IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

MARINE FORESTS SOCIETY, **a nonprofit corporation; and** **RODOLPHE STREICHENBERGER,** **an individual and taxpayer,** Respondents, **v.** **CALIFORNIA COASTAL COMMISSION,** Appellant.	Civil No. C038753

Sacramento County Superior Court No. 00AS00567
The Honorable Charles C. Kobayashi, Judge

PETITION FOR REHEARING OF CALIFORNIA COASTAL COMMISSION

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INTRODUCTION

The opinion in this case is the first appellate decision in 153 years to invalidate the Legislature's appointment or removal of executive agency officials. The decision likely will create considerable uncertainty for both the Commission and permit applicants until the legality of the Commission's appointment structure is finally resolved, as well as inspire new litigation challenging the legality of other executive agencies in California. This dramatic new development in California's separation of power doctrine is based in large part on the opinion's assumption that the Commission's legislative appointees will make decisions based on their "presumed desire" to avoid removal from office. Because this is a facial challenge, there is no basis for making any factual assumptions about what motivates the decisions of Commissioners. More importantly, the opinion's assumption conflicts with California's legal presumption, not addressed by the opinion, that public officials will comply with the law. (*Post,* at pp. 5-7.)

But the ambiguities surrounding the opinion run deeper than this. The opinion, correctly, agrees that the appointment and removal powers set out in the 1849 constitution remain intact today, and accepts that the Legislature may appoint even a majority of an agency's officials. Treating the Legislature's removal of those same officials as analytically distinct, however, the opinion finds that the Legislature violated the separation of powers doctrine by retaining the power to remove its appointees at will. The opinion reaches this conclusion without addressing an entire body of California Supreme Court case law affirming the power of an appointing authority to remove appointees at will. In particular, the opinion fails to reconcile *Brown v. Superior Court* (1975) 15 Cal.3d 52, in which our Supreme Court reaffirmed an appointing authority's power of removal and blessed a "politically responsive" appointment scheme that is virtually identical to the one now found objectionable by this opinion.

Finally, the opinion never answers the threshold question: what did the makers of the 1849 constitution have in mind when they assigned the powers of appointment and removal to the Legislature in articles 6 and 7 of Section XI? The opinion never addresses the extensive constitutional history offered by the Commission that answers that question—California rejected the federal strong executive model in favor of one that placed greater authority in the Legislature as the branch most responsive to the voters. Yes, the Legislature's power to appoint and remove executive agency officials gives it influence over those agencies, but that influence is exactly what the makers of the California constitution intended. The opinion frustrates this constitutional delegation by erroneously equating the Legislature's *permissible influence* in the appointment and removal process with the *impermissible control* that would be involved were the Legislature to tell executive agency officials how to vote or in some other manner attempt to directly supervise the actual decisions of the agency.

In California, the power to appoint executive agency officials, which includes the incidental power to remove them, is an inherently legislative

function. Consequently, when the Legislature exercises this power, there cannot be a separation of powers violation because the Legislature is only exercising the power assigned to it in the first instance. (E.g., *People ex rel. Waterman v. Freeman* (1889) 80 Cal. 233, 234.) This was not a case of first impression, but the application of well-established principles to a different set of facts.

The petition for rehearing should be granted.

ARGUMENT

I.
THE COURT'S OPINION

Rather than reargue the case, the Commission's petition for rehearing will address those aspects of the Court's opinion which fail to address matters that, if considered, would require a different outcome. Where appropriate, the petition will refer to the Commission's opening brief (COB) or its reply brief (CRB) for further discussion.

The first half of the opinion accepts much of the Commission's argument. It agrees with the Commission that the Commission is an executive agency, necessarily rejecting the view of the trial court and Marine Forest Society that the Commission is a "legislative agency." (Slip op. at pp. 4-5, 9-11.) The opinion acknowledges the provisions addressing the Legislature's power of appointment and removal that are found in the 1849 and 1879 constitutions (*id.* at p. 12), and agrees that the deletion of these provisions and their replacement by statute did not effect a substantive change in that legislative power (*id.* at p. 13). The opinion accepts that in California the appointment of executive agency officials is not an inherently executive function. (*Id.* at p. 14, fn. 3.) It even accepts in principle the Commission's argument that, where there is no set term, the power to appoint confers the power to remove at will. (*Id.* at p. 15.)

But after acknowledging the Legislature's power to appoint and remove, the opinion states that this power has "limits." (Slip op. at p. 15.) Relying on *Obrien v. Jones* (2000) 23 Cal.4th 40, the opinion reasons that the Commission's appointive structure encroaches on the authority and independence of the executive branch unless there are sufficient safeguards to protect the executive authority. Finding an absence of safeguards, the opinion determines that the Legislature's retention of the power to appoint and remove at will two-thirds of the Commission's voting members "serves to ensure that the Commission is under the control of the Legislature." (*Id.* at p. 18.) The opinion likens the Legislature's appointment and removal of Commissioners to "direct supervisorial control over the performance of the duties of an executive officer." (*Id.* at p. 19.)

The opinion finds its conclusion reinforced by the United States Supreme Court's decision in *Bowsher v. Synar* (1986) 478 U.S. 714. (Slip op. at pp. 20-24.) Recognizing that *Bowsher* was a federal decision, the opinion states that this "commonsense" principle is equally applicable to California because the Legislature's ability to unilaterally remove an executive official necessarily interferes with the execution of the laws by the executive branch. (*Id.* at pp. 23-24.) According to the opinion, the "presumed desire of [Commissioners] to avoid being removed from their positions creates an improper subservience to the legislative branch of government," which results in the Commission having "control" over the Commission's execution of the law. (*Id.* at pp. 22-23.) Because it is the appointment scheme itself that creates the members' "presumed desire" to avoid removal, the opinion finds that the appointment structure is facially unconstitutional. (*Id.* at pp. 24-25.)

II.

THE OPINION OVERLOOKS THE LEGAL PRESUMPTION THAT EXECUTIVE OFFICIALS WILL FOLLOW THE LAW

The Legislature's exercise of its constitutionally-assigned power to appoint and remove officers of executive agencies by definition does not involve improper "control" over the execution of the laws. (See *post* at pp.11-16.) Although the exercise of this inherent power affords the Legislature significant influence over the composition of executive agencies, it is an influence that was fully contemplated by the makers of the Constitution when they entrusted the appointing power to the "immediate representatives" of the people. (*People ex rel. Aylett v. Langdon* (1857) 8 Cal. 1, 35; *post,* at pp. 11-16.) This permissible influence is much different than the improper "control" involved when the Legislature seeks to exercise direct control over particular actions of the executive branch. (See, e.g., *California Radioactive Materials Management Forum (CRMMF) v. Department of Health Services* (1993) 15 Cal.App.4th 841.)

A. The Opinion's Conclusion That the Legislative Appointees Will Follow Their "Presumed Desire" to Keep Their Positions Conflicts With the Legal Presumption That They Will Follow the Law.

Even if the issue of "control" were a proper inquiry in this case, the opinion incorrectly concludes that at-will removal interferes with the execution of the law because of the "presumed desire" of legislative appointees to please their appointing authorities. In this regard, the opinion fails to address an important argument raised by the Commission—rather than engage in speculation about the motives of appointed officials, the courts should apply the legal presumption that agency officials have acted correctly. (E.g., *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812-823; see *City of Sacramento v.*

State Water Resources Control Bd. (1992) 2 Cal.App.4th 960, 976 [executive agency officials presumed to have complied with requirements of agency's regulatory program]; Evid. Code, § 664.)

In contrast to the opinion's assumptions about the motivation of agency officials, courts traditionally have presumed that the officials who serve the public—administrative officials and judges alike—will lawfully carry out the duties that they have sworn to perform. The courts have reaffirmed this presumption in a variety of settings. (See, e.g., *Adams v. Commission on Judicial Performance* (1995) 10 Cal. 4th 866, 881 ["in general, it is appropriate to presume the integrity of those serving as adjudicators in an administrative proceeding, and, accordingly, that a challenge on such a ground carries a very high burden of persuasion," citing *Withrow v. Larkin* (1975) 421 U.S. 35]; *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792 [rejects challenge to administrative officer, finding that "bias and prejudice are never implied and must be established by clear averments," citing *Shakin v. Bd. of Examiners* (1967) 254 Cal.App.2d 102, 107]; *Miller v. Board of Public Works of the City of Los Angeles* (1925) 195 Cal. 477, 496 [Supreme Court upholds validity of zoning ordinance, noting that "in the absence of any issue concerning the good faith of the council, the presumption of fair dealing on the part of the council and the further presumption that they will not fail in the performance of an official duty must prevail"]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App. 3d 568, 579 [party challenging the public official had to overcome "the presumption of honesty and integrity in policymakers with decisionmaking power"]; *People v. Hernandez* (1984) 160 Cal. App. 3d 725, 746 ["There is a presumption in the honesty and integrity of our judicial officers"]; *Cosgrove v. Sacramento County* (1967) 252 Cal.App.2d 45, 50-51 [this Court, in mandamus appeal, applying presumption that public officials have performed their duties as required by law].)

This legal presumption is not an idle one. There are numerous

institutional constraints upon Commission members that compel their adherence to the law. Upon joining the Commission, members take an oath of office that they will faithfully discharge their duties. (Cal Const., Art. XX, § 3; Gov. Code, § 1360.). When they review applications for coastal development permits, they must consider the Act's resource protection policies and, generally speaking, must issue a permit if they find that the application meets these policies. (See Pub. Resources Code, § 30604.) Permit applications are considered at public hearings, where the affected parties and other members of the public testify, and where Commission members openly debate and vote based on the evidentiary record that has been compiled. (*Id.,* § 30320.) Further, the Commission must issue a written decision that contains findings and that explains how the evidence supports those findings. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 906.) As an additional check, the Commission's decisions are subject to judicial review under Code of Civil Procedure section 1094.5. (Pub. Resources Code, § 30801.)

Consequently, when they engage in quasi-adjudicative decision making, Commission members are legally precluded from basing their decision on the perceived wishes of their appointing authorities. They are instead required to obey the law, and these numerous checks insure that these decisions are fair and do not violate the due process rights of applicants and interested third parties. (See Pub. Resources Code, §§ 30320-30329.) Therefore, the conclusion that the actions of the Legislature's appointees will be motivated by a "presumed desire" to save their positions conflicts with the legal presumption that agency officials will properly carry out their duties. In a facial challenge that contains no facts to support the suggestion of any improper conduct, this legal presumption should be honored.

B. The Bowsher Decision Is Distinguishable

Given the legal presumption of California law, it was error for the opinion to find support for a contrary view in *Bowsher, supra.* But *Bowsher* is distinguishable for a number of other reasons.

Although the opinion discounts the differences between the federal and California Constitutions, the "commonsense" principle mentioned in *Bowsher* cannot be divorced from the dramatically different allocation of appointment power in the federal Constitution. (See COB at 10-19.) The federal Constitution confers the President with sole power to choose executive officers and allows the Congress to remove them only through impeachment proceedings. In contrast, the California Constitution always has conferred the Legislature with the power to appoint executive agency officials, determine the duration of an executive office and remove its appointees at will. (*Ibid.*) The Legislature's far-reaching power of removal even allows the Legislature to abolish an executive office where the position has a fixed term and where the officer was appointed by someone other than the Legislature. (See, e.g., *Ford v. Board of State Harbor Commissioners* (1889) 81 Cal. 19, 27.)

The President himself appointed the Comptroller-General and, consequently, Congress's assertion of removal authority in *Bowsher* could reasonably be viewed as intruding on the President's incidental power to remove and supervise his own appointee. With regard to the Commission, the Legislature simply has retained the incidental power to remove its own appointees, a power that the Legislature has exercised for the past 150 years. It is very doubtful that the United States Supreme Court would have employed the same reasoning had it been construing the California Constitution.

In any event, even if one chooses to disregard the dramatic differences between the two constitutional schemes, the opinion's reliance on the "commonsense" principle in *Bowsher* overlooked the California Supreme Court's irreconcilable and controlling holding in *Brown.* *Brown* upheld a very

similar appointment scheme under which Commission members on the regional coastal commissions created by the 1972 voter initiative were subject to at-will removal by their appointing authorities. (See *post* at pp. 15-16.) *Brown* specifically approved an appointment structure that made these executive agency officials accountable to their respective gubernatorial and legislative appointing authorities: "The drafters and voters could reasonably choose to establish a commission of limited duration, but one composed of politically responsive members subject to removal by elected officials." (*Brown, supra,* 15 Cal.3d at p. 56.) There is nothing unconstitutional about making appointees accountable to the elected officials who appointed them and who, in turn, are accountable to the voters if they make unwise appointments.

In short, respectfully, the opinion should have been guided by 150 years of California addressing the Legislature's appointment power, not a federal case decided under a profoundly different appointment scheme.

III.

EVEN WERE *OBRIEN'S* ANALYSIS APPLICABLE, THERE ARE SUFFICIENT SAFEGUARDS PREVENTING IMPROPER ENCROACHMENT OF EXECUTIVE FUNCTIONS.

The opinion relies on *Obrien* and finds that in this case, unlike *Obrien*, there are no safeguards that prevent the Legislature's retained power of removal from encroaching on the execution of the laws. But *Obrien* is distinguishable. The State Bar is a constitutional entity, and the control of attorney discipline, including the appointment of disciplinary officers, is a judicial function, not a legislative one. Therefore, when the Legislature seeks to legislate in an area assigned to the judicial branch, there must be sufficient safeguards to insure that the Legislature does not materially impair or defeat inherent judicial functions.

In this case, the only Legislative action being challenged is the appointment scheme contained in sections 30301 and 30302 in the Coastal Act.

In California, the power to create executive agencies and to determine the method for appointment and removal of executive officers was assigned to the Legislature under the 1849 constitution and has belonged to the Legislature ever since. (*Post,* at pp. 11-16.) Therefore, when the Legislature exercises its assigned power to appoint and remove officials of executive agencies, there is no reason to consider whether there are sufficient "safeguards" on the exercise of this power, because the power being exercised belongs to the Legislature, not the executive branch.

Nevertheless, there are sufficient safeguards:

- The Legislature's appointees do not have unfettered discretion—any quasi-adjudicative decision must follow the law, be supported by substantial evidence and be subject to judicial review under Code of Civil Procedure section 1094.5. The Commission's quasi-legislative adoption of regulations is subject to oversight by the Governor's Office of Administrative Law and ultimately by the courts. (*Ante,* at pp. 6-7; COB at 30-33.)
- The legislative role is limited to the appointment and removal of executive officials—the Legislature may not dictate how its appointees should vote or otherwise directly interfere in the agency's actions. (*Ibid.*)
- The Legislature's appointment power is split between the Assembly and the Senate. Therefore, no one body has more than four appointees and, in any given year, it is just as likely that the Assembly or the Senate will be aligned politically with the Governor as with each other.
- In addition to the Governor's four voting appointees, three Governor appointees participate as nonvoting members of the Commission in both public and closed sessions and may seek to inform and persuade the Commission regarding the Governor's views.

- The decisions of the Commission are not "subject to the Governor" in the sense that the Governor, like the Legislature, may not dictate the quasi-adjudicative decisions of the Commission. Because the Governor's role in day-to-day decisions of the Commission is limited, the presence of legislative appointees on the Commission does not materially affect the duties of the Governor.[1/]
- The Governor has significant indirect influence over the work of the Commission because he proposes the Commission's annual budget and may "blue pencil" portions of its budget passed by the Legislature.
- The Governor signed the Coastal Act into law, and must approve any future amendments to the Act. Although this is not dispositive (see slip op. at p. 25), it is a significant factor in assessing whether a particular legislative action materially encroaches on a function of the executive branch (see *Carmel Valley Fire Protection District v. State of California* (2000) 25 Cal.App.4th 287, 297, 308.)

Therefore, if the *Obrien* analysis were applicable, there are sufficient safeguards to insure that the Legislature's retained power of removal does not materially encroach on the execution of the law.

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[1] This was what the Commission meant when it stipulated that it was not "subject to the Governor." In this sense, the Commission is not "subject to the Legislature" either, in that the Legislature may not dictate the actions of its appointees. Of course, the Commission is subject to the Governor in the sense that the Governor may appoint and remove four commissioners, has three non-voting members and maintains significant control over the Commission's budget.

IV.

THE OPINION FAILS TO ADDRESS THE LANGUAGE IN CONSTITUTIONAL PROVISIONS AND CONTROLLING CASE LAW THAT CONFLICTS WITH THE OPINION'S ILL-DEFINED LIMITS ON THE LEGISLATURE'S POWER TO APPOINT AND REMOVE EXECUTIVE OFFICIALS

The opinion acknowledges that the Legislature has the power to appoint and remove executive agency members, but finds that this power has "limits." The opinion never precisely defines what these limits are, and never explores the extensive case law that demonstrates just how broadly the California Supreme Court has sustained the Legislature's exercise of its power in the past. As a result, the practical effect of the opinion is to call into question the Legislature's inherent power to appoint and remove members of executive agencies, even while purporting to abide it.

A. The Legislature's Historic Exercise of its Power to Appoint and Remove Executive Agency Officials Has Never Been Considered Improper "Control" Over the Execution of the Law.

The opinion's central flaw is this—it equates the Legislature's power of executive appointment and removal with "control" over the execution of the law. But none of the many appointment and removal cases cited by the Commission have ever characterized this legislative power as investing the Legislature with any sort of "control" over the execution of the laws. (COB at pp. 16-25, CRB at pp. 7-13.) These cases uniformly have viewed the Legislature's appointment/removal power as an inherent legislative function that exists separate and apart from the execution of the law. Indeed, two Supreme Court cases, mentioned but not addressed by the opinion, specifically rejected claims that the Legislature's exercise of this power violated the separation of powers doctrine. (*People ex rel. Aylett v. Langdon* (1857) 8 Cal. 1, 33-35; *People ex rel. Waterman v. Freeman* (1889) 80 Cal. 233, 234-236.) The

separation of powers doctrine is not offended when the Legislature exercises a power that is rightfully its and not the Governor's.

The opinion never addresses the extensive constitutional history offered by the Commission (COB at pp. 10-19), but this history explains why the Legislature's exercise of its powers of appointment and removal do not involve impermissible "control." A constitution may assign powers among the three branches in any manner that it chooses, and California deliberately rejected the federal strong executive model in favor of one that placed relatively greater authority in the Legislature as the branch most immediately responsive to the voters. (*Ibid.*) The Legislature's power to appoint and remove executive agency officials gives it influence over those agencies, but the Constitution fully intended that the Legislature exert this influence. (*Ibid.*) By equating the Legislature's permissible influence in the appointment process with the impermissible control that would be involved were the Legislature to attempt to direct the actual decisions of an executive agency, the opinion frustrates this constitutional intent and effectively reorders the constitutional power of appointment that has existed since 1850.

B. The Opinion Does Not Address the Body of Law Rejecting Limits on the Legislature's Power of Appointment

The opinion also disregards the language of specific constitutional provisions and Supreme Court case law that repudiates the "limits" imposed by the opinion. The starting point for any discussion of constitutional meaning should be the text of the Constitution, but the opinion never mentions the language of the Constitution and never reconciles it with the limits that it has imposed. With regard to appointments, Article XI, section 6 of the 1849 constitution provides no such limiting language:

> "All officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created

> by law, shall be elected by the people, *or appointed as the Legislature may direct*." (Italics added.)

And, in other language not addressed by the opinion, the California Supreme Court refused to impose limits on the Legislature's power of appointment: "The Constitution, as we have seen, authorized the appointment to be made 'as the Legislature may direct,' *and in none of its provisions, so far as we know, is any limitation placed upon the exercise of this power*." (*In re Bulger* (1873) 45 Cal. 553, 559.) (Italics added.) Cases upholding legislative appointment of all or a majority of an agency's officials further established the breadth of the Legislature's power of appointment (*Langdon, supra* [Legislature makes all appointments to board]; *Freeman, supra* [same]; see also COB at pp. 15-22.)

C. The Opinion Does Not Address the Body of Law Rejecting Limits on the Power of Removal

The opinion, however, suggests that the real problem is not with legislative appointment but with the Legislation's retention of authority to remove its appointees at will. The weakness of this distinction, as acknowledged elsewhere in the opinion (slip op. at p. 15), is that the power to remove is legally inseparable from the power to appoint: "[t]he power to remove is an incident to the power to appoint, as a general proposition, and is made so expressly by the Constitution." (*People ex rel. The Attorney-General v. Hill* (1857) 7 Cal. 97, 102.) If, as the opinion acknowledges, the Legislature may appoint a majority of Commission members, it necessarily follows that it may constitutionally remove them.

Although the opinion suggests that the extent of the Legislature's power of removal creates an issue of first impression, it overlooks an extensive body of law addressing the removal question, including the very language of the Constitution. (See COB at pp. 14, 19, 22-25, CRB at pp. 10-16.) For example, the opinion never reconciles its limits on the power of removal with Article XI,

section 7 of the 1849 constitution (that the opinion acknowledges remains viable in Government Code section 1301). Article XI, section 7 contains no limitations on the Legislature's power to determine the duration of a term of office and it expressly endorses at-will removal whenever the Legislature does not choose to establish a specific term of office.[2/]

Moreover, there are numerous cases, cited by the Commission and not addressed by the opinion, which confirm that the Legislature may remove its appointees or even destroy an office altogether, without any suggestion that this represents improper control of the executive branch. (See, e.g., *Ford v. Board of State Harbor Commissioners* (1889) 81 Cal. 19, 27 ["The exercise of this power to abolish an office by the same authority that created it and fixed its term, and thus remove the incumbent before the expiration of his term, has been too frequent and too long practiced in this state to leave the question of the right to do so longer open to discussion"]; COB at pp. 22-25; CRB at pp.10-13.) The opinion's most conspicuous omission is the Supreme Court's 1976 decision in *Brown, supra*, which involved a challenge to the removal provisions of a similar appointment scheme for the regional coastal commissions created under the 1972 coastal initiative.

Brown involved the claim of a governor's appointee that the initiative should be construed as providing for a term of years rather than for removal at will. The Court's sweeping rejection of this argument, however, embraced the removal of an agency official by *any* appointing authority, stating that "*California courts have frequently held that appointed officials without fixed terms of office can be removed by the authority which appointed them.*" (*Id.* at p. 55.) (Italics added.) There is nothing in the *Brown* Court's endorsement

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2. Article XI, section 7 provided: "When the duration of any office is not provided for by this Constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment . . ."

of this appointment scheme that suggests that it was limited to the Governor's two appointments to the regional commission, or that the scheme would have been constitutionally invalid as to the other ten Commission members who were appointed and subject to at-will removal by the State or by local legislative bodies. (See also *id*. at p. 56 [broadly endorsing at-will removal by "elected officials" and not just the Governor].) Despite *Brown's* uncanny similarity to this case, however, the opinion does not address the *Brown* holding, much less attempt to distinguish it.

D. Restricting the Legislature from Directing the Actions of its Appointees Provides a Workable Limitation on Avoiding Legislative Interference in the Execution of the Law.

Finally, it should be recognized that there are certain "limits" to the Legislature's power to appoint and remove officers of executive boards and commissions. That power is circumscribed by other constitutional provisions, such as the appointment of constitutional officers or the appointment of legislators themselves to executive agency positions. (Cal.Const., Art. 14, § 13). The Court may wish to consider imposing another more sensible and workable limit on legislative encroachment. Such a rule might be: The Legislature may appoint or remove the officers of executive boards and commissions, but the Legislature may not direct the actions of its appointees or compel them to vote in any particular way. (COB at pp. 30-33.) The imposition of this limit would provide a bright line test that is consonant with California's constitutional history and would not suffer from the uncertainty of the "limits" identified in the opinion.

CONCLUSION

The petition for rehearing should be granted.

Dated: January 14, 2003

Respectfully submitted,

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Civil Case No. C038753

CERTIFICATE OF COMPLIANCE

Pursuant to the Court of Appeal of the State of California, Third Appellate District, Appellate District Rule 14(c)(1), California Rules of Court, as amended January 1, 2002, I certify that all text in the attached Petition for Rehearing of California Coastal Commission is proportionally spaced and contains 4,559 words.

Dated: January 14, 2003

Respectfully submitted,

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