Oregon State Bar
Sustainable Future Section

Photo: J. Michael Mattingly

Is the Precautionary Principle Sustainable?

By Greg Corbin

The precautionary principle is a simple and powerful idea. Who can argue with statements such as "look before you leap" and "better safe than sorry"? One of my favorites is attributed to the great conservationist Aldo Leopold, and goes something like this: "The first lesson of intelligent tinkering is to save every part."

These statements are powerful for the seemingly obvious truths they express. But as Gail Achterman notes in her article, translating these ideas into a workable principle is challenging at best. This is why there is no uniform formulation of the precautionary principle. While the concept of not acting in the face of significant scientific uncertainty threads through many of the formulations, they differ widely in the degree to which precaution must be applied, how deeply impacts must be understood, and the extent to which economics and other social considerations should moderate the principle's application. This diversity of definition demonstrates the challenge of translating the simple idea of precaution into a guiding principle.

The ESA's inflexible approach to species conservation has provided some of the best examples of the precautionary principle's limits.

A more important limitation to the precautionary principle is that it expresses a preference for one set of interests—human health and environment in most definitions—and in this regard, especially when expressed in legislation, disenfranchises other legitimate interests and consequently threatens the sustainability of the precautionary approach. Take as an example the Endangered Species Act (the "ESA"). The ESA codifies a form of the precautionary principle through its protection of species regardless of cost and other social considerations, and the requirement that "best available science" be the basis for deciding whether to proceed with an action that may affect a protected species. Though the ESA's stated policy is to conserve species (i.e., the collection of individuals and populations that make up the species), and the ecosystems on which they depend, it does so primarily through the extremely cautious approach of prohibiting an exceedingly wide array of threats to individual members of a species.

The ESA's inflexible approach to species conservation has provided some of the best examples of the precautionary principle's limits. The Tellico Dam controversy, which led to the landmark U.S. Supreme Court decision *TVA v. Hill*, is one of the most prominent. Not long after Congress passed the ESA, the Tennessee Valley Authority ("TVA") discovered a protected fish species, the snail darter, in the river system that the Tellico Dam was to impound. The dam, which TVA had been planning and even started constructing before Congress passed the ESA, would undoubtedly harm the snail darters found in that stretch of the river. In a strongly worded opinion the Court found that Congress allowed no exception to the ESA's species-protection mandate, and that the Tellico Dam must be enjoined, regardless of the cost and any other considerations. That result was too much, and eventually Congress passed, and President Carter signed, an exemption for the Tellico Dam from the ESA's mandate, highlighting that a precautionary approach that fails to recognize competing interests in the end will not be sustained.

An example closer to home demonstrates that the ESA's rigid version of the precautionary principle can even hamper efforts to resolve controversy and steward the resources that it was intended to save. The Klamath Basin of southern Oregon and northern California is ground zero for one of the West's most intractable natural resource controversies. The issue is water. Put simply, there isn't enough in all years to supply the needs of agriculture, tribal treaty rights, hydroelectric power, domestic and municipal uses, and ESA-protected fish. For years the ESA has dictated the management of the basin's water without regard to other competing interests. In 2001, rigid application of the ESA led to an unprecedented shutoff of agricultural water to the U.S. Bureau of Reclamation's Klamath Irrigation Project, causing massive economic impacts to the basin. This one-sided approach to natural resource management failed to improve the plight of fish and instead precipitated lawsuits, community protests, and even calls to repeal or amend the ESA, not unlike the Tellico Dam experience.

(Continued on page 16)

Oregon State Bar
Sustainable Future Section

Is the Precautionary Principle Sustainable?

To its credit, the community of the Klamath Basin took matters into its own hands, and after many years of difficult negotiations produced two massive agreements intended to resolve long-standing conflicts within the basin and to balance the needs of all competing interests, including those of the agricultural and tribal communities, local, state, and federal government mandates, and environmental concerns. The agreements intend to be protective of the environment, and they employ rigorous science and adaptive resource management to accomplish that end, but they don't elevate one set of interests over others, and in doing so they offer a chance at a sustainable solution. This balance was demonstrated this past year. The agreements are still being implemented, and have many years of hard work to go, but when it became clear that the basin would experience drought in 2010, rather than retreat to their own corners to protect their individual interests, the parties to the Klamath agreements cooperated, looked for solutions, and came together to support all the interests of the basin, including the fish and the environment.

The Tellico Dam and Klamath Basin experiences illustrate that the precautionary principle, at least in its most rigid forms, ultimately fails to offer a sustainable approach to our most challenging problems. It fosters dispute and creates winners and losers, not cooperation and creative solutions. As the Klamath situation demonstrates, balancing the needs of all legitimate interests is the most sustainable approach.

Greg Corbin is a partner and chair of the Forest Products Industry Practice at Stoel Rives LLP. He frequently writes and speaks on issues affecting the forest products industry, water rights, and endangered species issues.