

## CALIFORNIA COASTAL COMMISSION

15 FREMONT STREET, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
TELEPHONE AND TDD (415) 904-5200



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September 19, 1997

TO: Commissioners and Interested Persons

FROM: Ralph Faust, Chief Counsel  
Dorothy Dickey, Deputy Chief Counsel  
John Bowers, Staff Counsel

SUBJECT: **Public Hearing on Change to Proposed Amendment to Section 13188(b) and to Proposed Section 13197 of the Commission's Regulations**

**For Commission Discussion and Possible Action on October 9, 1997**

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**SUMMARY**

On September 11, 1997, the Commission adopted new regulations and amendments to existing regulations which set forth procedures for issuance by the Commission of cease and desist and restoration orders pursuant to sections 30810 and 30811, respectively, of the Public Resources Code.

As proposed, the amendment to existing section 13188(b), which sets forth procedures for rescission or modification of cease and desist orders, and the new section 13197, which sets forth identical procedures for rescission or modification of restoration orders, state that a person who is subject to either type of order may request rescission or modification thereof only on the ground of a change in the facts on the basis of which the Commission issued the order. At the hearing the staff stated its intention to make a minor change to the language of the amendment to section 13188(b), and of section 13197, to clarify that the Executive Director has the responsibility to determine whether a particular request for rescission or modification satisfies this standard. The staff explained that it believed such a responsibility to be clearly included within the Executive Director's general authority to manage the Commission's agenda,<sup>1</sup> but felt that an explicit statement to this effect would add a desirable element of clarity to the proposed amendment and regulation. In response to this statement the Commission authorized the staff to fulfill all necessary requirements under the Administrative Procedure Act for the adoption of the subject change to the proposed amendment to section 13188(b) and to proposed section 13197.

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<sup>1</sup> Section 13024(a) of the Commission's regulations provides in relevant part that "The agenda for regular meetings of the commission shall be set by the executive director...."

A copy of the proposed amended and new regulations, as modified by the above-described change, is attached. (Exhibit 1.) The Commission staff has taken the necessary procedural steps under the applicable section of the Government Code (Govt. Code § 11346.8(c)) to enable the Commission to consider whether to adopt the proposed changes at its October 9, 1997, meeting. Section 11346.8(c) provides in relevant part that a state agency such as the Commission may adopt a proposed regulation that "has been changed from that which was originally made available to the public" if the change "is sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action." The proposed change satisfies this test because 1) the substance of the requirement imposed by the original text, that a request for rescission or modification of a Commission order be based on a change in facts from those on which the Commission issued the order, remains the same, and 2) the change merely makes explicit the already existent authority of the Executive Director to determine whether in a given instance the requirement is satisfied. See Notice of Modification to Text of Proposed Regulations. (Exhibit 2.) Staff recommends that the Commission vote to adopt the proposed amendment to section 13188(b), and proposed section 13197, both as modified by the change shown in Exhibit 1. The motion to adopt the changed amendment and regulation as proposed by staff appears on page 4.

#### **MATERIALS PROVIDED FOR COMMISSION REVIEW**

The following exhibits are being transmitted to the Commission attached to this staff report:

Exhibit 1 - Text of the proposed amendment to section 13188(b), and of proposed section 13197, of the California Code of Regulations, both as modified by proposed change

Exhibit 2 - Notice of Modification to Text of Proposed Regulations

Exhibit 3 - Ojavan Investors Inc. letter of September 6, 1997, received September 11, 1997

#### **RESPONSE TO COMMENTS**

After the close of the originally noticed comment period for the amendments to the cease and desist order regulations and the new restoration order regulations, one person submitted a comment urging the Commission not to adopt the amendments and the regulations. (See Exhibit 3.) The Commission has no obligation to respond to any such untimely comment. However, because the comment touches on the change to the amendment to section 13188(b) and to section 13197 that is the subject of the present proceeding, it is appropriate for the Commission at this time to consider the comment and respond to it.

The comment criticizes the fact that under the amended section 13188(b), and under section 13197, the determination as to whether a request for rescission or modification of a Commission order is grounded on a change in facts on the basis of which the Commission issued

the order may be made by a "gatekeeper clerk." Thus, the comment may be interpreted to argue that the Commission itself, rather than the Executive Director, should make this determination. There are numerous examples in the Commission's regulations of the Commission having expressly delegated to the Executive Director the authority to apply a standard that the Commission requires to be satisfied in order for a matter to be brought before the Commission. See, e.g., sections 13166(a)(1) (determination as to whether proposed amendment would either not lessen effect of previously conditioned permit or is based on newly discovered material information), 13106 (determination as to whether revocation request is patently frivolous and without merit), and 13052 (determination as to whether preliminary local approvals have been obtained). Given the abundance of this precedent, it is fully consistent with the manner in which the Commission has handled analogous threshold determinations to delegate to the Executive Director the authority to determine whether a person wishing to rescind or modify a Commission-issued order has satisfied the Commission's standard for bringing such a request before the Commission.

As of the date of this staff report, no other comments have been received from members of the public. Staff will respond to any other comments received from the public prior to any Commission action on the proposed change to the amendment to section 13188(b) and to section 13197.

### **OPTIONS FOR COMMISSION ACTION**

The Commission has the following major options for action on October 9, 1997:

1. **Adopt Regulations as Proposed**

Hold the public hearing, close the hearing, consider the regulation and vote to adopt the proposed amendment and new regulation as modified by the change identified herein. If the Commission adopts the changed amendment and new regulation, staff will submit the changes to the Office of Administrative Law for approval. If approved, the changed amendment and new regulation would then be sent on to the Secretary of State for filing. The changed amendment and new regulation would become effective 30 days after that filing.

2. **Reject Regulations as Proposed**

Hold the public hearing, close the hearing, consider the change to the amendment and regulation and vote to reject the change.

3. **Modify Regulations In Minor Way(s) and Circulate Change(s) for Public Comment**

Hold the public hearing, close the hearing, consider the changed amendment and regulation and vote to modify the proposed amendment and regulation in nonsubstantial

or minor ways and direct staff to circulate the amendment and regulation as modified by those (further) nonsubstantial or minor changes for public comments. The minimum public comment period would be 15 days. The Commission would then hold a public hearing at a future Commission meeting and vote on whether to adopt or reject the amendment and regulation as modified.

4. Modify Regulations In A Major Way and Circulate Change(s) for Public Comment

Hold the public hearing, close the hearing, consider the changed amendment and regulation and vote to modify the proposed amendment and regulation in a substantial or major way and direct staff to circulate the amendment and regulation as modified by the substantial or major change for public comment. Staff would submit a new notice to OAL and OAL would publish the notice, which would commence a new 45 day comment period. The Commission would then hold a public hearing at a future meeting and vote on whether to adopt or reject the amendment and regulation as modified.

**STAFF RECOMMENDATION**

The staff recommends that the Commission follow the first option identified and vote to adopt the amended and the new regulations as modified by the proposed change. The staff recommends that the Commission adopt the following resolution:

**Resolution:**

The Commission hereby adopts the proposed amendment to section 13188(b), and the proposed new section 13197, of the Commission's regulations as modified by the change identified in Exhibit 1 of the staff report. No alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to private persons than the proposed action.

**MOTION**

The appropriate motion for adoption is "I move that the Commission adopt the proposed amendment to section 13188(b), and the proposed new section 13197, of the Commission's regulations as modified by the change identified in Exhibit 1 of the staff report."

Staff recommends a YES vote. A majority of the Commissioners present is required to pass the motion. Approval of the motion means the proposed amendment and regulation, as modified by the change identified in Exhibit 1, have been adopted.

**CALIFORNIA COASTAL COMMISSION**

15 FREMONT STREET, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
TELEPHONE AND TDD (415) 904-5200



(Additions to the originally proposed language are double underlined,  
and language which is proposed to be repealed appears in strikeout.)

**CALIFORNIA CODE OF REGULATIONS**  
**TITLE 14. NATURAL RESOURCES**  
**DIVISION 5.5. CALIFORNIA COASTAL COMMISSION**  
**CHAPTER 5. COASTAL DEVELOPMENT PERMITS ISSUED BY COMMISSION**  
**SUBCHAPTER 8. PROCEDURES FOR THE ISSUANCE OF COMMISSION CEASE**  
**AND DESIST ORDERS**

**§ 13188. Rescission or Modification of Cease and Desist Orders.**

....

(b) The commission, after public hearing, may rescind or modify a cease and desist order that it has issued. A proceeding for such a purpose may be commenced by (1) any person to whom the cease and desist order is directed, (2) the executive director or (3) any two members of the commission. A person described in subdivision (1) of this subsection (b) may commence a proceeding for the purpose of rescinding or modifying a cease and desist order only on the ground where the person demonstrates to the satisfaction of the Executive Director that there has been a material change in the facts upon which the order was issued. Upon receipt of a request pursuant to this subsection (b) for rescission or modification of a cease and desist order issued by the Commission, a hearing on the request shall be held at the next regularly scheduled meeting or as soon thereafter as is practicable after notice to all persons subject to the order or whom the executive director otherwise has reason to know would be interested in the matter.

Authority cited: Section 30333, Public Resources Code

Reference: Sections 30809 and 30810, Public Resources Code

<b>EXHIBIT NO. 1</b>
<b>APPLICATION NO.</b> Text of Proposed
Amendment to Section 13188(b) of Comm'n's
Regulations
Page 1 of 2 California Coastal Commission

**CALIFORNIA COASTAL COMMISSION**

45 FREMONT STREET, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
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(Additions to the originally proposed language are double underlined,  
and language which is proposed to be repealed appears in strikeout.)

**CALIFORNIA CODE OF REGULATIONS****TITLE 14. NATURAL RESOURCES****DIVISION 5.5. CALIFORNIA COASTAL COMMISSION****CHAPTER 5. COASTAL DEVELOPMENT PERMITS ISSUED BY COMMISSION****SUBCHAPTER 9. PROCEDURES FOR THE ISSUANCE OF  
RESTORATION ORDERS****§ 13197. Rescission or Modification of Restoration Orders.**

The commission, after public hearing, may rescind or modify a restoration order that it has issued. A proceeding for such a purpose may be commenced by (a) any person to whom the restoration order is directed, (b) the executive director or (c) any two members of the commission. A person described in subsection (a) may commence a proceeding for the purpose of rescinding or modifying a restoration order only on the ground where the person demonstrates to the satisfaction of the Executive Director that there has been a material change in the facts upon which the order was issued. Upon receipt of a request pursuant to this section for rescission or modification of a restoration order, a hearing on the request shall be held at the next regularly scheduled meeting or as soon thereafter as is practicable after notice to all persons subject to the order or whom the executive director otherwise has reason to know would be interested in the matter.

Authority cited: Section 30333, Public Resources Code

Reference: Section 30811, Public Resources Code

<b>EXHIBIT NO. 1:</b>
<b>APPLICATION NO.</b>
Text of Proposed
Amendment to Section
13197 of Commn's
Regulations
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California Coastal Commission

**CALIFORNIA COASTAL COMMISSION**

45 FREMONT STREET, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
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## **NOTICE OF MODIFICATION TO TEXT OF PROPOSED REGULATIONS**

**(Prepared for 15-day comment period commencing  
September 19, 1997 and ending October 9, 1997.)**

Pursuant to the requirement of Government Code section 11346.8(c), and section 44 of Title 1 of the California Code of Regulations, the California Coastal Commission is providing notice of changes made to 1) a proposed amendment to Coastal Commission Cease and Desist Order regulation section 13188(b), and 2) proposed Coastal Commission Restoration Order regulation section 13197, in Chapter 5 of Division 5.5 of Title 14 of the California Code of Regulations, which were the subject of a regulatory hearing on September 11, 1997. Additions to the originally proposed language are double underlined, and language which is proposed to be repealed appears in strikeout.

A written comment period has been established commencing on September 19, 1997 and terminating on October 9, 1997. A public hearing is scheduled as part of the Commission's regular meeting on Thursday, October 9, 1997, at the Del Mar Fairgrounds in San Diego, CA. The meeting will commence at 9:00 AM, however, the hearing on this matter may not be the first agenda item to be heard. Interested persons may comment orally about the proposed changes at the hearing or may submit written comments concerning the proposed changes to the **CALIFORNIA COASTAL COMMISSION, LEGAL DIVISION, 45 FREMONT ST., STE. 2000, SAN FRANCISCO, CA 94105-2219** before 4 p.m. on the day before the hearing. Written comments may also be submitted to the Commission on the day of the hearing at the meeting prior to the Commission's consideration of the matter. It is requested, but not required, that written comments be mailed so that they are received no later than three (3) working days prior to the date of the public hearing. It is requested, but not required, that persons who submit written comments to the Commission at the hearing provide twenty (20) copies of such comments. This will ensure that each commissioner will receive a copy.

All comments received as stated above, which pertain to the indicated changes, will be reviewed and responded to by the Commission's staff as part of the compilation of the rulemaking file. Please limit your comments to the modifications to the text which appear in either strikeout or double underlining.

<b>EXHIBIT NO. 2</b>
<b>APPLICATION NO.</b>
Notice of Modification
to Text of Proposed
Regulations

OJAVAN INVESTORS  
INCORPORATED

333 So. State St. Unit 230  
LAKE OSWEGO, OR 97034

September 6, 1997

RECEIVED  
SEP 11 1997

California Coastal Commission  
45 Fremont St #2000  
San Francisco CA 94105-2219

CA COASTAL COMMISSION  
LEGAL DIVISION

Subject: Rules for Cease and Desist Orders.

As interested persons and property owners in the Malibu area, here are some comments on the proposed rule changes supplementing PRC §30809/30810. However preliminary issues should be considered, BEFORE new rule making. This quasi legislative function needs review based on the Constitution.

1. IS PRC §30809 and 30810 CONSTITUTIONAL?

The short answer is NO.

State (and federal) government is based on the Separation of Powers doctrine, which requires various government agencies to check and balance each other. The Legislative Executive/administrative and Judicial powers must remain separate. This is made clear in California Constitution, Article III Section 3:

"The powers of state government are legislative, executive and judicial.

Persons charged with the exercise of one power may not exercise either  
OF THE OTHERS EXCEPT AS PERMITTED BY THE Constitution."

Indubitably the Coastal Commission is within the executive/administrative powers. Thus the "quasi-legislative" and "quasi-judicial powers" cannot be exercised by the Commission or its employees. Even such legislative dedication is and remains unconstitutional.

While some courts seek to lighten their workload - it remains unconstitutional. The answer: DO NOT USE the quasi-judicial Sections §30809 and 30810. Or - at the very least - take it to court on a Declaratory judgment after notice to all interested persons - including us.

2. IS THE CURRENT PROCESS IN COMPLIANCE WITH DUE PROCESS OF LAW?

The answer, again, is "NO".

In our system of justice, every offender or "violin" is presumed innocent until proven guilty. Even at a judicial TRO hearing, the proponent ("the cop") has to make a showing of probable "guilt", before his property can lawfully be taken or invaded. A piece of paper signed by "the cop" does not establish a violation. Even if the signature is that of the Executive Director - who has no personal knowledge of the facts but relies on hearsay-does not meet basic Due Process.

A better system would be to return to the TRO system where a judge hears both sides before interfering with private property. Better yet: Let all "quasi-judicial" matters heard under the Administrative Procedures Act by an Administrative Judge.

3. AMENDING THE REHEARING PROVISIONS OF §13183(b) IS COUNTER-PRODUCTIVE.

The planned "material change" amendment is vague and violates Due Process again. WHO will determine that the proponent has "a material change"? Some clerk? Certainly the Commission must first hear what the applicant has to say, rather than trust some "gatekeeper clerk" the task to "judgment first, trial later", as the Queen of hearts screamed in the childrens' tale. Remember the First Amendment gives everyone the "Right to petition the Government". We'd suggest to skip this amendment.

Sincerely yours,  
OJAVAN INVESTORS Inc.



EXHIBIT NO.	3
APPLICATION NO.	Ojavan Investors Inc.
	9/6/97 letter
California Coastal Commission	