1ST CIVIL NO. A132165
(San Francisco County Superior Court No. CPF-09-509562)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA AIR RESOURCES BOARD, et al.,

Petitioners and Appellants,

v.

ASSOCIATION OF IRRITATED RESIDENTS, et al.,

Respondents and Appellees.

Petition for Review of the June 24, 2011 Decision by the Court of Appeal, First Appellate District, to grant a Petition for Writ of Supersedeas that Stayed a Writ of Mandate issued by the San Francisco County Superior Court,
Honorable Ernest H. Goldsmith, Judge, Dept. 613 (415) 551-3840

PETITION FOR REVIEW

STAY REQUESTED

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1ST CIVIL NO. A132165
(San Francisco County Superior Court No. CPF-09-509562)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA AIR RESOURCES BOARD, et al., MARY D. NICHOLS, in her official capacity as Chairman of the Board, and DANIEL SPERLIN, KEN YEAGER, DORENE D'ADAMO, BARBARA RIORDAN, JOHN R. BALMES, M.D., LYDIA H. KENNARD, SANDRA BERG, RON ROBERTS, JOHN G. TELLES, RONALD O. LOVERIDGE, in their official capacities as members of the Board,

Petitioners and Appellants,

v.

ASSOCIATION OF IRRITATED RESIDENTS, et al., an unincorporated association, CALIFORNIA COMMUNITIES AGAINST TOXICS, an unincorporated association, COMMUNITIES FOR A BETTER ENVIRONMENT, a nonprofit corporation, COALITION FOR A SAFE ENVIRONMENT, a nonprofit corporation, SOCIETY FOR POSITIVE ACTION, a nonprofit corporation, WEST COUNTY TOXICS COALITION, a nonprofit corporation, ANGELA JOHNSON MESZAROS, CAROLINE FARRELL, DR. HENRY CLARK, JESSE N. MARQUEZ, MARTHA DINA ARGUELLO, SHABAKA HERU, TOM FRANTZ, in their individual capacities,

Respondents and Appellees.

Petition for Review of the June 24, 2011 Decision by the Court of Appeal, First Appellate District, to grant a Petition for Writ of Supersedeas that Stayed a Writ of Mandate issued by the San Francisco County Superior Court,
Honorable Ernest H. Goldsmith, Judge, Dept. 613 (415) 551-3840

PETITION FOR REVIEW

STAY REQUESTED

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Adrienne Bloch, SBN 215471 1904 Franklin Street, Suite 600 Oakland, CA 94612 TELEPHONE NO.: 510-302-0430 FAX NO. (Optional): 510-302-0437 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Communities for a Better Environment and AIR et al.	Superior Court Case Number: CPF-09-509562 FOR COURT USE ONLY
APPELLANT/PETITIONER: California Air Resources Board, et al. RESPONDENT/REAL PARTY IN INTEREST: Association of Irritated Residents, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Asssociation of Irritated Residents et. al.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) Association of Irritated Residents	Respondent and Appellee
(2) California Communities Against To	Respondent and Appellee
(3) Communities for a Better Environm	Respondent and Appellee
(4) Society for Positive Action	Respondent and Appellee
(5) West County Toxics Coalition	Respondent and Appellee

☑ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June 20, 2011

Adrienne L. Bloch
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Certificate of Interested Entities or Persons

Case Name: *California Air Resources Board, et. al. v. Association of Irritated Residents et. al.*
San Francisco County Superior Court Case No. CPF-09-509562
California District Court of Appeal, First Appellate District, Case No. A132165

Full Name of Interested entity or person	**Nature of Interest**
Angela Johnson Meszaros	Respondent and Appellee
Caroline Farrell	Respondent and Appellee
Henry Clark	Respondent and Appellee
Jesse N. Marquez	Respondent and Appellee
Martha Dina Arguello	Respondent and Appellee
Shabaka Heru	Respondent and Appellee
Tom Franz	Respondent and Appellee
California Air Resources Board	Petitioner and Appellant
Mary D. Nichols	Petitioner and Appellant
Daniel Sperling	Petitioner and Appellant
Ken Yeager	Petitioner and Appellant
Dorene D'Adamo	Petitioner and Appellant
Barbara Riordan	Petitioner and Appellant
John R. Balmes, MD	Petitioner and Appellant
Lydia H. Kennard	Petitioner and Appellant
Sandra Berg	Petitioner and Appellant
Ron Roberts	Petitioner and Appellant
John G. Telles, MD	Petitioner and Appellant
Ronald O. Loveridge	Petitioner and Appellant

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action; my business address is Communities for a Better Environment, 1904 Franklin Street, Suite 600, Oakland, CA 94612.

On June 20, 2011, I served the foregoing document(s):

APPELLANT COMMUNITIES FOR A BETTER ENVIRONMENT'S CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☐ By transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the page attached to the following:

☒ By addressing the envelopes as set forth on the page attached, placing a true and correct copy(ies) thereof in a sealed envelope with postage affixed hereon fully prepaid in the United States mail to the following:

☐ By placing the document(s) listed above in a sealed FEDERAL EXPRESS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered as set forth on the page attached to the following:

Alegria De La Cruz, Esq. Center for Race, Poverty, and Environment 47 Kearney St. Suite 804 San Francisco, CA 94108	Mark Poole Deputy Attorney General 455 Golden Gate Ave., Suite 11000 San Francisco, CA 94102-7004
Caroline Farrell, Esq. Center for Race Poverty, and Environment 1302 Jefferson Street, Suite 2 Delano, CA 93215	Ms. Fong San Francisco Superior Court For: Honorable Judge Ernest Goldsmith Department 613 San Francisco Superior Court 400 McAllister Street San Francisco, CA 94102-4514
Angela Johnson Mezsaros, Esq. Law Offices of Angela Johnson Mezsaros 1107 Fair Oaks Avenue, Suite 246 South Pasadena, CA 91030	Supreme Court of California (4 copies) 350 McAllister Street San Francisco, CA 94102-4797

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, all mail is deposited with the U.S. Postal Service on the same day with postage thereon, fully prepaid at Oakland, California, in the ordinary course of business. I

am aware that on motion of the party served, service is presumed invalid if the postage meter date is more than one day after date of deposit for mailing in the affidavit.

I declare under penalty of perjury, pursuant to the laws of the State of California, that the above is true and correct. Executed on June 20, 2011, at Oakland, California.

Adrienne L. Bloch

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PETITION FOR REVIEW

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

In a California Environmental Quality Act lawsuit, Respondents and Appellees Association of Irritated Residents, *et al.* (collectively "AIR") secured a Writ of Mandate that provides prohibitory injunctive relief. AIR respectfully petitions this Court for review of the Court of Appeal's order summarily granting a Petition for Writ of Supersedeas that stayed the Writ of Mandate. A copy of the Order Granting Petition for Writ of Supersedeas (hereafter "Order") is attached as Exhibit 1.

ISSUE PRESENTED

The issue presented is whether a Public Agency, which has violated the California Environmental Quality Act ("CEQA"), may obtain a Writ of Supersedeas to stay a prohibitory injunction in order to continue to implement an unlawfully adopted project.

REQUEST FOR A TEMPORARY STAY

As set forth below, AIR suffers undue prejudice and the California Air Resources Board incurs no irreparable harm. AIR respectfully requests this Court to stay the Writ of Supersedeas pending consideration of this Petition pursuant to California Rule of Court 8.116.

GROUNDS FOR REVIEW

The California Environmental Quality Act requires informed decision-making and public participation, including consideration of a project's alternatives, *before* a Public Agency approves and implements a project. The Superior Court held that adoption of the AB 32 Scoping Plan

was unlawful because the California Air Resources Board ("CARB") failed to adequately analyze alternatives to the Plan's central strategy called cap and trade.[1] The Court of Appeal granted CARB's Petition for Writ of Supersedeas, stayed the Writ of Mandate, and allowed CARB to continue to implement cap and trade. Absent review by this Court, the CEQA analysis of alternatives ordered by the Superior Court will be meaningless while CARB simultaneously implements cap and trade. This Court should thus grant this Petition for Review because it presents an important question of law and an urgent matter of public policy. California Rules of Court 8.500(b)(1).

A PETITION FOR REHEARING WAS FUTILE

AIR may file a Petition for Rehearing in the Court of Appeal. California Rule of Court 8.268(b)(1) (petition for rehearing not obligatory). AIR did not file a petition for rehearing because AIR believes that such a petition would have been futile since the First District Court of Appeals summarily granted the Petition for Writ of Supersedeas.

THIS PETITION FOR REVIEW IS TIMELY

The Order became final 30 days after the Court of Appeals entered the Order, or on July 24, 2011. *See* California Rule of Court 8.264(b)(1); Order at 1, attached as Exhibit 1. This Petition for Review was filed within 10 days of the Order becoming final, or no later than August 3, 2011. *See* California Rule of Court 8.500(e)(1).

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[1] Cap and trade is a market-based trading scheme that allows a source of greenhouse gases to choose to pay another source to reduce greenhouse gases, or offset its own emissions, rather than directly reducing emissions on-site as would be the case under a traditional regulatory approach.

I. INTRODUCTION.

The Court of Appeal erred when it, without explanation, granted CARB the extraordinary remedy of supersedeas that effectively erased an injunction prohibiting CARB from implementing cap and trade before CARB complied with CEQA. The Order unduly prejudices ARI because the more CARB develops and implements cap and trade, the more momentum that policy gains to the detriment of AIR's right to have CARB meaningfully consider, in good faith, the court-ordered analysis of Scoping Plan alternatives.

In comparison, CARB suffers no prejudice if cap and trade is delayed while CARB complies with the Writ of Mandate. Just days after CARB's Petition for Writ of Supersedeas argued that CARB would suffer irreparable injury if CARB could not implement cap and trade by January 1, 2012, CARB's Chairman announced that CARB was *delaying* enforcement of cap and trade until January 1, 2013. CARB's Machiavellian tactics to escape a prohibitory injunction, without any obvious threat of irreparable injury, warrants reversal of the Court of Appeal's decision to grant CARB the extraordinary remedy of supersedeas.

This Petition presents an important question that this Court should resolve in AIR's favor: whether a Public Agency, having violated CEQA, may nevertheless continue to implement an unlawfully adopted project. The Court should stay Order and grant review because any other result fundamentally undermines the Legislature's intent that Public Agencies consider the consequences of their actions, as well as other policy alternatives, *before* charging forward to implement their projects.

II. STATUTORY BACKGROUND.

In 2006, the California Legislature passed the Global Warming Solutions Act of 2006 ("AB 32"), codified at Health and Safety Code §§ 38500, *et seq.* AB 32 seeks to reduce the environmental harms of manmade greenhouse gases by directing CARB to develop regulations that will reduce greenhouse gas emissions to 1990 levels by 2020. *Id.* at §§ 38501(a), 38550. These regulations must be tailored to direct economic benefits to California's most disadvantaged communities, and allow them to participate in, and benefit from, efforts to reduce greenhouse gases. *Id.* at § 38565. The Legislature sought to place California "at the forefront of national and international efforts to reduce emissions of greenhouse gases." *Id.* at § 38501(c).

AB 32 describes the process CARB must follow to implement the Legislature's vision. CARB must first develop a Scoping Plan, the purpose of which is to reduce greenhouse gas emissions to meet AB 32's objective. *Id.* at §§ 38561(a), (b). The Scoping Plan must include a comprehensive comparative analysis of various measures, including discussion of their economic and noneconomic costs, in order to ensure that the suite of strategies that CARB ultimately chooses will achieve "the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions." *Id.* at §§ 38561(a)-(c), (h). AB 32 also created an Environmental Justice Advisory Committee ("EJAC") to advise CARB in developing the Scoping Plan. *Id.* at § 38591(a).

AB 32 gives CARB the option of choosing market-based mechanisms as part of the Scoping Plan. *Id.* at § 38570(a) ("[ARB] may include . . .. the use of market-based compliance mechanisms. . . ."). Cap

and trade is one example of such a mechanism. *Id.* at § 38505(k). CARB may also include direct GHG emission reductions,[2] alternative compliance mechanisms,[3] and incentives in the Scoping Plan. *Id.* at § 38561(b). AB 32 directs CARB to adopt the regulations in the Scoping Plan by January 1, 2011 and shall make those regulations operative by January 1, 2012. *Id.* at § 38562(a). Despite these deadlines, the Legislature allowed CARB to revise regulations already adopted or adopt additional regulations after January 1, 2011. *Id.* § 38562(g).

III. STATEMENT OF FACTS.

In 2008 CARB released a draft Scoping Plan, and the EJAC submitted comments expressing concerns with, among other things, the Plan's reliance on cap and trade as the main strategy in the Scoping Plan. ARB 020758-020799. EJAC submitted these concerns again at public hearings on November 10-11, 2008, and December 11, 2008. ARB 026620-66; ARB 023694-727.[4] At the end of the latter hearing CARB adopted the Scoping Plan without considering or responding to any of the public comments raised there. ARB 027607-618. CARB's resolution directed its Chief Executive Officer to respond to comments and submit any substantial changes to the Plan to the Board at a later date. ARB 027613. The Executive Officer made no changes to the Scoping Plan and finalized it as adopted by the Board.

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[2] The term "direct emission reduction" is defined at Health & Safety Code § 38505(e).

[3] The term "alternative compliance mechanism" is defined at Health & Safety Code § 38505(b).

[4] Citations to the Administrative Record are in the form "ARB 020758," where the number represents a specific page number.

On June 10, 2009, AIR filed a Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief, alleging that CARB violated both AB 32 and CEQA.

On March 18, 2011, the Superior Court issued a Statement of Decision that granted AIR's Petition for Writ of Mandate in part. *See* Statement of Decision: Order Granting in Part Petition for Writ of Mandate ("Decision") at 35, attached as Exhibit 2. The Superior Court concluded that because CARB "failed to adequately describe and analyze alternatives sufficient for informed decision-making and public review, it failed to proceed in a manner required by law. Therefore, [C]ARB abused its discretion in certifying the FED[5] as complete." Decision at 32. In addition, the Superior Court found that CARB failed to "comply with the informational requirements of CEQA and its own certified regulatory program when it issued Resolution 08-47 and began implementing the Scoping Plan ...without first completing the environmental review process." Decision at 34.

On May 20, 2011, the Superior Court entered judgment against CARB. Also on May 20, 2011, the Superior Court issued a Peremptory Writ of Mandate compelling CARB immediately to:

1. **Set aside** Board Resolution 08-47 and Executive Order G-09-00 adopting and approving the *Climate Change Scoping Plan* to Reduce Greenhouse Gases in California ("Project") as it relates to cap and trade.

2. **Set aside** Executive Order G-09-001 approving and certifying the Functional Equivalent Document ("FED").

[5] A Functional Equivalent Document ("FED") is a streamlined equivalent of an Environmental Impact Report, which Public Agencies may adopt pursuant to a Certified Regulatory Program.

3. **Take no action** in reliance on the FED and the Scoping Plan, as it relates to cap and trade, until Respondents have come into complete compliance with Respondents' obligations under Respondents' certified regulatory program and the California Environmental Quality Act ("CEQA"), consistent with the Court's Order.

Respondents are hereby **enjoined** from engaging in any cap and trade-related Project activity that could result in adverse change to the physical environment until Respondents have come into complete compliance with Respondents' obligations under its certified regulatory program and CEQA, consistent with the Court's Order. This includes any further rulemaking and implementation of cap and trade, specifically but not limited to any action in furtherance of California Cap and Trade Program Resolution 10-42.

Peremptory Writ of Mandate at 2:9-24 (emphasis original), attached as Exhibit 3.

On May 23, 2011, CARB filed a Notice of Appeal.

On June 2, 2011, CARB filed a Petition for Writ of Supersedeas. CARB argued, *inter alia*, that supersedeas must issue to stay the Writ of Mandate because any delay in implementing its cap and trade program beyond January 1, 2012 would irreparably harm CARB and the public interest. Petition for Writ of Supersedeas at 26.

On June 3, 2011, the Court of Appeal, First Appellate District, issued a temporary stay of enforcement of the Peremptory Writ of Mandate.

On June 6, 2011, the Superior Court heard AIR's *Ex Parte* Application to Enforce the Writ of Mandate. The Superior Court ruled that the Writ of Mandate was prohibitory, and that CARB's continued implementation of the cap and trade program after service of the writ

violated the writ. *See* Reporters' Transcript of Proceedings at 5:21-28, attached as Exhibit 4. The Superior Court later declined to enter an order finalizing the ruling because the Court of Appeal had granted a temporary stay.

On June 13, 2011, CARB released an alternatives analysis as ordered by the Court, even though CARB appealed the Judgment.[6] CARB will hold a hearing on August 24, 2011 to consider the alternatives analysis.[7]

On June 24, 2011, the First District Court of Appeals summarily granted CARB's Petition for Writ of Supersedeas. *See* Order at 1, attached as Exhibit 1.

On June 29, five days after the Court of Appeals granted CARB's Petition, CARB Chairman Mary Nichols testified before the California Senate Select Committee on Environment, Economy, and Climate Change. As part of her testimony, Nichols announced that CARB decided to delay enforcement of the cap and trade program for one year, or until January 1, 2013.[8]

On July 6, 2011, AIR filed a Notice of Cross-Appeal.

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[6] *See* Supplement to the AB 32 Scoping Plan Functional Equivalent Document, *available at* http://www.arb.ca.gov/cc/scopingplan/document/Supplement_to_SP_FED.pdf.

[7] *See* AB 32 Scoping Plan Public Meetings, *available at* http://www.arb.ca.gov/cc/scopingplan/meetings/meetings.htm.

[8] Margot Roosevelt, *California delays its carbon trading program until 2013*, LA Times (June 30, 2011), *available at* http://www.latimes.com/news/local/la-me-cap-trade-20110630,0,2108482.story.)

ARGUMENT

IV. THE SUPERIOR COURT'S INJUNCTION IS PROHIBITORY AND NOT AUTOMATICALLY STAYED.

Injunctions enjoin a party either to take or to refrain from taking specific actions. *Comfort v. Comfort* (1941) 17 Cal.2d 736, 741. A "mandatory injunction" mandates specific action. *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80, 85. A "prohibitory injunction" requires a party to refrain from a particular act. *Id.*, *citing* Code Civ. Proc. § 525. An appeal automatically stays a mandatory injunction but does not stay a prohibitory injunction. *Id.* at 82.

The fundamental purpose of a prohibitory injunction is to maintain the status quo, which is the "last actual peaceable, uncontested status which preceded the pending controversy." *Id.* at 87. The Court looks to the effect of the injunction to determine whether it is mandatory or prohibitory. *Id.* at 85.

In a very narrowly tailored injunction, the Superior Court ordered CARB to *refrain* from taking any action "in reliance on the FED and Scoping Plan, as it relates to cap and trade" and also *prohibited* CARB "from engaging in any cap and trade-related project activity" which "includes any further rulemaking or implementation of cap and trade." Peremptory Writ of Mandate at 2:15-24, attached as Exhibit 3.[9]

[9] The trial court also ordered CARB to affirmatively "set aside" the CEQA Functional Equivalent Document and the cap and trade components of the Scoping Plan. Peremptory Writ of Mandate at 2:9-13, attached as Exhibit 3. These two affirmative obligations in the Writ are mandatory in nature and, therefore, automatically stayed.

The injunction ordering CARB to refrain from relying on the FED as it relates to cap-and-trade, and prohibiting CARB from taking action in furtherance of cap-and-trade, is unequivocally and unambiguously prohibitory. As the Superior Court stated on June 6, 2011, "the Court's order and writ are clearly prohibitory by their language; that the Board has been ordered to stop implementation and rule making, as I've stated in the writ[.]" Reporters Transcript of Proceedings at 5:22-25, attached as Exhibit 4. The Superior Court articulated the importance of a prohibitory injunction in this case: stopping continued implementation of cap and trade was necessary to ensure that CARB considered Scoping Plan alternatives. Order Granting Petition for Writ of Mandate at 35:4-9, attached as Exhibit 2.

The prohibitory injunction was entirely proper. While "courts may not enjoin the enforcement of legislation," *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401, courts can enjoin the enforcement of legislation "to prevent the threatened enforcement of a 'statutory scheme' in an illegal manner where there is no adequate remedy at law." *Envtl Prot. Info. Ctr, Inc. v. Maxxam Corp.* (1992) 4 Cal.App.4th 1373, 1381, *citing* Code Civ. Proc., § 526, *Coffee–Rich, Inc. v. Fielder* (1975) 48 Cal.App.3d 990, 1000, and *Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410. Given the unequivocal and prohibitory nature of the Writ, to the extent that the Court of Appeals may have granted the Petition for Writ of Supersedeas because it believed the Writ is mandatory, the Court of Appeal erred.

V. THE WRIT OF SUPERSEDEAS UNDULY PREJUDICES AIR AND CARB SUFFERS NO IRREPARABLE HARM.

AIR effectively lost the remedy it won in the Superior Court when the Court of Appeals granted the Writ of Supersedeas, allowing CARB to continue cap and trade implementation pending appellate review. Any consideration of alternatives to cap and trade, as ordered by the Superior Court, will lack any meaningful and good faith consideration when CARB fully develops its preferred course of action, making cap and trade a *fait accompli.* Nor does CARB suffer any irreparable harm, especially after CARB Chairman Mary Nichols announced that CARB will defer enforcement of cap and trade until January 1, 2013. This Court should grant this Petition for Review because a Public Agency should never be allowed to violate CEQA and steamroll ahead with a project to the detriment of the prevailing petitioner.

"This Court must consider the rights of respondents as well as those of appellants." *Nuckolls v. Bank of California* (1936) 7 Cal.2d 574, 578. In considering a Petition for Writ of Supersedeas, the Court affords a presumption in favor of the lower court's decision. *Id.* "[Courts] cannot presume error, and we should not interfere with the normal incidents of a prohibitory injunction in the absence of a clear and compelling proof of extraordinary circumstances." *Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal.App.2d 368, 376 ("*Sun-Maid Raisin Growers*") (court denied writ of supersedeas to stay a trial court's prohibitory injunction).

To successfully obtain a Writ of Supersedeas to stay the Writ of Mandate, CARB must show that its appeal has merit, that AIR will not be unduly prejudiced by a stay, and that CARB will suffer irreparable harm without a stay. *See Deepwell Homeowners' Protective Ass'n v. City*

Council of Palm Springs (1965) 239 Cal.App.2d 63, 67; *see also Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861.

The test for whether to grant a petition for writ of supersedeas "is not 'a balancing of conveniences or hardships,' but rather 'a consideration of the respective rights of the litigants, which contemplates the possibility of an affirmance of the decree as well as of a reversal.'" *Rubin v. American Sportsmen Television Equity Soc.* (1951) 102 Cal.App.2d 288, 291, *quoting Food & Grocery Bureau v. Garfield* (1941) 18 Cal.2d 174, 177; *see also Sun-Maid Raisin Growers*, 229 Cal.App.2d at 376.

A. AIR will Suffer Undue Prejudice if the Writ of Supersedeas Stands.

AIR suffers significant prejudice because premature implementation of cap and trade before CARB considers Scoping Plan alternatives – as ordered by the trial court – renders CEQA irrelevant. As CARB steamrolls forward with cap and trade implementation, the momentum of government bureaucracy and industry reliance will increase the pressure on CARB to retain cap and trade as the central pillar of the Scoping Plan regardless of what the court-ordered alternatives analysis ultimately discloses. AIR would thus lose the lawsuit it had won: meaningful CEQA compliance.

The prejudice to AIR – and the general public – of premature implementation before full CEQA compliance rests on the principles of informed, good-faith decision-making before decisions become irreversible. In *Sierra Club v. Marsh*, the First Circuit U.S. Court of Appeals reversed a District Court's order denying an injunction for lack of irreparable injury in a National Environmental Policy Act case. *Sierra Club v. Marsh*, 872 F.2d

497, 499 (1st Cir. 1989) ("*Sierra Club*").[10] The First Circuit recognized that the irreparable injury to the plaintiff "is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental decision-makers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment." *Sierra Club*, 872 F.2d at 500 (emphasis original); *see also National Parks & Conservation Assn v. Babbitt*, 241 F.3d 722, 738 n.18 (9th Cir. 2001) (harm to environmentally informed decision-making justified injunction). The First Circuit observed that:

> The way that harm arises may well have to do with the psychology of decisionmakers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built. But the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation.

Sierra Club, 872 F.2d at 504.

An alternatives analysis of the Scoping Plan, performed while CARB implements the Scoping Plan and forges ahead with cap and trade, defeats a fundamental purpose underlying CEQA. This Court has described the discussion of mitigation measures and alternatives as "the core of an [Environmental Impact Report]," which is the "heart of CEQA." *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The purpose of this environmental review, including an analysis of alternatives, "is to inform the public and its responsible officials of the

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[10] Federal case law applying the National Environmental Policy Act is highly persuasive authority for Courts in CEQA cases. *No Oil, Inc. v. City of Los* Angeles (1974) 13 Cal.3d 68, 86 n.21; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 261.

environmental consequences of their decisions *before* they are made." *Id.* (emphasis original). This stems from CEQA's fundamental policy that Public Agencies should require implementation of feasible alternatives to reduce a project's significant environmental impacts. Pub. Res. Code § 21002.

Here, the Superior Court found that the consideration of alternatives is "central to the analysis and decision-making process of determining GHG reduction methodology," and that CARB intended to "create a *fait accompli* by premature establishment of a cap and trade program before alternatives can be exposed to public comment and properly evaluated by CARB itself." Decision at 30, 32, attached as Exhibit 2. The Superior Court concluded:

> Continued rulemaking and implementation of cap and trade will render consideration of alternatives a nullity as a mature cap and trade program would be in place well advanced from the premature implementation which has already taken place. In order to ensure that ARB adequately considers alternatives to the Scoping Plan and exposes its analysis to public scrutiny prior to implementing the measures contained, the Court must enjoin any further rulemaking until ARB amends the FED in accordance with this decision.

Order Granting Petition for Writ of Mandate at 35:4-9, attached as Exhibit 2.

The Superior Court's prohibitory injunction thus has the effect of preventing CARB from prematurely implementing or locking-in a measure within its Scoping Plan before CARB complies with CEQA's alternatives analysis requirement. Without the Writ of Mandate, the status quo at the last actual peaceable moment is lost. *See People v. iMergent, Inc.* (2009) 170 Cal.App.4th 333, 343.

Thus, allowing CARB to move forward with cap and trade implementation before it has adequately evaluated other Scoping Plan alternatives ensures that cap and trade is a *fait accompli*. It also destroys AIR's rights to a meaningful analysis of alternatives that unquestionably belong to AIR if the First District Court of Appeals affirms the Superior Court's judgment. *See Sun-Maid Raisin Growers*, 229 Cal.App.2d at 375, *quoting Hulbert v. California Portland Cement Co.* (1911) 161 Cal. 239, 255-256.

B. CARB will Not Suffer Irreparable Harm If the Writ Is Denied

CARB falsely argued to the Court of Appeal that, unless CARB could implement cap and trade no later than January 1, 2012, CARB would suffer irreparable harm. CARB's behavior since obtaining the Writ of Supersedeas confirms that CARB will not suffer irreparable injury. Not more than five days after the Court of Appeal granted CARB its extraordinary relief, CARB Chairman Nichols announced that CARB was delaying enforcement of cap and trade by one year to January 1, 2013.[11] Less than a month earlier, CARB represented to the Court of Appeal that:

> A delay of a year in the cap and trade program would cause harm to the environment by delaying crucial reductions of greenhouse gas emissions; would threaten ARB's ability to meet AB 32's goal to reach 1990 greenhouse gas levels by 2020; and would negatively affect California's and the nations [sic] investments in clean-technology, emissions

[11] Margot Roosevelt, *California delays its carbon trading program until 2013*, LA Times (June 30, 2011), *available at* http://www.latimes.com/news/local/la-me-cap-trade-20110630,0,2108482.story.)

> reduction technology and projects to reduce emissions or sequester carbon.

Petition for Writ of Supersedeas at 26. Given CARB's decision to delay enforcement of cap and trade, CARB has grossly exaggerated its claimed injury.

CARB also argued that the Writ of Mandate interfered with the performance of CARB's duties. *Id.* at 17, 26. No such legal barrier exists. Cap and trade is not a mandatory rule which CARB must implement by any given date. Rather, AB 32 gives CARB the *discretion* to use market based compliance mechanisms. Health & Safety Code § 38570(a). Even though regulations must be adopted before January 1, 2011 and implemented one year later, Health & Safety Code § 38562(a), AB 32 specifically allows CARB to adopt and amend any regulations *after* January 1, 2011. *Id.* at § 38562(g). Contrary to CARB's argument, AB 32 does not require that CARB adopt cap and trade or implement cap and trade by January 1, 2012.

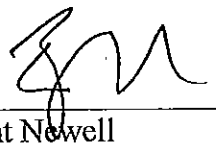
Regardless of what AB 32 states, CARB must comply with CEQA. The "Legislature intended CEQA to apply to all public agencies undertaking discretionary projects and to the fullest extent possible, even if the agency's discretion to comply with all of CEQA's requirements may be constrained by the substantive provisions of the law governing the public agency. *Mountain Lion Found. v. Fish & Game Comm'n.* (1997) 16 Cal.4th 105, 117. Any delay in cap and trade implementation in order to comply with CEQA causes no irreparable harm to CARB. Accordingly, the Court of Appeal erred when it granted the Writ of Supersedeas.

CONCLUSION

The Superior Court issued a narrowly tailored prohibitory injunction restraining CARB from implementing cap and trade. CARB's appeal does not automatically stay that injunction. Moreover, the stay of the Peremptory Writ of Mandate unduly prejudices AIR and CARB will not suffer irreparable harm if the injunction remains in effect pending appeal. Therefore, AIR respectfully requests this Court to stay the Writ of Supersedeas and grant this Petition for Review.

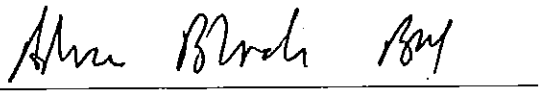
DATED: July 25, 2011 Respectfully submitted,

CENTER ON RACE, POVERTY & THE ENVIRONMENT



Brent Newell
Attorney for Respondents and Appellees
Attorneys for Petitioners Angela Johnson Meszaros, Association of Irritated Residents, Coalition for a Safe Environment, Dr. Henry Clark, Jesse N. Marquez, Tom Frantz, Society for Positive Action, Shabaka Heru, and West County Toxics Coalition

COMMUNITIES FOR A BETTER ENVIRONMENT



Adrienne Bloch
Attorney for Respondent and Appellee
Communities for a Better Environment

LAW OFFICES OF ANGELA JOHNSON MESZAROS

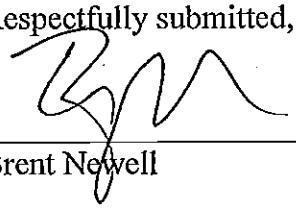
Angela Johnson Meszaros
Attorney for Respondents and Appellees
California Communities Against Toxics,
Caroline Farrell, and Martha Dina Arguello

CERTIFICATE OF WORD COUNT

I hereby certify that pursuant to California Rule of Court 8.504(d)(1), in reliance upon the word count feature of the software used, I certify that the attached contains 4,194 words, exclusive of those materials not required to be counted under California Rule of Court 8.504(d)(3).

Dated: July 25, 2011

Respectfully submitted,



Brent Newell

DECLARATION OF SERVICE BY U.S. MAIL

I, Michael Zimmerman, declare that I am over the age of eighteen (18) and not a party to this action. My business address is 47 Kearny Street, Suite 804, San Francisco, CA 94108.

On July 26, 2011, I served one copy of the PETITION FOR REVIEW on the following on the following persons by placing it in a sealed, postage-paid envelope to be sent through the U.S. mail in the regular course of business:

Mark Poole
Gavin McCabe
David Zonana
Attorney General's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Clerk of the Court
San Francisco Superior Court
400 McAllister Street,
San Francisco, CA 94102

Clerk of the Court
First Appellate District Court of Appeals
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 26, 2011 in San Francisco, California.

Michael Zimmerman

EXHIBIT 1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CALIFORNIA AIR RESOURCES BOARD et al.,

Petitioners and Appellants,

v.

ASSOCIATION OF IRRITATED RESIDENTS et al.,

Respondents and Appellees.

A132165

(San Francisco County Super. Ct. No. CPF-09-509562)

THE COURT:*

Petitioners' Request for Judicial Notice in Support of Petition for Writ of Supersedeas (Exhs. A-C), Petitioners' Second Request for Judicial Notice in Support of Petition for Writ of Supersedeas (Exhs. A-B), and Respondents' Request for Judicial Notice in Opposition to the Petition for Writ of Supersedeas (Exhs. A-N)[1] are GRANTED. (Evid. Code §§ 452, subds. (c), (d) & (h); 453; & 459, subd. (a).)

The petition for a writ of supersedeas is GRANTED. Pending consideration of the appeal on file herein, enforcement of the superior court's Peremptory Writ of Mandate, in *Association of Irritated Residents et al. v. California Air Resources Board, et al.*, San

* McGuiness, P.J., Pollak, J., & Jenkins, J.

[1] The court takes judicial notice of the corrected Exhibit C to Respondents' Request for Judicial Notice. (See Errata to Respondents AIR et al.'s Request for Judicial Notice in Opposition to the Petition for Writ of Supersedeas, filed June 23, 2011.)

Francisco County Superior Court Case No. CPF-09-509562, dated May 20, 2011, is stayed, subject to further order of this court.

Dated: JUN 24 2011

McGuiness, P.J.
P.J.

EXHIBIT 2

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ASSOCIATION OF IRRITATED RESIDENTS, an unincorporated association; CALIFORNIA COMMUNITIES AGAINST TOXICS, an unincorporated association; COMMUNITIES FOR A BETTER ENVIRONMENT, a nonprofit corporation; COALITION FOR A SAFE ENVIRONMENT, a nonprofit corporation; SOCIETY FOR POSITIVE ACTION, an unincorporated association; WEST COUNTY TOXICS COALITION, a nonprofit corporation ANGELA JOHNSON MESZAROS; CAROLINE FARRELL; HENRY CLARK; JESSE N. MARQUEZ; MARTHA DINA ARGUELLO; SHABAKA HERU; TOM FRANTZ; in their individual capacities, Petitioners and Plaintiffs, vs. CALIFORNIA AIR RESOURCES BOARD, MARY D. NICHOLS, in her official capacity as Chairman of the Board; and DANIEL SPERLING, KEN YEAGER, DORENE D'ADAMO, BARBARA RIORDAN, JOHN R. BALMES, M.D., LYDIA H. KENNARD, SANDRA BERG, RON ROBERTS, JOHN G. TELLES, RONALD O. LOVERIDGE, in their official capacities as Members of the Air Resources Board, Respondents and Defendants.	Case No. CPF-09-509562 **STATEMENT OF DECISION:** **ORDER GRANTING IN PART PETITION FOR WRIT OF MANDATE** Judge: Hon. Ernest H. Goldsmith Dept: 613

forecast 2020 emissions from a variety of sectors in the absence of any regulations. (ARB027563.)

Alternatives 2 through 5, by contrast, are collectively described in just over three pages of the FED. (See ARB027572-027575.) In its discussion, ARB states that it "expect[s] that environmental impacts (both positive and adverse) of all the alternatives would be similar to the impacts expected from [the] mix of measures identified in the Scoping Plan" because they target the same basic level of emissions reductions under AB 32. (ARB027572-027573.) However, ARB provides little to no facts or data to support this conclusion, noting only that "[d]ifferent approaches could mean more or less reduction activity in any given sector," and "[w]hile the magnitude of impacts might increase or decrease, it would be speculative to try to estimate the effects at this time, before the details of specific measures are developed." (ARB027572-027573.)

ARB makes similar assertions about each individual alternative; repeatedly stating that measures ultimately adopted will depend on information that is learned in the future during the development of each measure, and that it cannot predict in which sectors and what geographic locations reductions might occur. (See ARB 027573, 027574, 027575.)

ARB argues that its discussion of alternatives was sufficiently detailed for a programmatic document, and that it is inconsistent for the Court to find its discussion of impacts to be adequate, yet insufficient as to alternatives. (RB, p. 41: 12-16.) Impacts and alternatives cannot be equated given the facts of the instant case. As discussed in the *Rio Vista* and *Bay Delta* cases (see above), detailed discussion of site-specific projects such as biofuel and waste treatment plants may be deferred until such projects are actually planned and implemented. By contrast, consideration of alternatives here is central to the analysis and decision-making process of determining GHG reduction methodology. While a program-level EIR need not be as detailed as a project-level EIR, ARB must still provide the public with a clear indication based on factual analysis as to why it chose the Scoping Plan over the alternatives. ARB's extensive evaluation of the proposed cap and trade program in Chapter II of the Scoping Plan provides the public with information about

ARB seeks to create a *fait accompli* by premature establishment of a cap and trade program before alternatives can be exposed to public comment and properly evaluated by ARB itself. ARB's discussion must include a factual analysis of each of the alternatives to the Scoping Plan, not merely a discourse on cap and trade justification, and as Petitioners point out, data is available to analyze. (See PB, p. 37: 7-22.) ARB could have, and should have used data from existing programs, studies, and reports to analyze the potential impacts of the various alternatives.[2]

The Court concludes that because ARB failed to adequately describe and analyze alternatives sufficient for informed decision-making and public review, it failed to proceed in the manner prescribed by law. Therefore, ARB abused its discretion in certifying the FED as complete.

c. ARB Improperly Approved the Scoping Plan Prior to Completing Its Environmental Review

Petitioners argue that ARB improperly approved and began implementing the Scoping Plan prior to completing its obligation to review and respond to public comments. (See PB, pp. 38-41.) In support of this contention, Petitioners point to (1) the specific language of Resolution 08-47, (2) a public meeting that ARB held to discuss implementation of the Scoping Plan, and (3) the fact that no changes were made to the FED or the Scoping Plan after the time Resolution 08-47 was adopted.

On December 11, 2008, during a noticed public hearing, ARB adopted Resolution 08-47, which stated that "subject to the Executive Officer's approval of written responses to environmental issues that have been raised, the Board is initiating steps toward the final approval of the Proposed Climate Change Scoping Plan and its Appendices." (ARB027612-027613.) The Resolution further stated that ARB had prepared an FED for the Scoping Plan which indicated

[2] ARB claims that such information from programs, studies and reports is not found in the Administrative Record. (Respondent's Objections to the Tentative Statement of Decision, p. 14.) It was ARB's own decision not to include such information in the Administrative Record, and consequently the Scoping Plan, and not to expose it to public scrutiny and comparison.

mandates, it cannot defer to ARB's erroneous interpretation of AB 32's procedural mandates. To find that ARB's rulemaking authority under AB 32 is completely severable from its obligation to prepare a Scoping Plan would render that obligation an expensive and meaningless waste of time. Continued rulemaking and implementation of cap and trade will render consideration of alternatives a nullity as a mature cap and trade program would be in place well advanced from the premature implementation which has already taken place. In order to ensure that ARB adequately considers alternatives to the Scoping Plan and exposes its analysis to public scrutiny prior to implementing the measures contained therein, the Court must enjoin any further rulemaking until ARB amends the FED in accordance with this decision.

CONCLUSION

I. PETITIONERS' CHALLENGES UNDER AB 32

Based upon the foregoing, the Court DENIES the Petition for Writ of Mandate as to all of Petitioners' AB 32 causes of action.

II. PETITIONERS' CHALLENGES UNDER CEQA

The Court GRANTS the Petition for Writ of Mandate as to the alternatives analysis and timing causes of action. The Court DENIES the Petition for Writ of Mandate as to the impacts analysis causes of action. Therefore, let a peremptory writ of mandate issue commanding ARB to set aside its certification of the FED and enjoining any further implementation of the measures contained in the Scoping Plan until after Respondent has come into complete compliance with its obligations under its certified regulatory program and CEQA.

Petitioner is ORDERED to prepare a Writ of Mandate consistent with the Court's ruling in this case.

Under Public Resources Code § 21168.9(b), this Court will retain jurisdiction over ARB's proceedings by way of a return to this peremptory writ of mandate until the Court has determined that ARB has complied with the provisions of CEQA.

DATED: MAR 17, 2011

ERNEST H GOLDSMITH

HON. ERNEST H. GOLDSMITH
Judge of the Superior Court

EXHIBIT 3

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ASSOCIATION OF IRRITATED RESIDENTS, an unincorporated association, CALIFORNIA COMMUNITIES AGAINST TOXICS, an unincorporated association, COMMUNITIES FOR A BETTER ENVIRONMENT, a nonprofit corporation, COALITION FOR A SAFE ENVIRONMENT, a nonprofit corporation, SOCIETY FOR POSITIVE ACTION, an unincorporated association, WEST COUNTY TOXICS COALITION, a nonprofit corporation, ANGELA JOHNSON MESZAROS, CAROLINE FARRELL, DR. HENRY CLARK, JESSE N. MARQUEZ, MARTHA DINA ARGUELLO, SHABAKA HERU, TOM FRANTZ, in their individual capacities,

Petitioners,

v.

CALIFORNIA AIR RESOURCES BOARD, MARY D. NICHOLS, in her official capacity as Chairman of the Board, and DANIEL SPERLING, KEN YEAGER, DORENE D'ADAMO, BARBARA RIORDAN, JOHN R. BALMES, M.D., LYDIA H. KENNARD, SANDRA BERG, RON ROBERTS, JOHN G. TELLES, RONALD O. LOVERIDGE, in their official capacities as members of the Board,

Respondents

Case No.: CPF-09-509562

PEREMPTORY WRIT OF MANDATE

Department 613
Honorable Ernest H. Goldsmith

Action Filed: June 10, 2009

Judgment having been entered in this proceeding, ordering that a peremptory writ of mandate be issued from this Court,

IT IS ORDERED that, immediately on service of this writ, Respondents, CALIFORNIA AIR RESOURCES BOARD, MARY D. NICHOLS, in her official capacity as Chairman of the Board, and DANIEL SPERLING, KEN YEAGER, DORENE D'ADAMO, BARBARA RIORDAN, JOHN R. BALMES, M.D., LYDIA H. KENNARD, SANDRA BERG, RON ROBERTS, JOHN G. TELLES, and RONALD O. LOVERIDGE, in their official capacities as members of the Board:

1. **Set aside** Board Resolution 08-47 and Executive Order G-09-001 adopting and approving the *Climate Change Scoping Plan* to Reduce Greenhouse Gases in California ("Project") as it relates to cap and trade.

2. **Set aside** Executive Order G-09-001 approving and certifying the Functional Equivalent Document ("FED").

3. **Take no action** in reliance on the FED and Scoping Plan, as it relates to cap and trade, until Respondents have come into complete compliance with Respondents' obligations under Respondents' certified regulatory program and the California Environmental Quality Act ("CEQA"), consistent with the Court's Order.

Respondents are hereby **enjoined** from engaging in any cap and trade-related Project activity that could result in an adverse change to the physical environment until Respondents have come into complete compliance with Respondents' obligations under Respondents' certified regulatory program and CEQA, consistent with the Court's Order. This includes any further rulemaking and implementation of cap and trade, specifically but not limited to any action in furtherance of California Cap and Trade Program Resolution 10-42.

Pursuant to Public Resources Code § 21168.9(c), this Court does not direct Respondents to exercise their discretion in any particular way with respect to the Project except as specifically set forth herein.

This Court expressly RETAINS JURISDICTION over Respondents' proceedings by

way of a return to peremptory writ of mandate and any subsequent return proceedings until the Court has determined that Respondents have complied with CEQA. The writ shall be returned by ARB within fifteen (15) months of its issuance.

IT IS SO ORDERED.

Date: May 20, 2011

Hon. Ernest H. Goldsmith
Judge of the Superior Court

EXHIBIT 4

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE ERNEST H. GOLDSMITH, JUDGE PRESIDING

DEPARTMENT NUMBER 613

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ASSOCIATION OF IRRITATED RESIDENTS, AN UNINCORPORATED ASSOCIATION, ET AL.,	
Petitioners and Plaintiffs,	Case No. CPF-09-509562
vs.	
	Pages 1 - 27
CALIFORNIA AIR RESOURCES BOARD, ET AL.,	
Respondents and Defendants.	

Reporter's Transcript of Proceedings

Monday, June 6, 2011

APPEARANCES OF COUNSEL:

For Petitioners and Plaintiffs:

Communities for a Better Environment
1904 Franklin Street, Ste. 600
Oakland, California 94612
By: **SHANA LAZEROW, Staff Attorney**
ADRIENNE BLOCH, Senior Staff Attorney

(Appearances continued on next page)

issues are in front of the Court of Appeal for resolution, and we would note that despite serving this, the petition for writ of supersedeas on petitioners on Thursday evening of last week, petitioners did not mention the petition for the writ of supersedeas in the papers they filed on Friday.

It's our view that the Court and we would ask the Court --

THE COURT: They probably didn't get them yet.

MR. POOLE: We emailed them on Thursday night.

THE COURT: The proof of service said it was mailed.

MR. POOLE: And we emailed courtesy copy, as has been the conduct in this case, and I would ask the petitioners -- if they didn't receive it, we would be surprised.

MS. LAZEROW: We did not in fact receive it.

MS. BLOCH: We received it after the papers were filed.

MR. POOLE: But it was sent on Thursday night.

MS. BLOCH: It was sent on Thursday after the close of business.

MR. POOLE: So we would ask the Court to allow the First District Court of Appeal to decide the issues regarding the application of the automatic stay.

THE COURT: It appears to the Court that the Board is in violation of my order and that the writ -- the Court's order and writ are clearly prohibitory by their language; that the Board has been ordered to stop implementation and rule making, as I've stated in the writ; and that the petitioners should be entitled to such relief as they're seeking so far.

The Court is in disagreement with respondents as to the nature of the writ.