

Rachel's Environment & Health News
#775 – A New Tool for Environmental Protection and Justice
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We need some new tools for environmental protection and environmental justice, because traditional approaches don't seem to be working very well. One such tool is the "public trust doctrine," which has been around for a long time but has been used only rarely and narrowly.

Before we describe the public trust doctrine, let's define the problem we're all facing.

The principal actor on the environmental stage is the large publicly-held corporation.[1] Large corporations, and the elites that control them, make most of the decisions that affect our air, water, soils, and quality of life. In general, it is corporate actions and policies that harm workers and the environment and create disproportionate environmental impacts on people of color and on low-income communities. (To the extent that governments share responsibility for these harms, it is usually by ignoring, or rubber stamping, something that a corporation has decided to do.)

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.[2]

As a matter of law, publicly-held corporations must try to return a steady, modest profit to investors. If corporate managers make decisions that might interrupt the flow of steady profit to investors, they can be (and probably will be) sued for breach of fiduciary duty. This legal requirement to return a more-or-less steady profit narrowly restricts the kinds of decisions that corporate managers can make.[2]

We do not mean to imply that the individuals who manage large corporations are bad people or lacking personal conscience. On the contrary, in our 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.[2]

In sum, corporate directors and managers cannot voluntarily make worker safety or environmental protection or environmental justice a primary goal because the law prevents them from doing so whenever those goals conflict 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 or good behavior.

Indeed, most of the incentives push in the opposite direction.

Corporations have major incentives to "externalize" their costs -- to dump toxic materials into public air and water, to take inadequate steps to promote the health and dignity of their workers, and to oppose almost all laws, regulations, and policies that enhance social justice or protect the environment but might interfere with profits.

To the extent that they can under law (and occasionally outside the bounds of law), corporate officials MUST try to get someone else to pay their costs. Often it is the tax-paying public that must pay directly -- for managing mountains of industrially-contaminated sewage sludge, for example, or paying for emergency-room care of asthmatic children, or supporting a large bureaucracy to worry about pollution's effects on public health. And frequently it is individuals who must pay -- individual workers disabled by emphysema or cancer, or community members who must stay indoors on smoggy days or who must purchase safe drinking water for their families, or commercial fishermen whose livelihood is threatened by contaminated fish or shellfish, for example.

It is the framework of law that requires corporations to behave in these ways, and we should acknowledge what a problem this arrangement has become. Corporations can live forever, they can grow without limit, and they have no reliable built-in conscience. If an individual were to behave like a corporation, he or she could be labeled a "sociopath" or in extreme cases a "psychopathic personality." [3] Enron was not an aberration.[4]

Again, this is not intended to disparage the vast majority of individuals who control corporations. The law narrowly constrains the goals that they can seek.[2]

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).[4]

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 the natural tendencies of corporations to externalize their costs.[5]

The Role of Government: Fiduciary Duty to The Public Trust

Everyone acknowledges that a diverse, self-regulating, and 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]

Professor 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 alienate, repudiate, or deny.

The role of trustee casts government in a new and positive light. In fulfilling its central 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. This 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 has four parts: 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.

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, pgs. 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]

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 foresee and forestall.

The trustee must be alert, vigilant, attentive, heedful, mindful, prudent, prepared and precautionous. 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. Indeed, the Supreme Court of Hawaii has determined that the public trust doctrine REQUIRES use of the precautionary principle.[9]

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.[9,10,11] 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.[12,13] 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, much 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.

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 the 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 disheartened 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 down 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.

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] - -Peter Montague and Carolyn Raffensperger

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[1] 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 Rachel's #775, 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.

[2] 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> .

[3] 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...."

[4] For example, see Kurt Eichenwald, "After a boom, there will be scandal. Count on it.," New York Times Dec. 16, 2002. Available at <http://www.rachel.org/library/getfile.cfm?ID=308> .

[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, we believe the corporate form itself will need to be modified to allow corporate managers to pursue other goals in addition to profit. See note 2, 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).

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