

## Oregon State Bar Sustainable Future Section

Photo: J. Michael Mattingly

# The Long View

## The Precautionary Principle— Taking Precautions Today to Protect the Future

By Ralph Bloemers

The precautionary principle should be invoked in many situations to foster sound natural resource management in the Pacific Northwest. We have good reason to act locally.

Our native forests and grasslands have been altered and covered with an extensive road network. Our planet is warming, and snow-pack and water resources are shifting. Our oceans are becoming more acidic. Whatever the cause of these changes, we have a lot of work to do to restore natural systems. For new development or extraction, we are well advised to be cautious and take principled action, and the precautionary principle is one available tool.

Our federal forestlands provide us with an excellent illustration of the need for applying the precautionary principle. Over half of Oregon is federal land and all the land managed by the Forest Service is governed by the National Forest Management Act (the “NFMA”). To comply with the NFMA, the Forest Service adopted the Northwest Forest Plan (the “NW Plan”) to protect and manage federal forestlands in western Oregon. The NW Plan set aside some of the forest as old-growth reserves and permits logging on other land. On all of the forestland, the NW Plan requires federal managers to “look before they leap” into logging by surveying for species before entering into an area to extract natural resources. While we do not have a comprehensive plan for our eastside forests, the Eastside Screens (a Forest Service standard designed to protect old-growth forests from logging) protect live old trees and provide some measure of protection for creeks, streams, and rivers.

The NFMA requires managers to ensure “viable populations” of species. In some cases, managers must actually “look before they leap,” but, in practice, the managers are allowed to determine those populations based on models instead of ensuring that the species are actually present on the ground. If not challenged,

fancy guesswork may be used to predict risk, mitigate harm, and permit the extraction of natural resources unwisely. American natural resource law is not cautious in every regard. Rather, it is a mixed bag. The standard of review under the NFMA permits deference to “agency expertise” in evaluating proposed action. Sometimes agencies use the best science available to make decisions and other times deference to “agency expertise” is abused in order to authorize logging in sensitive areas.

Application of the precautionary principle could provide significant benefit in terms of resource protection. Instead, the lack of definitive science is used to allow, if not encourage, action that degrades old-growth habitat for decades based



*The law provides that the State of Oregon must ensure the greatest permanent value, and the rules implementing this state law provide that the State of Oregon must provide a high probability of assurance that fish and wildlife habitat will be maintained now and in the future. This is a good example of what we see in our laws— not a strong precautionary approach, but an approach that says our actions should not “retard”*

on the claim that the action decreases fire risk. Scientific studies have shown that more than a century of logging, road-building, and grazing has altered our forests and made them more at risk of loss in the event of a natural disturbance such as fire, insects, or wind-storm. The lower-elevation Ponderosa pine forests, for example, are thicker than they were when settlers first arrived. Industry reasons that the forest must be thinned (logged) to immediately mitigate the “catastrophic” fire risk. Local citizens and conservation groups point out that the logging has a great cost in terms of its degradation on the landscape by the loss of old-growth habitat for 50 to 100 years with only speculative benefits in terms of reducing fire risk. The action is framed as avoiding risk, but the benefits are grossly overstated while the costs are severely discounted.

When an action is harming the environment, it is all too often left up to the agency to supply mitigation or to analyze that harm in relation to the larger landscape or the longer term. Without application of the precautionary principle and in light of some agency practices, the actual harm seems less severe under

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these analyses. Often the proposed mitigation, while arguably well intentioned, does not translate into actual protection of the resource or good results for the land.

Yet based on an industry claim that logging the forest will reduce forest-fire, an agency may permit the degradation of that forest for over 50 years on the slim chance of a fire in the next 10 to 15 years, the period that the so-called treatment (logging) is claimed to be effective in reducing risk. If the precautionary principle were applied in this context, the agency would probably not proceed because the fire-risk-reduction benefits are speculative while the costs in terms of habitat degradation are large and concrete.

Application of the precautionary principle is situational, determined by society, aided (or not) by the best available science. In some cases, proving irreparable harm in the moment may not be possible because this, too, appears to be based on society's current understanding of the harm, which is a constantly evolving concept.

Can we show that one additional land use practice or discrete action caused the decline of animals found in old-growth forests, wild fish in our rivers, ocean acidification, or climate change? Should we wait to be sure that something will damage the earth or claim benefits while downplaying the damage? We did so with toxic chemicals, radioactive waste, offshore oil-and-gas drilling, and so on. The management of our federal land provides an example of an area where there is room for improvement. In Oregon, we continue to allow toxic mixing zones, have weak laws governing our Tillamook and Clatsop state forests, and have exercised little control over the pollution caused by logging roads. There is a lot more that we can do at both the federal and state level to be cautious before committing our resources. Oregon can and should find more specific ways to incorporate the precautionary principle into our decisions and actions.

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