Oregon State Bar
Sustainable Future Section

Winter 2010

# Climate-Change-Related D&O Liability—the Coming Flood?

By Alex Hardiman and William Passannante

As the number of climate-change-related lawsuits against public companies grows, and climate-change issues become the subject of increasing state, federal, and international regulatory efforts, the risk that directors and officers ("D&Os") of those companies will become the targets of governmental and private lawsuits based on their companies' climate-change-related disclosures is becoming all the more likely. Perhaps the clearest indication of the potential future landscape of climate-change-related D&O liability is the SEC's issuance, for the first time this year, of climate-change-related financial disclosure guidelines.

### The Rise of Climate-Change-Related Lawsuits

The number of climate-change-related lawsuits has risen in the last three years.

The landmark case against a governmental entity is *Massachusetts. v. Environmental Protection Agency*, 549 U.S. 497 (2007). In the *Massachusetts* case, several states and private organizations challenged the EPA's denial of the plaintiffs' petition for the EPA to regulate emissions from new cars because of the EPA's alleged duty to promulgate emission standards for "any air pollutant" under the Clean Air Act. The EPA had denied the plaintiffs' petition based on the conclusion that the Clean Air Act did not give the EPA the power to issue mandatory regulations to address climate change and that in any event it would have chosen not to do so. In rejecting the EPA's position, the Supreme Court made its first ruling on climate-change issues and held that greenhouse gas emissions from cars (including carbon dioxide) constituted an air pollutant under the terms of the Clean Air Act and that the EPA had failed to support its refusal to decide whether the emissions contributed to climate change and endangered public health and welfare. In addition, the Court found that state-entity plaintiffs had standing to bring the lawsuit insofar as they were able to demonstrate injury, causation, and the existence of a remedy. In December 2009, in response to the Supreme Court's ruling, the EPA issued a finding that greenhouse gas emissions "in the atmosphere threaten the public health and welfare of current and future generations."[1]

A number of climate-change-related lawsuits against corporations also are at various stages

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## Calendar

**Jan. 21, 2011**
**Unitarian Church**
**Screening of "The Economics of Happiness" and filmmaker discussion with Helena Norberg-Hodge**

**Jan. 26, 2011, 12:00- 1:15,**
**Schwabe Williamson & Wyatt**
**Legislative update with Rep. Garrett and Sen. Dingfelder**

# The Precautionary Principle

By Gail Achterman

The precautionary principle is an approach to decision-making in the face of uncertainty. The principle has been adopted in many international treaties since 1982, when it was included in the United Nations World Charter for Nature. It is a foundation for environmental policy in the European Union under the Maastricht Treaty of 1994. In 2003, San Francisco became the first government in the United States to make the principle the basis for its environmental policy. The principle is most often applied or invoked in the context of assessing the impacts of new technologies or human activities on the environment and public health, for example, to evaluate a ban on toxic chemicals such as mercury, restrictions on commercialization of genetically modified foods, or the use of growth hormones in livestock.

*The principle builds on proverbs such as "an ounce of prevention is worth a pound of cure."*

The principle builds on proverbs such as "an ounce of prevention is worth a pound of cure," "better safe than sorry," and "look before you leap." There are many definitions of the precautionary principle in policy literature and law, revealing a considerable lack of uniformity in its definition and its application.[1]

The most widely known definition emerged from the Wingspread Conference, held in 1998 by the Science and Environmental Health Network:

> "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically."[2]

Hickey and Walker, in a seminal law review article, list all the definitions in international treaties and laws and make three observations. First, each definition includes the premise that pollution prevention is preferable to assigning responsibility after damage has occurred. Second, the definitions assert that the degree of precaution required is primarily a function of the available scientific data. Third, the definitions require precaution in proportion to the risk of irreversible permanent damage to human life or health.[3]

R. B. Stewart identified four versions of the principle: (1) scientific uncertainty should not automatically preclude regulation of activities that pose a potential risk of significant harm (Non-Preclusion PP); (2) regulatory controls should incorporate a margin of safety; activities should be limited below the level at which no adverse effect has been observed or predicted (Margin of Safety PP); (3) activities that present an uncertain potential for significant harm should be subject to best available technology requirements to minimize the risk of harm unless the proponent of the activities shows that they present no appreciable risk of harm (BAT PP); and (4) activities that present an uncertain potential for significant harm should be prohibited unless the proponent of the activities shows that they present no appreciable risk of harm (Prohibitory PP).[4]

The principle has generally been used to provide overarching guidance or direction, not as an enforceable directive. For example, the President's Council on Sustainable Development in 1996 recommended that "even in the face of scientific uncertainty, society should take reasonable actions to avert risks where the potential harm to human health and the environment is thought to be serious or irreparable."[5] It is reflected, however, in some specific environmental and public-health statutes, such as the Toxic Substances Control Act (allowing halt to marketing of new substances if EPA determines that they present an unreasonable risk) and the Food Quality and Protection Act of 1996 (requires pesticides to be proved safe for children).

*Gail Achterman is the Director of the Institute for Natural Resources at Oregon State University and Chair of the Oregon Transportation Commission.*

### Footnotes

[1] D. Turner & L. Hartzell, "The Lack of Clarity in the Precautionary Principle," 13 Envtl Values 449-60 (2004).
[2] http://www.sehn.org/precaution.html.
[3] J. Hickey & V. Walker, "Refining the Precautionary Principle in International Environmental Law," 14 Va Envtl LJ 423, 437 (1995).
[4] R. B. Stewart, *Environmental Regulatory Decision Making Under Uncertainty*, 20 Research in L & Econ 76 (2002).
[5] President's Council on Sustainable Development, *Sustainable America: A New Consensus for Prosperity, Opportunity and a Healthy Environment for the Future*, http://clinton2.nara.gov/PCSD/Publications/TF_Reports/amer-top.html (1996).

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in the judicial system. The lawsuits, brought by private and state litigants, generally assert a variety of tort-based theories alleging that the defendant companies' emissions have caused or contributed to climate change with resulting environmental damage. *See, e.g., Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). A frequently asserted defense in these lawsuits is that they present a "nonjusticiable political question" based on the notion that "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D.Cal. 2009). *See also People of State of California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. 2007) (holding climate-change-related suit as

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# Sustainable Future Section Annual Business

By Robin Bellanca Seifried

The Section held its 2010 Annual Business Meeting on November 2, 2010. At the Annual Meeting, Executive Committee Chair Jim Kennedy summarized the Section's activities and accomplishments this first year. The Section's accomplishments in 2010 include adoption of a mission statement, development of a website, creation and publication of four issues of its newsletter, *The Long View,* presentation of five programs, and creation and award of three sustainable leadership awards.

In addition to these accomplishments, the Section formed several study groups to examine specific issues relating to sustainability. In 2010, the Section's study groups examined the adoption of sustainable court practices and began reviewing the scope of client inquiries regarding the sustainable office practices of potential service providers. The Section is also forming a study group to examine the possibilities for protecting the rights of future generations based in part on interest stemming from the Section's program on whether the Oregon Constitution should be amended to protect those rights.

As of November 19, 2010, the Section's projected 2010 expenses were $7,139 with a projected year-end balance of $1,057. Most of the Section's 2010 revenue came from membership fees (65%) with substantial contributions from program fees (26%). The Section's major expenditures in 2010 were for the newsletter (22%), primarily printing and design costs associated with the first publication (the only edition issued in print), and for programs (21%).

At the recommendation of the Section's Nominating Committee, the Section elected the following slate of officers and executive committee members: Chair, James Kennedy; Chair-Elect, Michelle Slater; Treasurer, Robin Seifried; Secretary, Dallas DeLuca; and Members-at-Large (terms ending December 31, 2012), Ellen Grover, Amie Jamieson and Dick Roy. Members-at-Large Jennifer Gates, Diane Henkels and Pat Neill will continue to serve until December 21, 2011.

The week after the Annual Business Meeting, the Section held its Awards and First-Year Celebration at which it recognized one law office and two individuals for exceptional contributions in advancing sustainability . In addition to the Section's awards, the OSB Board of Governors created its own sustainability award based on the Section's recommendation, and the first recipient of this award was Executive Committee member Dick Roy.

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nonjusticiable political question). In addition, defendants in these suits typically challenge the plaintiffs' standing based on causation—asserting that plaintiffs cannot meet the necessary standard of proof to prove the nexus between the alleged emissions and the alleged injuries. *Id.*

The decision of the United States Supreme Court in *Massachusetts* and the subsequent EPA finding regarding the link between greenhouse gas emissions and climate change have set the stage for increased regulation and climate-change-related lawsuits, not least because they represent the first Supreme Court and federal agency findings on climate-change-related issues, and are being used as the support for climate-change-related lawsuits against companies. Moreover, although corporate defendants continue to assert "nonjusticiable political question" and "standing" defenses, those defenses may have been significantly undermined both by the Supreme Court's *Massachusetts* decision and by the rejection of those defenses in a number of lower courts.[2]

### D&O Liability for Climate-Change-Related Corporate Disclosures

The first wave of lawsuits, essentially based on tort theories, will likely be only the start. Increased regulatory activity often leads to increasing liability. Because of the likelihood of increased regulation on climate-change issues, the growing number of lawsuits alleging corporate liability for climate-change-related damages, and the possibility that those regulations and lawsuits will have a significant effect on a corporation's financial status, corporations and their management and directors are facing more risks in connection with climate-change-related financial disclosures and the potential for shareholder and derivative suits based on alleged climate-change-related financial nondisclosures.

A variety of SEC regulations potentially require disclosure of a corporation's climate-change-related issues. In a sign that the SEC has recognized that climate-change-related regulations and liabilities may increasingly trigger corporate reporting requirements under these and other SEC rules and regulations, on February 8, 2010, the SEC issued guidance to public companies regarding the SEC's "existing disclosure requirements as they apply to climate change matters."[3] In its guidance, the SEC identified a variety of climate-change-related issues that might trigger corporate disclosure requirements under its

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***"Insurance companies have already indicated that they will take the position that climate-change-related D&O claims are not covered . . ."***

# Robin Morris Collin: Leader in Sustainability

Robin Morris Collin is professor of law and director of the Sustainability Law Certificate program at Willamette University College of Law in Oregon. Her latest publications include "Restoration and Redemption," in Moral Ground: Ethical Action for a Planet in Peril (a collection including the Dalai Lama, Desmond Tutu, and Barack Obama, 2010), and the Encyclopedia of Sustainability: Environment and Ecology, Business and Economics, Equity and Fairness (coauthored with husband Robert William Collin, 2010).

Professor Morris Collin comes from a long line of intellectuals and practitioners dedicated to civil rights: her great-grandfather was a freed slave who taught math, her grandfather a Methodist minister who helped end segregation in the church, and her father an attorney and law professor who opened the first integrated law practice in Chicago and sued to enforce access for black physicians in city hospitals. Professor Morris Collin has continued in this vein, becoming the first law professor to teach a course on sustainability at American law schools.

Professor Morris Collin, along with her husband, Professor Robert William Collin, began teaching law at the University of Oregon Law School in 1993, building a reputable environmental law program that included courses on environmental justice, sustainable urban planning, and urban environmental impact assessment, all novel legal concepts at the time.

The Collins cofounded the Coalition Against Environmental Racism, providing a forum to promote environmental justice and end environmental racism and support students of color. Their energy and annual conference brought to Eugene prominent environmental and social-justice leaders, such as Dr. Bob Bullard, Winona LaDuke, and the late Damu Smith.

The Collins also cofounded the Sustainable Business Symposium, and Professor Morris Collin continued to support grassroots activism by participating as a founding board member of the Environmental Justice Action Group, a community-based nonprofit based in Portland.

Importantly, Professor Morris Collin never shied away from the larger public-policy responsibility that comes with such experience and credentials. She worked with the U.S. EPA's Common Sense Initiative, a federal advisory committee that advised EPA on matters of public policy. Professor Morris Collin served as the founding chair of the Oregon Governor's Taskforce on Environmental Justice, continuing to serve as a member and giving of herself selflessly for the public good. She has received the David Brower Lifetime Achievement Award from the Public Interest Environmental Law Conference as well as the Campus Compact Faculty Award for Civic Engagement in Sustainability, has been honored by former Vice President Al Gore for her work advising the U.S. EPA, and has been recognized as a founding leader of the Sustainable Futures Section of the Oregon State Bar.

Professor Morris Collin has advanced the regional and national discussion concerning sustainability and environmental justice in meaningful ways, ensuring that the concept necessarily incorporates an emphasis on equity and education, along with the presumed focus on the environment and economy. For her leadership in the field of sustainability, Professor Robin Morris Collin is an asset to the Oregon State Bar and to the broader environmental justice and sustainability movement, and could not be more deserving of the Sustainable Futures Section 2010 Sustainable Leadership Award.

*"Professor Morris Collin has advanced the regional and national discussion concerning sustainability and environmental justice…."*

*Section Chair Jim Kennedy with award recipient Robin Morris Collin at the Section's First Year Celebration.*

# Miller Honored With Sustainable Leadership Award

Tonkon Torp's Max M. Miller, Jr., has been honored by the Oregon State Bar with one of two new awards for sustainable leadership. Miller earned the award in recognition of his volunteer leadership in moving the legal profession to embrace sustainability. The Sustainable Future Section congratulates Miller on this well-deserved acknowledgment of his commitment to sustainability.

Miller has a long record of developing and nurturing sustainability initiatives within his firm, in Portland's business, legal, and civic communities, and on behalf of clients. In 1999, when Tonkon Torp hosted a seven-week Northwest Earth Institute discussion course on sustainable living, Miller was intrigued by the question of how to encourage businesses to adopt sustainable practices and perspectives. He and several colleagues formed an internal sustainability committee at Tonkon Torp, which he has chaired since its inception over a decade ago. During that time, the group has morphed from a guerrilla green team tactical strike force to a management-sanctioned committee working on firm-wide initiatives. Miller was also the principal drafter of his firm's sustainability policy, which addresses everything from waste and energy-use reduction to policies on procurement, business travel and commuting, and use of green building materials in office-space improvements.

Under his leadership, Tonkon Torp's sustainability committee has transformed many of the firm's operations to embrace sustainable office practices, and has educated firm employees about sustainability from both personal and business perspectives. The committee has been a leader in the legal community, providing outreach and networking with other firms to share best practices in sustainability. It opened its sponsored discussion courses and presentations to those outside the firm and encouraged others to participate in organizations and efforts that provide support and resources to the sustainability effort.

Beyond the internal committee focus, Miller has been a tireless mentor to Tonkon Torp lawyers wishing to become more involved in external sustainability issues. He founded and co-chairs the firm's Sustainability Practice Group as well as chairing the Environmental and Natural Resources Practice Group, where he works with clients in renewable energy, manufacturing, and responsible stewardship of Oregon's natural resources. An original member of Oregon Lawyers for a Sustainable Future, he has served on the Office Practices Committee and participated in a pilot leadership training program. In 2007, he encouraged Tonkon Torp to host a CLE program by the Center for Earth Leadership called "Dimensions of Sustainability: Emerging Context for the Practice of Law." Tonkon Torp did host that program and continues to host Center for Earth Leadership programs.

Miller served on the Oregon State Bar Sustainability Task Force in 2009. He was on the Portland Business Alliance's Sustainability Committee from 2006 to 2009 and was an instructor and facilitator for the Alliance's Green Team Forum, which instructed business members on best practices for green teams. He also brings his sustainability and environmental perspective to his role on the Mayor's Economic Cabinet of the City of Portland.

Miller is a sought-after speaker for business, civic, and legal organizations that are examining sustainability issues. He has spoken at the Law Firm Alliance annual meeting, OLSF presentations, OSB CLEs, OSB Leadership College, OSB Sustainable Future Section programs, and the Portland Business Alliance Green Team Workshop. His leadership and knowledge of best practices led to an invitation to serve on the editorial board of a national publication, *Sustainability: The Journal of Record.*

*Section Chair Jim Kennedy and award recipient Max Miller at the Section's First-Year Celebration, which was held at Ater Wynne's office.*

# 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

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## 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 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" the environment.*

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

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## Is the Precautionary Principle Sustainable?

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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.

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.*

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rules and regulations, including:

- Enacted or proposed state, federal, or international legislation that may have a material effect on a public company.[4]
- Legal, technological, political, and scientific developments regarding climate change that may create risks for companies, such as decreases in demand for existing products or services, or adverse effects on a company's reputation.[5]
- The potential physical effects of climate change on weather-sensitive business operations, such as the financial effects on companies with operations on coastlines or effects from disruptions to the operations of major customers or suppliers from severe weather.[6]

Although we have yet to see any significant number of governmental actions or shareholder suits against corporations or their D&Os in relation to climate-change-related disclosure failures, the seeds for the future growth of such actions are being sown.

### D&O Insurance—Protection Against the Flood?

Lawsuits against D&Os alleging damages arising out of climate-change-related issues are likely to trigger the coverage provided by D&O insurance policies for claims alleging "losses" as a result of D&Os' "wrongful acts." Insurance companies, however, have already indicated that they will likely take the position— improperly in our view—that a so-called "pollution exclusion" contained in many D&O policies would eliminate coverage for such lawsuits.

Such a pollution exclusion typically purports to exclude claims "based on, arising out of, or in any way involving" "pollution." Insurance companies have already indicated that they will take the position that climate-change-related D&O claims are not covered under D&O policies based on the "pollution exclu-

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

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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 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 windstorm. 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 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

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sion" and the Supreme Court's *Massachusetts* decision finding carbon dioxide and other greenhouse gas emissions to be a "pollutant" under the Clean Air Act.

It is far from clear, however, whether the courts will agree with such a position. Even though the Supreme Court classified carbon dioxide as a "pollutant" for the purposes of EPA regulation under the Clean Air Act in the *Massachusetts* decision, no certainty exists that the same classification would be adopted in the context of "pollution," as that term has traditionally been interpreted in a D&O liability policy. Moreover, a lawsuit against D&Os asserting, for example, damages as a result of the alleged nondisclosure of climate-related liabilities or issues, asserts liability based on the nondisclosure, not liability for a "pollution"-related activity. In an analogous case, at least one court in recent years has agreed. In *Sealed Air Corp. v. Royal Indem. Co.,* 404 N. J. Super. 363, 372, 961 A.2d 1195 (2008), the court held that a pollution exclusion in a D&O policy did not bar coverage for a lawsuit against D&Os based on the D&Os' allegedly misleading financial statements with respect to asbestos environmental liabilities. Companies may also find that with the rise of climate-change-related D&O litigation, however, it may be possible to purchase D&O policies with clauses specifically carving out climate-change-related securities lawsuits from a policy's "pollution exclusion" or claims against D&Os for which the D&Os are not being indemnified by their corporate employer.[7]

Accordingly, although standard D&O liability insurance may ultimately provide insurance for climate-change-related lawsuits against D&Os, those lawsuits are likely to spawn parallel disputes between policyholders and insurance companies regarding the coverage provided for such suits under standard D&O policies.

### Building Levees Against the Uncertain Future

The increased regulatory activity and private litigation activity surrounding the climate-change issue suggests future increased liabilities. Whether D&Os will face significant climate-change-related lawsuits in the future is an open question. Ensuring that corporate indemnities and insurance respond is one important task. While the treatment of liability for climate-change-related issues by the courts and governmental entities is in an early stage of evolution, however, the liability and regulatory machinery is grinding forward.

### Footnotes

[1] *See* http://www.epa.gov/climatechange/endangerment.html.
[2] *See*, e.g., *Connecticut v. American Electric Power Co.*, 582 F.3d 309; *Comer v. Murphy Oil USA*, 585 F.3d 855.
[3] Commission Guidance Regarding Disclosure Related to Climate Change, http://www.sec.gov/rules/interp/2010/33-9106.pdf, at 1.
[4] *Id.* at 22-23.
[5] *Id.* at 26-27.
[6] *Id.* at 27.
[7] *See* "Global Warming—Are D&Os in the Hot Seat?," Directors & Officers—The ACE Report No. 66, Nov. 2007, *available at*: http://www.acebermuda.com/AceBermudaRoot/AceBermuda/Media+Centre/D+and+O+Newsletter/Global+Warming++Are+DampOs+In+The+Hot+Seat.htm.

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Oregon State Bar
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# The Long View

Photo by J. Michael Mattingly

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## Consider This...

"The saddest aspect of life right now is that science gathers knowledge faster than society gathers wisdom."
~Isaac Asimov

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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 on 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.

*Ralph Bloemers is Co-Executive Director and Staff Attorney at the Crag Law Center. Crag is a client-focused law center that supports community efforts to protect and sustain the Pacific Northwest's natural legacy. He is the director of Crag's public lands program and he practices natural resources and land use law in Oregon, Washington and Alaska.*

## Announcements

### The Economics of Happiness

The Portland debut of "The Economics of Happiness," a documentary about the worldwide movement for economic localization, is being presented next month. A discussion with the filmmaker, Helena Norberg-Hodge, will follow. Organizational partners include The Center for Earth Leadership, Social Justice Council, First Unitarian Church, Illahee, and KBOO Community Radio.

The film features a chorus of voices from six continents including David Korten, Bill McKibben, Vandana Shiva, Rob Hopkins, Richard Heinberg, Juliet Schor, Michael Shuman, Helena Norberg-Hodge, and Samdhong Rinpoche - the Prime Minister of Tibet's government in exile.

Main Street Sanctuary
First Unitarian Church, Portland
Friday January 21st 7:00 –10:00
$15 donation appreciated, no one turned away

**Editor's Note:**
Thank you for reading *The Long View*. Your input and suggestions on content are welcome. E-mail SFSeditor@millernash.com to comment.

Michelle Slater
Miller Nash LLP
Editor