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9  
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF SAN DIEGO**

12 CITIES OF ARCADIA, BALDWIN PARK, )  
BELLFLOWER, CERRITOS, COMMERCE, )  
13 DIAMOND BAR, DOWNEY, IRWINDALE, )  
LAWNDALE, MONROVIA, MONTEBELLO, )  
14 MONTEREY PARK, PICO RIVERA, )  
ROSEMEAD, SAN GABRIEL, SANTA FE )  
15 SPRINGS, SIERRA MADRE, SIGNAL HILL, )  
SOUTH PASADENA, VERNON, WEST COVINA )  
16 and WHITTIER, municipal corporations, )

17 Petitioners/Plaintiffs, )

18 vs. )

19 THE STATE WATER RESOURCES CONTROL )  
BOARD; and THE CALIFORNIA REGIONAL )  
20 WATER QUALITY CONTROL BOARD, LOS )  
ANGELES REGION, and DOES 1 through 50, )  
21 inclusive, )

22 Respondents/Defendants. )  
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Case No. GIC 803631

Judge Linda B. Quinn  
Department 74

**RESPONDENTS' OPPOSITION TO  
PETITIONERS' MOTION (1) TO  
STRIKE RETURN TO WRIT OF  
MANDATE, AND (2) FOR AN  
ORDER FOR ADDITIONAL  
RETURNS SHOWING  
COMPLIANCE WITH WRIT**

Date: September 1, 2006  
Time: 1:30 p.m.  
Dept. 74

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1 I. INTRODUCTION

2 On October 21, 2001, Respondent the California Regional Water Quality Control Board  
3 adopted a regulation known as the Total Maximum Daily Load for Trash in the Los Angeles  
4 River (hereinafter "Trash TMDL"). The regulation would have required the Regional Board to  
5 revise the Petitioner Cities' waste discharge permits to require that they abate the volumes of  
6 garbage they discharge to the Los Angeles River and Estuary from their storm sewer outfalls,  
7 with progressive annual reductions over a 10-year period. Pursuant to Water Code section  
8 13245, the State Water Resources Control Board (State Board) approved the regulation on  
9 February 19, 2002 (Los Angeles Administrative Record (LAR), 05534-35), as did the Office of  
10 Administrative Law (OAL) on July 16, 2002 (LAR 05653).

11 On December 24, 2003, the court issued a judgment declaring the Trash TMDL to be  
12 "void, invalid, and unenforceable." (Cities' Exh. 1, 23:12-26.) The court also issued a writ of  
13 mandate that directed the Regional Water Quality Control Board and the State Board  
14 (collectively, "Water Boards") to do four discrete things in connection with the regulation: 1) set  
15 it aside; 2) cease and desist from enforcing or implementing it; 3) suspend all activity relating to  
16 it that could result in a change to the physical environment, until the Water Boards brought the  
17 regulation into compliance with CEQA; and 4) file a return within 90 days. (Cities' Exh. 1,  
18 20-21) Both sides appealed. The Court of Appeal reversed most claims, but affirmed the  
19 judgment and writ exclusively on the basis of the Cities' CEQA claims. The Supreme Court  
20 denied the Cities' petition for review. The Water Boards timely filed their Return on July 21,  
21 2006, demonstrating that they had complied with all four of the directives set forth in the Writ.  
22 The Cities filed this motion to strike the Return.

23 It is unclear why they did. The Cities have not cited any deficiencies in the Return itself,  
24 nor do they allege that the Water Boards failed to comply with any of the Writ's directives.  
25 Rather, the Cities allege the Return is invalid because, they assert, the Water Boards might not  
26 comply with CEQA in the future when they adopt a new regulation to control trash in the Los  
27 Angeles River. (Cities' Motion to Strike (Motion), 4:9-14.) Their motion to strike is essentially  
28

1 a request that this court issue an advisory opinion in an unripe challenge to a potential regulation  
2 that has not yet been before any board, much less reached the status of "final agency action."

3 The Cities also ask this court to retroactively amend the Writ to require ongoing reports,  
4 returns, and other supervisory proceedings. The Cities pretend that by virtue of determining the  
5 Trash TMDL to be invalid, the court had become a special master to maintain ongoing  
6 supervision of the Water Boards' (and their staffs') CEQA compliance for whatever subsequent  
7 regulations the Water Boards may consider with respect to trash in the Los Angeles River. As set  
8 forth below, the request is untenable, would violate the doctrines of exhaustion of administrative  
9 remedies, ripeness, and separation of powers, is far beyond the express language of the Writ, and  
10 is not, despite the title of this motion, an actual attack on the adequacy of the Return. The Return  
11 shows the Water Boards have complied with the Writ. This motion should be denied, and the  
12 Writ discharged.

13 **II. THE RETURN FULLY COMPLIES WITH EACH OF THE FOUR DIRECTIVES**  
14 **OF THE WRIT**

15 As expressly shown in the Return and its attachments, the Water Boards fully complied  
16 with each of the four directives in the Writ of Mandate. Each directive is discussed separately  
17 below.

18 **A. The Water Boards Complied With the First Order to Set Aside the**  
19 **Regulation.**

20 The Writ ordered the Water Boards to set aside their regulatory actions taken in adopting  
21 the Trash TMDLs for the Los Angeles River Watershed. (Cities' Exh. 1, 2:8-18.) It stated:

22 "You are hereby directed and commanded immediately upon receipt of this Writ to set  
23 aside your action taken in . . . adopting the Trash Total Maximum Daily Loads for the Los  
24 Angeles River Watershed, dated September 19, 2001."

25 As the Return clearly details, the Water Boards fully complied with this directive by  
26 adopting resolutions repealing the Los Angeles River Trash TMDL and the resolutions that  
27 adopted it. On June 8, 2006, the Regional Board adopted Resolution No. 06-013 as follows:

28 "Therefore, be it resolved that pursuant to the writ of mandate and to sections 13240 and

1 13242 of the Water Code, the Regional Board hereby:

2 "1. Sets aside the Los Angeles River Trash TMDL, and resolution # 01-013 which  
3 established it.

4 "5. Requests that the State Water Board approve [this] resolution in accordance with the  
5 requirements of sections 13245 and 13246 of the California Water Code and forward it to  
6 [the Office of Administrative Law] and the [United States Environmental Protection  
7 Agency]."

8 (Exhibit A to the Return of the Writ (Water Boards' Exh. 1), p. 3, 1 and 5.) The Water Boards  
9 submitted a copy of this resolution with their return to the writ.

10 Moreover, on July 19, 2006, the State Board adopted Resolution No. 2006-0051 (Exhibit  
11 B to the Return) setting aside State Board Resolution No. 2002-0038, which approved  
12 incorporation of the Trash TMDL into the Los Angeles Basin Plan, and remanding the Trash  
13 TMDL to the Regional Board. Specifically, the State Board resolved:

14 "As ordered by the Court, State Water Resources Control Board Resolution No.  
15 2002-0038 is hereby set aside. The TMDL for trash in the Los Angeles River is  
16 remanded to the Los Angeles Water Board. "State Water Resources Control Board  
17 Resolution No. 2002-0038 is set aside and remanded for further proceedings consistent  
18 with this Resolution."

19 (Exhibit B, pages 1-2.) Finally, as noted in the Return, the State Board requested that the Office  
20 of Administrative Law (OAL) repeal California Code of regulations, title 23, section 3935,  
21 pertaining to the Trash TMDL.

22 **B. The Water Boards Complied With the Writ By Ceasing and Desisting From**  
23 **Enforcing or Implementing the Regulation.**

24 In the court's writ, its second order was that:

25 "You are further directed and commanded to cease and desist from any and all actions to  
26 implement, enforce, or otherwise apply the Los Angeles River Trash TMDLs."

27 (Cities' Exh. 1, 2:24-25.

28 The Cities admit the Writ "voided the project at issue" (Motion, 3:21.) The Court of

1 Appeal's decision, the Judgment, and the Writ, each declared the 2001 Trash TMDL invalid. As  
2 such, there is currently no Trash TMDL to implement or enforce. The Water Boards have not  
3 attempted to implement or enforce the Trash TMDL, and the Cities have not alleged otherwise.

4 The Regional Board's resolution expressly ordered:

5 "Be it further resolved that the Executive Officer is directed to ensure that the Regional  
6 Board complies with all relevant terms of the writ, as modified by the Appellate Decision,  
7 including the applicable provisions of CEQA."

8 (Exhibit C, 3, 8.) It is hard to imagine what more the Regional Board could do to demonstrate  
9 compliance with this directive.

10 **C. The Water Boards Complied With the Court's Third Directive.**

11 The court's third directive in its writ is as follows:

12 "You are further directed and commanded to suspend all activity relating to the Los  
13 Angeles River Trash TMDLs that could result in any change or alteration to the physical  
14 environment until you have reconsidered the Los Angeles River Trash TMDLs and  
15 brought it into compliance with the requirements of the California Environmental Quality  
16 Act ('CEQA') through the preparation of an environmental review document that is the  
17 functional equivalent to an Environmental Impact Report, in accordance with law."

18 (Cities' Exh. 1, 20:26 through 21:3.)

19 The command of this directive is to "suspend all activity ... that could result in any  
20 change or alteration to the physical environment." As noted above, the regulatory instruments  
21 that established the Trash TMDL have been repealed. Regional Board Resolution No. 06-013  
22 also directed staff "to ensure that the Regional Board complies with all relevant terms of the writ,  
23 as modified by the Appellate Decision...." (Exhibit A to the Water Boards; Exh. 1, p. 3, paras.  
24 1, 8.) The Cities have not alleged that the Water Boards failed to suspend such activities as  
25 required by the writ. As above, it is hard to imagine what more the Regional Board could do to  
26 demonstrate compliance with this directive.

27 ///

28

1 While the Cities quarrel with the appropriateness of the Water Board's impending CEQA  
2 process (discussed below), they have not contended that the Water Boards are in any way  
3 engaged in implementing any regulations or other provisions related to the void Trash TMDL, or  
4 otherwise altering the physical environment. The Water Boards have unquestionably complied  
5 with this directive, too.

6 **D. The Water Boards Complied With the Fourth Directive of The Writ.**

7 The court's final directive was as follows:

8 "You are further directed and commanded to make and file a return to this Writ on or  
9 before (90) days from the date a copy of this writ is served upon you, setting forth what  
10 you have done to comply with this Writ."

11 (Cities' Exh. 1, 21:4-6.)

12 The Water Boards' Return was timely filed with this Court on July 21, 2006, which was  
13 on or before 90 days of the issuance of the Court of Appeal's Remittitur, on April 25, 2006.

14 The Return plainly explains that the Writ's four directives have been fully satisfied. The Return  
15 is adequate by all measures, and the Cities' Motion to Strike should therefore be denied.

16 **III. THE CITIES' ATTACK UPON THE WATER BOARDS' FUTURE  
17 REGULATORY ACTIONS UNDER THE GUISE OF A MOTION TO STRIKE  
18 THE RETURN IS CONTRARY TO THE LANGUAGE OF THE WRIT AND TO  
19 THE LAW.**

20 The writ issued by the court and complied with by the Water Boards ensured that the  
21 Water Boards rescind the Trash TMDL. Once the Water Boards rescinded the Trash TMDL, the  
22 dispute in this matter disappeared. If and when the Water Boards create a new Trash TMDL,  
23 then the Cities can take action to oppose it. But until then - under CEQA, the doctrines of  
24 separation of powers, exhaustion of administrative remedies and ripeness -- they cannot.

25 **A. The Writ Does Not Vest the Court With Jurisdiction Over the Water Boards'  
26 Future Projects or Regulations.**

27 The Cities have styled a collateral attack upon an impending regulatory action by the  
28 Water Boards as an attack on the adequacy of the Return. At 15 different locations throughout  
the Cities' 15 page memorandum of points and authorities, the Cities allege that the Return is

1 invalid because it does not state or show that:

2 "Respondents will prepare an environmental impact report ("EIR"), or the functional  
3 equivalent of an EIR, as expressly required by the Writ of Mandate."

4 (Cities' Motion, 3:6-7, 4:9-10, 4:15-16, 6:7-11, 7:2-4, 7:18-21, 8:1-2, 10:21-24, 11:2-7, 14:3-6,  
5 14:26-15:2, 15:20-21, 16:2-3, 16:6-7.) The repetitive assertion, however, lacks the requisite  
6 foundation: nothing in the Writ requires the Return to make such an averment. On the contrary,  
7 the Writ expressly states:

8 "Under Public Resources Code Section 21168.9(c), this Court does not direct you to  
9 exercise your lawful discretion in any particular way."

10 (Cities' Exhibit 1, 21:10-11.)

11 While Exhibits A and B to the Return of the Writ (Water Boards' Exh. 1) instruct the  
12 Regional Board staff to comply with CEQA as expounded upon by the Court of Appeal, and  
13 demonstrate the Regional Board's intention to do so, nothing in the Writ required that such  
14 instructions be included in those resolutions, or in the Return.<sup>1/</sup> The Writ properly does not (nor  
15 could it) direct the Water Boards to undertake a discretionary action. (*Sklar v. Franchise Tax*  
16 *Board* (1986) 185 Cal.App.3d 616, 624 [mandamus will not lie to compel a legislative body to  
17 perform legislative acts in a particular manner]; Code Civ. Proc., § 1085, subd. (a) [writ of  
18

19 1. Cities' many references to "an EIR or its functional equivalent" amount to a form-  
20 over-substance argument about the title, rather than the content, of the environmental documents.  
21 For the court's information, despite its use as a nickname by many agencies and Courts of  
22 Appeal, the term "functional equivalent" is a term not derived from CEQA, but from its federal  
23 counterpart the National Environmental Policy Act (NEPA). In fact, the statute authorizing  
24 CEQA's "certified regulatory programs", Public Resources Code § 21080.5, has no federal  
25 analogue, and the federal concept of "functional equivalence" under federal authority does not  
26 dictate the scope of an agency's obligations under section 21080.5. (See Exh. 2, hereto: Guide to  
27 the California Environmental Quality Act (10<sup>th</sup> Ed., 1999) Remy, Thomas, Moose, Manley, p.  
28 146.) In response to this very lawsuit, Regional Board staff has determined to be more precise  
with respect to the Regional Board's CEQA obligations, including by using the appropriate  
terminology. The term "substitute environmental documents" is derived from title 14, section  
15252 of the California Code of Regulations, which is found in Article 17, relating to certified  
state regulatory programs. Whether or not use of this terminology is appropriate for the title of  
the draft, not yet adopted documents, is not ripe for judicial review at this time.

1 mandate is available “to compel the performance of an act which the law specifically enjoins as a  
2 duty resulting from an office, trust, or station...”].) Thus, just as courts are empowered to  
3 determine that a statute is unconstitutional but cannot instruct the California legislature what  
4 statutes it should make, courts are empowered to compel the Water Boards to rescind regulations  
5 but cannot instruct the Water Boards how it must regulate. That would violate the doctrine of  
6 separation of powers. (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62,  
7 76-77 [“Courts, by the same token, cannot interfere with the legislative process. (Citations  
8 excluded.) And courts cannot compel legislative action. (Citations excluded.) An  
9 administrative procedure is part of the legislative process and it has been recognized that “the  
10 legislative process remains incomplete” until the administrative remedy is exhausted.”]  
11 In contravention of that rule, the Cities boldly and falsely state:

12 “Accordingly, both the Writ of Mandate and Judgment specifically provide that this Court  
13 retains jurisdiction over this matter until the Boards have prepared an EIR or its  
14 functional equivalent.”

15 (Motion, page 8:22-24.) However, no such language appears in either the Writ or the Judgment.  
16 Unable to back the unsupported theory with an actual order, the Cities instead rely upon the  
17 second to last sentence of the Writ:

18 “Under Public Resources Code Section 21168.9(b), this Court will retain jurisdiction by  
19 way of a return to this Peremptory Writ of Mandate until the Court has determined that  
20 you have complied with the provisions of CEQA.”

21 (Cities’ Exh. 1, 21:7-9 (emphasis added).) The Cities suggest that this language effected broad  
22 and continuing assumption of judicial authority over the Water Boards with respect to future  
23 actions and future regulations. The Cities neglect to recognize, however, that the Water Boards  
24 “have complied with the provisions of CEQA” by rescinding the regulations.

25 The Cities’ claim that the Writ requires the Water Boards to adopt an EIR or the  
26 functional equivalent of an EIR is taken out of context from both the Writ and appellate decision.  
27 The relevant language of the writ appears on page 2:26-3:3. The writ states: “...suspend all  
28

1 activity...until you have reconsidered the ...[Trash TMDL].” (Cities’ Exh. 1, 20:26-21:3)  
2 (emphasis added). The Water Boards reconsidered the Trash TMDL and rescinded it. Thus,  
3 there is no Trash TMDL remaining which could violate CEQA.

4 Since the Water Boards maintain the ultimate discretion as to whether to adopt a new  
5 TMDL, the writ must be interpreted to command an indefinite suspension of activity, “unless and  
6 until” the Water Boards have complied with CEQA. Thus, the Writ only must be deemed to  
7 require preparation of an environment review document that is the functional equivalent to an  
8 EIR if there is activity that could result in any change or alteration to the physical environment.  
9 The error of the Cities’ claim that jurisdiction extends beyond the now invalidated Trash TMDL  
10 is demonstrated in Public Resources Code, section 21168.9, cited in the Writ. In pertinent part,  
11 section 21168.9(a) states:

12 “If a court finds ... that any determination, finding, or decision of a public agency had  
13 been made without compliance with this division, the court shall enter an order that  
14 includes one or more of the following:

15 “(1) A mandate that the determination, finding, or decision be voided by the public  
16 agency in whole, or in part.

17 “(3) A mandate that the public agency take specific action as may be necessary to bring  
18 the determination, finding, or decision into compliance with this division.”

19 (Pub. Res. C. § 21168.9, subd. (a).) The court plainly implemented these requirements with the  
20 four directives in the Writ. Indeed, the first sentence of section 21168.9, subdivision (b) states:

21 “Any order pursuant to subdivision (a) shall include only those mandates which are  
22 necessary to achieve compliance with this division....” (Emphasis added.)

23 The only mandates necessary to achieve compliance with CEQA in a case where a  
24 regulation has been nullified, are those that require the agency to set aside or vacate the  
25 regulation. Fundamental CEQA jurisprudence has long dictated that CEQA does not apply to  
26 projects that are rejected:

27 “This division does not apply to any of the following activities: [] (5) Projects which a  
28

1 public agency rejects or disapproves.”

2 (Pub. Res. Code, § 21080, subd. (b)(5).

3 As noted above, nothing in the Writ, the judgment, the appellate decision, or even state or  
4 federal law compels the Water Boards to adopt a new Trash TMDL. While it is true that Section  
5 303(d)(1)(C) of the Clean Water Act (23 USC §1313(d)(1)(C)) requires states to establish  
6 TMDLs for impaired waterbodies, the only sanction when a state fails to do so is that the United  
7 States Environmental Protection Agency (EPA) may establish the TMDL itself under a consent  
8 decree. (*City of Arcadia v. United States Environmental Protection Agency* (N.D. Cal. 2003) 265  
9 F.Supp. 2d 1142, 1146.)<sup>2</sup> Indeed, the record in this action shows EPA did just that on March  
10 19, 2002 when the Water Boards failed to timely adopt the Trash TMDL in the first instance.  
11 (See LAR 05634 (federally promulgated Trash TMDL superseded by approved state TMDL).  
12 See also 66 Fed. Reg. 41817-22, Aug. 9, 2001(proposed federal Trash TMDL for the Los  
13 Angeles River).)

14 No authority exists to compel the Water Boards to establish a TMDL, and the Writ  
15 certainly does not do so. If the Water Boards cannot be compelled to adopt a Trash TMDL, there  
16 is nothing upon which the court’s continuing jurisdiction can operate. Rescinding the regulation  
17 effected full compliance with CEQA for the project that was subject to this litigation, and  
18 therefore, full compliance with the Writ. If the Cities object to the Water Boards’ CEQA  
19 compliance with respect to future regulatory actions, their recourse is to file a petition for a writ  
20 of mandate to a final agency action after exhausting their administrative remedies. They may not  
21 circumvent that process merely because a previous regulation was invalidated.

22  
23  
24 2. Even if a state completely fails to establish any TMDLs, the result is that the United  
25 States Environmental Protection Agency (EPA) is itself compelled to establish the TMDLs for  
26 the state. (*Alaska Center for Environment v. Browner* (9th Cir., 1994) 20 F.3d 981, 983 [state’s  
27 complete failure to establish TMDLs trigger a mandatory duty on the part of US EPA to establish  
28 them under section 303(d)(2)], but see *San Francisco BayKeeper v. Whitman* (9<sup>th</sup> Cir., 2002) 297  
F.3d 877 [doctrine of “constructive submission” only applies to require EPA to establish  
TMDLs when a state has completely failed to establish any TMDLs and has no plans to do so].)

1           **B. Even if the Court Had Continuing Jurisdiction Over the Water Boards'**  
2           **Future Projects and Regulations, the Boards Have Not Taken Action that is Ripe for**  
3           **Judicial Review and the Cities Seek Judicial Intervention Before They Have**  
4           **Exhausted Their Administrative Remedies.**

4           None of the allegations in the motion relate to the project that was the subject of this  
5 litigation. That project that is now "void, invalid, and unenforceable" (Cities' Exh. 2, 23:12-26)  
6 and that has been rescinded by both the Regional Board (Ex. A to Water Boards' Exh. 1) and  
7 State Board (Exh. B to Water Boards' Exh. 1). Rather, the allegations relate to a new project: a  
8 new regulation proposed by staff but which has not been heard by any of the three regulatory  
9 bodies required for a final agency action (Regional Board, State Board, and the Office of  
10 Administrative Law).

11           Indeed, the Cities' evidence in ostensible support of the claim that the Return is invalid  
12 consists entirely of several Water Board staff-generated draft documents, circulated for public  
13 comment, that relate to a proposed future regulation that has not even been heard by an agency,  
14 must less been approved and become final agency action. These include:

15           ·           Exhibit 3: Notice of CEQA Scoping Meeting, to receive public comments on the  
16 appropriate "scope and content" of the environmental documents supporting one of  
17 perhaps many new trash regulations. The Notice also states: "Regional Board staff has  
18 not proposed any specific revisions to the previous trash TMDL to address environmental  
19 concerns as yet...."

20           ·           Exhibit 4: Notice of Hearing to be held on September 14, 2006, to consider staff's  
21 proposal about a new trash regulation.

22           ·           Exhibit 5: Draft CEQA documentation referenced in the Notice of Hearing;

23           ·           Exhibit 6: Draft regulatory provisions referenced in the Notice of Hearing.

24           Whether the documents are adequate or inadequate under CEQA, the documents are  
25 nevertheless nothing more than staff proposals about what the board in the future should  
26 consider. The documents have no independent legal force, and are certainly not evidence of any  
27 action or inaction by the Regional or State Board, in compliance with or contravention of the  
28

1 Writ. The Cities cannot bootstrap into this proceeding subsequent projects and subsequent  
2 challenges to subsequent CEQA processes that have not yet occurred.

3         Since a new Trash TMDL before one has not been adopted, nor have final documents  
4 been approved, the issue simply is not ripe and should not be considered by this court. (*Golden*  
5 *Gate Bridge & Highway Dist. v. Fell* (1931) 214 Cal. 308, 316; *Sherwyn v. Department of Social*  
6 *Services* (1985) 173 Cal.App.3d. 52, 58.) Only after the Water Boards have taken final action is  
7 there any action against which to file a lawsuit.

8         Until then, and the court has no jurisdiction to essentially entertain a request for an  
9 advisory opinion to an executive branch agency's staff members, instructing them about the legal  
10 efficacy of their proposals. (*In re S.C.* (2006) 138 Cal.App.4th 396, 414 [It is a fundamental rule  
11 of jurisprudence that courts do not issue advisory opinions.]) Indeed, assuming these proposals  
12 are heard when scheduled on September 14th (they may or may not be), the Cities (and any other  
13 interested person) will have every lawful opportunity to present their comments orally to the  
14 Regional Board at the board meeting, or in writing, by August 21st, as demonstrated in the  
15 Notice of Hearing. (Cities' Exh. 4.)

16         At that place and time, the Cities may air any complaints they may have about whether  
17 the proposal is consistent with the appellate decision, what the title of the CEQA documents  
18 should be, whether the substance of the CEQA documents comply with the statutory mandate  
19 and the appellate decision, and any other deficiencies perceived by the Cities or concerns they  
20 may have. Upon receipt of comments, staff may or may not change their proposals, but they will  
21 respond to the comments as required by applicable regulations. (Cal. Code Regs, tit. 23, § 3779.)  
22 Furthermore, the Regional Board may or may not make changes to the proposals in view of the  
23 Cities' comments, and may or may not adopt the staff recommendation.

24         If the Regional Board does adopt the proposal over the Cities' objections, the proposal is  
25 nevertheless not effective until the State Board has likewise approved it. (Wat. Code § 13245.)  
26 The Cities will have the opportunity to comment both in writing and orally to the State Board,  
27 and the State Board may then either approve or disapprove and remand the proposal. Finally, the  
28

1 proposal, if approved by the State Board, will be submitted to the Office of Administrative Law  
2 for approval, and only thereafter, will the Water Boards have committed a final agency action.  
3 (Gov. Code. § 11352(b)(5).)

4 Yet the Cities would ask this court, under the guise of “continuing jurisdiction” to  
5 intercede at any of these steps to “correct” perceived deviations in the appropriate Water Boards’  
6 course. Nothing in the Writ suggests that this court ordered or intended to order that it be  
7 appointed some sort of special master to hear the Cities’ complaints throughout the Water  
8 Boards’ regulatory processes, even in the absence of final agency action. The suggestion turns  
9 administrative law upside down.

10 Specifically, courts should not review administrative decisions unless and until  
11 petitioners have exhausted their administrative remedies. The matter is jurisdictional. (See, e.g.,  
12 *Albelleira v. District Court of Appeal* (1941) 17 Cal.2d. 280, 293; *California Correctional Peace*  
13 *Officers Assn. v. State Personnel Board* (1995) 10 Cal.4th 1131, 1151.)

14 The process proposed by the Cities would completely eviscerate the exhaustion  
15 requirement. Instead, the Cities should take their opportunity to participate in the hearing process  
16 at each administrative level, before seeking redress in the court. An attack on an agency’s new  
17 final action is not subject to this court’s “continuing jurisdiction”, but rather by review with a  
18 petition for a writ of mandate under Code of Civil Procedure section 1085, but only after the  
19 action is final.

#### 20 IV. CONCLUSION

21 As stated by Supreme Court Justice Fox in 1890, in another case where the beneficiary of  
22 the writ sought to revise the writ to include further additional subsequent proceedings:

23 “The writ has accomplished the purpose for which it was issued, and is therefore *functus*  
24 *officio*. There can be no further proceedings under it. Such being the case, the writ  
25 should be discharged.”

26 (*Thornton et al. v. Hoge* (1890) 84 Cal. 231, 232.)

27 The Water Boards prevailed in most of the claims in this action by the Cities. With  
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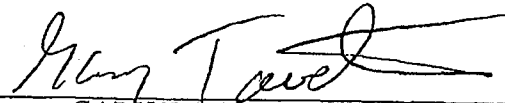
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respect to CEQA, the Cities prevailed. The Court issued its Writ invalidating the Trash TMDL and ordered the Water Boards to rescind it. The Water Boards rescinded it, and filed their Return. The case is over. There is nothing more to be done.

Thus, the Water Boards respectfully request that the cities' motion to strike the Return be denied, and the Writ discharged.

DATED: August 22, 2006

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