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November 9, 2018

VIA ELECTRONIC FILING

Hon. Tani Gorre Cantil-Sakauye, Chief Justice
and Associate Justices of the California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

RE: **Amicus Curiae Letter In Support of Petition for Review**
Environmental Law Foundation, et al. v. State Water Resources Control Board and County of Siskiyou (2018) 26 Cal.App.5th 844, Third Appellate District Case No.C083239; California Supreme Court Case No. S251849

Dear Honorable Chief Justice and Associate Justices of the Supreme Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, the League of California Cities ("League"), the California State Association of Counties ("CSAC") and the California Association of Sanitation Agencies ("CASA") (collectively, "Amici") write in support of the petition for review filed in the above-entitled action by Appellant County of Siskiyou ("County").

The Court of Appeal's opinion ("Opinion") generates significant and difficult burdens for local government that are unnecessary for the protection of resources secured by the public trust doctrine. Specifically, the implications of the Opinion are to require local government agencies to engage in a balancing of public trust considerations for each and every action that *may* affect trust resources, regardless of how attenuated the cause and effect may be or how far removed the authority underlying the local government's action is from the administration of the trust resource.

The ministerial well permitting ordinance at issue in this case is an apt example. The ordinance, administered by the County, is singularly focused on ensuring proper construction of wells to avoid groundwater contamination. The ordinance is not designed to regulate the *quantity* of groundwater use—

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individually or collectively across the common groundwater supply—nor any impact caused by groundwater production. The Opinion, however, would burden the County with making difficult judgments on groundwater supply issues, which involve complex hydrologic and water right matters, before the County exercises its authority under the ordinance. And the implications of this reasoning extend far beyond the ordinance, from ministerial building and grading permit ordinances to zoning and numerous other land use and local planning activities that do not involve direct administration of trust resources but may nevertheless indirectly affect navigable waterways. As such, this Court's review is appropriate, under California Rules of Court, rule 8.500(b), to settle the scope and reach of a local government's duties and liabilities under the public trust doctrine when engaged in regulatory activities that do not involve administration of trust resources and without delegation of public trust responsibilities from the Legislature.

Amici take no issue with the venerable goals of protecting public trust uses in navigable waters that are adversely affected by the production of hydrologically-connected groundwater supplies. However, such issues should be decided, to the extent feasible, by agencies delegated the authority to balance competing societal interests, ideally through the application of regulatory regimes specifically crafted by the Legislature to address such concerns. With respect to the impacts of groundwater production on the Scott River, the Sustainable Groundwater Management Act ("SGMA") affords such an opportunity. This is not to argue that SGMA subsumes the public trust doctrine, which the Court of Appeal held it did not, but to urge this Court to accept review to clarify that SGMA is an appropriate method under which public agencies can and should consider public trust uses, not through local agency determinations on matters far removed from the administration of the resource.

I. STATEMENT OF INTEREST

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is

administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CASA is an association dedicated to protecting public health and the environment through effective wastewater treatment. CASA represents more than 110 local public agencies throughout the state, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, joint powers authorities, California water districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of California residents, businesses, industries and institutions. CASA has identified this case as one affecting its member agencies.

II. BACKGROUND

The public trust doctrine is based on the legal fiction that certain natural resources, such as air, water, and wildlife, are "public property" held in trust by the state for the public's benefit. (*Toomer v. Witsell* (1948) 334 U.S. 385, 402; *Illinois Cent. R.R. Co. v. Illinois* (1892) 146 U.S. 387, 452 ("*Illinois Central*").) At its core, the doctrine seeks to justify enhanced judicial scrutiny of governmental transactions involving these common and shared natural resources. The premise of public ownership, or state trusteeship, over navigable water in particular, provides a legal shorthand to express the societal importance of water and the state's sovereign power to regulate and manage it for the public's benefit. (See *Sporhase v. Neb. ex rel. Douglas* (1982) 458 U.S. 941, 950–51 [explaining that the notion of public ownership of water is "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource"].)

As explained in the Opinion, the doctrine's protections have expanded to include ecological, aesthetic, and recreational values, as well as other aspects of resource conservation. (Opinion, pp. 11–13 [discussing this Court's seminal opinion in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 ("*Audubon*")].) In *Audubon*, this Court held that the public trust doctrine imposed an affirmative duty on the State Water Resources Control Board ("State Water Board") to reconsider the effect of permitted water withdrawals from non-navigable streams in the Sierra Nevada Mountains, withdrawals that significantly reduced inflow into and had for years damaged the public trust values in Mono

Lake. (*Id.* at 446–48.) According to this Court, "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses *whenever feasible*." (*Id.* at 446 [emphasis added].) The decision in *Audubon* compels reasoned decision-making and *a balancing of public interests*; public trust uses must be protected "whenever feasible" and "so far as consistent with the public interest." (*Id.* at 446–47.)

The public trust doctrine remains an important aspect of the State's common law duties, imposing an affirmative duty to act on behalf of the people to protect their interest in navigable water. (Opinion, p. 11.) However, there have been notable developments in the law and regulatory processes since *Audubon*, including the adoption of SGMA in 2014 (Wat. Code, § 10720, et. seq.) and the State Water Board's routine consideration of public trust interests in managing surface water allocations. (See, e.g., Wat. Code, § 1253; *In the Matter of the Petitions for Reconsideration of Water Ratepayers Association of the Monterey Peninsula and Public Trust Alliance*, Order WR-2016-0024 at 13–15 [confirming that the State Water Board has "an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible" (citation omitted)].) As discussed below, such substantive environmental laws can and should afford the means by which the State exercises its public trust responsibilities in an efficient, organized, and comprehensive manner.

III. GROUNDS SUPPORTING REVIEW

A. Review Is Appropriate to Avoid Imposing Unnecessary, Duplicative, and Potentially Conflicting Public Trust Duties on Local Subdivisions of the State When They Are Not Directly Administering Public Trust Resources

The Opinion imposes procedural duties on local government to evaluate the public trust in any situation where it undertakes an activity that may affect public trust resources. (Opinion, pp. 15–17.) With these responsibilities comes the potential for litigation challenging the manner and substance of such determinations. This responsibility and liability is unwarranted in circumstances, like the one at hand, where local government is not administering trust resources, has not been delegated such responsibility from the Legislature, and there are overarching substantive laws promulgated by the Legislature to ensure the protection of the public trust resources at stake.

1. The Implications of the Opinion Will Place a Substantial Unwarranted Burden on Local Government

The well ordinance in this case is an apt example of the conflict and burden that will arise as a result of the Opinion. The ordinance was not designed nor intended to regulate groundwater production or the management of local groundwater supplies generally. Rather, the ordinance implements state standards for proper well construction to avoid groundwater contamination. (Joint Appendix 311, § 5-8.01; Wat. Code, § 13800.) The ordinance sets forth a simple, ministerial review process by the County to ensure proper well completion. The Opinion compounds this process; it requires the County, prior to issuance of a well permit, to perform a wholly different and far more expansive determination even though the County does not control the amount of water that can be withdrawn.

Specifically, under this Opinion, the County must now assess the potential impacts of groundwater use from the well on hydrologically connected surface water bodies and the public trust uses therein. To make a properly informed decision, the County will arguably need to amend the local well ordinance to require applicants to disclose information concerning their intended quantity of groundwater extraction and other information pertinent to the well's potential impact on navigable surface water bodies.[1] The County would then need to make determinations on challenging questions of groundwater hydrogeology and water right priorities amongst competing users, arguably requiring consideration and application of complex water rights law. (See *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224; *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199.)

This result would place the County into a regulatory role not intended by the well construction ordinance and one that it may not be appropriately staffed or inherently well-situated to perform. And, perhaps more importantly, the County would be required to exercise discretion over matters that are the proper province of groundwater sustainability agencies ("GSA") in their development of groundwater sustainability plans ("GSP") under SGMA,[2] the Department of Water

[1] Well construction permitting ordinances typically only require the applicant to provide the location and specifications of the proposed well prior to issuance of a permit to drill the well.

[2] For the Klamath River, to which the Scott River is tributary, the Siskiyou County Flood Control and Water Conservation District and other GSAs in Humboldt County will have to assess groundwater management impacts on interconnected

Resources ("DWR"),[3] the State Water Board,[4] and the courts,[5] heralding potentially inefficient, haphazard, and conflicting decisions concerning groundwater management.

The well ordinance in this case is just one example of the conflict and burden that would arise as a result of the Opinion. Local governments issue a multitude of similar permits, such as demolition and building permits, to approve activities that may affect public trust resources. (See Siskiyou County Code, Title 9 (Building Regulations) & Title 10 (Planning and Zoning).) As examples, demolition and grading raise the risk of sediment entering a watercourse and impacting water quality, aquatic species, and navigability, and construction authorized under a building permit could allow noisy development that affects nesting habitat for birds, indirectly harming wildlife trust resources. Indeed, almost any local government activity may have some effect on the environment and public trust resources. The Opinion would impose public trust responsibilities on a local agency permitting any of these actions and many others that affect public trust resources, regardless of the law's intended object and scope. This would substantially burden many basic functions of local government and expose them to significant litigation risks for activities far removed from the administration of the resource. Importantly, as discussed next, imposing such a

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surface water bodies, and in so doing, consider and balance public trust principles. (Wat. Code, §§ 10721(x), 10727.2(b).)

3 The Department of Water Resources provides technical assistance to GSAs (Wat. Code, § 10729; Cal. Code Regs., tit. 23, § 350 et seq.), reviews and approves GSPs (Wat. Code, § 10727 et seq.), and conducts ongoing monitoring and assessment of GSP performance (Wat. Code, §§ 10728, 10728.2).

[4] The Opinion would impose public trust duties concerning the quantity and allocation of pumping that affect surface water resources, which are delegated to the State Water Board, on counties, creating potential conflict between the State Water Board and local agencies. (See, e.g., Wat. Code, § 1200 [Board regulates appropriations of surface water and groundwater in "subterranean streams flowing through known and definite channels"].)

[5] Regulation of groundwater pumping is now shared between GSAs implementing GSPs (See Wat. Code, § 10726.4 [granting GSAs the power to regulate groundwater extractions]) and the courts, which oversee comprehensive groundwater basin adjudications (See Code of Civ. Pro § 830 et. seq. [establishing procedures for comprehensive groundwater basin adjudications]). (See also Wat. Code, §§ 10737.2–10737.8 [establishing provisions for "harmonization" of groundwater basin adjudications with the goals of sustainable groundwater management set forth in SGMA].)

burden on local government is unnecessary for the protection of public trust values.

2. The Protection of Public Trust Resources Does Not Require Assignment of Public Trust Responsibilities to Local Government Undertaking Actions Substantially Removed from Administration of the Trust

Although local government plays an essential role in providing public services, planning, land use, and regulating for local health and welfare, it is not typically charged with directly administering trust resources despite the conclusion in the Opinion. (*Audubon,* 33 Cal.3d at 438; *Illinois Central*, 146 U.S. at 453–54 [public trust "powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner"].) Trust resources are typically regulated by state agencies with powers delegated by the Legislature to ensure consistent regulation statewide.[6] As courts have recognized, it is important to place public trust duties with the right governmental body delegated by the Legislature to administer the trust. (*Zack's Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1178.) Trustee agencies have the discretionary authority to allocate public trust resources among competing interests. (*Audubon,* 33 Cal.3d at 446–47; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 289 [permitting agencies may prefer one trust use over another].) This approach ensures that regulation of trust resources is performed by the agency with specific knowledge and authority to administer the resource in a consistent and qualified manner, avoids conflicting regulations and directives concerning trust resources, and allows local government to focus on the matters it is optimally suited to address.

Local government does, of course, perform many functions that may have an indirect effect on trust resources.[7] However, under the modern police power state, there are generally substantive laws to ensure local government actions are consistent with state priorities for protecting trust resources. For example, the

[6] The Legislature created the State Water Board, California Coastal Commission, State Lands Commission, and California Department of Fish and Wildlife to protect critical trust resources to ensure those resources are available to the entire population of the state. (See, e.g., Wat. Code, § 1120; Pub. Res. Code, §§ 30212, 30214; Pub. Res. Code, § 6301; *California Trout, Inc. v. SWRCB* (1989) 207 Cal.App.3d 585.) These agencies are directly charged with the responsibility to balance competing interests in trust resources for the overall public welfare.

[7] See Section III.A.1 *supra*.

California Coastal Act (Pub. Res. Code, § 30000 et seq.) allows local governments to adopt local coastal plans ("LCP") to protect coastal resources. An LCP, however, is subject to approval by the Coastal Commission and decisions under the plan are subject to appeal to the Coastal Commission. (See Pub. Res. Code, § 30500 et seq. [process for review of an LCP by the Coastal Commission]; Pub. Res. Code, §§ 30600.5(d), 30603 [Coastal Commission review of local government decisions].) This approach ensures that the Coastal Commission, as a supervisory agency, uniformly regulates activities in protection of public trust resources. (See *Charles A. Pratt Construction Co., Inc. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1076 [The Coastal Commission applies state law and policy in determining whether a development complies with an LCP.].) By supervising implementation of an LCP, the Coastal Commission can implement a cohesive policy for protecting coastal resources.[8]

The Legislature adopted a similar approach in SGMA. SGMA empowers a GSA to manage a groundwater basin to achieve sustainable groundwater use and avoid "undesirable results." (See Wat. Code, §§ 10720.1, 10726.4.) The Legislature delegated to GSAs the authority to regulate groundwater in a manner that avoids "depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of surface water." (Wat. Code, § 10721(x).) A GSA implements groundwater regulations through adoption of a GSP, which is subject to review by DWR and intervention by the State Water Board if the GSA fails to implement SGMA. (See Wat. Code, §§ 10728.2, 10733, 10735.2, 10735.4, 10735.8.) The Legislature drafted SGMA as a regulatory framework for local agencies—under the supervision of the State—to administer the State's public trust duty in an organized and efficient manner.

Considering the conflict between the Opinion's expansive view of public trust duties and the Legislature's specific delegation of public trust duties to certain agencies, the Court should grant review to clarify that specialized trustee

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[8] Similarly, the Legislature enacted the California Environmental Quality Act ("CEQA") (Pub. Res. Code, § 21000 et seq.) to require local government to thoroughly evaluate and mitigate actions that may result in a significant adverse effect on the environment. CEQA establishes a framework for local governments to assess and mitigate public trust impacts, and identifies activities that do not require evaluation for policy reasons. (See Pub. Res. Code, § 21084; Cal. Code Regs., tit. 14, §§ 15300–15333; see also *Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal.App.4th 549, 577 ["[E]valuating project impacts within a regulatory scheme like CEQA is sufficient 'consideration' for public trust purposes."].)

agencies, with specific expertise and authority, are responsible for administering public trust resources for the benefit of all Californians.

B. Review Is Appropriate to Clarify that Public Trust Duties Can Be Satisfied Through Substantive Law Like SGMA

Amici do not dispute the Court of Appeal's conclusion that SGMA did not supplant the public trust doctrine. (See Opinion, p. 23.) The Court of Appeal explained that in *Audubon,* this Court "harmonized the [appropriative permitting system and the public trust doctrine], concluding the parallel systems did no violence to the legislative objectives." (*Id.*) Applying similar reasoning, the Court of Appeal held that it could "evince no legislative intent to eviscerate the public trust in navigable waterways in the text or scope of SGMA." (*Id.*) While such reasoning is sound, the regulatory regime set forth in SGMA is quite different than the water rights permitting regime under review in *Audubon*. In *Audubon*, the State Water Board had not considered public trust uses in its issuance of surface water diversion permits to the City of Los Angeles, and in fact, it believed "it lacked both the power and the duty to protect the Mono Lake environment." (*Aububon*, 33 Cal.3d at 447.) Thus, this Court mandated the coterminous consideration of public trust values alongside the permitting of water diversions for consumptive purposes. (*Id.* at 446–47.)

By contrast, SGMA specifically requires that a GSA, in adopting and implementing a GSP, avoid depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water (i.e., public trust uses).[9] As such, compliance with SGMA mandates reasoned decision-making with respect to potential impacts to public trust resources in navigable water occasioned by groundwater production and management. SGMA therefore affords a means of performing and satisfying public trust review of impacts of groundwater management on trust resources (navigable surface waters).

[9] SGMA is arguably the most comprehensive and significant water legislation since the Water Commission Act of 1914, which imposed the state-wide surface water appropriation permitting system. In SGMA, the Legislature created a comprehensive process to achieve sustainable groundwater management that avoids six specified undesirable results arising from ineffective groundwater management, including significant and unreasonable impacts to surface water resources. (Wat. Code, § 10721(x).)

Similar examples of comprehensive substantive laws that, as applied, afford opportunities for thorough consideration of public trust concerns include CEQA, Porter Cologne, and the Coastal Act. (Pub. Res. Code, § 21000 et seq. [CEQA]; Wat. Code, § 13000 et seq. [Porter Cologne]; and Pub. Res. Code, § 30000 et seq. [Coastal Act].) Where such laws are designed to thoroughly consider and balance societal interests pertaining to a trust resource (like SGMA's requirements to avoid significant and unreasonable impacts to surface water bodies from groundwater use), the public trust doctrine should work in concert with the substantive law. Otherwise, a risk of inconsistent decisions, uncertain regulatory directives, unnecessary litigation, and second-guessing of governmental entities imbued with authority to render decisions concerning the subject resource arises. (See *Citizens for East Shore Parks*, 202 Cal.App.4th at 577–78 ["Intervention by the courts [through a separate lawsuit under the public trust doctrine] . . . not only would threaten duplication of effort and inconsistency of results, but would require courts to perform an ongoing regulatory role . . . [and] risk[] 'the pronouncement of inconsistent standards and conditions'"], quoting *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1371–72.)

The discussion at pages 22 through 24 of the Opinion, however, appears to reject the premise that public agencies should exercise their trust responsibilities with respect to groundwater management impacts on navigable waters through the procedures set forth in SGMA. Review of the Opinion is warranted to clarify that comprehensive statutes, like SGMA, are the proper venue for fulfilling pubic trust duties—i.e., assessing and balancing such public trust concerns.

IV. CONCLUSION

For the reasons specified above, Amici respectfully request that this Court grant the petition for review in *Environmental Law Foundation, et al. v. State Water Resources Control Board and County of Siskiyou,* California Supreme Court Case No. S251849.

Sincerely,

Russell M. McGlothlin

PROOF OF SERVICE

I, Caitlin Malone, declare:

I am a citizen of the United States and employed in Santa Barbara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Brownstein Hyatt Farber Schreck, LLP, 1021 Anacapa Street, Second Floor, Santa Barbara, California 93101. On November 9, 2018 I served a copy of the within document(s):

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

.. by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

.. by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.

.. by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an agent for delivery.

.. by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

x based on a court order or an agreement by the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification listed below.

Service List

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on

motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 9, 2018, at Santa Barbara, California.

Caitlin Malone

Caitlin Malone