answered "yes." AAC Roach also testified that the County had not provided input on terms of the Work Plans because it "never wanted to," and "it is generally difficult to change government contracts" due to issues with bureaucracies, "[s]o we generally don't attempt to change state or federal contracts." AAC Roach testified that the County retained a contractor to perform CEQA environmental review in anticipation of the upcoming renewal of the 2013 CSA that will occur in 2018.

C. Applicable CEQA Principles

CEQA and the CEQA guidelines establish a three-tiered review structure. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) First, a lead agency must conduct a preliminary review to determine whether an activity is subject to CEQA—or not subject to CEQA because it (1) "does not involve the exercise of discretionary powers"; (2) "will not result in a direct or reasonably foreseeable indirect physical change in the environment"; or (3) is not a project—and whether the project is exempt. (Cal Code Regs. Tit. 14 [CEQA Guidelines], §§ 15060, subd. (c) & 15061.) If a project falls within an exemption or "it can be seen with certainty that the activity in question will not have a significant effect on the environment" (Cal. Admin. Code, tit. 14, § 15060), no further agency evaluation is required." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.)

Second, if the project is non-exempt, subject to CEQA, and "there is a possibility that the project may have a significant effect," then CEQA compliance is required and the analysis proceeds to the second tier, i.e. the requirement that the lead agency conduct an initial study. (See *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.; see also CEQA Guidelines, §§ 15060 & 15063, subd. (a).)

Third, depending on the results of the threshold initial study, the lead agency issues an EIR, a negative declaration, or another environmental review document authorized by the CEQA Guidelines. (CEQA Guidelines, § 15063, subd. (b); see also *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) Specifically, "[i]f the agency determines that there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a

significant effect on the environment . . . the lead agency shall" either: (a) prepare an EIR; (b) use an existing EIR; or (c) determine, pursuant to a program EIR, tiering, or another appropriate process, which of a project's effects were adequately examined by an earlier EIR or negative declaration." (CEQA Guidelines, § 15063, subd. (b)(1).) "The lead agency shall prepare a negative declaration if there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment." (*Id.*, subd. (b)(2).)

Furthermore, if CEQA compliance is required, then "[b]efore granting any approval of a project subject to CEQA, every lead agency or responsible agency shall consider a final EIR or negative declaration or another document authorized by these guidelines to be used in the place of an EIR or negative declaration." (CEQA Guidelines, § 15004, subd. (a).) The issue of whether the "agency approved a project with potentially significant environmental effects before preparing and considering an EIR for the project" may "also be framed by asking whether a particular agency action is in fact a 'project' for CEQA purposes." (*Save Tara v. City of West Hollywood* (2010) 45 Cal.4th 116, 131 ["*Save Tara*"].)

D. Discussion

In the FAP, Petitioners challenge CEQA compliance based on allegations that the County (1) improperly asserted a ministerial exemption for the 2016 Program/2016 Plan in the 2016 NOE; and (2) failed to perform CEQA environmental review for the 2016 Program before the approval in the 2016 Plan as required.

It is undisputed that the County is a lead agency for purposes of CEQA. The parties dispute the following matters that must be decided in order to determine whether the County violated CEQA as alleged in the FAP: (1) the proper definitions of the project and approval at issue for purposes of CEQA; (2) whether the action is barred by the statute of limitations based on the date of approval; (3) whether the County's preliminary review properly determined that CEQA compliance is not required based on the ministerial exemption and whether asserted exemptions regarding safe harbor for pre-existing activities, baseline comparison, continuing implementation of an ongoing project, and the common sense exemption apply; and (4) whether the County violated CEQA review procedures. Each issue is analyzed below.

1. Definitions of Project & Approval for Purposes of CEQA

As a preliminary matter, the court must determine what is the "project" and the "approval" for purposes of CEQA, since the analysis of whether the County complied with CEQA depends on those determinations. The issue of whether the "agency approved a project with potentially significant environmental effects before preparing and considering an EIR for the project 'is predominantly one of improper procedure' ([citation]) to be decided by the courts independently." (*Save Tara*, *supra*, at p. 131.) "[T]he timing question may also be framed by asking whether a particular agency action is in fact a 'project' for CEQA purposes, and that question, we have held, is one of law. ([Citations].) [Footnote.]" (*Ibid.*)

i. The 2013 CSA Activity is the Project

"'Project' means an activity"—i.e. "the whole of an action"—"which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Res. Code, § 21065, subd. (b); CEQA Guidelines § 15378, subd. (a).) "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies," not "each separate government approval" or creation of a funding mechanism. (CEQA Guidelines § 15378, subds. (b)-(c).) This broad interpretation of a project "is designed to provide the fullest possible protection of the environment" and "ensures CEQA's requirements are not avoided by chopping a proposed activity into bite-sized pieces which, when taken individually, may have no significant adverse effect on the environment." (*POET, LLC v. State Air Resources Board* (2017) 10 Cal.App.5th 764, 478.) "Whether an activity constitutes a project subject to CEQA is a categorical question respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact." (*Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 701.) The question of whether the activity qualifies as a CEQA project is an issue of law. (*Ibid.*)

Petitioners' Argument re: 2016 Program/2016 Plan: Petitioners assert that the project is the 2016 Program approved by the execution of the 2016 Work Plan. The evidence presented shows that the 2016 Program is a 1-year implementation of the ongoing IWDM Program. The evidence also shows that the County previously approved other 1-year implementations of the IWDM Program by executing prior Work Plans. In other words, it is Petitioners' position that the

project is a particular activity subject to a single approval, as opposed to the whole of the activity that may be subject to several approvals. Under CEQA, the project is the whole of the action that might be subject to several approvals, and not each separate approval. (See Pub. Res. Code, § 21065, subd. (b); see also CEQA Guidelines § 15378, subds. (a)-(c).) Therefore, the project cannot be the 2016 Program/2016 Plan, and Petitioners' argument lacks merit.

The County's Argument re: 2013 CSA: The County asserts that that the CEQA project is the 2013 CSA. Presumably, it is the County's position that the project at issue is the activity described in the 2013 CSA ("CSA Activity"). The evidence shows that the 2013 CSA relates to the implementation of the IWDM Program for a 5-year period beginning in 2013 and ending in 2018, and incorporates the 2014 Plan, 2015 Plan, and 2016 Plan upon execution of each Work Plan. The evidence also shows that the 2014 Plan, 2015 Plan, and 2016 Plan relate to implementation of the IWDM Program for three separate 1-year periods beginning July 1, 2014 and ending June 30, 2017. Such evidence supports the County's assertion that the project is the CSA Activity, as opposed to the 2016 Plan/2016 Program, standing alone. The CSA Activity refers to the whole of the activity – including and incorporating each of the annual Work Plans - whereas the 2016 Program is only a part of the activity subject to a single approval.

Notably, other evidence in the record shows that the 2013 CSA only describes activity that is part of a larger ongoing IWDM Program that commenced before the execution of the 2013 CSA and will continue after the 2013 CSA expires.[8] Such evidence shows that the project could be properly defined as the ongoing IWDM Program that began before and will continue after the CSA Activity. That said, neither Petitioners nor the County has taken the position that the entirety of the IWDM Program is the project for purposes of CEQA. The broadest asserted definition of the project at issue is the County's contention that the CSA Activity is the project at issue. Therefore, the court declines to consider whether the IWDM Program is the project at issue, and finds that the CSA Activity, including and incorporating each annual Work Plan, is the project.

[8] For example, the 2013 Plan refers to a 1-year implementation of the IWDM Program before the execution of the 2013 CSA, and the 2013 Plan is not incorporated into the 2013 CSA. Moreover, AAC Roach testified that the County began implementing the IWDM Program someone around 1993. Additionally, AAC Roach's deposition testimony and some of the communications related to the County's retention of a contractor to perform CEQA environmental review show that the County intends to renew the 2013 CSA upon its expiration in 2018.

Conclusion: In light of the foregoing, the court finds that the CSA Activity—not the 2016 Program/2016 Plan—is the project at issue in this proceeding for purposes of CEQA.[9]

ii. The Execution of the 2016 Plan is the Approval

"'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (CEQA Guidelines, § 15352, subd. (a).) An agency's approval only triggers CEQA environmental review if, at the time it was made, the project was "sufficiently well defined" to provide "meaningful information for environmental assessment." (*Save Tara, supra*, at p. 136.) CEQA should not be interpreted as allowing an EIR to be delayed beyond the time when it can, as a practical matter, serve its intended function of informing and guiding decision makers. (*Id.*, at p. 130.) Even if an instrument "is extremely detailed," it lacks the requisite commitment to constitute an approval if it "expressly binds the parties to only continue negotiating in good faith." (*Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1171 ["Cedar Fair"].)

The County insists that the execution of the 2013 CSA is the approval. However, the 2013 CSA itself and other evidence containing information available upon execution of the 2013 CSA show that: (a) at the time of execution of the 2013 CSA, there was insufficient detail available about the IWDM Program or any of its aspects to allow for meaningful environmental review; and (b) the 2013 CSA is analogous to the agreement to negotiate in good faith in *Cedar Fair* and therefore lacks the requisite commitment to constitute an approval. Accordingly, the execution of the 2013 CSA is not the approval for purposes of CEQA.

Petitioners contend that the April 26, 2016 execution of the Work Plan is the approval for purposes of CEQA. This argument is persuasive. The 2016 Plan shows that: (a) it contains sufficient detail about the IWDM Program to allow for meaningful environmental review; and (b) it is a commitment sufficient to constitute an approval, and is distinguishable from *Cedar Fair*. Contrary to the County's assertion, the fact that the 2016 Plan is one of several approvals of the IWDM Program is of no consequence. A single project may be subject to multiple approvals. (CEQA Guidelines § 15378, subd. (b)(4) & (c).) Thus, the execution of the 2016 Plan is the approval for purposes of CEQA.

[9] This finding is limited only to the pending petition for writ of mandate and shall not be conclusive in any subsequent litigation/proceeding.

In sum, the court finds that the April 26, 2016 execution of the 2016 Plan contract—not the 2013 CSA—is the approval for purposes of CEQA.

2. Statute of Limitations

The County argues that this entire action is time-barred pursuant to the 180-day limitation in Public Resources Code section 21167, subdivision (a). That provision requires an action or proceeding to "be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project." (Pub. Res. Code, § 21167, subd. (a).) The County's argument is predicated on its contention that the approval that commenced the limitations period is the execution of the 2013 CSA, and that the 2016 Plan "simply repeated" the prior Work Plans and 2013 CSA. To the contrary, as explained above, the approval for purposes of CEQA is the execution of the 2016 Plan, not the 2013 CSA. Furthermore, the evidence shows that the 2016 Plan is materially distinguishable from the 2013 CSA because the 2013 CSA lacks detail about the CSA Activity. The evidence also shows that the 2016 Plan is distinguishable from prior Work Plans that set forth different details to govern different annual implementations of the CSA Activity and IWDM Program. The County's agent signed the approval (2016 Work Plan) on April 26, 2016. Petitioners commenced this action within 180 days of that date on June 1, 2016. Therefore, the court finds that this action is not time-barred.

3. Preliminary Review & Determinations as to Whether the Project is Subject to CEQA and Subject to an Exemption

Since the action is not time-barred, the analysis turns to the first tier of the CEQA procedure, i.e. the preliminary review. A lead agency must conduct a preliminary review to determine whether an activity is subject to CEQA, and whether any exemption applies. If a project is not subject to CEQA or if an exemption applies, then no further agency action is required. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) The agency's quasi-legislative determinations during preliminary review are subject to the abuse of discretion standard of review in Public Resources Code section 21185.5, and an abuse of discretion is established if the agency has not proceeded in the manner required by law or if the determination is not supported by substantial evidence. (See Pub. Res. Code, § 21168; see also *Bus Riders*

Union v. Los Angeles County Metropolitan Transp. Agency (2009) 179 Cal.App.4th 101, 107; see also *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1375.)

In the 2016 NOE, the County asserted a ministerial exemption. The County proffers arguments to support its (1) ministerial exemption claim, (2) contention that CEQA compliance is not required because the subject project will not result in a change in the environment, (3) and other exemptions not included in any notice of exemption. The ministerial exemption and other arguments and asserted exemptions are discussed below.

i. Ministerial Exemption

Ministerial projects are exempt from CEQA. (CEQA Guidelines, § 15268, subd. (a).) "'Ministerial' describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project"; the public official "uses no special discretion or judgment in reaching a decision" and "cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (CEQA Guidelines, § 15369.) "To be ministerial, a decision must be one the administrative agency itself is forced to follow." (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 278.) "It must be a standard fixed by statute or ordinance or the enactment of some other legislative body." (*Ibid.*) "It cannot be a standard the administrative agency itself exercised its own discretion to create . . . ." (*Ibid.*) Courts "have adopted a restrictive definition of 'ministerial projects' considered exempt from environmental review." (*Id.*, at p. 271.) "Where a project involves elements of both ministerial and discretionary action, it is subject to CEQA." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 119; see also CEQA Guidelines, § 15268, subd. (d).) Any doubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization. (*Day v. City of Glendale* (1975) 51 Cal.App.3d 817, 824.)

As a threshold issue, the arguments and evidence presented suggest that the issue is whether the 2016 Program/2016 Plan is subject to the ministerial exemption,[10] but the question

[10] The 2016 NOE states that the ministerial exemption is asserted for a project that it defines as an undated Work Plan to maintain the IWDM Program. Given that the County executed the 2016 Plan to implement the 2016 Program (i.e. a 1-year implementation of the IWDM Program) the day before it executed the 2016 NOE, it is apparent that the 2016 NOE asserts the County's ministerial exemption to the 2016 Plan, which approves the 2016 Program.

presented is whether the project—i.e. the CSA Activity—is subject to the ministerial exemption. That being said, the 2016 Plan, 2013 CSA, and any other action involved in the CSA Activity must be considered in determining whether the ministerial exemption applies.

The County asserts that its actions were mandatory, non-discretionary, not voluntary, and subject to the ministerial exemption. As explained below, the County's arguments lack merit.

No statute, ordinance, or legislative enactment obligated the County or its Agricultural Commissioner to execute any approval or other contract, or to implement the CSA Activity or any of its aspects. The 2013 Board Order and 2016 Board Order delegate authority to enter into contracts to the Agricultural Commissioner, but did not require him to execute any instrument or take any action.

The evidence shows that the Agricultural Commissioner exercised discretion by voluntarily executing the 2013 CSA pursuant to the discretionary authority delegated under the 2013 Board Order. Assuming *arguendo* that the 2013 CSA required the County to approve the 2016 Plan, the 2013 CSA would not impose a standard sufficient to support the ministerial exemption. An agency cannot properly assert a ministerial exemption based on a standard that it "exercised its own discretion to create and therefore which it possesses the discretion to modify or ignore should an environmental assessment reveal the standard would cause adverse environmental consequences if the agency continued to apply it." (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 278.) Since the evidence shows that the Agricultural Commissioner voluntarily entered into the 2013 CSA, any standard in the 2013 CSA that purportedly requires the approval of the 2016 Plan is insufficient to support a ministerial exemption.

Moreover, the evidence shows that the 2013 CSA expressly gave the Agricultural Commissioner the discretion to negotiate and decide whether to approve or reject Work Plans, including the 2016 Plan, and to unilaterally cancel the 2013 CSA. The 2013 CSA's terms expressly state that the parties would later negotiate terms of Work Plans. AAC Roach's deposition testimony shows that the County did not attempt to negotiate the terms based on the general belief that negotiating with other government agencies is difficult: AAC Roach does not indicate that negotiations were barred. More importantly, the 2013 CSA's terms expressly state

that the County had discretion to either approve or reject proposed Work Plans, and could terminate the 2013 CSA for any reason at any time. AAC Roach confirmed these terms at his deposition, and testified that the County could either accept or reject the Work Plans offered by APHIS-WS. Such evidence demonstrates that the County had the discretion to voluntarily terminate the 2013 CSA at any time, negotiate the terms of Work Plans, and approve or reject Work Plans offered by APHIS-WS.

The evidence further shows that, pursuant to the discretionary authority delegated under the 2013 Board Order and terms of the 2013 CSA, the Agricultural Commissioner exercised discretion and voluntarily approved the 2016 Plan. Such evidence is sufficient to show that there was no statute, ordinance, legislative enactment, or other mandatory duty requiring approval of the 2016 Plan. Thus, the approval of the 2016 Plan was discretionary and voluntary, not ministerial.

In sum, the County has not shown that substantial evidence supports the ministerial exemption asserted. Neither the CSA Activity nor the action approved by the 2016 Plan is subject to the ministerial exemption. Accordingly, the court finds that the County violated CEQA by asserting the ministerial exemption in the 2016 NOE.

ii. Other Arguments & Exemptions

The County asserts that there is no change in the environment and therefore the CSA Activity is not subject to CEQA based on arguments relating to the pre-existing activity safe harbor, baseline, and continuation of an ongoing project. The County also asserts that the CSA Activity is subject to the common sense objection.

Pre-Existing Activity Safe Harbor: The County asserts that Petitioners' CEQA challenge is barred because the 2016 Program/2016 Plan is a continuation of a pre-existing activity. The "pre-existing activity" safe harbor applies when a public agency has issued an initial environmental impact report in the first instance. (Pub. Res. Code, § 21166; CEQA Guidelines, § 15162; *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 805.) The evidence shows that the County never conducted an environmental review of the CSA Activity any time before the approval of the 2016 Program pursuant to the 2016 Plan. Therefore, the County's pre-existing activity argument lacks merit.

Baseline: The County contends that the 2016 Plan is not a project because it did not directly or indirectly change the physical environment from the baseline. "Where a project involves ongoing operations or a continuation of past activity, the established levels of a particular use and the physical impacts thereof are considered to be part of the existing environmental baseline." (*North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832, 872.) Contrary to the County's assertion, the 2016 Plan is not nearly identical to the 2013 CSA, the 2013 Plan, 2014 Plan, and 2015 Plan. The 2013 CSA lacks any details about the CSA Activity or 2016 Program. The prior Work Plans set forth details about prior 1-year implementations; however, the details of the prior implementations are materially distinguishable from the details set forth in the 2016 Plan. Due to these distinctions, there is no evidence to support the contention that the 2016 Program/2016 Plan could not possibly have a significant effect on the environment compared to the baseline. Furthermore, the facts presented are distinguishable from the authorities cited by the County, including the *Union of Medical Marijuana Patients vs. City of Upland* (2016) 245 Cal.App.4th 1265, 1272-1273, where the agency merely issued an ordinance ratifying an existing law. In any event, there is no baseline to compare to the 2016 Work Plan because there was no prior environmental analysis. (See *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.) Accordingly, the County's baseline argument is unavailing.

Continuation of Existing Project The County contends that the 2016 Plan is merely a continuation of an existing project, i.e. the CSA Activity. Even so, as discussed above, the project for purposes of CEQA is the entirety of the CSA Activity, as opposed to any part of its implementation subject to a particular approval such as the 2016 Program approved by the 2016 Plan. Although there is evidence indicating that the CSA Activity is a continuation of the ongoing IWDM Program, there is no evidence to support the contention that the CSA Activity could not result in significant environmental change compared to the prior implementations of the ongoing IWDM Program. Thus, the County's argument is not well-taken.

Common Sense Exemption: Relying on *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175 ("*Save the Plastic Bag Coalition*"), the County contends that Petitioners' CEQA challenge is fundamentally unreasonable because each environmental review will take up to 18 months to complete. The County's reliance on *Save the*

Plastic Bag Coalition is misplaced. The issue was whether the agency properly issued a negative declaration after completing an initial study and concluding that the project would not result in a significant environmental change. (*Save the Plastic Bag Coalition, supra,* at pp. 171-175.) Here, the evidence shows that the County failed to complete the initial study and failed to issue a negative declaration or other required CEQA environmental document before executing the subject approval (2016 Plan). In any event, there is no evidence showing the time it would take to complete subsequent environmental review, and this action arises from the County's failure to perform any environmental review, as opposed to a subsequent environmental review. Therefore, the County's argument is unavailing.

Notably, although not addressed by the parties, the common sense exemption that may arise during preliminary review does not consider the time required for environmental review. The "common sense" exemption arises when a project does not qualify for a statutory or categorical exemption, and "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com'n* (2007) 41 Cal.4th 372, 380.) In other words, the common sense objection is essentially identical to the County's argument regarding the continuation of an existing project. For the reasons set forth above, the County's assertion lacks merit. It follows that the common sense exemption is inapplicable, since it cannot be determined with reasonable certainty that there is no possibility that the activity in question may have a significant effect on the environment. Thus, the common sense exemption does not apply.

Conclusion: To summarize, the court finds that the County abused its discretion in determining that the subject project was not subject to CEQA or otherwise subject to an exemption. There is no substantial evidence to support the County's decisions.

iii. Conclusion

In sum, the court finds that the project (i.e. the CSA Activity) is subject to CEQA, non-discretionary, and not subject to a ministerial exemption or any other exemption asserted by the County, the County abused its discretion by determining that CEQA review procedures did not apply, and the County violated CEQA by asserting a ministerial exemption in the 2016 NOE.

4. Initial Study & Consideration of Resulting EIR, Negative Declaration, or Another CEQA Document Before Granting Approval

Since the action is not time-barred, the CSA Activity is a non-discretionary project subject to CEQA, and no exemption applies, the analysis turns to the second and third tiers of the CEQA procedures, i.e. the initial study and preparation of an EIR, negative declaration, or other CEQA document that results from the completed initial study. (See CEQA Guidelines, § 15063, subds. (a)-(b)).) The lead agency "shall consider" the document "[b]efore granting any approval of a project subject to CEQA, every lead agency or responsible agency shall consider a final EIR or negative declaration or another document authorized by these guidelines to be used in the place of an EIR or negative declaration." (CEQA Guidelines, § 15004, subd. (a).)

The County was required to complete an initial study and prepare an EIR, negative declaration, or other CEQA document because, as explained above, the CSA Activity is a non-discretionary project subject to CEQA and no exemption applies. Furthermore, since the approval at issue is the 2016 Plan, the County needed to complete these CEQA procedures and consider the resulting EIR, negative declaration, or other CEQA document before it granted the approval in the 2016 Plan. The evidence shows that the County failed to complete an initial study or any CEQA environmental document before executing the 2016 Plan. Accordingly, the evidence shows that the County violated CEQA by failing to complete the required environmental review before executing the approval (2016 Plan).

In the opposing brief, the County asserts that after executing the 2016 Plan, it completed the initial study, determined that a negative declaration was warranted, and "voluntarily" commenced CEQA environmental analysis in anticipation of renewing the CSA in 2018.[11] The parties have not submitted evidence to support these factual assertions. Even if the County completed the initial study and commenced CEQA environmental review after executing the 2016 Plan, the County still violated CEQA by failing to comply before executing the 2016 Plan. Thus, the County's argument regarding is untimely commencement of CEQA environmental review procedures is not well-taken.

Therefore, the court finds that the County abused its discretion and violated CEQA by executing the 2016 Plan without having completed the initial study and prepared and considered either an EIR, negative declaration, or other authorized CEQA document.

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[11] For the reasons set forth above, environmental review is *mandatory* under CEQA, not merely voluntary as the County asserts. (See, e.g., *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 701-702.)

E. Conclusion

The court makes the following findings: The project at issue is the CSA Activity.[12] The approval at issue is the 2016 Plan. The action is not barred by the 180-day statute of limitations. The County abused its discretion by determining that the project was not subject to CEQA or otherwise exempt, and violated CEQA by asserting an improper ministerial exemption in the 2016 NOE. The County was required to comply with CEQA review procedures before it executed the 2016 Plan. The County abused its discretion and violated CEQA by approving the 2016 Plan before completing any initial study and issuing an EIR, negative declaration, or other authorized CEQA document.

Accordingly, Petitioners' petition for writ of mandate is GRANTED. Pursuant to Public Resources Code section 21168.9, the court finds that an order voiding and setting aside the 2016 NOE and the 2016 Plan is warranted. The other remedies requested in Petitioners' FAP are not warranted at this juncture under Public Resources Code section 21168.9, subdivision (b), or have been rendered moot by the conclusion of the 2016 Program on June 30, 2017.

VI. Conclusion & Order

The County's request for dismissal in the opposing brief is DENIED.

Petitioners' second and fourth causes of action for declaratory relief are DISMISSED.

The County's evidentiary objections are OVERRULED.

Petitioners' petition for writ of mandate is GRANTED. Accordingly, the court mandates and orders that the County shall: (1) void the NOE; and (2) void the 2016 Plan.

Petitioners are directed to draft a proposed judgment in accordance with this statement of decision, serve the proposed judgment on the County's counsel to approve as to form, and to submit the proposed judgment for the court's approval and signature.

Dated: 8/9/17

Hon. Lydia M. Villarreal
Judge of the Superior Court

[12] This finding is based on the record of this case and limited to the pending petition for writ of mandate and may not be conclusive in any subsequent litigation/proceeding.

CERTIFICATE OF MAILING
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the **INTENDED DECISION** for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Salinas, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

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Dated: AUG 0 9 2017

Chris Ruhl, Clerk of the Superior Court,

_____, Deputy Clerk
Sally Lopez