The Business Perspective on the Precautionary Principle and Precautionary Approach Policies in California

Presentation by Cindy Tuck, General Counsel
California Council for Environmental and Economic Balance

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I. INTRODUCTION

A. CCEEB

CCEEB is a private, non-profit coalition of business members, labor members and public leaders.

CCEEB works to develop and advance solutions that help attain our inter-dependent goals of a healthy environment and strong economy.

We work on environmental policies at the State Capitol, Cal/EPA and its boards, departments and office, the South Coast Air Quality Management District and the Bay Area Air Quality Management District, and regional water quality control boards.

As we work on policy and regulatory issues, some of the questions that we typically ask include:

1) what is the problem that needs to be solved?

2) is there a gap in the current regulatory program allowing a problem to go unaddressed?

3) what is the most cost-effective solution?

4) is the solution based in sound science?

5) is the solution workable from an implementation standpoint?

6) what impact does the solution have on jobs?

7) does the solution provide regulatory certainty for businesses?

B. Conclusions on the Precautionary Principle

Our conclusions on the precautionary principle are that:

The precautionary principle is an **extreme form of precaution**.

The precautionary principle is **not needed in California** to protect public health and the environment.

The precautionary principle is **not workable**.

The precautionary principle **would create great regulatory uncertainty for business**.

The precautionary principle **would hurt job creation and retention in California**.

I will explain our analysis of various policy and regulatory issues that led us to these conclusions.

II. ANALYSIS THAT LED CCEEB TO THESE CONCLUSIONS

At the beginning of this year, CCEEB had the opportunity to review the precautionary principle and related issues in the context of the Cal/EPA Environmental Justice Advisory Committee's process.

As a member of that Committee, I personally reviewed many documents on both sides of the issue. I heard public comments on both sides of the issue at a special meeting of the Committee on the subject in February.

A. Starting Point of Analysis – A Reasonable Precautionary Approach is Appropriate.

First, we recognize that the environmental agencies such as the AQMD need to exercise precaution in developing and implementing the regulatory programs.

Protection of public health and the environment warrants a reasonable precautionary approach.

1. The Existing System Incorporates a Precautionary Approach and Works.

California has more stringent air quality standards than the federal government has.

California's risk assessment guidance is more stringent that EPA's risk assessment guidance. The risk assessment guidance includes conservative assumptions regarding exposure and other details to account for scientific uncertainties.

At the SCAQMD, the District has the most stringent air quality requirements in the United States, and these requirements have produced great results. The District has reduced ozone levels by fifty percent over the past 30 years despite population growth. That is a huge accomplishment.

The District has met the nitrogen dioxide, sulfur dioxide and lead standards.

On air toxics, reductions in toxics exposure have resulted in over 44 percent reduction in carcinogenic risks to residents of the Basin since 1990.
It should be noted that mobile sources are the predominant contributor to air toxics risk in the Basin.

The District continues to update and refine its programs to continue progress in improved air quality.

The existing system works.

2. The Existing System Generally Provides Regulatory Certainty to Businesses.

The environmental regulatory system in California is designed to provide "regulatory certainty" to businesses.

Companies can review the law and the rules and regulations and determine what is required to comply.

If a business comes to the district that wants to open a new business here, or to expand a business here, they can find out what requirements they have to meet to obtain a permit, and if they meet those requirements, they can obtain a permit.

For example, at the District, a business knows up front what the rules are, and it can generally determine how much it going to cost to obtain the permit, to buy offsets, to install the best available control technology, etc. It is very challenging to comply with the rules, but a business knows what they are.

B. If a Reasonable Precautionary Approach is Good, Why Shouldn't the State or the AQMD Implement the Precautionary Principle?

1. What is it?

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**. In this context, the proponent of an activity, rather than the public, should bear the **burden of proof.**

January 1998 Wingspread Statement

2. Why is the Precautionary Principle an Extreme Form of Precaution?

a. It is Not Workable in Practice.

So why is the principle not workable in practice? Consider:

1) prohibitions or limitations on activity based on mere allegations of harm;
2) an impossible burden of proof;
3) no consideration of benefits; and
4) complete regulatory uncertainty for businesses.

1. It Allows for an Activity to be Prevented or Limited based on Mere Allegations of Harm.

> 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. In this context, the proponent of an activity, rather than the public, should bear the burden of proof.

One of the major concerns regarding the principle is that bans and regulation could be based on mere allegations. In its application, the precautionary principle typically does not include either evidentiary standards or procedural criteria for what constitutes a "threat of harm." What quantity and quality of evidence or information is required to "raise a threat of harm" is uncertain.

A representative of the Sacramento Branch of the NAACP put it this way in written testimony to the Cal/EPA Environmental Justice Advisory Committee:

> "substituting *mere allegations* of harm for *scientific consensus* as the prerequisite for precautionary action possesses possibly even greater risk of harm to society in terms of lost economic opportunity." [David B. De Luz, Sacramento Branch, NAACP, February 18, 2003]

Having programs based on alleged risk as opposed to scientific evidence also diverts limited regulatory and public health resources away from known risks.

We are not saying that there has to be perfect science before an agency can take action – but environmental programs need to be based in sound science – not on allegations.

2. The Shift in the Burden of Proof is Not Workable.

The precautionary principle shifts the burden of proof to the proponent of the activity to prove that there is no threat of harm.

The problem with this second half of the principle is that it is impossible to prove a negative. You cannot prove absolute safety or no threat of harm.

If you ask a proponent of a product or activity to prove that there is no threat of harm, you are asking them to address an endless list of hypotheticals instead of asking them to focus on known risks. This would divert limited public health resources and slow or stop beneficial technology development.

If any agency can ban or limit an activity because they do not have 100 percent knowledge of all risks – that is a very narrow choice for society.

The existing program would set standards that the business would have to meet to protect public health, air quality and water quality – but if the company could meet those standards, the activity can go forward.

A. The Evidentiary Standards and Procedural Criteria are Missing.

A major concern is that, in its application, the precautionary principle typically does not include either evidentiary standards or procedural criteria for gaining approval from the regulatory agency.

In other words, the business proposing an activity would not know what quantity and quality of evidence they would need to provide to meet the burden of proof.

If a company cannot determine what it is going to take, or how much it going to cost, to go through a process, they probably will not enter into that process.

3. There is No Consideration of Benefits.

Another factor that makes the precautionary principle unworkable is that it does not provide for taking into account the benefits of a proposed activity.

Imagine if the manufacture of plastics had not been allowed because of allegations of threats of harm. Imagine if the administration of vaccines had not been allowed because of the risks. Imagine if the inventor of the wheel was stopped because of uncertainty as to risks.

Additionally, the principle ignores that you cannot always foresee the benefits of an activity (e.g., plastics).

4. The Precautionary Principle Takes Away Regulatory Certainty.

It the precautionary principle applied in California, and if you owned a business, would you consider proposing to develop a new technology here – when you would be required to prove something that is impossible to prove – no threat of harm?

I suggest that you would not – you would develop the technology in another state – for example 90 miles away in Nevada.

You would not make the investments here because you would not be able to determine up front what it would take to meet the environmental requirements.

Implementing the precautionary principle in California would send an anti-business and anti-technology signal – a signal that this is the State where you do not want to come if you want to develop technology or new products.

The precautionary principle is great if you goal is to slow technology development and stop business activity – that is NOT what California needs.

With California at a $38 billion deficit, this is not the right time to be putting businesses in a regulatory purgatory.

The existing regulatory structure generally allows the environmental agencies to provide environmental protection without stopping business activity and hurting job creation.

b. The Precautionary Principle would Hurt Job Creation and Retention in California.

When you stop technology development and unnecessarily limit business activity, you have a negative impact on jobs.

The strongest indicator of individual health for a family is does the breadwinner have a job. Undermining jobs hurts public health.

In the Cal/EPA process, we heard testimony from representatives of PACE Union Local 8-675 and the Congress of Racial Equality of California regarding the negative impact on jobs of implementation of the principle. We heard that it goes against technology development – and technology development is so important to job creation and economic development in California.

III. CONCLUSIONS

CCEEB recognizes that environmental agencies such as the AQMD need to exercise a reasonable precautionary approach in their programs – and that they do exercise a precautionary approach.

However, our conclusions on the precautionary principle are that:

> The precautionary principle is an **extreme form of precaution**.
>
> The precautionary principle is **not needed in California** to protect public health and the environment and, due to its potentially catastrophic economic impacts, it would actually undermine public health.
>
> The precautionary principle is **not workable**.
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> The precautionary principle **would create great regulatory uncertainty for business**.
>
> It would **hurt the creation and retention of jobs**.

The bottom line:

> The AQMD has the most stringent air quality rules in the country.
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> We urge the District to retain its precautionary **approach** and **reject** the precautionary **principle** as a foundation for program development and rulemaking – it is too extreme.
>
> The existing system is not broken – the South Coast and the State of California do not need to take on a new policy that creates regulatory uncertainty and hurts jobs creation.