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RE: Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions (Released January, 2009)

COMMENTS OF THE PUBLIC TRUST ALLIANCE ON DRAFT CEQA GUIDELINE AMENDMENTS

The Public Trust Alliance wishes to comment on two related topics: (1) the need to incorporate a public trust concept in the amended CEQA guidelines; (2) the need to further define the scope of (and basis for) agency discretion regarding the analysis of greenhouse gas emissions.

(1) Public Trust Doctrine

The portions of the draft CEQA guidelines that address climate impacts should include appropriate references to the public trust doctrine. As California proceeds to address global warming impacts, it necessarily assumes a role beyond that of a mere regulator. It is a trustee, holding a property interest in the absorptive capacity of the atmosphere and managing that interest on behalf of all citizens rather than for the benefit of private gain or special interests.

The public trust doctrine provides the appropriate framework for California's role, requiring the state to act as the people's fiduciary to protect the environmental benefits and "services" that the atmosphere provides.¹ Agencies managing public resources are held to a high standard of prudent management to preserve the value of trust assets for present and future generations.² To repeat, they are trustees, not simply administrators.

¹ The public trust doctrine establishes that the state, as sovereign, owns and manages certain crucial natural resources "as trustee of a public trust for the benefit of the people." See, e.g., *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434 (addressing water rights).

² Although courts respond with deference to agency expertise in cases brought under administrative procedure acts, in actions they are less deferential in challenges brought under the trust doctrines, responding to a trustee's

The atmosphere is increasingly recognized as a public trust asset.³ Indeed, it is a global “common” asset, fundamentally different from the private property addressed in other parts of CEQA.⁴ As trustee, the government may not transfer public interests in natural resources to private ownership in a manner that undermines public trust “values.”⁵ Public trust “values” have been defined flexibly, evolving as public needs have changed. The need to stem climate change is clearly an emerging and urgent public need.

OPR’s draft guidelines frequently reference the role of the California Air Resources Board in implementing a comprehensive scheme for regulating greenhouse gas emissions. The draft guidelines thus recognize that the CEQA process may entail a role in managing (or failing to manage) the atmosphere. Thus, the fiduciary duty of prudent atmospheric management should extend to the lead agency in the CEQA process, with the public trust doctrine as an umbrella concept. Explicitly recognizing the applicability of the public trust doctrine to lead agencies would help to limit the intense political pressure that private developers and industry might otherwise wield during the CEQA process.

(2) Precautionary Principle

In addition, the guidelines references to “substantial evidence” as a basis for examining climate impacts should be supplemented and clarified by references to the precautionary principle. A precautionary approach is implicit in the “trust” concept underlying the public trust doctrine.⁶ This standard can be met with the precautionary principle. An increasingly pervasive feature of international law, the precautionary principle states: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for

asserted expertise by “requiring a higher level of performance.” Jon A. Souder & Sally K. Fairfax, *Arbitrary Administrators, Capricious Bureaucrats and Prudent Trustees: Does It Matter in the Review of Timber Salvage Sales?*, 18 PUB. LAND & RESOURCES L. REV. 165, 170-71(1997), citing Prudent Investor Rule. “In administrative law, there is a presumption that the agency has made a decision based on its experience and the challenger must demonstrate otherwise. In trust law, the trustee is required to demonstrate that she is acting prudently.”

³ See, e.g., Peter Barnes, *Who Owns the Sky?* (Island Press 2001); Mary Christina Wood, *Atmospheric Trust Litigation*, available at <http://www.law.uoregon.edu/faculty/mwood/docs/atlchap.pdf>.

⁴ The public trust doctrine dates from the time of Roman law. According by Justinian: “[T]he following things are by natural law common to all -- the air, running water, the sea, and consequently the sea-shore. . . .” J. INST. 35 § 2.1.1 (J. B. Moyle trans., 5th ed. 1913) (cited by, e.g., Allan Kanner, *The Public Trust Doctrine, Parens Patriae, And The Attorney General As The Guardian Of The State's Natural Resources*, 16 Duke Env'tl. L. & Pol'y F. 57, n. 35 (2005).

⁵ *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

⁶ The public trust doctrine is frequently analogized to common law trust principles, which include duties to preserve trust property, act in good faith, and manage the trust property prudently, protecting the productive capacity of trust assets, the people’s natural resources. See, Restatement (Second) of Trusts §§ 3, 170, 176, 230; Restatement (Third) of Trusts § 227 (1992) (Prudent Investor Rule). See also, *People v. California Fish Company*, 166 Cal. 576, 597; 138 P. 79 (1913) (Implied powers of the state as trustee are commensurate with the duties of the trust and enable trustee to do everything necessary to the execution and administration of the trust).

postponing cost-effective measures to prevent environmental degradation.” *See, e.g.*, Rio Declaration on Environment and Development, Principle 15, June 14, 1992, U.N. Conference on Env't & Dev., U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874, 879 (1992)⁷; *see also*, Preamble to The Montreal Protocol on Substances that Deplete the Ozone Layer, *reprinted in* 26 I.L.M. 1550, *entered into force*, January 1, 1989: “Parties to this protocol... determined to protect the ozone layer by taking precautionary measures...”

(3) Agency Discretion

Explicitly recognizing the public trust aspect of evaluating the GHG impacts of proposed projects would establish clear standards for agencies and a heightened level of responsibility for ensuring the survival of a crucial and threatened environmental asset.

There are several duties inherent in the public trust relationship, including the duty to manage the trust for the benefit of the beneficiaries of the trust (the citizens of California), to act with reasonable prudence, to preserve corpus of trust, to operate with loyalty, accountability and transparency to the beneficiaries of trust, putting their needs ahead of the interests of the trustees or the interests of private parties.⁸

These duties would help to define the scope of the agency “discretion” that is established at several key points in the draft regulations. As they stand now, these guidelines afford the agency an opportunity to do less, rather than more, to limit GHG emissions.

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/s/ Michael Warburton, Patricia Nelson

⁷ Risk managers have formulated an alternate definition: The precautionary principle recognizes the fundamental role of uncertainty in policy making and attempts to shift the burden of ignorance towards precaution rather than inaction. Society for Risk Analysis, 1999 Annual Meeting: Past President’s Message: Risk Analysis Under Fire, reported in Risk Newsletter, Vol. 20 No. 1 (2000) at p. 3, <http://www.sra.org/newsletter/news0200.pdf>.

⁸ RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).