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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF ORANGE

11 COASTAL RIGHTS COALITION,
12
13 Petitioner and Plaintiff,
14
15 v.
16
17 CALIFORNIA COASTAL COMMISSION,
18
19 Respondent and Defendant.

No. 30-2018-00994285-CU-WM-CJC

**PETITIONER AND PLAINTIFF'S
OPPOSITION TO MOTION FOR
JUDGMENT ON THE PLEADINGS**

Date: May 23, 2019
Time: 2:00 p.m.
Department C-12
Honorable Layne H. Melzer

Trial Date: December 16, 2019
Action Filed May 22, 2018

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Baillargeon v. Department of Water & Power*, 69 Cal. App. 3d 670 (1977) 8

4 *California Coastal Comm’n v. Office of Admin. Law*, 210 Cal. App. 3d 758 (1989)..... 14, 16

5 *California Hotel & Motel Ass’n v. Industrial 342 Welfare Comm’n*,

6 25 Cal. 3d 200 (1979) 11-12

7 *Capen v. Shewry*, 155 Cal. App. 4th 378 (2007)..... 14

8 *Gill v. Rich*, 128 Cal. App. 4th 1254 (2005) 8

9 *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.*,

10 44 Cal. App. 4th 194 (1996)..... 8

11 *Ludgate Ins. Co. v. Lockheed Martin Corp.*, 82 Cal. App. 4th 592 (2000) 8, 14

12 *McAllister v. California Coastal Comm’n*, 169 Cal. App. 4th 912 (2008),

13 *as modified* (Jan. 20, 2009) 13

14 *Modesto City Schools v. Education Audits Appeals Panel*,

15 123 Cal. App. 4th 1365 (2004)..... 15

16 *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324 (2006) 9-10, 12

17 *Pacific Legal Foundation v. California Coastal Comm’n*, 33 Cal. 3d 158 (1982)..... 14, 16

18 *People ex rel. Cochran v. Bd. of Educ. of Oakland*, 54 Cal. 375 (1880)..... 13

19 *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996) 8, 10, 15

20 *Wilson v. Hidden Val. Mun. Water Dist.*, 256 Cal. App. 2d 271 (1967)..... 13

21 **Statutes**

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1 Pub. Res. Code § 30620(a)(3) 14

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7

8 Caldwell, Meg & Segall, Craig Holt, *No Day at the Beach: Sea Level Rise,*
9 *Ecosystem Loss, and Public Access Along the California Coast,*
34 Ecology L.Q. 533 (2007) 7

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Cardiff, Todd T., *Conflict in the California Coastal Act: Sand and Seawalls,*
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12 Reiblich, Jesse & Hartge, Eric H., *The Forty-Year-Old Statute: Unintended*
13 *Consequences of the Coastal Act and How They Might Be Addressed,*
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INTRODUCTION

Petitioner and Plaintiff Coastal Rights Coalition (Coalition) filed this action for a traditional writ of mandate and declaratory relief to contest the California Coastal Commission's (Commission) adoption of an underground regulation. Since at least 2010, the Commission has developed and implemented a general rule by which it conditions permits for new residential oceanfront homes and significant remodels on a waiver of the property owner's rights to protect that development in the face of future natural hazard or erosion (*e.g.*, by building a seawall, rock revetment, or bluff stabilization device). This "Waiver Rule" has been articulated in written form in dozens of Commission staff reports and in other Commission publications. It is an illegal, underground regulation because the Commission has not subjected it to the rulemaking requirements of the California Administrative Procedure Act (APA) and the Waiver Rule does not fall into any exception from those requirements. The Waiver Rule imposes a significant burden on coastal property owners. Losing the right to future shoreline protection means that homes and the beachgoing public will be imperiled if storms, erosion, or damage to neighboring properties creates instability on oceanfront bluffs or along residential sections of the beach. The Commission's use of this wide-reaching and significant policy merits public notice and the kind of public discussion intended by the APA before its continued implementation is allowed.

In response, the Commission has filed this Motion for Judgment on the Pleadings (Motion). As the Commission's Answer and the Motion indicate, this matter is rife with factual disputes. Despite the Coalition's identification of at least 139 permits in which the Waiver Rule has been applied, the Commission's Answer disputes even the existence of the policy. The Commission seeks to evade discovery and an argument on the merits of this controversy on three grounds, each of which fails.

First, it views this action as a time-barred collateral attack on the 139 permit above-noted permit decisions. But the Coalition has made no collateral attack on any past permit decision. If the Court granted the complete remedy requested by the Coalition's complaint, it would not disturb a single past permit decision—it would only require the Commission to subject its Waiver Rule to the notice, comment, and hearing requirements of the APA before implementing it in the future.

1 requirements of Coastal Act sections 30253 and 30235. The waiver is implemented as a deed
2 restriction that must be recorded as a condition of receiving the permit.

3 The Waiver Rule is general as to a large but limited class of new and substantially
4 redeveloped oceanfront (bluff-top or beachfront) residential property. The Commission does not
5 apply the waiver condition to other tidal waterways like bays and channels, or to inland properties.
6 Verified Petition for Writ of Mandate and Compl. (Petition and Compl.) ¶ 13. Between September
7 2010 and April 2018, the Commission issued 160 coastal development permits for residential
8 construction on oceanfront (beachfront or bluff-top) parcels. *Id.* ¶ 15. Of these, 139 permits include
9 a condition requiring that the applicant give up all rights to build any future shoreline protective
10 device. *Id.* Based on the Coalition’s review, those permits that do not contain the waiver condition
11 were for development on Mission Beach (which is protected by an existing seawall), were for minor
12 projects too insignificant to meet the Commission’s threshold for “new” development, or because
13 litigation over the conditions caused the Commission to remove it from a small number of permits.
14 *Id.*

15 The Commission’s permitting practice establishes a clear and consistent application of the
16 Waiver Rule dating back at least eight years, if not longer. Petition and Compl. ¶ 16 (citing Cal.
17 Coastal Comm’n, *Sea Level Rise Policy Guidance* 166 (2015) (The Commission has “over the last
18 15-20 years, generally required that applicants proposing new development in hazardous shoreline
19 locations waive any rights under Section 30235 (or related LCP policies) to build shoreline
20 protection for the proposed new development.”); Jesse Reiblich & Eric H. Hartge, *The Forty-Year-*
21 *Old Statute: Unintended Consequences of the Coastal Act and How They Might Be Addressed*, 36
22 *Stan. Envtl. L.J.* 63, 70 (2016) (Commission has for some years “require[ed] ‘no future armoring’
23 conditions in permits it issues.”); Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea*
24 *Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 *Ecology L.Q.* 533,
25 564 (2007) (“The Commission has [. . .] plac[ed] ‘no future armoring’ conditions in all recent
26 permits.”) Todd T. Cardiff, *Conflict in the California Coastal Act: Sand and Seawalls*, 38 *Cal. W.*
27 *L. Rev.* 255, 278 (2001) (observing that the “current policy of the Coastal Commission” is to

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1 condition permits for houses on coastal bluffs on “a promise not to build shoreline protection in the
2 future.”)).

3 STANDARD OF REVIEW

4 A motion for judgment on the pleadings attacks defects disclosed on the face of the
5 pleadings. *Gill v. Rich*, 128 Cal. App. 4th 1254, 1264 n.9 (2005); Code Civ. Proc. § 438(d). The
6 task of the Court is to determine whether the complaint states a cause of action. *Lance Camper*
7 *Manufacturing Corp. v. Republic Indemnity Co.*, 44 Cal. App. 4th 194, 198 (1996). The Court must
8 give the complaint a reasonable interpretation by reading all of its parts as a whole. *Ludgate Ins.*
9 *Co. v. Lockheed Martin Corp.*, 82 Cal. App. 4th 592, 602 (2000). The Court must also accept as
10 true and liberally construe the facts alleged by the plaintiff, without concern about “a plaintiff’s
11 possible inability to prove the claims.” *Id.*; *Baillargeon v. Department of Water & Power*, 69 Cal.
12 App. 3d 670, 676 (1977).

13 ARGUMENT

14 A correct reading of the pleadings demonstrates plausible allegations supporting valid
15 causes of action. The APA precludes the enforcement of any agency “regulation” that has not been
16 subjected to the APA’s rulemaking procedures and that is not otherwise exempt from those
17 procedures. Gov’t Code § 11340.5(a). The Act defines “regulation” very broadly to encompass any
18 rule or standard of general application that interprets the law or makes it specific. *See* Gov’t Code
19 § 11342.600; Cal. Code Regs. tit. 1, § 250. A rule constitutes a regulation when (1) the agency
20 intends to apply the rule generally and (2) the rule interprets a law that the agency administers.
21 *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996). The Commission’s
22 Waiver Rule bears both characteristics of a regulation. The Coalition’s petition alleges that the
23 Commission has failed to promulgate the Waiver Rule in compliance with APA procedures and
24 asks that the agency be stopped from enforcing the Waiver Rule until it does so. The Commission’s
25 motion is a series of red herrings.

26 Contrary to the Commission’s assertions, the Coalition is not attempting to collaterally
27 attack past permit decisions. This lawsuit is not, therefore, an attempt to resurrect time-barred
28 administrative mandate claims. Nor is it an attempt to undermine the Commission’s adjudicative

1 discretion to approve or deny permits. Rather, the Coalition’s lawsuit seeks to make the
2 Commission comply with the APA when the agency promulgates a new rule of general application.
3 A writ of traditional mandate (Code Civ. Proc. § 1085) and declaratory judgment are the correct
4 means of challenging the Commission’s quasi-legislative actions, such as the sub silentio
5 promulgation of the Waiver Rule at issue here. Finally, the APA applies to quasi-legislative actions
6 of the Commission; the Waiver Rule does not fall into an exception to the APA established for the
7 Commission’s creation of “interpretive guidelines.”

8 **I. The Coalition is not collaterally attacking past permit decisions**

9 The Commission claims that the Coalition’s action is improper because it seeks to invalidate
10 past permit decisions that relied on the Waiver Rule. Thus, the Commission concludes that the
11 action is time-barred because permit decisions must be contested by a petition for writ of mandate
12 (Code Civ. Proc. § 1094.5) within 60 days of the Commission’s final decision on the permit. *See*
13 Motion at 12-13. The Commission misunderstands the Coalition’s Complaint and its objection has
14 no merit.

15 The Coalition does not seek to collaterally attack any past permit decisions. It seeks only to
16 force the Commission to comply with the APA process when it acts in a quasi-legislative capacity
17 to promulgate a new rule of general application, particularly the Waiver Rule challenged here. The
18 Court could grant all the relief requested by the Coalition’s pleading and it would not disturb a
19 single past permit decision of the Commission or interfere with its discretion to consider current
20 permits.

21 The relief requested is therefore proper and consistent with precedent. *See Morning Star*
22 *Co. v. State Bd. of Equalization*, 38 Cal. 4th 324 (2006). In *Morning Star*, a business sought relief
23 from an agency’s decision that all corporations with more than 50 employees were subject to a
24 state-imposed hazardous material fee, because they all “use, generate, store, or conduct activities
25 in this state related to hazardous materials.” *Id.* at 328. The California Supreme Court held that the
26 decision flowed from a more general rule adopted by the agency about “how a certain class of cases
27 will be decided.” *Id.* at 334. Because that Rule was not promulgated according to the APA process,
28 the Supreme Court held that it was an underground regulation. *Id.* The proper remedy was not,

1 however, to invalidate all past decisions premised on that rule, but rather to declare the regulation
2 invalid and remand with a direction “to correct the deficiency . . . by subjecting [the regulations] to
3 APA procedures.” *Id.* at 342. The Coalition seeks similar relief.

4 Nowhere in its pleading does the Coalition ask to overturn any past permit decision. It only
5 asks that the Commission be stopped from continuing to enforce the Waiver Rule until it has
6 complied with notice and hearing requirements of the APA. *See* Petition and Compl. at p. 10. This
7 relief is not what would be afforded in review of a quasi-adjudicative permit decision. Rather, the
8 Coalition asks that the Commission abandon the blanket policy of conditioning a large and discrete
9 class of oceanfront residential development permits on a waiver of rights to future shoreline
10 protection until that policy is promulgated according to the APA. Enjoining the Commission from
11 implementing the Waiver Rule leaves the Commission entirely free to make individualized
12 determinations based on the facts present in each case as to whether such a waiver is appropriate in
13 that case.

14 To the extent that the Commission suggests that the only relief available to remedy the
15 underground Waiver Rule is to invalidate all permit decisions that relied on it, the California
16 Supreme Court has already rejected a similar suggestion in *Tidewater Marine*. There, the Court
17 explicitly refused to overturn an agency’s individual decisions, even though they were based on an
18 illegal, underground regulation. *Tidewater Marine*, 14 Cal. 4th at 576 (“The DLSE’s policy may
19 be void, but the underlying wage orders are not void.”). No fair reading of the Coalition’s pleading
20 supports the Commission’s contention that it is a collateral attack on any final permitting decision
21 of the Commission. Therefore, the Commission’s argument that this action is a disguised, time-
22 barred administrative mandamus action must be rejected.

23 **II. A petition for traditional writ of mandate is the correct way to**
24 **challenge the Commission’s refusal to conform its quasi-legislative**
25 **rulemaking to APA requirements**

26 The Commission’s second argument asserts that no traditional writ of mandate can be issued
27 in this case because it would impermissibly deprive the government of its authority to exercise
28 discretion in making adjudicative decisions on coastal development permits. Once again, the
Commission proceeds by mischaracterizing the Coalition’s claim.

1 As explained above, the Coalition is not challenging any adjudicative permit decision that
2 the Commission has made or will make. Were the Coalition granted the entire relief requested, no
3 permit decision by the Commission would be overturned. The Commission’s legal authority to
4 exercise discretion in its duty to make permitting decisions is not at issue in this case.

5 Rather, the Coalition challenges only the Commission’s quasi-legislative adoption of an
6 underground regulation. Specifically, the Commission has adopted a rule arising from its
7 understanding of sections 30253 and 30235 of the Coastal Act without subjecting that rule to the
8 procedures of the APA. It applies that rule prospectively—generally and consistently—in the
9 approval or denial of a particular and identifiable class of coastal development permit applications.
10 To the extent that past permit decisions are involved in this case, they are relevant only as evidence
11 establishing the existence of the Waiver Rule.

12 The Coalition’s pleading states that the Waiver Rule:

13 has been applied at least 139 times since 2010 and has been articulated as a
14 consistent rule in dozens of Commission staff reports, as well as formal
15 guidance documents. Accordingly, the Waiver Rule is an underground
16 regulation. The Coalition seeks a declaration that the rule is illegal under the
APA, Gov’t Code § 11340.5(a), and asks for a writ of mandamus compelling
the agency to follow the rulemaking requirements of the APA before continuing
to enforce the rule.

17 Petition and Compl. ¶ 2. Moreover, the Coalition alleges that the Waiver Rule’s “application does
18 not depend on a case-specific exercise of discretion, nor has it changed in response to several
19 adjudications voiding waiver conditions in particular cases.” *Id.* ¶ 18(a). Further, it alleges that, “by
20 imposing the Waiver Rule, without subjecting the Rule to the requirements of the APA, the
21 Commission has failed to act in the manner required by law.” *Id.* ¶ 35. It is plain from the face of
22 the Coalition’s pleading that it is the promulgation of the Waiver Rule, and not any individual
23 permit decisions, that the Coalition alleges to be unlawful and the subject of this action.

24 A traditional writ of mandate is the correct way to challenge the Commission’s failure to
25 conform its quasi-legislative rulemaking to APA requirements. The California Supreme Court has
26 repeatedly issued writs of mandate requiring government agencies to stop using invalid rules. *See,*
27 *e.g., California Hotel & Motel Ass’n v. Industrial 342 Welfare Comm’n*, 25 Cal. 3d 200, 216 (1979)
28 (directing the issuance of a writ of mandate to compel agency to correct the legal deficiencies of a

1 rule within 120 days). Contrary to the Commission’s worry, the issuance of a traditional writ of
2 mandate by this Court would not disturb any valid discretionary authority of the Commission—the
3 remedy would only require the Commission to follow the law when it adopts rules that apply
4 generally in the exercise of its duties. *See, e.g., Morning Star*, 38 Cal. 4th at 342 (“[W]e will allow
5 the Department a reasonable opportunity to correct the deficiency in its hazardous material fee
6 regulations by subjecting them to APA procedures.”).

7 The Coalition does not seek to control the Commission’s discretionary powers. Rather, it
8 seeks to end the Commission’s refusal to submit a rule to the requirements of the law. The
9 Coalition’s request for a traditional writ of mandate is therefore proper and this Court has the power
10 to provide that remedy. *Id.*; *California Hotel & Motel Ass’n*, 25 Cal. 3d at 216.

11 **III. The Commission’s underground regulation is subject to the APA**

12 The Commission next attempts to support its motion with an argument that the Waiver Rule
13 is not subject to the APA. The thrust of the argument is that the Commission is not applying a rule
14 at all, and that the Coalition’s objection is merely to the way that the Commission exercises its
15 adjudicative discretion over coastal development permits. Adjudicative permit decisions, it then
16 concludes, are not subject to the APA. In the alternative, the Commission argues that the Waiver
17 Rule is a kind of “interpretive guideline” that is exempt from APA procedures. Both arguments
18 miss the mark. The first is a strawman, and both the first and second turn on a factual dispute about
19 the nature or existence of the Waiver Rule, a dispute that necessarily cannot be resolved on a motion
20 for judgment on the pleadings.

21 **A. The adoption of the Waiver Rule is distinct from its application to individual permits**

22 The Commission marshals precedent to support the proposition that it does not need to
23 comply with the APA when exercising quasi-judicial power to approve or deny permits. Motion at
24 15. The Coalition has alleged that the existence of the Waiver Rule is inferred from the
25 Commission’s unvarying imposition of the condition requiring coastal homeowners to waive rights
26 to future shoreline protection in 139 individual cases. The Commission believes, however, that no
27 “underground regulation [can] arise from [] quasi-judicial applications of law to specific facts.” *Id.*
28 But the Commission is wrong. Although the Waiver Rule is unwritten and expressed largely in the

1 context of hearings on individual permit applications, it was not *created* pursuant to the
2 Commission’s adjudicatory power. Although the application of the Waiver Rule may be
3 adjudicative and not subject to scrutiny under the APA, the creation of the Waiver Rule itself is a
4 quasi-legislative act that is indeed subject to the APA.

5 A quasi-judicial decision “determines what the law is, and what the rights or parties are,
6 with reference to transactions already had.” *Wilson v. Hidden Val. Mun. Water Dist.*, 256 Cal. App.
7 2d 271, 280 (1967) (quoting *People ex rel. Cochran v. Bd. of Educ. of Oakland*, 54 Cal. 375, 376
8 (1880)). In contrast, a quasi-legislative decision “prescribes what the law shall be in future cases
9 arising under it.” *Id.* When the Commission considers an individual permit, it applies existing
10 statutes and regulations to the permit application to determine the outcome. *McAllister v. California*
11 *Coastal Comm’n*, 169 Cal. App. 4th 912, 953 (2008), *as modified* (Jan. 20, 2009). The Coalition
12 alleges that the Commission is *applying the Waiver Rule* to these permit applications, which
13 determines the conditions imposed on those permits. That rule is, by definition, quasi-legislative,
14 because it “prescribes what the law shall be in future cases arising under it.” *Wilson v. Hidden Val.*
15 *Mun. Water Dist.*, 256 Cal. App. 2d at 280 (quoting *People ex rel. Cochran v. Bd. of Educ. of*
16 *Oakland*, 54 Cal. at 376).

17 A prosaic hypothetical is helpful to understanding what the Commission has done. Every
18 regulation that applies in some but not all cases operates only when predicate facts are determined
19 to exist. If the predicate is not present, the rule does not apply. For example, a local regulation
20 declaring that every dog shall be leashed in a public park is legislative in nature. It does not become
21 less of a regulation (or merely “adjudicative”) because the dog catcher must first make a factual
22 determination of whether an animal that he observes running without a leash is a canine before
23 issuing a ticket. So too with the Commission here: that it must determine facts about a particular
24 property as a predicate to applying the Waiver Rule does not change the rule, nor does it mean that
25 the rule is not real. Rather, it means that the Commission reviews the facts, enforcing the rule when
26 the predicate facts trigger its application; it does not apply where those predicate facts are not
27 present.

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1 Just because the Commission *applies* the Waiver Rule in the context of a “quasi-
2 adjudicative applications of the [Rule] to specific facts,” Motion at 16, does not mean that the
3 Waiver Rule is not legislative in character and subject to the APA. The Coalition has plausibly
4 alleged the existence of the Waiver Rule, documenting its application in 139 individual past permit
5 decisions and its expression in various Commission writings. To the extent that the Commission is
6 merely denying the existence or character of the Waiver Rule, it is pressing the merits of a factual
7 dispute that cannot be determined on this motion for judgment on the pleadings. On a motion for
8 judgment on the pleadings, such disputes of fact must be decided in favor of the plaintiff, without
9 concern about “a plaintiff’s possible inability to prove the claims.” *Ludgate*, 82 Cal. App. 4th at
10 602.

11 **B. The Waiver Rule is not exempted from the APA as an “interpretive guideline”**

12 The Commission argues in the alternative that the Waiver Rule is an “interpretive guideline”
13 under Public Resources Code section 30620(a)(3), which is exempted by Public Resources Code
14 section 30333 from the requirements of the APA. *See* Motion at 16-17. True enough, interpretive
15 guidelines are not subject to the APA. *See Pacific Legal Foundation v. California Coastal Comm’n*,
16 33 Cal. 3d 158 (1982), and *California Coastal Comm’n v. Office of Admin. Law*, 210 Cal. App. 3d
17 758 (1989)). But this APA exception is unavailing here as the Waiver Rule is not a mere
18 “interpretive guideline”—nor does the Commission treat it as such—and the Commission’s
19 claimed authorities are distinguishable on their facts.

20 The Waiver Rule represents the Commission’s understanding of what is mandated by the
21 terms of sections 30253(b) and 30235 of the Coastal Act, which govern permitting decisions for
22 new development that may require a protective device. Accordingly, the Commission’s policy
23 constitutes a “regulation” under the Administrative Procedure Act. *See Capen v. Shewry*, 155 Cal.
24 App. 4th 378, 383 (2007) (“An unwritten, generally applicable interpretation of an ambiguous
25 statute ‘amount[s] to a regulation’ subject to the APA.”). An interpretive guideline, by contrast, is
26 a flexible aid or tool that is “designed to assist local governments, the commission, and persons
27 subject to this chapter in determining how the policies of this division shall be applied in the coastal
28 zone.” Pub. Res. Code § 30620(a)(3).

1 The Commission cites an audit manual at issue in *Modesto City Schools v. Education Audits*
2 *Appeals Panel*, 123 Cal. App. 4th 1365, 1382 (2004), as an example of an interpretive guideline.
3 Motion at 15. In that case, the court of appeal held that the written audit guide was a tool that
4 auditors could use or ignore at their discretion, and therefore it was not a “rule of general
5 application” akin to a regulation. 123 Cal. App. 4th at 1365. But that is unlike the Waiver Rule at
6 issue here, which the Coalition has alleged to apply “generally to new oceanfront residential
7 development” and which has been “consistently applied [] to permit applications for such
8 development over the last years,” not as the result of “case-specific exercise[s] of discretion.”
9 Petition & Compl. ¶ 18(a). The Waiver Rule is a regulation because it is “intended as a rule of
10 general application” and “predicts how the agency will decide future cases.” *Tidewater Marine*, 14
11 Cal. 4th at 571.

12 Moreover, the Commission itself has not treated the Waiver Rule as an interpretive
13 guideline. While the Commission emphasizes that interpretive guidelines construing Chapter 3 of
14 the Coastal Act are exempt from APA procedures, it fails to mention that the Coastal Act provides
15 its own rulemaking process for such guidelines. Public Resources Code section 30620(b) states that
16 “[t]he Commission may, from time to time, [. . .] *after public hearing*, modify or adopt additional
17 [. . .] guidelines that the Commission determines to be necessary to better carry out the purposes of
18 the [Coastal Act].” (emphasis added). Yet, the Commission offers no allegation or evidence that it
19 has held any public hearing with respect to the Waiver Rule, and the Coalition knows of none. If
20 the Waiver Rule is an interpretive guideline, the Commission has never treated it as one and, even
21 assuming that it is a guideline rather than a regulation, the Commission has failed to proceed
22 according to law in implementing an underground *guideline*.

23 Perhaps most importantly, according to the Coalition’s allegations (which must at this stage
24 be accepted as true), the Commission does not treat the Waiver Rule as a flexible guide that may
25 be ignored, but as a mandatory regulation embodying (its legally untenable) interpretation of the
26 Coastal Act. The Commission is again simply raising an objection to well-pled factual allegations
27 in this motion for judgment on the pleadings, which objections cannot be ruled on by such a motion.

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1 Finally, the two cases cited by the Commission in support of its argument that the Waiver
2 Rule is “exempt from the APA as a matter of law,” Motion at 16, are easily distinguished. In *Pacific*
3 *Legal Foundation v. California Coastal Commission*, 33 Cal. 3d at 174, the California Supreme
4 Court held that the guidelines at issue were “not mandatory” because they did “not require the
5 Commission to impose access conditions in any particular circumstances, but rather adopt[ed] a
6 flexible approach” allowing the Commission to apply them or not on a case-by-case basis. Here,
7 however, the nature of the Waiver Rule and its unyielding application are the basic facts in dispute.
8 It would be inappropriate to avoid the merits of that question by assuming the Commission’s
9 argument to be true notwithstanding the Coalition’s contrary allegations. Similarly, in *California*
10 *Coastal Commission v. Office of Administrative Law*, 210 Cal. App. 3d at 761, both parties agreed
11 that the guidelines in dispute in the case were *guidelines*. There was no factual dispute as to whether
12 the relevant rules were regulations or guidelines and, therefore, the court determined that “there is
13 no reason to reach the question of whether the guidelines at issue . . . are ‘regulations’ within the
14 meaning of the APA.” *Id.*

15 CONCLUSION

16 For the foregoing reasons, the Coalition respectfully requests that the Commission’s Motion
17 for Judgment on the Pleadings be denied.

18 DATED: April 18, 2019.

19 Respectfully submitted,

20 LAWRENCE G. SALZMAN
21 DAMIEN M. SCHIFF

22 By /s/ Lawrence G. Salzman
23 LAWRENCE G. SALZMAN

24 *Attorneys for Petitioner and Plaintiff*
25 *Coastal Rights Coalition*

1 **DECLARATION OF SERVICE**

2 I, Tawnda Dyer, declare:

3 I am a resident of the State of California, residing or employed in Sacramento, California.

4 I am over the age of 18 years and am not a party to the above-entitled action.

5 My business address is 930 G Street, Sacramento, California 95814.

6 On April 18, 2019, I electronically served the attached PETITIONER AND PLAINTIFF'S
7 OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS by transmitting a true
8 copy via One Touch Legal's electronic filing and service system, and via Federal Express, on the
9 following recipient:

10 Andrew M. Vogel, Deputy Attorney General
11 California Department of Justice
12 300 S. Spring Street, Suite 1702
13 Los Angeles, CA 90013
14 Email: Andrew.Vogel@doj.ca.gov

*Attorney for Respondent and Defendant
California Coastal Commission*

15 I declare under penalty of perjury under the laws of the State of California the foregoing is
16 true and correct and this declaration was executed this 18th day of April, 2019, at Sacramento,
17 California.

18 
19 TAWNDA DYER