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Via Electronic Mail

Attn: Mabel Echols
Office of Information and Regulatory Affairs,
Records Management Center, OMB
Room 10102, NEOB
725 17th Street, NW.,
Washington, DC 20503

**Re: Office of Management and Budget, Federal Regulatory Review,
Request for Comments (74 Fed. Reg. 8819 (February 26, 2009))**

Dear Ms. Echols,

Thank you for this opportunity to submit recommendations to the OMB for a new Executive Order on Federal regulatory review, replacing Executive Order 12866. In producing a set of recommendations for the President's new Executive Order, I strongly encourage the Office of Management and Budget to carefully consider applying principles to the analysis of environmental regulations that reflect government's trust obligations to protect our country's air, water, wildlife, soil, forests and all other natural resources for present and future generations. Below, I have provided a general overview of the government's trust obligation and its interface with statutory law and regulatory actions, followed by a short list of specific recommendations for a new Executive Order.

On election night, President Obama told the United States it faces "a planet in peril". Without immediate, dramatic greenhouse gas pollution reductions, scientists fear the planet will cross the threshold of catastrophic runaway heating. Last year, the head of the Intergovernmental Panel on Climate Change (IPCC) told world leaders: "If there's no action before 2012, that's too late. What we do in the next two to three years will determine our future. This is the defining moment." In issuing a new Executive Order on Federal regulatory review, the President should recognize a regulatory philosophy and principles that separate environmental regulatory decision making from a pure cost-benefit analysis, and that promote the Federal government's duty to uphold its fiduciary duty as trustee of our natural heritage.

Since the earliest times, our legal system has recognized that "we the people" own critical natural resources—like the waters, wildlife, and the air—in common. As a fiduciary, or trustee, government must manage these resources on behalf of, and for the survival of, present and future

generations of citizens. This is a fundamental, inherent obligation of government, and no official may disregard it.

The government's obligation to protect trust resources for present and future generations interfaces squarely with statutory laws and should therefore be considered and upheld in all regulatory decisions that will have an impact on trust resources. While statutory law provides bureaucratic structure and process, the trust doctrine supplies a firm obligation that can steer agency discretion to carry out the protective goals of the statutes. The trust doctrine supplies a beacon within the broad realms of statutory discretion, which might on its own allow several conflicting resource outcomes. Reorienting administrative practice towards safeguarding the trust is likely to effectuate underlying statutory goals better than would be done by continuing to allow agencies broad deference in all environmental decision making.

By including the trust approach in regulatory review, the OIRA can redirect agency behavior toward greater conservation within the framework of existing statutory law. The fiduciary obligation to protect and restore public assets can form an overlay to nearly every environmental and land use statute. The statutes typically provide ample authority for protecting the asset. Trust law can rein in bureaucratic discretion at all points in the process by holding the agency trustees to the "most exacting fiduciary standards" in administering the trust. The trust approach, in effect, turns discretion into obligation and calls for a measurable standard of performance to protect the natural health of public assets. The focus of the doctrine is not on some amorphous agency conception of the "public interest," but rather on the measurable abundance on the natural assets themselves.

Infusing the trust approach into agency practice requires identifying the pockets of discretion and invoking trust standards of protection as an interstitial duty that fills the gaps of statutory law. First, where the agency has a choice of regulations to carry out statutory mandates, the trustee orientation would require the approach that is most protective of the assets. Regulatory approaches that convey broader protection for public assets are likely to be upheld by courts. Second, where the agency has choices in formulating or operating projects such as dams, roads, and facilities, the trust duty requires selecting the alternative that rebuilds the natural assets at stake. Third, where the agency is charged with enforcing a regulatory program, it must actually enforce the program. If even these three vectors of discretion were redirected towards protecting the trust, much would be accomplished.

In particular, the OMB and the President should consider:

- including in any new statement of regulatory philosophy and principles (Section 1(a) of EO 12866) a recognition that in promulgating environmental regulations or any regulations that will affect the environment, Federal agencies must recognize their public trust obligation to protect natural resources;
- defining in any new statement of regulatory philosophy and principles and in any new section defining principles of regulation that environmental statutes require a regulatory approach separate from a traditional cost-benefit analysis;
- including in any new section defining *Principles of Regulation* (Section 1(b) of EO 12866), a provision that when an agency determines that a proposed regulation will affect the

environment, the agency shall choose a regulatory approach that will be the most protective of any trust assets affected.

- providing that each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations, those of other Federal agencies, or with the agencies public trust obligation to protect resources for future generations.

Thank you again for this valuable opportunity to provide recommendations for the President's new Executive Order on Federal regulatory review. I have spoken and written extensively on government's public trust obligations, and encourage you to supplement the short comments provided here by referencing some of my most current works, listed below. Please feel free to contact me at mwood@law.uoregon.edu for clarification on any of my comments.

Sincerely,

Mary Christina Wood

Supporting Literature

pdf's of most literature listed below can be obtained for free at my website,
<http://www.law.uoregon.edu/faculty/mwood/>

"Atmospheric Trust Litigation," in *Climate Change Reader* (W.H. Rodgers, Jr. and M. Robinson-Dorn, eds.) Carolina Academic Press (forthcoming 2009).

"Nature's Trust: A Legal, Political and Moral Frame for Global Warming," reprinted in *SOCIAL PROBLEMS* (Anna Leon-Guerrero and Kristine Zentgraf, eds.) (forthcoming January 2009, Sage Publications, Inc.) (originally published by *Boston College Environmental Affairs Law Review*, May 2007).

Atmospheric Trust Obligation, chapter in *ADJUDICATING CLIMATE CHANGE: SUB-NATIONAL, NATIONAL, AND SUPRA-NATIONAL APPROACHES* (William C.G. Burns & Hari M. Osofsky, eds.) (forthcoming 2009, Cambridge University Press).

"American Indian Law and Forestry," *Encyclopedia of U.S. Indian Policy and Law*, Paul Finkleman, ed., CQ Press (forthcoming 2009).

Treatise on Public Trust Law (work in progress with Professor Michael Blumm, 2008).

"Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations," *Climate Legacy Initiative Project*, (white paper) (May 2008).

"Law and Climate Change: Government's Atmospheric Trust Responsibility," *10 Environmental Law Reporter* (September 2008).

"A Framework of China-U.S. Partnership to Address Global Warming," *3 China Environmental and Resource Law Review*, Ocean University (Renmin Press, Spring 2008).

"Nature's Trust: Reclaiming an Environmental Discourse," 2 Stratigraphy and Sedimentology of Oil-gas Basins, Geology Institute of Azerbaijan National Academy of Sciences, Azerbaijan, Russia (Spring 2008).

"Government's Atmospheric Trust Responsibility," Ecotone, Environmental Studies Program, University of Oregon, Eugene, OR (Spring 2008).

"Government's Atmospheric Trust Responsibility," California Environmental Law Reporter (February 2008).