



# Tips for Activists

## Volume One: Planning & The Public Trust Doctrine

### **Activist Tips for Change Makers**

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#### Introduction

Over the past twenty years we at the Science and Environmental Health Network have been working on providing useful frameworks for activists to use in their important work to protect public health and the environment. Throughout history, environmental decisions have been made using tools called risk assessment and cost benefit analysis. Those tools were often used to delay decision-making and to privilege polluting and harmful activities over the health of children, elders and the Earth.

In 1998, we convened a landmark conference, the Wingspread Conference on the Precautionary Principle. The conference was held to introduce the concept of precaution to the United States and develop it into a robust decision-making tool that would allow regulators and others to make decisions that were protective of public health and ecological systems.

We came to two major insights soon after the Wingspread Conference. The first was that the precautionary principle coupled ethics with the philosophy of science in its decision-making algorithm. While we had a good grasp of scientific uncertainty, we were a bit flummoxed by the dimensions of that ethic, although we knew the starting point was taking preventive action. As we struggled with that idea it became clearer that the ethic had two parts to it: preventing suffering and recognizing future generations as the beneficiaries of our actions. Of course, anything done to prevent harm to future generations should also accrue to present generations.

The second major insight came after meeting with numerous state agencies that had the responsibility for protecting the environment or public health. Most of those agency people liked the idea of the precautionary principle but it conflicted with how they saw their jobs. They saw their task as balancing competing interests. What this meant was that if the issue on the table was mining, then the miners, the equipment owners, the end users of the minerals and the Chamber of Commerce were all given a seat at the table--but public health often only had one seat at the regulatory table. Public health always was outweighed by the other stakeholders.



Our “aha!” moment or insight came when we realized that the overarching framework for those bad decisions was how the role of government was defined in legislation, regulation or by politically appointed heads of agencies. Even when dedicated public servants wanted to protect public health and the environment, the dominating frame was that the role of government was protecting the free market and growing the economy. This meant that even *environmental* agencies tried to interfere as little as possible with the economy and bent over backward to not regulate even the most egregious polluters.

It was clear that how we frame the role of government determines the outcome of decisions. That laser focus on the economy obscured the essential nature of the commons, all these things that we share including water, air, rivers, wildlife, parks, public schools, wildlife and so much more. If nobody is caring for the commons, then we are left with Garrett Hardin’s notorious tragedy. We dump toxics, over fish, pollute the atmosphere, and otherwise use up and destroy the common wealth and public health. Government must steward the commons so that we can flourish. **The economy is irrelevant if we can’t drink the water or breathe the air.**

And so, we saw the critical relevance of this idea called the Public Trust Doctrine which asserts that government’s primary responsibility is to care for the commons. That brings us back to the precautionary principle: the best way for governments to protect the commons is to take precautionary action to prevent harm in the face of scientific uncertainty.

One thing leads to another and both the precautionary principle and the public trust doctrine bring with them other robust game-changing ideas such as the responsibility on the part of the citizenry to give or withhold its consent to government decisions that affect the future of the commonwealth and public health and the idea and that we can invent new institutions such as a legal guardian for future generations that safeguard the commons.

With these Activist Tip sheets, we hope to share with you the basic concepts and translate them into action items you can use to be change-makers and guardians of future generations.

Onward.

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## Background on the Public Trust Doctrine

Barry Lopez, the great writer, once said “Free market capitalism is an experiment, of course, but so is democracy.”

We’ve been running an experiment in the role of government for the past two hundred years. The experiment was testing the hypothesis that government’s primary responsibility was to get out of the way of the free market and to grow the economy. The results of that test are conclusive: government and the free market have failed to protect the basic necessities of life—air, drinking water, healthy soils, public health and essential norms of justice.

Given the failure of that experiment, it is time to use a different guiding principle in our democracy than economic growth at all costs.

In this case, we don’t have to look very far, or even reinvent the wheel, for a different approach to government. It exists as an ancient precept of law that can be traced back to the Roman Empire, through the Magna Carta, and on to very recent court cases. It offers an approach to governance that stands a far better chance of protecting the commonwealth and public health than leaving it to the dead hand of the free market. This approach, formally known as the Public Trust Doctrine, stands for the proposition that the commons (traditionally shorelines and submerged lands), are held for the public in trust by government. The commons are to be stewarded for present and future generations.

The Public Trust Doctrine was established so no one (king or corporation) could keep the public from access to fishing and navigation. The rationale for the Public Trust was that people had a right to access the commons. When they were denied access to the tidal waters and submerged lands, they couldn’t obtain the essential necessities for a livelihood.

This basic idea of the Public Trust Doctrine has been extended beyond the economic necessities of transportation and fishing to cover access of shorelines and waterbodies for the recreational benefits provided by these waterways and adjacent lands.

Recently, the Public Trust Doctrine has been expanded to commons assets other than water bodies. Young people are bringing lawsuits in state and federal courts charging that government has a public trust responsibility to reduce greenhouse gases to stabilize the climate. These young people, as beneficiaries, are making the case that the atmosphere is part of the public trust and that government, as the trustee, has a fiduciary duty to protect the atmosphere from climate change.

We at SEHN and the Women’s Congress for Future Generations are advocating a much wider view of the Public Trust Doctrine: it is actually an elegant approach to the role of government. The Public Trust is an expression of the most fundamental responsibilities of government: to care for all the things we share, the things that are part of the commonwealth and the public health. The commons include drinking water, parks, wildlife, roads, bridges, public schools the atmosphere and so much more. As the earliest advocates of the Public Trust Doctrine recognized, the commons are the foundation of the



economy. Without the road to market, farm products have little value. Without clean drinking water for the city of New York there is no city. And on it goes.

Most of us can manage some of our needs—we garden or maybe even have a well in our yard-- but we cannot provide for all our needs. The infrastructure and environmental gifts of nature such as clean air or public transportation that we cannot provide on our own is the primary responsibility of governments.

A recent court case in Minnesota points the way for how government can fulfill its charge to care for the commonwealth and public health for present and future generations. While the court was deciding about a traditional commons asset, a lake, the overall decision shows a clear roadmap to how decisions should be made about all of our shared commons.

In this case, Ramsey County judge Margaret Marrinan ruled that the shore, water and lake bed of White Bear Lake, is held in trust by the state of Minnesota for the benefit of the public, both now and in the future. The court held that a state agency had violated that public trust by allowing excessive groundwater pumping that had substantially lowered the Lake. There was sufficient harm to the trust assets to grant equitable relief.

The idea of equitable relief is important when it comes to the commons that are held in trust for the public. Equitable relief is a non-monetary remedy ordered by a court. In this case, cash couldn't fix the harm done. In most cases harm to commons such as clean air or drinking water, the atmosphere and other necessities of life cannot be made whole through money. Justice requires action, restoration, protection.

The court went on to say that the state agency had the power to take precautionary measures to ensure the long-term sustainability of the Lake to ensure drinking water supplies as well as ground and surface water quantity and quality. It is worth emphasizing this point: the court made clear that the state agency had an obligation to take precautionary measures to prevent harm to White Bear Lake. The precautionary principle is a powerful tool to help governments fulfill their trust obligations to care for the commons.

What would it mean if we actually demanded that government hold our common assets in trust and care for them for the benefit of present and future generations? What would this experiment look like? Here are some preliminary thoughts. You can add your own.

1. Each level of government would do an audit of the commons under its jurisdiction and prepare a plan to restore and protect them.
2. Governmental budgets would be tailored to the trust responsibilities of government and minimize the give-aways to corporations.
3. Governments would do long range plans that would include goals for the common assets they were responsible for.
4. Agencies would employ the precautionary principle to make decisions.

Trust assets (drinking water to parking meters) would not be privatized since they belong to the public.



## **Activist Tip 1:**

### **Designing the Future through Planning**

#### **Using the Precautionary Principle to carry out the governmental responsibilities of the public trust doctrine**

The public trust doctrine charges government bodies with protecting the commonwealth and public health for present and future generations. A key way to fulfill that responsibility is for governments to develop plans. Governments almost all engage in planning on both an annual and a longer-term basis. These plans which set goals and allocate resources are the design of the future and therefore a key place where activists can intervene to reinforce the responsibilities of government to care for the commons.

Some communities, such as those in metropolitan Minnesota, are required to develop 10 year plans. Community members can get involved in the planning and help develop robust plans that protect future generations.

Here are some steps you can take:

1. Identify the people charged with developing the plans and contact them to let them know of your interest. Find out if there are mechanisms for public involvement.
2. Read past plans for the specific goals and implementation steps.
3. Introduce the staff to the core idea that government's responsibility is to care for the commonwealth and public health for present and future generations. See if they will include it up front in the preamble or introduction. For instance, you can take language from the law that created the national parks that says the parks (or roads, water, bridges, parks) are for present generations to enjoy but we must leave them to future generations unimpaired. Leaving the commons to future generations unimpaired is the standard by which we measure our actions.
4. Finally incorporate the precautionary principle into the document as the method by which the plan will be carried out.

The precautionary principle is a powerful decision-making tool that follows the basic precept of public health and applies it more broadly to environmental and environmental health issues: we ought to take precautionary action to prevent harm in the face of scientific uncertainty. This is a decision rule that couples an approach to science with the ethical idea of preventing harm. It stands for the proposition that the wise course is to take action to prevent harm and not wait for certainty about cause and effect before finding another way forward.

The principle is grounded in an ethic of present generations taking responsibility for the health and well-being of future generations. Government is specifically charged with fulfilling that responsibility since typically it is the steward of the commonwealth and common health—all the



things we share from air, water, parks, public schools, roads, wildlife and so much more. The commons are the basis of the economy and community. Planning for, and taking care of the commons, is the central role of government. For government to fulfill this responsibility to present and future generations, the most effective decision-making tool is the precautionary principle.

There are three components to the precautionary principle: scientific uncertainty, the likelihood of harm and precautionary action. Those three elements of the principle are not self-implementing and require some additional decision steps. There are 5 basic steps that decision-makers can take to implement the precautionary principle.

1. **Heed early warnings.** Pay attention to trend lines in areas the community cares about. Increases in negative indicators such as cancer, autism, traffic deaths, obesity, or declines in positive indicators such as water quality or air quality give communities key information about where to intervene in the system.
2. **Set goals.** Once a community has an idea of the status and direction of an indicator, it can set goals to improve the health or environmental quality. Do you want to reverse the trend lines in special education or water quality? Setting a goal will help a community design and plan new strategies. Planning and then monitoring success will inform whether the intervention worked.
3. **Identify and choose alternatives to the harmful activity.** Say a pesticide being used in parks that is a known neuro-toxicant or carcinogen. What other methods are there to address the problem in the park? In the case of the Los Angeles school system, they decided to eliminate the use of cosmetic herbicides. School personnel identified steam backpack devices that used steam to get rid of weeds growing in playgrounds and schoolyards. Steam was safe and effective in contrast to the toxicity of the pesticide.
4. **Reverse the burden of proof.** Reversing the burden of proof means the things a community wants to protect (air, water, children, elders, wildlife) get the benefit of the doubt. It means that the corporate proponent of an activity needs to verify that their activity won't make things worse. It also means that the polluter must be held accountable and pay for the damages. For instance, a corporation that wants to put in a possibly polluting facility could be required to put up a performance bond before it was given a permit. The bond would be held by the community and cashed in case of a spill or accident. The corporation could also be required to negotiate a community benefits package to balance out the negative impacts of the corporation's project. These community benefit agreements are frequently used by developers but could be used to obtain benefits from other proponents of various businesses. Usually the community is represented by nonprofits and the completed benefits agreement is ratified by the county board or city council.



5. **Democratic engagement.** Involve all stakeholders in the decisions. A community is far more likely to get creative solutions and better alternatives if it involves all the parties who will be affected by the decision. In the case of the L.A. school district, they first neglected the maintenance crews and imposed a solution on them. The results were angry staff and ugly school grounds. When the district finally involved the maintenance crews, the collaboration co-created the innovative solution of the steam backpacks.

There is one additional step in democratic engagement, and that is obtaining the free, prior and informed consent of the community affected by the decision. The community needs to have the right to say 'yes' or 'no' to things affecting their future. Local governments have a remarkable capacity for obtaining the consent of their communities through town hall meetings, referenda, ballot initiatives and other measures for engaging the residents.

### **Summary: Embedding the Precautionary Principle in Comprehensive Plans**

1. Describe the government public trust responsibility of government by creating a preamble to the Comprehensive Plan or by including this in the Plan introduction. An important step in justifying the inclusion of the precautionary principle into plans is to assert the authority of government to make decisions that protect the commonwealth and public health for present and future generations. A good way to do that is to incorporate a statement about the public trust responsibilities of government early in the Plan.
2. Include the five precautionary principle mechanisms (listed above) in the planning process and in the community's Plan. The specific steps of implementing the precautionary principle provide a roadmap for planners. They provide a guide for preventing harm to the commonwealth and public health. For instance, if a proposal comes before planners, the proponents of that activity need to demonstrate it will not add to the ecological or social justice burdens of the community. This way the burden of proof is reversed since the community is not responsible for demonstrating that the proposal could increase pollution, or social inequities like poverty. Another key precautionary step is identifying alternatives to harmful activities. Proponents of activities and planners alike can identify the potential harms and search for better alternatives.

### **Resources**

At the nexus of science and environmental health, the websites <http://sehn.org/precautionary-principle/> and Toxipedia provides some wide-ranging resources for defining and incorporating the precautionary principle into Plans, City Resolutions, and decision-making.