

BEFORE THE CALIFORNIA COASTAL COMMISSION

In re Petition to California Coastal Commission  
for Repeal of After-the-Fact Permit Fee Regulation

---

**PETITION TO THE CALIFORNIA  
COASTAL COMMISSION FOR REPEAL OF  
AFTER-THE-FACT PERMIT FEE REGULATION**

---

JONATHAN C. CORN  
Cal. Bar No. 156983  
Axelson & Corn, P.C.  
160 Chesterfield Drive  
Suite 201  
Cardiff by the Sea, California 92007  
Telephone: (760) 944-9006  
Facsimile: (760) 454-1886  
joncorn@axelsoncorn.com

DAMIEN M. SCHIFF  
Cal. Bar No. 235101  
Pacific Legal Foundation  
930 G Street  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747  
dms@pacificlegal.org

Attorneys for Petitioner Beach & Bluff Conservancy

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
INTEREST OF PETITIONERS .....	1
BACKGROUND .....	2
ARGUMENT .....	3
THE AFTER-THE-FACT PERMIT FEE REGULATION SHOULD BE REPEALED BECAUSE THE COASTAL ACT DOES NOT AUTHORIZE IT .....	3
I. THE ADMINISTRATIVE PROCEDURE ACT PROHIBITS ULTRA VIRES REGULATIONS .....	3
II. PROCESSING AFTER-THE-FACT PERMITS DOES NOT REQUIRE TWO TO FIVE TIMES THE EFFORT FOR COMPARABLE BEFORE-THE-FACT PERMITS .....	4
III. THE COMMISSION’S POWER TO PENALIZE PROPERTY OWNERS DOES NOT EXTEND TO PERMITTING FEES .....	7
CONCLUSION .....	9
CERTIFICATION .....	11

## TABLE OF AUTHORITIES

**Page**

### Cases

<i>Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd.</i> , 13 Cal. 4th 1017 (1996) .....	9
<i>Bearden v. U.S. Borax, Inc.</i> , 138 Cal. App. 4th 429 (2006) .....	3-4
<i>California Beer &amp; Wine Wholesalers Ass'n v. Dep't of Alcoholic Beverage Control</i> , 201 Cal. App. 3d 100 (1988) .....	4
<i>Dyna-Med, Inc. v. Fair Employment &amp; Housing Comm'n</i> , 43 Cal. 3d 1379 (1987) .....	8-9
<i>Henderson v. Mann Theatres Corp.</i> , 65 Cal. App. 3d 397 (1976) .....	9
<i>LT-WR, L.L.C. v. Cal. Coastal Comm'n</i> , 152 Cal. App. 4th 770 (2007) .....	6
<i>Pulaski v. California Occupational Safety &amp; Health Standards Bd.</i> , 75 Cal. App. 4th 1315 (1999) .....	4
<i>San Diego Gas &amp; Elec. Co. v. San Diego Cnty. Air Pollution Control Dist.</i> , 203 Cal. App. 3d 1132 (1988) .....	4
<i>Terhune v. Superior Court</i> , 65 Cal. App. 4th 864 (1998) .....	4
<i>Transworld Sys., Inc. v. Cnty. of Sonoma</i> , 78 Cal. App. 4th 713 (2000) .....	4

### Statutes

Gov't Code § 11340.6 .....	1, 10
§ 11340.7 .....	4, 10
§ 11342.1 .....	3, 9

	<b>Page</b>
§ 11342.2 .....	3, 9
Pub. Res. Code § 30620(c)(1) .....	4, 7-8
§ 30820 .....	8-9
§ 30821 .....	8, 10
§ 30821(a) .....	8
§ 30821(c) .....	8
§ 30821(h) .....	8

### **Regulations**

Cal. Code Regs. tit. 14 § 13055(d) (2014) .....	1, 9
§ 13055(d) (1992) .....	2, 5
§ 13055(d)(2) (2014) .....	2, 7

### **Miscellaneous**

Appeal Staff Report for A-2-SMC-11-041 & A-2-SMC-11-040 (Hodge, San Mateo Co.) (Dec. 2013) .....	6
Revisions to the Statement of Reasons for Proposed Amendments of the California Coastal Commission's Filing Fee Regulations (2008) .....	5
Staff Report for 3-12-018 (Gravelle's Boat Yard, Moss Landing) (June 2013) .....	6
Staff Report for 5-12-292 (Oglivie & Svrcek, Newport Beach) (Sept. 2013) .....	6
Staff Report: Permit Amendment for A-5-RPV-93-005-A21 (VH Property Corp.) (July 2014) .....	6

## **INTRODUCTION**

Pursuant to Government Code section 11340.6, the Beach and Bluff Conservancy hereby petitions the California Coastal Commission for the repeal of the Commission's after-the-fact permit fee regulation, Cal. Code Regs. tit. 14, § 13055(d). Under this regulation, applicants for after-the-fact coastal development permits are presumptively required to pay five times, and under no circumstance less than twice, the permit fee for a comparable before-the-fact permit. This regulation should be repealed because the Coastal Act does not authorize it. The regulation operates as a de facto penalty for property owners who, the Commission alleges, committed development without first obtaining a permit, or who in good faith acquired property with unpermitted development on it. The Act, however, sets forth specific procedures by which the Commission may impose monetary penalties on a property owner. Because the Act does not authorize the Commission to assess penalties against landowners as part of a permit processing fee, the Commission's after-the-fact permit fee regulation is ultra vires and should be repealed.

## **INTEREST OF PETITIONERS**

The Beach and Bluff Conservancy is a mutual benefit corporation that represents the interests of coastal landowners. Formed in 1998, its broad mission is to restore, rebuild, maintain, and preserve the safety, beauty, and joy

of, and access to, beaches and bluffs for the benefit of everyone. Its supporters' concerns over fairness for coastal landowners, coupled with at least one supporter's personal experience with the after-the-fact permitting process, support the Conservancy's interest in the repeal of the Commission's after-the-fact permit fee regulation.

### **BACKGROUND**

In 1992, the Commission enacted a regulation requiring all after-the-fact permit applicants to pay double the fee for comparable before-the-fact permit applications, unless the executive director determined that the permit "could be processed by staff without significant additional review time resulting from the processing of the violation." Cal. Code Regs. tit. 14, § 13055(d) (1992). In 2008, the Commission amended the regulation to presumptively impose a fee five times that charged for before-the-fact permits. Although the executive director retains the discretion to reduce the fee in certain circumstances, the amended regulation provides that in no instance can the fee be less than double that for a before-the-fact permit. *See id.* § 13055(d)(2) (2014). Thus, under the amended regulation, after-the-fact permit fee applicants can be expected to pay a sum considerably greater for

their permits than before-the-fact permit applicants seeking approval for the same development. That is true even if the applicant had no role in the alleged unpermitted development, and acquired the property in good-faith without knowledge of any alleged unpermitted development.

## **ARGUMENT**

### **THE AFTER-THE-FACT PERMIT FEE REGULATION SHOULD BE REPEALED BECAUSE THE COASTAL ACT DOES NOT AUTHORIZE IT**

The Commission's after-the-fact permit fee regulation is punitive. The Coastal Act, however, does not authorize the assessment of penalties as part of a permit fee. Accordingly, the regulation is ultra vires and should be repealed.

## **I**

### **THE ADMINISTRATIVE PROCEDURE ACT PROHIBITS ULTRA VIRES REGULATIONS**

The Administrative Procedure Act prohibits agencies from exercising any powers not delegated by the Legislature: no regulation "is valid or effective unless consistent and not in conflict with the statute." Gov't Code § 11342.2. Regulations must "be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." *Id.* § 11342.1. *See Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 436 (2006) ("[T]he rulemaking power of an administrative agency does not permit the

agency to exceed the scope of authority conferred on the agency by the Legislature.”) (citation omitted). Whatever its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with its governing statutes. *E.g., Terhune v. Superior Court*, 65 Cal. App. 4th 864 (1998); *Pulaski v. California Occupational Safety & Health Standards Bd.*, 75 Cal. App. 4th 1315, 1341 (1999); *Transworld Sys., Inc. v. Cnty. of Sonoma*, 78 Cal. App. 4th 713, 717 (2000). Therefore, regulations that “alter or amend the [governing] statutes or enlarge or restrict the agency’s statutory power” are invalid. *California Beer & Wine Wholesalers Ass’n v. Dep’t of Alcoholic Beverage Control*, 201 Cal. App. 3d 100, 106-07 (1988).

## II

### **PROCESSING AFTER-THE-FACT PERMITS DOES NOT REQUIRE TWO TO FIVE TIMES THE EFFORT FOR COMPARABLE BEFORE-THE-FACT PERMITS**

The Coastal Act authorizes the Commission to charge reasonable filing fees designed to reimburse the Commission for the expenses of processing permit and other applications.<sup>1</sup> *See* Pub. Res. Code § 30620(c)(1). The

---

<sup>1</sup> When establishing fee rates, an agency must “prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned.” *San Diego Gas & Elec. Co. v. San Diego Cnty. Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1146 (1988). The Conservancy requests that in the response to this Petition, *cf.* Gov’t Code § 11340.7, the Commission set forth the analysis, if any, on which the Commission relied to determine that the after-the-fact permit fee provision is designed only to generate those funds necessary to reimburse the  
(continued...)



Commission's original after-the-fact permit fee regulation presumptively imposed a double multiplier, but nevertheless gave the executive director discretion to reduce the multiplier to zero if the processing of the application would not take "significant additional review time." Cal. Code Regs. tit. 14, § 13055(d) (1992). In the 2008 amendments to the regulation, the Commission asserted that review of after-the-fact permit applications "require[s] more review than normal permits," because "more site visits than usual are required to analyze the site as it would have been" before the development, and because it is "far more difficult to assess the environmental impacts and to devise conditions for mitigating environmental impacts after development has occurred." *See* Revisions to the Statement of Reasons for Proposed Amendments of the California Coastal Commission's Filing Fee Regulations 14 (2008).

After-the-fact permit applications, however, do not require twice as much effort, much less five times more effort, than comparable before-the-fact permit applications.<sup>2</sup> Given the Commission's policy of processing after-the-

---

<sup>1</sup> (...continued)

Commission for the administrative and processing costs associated with after-the-fact permits.

<sup>2</sup> A Public Records Act request to the Commission seeking "all documents showing how the Commission determined that presumptively charging five times the regular fee for after-the-fact permit applications, and in all such cases no less than twice the regular fee" was appropriate produced nothing of (continued...)

fact permit applications as if they were before-the-fact permit applications,<sup>3</sup> processing after-the-fact permit applications presumably requires no more work than that for comparable before-the-fact permit applications. *Cf. LT-WR, L.L.C. v. Cal. Coastal Comm'n*, 152 Cal. App. 4th 770, 796-97 (2007) (“In order to enable the Commission to protect coastal resources, and to avoid condoning unpermitted development, the Commission properly reviewed the application as though the unpermitted development had not occurred.”).

Although after-the-fact permit applications may require hypothetical reconstruction (“What did the project site look like before the alleged

---

<sup>2</sup> (...continued)

relevance except for the conclusory staff report assertions quoted in the text. *See* Exhibit 1.

<sup>3</sup> *See, e.g.*, Staff Report: Permit Amendment for A-5-RPV-93-005-A21 (VH Property Corp.), at 2 (July 2014) (“When the Commission evaluates permits for development that has already taken place, it must evaluate the development as if it had not taken place.”); Appeal Staff Report for A-2-SMC-11-041 & A-2-SMC-11-040 (Hodge, San Mateo Co.), at 25 (Dec. 2013) (“[S]ince the fill of wetlands and the removal of riparian and wetland vegetation were undertaken without the required [coastal development permit], the Commission reviews the [coastal development permit] application based on the resources that existed prior to unpermitted activities. Therefore, the analysis below is based on the assumption that the wetlands and the extent of riparian habitat which existed on the property in 2004 still exist . . . .”); Staff Report for 5-12-292 (Oglivie & Svrcek, Newport Beach), at 2 (Sept. 2013) (“Staff has considered the existing unpermitted bulkhead, pool and spa as if they do not exist and thus, the proposal is for new development of two homes with one pool and bulkhead . . . .”); Staff Report for 3-12-018 (Gravelle’s Boat Yard, Moss Landing), at 9 (June 2013) (“Although the development exists, it has not previously been authorized by a [coastal development permit], and therefore, for Coastal Act analytical purposes, the evaluation of the proposed development is as if it is not yet in place.”).

unpermitted development?”), there is no reason why such paper reconstruction cannot be provided by the after-the-fact permit applicant. Moreover, even if some after-the-fact permits require more processing time to reconstruct the permit’s baseline, they may also save time: the impacts of the “proposed” development are easier to assess and no longer speculative, because they already exist. The Commission simply does not have sufficient evidence to conclude that the after-the-fact permit application multiplier produces a “reasonable filing fee.” Pub. Res. Code § 30620(c)(1). The Conservancy must therefore conclude that the real reason for the after-the-fact permit fee multiplier—which applies no matter how insignificant the alleged unpermitted development—is to penalize.<sup>4</sup>

### III

#### **THE COMMISSION’S POWER TO PENALIZE PROPERTY OWNERS DOES NOT EXTEND TO PERMITTING FEES**

The Commission does not have the power to impose a penalty as part of a permit fee. Rather, the Coastal Act authorizes only two ways by which the Commission can force someone to pay a penalty: following a judgment of the superior court, or following the issuance of an administrative penalty order.

---

<sup>4</sup> The regulation as much as admits the punitive nature of the fee multiplier in its allowance to the executive director to reduce the fee if the after-the-fact permit applicant was not the one responsible for the unpermitted development. *See* Cal. Code Regs. tit. 14, § 13055(d)(2). The innocence of the permit applicant has nothing to do with the cost to the Commission of processing the permit.

*See* Pub. Res. Code §§ 30820, 30821. Notably, both of these methods impose important limitations on the Commission’s punitive power not found in the permit fee process. Penalties for unpermitted development that do not implicate the Coastal Act’s public access provisions are committed to the sound discretion of a superior court judge—not the Commission. *See id.* § 30821(c). Although the Commission may assess penalties against landowners for violation of the Coastal Act’s public access provisions without first having obtained superior court approval, the Commission may only do so following a duly noticed hearing and a majority vote of the Commission, *id.* § 30821(a), and even then the alleged violator has 30 days to correct the violation before penalties can be assessed, *id.* § 30821(h).<sup>5</sup> None of these protections is afforded an applicant for an after-the-fact permit.

The Legislature has clearly limited the circumstances under which and the procedures through which the Commission may assess penalties. Pursuant to the canon of statutory interpretation *expressio unius*, no other provision of the Coastal Act—including the provision to charge permit fees, Pub. Res. Code § 30620(c)(1)—should be read impliedly to authorize alternative methods of penalty assessment. *Cf. Dyna-Med, Inc. v. Fair Employment &*

---

<sup>5</sup> That the Legislature only recently granted the Commission the power to issue *any* penalty orders (and those only for alleged public access violations) underscores that the Coastal Act’s methods for penalty assessment should be strictly construed. *Cf. Dyna-Med, Inc. v. Fair Employment & Housing Comm’n*, 43 Cal. 3d 1379, 1389 (1987) (“An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld.”).

*Housing Comm'n*, 43 Cal. 3d 1379, 1391 n.13 (1987) (“‘[T]he expression of certain things in a statute necessarily involves exclusion of other things not expressed . . . .’”) (quoting *Henderson v. Mann Theatres Corp.*, 65 Cal. App. 3d 397, 403 (1976)). To interpret the Act’s fee provision to allow for punitive after-the-fact permit fees would frustrate the Legislature’s desire to constrain, procedurally and substantively, the Commission’s punitive power. *Cf. Am. Fed’n of Labor v. Unemployment Ins. Appeals Bd.*, 13 Cal. 4th 1017, 1034 (1996) (holding that, based on the Civil Code’s express authorization for superior court judges to award interest on wrongfully withheld unemployment benefits, a state agency had no implied authority to award the same through its own administrative process); *Dyna-Med*, 43 Cal. 3d at 1392 (refusing to authorize an implied power for an administrative agency to assess punitive damages).

## CONCLUSION

The Administrative Procedure Act forbids the enforcement of regulations that exceed the authority granted by, or that are in conflict with, their purportedly authorizing statute. *See* Gov’t Code §§ 11342.1, 11342.2. The Commission’s after-the-fact permit fee regulation, Cal. Code Regs. tit. 14, § 13055(d), falls within this prohibition because it imposes a de facto penalty for owners of alleged unpermitted development outside the procedures that the Coastal Act authorizes for penalty assessment. *Cf.* Pub. Res. Code §§ 30820,

30821. Therefore, the Conservancy petitions the Commission to repeal the regulation. *Cf.* Gov't Code § 11340.6.

Pursuant to Government Code section 11340.7, the Commission has thirty days from the receipt of this Petition to set a hearing on the Petition or to explain in writing why the Commission denies the Petition. The Conservancy looks forward to the Commission's prompt response.

DATED: November 5, 2014.

Respectfully submitted,

JONATHAN C. CORN  
DAMIEN M. SCHIFF

By   
DAMIEN M. SCHIFF

Attorneys for Petitioner  
Beach & Bluff Conservancy

## CERTIFICATION

I, Tawnda Elling, certify that I have submitted a copy of this petition and all attachments to the state agency which has issued, used, enforced, or attempted to enforce the purported underground regulation:

Dr. Charles Lester  
Executive Director  
California Coastal Commission  
45 Fremont Street  
Suite 2000  
San Francisco, CA 94105-2219  
(415) 904-5200

  
TAWNDA ELLING

# **EXHIBIT 1**





# PACIFIC LEGAL FOUNDATION

September 8, 2014

Jessica Reed  
Legal Analyst  
California Coastal Commission  
San Francisco Division

**VIA FACSIMILE**  
**(415) 904-5400**

**Re: Follow-Up Public Records Act Request**

Dear Ms. Reed:

In 2008, the California Coastal Commission amended its after-the-fact permit fee regulation to require that the application fee for an after-the-fact permit should be presumptively five times the fee for a comparable before-the-fact permit application, and that in no circumstance should the fee be less than two times the fee for a comparable before-the-fact application. See Cal. Code. Regs. tit. 14, § 13055(d).

As a follow-up public records act request, please provide all documents showing how the Commission determined that presumptively charging five times the regular fee for after-the-fact permit applications, and in all such cases no less than twice the regular fee, conforms to Public Resources Code section 30620(c)(1), which authorizes the Commission to charge only a "reasonable filing fee for the processing by the commission of an application for a coastal development permit."

Please let me know what the fee is to obtain the copies, or if you have any questions. Thank you for your assistance.

Sincerely

KIREN MATHEWS  
Pacific Legal Foundation  
Litigation Paralegal  
[kkm@pacificlegal.org](mailto:kkm@pacificlegal.org)  
Tele: 916.503.8993

**CALIFORNIA COASTAL COMMISSION**

45 FREMONT, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
VOICE (415) 904-5200  
FAX (415) 904-5400  
TDD (415) 597-5885



September 11, 2014

Kiren Mathews  
Pacific Legal Foundation  
930 G Street  
Sacramento, CA 95814

Re: Your Public Records Act Request dated September 8, 2014

Dear Ms. Mathews:

This responds to your above-referenced request for records of the California Coastal Commission (“Commission”). You have requested regarding the 2008 regulation amendments by the Commission with regard to 14 CCR 13055(d).

We have two rule-making files for the 2008 filing fee regulation changes, the first of which contains 33 pages, and the second of which contains 46 pages and the February 2008 report with exhibits, which is available on the Commission’s website at <http://documents.coastal.ca.gov/reports/2008/2/F2.5a-2-2008.pdf>. The copying cost, at 27¢ per page, without the February report, is \$21.33. Along with the February 2008 report, the other reports on the 2008 regulation amendments are available at <http://documents.coastal.ca.gov/reports/2007/7/F11a-7-2007.pdf> (hearing available at <http://www.cal-span.org/cgi-bin/archive.php?owner=CCC&date=2007-07-13>) and <http://documents.coastal.ca.gov/reports/2007/11/W3a-11-2007.pdf> (hearing available at <http://www.cal-span.org/cgi-bin/archive.php?owner=CCC&date=2007-11-14>). The February 2008 hearing is available at <http://www.cal-span.org/cgi-bin/archive.php?owner=CCC&date=2008-02-08>.

If you would like copies of the rule-making files, please send a check payable to the California Coastal Commission in the amount of \$21.33 and directed to my attention. Upon receipt, I will make and mail the copies to you.

Please let me know if you have any questions.

Sincerely,

  
Jessica Reed  
Senior Legal Analyst