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January 24, 2005

The Honorable Chief Justice Ronald M. George and  
Honorable Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102

RE: *Marine Forests Society, et al. v. California Coastal Commission*  
California Supreme Court No. S113466  
(Court of Appeal, Third Appellate District Civil No. C038753)

Dear Chief Justice George and Associate Justices:

### **INTRODUCTION**

In its order of December 22, 2004, this Court requested that the parties file supplemental briefs on the effect on this case of the doctrine that appeals of injunctions are controlled by the law in effect at the time the Court issues its decision. In addition to the brief filed by petitioner California Coastal Commission (Commission), three other briefs were filed, one by respondent Marine Forests Society (MFS), one by amici California Building Industry Association, Home Builders Association of Northern California, the Building Industry Association of San Diego, and the California Association of Realtors (CBIA) and one by amicus Californians for Local Coastal Planning (CLCP). Each of these briefs requires only a summary response.

### **RESPONSE TO BRIEF OF MARINE FORESTS SOCIETY**

The most significant aspect of MFS's brief is its concession that courts of appeal in injunction cases should apply the law in effect at the time the court issues its decision. And MFS does not contest that it is seeking prospective injunctive relief in this case. Instead, MFS argues that application of this doctrine would not alter the outcome in this

case because both the former and amended versions of Public Resources Code section 30312 are unconstitutional, and even if this section, as amended, were constitutional, applying it to MFS and similarly situated parties would violate their due process rights. Neither argument is persuasive.

**A. MFS Has Reargued the Constitutional Issues.**

Most of MFS's brief reiterates and quotes arguments from its Answer Brief on the separation of powers issue. The parties and the amicus curiae, however, have fully briefed the merits of the constitutionality of the Commission's former and current appointment systems, and the Commission will not reargue the merits here.

**B. MFS's Discussion of "Due Process" Is Inapposite.**

In its only slightly new argument, MFS asserts that the current version of section 30312 is not retroactive and to apply it to MFS and similarly situated parties would violate their due process rights. Reiterating previous concerns, MFS also argues that, regardless of the constitutionality of section 30312 as amended, the Commission's decisions made before the section was amended are "null and void." These arguments demonstrate a fundamental lack of understanding of several important legal doctrines.

First, MFS misconstrues the application of the doctrine that appeals of injunctions are controlled by the law in effect at the time the Court issues its decision. While the Court requested the parties to address this doctrine we do not understand that the Court was implying that it would apply the amendment to section 30312 retroactively. To do this would be to engage in the fiction that the Commission had some different appointment structure when it rendered previous decisions. Because the de facto officer doctrine precludes challenges to Commission decisions made under its former appointment system (see p. 5 of the Commission's supplemental letter brief), it is unnecessary to reach the merits of the former system, making consideration of retroactivity irrelevant.

MFS next argues that because the Commission was unconstitutional before section 30312 was amended, all the many thousands of the Commission's decisions that occurred before the amendment took effect should be void *ab initio*. And, it continues,

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even if the de facto officer doctrine validates some of the Commission's past decisions, that doctrine does not apply to parties who timely alleged a separation of powers violation. MFS misinterprets the de facto officer doctrine when it claims it does not apply to cases in which parties timely alleged a constitutional violation. The many cases cited by the Commission demonstrate that the de facto officer doctrine applies regardless of whether there was a timely challenge to a decision. Irrespective of the constitutionality of the Commission's past appointment structure, none of its decisions under its former structure can be considered void *ab initio* or voided on any other grounds. (See COB, pp. 52-59.)

### **RESPONSE TO BRIEF OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION**

CBIA raises three main issues, each of which was also argued by MFS: (1) this Court should not apply the amendments to section 30312 retroactively; (2) the challenges on constitutional grounds to decisions that the Commission issued before section 30312 was amended are void *ab initio*; and (3) the amendments to section 30312 did not remedy the constitutional defects in the Commission's appointment scheme. These are the same arguments that MFS made in its letter brief and, as demonstrated, they fail for the same reasons that MFS's arguments fail.

In addition, CBIA asserts the rule that relief by injunction operates "in futuro" and should therefore not apply in this case because the amendments to section 30312 should not apply retroactively, CBIA, like MFS, misinterprets the concept of statutory retroactivity. For the reasons discussed above, retroactivity is not a consideration here and is not grounds for claiming that the "in futuro" rule should be ignored. As the Commission discussed in its supplemental letter brief at page 4, the doctrine that injunctive relief is governed by the law in effect at the time an appellate court renders its decision has been routinely followed by this Court, makes sense, and is properly applied in this case because MFS only sought and obtained prospective injunctive relief to remedy its complaints about the constitutionality of the Commission's appointment structure.

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**RESPONSE TO BRIEF OF  
CALIFORNIANS FOR LOCAL COASTAL PLANNING**

CLCP, in its amicus curiae brief, never directly responds to the Court's question of the effect of the doctrine that appeals of injunctions are controlled by the law in effect at the time the Court issues its decision. Instead, CLCP uses the Court's request for supplemental briefing on this specific issue as an opportunity to reply to the Commission's answer to CLCP's amicus brief. CLCP thus ignores not only the Court's question for supplemental briefing but also Rule 29.1(f) of the Rules of Court, which does not provide for replies by amici.

Instead of addressing the question posed by the Court, CLCP argues that both the Commission's former and present appointment structures violate the separation of powers doctrine. The Commission has previously argued that the Commission's appointment structure has been, and continues to be, constitutional under the former and present forms of section 30312, and will not repeat those arguments here.

**CONCLUSION**

For the reasons previously set forth in the Commission's briefs, the Court should limit its constitutional analysis to the Commission's existing appointment structure, should uphold that structure, and should bar any challenge to the Commission's past decisions.

Respectfully submitted,

  
LISA TRANKLEY  
Deputy Attorney General

For BILL LOCKYER  
Attorney General

Attorney for Petitioner  
California Coastal Commission

cc: service list

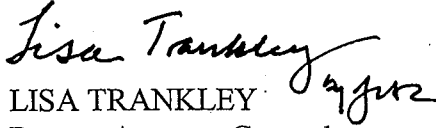
**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 14(c)(1) of the California Rules of Court, as amended January 1, 2002, I certify that the text in the attached PETITIONER CALIFORNIA COASTAL COMMISSION'S REPLY LETTER BRIEF ADDRESSED TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND HONORABLE ASSOCIATE JUSTICES, SUPREME COURT OF CALIFORNIA, IN RESPONSE TO LETTER BRIEFS FILED BY: (1) RESPONDENT MARINE FORESTS SOCIETY (MFS); (2) AMICI CALIFORNIA BUILDING INDUSTRY ASSOCIATION, HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, THE BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO AND THE CALIFORNIA ASSOCIATION OF REALTORS (CBIA); AND (3) AMICUS CALIFORNIANS FOR LOCAL COASTAL PLANNING (CLCP) is proportionately spaced, has a typeface of 13 points and contains 1,160 words as measured by the computer program that was used to prepare the brief.

DATED: January 24, 2005

Respectfully submitted,

BILL LOCKYER, Attorney General  
of the State of California  
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JOSEPH BARBIERI  
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California Coastal Commission

## DECLARATION OF SERVICE

**CASE:** MARINE FORESTS SOCIETY, et al. v.  
CALIFORNIA COASTAL COMMISSION, et al.

**NO:** Supreme Court Civil No. S113466  
(Court of Appeal, Third App. Dist. No: C038753;  
Sacramento Superior Ct. No: 00AS00567)

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, P.O. Box 70550, Oakland, California 94612-0550. On January 24, 2005, I served the following document:

PETITIONER CALIFORNIA COASTAL COMMISSION'S REPLY  
LETTER BRIEF ADDRESSED TO THE HONORABLE CHIEF JUSTICE  
RONALD M. GEORGE AND HONORABLE ASSOCIATE JUSTICES,  
SUPREME COURT OF CALIFORNIA, IN RESPONSE TO LETTER BRIEFS  
FILED BY:

- (1) RESPONDENT MARINE FORESTS SOCIETY (MFS);
- (2) AMICI CALIFORNIA BUILDING INDUSTRY  
ASSOCIATION, HOME BUILDERS ASSOCIATION OF  
NORTHERN CALIFORNIA, THE BUILDING INDUSTRY  
ASSOCIATION OF SAN DIEGO AND THE CALIFORNIA  
ASSOCIATION OF REALTORS (CBIA); AND
- (3) AMICUS CALIFORNIANS FOR LOCAL COASTAL  
PLANNING (CLCP)

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Messenger Service:** I caused each such envelope to be delivered by a courier employed by Professional Messenger, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.

- (D) **By Facsimile:** I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
- (E) **By Personal Service:** I caused such envelope to be hand delivered.
- (F) **By E-mail:** I caused such document to be served via electronic equipment transmission (E-mail) on the parties in this action by transmitting a true copy to the following E-mail addresses listed under each addressee below.

**TYPE OF SERVICE**

**ADDRESSEE**

	Office of the Clerk CALIFORNIA SUPREME COURT 350 McAllister Street San Francisco, CA 94102-3600 <b>(Filed an original + 8 via Messenger Service)</b>
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of Wildlife, National Audubon Society - California,  
Amigos de Bolsa Chica, Big Sur Land Trust,  
Cal Beach Advocates, California Coastkeeper  
Alliance, California Coastal Protection Network,  
The Center for Law in the Public Interest,  
Earth Alert!, Heal the Bay, Latino Urban Forum,  
The Ocean Conservancy, Ocean Outfall Group,  
Orange County Coastkeeper, San Diego*

*Baykeeper, Santa Barbara Channelkeeper,  
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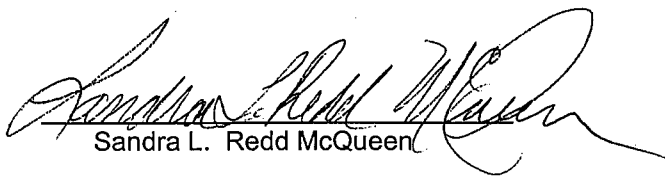
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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on January 24, 2005, at Oakland, California.

  
Sandra L. Redd McQueen

**R** E C E I V E **D**  
JAN 25 2005  
THE ZUMBRUN LAW FIRM