Yesteday, I described a California Court of Appeals order lifting the injunction preventing the California Air Resources Board (CARB) from implementing its cap and trade program. The order was apparently issued last Friday afternoon. Even in this age of instantaneous communication, however, apparently neither the Superior Court judge in the case, Earnest H. Goldsmith, nor the lead attorneys for CARB, Mark Poole and Gavin McAbe of the California Attorney General's Office, knew about the Court of Appeals order as of yesterday. Their lack of knowledge was apparent during a hearing in front of Judge Goldsmith yesterday afternoon. The court held a hearing on an application filed by the Association of Irritated Residents (AIR) for an order holding that CARB should be found to be in violation of the judge's order preventing the state from implementing the cap and trade program (the order in California is called a peremptory writ of mandate). I have a copy of the transcript of the proceedings in superior court but don't yet have a link to it.

Here's the technical legal issue in front of the superior court: if the lower court's writ of mandate is a mandatory one then the judge's order is automatically stayed (suspended) on appeal; if it's a prohibitory one then the judge's order remains in effect unless the court of appeals says otherwise. CARB interpreted the judge's order as a mandatory one and thus told opposing counsel that the state would continue with its efforts to issue rules to govern the cap and trade program. AIR disagreed, saying the preemptory writ is prohibitory and thus prevents CARB from moving forward. AIR brought the motion with Judge Goldsmith and yesterday afternoon the judge agreed with AIR, issuing an order "delcaring respondents in violation of the peremptory writ of mandate and issuing [a] fine." Moreover, the judge set a hearing for next Monday, June 13, at which the Chair of CARB, Mary Nichols, and the Executive Director, James Goldstene, were to appear so that the judge could question them about whether they would comply with his order and would consider sanctioning them. During the hearing, the judge said his writ is prohibitory and that "it should be obeyed until someone tells me — until a higher court tells me different."

Of course a higher court had told him different but he just hadn't received notice that the court of appeals had done so. Nor, obviously, had the state's attorneys. It's unclear whether AIR's attorneys knew of the order at the time they appeared in front of Judge Goldsmith. If they did, it is also unclear why they failed to mention the order during the hearing.

It also isn't clear whether Judge Goldsmith will continue to require Nichols

and Goldstene to appear in front of him next week given that his order prohibiting the board from moving forward to implement cap and trade has been stayed. Theoretically at least he could still sanction them for violating his order prior to the ruling from the court of appeal but now that the court of appeal has ruled sanctions seem much less likely.

Stay tuned for more action….