From: Arnold Whitridge
To: Kamyar Guivetchi; Paul Dabbs
Cc: Virginia Cahill; Lisa Beutler; Nick Di Croce; John Sullivan; Michael Warburton
Sent: Friday, February 20, 2004 4:07 AM
Subject: Public Trust treatment in January 30 draft

Comments of Jack Sullivan, Michael Warburton, and Arnold Whitridge on Public Trust language in the January 30 draft of B-160

We appreciate B-160's progress to date towards appropriate treatment of the State's public trust responsibilities. In order for the Update to reach its intended consistency with the Supreme Court's Audubon decision, several essential (but simple) improvements are still necessary:

1. In several prominent places, the January 30 draft says that the public trust is applicable to navigable waters and the lands beneath them. No reasonable reader would understand this to include non-navigable waters, but the Supreme Court's Audubon decision makes it clear that the trust extends to the flows of non-navigable tributaries of navigable waters. To be accurate and acceptable, the root discussion in Chapter 2, the Key Recommendation in Chapters 1 and 5, page 2 of Chapter 5, and the introduction to Volume 2 should use the formulation that industrious readers may discover deep in Chapter 4: "navigable waters, the lands beneath them, and the flows of their tributaries".

2. Some of the references above discuss "continuing" supervision of trust resources, but Key Recommendation #5 in Chapters 1 and 5 substitutes "continued" supervision. "Continued" here tends to define the recommended supervision as a continuation of previous effort, which limits and obscures the responsibility that the Supreme Court described as "continuous" in its opening remarks, "continuing" in its conclusion, and "continuing" most often in the intervening discussion. "Continued" should be replaced by "continuous" or "continuing" to be consistent with Audubon.

3. The welcome new box at the end of Chapter 5 says that SWRCB "may fulfill its duty of continuous supervision under the Public Trust Doctrine by responding to complaints of violation..." This seems neither as "continuous" nor as "affirmative " as Audubon requires. We suggest "The Board may fulfill its duty of continuous supervision under the Public Trust Doctrine, **in part**, by responding to complaints...".

4. Modifying the first sentence of the box to read "The Public Trust Doctrine imposes trust responsibilities **to current and future generations** on state agencies that have authority over trust resources, or whose activities might affect the resources" would better convey the duty sketched out by the Supreme Court.

Thanks,

Jack Sullivan, Michael Warburton, and Arnold Whitridge