



Chief Justice Ronald George and the
Justices of the Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

February 20, 2008

**Re: *People ex rel. Gallegos v. The Pacific Lumber Co.* (2008) 158 Cal. App. 4th 950
Statement of interest of the Sierra Club in Support of the Petition for Review**

To the Honorable Chief Justice and the Justices of the Supreme Court:

As provided by California Rules of Court, rule 8.500(g), the Sierra Club files this letter in support of the above mentioned petition for review.

The Sierra Club is a national nonprofit organization of approximately 760,000 members, of whom roughly 195,000 live in California. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and encouraging humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the need and ability for concurrent regulatory authorities to ensure that the permit application and approval process is transparent and uniform.

The Club's particular interest in this case stems from a desire to "secure uniformity of decision." Securing uniformity of decision is a stated ground for granting review, per California Rule of Court 8.500 (b).

First, *People ex rel. Gallegos v. The Pacific Lumber Co.* (2008) 158 Cal. App. 4th 950 is directly inconsistent with *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal. 4th 921, 936 (Cal. 2006) on the issue of concurrent regulatory authority. *Pacific Lumber* expressly recognized that “there are valid reasons to allow for concurrent jurisdiction among various regulatory agencies,” over a timber harvesting plan, one of which, was the Forest Practice Act’s savings clause. *Pacific Lumber*, 37 Cal. 4th at 943. In *Gallegos*, the law at issue – CEQA – had a similar savings clause, but the appellate court’s ruling has the effect of eliminating the ability of a separate government entity from having concurrent jurisdiction over a similar timber harvesting plan. The appellate court noted “. . . we disagree the State was not a party to the underlying CEQA proceedings.” *Gallegos v. The Pacific Lumber Co.* (2008) 158 Cal. App. 4th at 960. The appellate court then sought to deny this “single government actor” a second bite at the apple through collateral litigation. Yet, the District Attorney is not the California Department of Forestry. Per *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal. 4th 921, 936 (Cal. 2006), the District Attorney has concurrent jurisdiction under Business and Professions Code sections 17200 *et seq.* and 17204. The District Attorney should be able proceed on a collateral Complaint past Demurrer.

The inconsistency now arises from the potential abuse of evidentiary shields such as the litigation privilege of Civil Code section 47 (b) and the *Noerr-Pennington* doctrine to effectively strip a regulatory authority, such as the District Attorney, of concurrent jurisdiction. A District Attorney cannot proceed with a prosecution for unfair competition under California’s Unfair Competition Law (UCL), if the *entire* evidentiary record is shielded from collateral examination. The ruling provides incentive, in effect, for permit applicants to intentionally falsify materials



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during the permit approval process, knowing full-well that the litigation privilege and the *Noerr-Pennington* doctrine would shield them from collateral prosecution.

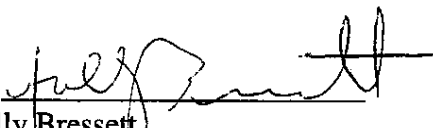
The Club also would like the Court to bring the “sham exception” to the *Noerr-Pennington* doctrine under California law into uniformity with the United States Supreme Court’s view on *Noerr* immunity. The United States Supreme Court has recognized that “the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.” *Allied Tube & Conduit Corp. v. Indian Head* (1988) 486 U.S. 492, 504. The Ninth Circuit has followed suit, and expanded the “sham exception” to include litigation that “deprive[s] the court of its legitimacy, through the making of intentional misrepresentations to the court.” *Kottle v. Northwest Kidney Centers* (9th Cir. 1998) 146 F.3d 1056, 1060.

These evidentiary shields cannot be used a sword to protect the ongoing consequences of a past fraudulent act.

For the above reasons, the Sierra Club supports the Petition for Review.

Dated: February 20, 2008

Respectfully Submitted,
Holly Bressett
The Sierra Club

By: 
Holly Bressett
The Sierra Club

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco and my business address is 85 Second St, 2nd Floor, San Francisco, CA 94105.

On February 20, 2008, I served the STATEMENT OF INTEREST OF THE SIERRA CLUB IN SUPPORT OF PETITION FOR REVIEW OF APPELLANT GALLEGOS on the following addresses via U.S. Certified Mail:

<p>Paul Gallegos, District Attorney Christa McKimmy, Deputy District Attorney Humboldt County District Attorney Office 825 5th Street Eureka, CA 95501</p> <p><i>Attorney for Plaintiffs and Appellants</i> THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel</p>	<p>Edgar B. Washburn, Esq. Christopher J. Carr, Esq. William M. Sloan, Esq. Shaye Diveley, Esq. Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105-2482</p> <p><i>Attorney for Defendants and Respondents</i> THE PACIFIC LUMBER COMPANY, et al</p>
<p>Dennis Herrera, City Attorney Danny Chou, Chief of Appellate Litigation Office of the City Attorney, San Francisco City Hall, Room 234 San Francisco, CA 94102</p> <p><i>Attorney for Amicus Curiae</i> THE CITY AND COUNTY OF SAN FRANCISCO, in support of Appellant</p>	<p>Office of the Clerk Humboldt County Superior Court 825 Fifth Street Eureka, CA 95501-1153</p>
<p>Office of the Clerk California Court of Appeal First District 350 McAllister Street San Francisco, CA 94102-3600</p>	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on this 20th day of February 2008 in San Francisco, California.



Sara Breckenridge