

# **Government Has a Public Trust Duty to Take Precautionary Action to Achieve Environmental Justice\***

**Comments August 21, 2003 at a meeting convened by the South Coast Air Quality  
Management District, Diamond Bar, California**

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# Government Has a Public Trust Duty to Take Precautionary Action to Achieve Environmental Justice\*

**Peter Montague**

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Thank you for the opportunity to offer comments on the precautionary principle and environmental justice. I want to explore the role of government in achieving environmental justice. First, let's define "environmental justice."

## I. What is Environmental Justice?

The federal government defines environmental justice this way: (from: <http://www.epa.gov/compliance/environmentaljustice/> )

"Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

"Fair treatment means that no group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

"Meaningful involvement means that:

"(1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health;

"(2) the public's contribution can influence the regulatory agency's decision;

"(3) the concerns of all participants involved will be considered in the decision making process; and

"(4) the decision makers seek out and facilitate the involvement of those potentially affected." [End of definition.]

In sum: environmental justice requires that

(1) The environmental and health consequences of decisions must be shared fairly and nearly equally by everyone;

(2) Everyone whose life will be touched by the environmental or health consequences of a decision should have an opportunity to GENUINELY AFFECT that decision; and

(3) In pursuit of (2), above, decision-makers have a duty to “seek out” and “facilitate the involvement of” affected persons in decisions that will have environmental or health consequences.

## **II. What is the Precautionary Principle?[1]**

I believe the Wingspread Statement’s definition of the precautionary principle is now widely accepted: (from: <http://rachel.org/library/getfile.cfm?ID=189> )

“When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.

“In this context the proponent of an activity, rather than the public, should bear the burden of proof.

“The process of applying the Precautionary Principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action.”

The Essence of Precaution:

In all formulations of the precautionary principle, we find three elements:

- 1) When we have a reasonable suspicion of harm, and
- 2) scientific uncertainty about cause and effect, then
- 3) we have a duty to take action to prevent harm.

The precautionary principle does not tell us what kind of action to take when we suspect impending (or on-going) harm. But the Wingspread statement on precaution offers these suggestions for action:

- 1) Consider all reasonable alternatives;
- 2) Place the burden of assuring safety on the person whose activities raised the suspicion of harm in the first place;
- 3) In making decisions, fully involve the people who will be affected.

In sum:

The precautionary approach offers a new approach to traditional ways of protecting workers, communities and ecosystems. Instead of asking, “How much harm is allowable?” the precautionary approach asks us to consider, “How little harm is possible?”

Faced with reasonable suspicion of harm, the precautionary approach urges a full evaluation of available alternatives for the purpose of preventing or minimizing harm.

Precautionary action urges decision-makers to set goals for safe and healthy environments, examine all available alternatives for achieving the goals, really involve the public and workers in decisions, and put the burden of proof of safety on those whose activities raised suspicion of harm in the first place.

I believe that environmental justice cannot be achieved without use of the precautionary principle. I have discussed my reasons at length and will not repeat those arguments here. (See <http://www.rachel.org/library/getfile.cfm?ID=238> .)

I note that the people of the City of San Francisco also believe that the precautionary principle forms the basis for environmental protection AND justice. San Francisco recently adopted the precautionary principle into its municipal code, saying, "...the City sees the Precautionary Principle approach as its policy framework to develop laws for a healthier and more just San Francisco." In sum, precaution provides the "policy framework" for achieving a HEALTHIER and more JUST San Francisco. See <http://www.rachel.org/library/getfile.cfm?ID=195>

### **III. What is the Proper Role of Government in Achieving Environmental Justice?**

The principal actor on the environmental stage is the large publicly-held corporation.[2] Large corporations, and the elites that control them, make most of the decisions that affect our air, water, soils, and quality of life.

#### **a) The Role of Large Corporations: Fiduciary Duty to Investors**

As a matter of law, the managers of corporations that issue stock to the public cannot make decisions principally to promote environmental justice or to protect the environment.[3]

As a matter of law, publicly-held corporations must return a steady, modest profit to investors. If corporate managers make decisions that might interrupt the flow of steady profit to investors, they can (and probably will) be sued for breach of fiduciary duty. This legal requirement to return a steady profit narrowly restricts the kinds of decisions that corporate managers can make.[3]

I do not mean to imply that the individuals who manage large corporations are bad people or lacking personal conscience. On the contrary, in my experience many of them are very fine people.

However, when they make decisions on behalf of the corporation, directors and managers have to put their personal ethics aside and make decisions that are consistent with their legal obligation to provide a stream of profits to investors. Everything else is secondary because profit is the primary corporate goal that MUST be pursued as a requirement of law.[3]

I repeat: Corporate directors and managers cannot voluntarily seek environmental protection or environmental justice as a primary goal because the corporate code in law prevents them from doing so whenever those goals are inconsistent with the goal of returning profit to investors.

Therefore, so far as social justice and environmental protection are concerned, corporations have no reliable built-in mechanism for self-restraint.

Indeed, to the extent that they can, corporations have major incentives to "externalize" their costs, to dump toxic materials into public air and water, to take inadequate steps to protect the health and well being of their workers and to oppose all laws, regulations, and policies that might reduce profits while enhancing social justice or protecting the environment.

If an individual were to behave in this fashion, he or she would be labeled a “sociopath” or in extreme cases a “psychopathic personality.”[4]

In seeking profits, corporate managers DO have a legal obligation to comply with public laws, regulations, and policies (even though financial incentives constantly tempt them to do otherwise).

Therefore, to protect public health and the environment, the behavior of corporations MUST be and CAN BE constrained by government—through laws, regulations, and policies.

Government is the only entity that can reliably protect and defend members of the public, and their environment, from corporate abuse.[5]

## **b) The Role of Government: Fiduciary Duty to The Public Trust**

Everyone acknowledges that a diverse and self-regulating, self-regenerating environment is essential to life, liberty and the pursuit of happiness. We know from history that when the natural environment is allowed to deteriorate, even the greatest and most powerful civilizations can collapse.[6]

Caring for the commonwealth is an ancient duty of the sovereign. Sometimes this duty is considered so basic that it is taken for granted and not spelled out. At other times, this duty is given a name: the public trust.

As legal scholar Peter Manus describes it, “Under American democratic theory, the nation’s people possess an abstract form of sovereignty over the land and its natural resources that may be termed original ownership. In creating the government, the people delegated many powers and duties to its sovereign authority, including managerial responsibilities over the country’s resources. In trust terms, the people designated the government as trustee of the land and other natural resources and themselves as beneficiaries. This framework is particularly analogous to that of a charitable trust, which may incorporate a public purpose, government trustee, and generalized beneficiaries.” [7, pg. 325]

Manus goes on: “Certainly the trust concept, as a structure of law, was part of the common law upon which American constitutional protections were founded. Thus, the idea that a party may exercise control over the assets of a second party on that party’s behalf, and not in subjugation of the second party, is a principle that was among the fundamental presumptions of the original American settlers as well as the constitutional framers.” [7, pg. 361]

Here is another way of phrasing the public trust concept:

“Government has a fundamental duty to adhere to a program of environmental husbandry aimed at maintaining a regenerative natural environment. This obligation is perpetual and requires both preventive measures to protect environmental health and remediative measures where past behavior has breached the trust. The public trust thus serves the general citizenry, including future citizens, by ensuring that the natural environment thrives and will continue to thrive as a healthy and diverse human habitat.” [7, pg. 322]

In sum: Government has a duty to promote and maintain a healthy natural environment on behalf of current and future citizens. This duty is not optional: it is a mandatory, affirmative duty that government cannot deny, repudiate, or alienate.

The role of trustee casts government in a new and positive light. In fulfilling its magnificent duty to protect the future for us and for those unborn, government has a heroic role to play. Government is the protector, the guardian, the shield of the public trust. It is a role that government officials can proclaim proudly, for it is their unique, specific duty to protect our common heritage so that we can pass it on to the future undamaged and, ideally, improved.

How can we express this fundamental role of government? Here are some nouns:

caretaker  
champion  
custodian  
defender  
fiduciary  
guardian  
keeper  
paladin  
protector  
sentinel  
steward  
trustee

And here are some verbs:

defend  
guard  
hold  
husband  
keep  
protect  
safeguard  
save  
secure  
shield  
shelter  
watch over

A trust requires a creator, a beneficiary, a trustee, and a trust property. The “public trust” was created when the United States was created. The beneficiary is present and future generations. The trustee is government. So what is the “trust property” that the trustee must maintain and enhance for present and future generations?

The following phrases try to capture the elements of the trust property:

- the things that we own in common, which none of us owns individually
- our common heritage
- air
- water
- wildlife and biodiversity
- the common weal

- everything that is essential to life, liberty and the pursuit of happiness
- fertile and self-regenerating soils
- the presumption that we are all created equal and that we all have an inherent right to liberty and justice
- our genetic heritage (the human and wild genomes)
- knowledge passed from generation to generation[8]
- self-regulating, self-regenerating ecosystems
- the sky, the moon, the stars
- outer space
- the electromagnetic spectrum (carries radio and TV signals)
- peacefulness, stillness, silence
- the natural beauty of a place
- recreational amenities provided by nature
- the satisfaction of knowing that we are preserving life
- our right to live free from toxic threats
- our right to raise children free from toxic threats
- ... and so on

This “trust property” is a cultural legacy owed to future generations.

### **c) The Public Trust and Private Property**

We must acknowledge that, in fulfilling its affirmative public trust duty, government will have an obligation from time to time to limit the prerogatives of private property:

“A public trustee aims to protect individual citizens from their own trust-destructive instincts.” [7, pg. 342-343]

“A public trust perspective on takings law protects against the hoarding of nature’s gifts by refusing to allow private property interests to presumptively include the right to destroy natural resources.” [7, pg. 356]

“...[T]he government’s overarching sovereign duty to protect the environmental rights of citizen beneficiaries from the exploitive tendencies of the beneficiaries themselves. Access rights must be secondary.” [7, pg. 334]

“[T]he duty of this generation to future generations must be the key ingredient of an effective modern public trust.” [7, pg. 334]

## **IV. The Public Trust Requires Precautionary Action**

“In essence, public trustees must recognize that future patterns in land use and resource consumption may create ecological problems that trigger public trust duties to regulate these uses and, consequently, impact private property owners.” [7, pg. 342]

This is an important point: the trustee must recognize that circumstances change, and changing circumstances may bring new threats to the trust that never existed before.

The trustee must be alert, vigilant, attentive, heedful, mindful, prudent, prepared and precautionary. Like any good sentinel, the trustee must boldly anticipate and explore potential threats to the trust property. In this duty, the trustee will find the precautionary principle an essential guide.[9]

If the trustee waits for threats to fully manifest themselves, it will be too late—the trust property will have been harmed by the time action is taken. Precautionary action is essential for safeguarding the public trust.

In sum, protection of the trust property **REQUIRES** the trustee to take precautionary action.

## **V. For the Good of All: What Government Can Do**

There is a strong consensus among many biologists that the natural world is in deep trouble.[10,11,12] The biosphere, upon which all life depends, is being shredded. And there is abundant evidence that environmental deterioration has led to serious chronic disease among humans, especially among people of color and low-income populations.[13,14] This is environmental injustice.

It must be obvious that we need to develop an environmentally benign industrial base. It is also clear that corporations, as presently constituted under law, are not up to the task.

There is precious little evidence that corporate managers (in their role as corporate officials) are able to conceive of this goal, must less articulate the goal or prescribe steps for getting there. On the other hand, corporate managers spend enormous resources defending the status quo, attacking positive new ideas like the precautionary principle, and deflecting peoples' concerns away from the main source of our troubles, which is principally corporate policies.

I think of the air pollution problem that the people of Los Angeles are facing right now, and I recall that within my lifetime Los Angeles had the largest steel-rail trolley system in the U.S., with more than 1000 miles of track serving the central city and surrounding communities with fast, clean, quiet electric-motorized trolleys. Within my lifetime, steel-rail trolleys served Pasadena, San Gabriel, San Bernardino, Long Beach, Newport, San Pedro, Santa Ana, Hollywood, Burbank and Glendale, the San Fernando Valley, and Santa Monica, among other communities.[15]

This rail system was a tremendous community asset that was intentionally and systematically destroyed by a handful of major American corporations—Standard Oil of California, Phillips Petroleum, Mack Truck, General Motors, and Firestone Tire. [15, 16]

No, after a sober (and sobering) review of the available evidence, one is forced to conclude that the corporate sector, in its present legal form,[2] can never be engine for achieving social justice or environmental protection.

Protecting the environment and achieving social justice is the duty—and the honor—of government. Government has a clear mandate to do the job, to protect our common heritage, **AND** to achieve justice, including of course environmental justice.

It is **NOT** the role of government to auction off the public trust to the highest bidder.



It is NOT the role of government to “achieve a balance” between those who want to preserve our common heritage and those who want to use it up or throw it away. Too often we hear from discouraged government officials that they must be doing something right if “both sides” are dissatisfied with the job they are doing. This is nonsense. Government has a duty to come out squarely and proudly on the side of protecting our common heritage, including the natural environment and the conditions that make justice possible—including environmental justice.

### **What are the conditions that make environmental justice possible?**

To achieve environmental justice, people need POWER, MONEY, and INFORMATION:

- 1) The POWER to decide. To achieve environmental justice, government must align itself in service to those who are, or who are likely to be, the victims of environmental injustice. Figuring out who this might be is not rocket science.

In concert with these threatened communities, government can ask, “What can I do right now, and what should I plan to do in the future, to alleviate and avoid environmental injustices?”

Here, application of “alternatives assessment”—a key component of the precautionary principle—will pay big dividends. See the DRAFT report of the Cal/EPA Environmental Justice Advisory Committee at <http://www.rachel.org/library/getfile.cfm?ID=186> . (And see my short discussion of that draft report at [http://www.rachel.org/bulletin/index.cfm?issue\\_ID=2359](http://www.rachel.org/bulletin/index.cfm?issue_ID=2359) .)

In this effort, one of government’s essential roles is to bring representatives of all relevant stakeholders to the table, to make democratic decisions by talking together. The Cal/EPA Environmental Justice Advisory Committee provides an example of an inclusive process that gave credibility and power to the Committee’s recommendations.

How to engage the public is a subject that we could all study profitably. Best practices for democratic participation include many new processes and techniques worthy of study and experiment. For example, see <http://www.rachel.org/library/getfile.cfm?ID=161> .

- 2) MONEY to:

- \*\* build the capacity of specific communities to participate in decisions, including;
- \*\* gain time to get involved at the earliest stages, when alternatives are still being considered;
- \*\* gain time to read, think and participate as the process evolves;
- \*\* gain time to acquire knowledge and understanding;
- \*\* gain time to engage, reflect, reach conclusions, and act;
- \*\* tap into the needed resources to evaluate alternatives;
- \*\* gather the resources to organize the community to reach consensus (or at least a position agreeable to most) and to develop a community voice.

- 3) INFORMATION to provide the basis for informed decisions and actions—information at the earliest stages of the process (including available alternatives), information about all relevant aspects of the process (how the money flows, for example), information in a useful, understandable format.

It is government's righteous duty to see that victims of environmental justices, or the POTENTIAL victims of environmental justices, have access to these three things—POWER, MONEY, and INFORMATION—so that, together with government, communities can provide a counterweight to the deadening hand of the corporate form.

At their best, government officials provide inspiring examples of service to community. Protecting the public trust through precautionary action provides a way for government to celebrate and rededicate itself in its role of service for the common good. As guardian of the public trust, government can help America regain its balance, heal itself, and rediscover its core spiritual values of stewardship and self-sacrifice. As Peter Manus has written,

“Defined as a government responsibility to preserve a healthy natural environment for the American people, the public trust captures the essence of the stewardship principle. At the same time, by stressing the duty of all parties—government trustees, market participants, and citizen beneficiaries—to compromise personal exploitation values before the needs of the environment, the public trust captures the ideal of a democratic society of individuals working for the greater good even as they work for individual benefits.” [7, pg. 370]

Thank you for the opportunity to offer these thoughts.

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\* My thanks to Carolyn Raffensperger for several of the key public trust ideas in this paper, though she bears no blame for the way I have presented (or distorted) them. My thanks, too, to Maria B. Pellerano for valuable comments on an early draft.

[1] On the precautionary principle, see:

Precautionary principle - overviews

<http://www.rachel.org/library/getfile.cfm?ID=187>

<http://www.rachel.org/library/getfile.cfm?ID=188>

<http://www.rachel.org/library/getfile.cfm?ID=189>

<http://www.rachel.org/library/getfile.cfm?ID=227>

Precautionary principle in the workplace:

<http://www.rachel.org/library/getfile.cfm?ID=198>

<http://www.rachel.org/library/getfile.cfm?ID=218>

<http://www.rachel.org/library/getfile.cfm?ID=219>

<http://www.rachel.org/library/getfile.cfm?ID=221>

<http://www.rachel.org/library/getfile.cfm?ID=222>

Precautionary principle and municipal/county government:

<http://www.rachel.org/library/getfile.cfm?ID=195>

<http://www.rachel.org/library/getfile.cfm?ID=197>

Precautionary principle and environmental science:

<http://www.rachel.org/library/getfile.cfm?ID=170>

Precautionary principle and children's health:  
<http://www.rachel.org/library/getfile.cfm?ID=220>

Precautionary principle and public health:  
<http://www.rachel.org/library/getfile.cfm?ID=225>

[2] Sarah Anderson and John Cavanagh, Top 200; The Rise of Corporate Global Power (Washington, D.C.: Institute for Policy Studies, Dec. 4, 2000. Available at: <http://www.rachel.org/library/getfile.cfm?ID=147> . Throughout this paper, the word "corporation" refers exclusively to large, publicly-held corporations. Privately held corporations are free to do whatever their owners choose to do, within the law, no matter what the effect on profits might be.

[3] Robert Hinkley, "Twenty Eight Words to Redefine Corporate Duties," Multinational Monitor Vol. 23, Nos. 7 and 8 (July/August 2002); available at <http://www.rachel.org/library/getfile.cfm?ID=237> . And be sure to see The Model Uniform Code for Corporate Citizenship, available at <http://www.rachel.org/library/getfile.cfm?ID=236> .

[4] A dictionary definition of a "psychopathic personality" is, "An emotionally and behaviorally disordered state characterized by a clear perception of reality except for the individual's social and moral obligations...."

[5] Corporate campaigns by citizens can sometimes change corporate behavior. Under present circumstances, laws, regulations and public policies, COMBINED WITH corporate campaigns, are likely to be the MOST effective deterrent of corporate abuse.

However, sooner or later, I believe the corporate form itself will need to be modified to allow corporate managers to pursue other goals in addition to profit. See note 3, above.

[6] Clive Ponting, A Green History of the World; The Environment and the Collapse of Great Civilizations (London: Sinclair-Stevenson, 1991; New York: Penguin Books, 1993).

[7] Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," Stanford Environmental law Journal Vol. 19 (May 2000), pgs. 315-369. Available at <http://www.rachel.org/library/getfile.cfm?ID=234>

[8] Joseph L. Sax, "Implementing the Public Trust in Paleontological Resources," unpublished (?) paper dated 2001 (?). Available on the web at <http://www.rachel.org/library/getfile.cfm?ID=235> .

[9] James T. Paul, "The Public Trust Doctrine: Who Has the Burden of Proof?" Paper presented at the July 1996 meeting of the Western Association of Wildlife and Fisheries Administrators. Available at: <http://www.rachel.org/library/getfile.cfm?ID=190>

[10] See, for example, Peter M. Vitousek and others, "Human Domination of Earth's Ecosystems," Science Vol. 277 (July 25, 1997), pgs. 494-499. Available at <http://www.rachel.org/library/getfile.cfm?ID=200>

[11] Jane Lubchenco, "Entering the Century of the Environment: A New Social Contract for Science," Science Vol. 279 (Jan. 23, 1998), pgs. 491-497. Available at: <http://www.rachel.org/library/getfile.cfm?ID=203>

[12] William K. Stevens, "Lost Rivets and Threads, and Ecosystems Pulled Apart," New York Times July 4, 2000, pg. F4. Available at: <http://www.rachel.org/library/getfile.cfm?ID=233>

[13] See, for example, Michael McCally, editor, *Life Support: The Environment and Human Health* (Cambridge, Mass.: MIT Press, 1002; ISBN 0262632578). And see any issue of the U.S. government journal, *Environmental Health Perspectives* at <http://ehpnet1.niehs.nih.gov/docs/allpubs.html> .

[14] See Richard Wilkinson, *Unhealthy Societies: The Afflictions of Inequality* (New York: Routledge, 1997; ISBN: 0415092353); and see the bibliography in D. Raphael, *Inequality is Bad for Our Hearts: Why Low Income and Social Exclusion Are Major Causes of Heart Disease in Canada* (Toronto: North York Heart Health Network, 2001). And see, for example: Ana V. Diez Roux and others, "Neighborhood of Residence and Incidence of Coronary Heart Disease," *New England Journal of Medicine* Vol. 345, No. 2 (July 12, 2001), pgs. 99-106. And: Michael Marmot, "Inequalities in Health," *New England Journal of Medicine* Vol. 345, No. 2 (July 12, 2001), pgs. 134-136. And see the extensive bibliographies in the following: M. G. Marmot and Richard G. Wilkinson, editors, *Social Determinants of Health* (Oxford and New York: Oxford University Press, 1999; ISBN 0192630695); David A. Leon, editor and others, *Poverty, Inequality and Health: An International Perspective* (Oxford and New York: Oxford University Press, 2001; ISBN 0192631969); Norman Daniels and others, *Is Inequality Bad for Our Health?* (Boston: Beacon Press, 2000; ISBN: 0807004472); Ichiro Kawachi, and others, *The Society and Population Health Reader: Income Inequality and Health* (New York: New Press, 1999; ISBN: 1565845714); Alvin R. Tarlov, editor, *The Society and Population Health Reader, Volume 2: A State Perspective* (New York: New Press, 2000; ISBN 1565845579).

[15] The history of the electric railways of southern California can be found at <http://www.erha.org/index.html> .

[16] Jim Klein and Martha Olson, *Taken for a Ride*, a 55-minute film describing the intentional destruction of steel-rail trolley systems in 83 American cities between 1920 and 1970 by General Motors, Standard Oil of California, Phillips Petroleum, Mack Truck, and Firestone Tire. The film is available from New Day Films (<http://www.newday.com>), 190 Route 17M, P.O. Box 1084, Harriman, NY 10926; 1-888- 367-9154. Excerpts from the film's script are available at: <http://www.rachel.org/library/getfile.cfm?ID=147> .