

EXHIBIT “25”

1 San Diego, California - September 1, 2006 - 2:15 P.M.

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3 THE COURT: And Cities of Arcadia.

4 MR. GALLAGHER: Good afternoon, your Honor,
5 Terence Gallagher on behalf of plaintiffs and moving
6 parties Cities of Arcadia, et al.

7 MR. TAVETIAN: Good afternoon, Gary Tavetian,
8 Attorney General's office, on behalf of the State Water
9 Resources Control Board and the Regional Water Quality
10 Control Board, Los Angeles Region.

11 MR. LEVY: Michael Levy, attorney for the
12 Regional Board.

13 THE COURT: And we're here on the petitioners'
14 motion to strike the return on the writ. And I have not
15 issued a tentative ruling, but I did not because I
16 probably had more questions than I did tentative ruling.

17 But the findings that I'd like to share
18 with you before you argue, so that you can pinpoint your
19 comments and arguments, are the court of appeal I think
20 was fairly clear in stating that in the event that the
21 TMDL is reconsidered, that an EIR has to be done. And it
22 was a bit different conclusion than in the original writ,
23 because of all the other bases that Judge Peterson found
24 to invalidate the TMDL.

25 So the bottom line of the court of appeal I
26 think is very simple, and it was invalidated. If you wish
27 to reconsider it, you do an EIR.

28 All I have heard thus far is that the

1 respondents are not going to consider, or reconsider the
2 TMDL, but the petitioners have submitted evidence that a
3 TMDL is being reconsidered. So I'm at a loss as to why an
4 EIR wouldn't be required under the ruling of the court of
5 appeal.

6 MR. TAVETIAN: Do you want us to address that
7 now or do you want us to wait?

8 THE COURT: I want you to address it now,
9 because it seems far too clear to me, and so I wanted to
10 present that and see what your response is.

11 MR. TAVETIAN: All right. Thank you, your
12 Honor.

13 What is going on is your original TMDL was
14 rescinded. That's what the Court requested -- that's what
15 the Court ordered to happen, so it is gone. It does not
16 exist any more.

17 THE COURT: Okay. Now, let's clarify that,
18 because the -- it was invalidated by the trial court on
19 many bases.

20 MR. TAVETIAN: Right.

21 THE COURT: It was invalidated by the court of
22 appeal only on one basis.

23 MR. TAVETIAN: That's correct. And then
24 pursuant to the writ, the Regional Board and State Board
25 rescinded the regulation. It does not exist any more.

26 So what the Regional Board is doing -- it's
27 in the process of doing, is going through from scratch.
28 Should we have a TMDL? And if so, what form should it

1 take, et cetera, et cetera.

2 As you note from the return to the writ,
3 the Regional Board said we're rescinding everything.
4 There is no longer a TMDL. And let's start the process
5 again and return to the writ. And it says, by the way,
6 staff, do the proper environmental documents, the
7 environmental review documents to substitute EIR
8 documents.

9 So I am not sure why we're here I guess is
10 the bottom line. It is not the same TMDL and we're adding
11 documents to it. We're starting from scratch. So the
12 fundamental issue before this Court is, has -- have the
13 water boards complied with the writ? And the writ
14 basically says, cease and desist -- I had my notes all
15 ready to go. Here we go.

16 The writ says set the TMDL aside, so we did
17 that and we're starting over. The TMDL says cease and
18 desist implementation and enforcement of the TMDL.

19 Well, your Honor, the regulation that
20 existed no longer exists. There is nothing to enforce.
21 We're not doing anything to enforce it. We're starting
22 over. We're trying to create a new regulation. If the
23 Water Board decides to create a new regulation, they do.
24 If they decide not to create a new regulation, there will
25 be no TMDL.

26 THE COURT: Isn't the respondents'
27 interpretation of the court of appeal ruling that a
28 reconsideration of the exact TMDL is the only act that

1 would trigger the necessity of completing an EIR?

2 MR. TAVETIAN: Well, no, your Honor.

3 If the board, Water Board's regulations
4 choose to, they rescind the prior regulations. Now they
5 want to make -- or let me rephrase. They're considering
6 making a new regulation. That is correct. If they do
7 make a new regulation, a trash TMDL, basically the law is
8 fairly clear, we're going to have to prepare CEQA
9 documents or CEQA equivalent documents, and they have to
10 do so in a way that comports with the court of appeal's
11 statements.

12 So at this point in time, your Honor, there
13 is no regulation. Certainly they're working on one. And
14 when they -- if and when they create a regulation, they
15 will do everything they can to comply with the court of
16 appeal's and this Court's orders or findings.

17 Now, at that point in time the cities can
18 come back and say we're doing a new petition for new --
19 with a new 1085 petition for writ, and we don't like the
20 CEQA documents. Well, okay, fine. They'll have that
21 opportunity to do that.

22 THE COURT: But is it the respondents'
23 interpretation of the opinion of the court of appeal that,
24 for example, if the respondent were to adopt a
25 substantially similar TMDL to the one that has been
26 rescinded, that the ruling of the court of appeal would be
27 effective, that is you have to do an EIR? Or does it have
28 to be exact? Or does it have to be 50 percent the aim?

1 How are you interpreting it?

2 MR. TAVETIAN: Your Honor, the question, to
3 rephrase it in a different way, is if the water boards
4 pass the regulation, well, they have to comply with the
5 law. I believe the court of appeal set out the law fairly
6 clearly.

7 So yes, indeed that will be what has to
8 happen. Absolutely.

9 THE COURT: I could ask it a third time, but I'm
10 not sure I'm getting it across.

11 MR. TAVETIAN: I'm sorry, your Honor, I clearly
12 missed the question. But is the question if we do
13 another -- if we do another TMDL, do we have to comply
14 with what the court of appeal says? Absolutely, your
15 Honor.

16 MR. LEVY: Your Honor, may I?

17 Every TMDL we do, your Honor, has to comply
18 with the Cities of Arcadia decision, not just something
19 that's substantially similar to the last judgment.

20 THE COURT: What are you interpreting the Cities
21 of Arcadia decision to be, that is that if it's not this
22 TMDL that has been now rescinded --

23 MR. LEVY: Your Honor, I don't know what the new
24 regulation -- any new regulation is going to be. Right
25 now all I know is what we as staff have proposed to the
26 Regional Board.

27 There are an infinite variety of ways that
28 the Regional Board could issue a trash TMDL for the

1 Los Angeles River, in any of the TMDLs, in the hundreds
2 that are required to be done under 303(d). And all of
3 that have to engage and undergo the analysis the court of
4 appeal directed us to undergo when we're analyzing the
5 effects specifically of, for instance, catch basins and
6 increased traffic for street sweepers, and the like.

7 And staff would suggest, respectfully, that
8 we have done that in the documents that the petitioners
9 have put before you. The petitioners disagree with that.
10 This is not the time for them to raise that argument.
11 They have to raise that argument to the Regional Board
12 first, because the Regional Board hasn't acted on those
13 documents as yet. They basically got a staff proposal.

14 The problem with -- the thing I think
15 you're wrestling with is the ongoing jurisdiction or
16 continued jurisdiction, is we don't know how to tell you
17 what would be a project that is substantially similar or
18 substantially different, because there are so many
19 conceivable ways that the Regional Board could go about
20 complying with the mandates of 303(d) of the Clean Water
21 Act to meet that requirement.

22 And there is no, we would submit, defining
23 line where you can say that a new regulation is close
24 enough or different enough from the one that has been
25 nullified and voided by the Court, such that it is in the
26 same project.

27 We would make an offer of proof, if you
28 were going to engage in this line, that we would like to

1 submit for an evidentiary hearing about whether something
2 is the same or a different project. As I will represent
3 to you, the consent decree, which is driving a lot of
4 these TMDLs, which is a consent decree between several
5 environmental organizations and USEPA, compels EPA to
6 establish, as I recall, several hundred TMDLs over a
7 12-year period. Almost all of them will require, for
8 implementation, either upstream solutions to abate
9 pollution before they get into the sewers, retrofits to
10 storm drains, or capture devices of some sort at outfalls.
11 They are all going to use or implicate the same
12 environmental concerns that the trash TMDL that was voided
13 did. And so they're all going to have to undergo that
14 same analysis that the court of appeal said we failed to
15 undergo.

16 And again, in the draft documents that the
17 petitioners have put before you, we believe we've done
18 that. And we understand they disagree with us; however,
19 the time for them to make that argument is after we've
20 adopted something, after there's a final agency
21 regulation, final agency action, and then they file a 1085
22 action challenging that. And they come back to you
23 presumably, because Judge Peterson and you had the rulings
24 in the previous case, and they can get it assigned back
25 before you.

26 And the published appellate decision, which
27 is law and is binding, not because we're parties, but
28 because it's a published appellate decision, will

1 necessarily apply to our CEQA analysis.

2 I hope that answers your question.

3 THE COURT: I'm sorry, go ahead.

4 MR. LEVY: One more thing is we do trash TMDLs
5 for Callega creek, for Ballona Creek. Is that the same
6 project or a different project?

7 This is the Los Angeles River. This trash
8 TMDL involved four reaches, including the estuary, and
9 maybe the new TMDL involves one reach or different reach.
10 Is that the same or different project? We don't know.

11 This isn't like we're developing a shopping
12 mall or something like that, where there is a clear
13 project that's ongoing that an agency is trying to do.
14 This is a new regulation. The project that we had acted
15 on, the first regulation, is no more, both by decree of
16 this Court and by our act in rescinding it to comply with
17 the regulation. And so there is nothing to act on. There
18 is nothing more for the writ to apply to.

19 And when they have a grievance with what we
20 subsequently do, a new regulation, whether it's a new
21 reiteration of the trash TMDL or some other regs, they
22 have relief by 1085 to deal with that.

23 THE COURT: Obviously I'm coming in on the tail
24 end of this, because it was all done in Judge Peterson's
25 court and in the court of appeal, but I'm struck with this
26 question. What does the Water Board want to do?

27 I mean, right now we're talking about five
28 years. Is there a goal of establishing a TMDL? Because

1 it seems like the easy way to do it, if you were trying to
2 build a shopping center, I can guarantee you wouldn't be
3 going this route because you want to get that shopping
4 center up. But in this situation, you adopted the TMDL.
5 There was a challenge to it that took five years, and now
6 when it seems like there would be a way to get a TMDL in
7 place for the benefit of the Los Angeles River, there's a
8 hangup to it that I don't understand.

9 Why wouldn't you agree to an EIR?

10 MR. TAVETIAN: Well, you're starting with the
11 wrong premise -- well, let me rephrase. I think the Court
12 is starting with the wrong premise, which is we're not
13 planning on doing the EIR documents; is that correct or
14 incorrect?

15 THE COURT: No. I'm just wondering why you want
16 to struggle with continued litigation, because if I order,
17 yes, I'm going to strike this return and require you to
18 say that you do not intend to adopt a TMDL without an EIR,
19 and I have all this interpretation of the court of appeal
20 ruling of why I back that up, and the whole project could
21 be delayed even further with additional litigation, on the
22 other hand, if I let the return go through, then at the
23 time you adopt the TMDL, you're going to be faced with
24 another writ.

25 MR. TAVETIAN: Your Honor, soothsayer that I am,
26 I believe we're going to be before this Court one way or
27 the other. I think that's correct.

28 THE COURT: Why?

1 MR. TAVETIAN: Why? Because they are going to
2 make sure of that in whatever form it takes. Because
3 they're going to say -- and here's where I'm going to get
4 to the problem, I think -- they're going to say you
5 promise to do substitute EIR documents, but they're not
6 good enough and we're going to litigate that with the
7 court. Okay.

8 Then we go to the next step. That's still
9 not good enough, and what the Regional Board staff has
10 done is inadequate. What the Regional Board did is
11 inadequate, or what the State Board did is inadequate.
12 And they want to come back to the Court every single step
13 of the way.

14 Here's the problem. It's partly a
15 separation of powers argument, it's partly an exhaustion
16 of remedies argument. Does the other side have the right
17 to take a TMDL, which has been rescinded, and we're
18 working on a new one, we're trying to develop a new
19 regulation, do they have the opportunity to come to this
20 Court and force this Court to impose itself on every step
21 of the regulation process?

22 For example, we said in our return to the
23 writ that the Regional Board said we're going to withdraw
24 the TMDL and we're directing staff to revise the
25 environmental quality documentation. Okay, your Honor.
26 We understand what's going on here. We're starting from
27 scratch. We're creating new environmental documents.

28 The other side is pretending to say, no, we

1 don't think we have to do that. Well, that's incorrect.
2 Obviously we have to do environmental quality documents.
3 We understand that.

4 The other side is saying we don't like what
5 staff has done. Okay. What's the remedy? Staff doesn't
6 have the power to do anything. It has power to make
7 recommendations. It is the Regional Board, which will
8 take the first step. And then the State Board will take a
9 step. But the other side wants to impose this Court's
10 will on every recommendation that staff makes, on what the
11 Regional Board sends up to the State Board.

12 Are we going to end up in litigation? I
13 suppose we are, I really do. And I think it's
14 unfortunate, but what this entity -- what these entities
15 are trying to do is kind of micromanage every step of the
16 process.

17 Well, under the exhaustion of remedies
18 theory, what they should do first is go to the Regional
19 Board and say we don't like what staff has done, here's
20 our comments, et cetera. In fact, they have done that,
21 which is a good thing. Okay.

22 And then if the Regional Board adopts the
23 TMDL, gets sent up to the State Board, and the other side
24 can attack it at the State Board level. But what they
25 cannot do is come to this Court at every step of the way
26 and say you see this draft, this draft is no good. Well,
27 maybe it isn't, and maybe the Regional Board will never
28 accept it. I think that's where we're headed.

1 And if the Court is asking, is litigation
2 the wrong way to go, the answer is yes. But what we're
3 doing by saying the Court keeps continuing jurisdiction of
4 this case, which by the way was never ordered, it's going
5 to guarantee litigation --

6 THE COURT: What was never ordered?

7 MR. TAVETIAN: This Court didn't say it was
8 going to keep jurisdiction on a rolling basis.

9 This is what the order said, your Honor.
10 This is what the writ said. Number one, set aside
11 adopting the trash TMDL. We did that.

12 Number two, cease and desist implementation
13 and enforcement. We did that.

14 Number three, suspend all activities
15 regarding the particular trash TMDL until we've
16 reconsidered it and brought it into compliance with CEQA.
17 By getting rid of the TMDL, it's now in compliance with
18 CEQA. You don't have to do CEQA documents if you have no
19 regulation.

20 Number four, make a return to the writ
21 within 90 days. Not an interim writ, your Honor, but make
22 one return to the writ within 90 days setting forth what
23 we have done, not what will happen in the future.

24 So the Court wanted to know, you tell us,
25 one time, you tell us how you're complying with our
26 judgment. What have you done? Not, you know, not what's
27 going to happen in the future.

28 First do one interim TMDL, then a year from

1 now -- I'm sorry, interim return; a year from now do a
2 second return. That's not what was ordered.

3 Basically what this Court decided, and what
4 the appellate court upheld, was this regulation is no
5 good. It's invalid. And that's what we've gone with,
6 your Honor. But there isn't a continuing jurisdiction,
7 except to the extent that we file a return to the writ
8 that comports with the Court's judgment. And that's what
9 happened.

10 And just so everyone is clear, your Honor,
11 the return to the writ says we're rescinding. We're going
12 to start this process over and we're directing staff to
13 complete proper environmental documents.

14 The question is what have -- what's not in
15 the return to the writ? What doesn't comply? And that's
16 the hard part.

17 What the other side tells us, what's the
18 remedy they're seeking? That's the question I keep
19 thinking about. What do they want us to do?

20 They say in their reply brief, and this is
21 a quote, an interim return. First of all, nowhere does it
22 say interim return here. An interim need only say that
23 the boards will adopt an EIR or FEEIR. That's not in the
24 writ, your Honor. It's not an interim return that we need
25 to make, and the writ does not say tell us what you're
26 going to do in the future. It says what have you done
27 within those 90 days?

28 All right. And the next problem is what

1 happens after those 90 days? We don't know, your Honor.
2 We can't know that, your Honor. There's been a regulation
3 that's rescinded. It's over. What's going to happen
4 next, happens next. I can't tell you what happens next.
5 I can't tell you the Regional Board will consider
6 something. The Regional Board will either create a TMDL
7 or not. Assume it does, the State Board will approve it
8 or not and OAL, Office of Administrative Law, will have to
9 do something. I don't know.

10 The question before this Court is have we
11 violated a writ? Is there something about a return that's
12 inadequate?

13 Now, the last thing, they keep saying in
14 the reply brief, we keep telling this Court -- we keep
15 saying -- we keep arguing that the Court can't tell us to
16 do a CEQA document. Well, that's not correct, your Honor.
17 Our argument is the Court actually is not empowered to
18 force us to do a TMDL. I think that's the difference.
19 And if we do one, if we don't do one, that's up to an
20 administrative agency.

21 THE COURT: I don't think that's a question.

22 MR. TAVETIAN: That's the only question, your
23 Honor. I think that is the question, because right now
24 there is no trash TMDL for the L.A. River. And if there
25 is no trash TMDL for the L.A. River, there is no CEQA
26 documents that's necessary.

27 But you're right, is the best way to go
28 through this is to go through constant litigation?

1 Probably not. Is that what we want to do? No. Is that
2 where we're headed? I don't think it matters what this
3 Court does. We're headed back to court. I think that's
4 right. I find it disturbing.

5 THE COURT: Thank you.

6 Would you like to be heard?

7 MR. GALLAGHER: Can I be heard, please, your
8 Honor?

9 THE COURT: Yes.

10 MR. GALLAGHER: If it's okay, I'll stand up here
11 where I'm more comfortable.

12 There was a lot of things said, and I'm not
13 quite sure where the confusion comes in. I'll agree with
14 the Court that I think the court of appeal and the writ
15 issued by Judge Peterson could not be clearer. If they're
16 going to do a trash TMDL for Los Angeles River, they've
17 got to do a tier EIR, or functional equivalent of an EIR.

18 Why didn't they say that in their return?
19 This is all evidence they don't think they have to do one
20 for this project. That's why we had to object to the
21 return. The return will cut off jurisdiction to this
22 Court.

23 The court of appeal opinion, yes, it's
24 precedent for every CEQA project that goes forward.
25 Certainly. It would be nice if we didn't have to get that
26 precedent to make sure that this project itself complied
27 with CEQA. But that's a different thing than saying that
28 this Court no longer has jurisdiction, that that case is

1 no longer law of the case.

2 I mean, we had five years of litigation.
3 We had a trial before Judge Peterson. A lot of resources
4 have been expended. This is the same project. They
5 really don't try, other than I guess to stick their head
6 in the sand -- their argument that there's not an EIR
7 required is that this is no longer the same project.
8 That's what they're saying. They're saying that under
9 CEQA, they can rescind the prior regulation, and that
10 magic wand creates a different project.

11 I urge the Court to look again at the cases
12 we cite in our reply brief. They're right on point. The
13 Mountain Lion Coalition case, same exact thing. State
14 agency, regulation. They try to come back, hey, it's a
15 different project. Court looks at it. These are permits
16 for mountain lion hunting. Same project.

17 If we look at this case, the evidence they
18 submitted shows it's the same project. Their return for
19 the writ, Exhibit A, resolution of the board, direct staff
20 to prepare and submit for the Regional Board's
21 reconsideration a TMDL for trash for the Los Angeles River
22 watershed.

23 That issue is -- I mean, I think there is
24 no legitimate question this is the same project. And what
25 they're doing here goes against the very -- this is why
26 21158.9, I believe -- I apologize with that -- it provides
27 that this Court has continuing jurisdiction. The writ
28 just reiterates that point.

1 This is a legislative mandate. It also
2 says that this Court, and there's so many cases published
3 on point that I'm not quite sure how they can argue
4 otherwise, this court can tell them to do an EIR. That's
5 the point of CEQA, comply with the statutory mandate.

6 We're not asking this Court -- what we
7 asked for is very clear. It's very limited. If I could
8 go to the proposed order we submitted, this Court orders
9 respondents' writ is stricken, because our position is it
10 doesn't say they're going to do an EIR for this project,
11 even though five years of litigation, two court orders say
12 they do. The return nowhere says it. Completely avoids
13 it. In fact, the evidence with it shows they're not going
14 to do one.

15 Second thing we asked for, file a return in
16 the interim. We realize the writ doesn't say an interim
17 in a final return, but the writ, at that point they could
18 have come back and filed a return that says we're going to
19 abandon this project. There's not going to be a TMDL for
20 trash adopted under the Clean Water Act by this board.
21 We're not going to do it. We'll let EPA do it, or
22 somebody else. That's not what they did.

23 If you look at their own resolutions, if
24 you look at the TMDL, we have two exhibits in the records,
25 the same exact thing. If you look at our notice of
26 lodging, their base and plan amendment, it's entitled,
27 Amendments to the Water Quality Control Plan, Los Angeles
28 Region, for the Los Angeles Trash TMDL. The documents

1 that are under contemplation right now, the same project,
2 titled Amendments to the Water Quality Control Plan,
3 Los Angeles Region, for the Los Angeles River Trash TMDL.
4 That's Exhibit 6. It's the same project.

5 I really don't know what to say, other than
6 I think there is no legitimate question, this is the same
7 project before this Court that Judge Peterson ruled on,
8 the court of appeal ruled on. There is absolutely no
9 substantive difference.

10 This Court need not get into -- I mean,
11 they want to submit evidence and have another hearing.
12 They're conceding jurisdiction continues. There is no
13 doubt that there's a statutory mandate that this Court
14 continue jurisdiction until they've complied with CEQA.

15 We already know that this Court and the
16 court of appeal have said to comply with CEQA for this
17 project. You need to do an EIR, a tiered EIR or its
18 functional equivalent.

19 I am not asking this Court to step in at
20 the various -- they're going to go through a Regional
21 Board approval, then a State Board. There's a process
22 that applies to this. We're not asking for this Court to
23 opine on their current documents. We submitted those
24 documents merely in support of a motion to strike a writ
25 that's invalid -- I'm sorry, strike a return of a writ
26 that's invalid.

27 The only purpose of that return is to say
28 we've complied with the writ. There is no way they could

1 have complied with the writ if they're not even done with
2 their new CEQA documents. We cited the case, the
3 authority. This Court has to maintain continuing
4 jurisdiction.

5 Since they decided to go with the project,
6 the return need only say that. The initial return needs
7 to say we're reconsidering. When it's done, we'll file
8 our CEQA documents with the final regulation. At that
9 point they file their final run, they file the regulation.
10 Hopefully we don't have a litigation.

11 We say they did what they're supposed to
12 do, case dismissed, everyone move on. Until that time,
13 until they're done doing what they have to do, this Court
14 has jurisdiction, and any return that tries to extinguish
15 jurisdiction is invalid.

16 I submit that these are all straightforward
17 under CEQA, and these were adequately covered in the
18 briefing. I urge the Court to cite the authorities --
19 review again our authorities, review theirs, and it's
20 clear they are trying to avoid their duty. They're trying
21 to do things courts have rejected repeatedly. There's a
22 reason why you should have jurisdiction, so that they know
23 this project has to do the certain things you've already
24 ruled it has to do.

25 The County of Inyo line of cases I think
26 lasted 20 years. Until they do what they're supposed to
27 do in this case in an EIR, this Court has to retain
28 jurisdiction. We won't know until they're done, I'll

1 agree with that. But we're not asking you to step in at
2 some interim. We're not asking for advisory opinions. We
3 just want an order that says your return's invalid because
4 it doesn't show you're going to do an EIR. Say you're
5 going to do that, and when you're done with that, submit
6 it and we'll take it from there.

7 Finally a new lawsuit, a new court. There
8 is no guarantee it comes back to this Court. That's the
9 reason why the Legislature provides courts with continuing
10 jurisdiction, to make sure this same project doesn't start
11 from scratch and a new judge. The administrative record
12 is already here.

13 I'm just sort of amazed the lengths to
14 which they'll go to avoid having this matter properly
15 heard. This is a procedural matter. It shouldn't be that
16 large of an issue, I think, and we respectfully request
17 the Court issue the order striking the return. We'll get
18 a final return when they're done, one in the interim that
19 will say we'll do what you already told us to do, an EIR
20 or its functional equivalent.

21 Thank you, your Honor.

22 THE COURT: Anything further?

23 MR. TAVETIAN: Yes, your Honor, a couple things.

24 Number one, I am not sure which order to
25 put this, but I'll start here with the writ.

26 Remember, we're here dealing with whether
27 the return to the writ is adequate. The writ says make a
28 return within 90 days to tell us what you've done. We've

1 done that.

2 The second thing --

3 THE COURT: Let me just interrupt there.

4 What you haven't addressed in regard to
5 continuing jurisdiction under CEQA is the fact that the
6 Court does have continuing jurisdiction over the return.

7 MR. TAVETIAN: Yes, it does, your Honor. And as
8 soon as we provide a return to the writ, which is
9 adequate, that's when jurisdiction ends. That's when the
10 case can be discharged. That is absolutely right.

11 And, your Honor, I keep looking at the
12 writ, saying these are the four things the Court requested
13 that we do. Within 90 days tell us what you've done.
14 Make sure you cease and desisted, whatever it is.
15 Ultimately we rescinded, therefore we complied with the
16 writ.

17 Now, that's functionally where the case
18 starts and ends.

19 THE COURT: But in light of the evidence that I
20 have here, that a couple weeks after the rescission,
21 there's now in the works a new TMDL --

22 MR. TAVETIAN: That's correct.

23 THE COURT: You would be asking me to ignore
24 that evidence.

25 MR. TAVETIAN: No, your Honor.

26 THE COURT: And ignore the existence of a new
27 project or whether it's substantially the same or not
28 substantially the same, but a new TMDL.

1 MR. TAVETIAN: Correct, your Honor. If you had
2 a -- well --

3 THE COURT: In light of the authority that's
4 been cited.

5 MR. TAVETIAN: Okay. Let's, first of all, see
6 what we have now and see how it's different than the
7 authorities cited.

8 What we have in front of us right now, what
9 is the state of the law? There is no trash TMDL for the
10 L.A. River. Okay. Nothing exists.

11 Will there be a subsequent trash TMDL for
12 the L.A. River? Your Honor, I don't know. And nobody can
13 know the answer to that question.

14 The water boards have the authority to
15 either make a regulation or not make a regulation. This
16 Court can't impose --

17 Your Honor, let's assume that -- let's
18 assume that this Court orders you have to do a CEQA
19 document for this TMDL. And at the same time let's assume
20 that the Regional Board or the State Board or the Office
21 of Administrative Law says we're not going to have a trash
22 TMDL. Then what do we have? Do we have to prepare --
23 logically speaking, obviously this would never happen --
24 logically do we have to prepare CEQA documents by court
25 order for a trash TMDL that doesn't exist?

26 THE COURT: That's not what's being requested.

27 MR. TAVETIAN: It's specifically what's being
28 requested, your Honor. That is exactly what they're

1 asking for. They're asking for an interim authority that
2 we have to do environmental documents when we don't even
3 know if there is going to be a TMDL.

4 Just so no one is playing games, your
5 Honor, we said in the return to the writ that the Regional
6 Board has said we're rescinding and we're going to try to
7 start this process again, and we're ordering staff to
8 provide better environmental documents. Your Honor,
9 that's what it says in the writ return.

10 What does the writ ask us to do? The writ
11 asks us to rescind and comply and tell us what you have
12 done. You have 90 days to tell us what you have done.
13 Okay.

14 So we've complied with the writ. The
15 return of the writ very specifically applies to each
16 element.

17 Now, your Honor, what happens if the
18 Regional Board or the State Board in however many months
19 decides not to do a trash TMDL? What happens to an order
20 that says we have to do CEQA documents?

21 THE COURT: That's not what's being requested.
22 I don't know -- I'm not on the same page, obviously,
23 because the language is that's being requested that you
24 don't intend to adopt a TMDL for the L.A. River without an
25 EIR. So that doesn't say you do the EIR, regardless of
26 whether you adopt a TMDL.

27 MR. TAVETIAN: And, your Honor, the return to
28 the writ says -- this is where I'm troubled. The return

1 to the writ says, see if you can get a TMDL done, and by
2 the way, staff, you're going to have to comply with the
3 law. Okay.

4 And how does that not comply with the writ?
5 That's what I'm having trouble with. And once we get to
6 that point, I guess, we can go to the next issue. But
7 that's the first issue. How does that not comply? Okay.

8 MR. LEVY: May I speak again, your Honor?

9 There is another nuance that's missing, is
10 that what they're arguing that we haven't said is that
11 we're not going to use the language that they want us to
12 use on the title of our documents. They're saying that
13 our documents are invalid because they're not called an
14 EIR or the functional equivalent of an EIR, and that's a
15 legal conclusion that they have raised, which, with all
16 due respect, your Honor, is purely semantics.

17 We operate under a certified regulatory
18 program. We don't have an obligation to prepare an
19 environmental impact report, as the court of appeal
20 referenced. The court of appeal did use the words
21 "functional equivalent of an EIR," as we pointed out.
22 It's in the footnote of our opposition papers. That
23 language is really borrowed from a federal statute and not
24 a state statute.

25 The proper terminology is "substitute
26 environmental documents." It comes from Title 14, Cal.
27 Code Regs 15252.

28 And what they want us to do -- what they

1 want you to do is to order us to say that we're going to
2 adopt a document called EIR, or functional equivalent of
3 an EIR. And there's nothing anywhere that requires that
4 we title our documents what they want us to title them.

5 What the court of appeal said was comply
6 with CEQA. Do the analysis that's required under CEQA.
7 Comply with 21519 of the Public Resources Code, which the
8 court of appeal says was appropriate, and comply with
9 21080.5, which is the Certified Regulatory Program
10 Regulations.

11 And as we put forth in the opposition, the
12 terminology is really what they're objecting to. What
13 Mr. Tavetian is saying is absolutely correct. As staff
14 people we can't say what a Regional Board is going to do.
15 There's nine members that deliberate in a public body
16 together, and they decide what they're going to do.

17 So what the petitioners would be asking you
18 to do is to order us to say we're going to adopt this type
19 of document for this type of project, even though the
20 project may not exist. And that's Mr. Tavetian's point.
21 Absolutely right. If we don't adopt a trash TMDL under
22 the consent decree I referenced, USEPA would have to adopt
23 one. But we don't have to do one. And we can't guess, as
24 staff, what the Regional Board is going to do on that
25 project.

26 And your Honor, with all due respect, has
27 no legal authority to compel us to establish a TMDL. You
28 can compel us to comply with CEQA.

1 The question about continuing jurisdiction,
2 one more thing about the Mountain Lion case we, the
3 petitioners, cited. The court of appeal dropped a
4 footnote in that case saying nobody challenged the
5 question of whether the new regulations in that case was
6 or was not the same project. That was not before the
7 court of appeal on appeal. That was treated as waived on
8 appeal.

9 The question of whether or not the new
10 mountain lion hunting regulations were or were not the
11 same regulation, the same project as the 1987 ones,
12 whether the '81 and '87 ones was the same project was
13 never adjudicated. So that is not legal authority for the
14 position that a new TMDL is the, whatever it's called, is
15 the same project as the one that's been invalidated.

16 If you are going to go down that road of
17 entertaining -- retaining jurisdiction over our new
18 regulation, whatever it's called, we would ask you to
19 allow us a brief -- the opportunity to brief it and submit
20 evidence about why that's not tenable. That's what we're
21 asking.

22 THE COURT: Well, the Mountain Lion case perhaps
23 never adjudicated whether the two plans were different,
24 but the entire case had to do with the fact that they were
25 not identical and yet CEQA applied.

26 MR. LEVY: They were substantially --

27 THE COURT: The writ applied.

28 MR. LEVY: They were substantially identical.

1 The two regulations were substantially identical.

2 THE COURT: So your argument is that there was
3 no adjudication that they were actually different or not
4 different?

5 MR. LEVY: There was no appellate decision that
6 it was the same project, to use CEQA parlance. CEQA
7 applies to a project, and for the CEQA -- for the Court to
8 have continuing jurisdiction, it would have to be over
9 this same project that was previously done.

10 I would submit as a matter of law a new
11 regulation is not the same project as a regulation that
12 had been set aside. It could be your Honor disagrees with
13 that. You could say that based upon a factual nexus of
14 how similar they look, it's the same project. And we
15 would like the opportunity to brief that, if you're
16 willing to entertain continuing jurisdiction.

17 THE COURT: Thank you.

18 MR. TAVETIAN: Your Honor, the last thing is if
19 you read the writ, it says come back in 90 days and tell
20 us what you have done. Once we have done that, we have
21 complied with the writ.

22 THE COURT: Thank you. Anything further?

23 MR. GALLAGHER: Your Honor, if I could just very
24 quickly respond.

25 The Court has obviously read the case.
26 Superior court concluded it had continuing jurisdiction
27 over the matter because the enactments of regulations
28 authorizing a Mountain Lion --

1 THE COURT: You have to slow down.

2 MR. GALLAGHER: You're familiar with the case
3 already. Actually you cited it right back to the
4 plaintiff. This is the section you're talking about. The
5 same mountain lion hunt, different year, different
6 regulation, doesn't matter.

7 If I could just cite to the Court one
8 legislative provision that forecloses their entire
9 argument is different regulation as a matter of law is a
10 different project. That's just wrong. CEQA Guidelines,
11 14 Cal. Code Regs 15378, subdivision C. "The term, quote,
12 project, end quote, refers to the activity which is being
13 approved and which may be subject to several discretionary
14 approvals by governmental agency. The term "project" does
15 not mean each separate governmental approval."

16 I'll finish with that, your Honor. Thank
17 you.

18 THE COURT: Counsel, you will be advised in
19 writing as to a ruling on this motion to strike the
20 return.

21 Thank you.

22 (Whereupon, the hearing adjourned.)

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1 State of California)
2 County of San Diego)

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I, Teri L. Smith, CSR, certificate number 7949, do hereby certify that I am an official shorthand reporter of the Superior Court of the San Diego Central Division, County of San Diego, State of California;

That as such reporter, I reported in shorthand the proceedings held in the above-entitled matter;

That the foregoing transcript, consisting of pages numbered 1 through 28, inclusive, contains a full, true and correct record of the testimony taken and proceedings had at said hearing.

Dated at San Diego, California, this 8th day of September, 2006.

Teri L. Smith, CSR 7949
Official Reporter