

## Climate Change and Clean Technology Blog

June 10, 2011 by Sheppard Mullin

### Superior Court's Injunction Preventing California's Cap and Trade Program Has Been Stayed...Right?

*By Randolph Visser and Whitney Hodges*

Until recently, *Association of Irrigated Residents v. California Air Resources Board* proceeded along the litigation path as smoothly as any environmental challenge might. However, things took an unexpected twist last week that has left unanswered questions and many spectators baffled.

On March 18, 2011, Judge Ernest Goldsmith of the San Francisco County Superior Court suspended implementation of AB 32, California's landmark law to reduce greenhouse gas emissions. In *Association of Irrigated Residents v. California Air Resources Board*, Judge Goldsmith determined that the California Air Resources Board ("ARB") failed to properly consider alternatives to the highly touted, yet controversial, cap and trade program. (Previous article [here](#).)

On May 20, Judge Goldsmith issued his final ruling (the "final order"), which is significantly narrower in scope than the March 18 statement of decision. The final order set aside ARB's approval of the Climate Change Scoping Plan only "as it relates to the cap and trade" program and enjoined "any further rulemaking and implementation of cap and trade" until ARB is in compliance with the California Environmental Quality Act. While this mandate blocked any activity related to the cap and trade program, it left the other measures of AB 32 unaffected. (Previous article [here](#).)

As of June 2, ARB had filed an appeal with the First Appellate District of the California Court of Appeal and petitioned for a writ of supersedeas, or a stay, of the trial court's AB 32 injunction. At this point, the litigation became much more convoluted and opinions regarding the injunction began to diverge. ARB interpreted Judge Goldsmith's writ of mandate to be mandatory, which meant the injunction would be automatically stayed on appeal. Judge Goldsmith intended his writ of mandate to be prohibitory, which meant the injunction would remain in effect until a court of appeal determines otherwise. When ARB voiced its intention to continue with development of the cap and trade program based on its belief the writ was mandatory, the Association of Irrigated Residents ("AIR") motioned for a hearing on ARB's apparent violation of the final order.

On Friday, June 3, the Appellate Court quietly issued a temporary stay of the final order's injunction.[1] This ruling has important consequences as it will allow ARB to proceed with further rulemaking and implementation of cap and the trade program pending the Appellate Court's consideration of Judge Goldsmith's underlying order.

As demonstrated during a hearing on Monday, June 6, neither Judge Goldsmith, nor ARB's lead attorneys, appeared to have been notified of the Appellate Court's important recent determination. At this hearing, the AIR petitioned Judge Goldsmith to hold ARB in violation of the final order. Judge Goldsmith agreed with AIR, chastising ARB for "refusing to halt any implementation and development of the cap and trade program" and ordering sanctions against ARB for the alleged violation. In addition, Judge Goldsmith scheduled another hearing for Monday, June 13, and ordered the Chair and Executive Director of ARB to appear before him for questioning. The Judge even went so far as to command ARB to obey his final order "until a higher court tells [him] differently."

As it stands, a higher court had already told Judge Goldsmith differently! In this battle of the dueling orders, the Appellate Court's stay order trumps the final order's injunction. Presently, it is not clear whether Judge Goldsmith will require next week's hearing to remain on calendar or whether he will continue to impose sanctions against ARB.

The cap and trade program is slated to take effect on January 1, 2012, and the Appellate Court's stay, if it stands, increases the likelihood of this occurring.

In its June 3 order, the Appellate Court directed AIR to serve its opposition to the temporary stay on or before June 20.

Stay tune, more alerts to come...

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[1] STAY ORDER: "Pending this court's consideration of appellants' Petition for Writ of Supersedeas, enforcement of the superior court's Peremptory Writ of Mandate, dated May 20, 2011 issued in Association of Irrigated Residents et al. v. California Air Resources Board et al., San Francisco County Superior Court Case No. CPF-09-

509562, is temporarily stayed. Appellees are directed to serve and file points and authorities in opposition to the petition for writ of supersedeas on or before June 20, 2011. (California Rules of Court, rule. 8.112(b).) In addition to addressing all the issues raised in the petition, appellees shall inform the court of any further orders issued by the San Francisco Superior Court at or after its June 3, 2011 hearing in this matter. Appellees shall also serve and file a copy of any such orders."