CEQA AND THE PUBLIC TRUST DOCTRINE:

A CITIZENS' GUIDE

By Patricia Nelson for Environmental Forum of Marin Class 40

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Cover photo of Soda Lake at Carrizo Plain by Mark Floyd

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Don Edwards San Francisco Bay National Wildlife Refuge, Newark, in Wikipedia article, U.S Fish & Wildlife Service digital library, photo in public domain

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Turtle at Jewel Lake in Berkeley's Tilden Park, by Jannie Dresser, Sugartown Publishing

INTRODUCTION

This Guide is intended to promote discussion of the public trust doctrine and public trust resources during the California Environmental Quality Act (CEQA) environmental review process. It seeks to empower community activists to identify public trust resources and to use the protections afforded to those resources during the planning process—to promote a sense of ownership of critical public natural resources that otherwise might be inappropriately given over to private use.

The first section is a general discussion of the public trust doctrine. This section does not address the many subtleties of the doctrine but is intended to be useful in identifying resources that are protected and issues that citizens might want to raise. The second section gives a very brief background on the CEQA process and the opportunities it provides for citizens to comment on proposed projects or planning documents. The discussion is in question-and-answer format. Most references to sources and useful documents are given at the end rather than in footnotes. Internet citations are provided wherever possible so that you can look at the laws or documents in full.

Suisun Marsh, USFWS photo/Steve Martarano, from Wikipedia article

I. THE PUBLIC TRUST DOCTRINE

1. What Is the Public Trust Doctrine?

The public trust doctrine is a legal principle. It holds that certain natural resources are **"public"** resources that cannot be monopolized by private parties. The State holds these resources in trust for the people of California. It must manage the resources for the benefit of the public. The State can only allow the resources to be used in ways that promote "public trust values."

The public trust doctrine is most firmly established for water resources: "The public trust doctrine protects tidal and submerged lands and navigable waterways for the benefit of the People of California."[1] Under the doctrine, the State of California owns certain lands associated with the water. The State owns all land below tide water, the land below the ordinary high-water mark, and land bordering tidal waters within California. The State also owns all land below the water of a navigable lake or stream.

Russian River east of Healdsburg, at Del Rio, by poet Penelope La Montagne,
author of Jigsaw Heart and River Shoes

Public trust lands cannot be bought and sold like other State-owned lands. If the State "sells" these lands to a private owner, only a "bare legal title" is transferred. The property remains subject an easement to allow water-related public uses. The public trust doctrine covers filled

[1] State Lands Commission Summary, available at http://www.slc.ca.gov/Misc_Pages/Public_Trust/Public_Trust.pdf.

lands formerly under water that still serve a public trust purpose. The State also owns the water itself; people with "water rights" acquire only a right to use the water.

The exact content of the public trust doctrine may vary from state to state. The courts of one state are not bound by decisions made in other states, but citizens may cite those decisions to attempt to persuade a court. In California and many other states, the public trust doctrine has long protected the public's access to public trust resources and has also been used to protect the resources themselves. As a trustee, an agency may not sell these public resources to private parties, damage them unnecessarily, or turn them over to an agency with a mission that will lead to the destruction or inappropriate privatization of the resources.

Photo of Mono Lake by Michael Gäbler, Wikipedia article on Mono Lake

2. Origins of the Public Trust Doctrine

The California State Lands Commission identifies the following sources:

- **Roman Civil Law**

– The air, the rivers, the sea and the seashore were incapable of private ownership; they were dedicated to the use of the public.
Institutes of Justinian – 534 CE

- **English Common Law**

– The king held the tide and submerged lands as trustee for the benefit of the people of the realm. Magna Charta – 1215

The colonists in America were subject to English common law, including the public trust principle. After the American Revolution, the people of each state became sovereign, and assumed the right to hold all their navigable waters, and the land under them, for their own common use. The People placed these waters in the trust of Congress under the Constitution. Upon admission to the Union, these trust responsibilities were delegated to the states. States admitted later to the Union, such as California, succeeded to the same public trust rights and responsibilities under the Equal Footing Doctrine.

Merced River in Yosemite

3. What Is the Philosophy Underlying the Public Trust Doctrine?

Some natural resources are so intrinsically important that that they should not be privately owned. Their free availability to all people is critical to a democratic society.

Underlying the doctrine is an important distinction between benefits that are earned and benefits that flow from nature. Private ownership may be appropriate when something is created or earned by an individual's hard work. In contrast, the benefits that flow from nature's bounty should be preserved for all of the people rather than diverted to private use. In addition, some uses such as navigation are so peculiarly public that it is inappropriate to privatize them.

Photo of McKenzie River, Oregon, by Wendy Truxal, LMT

4. What Are "Public Trust Values"?

The concept of public trust values is dynamic and flexible—it has expanded as public needs and perceptions of the value of natural resources have changed. Uses associated with traditional

livelihoods are protected: for example, use of water for navigation, commerce and fishing. More recently, values that are more ecocentric have been recognized and protected. These include aesthetics, species protection, biodiversity, water quality, ecological health, and ecosystem services.

Yosemite falls

5. Who Is Accountable Under the Public Trust Doctrine?

The State, as the trustee of recognized "public" resources, is accountable for violations of the public trust doctrine. A California court has held that private parties may not be sued for harming public trust resources.

By legislation, the State has delegated its public trust authority to administrative agencies that have expertise concerning particular resources. The State Lands Commission administers public trust lands. The State Water Resources Control Board administers the public trust doctrine as applied to water resources. The California Department of Fish and Wildlife administers fish and wildlife protected by the public trust doctrine. The Bay Conservation and Development administers the use of the San Francisco Bay tidelands.

By statute, the State has granted some public trust lands to local entities to be held in trust and used or leased to private entities in a way that promotes public trust uses. The granting statute may specify the uses that the local entity may approve. The State Lands Commission has stated that "All agencies with jurisdiction over development or other activities that can impact public trust lands and resources have a responsibility to consider their actions in the context of the effect on the resource." This should include cities and counties, but these entities (which do not operate under a law that explicitly says they operate as public trust agencies) often don't view themselves as guardians of public trust resources.[2]

Brown pelicans at Salton Sea from California Department of Water Resources photo library

[2] See State Lands Commission, THE PUBLIC TRUST DOCTRINE AND THE MODERN WATERFRONT: Protecting the Environment and Promoting Water-related Economic Development, A Public Trust Synopsis, note 7, available at http://www.slc.ca.gov/Misc_Pages/Public_Trust/Public_Trust.pdf.

6. What Resources Does the Public Trust Doctrine Protect?

As noted, the public trust doctrine most clearly protects water resources. The public trust applies to both waters influenced by the tides and waters that are navigable. The public trust also applies to the natural resources (mineral or animal) contained in the soil and water over those public trust lands.

The public trust doctrine also protects wildlife apart from the water.

Hawk in brush at a shoreline in Benicia

Squirrel at Richmond Marina, California

by Jannie Dresser, Sugartown Publishing

Currently in California, the public trust doctrine does not apply to groundwater unless it is very closely connected to surface water (for example, the "underflow" of a river). Groundwater is protected by the doctrine in several other states, and there is a gradual trend for more states to recognize groundwater as a public trust resource.

Citizen advocates have been attempting to bring more resources within the protection of the doctrine. For example, several lawsuits have been filed to fight climate change under the banner of the public trust doctrine. Advocates have cited the underlying philosophy of the public trust doctrine and historical statements such as the following to assert that the atmosphere is a public trust resource: *"By the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to*

approach the seashore, provided that he respects habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations." Justinian Code 530 A.D.[3]

7. What Are "Public Trust Lands"?

In in its role as trustee for the public, the State owns the beds of tidal waters up to the ordinary high water mark. The State owns the beds of all nontidal, navigable rivers and streams up to the ordinary low water mark. The State also owns a "public trust easement" in the land between the ordinary low water mark and high water mark.

This land is administered by the State Lands Commission. The Commission may lease the land to private parties to use for recognized public trust purposes. Selling the land is disfavored. The Commission must balance competing uses of the lands.

Goleta Slough, in Wikipedia article, photo in public domain

[3] Based in part on this language, environmental groups have attempted to extend the doctrine to the atmosphere, to address climate change. See, e.g., http://www.gardere.com/Binaries/Press%20and%20Publications/20120717TexasTrialCourtRecognizesENVIRONMENTALALERTWEBVERSION.html.

8. Can the Public Trust Ever Be Terminated?

Yes, but it is a very rare occurrence and there are high standards for doing so. The U.S. Supreme Court held in a landmark case (Illinois Central Railroad Company v. Illinois) that a State cannot abdicate its interest in its waterfront by transferring the land to a private party. The Court allowed Illinois to revoke an unwise grant of an entire lakebed to the railroad. The Supreme Court recognized that the State may sell public trust land if the sale does not impair the public interest or if it actually improves the public trust.

Willamette River, Oregon, by Wendy Truxal LMT

California has followed suit, and has recognized that a grant of public trust land to a private party does not extinguish the public trust. The public retains a continued right to use the land for recognized public trust purposes (the "public trust easement") in most cases. Some public trust uses might be inconsistent with others. If the State has authorized a fish cannery on the waterfront, for example, this would preclude use of the land for recreation or open space.

In California, the State legislature can extinguish the public trust easement by legislation, but only if that intent is clearly expressed in the legislation. There is a presumption that the trust is not extinguished. The public trust easement may be extinguished on filled land if that land is no longer usable for public trust purposes, but filling or diking the land does not automatically extinguish the public trust interest.

The federal government can extinguish California's public trust rights when it exercises its federal power of eminent domain.

Spotted sandpiper at Lake Alpine, by Jannie Dresser, Sugartown Publishing

9. What Uses Are Permitted on Public Trust Lands?

Land uses permitted on public trust lands are generally limited to water-dependent or water-related activities. They promote the public right of access to water for commerce, fisheries, navigation, ecological preservation, and recreation. Examples of permitted uses include: ports, marinas, docks, piers, wharves, buoys, hunting, maritime commercial, sportfishing, aquaculture,

bathing, swimming, boating, warehouses, container cargo storage, facilities for the development and production of oil and gas, habitat, wildlife refuges, scientific study, open space, and visitor-serving facilities such as hotels, restaurants, shops, parking lots, and restrooms.

Merced River in Yosemite, spring

The public trust doctrine does not permit land uses that are not related to water, do not serve a public purpose, or could be located on non-waterfront property. Inappropriate uses include residential development; non-maritime commercial uses, including department stores; and certain office uses.

The land use must benefit a statewide public; it is not permissible if it provides only a local or municipal benefit. So a local park is not a permissible use of public trust land, even though it is "public" and may promote recreation.

10. What Can Be Done If an Existing Land Use Is Less Protective of Public Trust Resources than Other Possible Uses?

Under CEQA, there is currently little that can be done if the existing use is a recognized public trust use. An agency does not have to conduct a separate public trust analysis if the project under consideration would continue an existing public trust use, even though critics think another land use would be more protective of the public trust resource. This does not prevent opponents of the project from raising objections on other environmental grounds.

Delta Smelt from California Department of Water Resources photo library

This case law also does not prevent citizens from raising the issue that the existing use no longer serves its original public trust purpose. The State Lands Commission recognizes that "Piers, wharves and warehouses that once served commercial navigation but no longer can serve modern container shipping may have to be removed or converted to a more productive trust use. Historic public trust uses may have been replaced by new technologies. Antiquated structures on the waterfront may be an impediment rather than a magnet for public access and use of the waters."

Mono Lake Tufa towers, in Wikipedia article; Photo by Richard E. Ellis http://yosemitephotos.net/

11. What Kinds of State Laws Protect Public Trust Resources?

The public trust doctrine is a "common law" doctrine. Common law is the body of law created by judicial decisions.

The public trust doctrine is also embodied in California State laws and the State constitution. The distinction about the source of a law is important because laws passed by the legislature usually trump common law, and constitutional provisions trump any other State authority.

Usually, a common law principle only prevails in the "spaces" where the legislature has not yet enacted a law. But the public trust doctrine is unusual in that it has very long historical roots. It is also significant that one of the main functions of the doctrine has been to restrain unwise or unethical grants of public resources to private parties by legislatures that are subject to political pressure. The doctrine is designed to protect future generations from such actions. It is also significant that the public trust doctrine is reflected in the State Constitution.

A constitutional amendment, as opposed to a statute, protects policy judgments from the ebb and flow of the political tide. Indeed, some have described the public trust doctrine as "an effort to retreat from the excessive generosity of early legislatures and public land management agencies."[4]

[4] *See, e.g.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, at p. 547 (1970), a seminal article in which Professor Sax suggested that the doctrine was an underutilized avenue to protect natural resources.

Two egrets at Aquatic Park, Berkeley, by Jannie Dresser, Sugartown Publishing

The California Constitution

Several constitutional amendments were adopted in California in response to wholesale legislative giveaways of waterfront lands (Art. X, Sections 3-5; Art. 1, Section 25).

Article X, Section 2 – Reasonable use doctrine
This section requires water rights holders to use water reasonably and not waste it. It limits water rights by prohibiting the waste, unreasonable use, unreasonable method of use, or unreasonable method to divert water. The California State Water Resources Control Board has employed the reasonable use doctrine to regulate water uses that jeopardize State compliance with the public trust doctrine.

Article X, Section 3 – Prohibits the State from selling certain tidelands

Article X, Section 4 – Guarantees public access to waterways
This section forbids landowners to obstruct free navigation. It requires the State legislature to enact laws that interpret the public's right liberally, so that they will always have access to the navigable waters of California. It also forbids landowners "to exclude the right of way to [navigable] water whenever it is required for any public purpose."

Article X, Section 5 says that the State of California owns all the water in California.

Big Sur Coast at Bixby Bridge, in Wikipedia article, photo in the public domain

Article 1, Section 25 – Public Right to Fish
This section preserves the right to fish upon and from the State's public lands and public waters. The State may not sell these lands without reserving an absolute right for the people to fish there.

California Statutes

California Civil Code Section 670
The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the state; of all land below the water of a navigable lake or stream.

Female Salmon from California Department of Water Resources photo library

California Public Resources Code, Section 6301
Establishes the California State Lands Commission's exclusive jurisdiction over public trust lands

Public Resources Code Section 5093.50
States California policy under the Wild and Scenic Rivers Act

California Harbors & Navigation Code, Section 100
States that navigable waters are public waterways for the purpose of navigation and transportation

California Fish and Game Code Section 5937
Requires that owners of any dam to release sufficient water at all times to keep fish below the dam "in good condition"

California Water Code Section 85023

States that "The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta."

Black-shouldered kite on McEwen Road in West Contra Costa County
by Jannie Dresser, Sugartown Publishing

12. What Are Some of the Important Cases that Upheld the Rights of "The People"?

While it is not a requirement to cite legal cases in a public comment submitted under CEQA, it can be useful to do so, especially if the case represents a victory for public rights and is relevant to the kind of resource you are trying to protect. The few cases cited below are some examples. The list is by no means exhaustive. The reference section at the end of this pamphlet gives Internet citations where you can look at the full case.

Ledson Marsh, California, in Wikipedia article, photo in public domain

The foundational case is *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), a U.S. Supreme Court case that established how the doctrine would apply in the United States. In 1869, the Illinois Legislature granted 1,000 acres of tide and submerged lands to the Illinois Central Railroad Company. The grant covered almost the entire waterfront of Chicago, and placed very few restrictions on the railroad company. Four years later, the Legislature had second thoughts and tried to revoke the grant.

The Supreme Court sided with Illinois and held that the State legislature was entitled to revoke the grant. The Court reasoned that Illinois held title to these lands in trust for the public and could only grant title to other entities if the grant would actually improve the public's rights. The Railroad's plans for the land did not meet this standard. Therefore, the grant was revocable, and the State could resume the exercise of its trust rights at any time. The Court held that a legislature does not have the power to "give away nor sell the discretion of its successors" to "exercise the powers of the State" to protect public trust resources. Legislation "which may be needed one day for the harbor may be different from the legislation that may be required at another day."

Early California case law and legislation determined that the public trust lands along the seashore extended to the "mean high tide" mark, and that although landowners could own the land under the trust waters, they could not keep the public off it, or impede the public's use of those lands up to the mean high tide.

Red tail hawk and hummingbird at Santa Cruz by Jannie Dresser, Sugartown Publishing

People v. California Fish Co., 166 Cal. 576 (1913), applied the public trust principles expressed in *Illinois Central* to the California waterfront. The State wanted to invalidate a patent of swamp land under a law that authorized for the sale of swampland, salt marsh and tidelands. The State argued that the lands were protected by the public trust doctrine. The California Supreme Court agreed that the right of the State to dispose of the land is subservient to the public rights of navigation and fishery. The State cannot dispose of the land in a way that harms the right of the public to use it for these recognized public trust purposes. When the State grants the land to a private party, that party takes the land subject to an easement for the public to use the land to fish or sail. Notably, the Court did not say that the grant was void or revocable, but solved the problem by retaining a public trust easement for the benefit of the public.

Marks v. Whitney, 6 Cal. 3d 251 (1971), expanded the public trust in tidelands beyond the traditional uses of navigation, commerce and fishing, to include recreation and the right to hunt, bathe or swim, as well as the right to preserve the tidelands in their natural state as ecological units for scientific study. The crucial expansion was the recognition that an important use of the tidelands was "the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." The California Supreme Court made a famous statement that the doctrine is "sufficiently flexible to encompass changing public needs" and that California need not apply the doctrine according

to "an outmoded classification." This case is also useful to cite for the principle that the public trust doctrine covers marshes and other wetlands.

A view on the Sacramento River from Windy Cove, photo by David Monniaux, in Wikipedia article

City of Berkeley v. Superior Court, 26 Cal.3d 515 (1980), held that legislative grants of tidelands do not necessarily extinguish the public's trust interest. A major portion of the Berkeley waterfront was granted to private parties under a statute authorizing such grants. The Court found that the purpose of the statute was not to promote public trust uses but to raise revenue. The Court also noted that the Attorney General had issued an opinion that placed purchasers of the land on notice that they took the land subject to a public trust easement. In addition, the California Constitution prohibited the sale of public land within two miles of a city and preserved the public right of navigation. The Court decided that under the particular facts of this case, lands that had been filled and thereby made useless for public trust purposes were not subject to a public trust easement.

The California Supreme Court has said that public trust doctrine applies to activities that harm the fishery in both navigable and non-navigable waters. See *People v. Truckee Lumber Co.*, 116

Cal. 397 (1897); for a more recent appellate court case, see *California Trout, Inc. v. State Water Resources Control Board*, 207 Cal.App.3d 585 (1989).

In *Golden Feather Community Ass'n v. Thermalito Irrigation District*, 209 Cal.App.3d 1276 (1989), a California Court of Appeal reaffirmed that the public trust doctrine protects wildlife. The case focused on aquatic wildlife, stating that "[t]he general right and ownership of wild animals, the most important constituent of which are fish, is in the people of the state. The state's right to protect fish is not limited to navigable or otherwise public waters but extends to any waters where fish [are present]." California holds wild fish in trust for the people, wherever the fish are found.

Bluebird at Pt. Pinole, Richmond, California by Jannie Dresser, Sugartown Publishing

In *National Audubon Society v. Superior Court Alpine County*, 33 Cal.3d 419 (1983), The California Supreme Court made "three key holdings" in favor of the public: (1) the public trust doctrine "protects navigable waters from harm caused by diversion of non-navigable tributaries"; (2) the State retains supervisory "power to reconsider allocation decisions," as well as an affirmative duty "to protect trust uses whenever feasible"; and (3) no party can claim "a vested right to divert waters [if] such diversions harm the interests protected by the public trust."

Environmentalists brought suit because diversions from the tributaries of Mono Lake had caused the lake to sink 43 feet. Rising salinity levels disrupted the food chain and led to changes in migratory bird patterns. Lowered lake levels also provided pathways for predators to attack birds' nests.

The Supreme Court made a landmark ruling that the public trust doctrine applies to waters and water rights. Further, the public trust doctrine protects the ecology of water bodies and their value as wildlife habitat.

The Court also held that agencies have a continuing "affirmative duty" to consider the public trust doctrine when allocating water and during their planning process. "Whenever feasible," State agencies such as the State Water Resources Control Board and the courts must protect public trust resources. The doctrine now operates as a possible limitation on both new and established water rights, including rights that powerful parties had considered to be "vested."

In *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal.App.4th 1349 (2008), a wildlife protection group sued a wind farm operator. The group argued that the killing of birds of prey by large wind turbines was a violation of the public trust doctrine. The court recognized that raptors and other birds are protected by the public trust doctrine even if they are not specifically associated with public trust waters. Members of the public have standing to file suit under the public trust doctrine, but they must target the public agencies that improperly permit actions that violate the public trust, rather than private parties.

Hawk by Jannie Dresser, Sugartown Publishing

I. CEQA: A Brief Background

- A developer proposes to build housing in the floodplain of the longest free-flowing and last relatively pristine river in southern California. The project destroys wetlands and tributaries that provide aquatic habitat, water and sediment supply and retention, and groundwater recharge for the river. The County changes zoning in the area to accommodate the developer, citing its overriding need to plan for future population growth.

- In northern California, a city approves a private soccer sports complex on a diked wetland area that houses the endangered California Clapper Rail. Supporters of the plan say that it alleviates a shortage of local recreational facilities and suggest that the clapper rails will get used to a heightened level of noise and night lighting.

What do these two developments have in common? They damage resources that are held in trust for all of the citizens of California. And they put a State-owned resource to a private, local use that is not recognized as a legitimate public trust use. And no one directly raised the issue of these violations of the public trust doctrine during the CEQA process.

Woodpecker at Crockett, California, by Jannie Dresser, Sugartown Publishing

1. What Does CEQA Do for Me as a Citizen?

The California Environmental Quality Act (CEQA) is a planning law. It requires government decisionmakers to consider the environmental consequences before they make decisions. It is a "look before you leap" law.

The purposes of CEQA are:

- To inform governmental decisionmakers and the public about potentially significant environmental effects of proposed projects,
- To help an agency find ways to avoid or mitigate environmental damage,
- To identify feasible alternatives or changes in the project that will help the environment,
- To provide the public with an opportunity to comment on the project, and
- To force the agency to give its reasons for approving a project that has significant environmental effects.

The heart of CEQA is arguably the opportunity for public comment. Citizens who live close to a proposed project are sometimes better than official decisionmakers at envisioning effects on the natural (not the social or economic) environment. And sometimes they're also better at envisioning solutions. In addition, citizen participation is a counterweight to the influence of developers and the possibility of backroom deals.

The underlying theory of CEQA is that the more knowledge you can bring to bear on a decision, the better the decision will be. And likewise, if you make the decisionmaking process public and transparent, the quality of the decision will improve.

Bolinas Lagoon, in Wikipedia article, photo in public domain

2. What Happens During the CEQA Process?

CEQA is primarily a procedural law. It sets out a process that has three distinct phases: (1) preliminary review; (2) Initial Study; and (3) environmental document preparation. During the preliminary review, a lead agency decides whether an action is a "project" that is subject to CEQA, whether any exemptions apply, and whether any other agencies must be notified. Agencies to be notified include the agencies that manage public trust resources that might be affected by a project. In the Initial Study, the lead agency decides whether the project might have a significant effect on the environment. If not, it prepares a Negative Declaration. If the Initial Study indicates that the project might have a significant effect on the environment, the lead agency prepares an Environmental Impact Report (EIR). The CEQA process is summarized in an excellent flowchart in Appendix A of the CEQA Guidelines. See http://ceres.ca.gov/ceqa/guidelines/appa.html.

Robin by Jannie Dresser, Sugartown Publishing

3. Do These Procedures Mean Anything: Can an Agency Just Pretend to Listen to Me and Then Go Ahead and Do Whatever It Wants to Do?

Under CEQA, public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures that would substantially reduce their significant environmental effects. Agencies have a duty to avoid or mitigate the significant environmental impacts identified in an EIR if it is feasible to do so. If an agency decides that it cannot do so, it must explain its reasoning to the public. It must either give an overriding economic, social, or other consideration that makes it infeasible to mitigate damage or pursue and alternative project,

or it must show that it cannot make the suggested changes because the responsibility for such changes is in the purview of another agency.

If an agency doesn't comply with the requirements of CEQA, you can take them to court. California has a "Private Attorney General Statute" that is designed to encourage people to bring cases with merit. If you win the case, the losing party may have to reimburse your attorney fees. This happens if the case enforced an "important right affecting the public interest" and if, among other things, it resulted in a "significant benefit" to the "general public or a large class of persons."

Coyote Creek flowing into Richardson Bay by C. Michael Hogan, in Wikipedia article, released into public domain

4. If CEQA Is So Protective of the Environment, Why Do I Need to Raise the Public Trust Doctrine?

CEQA and the public trust doctrine both attempt to protect the environmental and our natural resources for future generations. Both look to the future, and both envision the agency as a kind of trustee for this purpose. But the public trust doctrine squarely addresses the central issue of privatizing a public asset in a way that CEQA simply does not.

There are very specific public-trust standards that prohibit development decisions that effectively privatize or unnecessarily damage a public asset. These are different than CEQA standards.

There are specific, recognized public trust land uses that agencies must consider. If proposed land uses are outside recognized public trust uses and do not benefit the public trust, they are not acceptable.

Under the public trust doctrine as it has developed, agencies are arguably held to higher standards. The doctrine's historical legacy incorporates a great deal more skepticism about legislative enactments and is more apt to consider whether decisionmaking has been politicized to the public's disadvantage by pressures from influential private parties. The public trust doctrine is equipped to look that problem right in the face. And because the doctrine has the weight of the State constitution behind it, it is not automatically trumped by legislative enactments.

Petaluma River flowing into San Pablo Bay at Sears Point, with marshland in the background, U.S. Army Corps of Engineers photo, public domain

Many people commenting under CEQA will mention the project's effects on wildlife, wetlands, rivers, and water-based ecosystems. If you also refer to these resources as "public trust resources," it should trigger consideration of an additional set of agency duties. This is the main advantage of doing so.

In the context of allocating water, a landmark California Supreme Court case held that agencies have a continuing "affirmative duty" to consider the public trust doctrine during their planning process. They must protect public trust resources "whenever feasible." How this planning duty

applies to resources other than water has not yet been fully resolved by the courts. One way to speed up this process is to bring it up during the CEQA process. It is not necessary that you bring a lawsuit yourself. Simply making a written comment can help other concerned people who might later wish to raise the public trust issue. Unless SOMEONE brings it up during the CEQA comment period, a court cannot consider the public trust doctrine as a reason to overturn an unwise project.

Black crowned night heron at Lake Merritt, Oakland, California,
by Jannie Dresser, Sugartown Publishing

5. Where Can I Find the CEQA Documents I'm Supposed to Review?

The agency that will be deciding whether to issue a permit to proceed with a project may give notice that a Draft EIR has been prepared in one of several ways: (1) by publishing a notice in the "public notice" section of the local newspaper, (2) posting a notice on the site where a project will be built, or (3) mailing a notice to people who own property adjacent to the site of the proposed project. And other people who are interested in a proposed project can ask to be put on the mailing list to be notified when EIR documents are issued or revised. The notice will say where copies of the EIR and the documents that the EIR refers will be made available for the public to review. Although agencies are not required to do so, when a major project is under consideration, they will often set up an Internet location where documents may be viewed.

6. What Can I Do?

COMMENT! Members of the public can look at a proposed project or planning document and ask their government officials whether it adequately considers public trust resources. As described in the foregoing section, public trust resources include rivers, lakes, streams, shoreline, wetlands, and wildlife both aquatic and non-aquatic. Look around a parcel proposed for development and see whether any of these resources are present. See for yourself how these resources are used, and whether the proposed project will damage any recognized public trust use. In addition to navigation and water-related commerce, these recognized uses include navigation, fishing, aquaculture, recreation, bathing, swimming, habitat, wildlife refuges, scientific study, open space, and other water-related uses. Comment in writing and orally to your public officials and make them accountable for damage to these uses. All comments are addressed to the "lead agency," the agency that is making the decision on the project.

Sea Otter Coming Ashore at Moss Landing, California, in Wikipedia article, photo by Andre Gunther, Original Image source: The little known Secret of Moss Landing Photography

There are several opportunities for public comment during the CEQA process. When a Negative Declaration is proposed, the agency must notify the public and give them time to submit comments. The agency must also notify the public when a draft EIR is prepared. The notice

must give the dates, places, and times of the public hearings on the project, a brief description of the project and its location, the anticipated significant effects on the environment, if any, as a result of the project, and the address where the draft EIR and documents it refers to are available for review.

There must be a public comment period of at least 30 days, for the public to address the content of the draft EIR, which is often lengthy. There is also a public comment period for the final EIR and for interim revisions of the EIR. An optional scoping meeting may occur before the completion of the draft EIR. In the scoping process, the Lead Agency consults directly with any person or organization it believes will be concerned with the environmental effects of the project. This early consultation may be called scoping. Scoping is mandatory when the agency is preparing an EIR/EIS jointly with a federal agency. It is advantageous to identify yourself to the agency as an interested party and to participate in any scoping process. The earlier in the process you voice your concerns, the easier it is to persuade people to make changes in a project.

Coots Out of Water, by Jannie Dresser, Sugartown Publishing

7. What Should My Comment Letter Look Like?

The easier you make it for an agency to read and understand, the more effective your letter will be. In a comment letter to the lead agency, you identify and explain your concerns and suggestions. You may attach documents that you want the lead agency to consider or cite to Internet sources.

There are some writing techniques that may make your comment letter more effective. These include organizing the letter clearly, with headings describing your concerns. Clearly identify

who you are and who or what you are representing. State your basic position (support or opposition to the project as proposed) at the outset. To help the agency follow your argument, give page numbers in the EIR or other document when identifying your concerns (inserting page numbers in your comment letter as well will make it easier for the agency to respond and for other readers to follow the thread of the response).

Identify any environmental effects that have not been considered by the agency. Identify any errors that you've spotted. Identify any suggestions you have for mitigation or alternative projects. Facts and evidence are generally more effective than polemics. Cite expert opinion if you have it, and give the agency a way to access your documentation (Internet citation or documents attached as exhibits to your comment letter).

Zedler Marsh at Los Cerritos Wetlands, Los Angeles region, in Wikipedia article, photo in public domain

REFERENCES AND RESOURCES

Agency Websites

California State Lands Commission – www.slc.ca.gov
California State Water Resources Control Board – www.swrcb.ca.gov
California Department of Water Resources – www.water.ca.gov
California Department of Fish & Game – www.dfg.ca.gov
California Coastal Commission – www.coastal.ca.gov
San Francisco Bay Conservation and Development Commission – http://www.bcdc.ca.gov
The CEQA laws and guidelines are available on the California Department of Natural Resources, http://ceres.ca.gov/ceqa/docs/CEQA_Handbook_2012_wo_covers.pdf. There is additional information at http://ceres.ca.gov/planning/ceqa/.

California Constitution

Art. X, http://www.leginfo.ca.gov/.const/.article_10
Art. I, http://www.leginfo.ca.gov/.const/.article_1

California Statutes

California Civil Code Section 670, http://www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=00001-01000&file=669-671

California Public Resources Code, Section 6301, http://www.leginfo.ca.gov/cgi-bin/displaycode?section=prc&group=06001-07000&file=6301-6320

Public Resources Code Section 5093.50, http://www.leginfo.ca.gov/cgi-bin/displaycode?section=prc&group=05001-06000&file=5093.50-5093.70

California Harbors & Navigation Code, Section 100, http://www.leginfo.ca.gov/cgi-bin/displaycode?section=hnc&group=00001-01000&file=100-107

California Fish and Game Code Section 5937, http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fgc&group=05001-06000&file=5930-5948

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Golden Feather Community Ass'n v. Thermalito Irrigation District, 209 Cal.App.3d 1276 (1989), http://scholar.google.com/scholar_case?case=11842696688567519967&q=Golden+Feather+Community+Assn+v.+Thermalito+Irrigation+District&hl=en&as_sdt=4,103

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California Trout, Inc. v. State Water Resources Control Board, 207 Cal. App. 3d 585 (1989), http://scholar.google.com/scholar_case?case=10707918469959668184&hl=en&as_sdt=2,5&as_vis=1

Center for Biological Diversity v. FPL, 166 Cal.App.4th 1349 (2008), http://scholar.google.com/scholar_case?case=8214259929582595679&hl=en&as_sdt=2&as_vis=1&oi=scholarr; http://www.leagle.com/xmlResult.aspx?xmldoc=In%20CACO%2020081010016.xml

Selected Articles

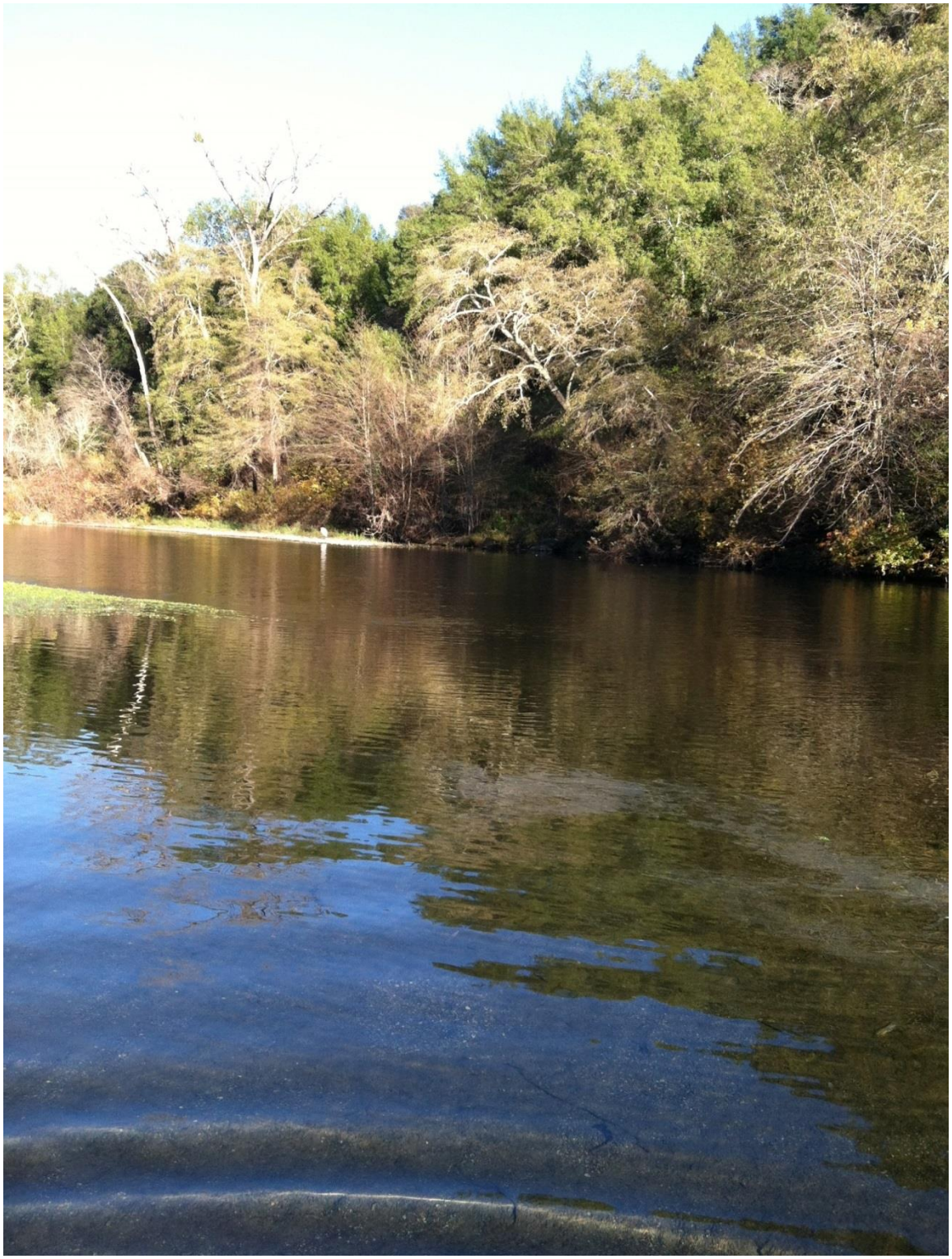
Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970), available at http://www.uvm.edu/~gflomenh/PA395-CMN-ASSTS/articles/sax.pdf

California Water Plan Update 2005, Jan Stevens, Applying the Public Trust Doctrine to River Protection, http://www.waterplan.water.ca.gov/docs/cwpu2005/vol4/vol4-environment-applyingpublictrustdoctrine.pdf

Symposia

U.C. Davis, SYMPOSIUM — THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT: A SYMPOSIUM (1980), http://lawreview.law.ucdavis.edu/issues/14/2/index.html

U.C. Davis, SYMPOSIUM — THE PUBLIC TRUST DOCTRINE: 30 YEARS LATER (2012), http://lawreview.law.ucdavis.edu/issues/45/3/index.html



Russian River east of Healdsburg, at Del Rio, by poet Penelope La Montagne,
author of Jigsaw Heart and River Shoes