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February 27, 2008

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The Honorable Chief Justice Ronald M. George
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4783

Re: *People ex rel. State of California v. Pacific Lumber Company, et al.* —
Case No. S161003
Response to Request for Depublication

Dear Honorable Chief Justice and Associate Justices:

On behalf of Respondents The Pacific Lumber Company, Scotia Pacific Company LLC and Salmon Creek LLC (collectively "Pacific Lumber"), this letter is submitted in opposition to the request by the Humboldt County District Attorney to depublish the opinion of the Court of Appeal, First District, Division Three, in *People ex rel. State of California v. Pacific Lumber Company, et al.*

The California Rules of Court provide that an appellate opinion "should be certified for publication" if the opinion establishes a new rule of law; applies an existing rule of law to a new set of facts; modifies or explains existing law; clarifies or interprets a statute; involves a legal issue of significant public interest; contributes legal literature; or reaffirms a principle of law not recently applied in reported decisions. Cal. R. Ct. 8.1105(c). A request to depublish a decision must clearly state why the opinion should not be published. *Id.* 8.1125(a).

The District Attorney provides no explanation for why the decision does not meet the standards for publication. Rather, the District Attorney's request is entirely based on his disagreement with the outcome of the case. This is insufficient to demand depublication, particularly of a decision that serves the greater public interest, as is the case here.

The Court of Appeal Properly Certified the Opinion for Publication

The Court of Appeal's decision is an important one and was properly certified for publication. The opinion makes a valuable addition to California Environmental Quality Act ("CEQA") and Unfair Competition Law ("UCL") jurisprudence. It clarifies and harmonizes

appellate decisions concerning the important public issue of the intersection of the right to petition the government for redress of grievances, the CEQA review process and the broad scope of liability under the UCL. *See, e.g., Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, 65 Cal. App. 4th 713 (1998), *overruled on other grounds, Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1123 n.10 (1999); *Ludwig v. Superior Court*, 37 Cal. App. 4th 8 (1995); *Pettit v. Levy*, 28 Cal. App. 3d 484 (1972). In a thoughtful and carefully written decision, the Court of Appeal reaffirmed this Court's holdings of the primacy of the constitutional right to petition (as codified in California Civil Code section 47 and expressed by the U.S. Supreme Court in the Noerr-Pennington Doctrine[1]) and the need for finality in the CEQA process. *See, e.g., Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232 (2007); *Rubin v. Green*, 4 Cal. 4th 1187 (1993); *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.*, 6 Cal. 4th 1112 (1993); *Blank v. Kirwan*, 39 Cal. 3d 311 (1985).

Furthermore, publication of the opinion serves an important public purpose. The policy behind the Noerr-Pennington Doctrine and California Civil Code section 47 is to encourage maximum public participation and free communication without fear of being subjected to an ancillary lawsuit predicated upon those communications. The publication of the Court of Appeal's decision reaffirms these policies and assures participants in administrative proceedings that they will not be sued for exercising their constitutional rights. Depublishing the decision may cast doubt on such policies, possibly chilling protected speech.

The District Attorney's Grounds for Depublication Have No Merit

In an attempt to get another bite at the apple, the District Attorney makes three general arguments in support of his request for depublication: (1) that the UCL must be interpreted to provide the government a "platform" to prosecute when it determines that an underlying administrative proceeding was corrupt; (2) that the decision is inconsistent with this Court's holding in *Pacific Lumber Co. v. State Water Resources Control Board*, 37 Cal. 4th 921 (2006), on concurrent regulatory authority; and (3) that the standing provisions for public prosecutors under the UCL are more specific and, therefore, preempt the protections of the California Civil Code section 47. None of these contentions has merit.[2]

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[1] The leading U.S. Supreme Court decisions on immunity for communications covered by the Petition Clause of the First Amendment are *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) ("*Noerr*"), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) ("*Pennington*"). Thus, the concept underlying both decisions is often referred to as the "Noerr-Pennington Doctrine."

[2] The District Attorney also attempts to reargue and recharacterize his case against Pacific Lumber, claiming that the facts in the complaint illustrate "clear admissions of fraud." DA Letter at 3. It is unclear what the District Attorney is referring to here, but the

The District Attorney's core argument is that the UCL must be interpreted in a manner to carve out a special provision for government prosecutors to reopen final administrative actions to sue for alleged fraud during the underlying process. However, California has long held that state agencies are in privity with each other for such purposes as collateral estoppel, completely barring a subsequent claim by another state agency. *People v. Sims*, 32 Cal. 3d 468, 487 (1982). Where the previous action involved a governmental agency, there is a strong presumption that the interests of the public are adequately represented. *See, e.g., Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1073 (1998). There is no need to interpret the UCL in the strained and improper manner sought by the District Attorney where the expert agencies involved are capable (and likely more capable than unfamiliar district attorneys) of ferreting out deficiencies and flaws in the administrative process.[3]

Interpreting the UCL to give district attorneys a chance to reopen the CEQA process and reevaluate submitted materials would also make a mockery out of the administrative exhaustion requirement and undermine the need for finality in the CEQA process. Indeed, this interpretation conflicts with this Court's holding in *Laurel Heights* that an environmental impact report ("EIR") is "conclusively presumed valid" if no lawsuit is brought during the CEQA limitations period. 6 Cal. 4th at 1130. "This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences." *Id.* The District Attorney's interpretation would alter the discretionary authority inherent in CEQA, providing district attorneys with "veto power" over the lead agency determination that the EIR is final or that there is no need to recirculate when new information comes to light.[4] *Id.* at 1133.

"facts" alleged by the District Attorney—that Pacific Lumber submitted erroneous data prepared by a consultant and later submitted the corrected data, both after the close of the public comment period under CEQA—not does demonstrate fraud. Moreover, as recognized by the Court of Appeal, these "facts" do not show the CEQA process was undermined, which is the entire premise of the District Attorney's case.

[3] The District Attorney's contention that such an exception to the constitutional protections is necessary to protect the public good is also without support. This Court has expressly refused to recognize an "interest of justice" exception to section 47. *Silberg v. Anderson*, 50 Cal. 3d 205, 213 (1990).

[4] This is exactly the situation here, where the lead agencies involved in the underlying administrative process—California Department of Forestry and Fire Protection ("CDF") and California Department of Fish & Game—both told the District Attorney that the claims made in the lawsuit were baseless and that they had no intention of reopening the CEQA process or rescinding permit approvals.

The District Attorney's claim that the decision is inconsistent with this Court's holding in *Pacific Lumber Co. v. State Water Resources Control Board*, 37 Cal. 4th 921 (2006), on concurrent regulatory authority, is also without support. In *Pacific Lumber*, this Court held that the timber harvesting plan regulatory regime administered by CDF did not preempt the regulatory authority of the Regional Water Quality Control Boards under the Porter-Cologne Water Pollution Control Act. This Court reached that conclusion after a step-by-step analysis of the two regulatory regimes in light of the requirements for asserting collateral estoppel. It did not, as the District Attorney implies, overrule long-standing law that collateral estoppel may be asserted to prevent ancillary civil proceedings by a state entity where another agency has already adjudicated the same issues in an administrative process. *See, e.g., People v. Sims*, 32 Cal. 3d 468 (1982).

The District Attorney's final argument, that the UCL preempts section 47, has been considered and rejected by this Court in *Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232 (2007). Moreover, a UCL claim, whether brought by a public entity or not, cannot eviscerate the public policy behind section 47 of protecting free access to the judicial system. *See Rubin*, 4 Cal. 4th at 1203. As recognized by this Court, section 47 has its roots in the First Amendment right of petition. *Cal. Teachers' Ass'n v. State of California*, 20 Cal. 4th 327, 339 (1999). "The policy of encouraging free access to the courts is so important that the litigation privilege extends . . . to any action except for one for malicious prosecution." *Id.* If the District Attorney's argument is adopted, the protections now afforded by section 47 would be severely restricted as parties would constantly be fearful that their communications, though protected against private actions, would draw the fire of public prosecutors. Such an interpretation of section 47 would eliminate all the protections of the privilege and encourage endless rounds of litigation on matters decided in official proceedings.

* * * * * *

In sum, the District Attorney seeks a radical transformation of CEQA and the UCL, whereas the Court of Appeal's decision reaffirms long-settled principles and assures members of the public that they will not be sued for commenting on an EIR or seeking a permit from a government agency. Accordingly, Pacific Lumber respectfully requests that this Court deny the District Attorney's request for depublication.

Sincerely,

Edgar B. Washburn

PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on February 27, 2008, I served a copy of:

LETTER TO CALIFORNIA SUPREME COURT
(dated February 27, 2008)

☒ **BY FACSIMILE [Code Civ. Proc sec. 1013(e)]** by sending a true copy from Morrison & Foerster LLP's facsimile transmission telephone number 415.268.7522 to the fax number(s) set forth below, or as stated on the attached service list. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine. I am readily familiar with Morrison & Foerster LLP's practice for sending facsimile transmissions, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be transmitted by facsimile on the same date that it (they) is (are) placed at Morrison & Foerster LLP for transmission.

☒ **BY U.S. MAIL [Code Civ. Proc sec. 1013(a)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices. I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, February 27, 2008.

Catherine L. Berté
(typed)

Catherine L. Berté
(signature)

sf-2471293