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Precaution as Policy

How advocates are asserting a new standard to protect the environment

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The Precautionary Principle, a scientific and ethical concept that promotes precaution in decisions that affect the environment and human health, is emerging as a useful policy tool and organizing principle for the environmental justice movement. It is not a new concept. Many Native American communities have long modeled a precautionary approach by considering all activities in light of their potential impacts on the next seven generations. The *Principles of Environmental Justice*, the foundation of the environmental justice movement, clearly asserts the universal right to protection from toxic pollutants and the right of low-income communities and communities of color to meaningfully participate in the decisions that affect our lives and environments.

As an explicit statement of these values, the Precautionary Principle presents an opportunity to proactively prevent harm to the environment and to human health before it occurs; to demand equal participation in decision-making; and to shift the burden of proof away from the public or potential victims and toward industry, corporations or agencies that stand to benefit from a proposed activity or project. The Precautionary Principle can be summarized by the following:

When an activity raises threats of harm to the environment or to human health, 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. —(source: from Wingspread Statement, 1998)

Finding viable alternatives to the current standard of risk assessments and pushing for non-risk based approaches to guide our decision-making is a key step towards achieving environmental justice. The Precautionary Principle is a tool that many communities and countries have begun to use as a step towards this goal.

A Brief History

For the last four decades, a "risk analysis" model has guided United States government regulation. This model purports to make non-arbitrary decisions by calculating the mathematical likelihood that a certain technology or activity will harm the public. The

risk assessment is widely accepted and our regulators routinely use it to make decisions such as: the siting of power plants, incinerators and garbage dumps; the clean up of contamination from toxic sites such as brownfields or military bases; and the degree of traffic permissible in a neighborhood, among others. This model leaves decision-making to “experts” and uses highly technical language that few lay people can truly understand and evaluate.

However, community experiences and evidence suggests that the risk assessment model is not unbiased but often functions as a manipulation of science to justify political decisions. Decisions made using this model have contributed to severe environmental injustices. Risk assessments effectively exclude community participation, often burdening communities with new facilities deemed “safe.” Further, community advocates who oppose existing contamination or pollution are continually stymied by the risk assessment model and industry “expert” testimonies that often claim a lack of scientific research or evidence of harm.

Despite the widespread use of risk assessment, the concept of precaution began appearing in international agreements in the 1980’s when the world began to face unprecedented environmental changes such as acid rain, ozone depletion, and deforestation. As a result, the Precautionary Principle is at the center of the Rio Declaration on Environment and Development signed at the 1992 United Nations conference. Since then it has been incorporated into other international agreements and the public health and environmental policies of nations such as Sweden and Denmark.

In 1998 at a convening at Wingspread in Racine, Wisconsin, a group of lawyers, scientists, policymakers, labor and grassroots environmental and environmental justice activists created a comprehensive consensus statement on the Precautionary Principle. Unlike risk assessments, the Precautionary Principle asserts the right to prevent harm even when science is uncertain. As described in the Wingspread Statement, the principle poses such questions as: How can we achieve our goal while doing the least amount of harm?; What is the threat of harm from what we don’t know (scientific uncertainty)?; and Who gets the benefits and who will be harmed?

The Precautionary Principle in Action

Three specific examples of Precautionary Principle implementation include European Union legislation, California State and city policies, and an August 2000 Hawaiian Supreme Court decision. These examples provide a glimpse of the possibilities of the Precautionary Principle and approaches that reframe our current regulatory framework.

* The European Union. Over the past few years, the EU has provided a strong example of government accountability with forward-thinking legislation that call for corporations to be responsible and responsive to public health and environment goals. This includes policies such as extended producer responsibility which require electronics manufactures to be responsible for the cost of the entire lifecycle of their product and to pay for the safe disposal of their products; a moratorium on genetically

modified foods; and a ban on the use of brominated flame retardants. Currently, the European Union is drafting legislation that by 2005 will require the chemical industry to conduct extensive safety testing on 30,000 commonly used chemicals. At least 1,500 of these chemicals are expected to be banned or severely restricted as a result.

European regulators estimate the cost of this legislation to total 14 to 26 billion euros by the year 2020, with 3.6 billion euros for testing and an additional expense for alternatives to forbidden chemicals. But they also estimate that strengthening chemical regulations will result in a drop of 2,200 to 4,300 cancer cases per year and a savings of 18 billion euros in occupational health costs in 30 years.

The United States government—which does not safety-test industrial chemicals or require manufacturers to submit testing data—along with U.S. corporations, is strongly resisting these changes as products that are banned will include products imported to Europe from around the world, including American-made products. This import requirement deters Europe's manufacturing sector from relocating to other parts of the world where manufacturing standards may be weaker. However, U.S. companies that offer safer substitutes for hazardous materials stand to benefit from access to a unified European market. A broad cross-section of European public interest groups, representing environmental, public health, and consumers have played a major role in the development of the European policy alongside the countries that constitute the European Union. And, European public opinion continues to strongly support the legislation as it moves forward.

* California. In June 2003 San Francisco became the first city and county in the U.S. to adopt the Precautionary Principle as a guide for environmental management and policymaking. Spearheaded by a regional coalition of environmental health and environmental justice advocates, the California initiative embraces the policy framework used in Europe and creates an umbrella under which all future environmental decisions can be evaluated. In adopting the precautionary principle, the policy statement reads, *“Every San Franciscan has an equal right to a healthy and safe environment. This requires that our air, water, earth, and food be of a sufficiently high standard that individuals and communities can live healthy, fulfilling, and dignified lives. The duty to enhance, protect and preserve San Francisco’s environment rests on the shoulders of government, residents, citizen groups and businesses alike”*. (For a look at all the coalition members and current projects, go to www.takingprecaution.org).

Implementation of the Precautionary Principle requires a participatory and transparent process involving those most affected by the decision. In the Bay Area, as in cities across the country, low-income communities and communities of color bear the disproportionate burden of pollution, toxic chemicals, brownfields, manufacturing and sewage treatment facilities. Bayview Hunters Point Community Advocates, a San Francisco community-based group that is particularly burdened by industry pollution, became one of the key organizations advocating for the implementation of the Precautionary Principle and more meaningful participation in decisions by community residents.

At the state level, a precautionary approach is being recommended for inclusion in California's environmental justice goals. The California Environmental Protection Agency is responding to a legislative mandate to implement environmental justice in all of its boards, offices and departments. The Advisory Committee on Environmental Justice, convened to formulate specific recommendations to guide the Cal EPA, published several goals to advance this agenda. Included in these recommendations was the specific proposal that, in creating new programs, Cal EPA departments must "officially recognize the importance of precaution, and that it is not always necessary or appropriate to wait for actual, measurable harm to public health or the environment before evaluating alternatives that can prevent or minimize harm." In developing these recommendations, hundreds of community groups and individuals testified from across the state. Many communities both inside and outside California are watching this Cal EPA process as a potential model in creating concrete guidelines to implement environmental justice in state policy.

* Hawaii. Perhaps the most interesting and far-reaching example of Precautionary Principle implementation comes from the Hawaiian Supreme Court decision on *Waiahole Ditch*. The case was brought by small family farmers and Native Hawaiians in order to restore the flow of water to their farms and communities that had been diverted to sugar plantations for the past 80 years. Part of the plaintiffs' plea was for the State to uphold the Public Trust Doctrine, which applies to all waters in Hawaii.

The Public Trust Doctrine, one of the oldest recognized laws in the U.S., incorporates many aspects of the modern Precautionary Principle. Based in common law, the protection of common resources is a Constitutional right and it was enacted to protect the use of common property and certain natural resources for future generations. In Hawaii it applies to all water resources under a state water resources trust as well as other state resources.

The Public Trust Doctrine requires the state to take proactive measures to protect common property. Further, the Public Trust Doctrine requires the state to take proactive measures to protect common property.

In the *Waiahole* case, the court ruled in favor of the small family farmers and Native Hawaiians and adopted the Precautionary Principle as a guideline to implement the doctrine and to protect the water resources. The court's decision affirmed that "where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource." The Court also placed the burden of proof onto the party that wanted to privatize the water and use it for commercial purposes.

The ruling in this case is exciting because it extends the Precautionary Principle to guide land use decisions. This case is also exciting because it protected native Hawaiians and small farmers instead of the big corporations. Further, the Public Trust

Doctrine, already in use in some form in 48 states, establishes a proactive government role in managing common property and keeping it in the hands of the public rather than the private sector. It also requires that the state fulfill its duties as a trustee of our natural resources and make decisions that preserve intergenerational equity. From this case, we see that the precautionary principle is a useful tool in protecting our rights to clean air, land, and water (the essence of the Public Trust Doctrine).

Practicing Precaution

Opponents of the Precautionary Principle claim it is anti-science and anti-progress. On the contrary, the principle calls for better science and the investigation of cumulative and complex impacts and interactions. It also demands that as decision-makers, all parties take into account what we don't know and what the science hasn't or is unable to tell us.

The environmental justice community can point to precedent in U.S. law to advocate for policies based on the Precautionary Principle. Our predecessors established laws such as the Public Trust Doctrine in the hope that once these were in place, our leaders would manage the environment for the benefit of all people and our descendants. Although few communities continue to have faith in a U.S. government that will protect public health and the environment over private interest, there is precedent and momentum to continue pushing our leaders for a different decision-making paradigm. While the Precautionary Principle is only part of the solution, it is emerging as a way to insist on the rights of low-income communities and communities of color to determine the policies that preserve their right to self-determination and their equitable share of public resources.

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“White Paper—The Precautionary Principle and the City and County of San Francisco”;
March 2003

http://www.sfgov.org/sfenvironment/aboutus/policy/legislation/precaution_principle.htm

Loewenberg, Samuel; *Business Meets Its Match*; The American Prospect; July/August
2003

Rachel’s Environment & Health News; #586 *The Precautionary Principle*; February 18,
1998

Raffensperger, Carolyn; “Precaution and a Theory of Property”; The Environmental
Forum; May/June 2003

Raffensperger, C. and J. Tickner, eds. 1999. *Protecting Public Health and the
Environment: Implementing the Precautionary Principle*. Washington, DC: Island Press

Draft- “Recommendations of the California Environmental Protection Agency (Cal/EPA)
Advisory Committee on Environmental Justice to the Cal/EPA Interagency Working
Group on Environmental Justice”; July 2003