

## **Unites States of America**

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### **I- ENVIRONMENTAL LAW EVOLUTION SINCE 1992**

#### **Progress And Difficulties in evolution of Environmental Law**

##### *Summary - Evolution of a Mature Environmental Law System*

In the decade since the Rio Conference on Environment and Development in 1992, environmental legislation and court precedents interpreting legislation in the United States of America have not experienced dramatic growth or radical change.

This is probably because the legal system for environmental law had already become mature and stable by the time of Rio, since a period of remarkable growth and developments in the 1970s and 1980s. For the USA, therefore, Rio was not a tectonic shift, but rather another event in a continuing process of adjustment and modification - a process that is more like the slow accretion of events that add up to climate change, although in this instance the trend is a positive one of environmental law development!

We could categorize “environmental law” in the USA into three categories: regulatory, assessment, and non-regulatory.

This brief sketch of the progress and difficulties in the evolution of environmental law provides a brief look at both the “regulatory” (part A), and “non-regulatory” (part B) aspects of “environmental law” in the USA. In addition part C of this paper mentions progress and difficulties regarding those who make the entire environmental law system work - the environmental lawyers (in government, private practice, public interest law firms, and academia).

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*Regulatory Environmental Legislation in the USA*

The common understanding of “environmental law” is the body of legislation enacted to impose certain requirements on either enterprises or government officials. When directed at private parties, this legislation often operates through the subsequent issuance of executive regulations by government departments and agencies. When directed at government decisionmakers (such as those granting approvals to projects, managing government-owned resources like public forests, or engaged in construction projects of their own like large hydroelectric or flood-control dams) this environmental legislation usually requires some sort of analysis and consultation before government action can proceed.

Detailed environmental legislation in the USA has become an integral part of the US legal system over the past 30 years. This had already occurred by the time of the Rio Conference. Little of significance has occurred since then. If we think of law as a kind of ecological system, with all the diversity and interconnections of life itself, then environmental law in the USA is now simply part of that larger ecosystem. Regulatory environmental law has itself become incredibly complex. To continue the metaphor, numerous provisions of legislation and executive regulations create a sometimes-confusing “forest.” In a small space, the most that one can do is to mention the existence of this forest, not analyze it in detail.

Steady progress has occurred under the legislation that is in force in the past decade. Nationwide, more than half of the areas not meeting air quality standards for ozone in 1990 now do so. Similar progress has been achieved with carbon monoxide: two-thirds of the areas not in attainment in 1990 now meet the standard.

*Federalism and Environmental Law*

Because the USA is a federal system, one cannot understand the overall coverage of US environmental law by looking only at national laws. Each of the 50 States of the USA has extensive legislation, regulations, permit requirements for individual pollution sources, bureaucracies, and an enforcement structure. In most cases these involve State-level implementation of national legislation. Environmental law in the USA, in short, is controlled by an enormous quantity of sectoral legislation at both the national and State levels.

Although the USA has a federal system, the country is a nation, not a federation. National environmental legislation (which is called “federal legislation” in the US) has set requirements since the early 1970s that the States cannot undercut, and that the States generally follow in the design of their own legislation and programs. To a large degree, in fact, the national environmental scheme relies upon State programs for implementation.

Since 1992 the U.S. Supreme Court has limited the federal government’s power in some important ways, under the rubric of Constitutional interpretation and the purpose of “preserving federalism.”

While these decisions have not yet reached into the environmental law field, the prospect of their doing so seems strong. This trend has accelerated markedly since 1995 when the Court limited Congress' powers to ban the sales of guns near schools - holding that Congress was interfering with State authority in the matter. A 1999 constitutional decision by a 5-4 majority invalidated the civil remedies provision of the federal Violence against Women Act, again holding that these interfered with State prerogatives. It is quite possible that some features of environmental laws will be the next to fall to a conservative Supreme Court.

#### List of Sectoral Legislation Areas

Following are some of the major federal (national) environmental laws in the USA. No significant laws have been adopted and few significant amendments have been enacted since 1992. Nonetheless, presenting a list of these laws will give a broad picture of the scope of environmental law in the USA.

Environmental legislation in the USA underwent major changes at about the time of the Stockholm Conference in 1972, with the adoption of the National Environmental Policy Act (1969), the Clean Air Act of 1970, the Clean Water Act of 1972,<sup>1</sup> and amendments to the Endangered Species Act (1973). Major changes took place again prior to the Rio Conference in 1992 - for example, with the 1990 amendments to the Clean Air Act emphasizing economic methods and extending deadlines. There have not, however, been major changes in the past ten years.

We can conveniently divide US environmental legislation into two categories, even if it is an oversimplification to do so.

#### **(a) Pollution and Contamination**

Clean Air Act (1970, 1977, 1990)<sup>2</sup>

Clean Water Act (1972, 1977, 1987)

Toxic Substances Control Act (1976)

Resources Conservation and Recovery Act (1976)

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (1947, 1972)

Safe Drinking Water Act (1974, 1996)

Noise Control Act (1976)

Occupational Safety and Health Act (1974)

Comprehensive Environmental Response, Compensation and Liability Act (1980, 1986) ("Superfund law")

Emergency Planning and Community Right-To-Know Act (1986)

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<sup>1</sup> Enacted in 1948, it was amended in 1972, 1977, 1981 and in 1987.

<sup>2</sup> Actually, the Clean Air Act originated in 1955, but its current, underlying structure is usually dated to its dramatic 1970 amendments. Similarly, the Clean Water Act assumed its current overall structure in its 1972 amendments, but the first components of the law were adopted in 1948. For each piece of legislation, I provide only the most important dates, not a comprehensive list.

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**(b) Natural Resources and Wildlife**

National Forest Management Act (1976)  
Federal Land Policy and Management Act (1976)  
Wilderness Act (1964)  
various National Parks acts (late 1800s to the present)  
Surface Mining and Reclamation Act (1977)  
National Wildlife Refuge System (various acts)  
Endangered Species Act (1973)  
Coastal Zone Management Act (1970)  
Marine Protection, Research and Sanctuaries Act (1972)  
Migratory Bird Treaty Act (1916)  
State land use laws (Oregon, for example, 1973)

**National Environmental Policy and Environmental Assessment**

The “grandfather” of environmental assessment laws in the world is the National Environmental Policy Act of the USA, adopted in 1969. This law, which requires that an environmental assessment be performed on each federal action that may “significantly affect the environment,” has inspired similar laws at the State level in about half of the States of the USA, as well as in dozens of other countries.

Although NEPA states “national policy,” it has probably had little direct effect on national policy. The Supreme Court of the USA ruled more than 20 years that NEPA contains no “substantive law” that can be enforced by the courts. Instead it operates as a procedural law, requiring assessment of environmental impacts. There have been no significant legislative or regulatory changes under NEPA since 1992, and court decisions can be characterized mostly as promoting continued evolution of existing doctrines.

*Non-regulatory Environmental Legislation and Laws in the USA*

Properly understood, environmental law consists of more than environmental legislation and its implementation. Some features of environmental law have not been created by planning and design for the purpose of environmental protection, but that effect occurs almost by accident. Thoughtful scholars have variously asserted that:

The most important “environmental” law in the United States is its Administrative Procedure Act.

Liability rules (tort law) have done much more to promote environmental safety than government regulations.

“Voluntary” reductions in pollution to avoid public reporting of pollution discharges under “toxic right-to-know” legislation (and adverse attendant publicity) has accomplished more than government planning.

Before moving on to regulatory legislation, I will describe each of these assertions in a little more detail. This will serve as a counterpoint to the common assumption that the story of environmental law and environmental

protection can be told simply through an examination of regulatory environmental legislation and its implementation.

Administrative Procedure - Participation, Information, Justice, and Responsibility

My colleague, Professor Michael Axline of the University of Oregon, has asserted on several occasions, “The most important ‘environmental law’ in the United States is the Administrative Procedure Act” (APA). The APA law helps promote participatory democracy, provides transparency (openness), and gives citizens judicial relief from arbitrariness by government officials. (Each of our 50 States has a similar law as well.) The basic laws promoting participatory democracy are:

- Administrative Procedure Act (1946),
- Freedom of Information Act (1966, 1974),
- Equal Access to Justice Act (1980).

The law of administrative process is so fundamental to environmental law in the USA that much of the growth and evolution in administrative law has involved cutting-edge environmental cases. This growth and evolution continues, but changes since 1992 have taken place more in the field of access to information than in the other fields.

Participation: There have been no significant changes in public participation requirements in the USA since 1992. The Administrative Procedure Act (APA), adopted in 1946, requires that all legal norms and requirements adopted by a government body below the level of the Congress or the President must allow for public participation in the process of their formulation and adoption. Any executive “regulation” or “rule” that is adopted without allowing such participation is invalid and can be stricken down by any federal court in the nation. This public participation in executive rulemaking is unusual in comparison to, for example, the democracies of Western Europe. None of them provides by legislation for public participation in the adoption of regulations or policies. Even the Aarhus Convention<sup>3</sup> hedges about public participation in such matters, calling upon Parties only to “strive to promote” participation in that context.

Information: Changes have taken place in terms of transparency of government since 1992. The Freedom of Information Act (FOIA) (which is part of the broader APA) was adopted in 1966 and significantly expanded in 1974. It grants citizens a right of broad access to most documents or other information that is in the hands of federal government departments (agencies, bureaus, bodies). This is not restricted, as in the Aarhus Convention, to “environmental” information, but instead applies to all information, except when eight narrow exemptions apply. The courts have consistently ruled that

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<sup>3</sup> Aarhus Convention on Access to Information, Public Participation in Decisionmaking, and Access to Justice in Environmental Matters, entered into force, Oct. 30, 2001.

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these exemptions must be construed narrowly, so as to promote the broadest access to information. Since 1992, the FOIA has been significantly amended to take account of the explosive growth of new information technologies, including the Internet. The *Electronic Freedom of Information Act Amendments of 1996* mandates (among other things) that each Federal agency implement a publicly-accessible Electronic Reading Room of agency FOIA response material and other material routinely available to the public, with associated electronic "search" and indexing capabilities.

Justice: Changes since 1992 involving access to justice have involved court decisions under the Constitution, not changes to legislation. (They will be discussed in part D-2, below.) The APA (along with other provisions of federal law) provides "access to justice," in the form of removing old barriers, so that a natural or legal person (individual, organization, or business enterprise) can file lawsuits to challenge any perceived illegality - whether procedural or substantive - by a governmental body.<sup>4</sup> The Equal Access to Justice Act furthermore provides for the award of attorneys' fees to a successful litigant against a governmental body or official, or participant in an agency adjudicatory process, even though general doctrines of U.S. law do not normally award such fees or expenses to a winning party.

#### The Behavior-Modifying Role of Liability Law (Tort Law)

The role of liability law (tort law, in American terms) in affecting the behavior of business enterprises should not be underestimated. There are debates about whether this has become a greater factor since 1992, but it is clear that it is an important kind of "non-legislative" environmental law.

An ordinary person can ask a private lawyer to file a lawsuit against an enterprise that has caused injury. A jury of 12 citizens will make the determination of liability and require that an enterprise responsible for causing such injury pay generous financial compensation. The lawyer for the plaintiff can recover 30 to 40% of that generous award, giving "plaintiffs' lawyers" an incentive to bring cases without demanding payment from their clients.

Level of Compensation for Damages: The most notable change since 1992 has been the increasingly shrill debate over *whether* high damage awards by juries in injury cases have "gotten out of hand." Juries normally base their compensation awards on a calculation of the cost of actual damages. However, they also have the ability to award additional damages as "punishment." Such "punitive damage" awards help ensure that a defendant will change its behavior. Juries can also award compensation for "pain and suffering," which are inherently subjective determinations. The evidence is

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<sup>4</sup> Of course, this summary is necessarily oversimplified. Various laws regulate this access and the U.S. Supreme Court has even interpreted (wrongly in my view) the U.S. Constitution to impose some limitations on legal "standing to sue."

mixed about whether injury awards have increased, when adjusted for factors such as inflation and increased life expectancy, but what is undeniable is that there has been a strong public relations and legislative lobbying campaign by business and industry in the past ten years, seeking to impose legislative limits on tort awards.

**Role of Insurance Companies:** The effect of tort law might be hit-and-miss, except for another factor. Rather than take the risk that defending such a lawsuit might cripple a company financially, companies seek insurance to cover the costs of an adverse compensation verdict in such lawsuits. As a result, they must subject themselves to requirements imposed by insurance companies that they operate in a clean and safe manner. Consequently, insurance companies must also be numbered among the environmental enforcers in the USA. It appears that this role has grown steadily in the past decade or more.

**Superfund:** The law on liability for damages from toxic contamination of industrial sites (the “Superfund” law) is based in legislation, but it operates more like tort (injury) law than like regulatory law. It is enforced in part by private parties against one another. It helps modify behavior in that an enterprise might have to clean up past toxic pollution on its site before being able to sell it to a purchaser. Its influence continues to be felt around the nation.

#### The Impact of Right-to-Know (PRTR)

One of the most dramatic developments in “non-regulatory environmental law” in the past 10 years has been the unexpected, favorable impact of “right-to-know” legislation in shifting American industry’s attention toward pollution prevention. Known in Europe as schemes for “pollutant release and transfer registers” (PRTR), right-to-know in the USA stems from the federal Environmental Planning and Community Right-to-Know Act (EPCRA) of 1986 (as well as some State-level laws, such as California’s pioneering Proposition 65,<sup>5</sup> adopted in 1986).

EPCRA was originally adopted largely at the request of firefighters and other emergency personnel, who wanted to know what toxic chemicals might be in a building to which they are called in an emergency. The law also provided, however, for information to be made available to the public as well. This right-to-know legislation has led to preparation of detailed Toxic Release Inventories, which are posted on the World Wide Web (often by nongovernmental organizations) and accessed by citizens. As a consequence, companies have instituted vigorous programs to reduce discharge of pollutants in order to avoid the adverse publicity that TRI reporting can engender. These almost-voluntary reductions, or even shifts to clean

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<sup>5</sup> The Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code (CH&SC) ch. 6.6, Secs. 25249.5 et seq.

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production techniques (“pollution prevention”) in some cases go beyond requirements imposed by regulatory legislation.

Right-to-know laws, while adopted before Rio, have had their substantial impacts only in the past 10 years.

#### *Environmental Lawyers in the USA*

The practice of environmental law by lawyers has also become mature, along with the legislation and court practices. The number of environmental lawyers in the USA is no longer growing at the fast pace of the 1980s, but the overall quantity is nonetheless impressive. The vast majority - probably about 95 percent - work for business and industry, either directly or in private law firms serving business clients. A smaller number work for government departments and agencies at the federal and State level, while an extremely small number work for “public interest law firms” (lawyers representing ordinary citizens in court).

#### Governmental sector

Hundreds of environmental lawyers are employed by governments in the USA. These include lawyers working at the U.S. Environmental Protection Agency, U.S. Department of the Interior, U.S. Department of Agriculture, Oceanic and Atmospheric Administration, Departments of the Army, Navy, and Air Force, and so on. The U.S. Department of Justice represents federal agencies in court and has its own stable of lawyers as well. Finally, the Attorney General offices of the 50 States have their own specialists in environmental law, and even city attorneys must have a basic familiarity with the field - usually in the area of land use regulation.

#### Private business sector

A private citizen or enterprise can only travel through the forest of environmental law with the assistance of professional “guides” - highly specialized environmental lawyers who are skilled at finding the sometimes obscure pathways for their clients, while avoiding dangerous mistakes.

The “forest guides” of environmental lawyers can be found in every major law firm - thousands of them - where their work is usually self-characterized as “compliance work.” That is, they are hired by companies to interpret the laws and warn the company about potential private liability issues. Every law school in the USA offers one or more courses in environmental law, and several offer up to 10 different courses. Many of the graduates go into private law firms that give legal advice to business enterprises.

#### Citizens, NGO sector (Public Interest Lawyers)

Of course, in the forest of environmental legislation lurk Robin Hood and his Merry Men (and Women) - the public interest environmental

lawyers who represent individual citizens and non governmental citizen groups, seeking to impose their own order on the inhabitants of the forest.

Some law graduates go to work for environmental groups and private citizens who are injured. These “public interest lawyers” are few in number and poorly paid, but incredibly dedicated. To a large degree, the 95% of environmental lawyers who work for business and industry are responding to the legal and political activities of the two percent who are public interest lawyers.

Legal education: Classes and Professors

Every law school in the USA offers one or more courses in environmental law. Most do no more than just provide a vague overview of the field, or concentrate on two or three major laws in more detail. In some schools, 10 or more separate courses are offered. The author of this report operates a listserv, ENVLAWPROFS, which is available to law professors throughout the world, but the vast majority of members are from the USA.

## **II- SPECIFIC TOPICS**

### **Ideas and Suggestions or the General Reports**

This author chooses to limit his “ideas and suggestions” to the one field in which he has been working steadily in recent years.

### **Democracy, access to justice and environment**

#### *Background and Perspective*

It may be said that democracy in the world has passed through three phases: from direct to representative to participatory. In the original direct democracy of ancient Athens, those who were citizens could influence policies directly with their votes. This can still happen today in New England “town meetings” in the USA, or by the use of the initiative or referendum in various countries. But direct democracy does not work very well in organizing a complex society, and is not broadly advocated today for general purposes of governing.

The increasing complexity of societies gave rise to representative democracy, in place of direct democracy. In its early days this form kept a reasonably strong link between citizens and policies. Those who were citizens (initially, of course, only men and only those of a higher social and economic class) elected their policy-makers on election day, but they could also communicate with them concerning policy in between elections. Representative democracy made some sense when most important policy decisions were made in legislative bodies, and at a time when implementation of decisions was reasonably straightforward. This election-based and representative version of democracy, including contact with legislative decisionmakers, provided some reasonable amount of accountability to the people at the time and in the conditions then prevailing.

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Today, however, we live in an age when a good deal of important governmental decisionmaking takes place primarily outside parliaments and legislatures. Thousands of civil servants with little direct accountability to the people work in hundreds of governmental bodies. These civil servants make crucial policy and implementation decisions, which are then approved often by unelected department heads. Endorsement of policies on election day has become increasingly theoretical, while communication with legislators can be seen as contacting the wrong people to affect policymaking.

To deal with these changes in the nature of governing, new approaches to the democracy of governance are being created (and not only in the USA, of course). Since policymaking and implementation are often handled by the bureaucracy, the new kind of democracy includes a variety of techniques: inviting the public to submit written or oral comments during the creation of regulations by executive branch departments or government agencies; various methods of formal and informal public consultation; formal hearings; negotiations among government and various stakeholders; and other methods. Such participatory methods are used during the full spectrum of government action, from the highest and earliest levels (such as the preparation of government plans and policies, perhaps including drafting legislation), to the intermediate levels (drafting and later adoption of regulations), to the lower or final levels of implementation (actions on permits or licenses, enforcement, and the like).<sup>6</sup>

#### *Developments in the USA*

Public participation has been transforming the very nature of democracy in the United States in recent decades. The concept of outside participation in decisionmaking can be traced far back. Economic interests achieved the earliest participation in bureaucratic decisions. The founding of the Chamber of Commerce of the United States in 1912 has been said to have been motivated by the desire for participation. In 1933 under the New Deal, farmers were involved in government planning of crop allocations. The Administrative Procedure Act was adopted in 1946 to govern federal government decisions that prescribe or implement policies through rulemakings<sup>7</sup> and actions on permits, licenses, or formal adjudications.<sup>8</sup>

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<sup>6</sup> Of course, the public in general is not always clamoring at the doors to comment and participate, but this problem of democracy was addressed nearly two hundred years ago by a famous democrat:

I know of no safe depository of the ultimate power of society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

Letter from Thomas JEFFERSON to Charles JARVIS (Sept. 28, 1820), in Bartlett's Familiar Quotations, at 473 (Little Brown & Co., 14th ed. 1968).

<sup>7</sup> 5 U.S.C. § 553.

<sup>8</sup> 5 U.S.C. § 554.

Although in many respects it consolidated existing agency practices, the uniform requirements that were put into a single law did guarantee a marked participatory approach to bureaucratic policy-making and policy implementation. Here too the primary beneficiaries at first were business and industry, which had its rights to participate in decisions formalized in law, and made reviewable in court actions, but the rights were defined that would later be used by a broader range of participants.

Participation moved beyond economic interests in the next two decades. The term "citizen participation" is said to have been introduced in 1954 by the Urban Renewal Administration, but the real flowering of a more broad-based public participation came in the 1960s and early 1970s. By the mid-1960s, under Lyndon Johnson's Great Society, the Office of Economic Opportunity was requiring the involvement of the poor on government boards, as well as community meetings to discuss planned government actions. The adoption of the Freedom of Information Act in 1966 added an "access to information" pillar to the Administrative Procedure Act. The mid-1970s, in the wake of the Watergate political scandal involving President Richard Nixon, saw strengthening of the Freedom of Information Act and adoption of open meetings laws at the national level, as well as legislation mandating transparency in government advisory commissions. The loosening of legal restrictions on access to courts in the early 1970s, along with the addition of the Equal Access to Justice Act in 1980, added an "access to justice" pillar. Meanwhile, the adoption of the National Environmental Policy Act (NEPA) in 1969, along with the Clean Air Act (CAA) and Clean Water Act (CWA) in 1970 and 1972, began the process of writing public participation and access to justice provisions squarely into the new wave of environmental laws that the U.S. Congress adopted in the 1970s. NEPA and its implementing regulations have led to a regime of draft documents about environmental impacts, a robust commenting process, and the obligation of US agencies to discuss and respond to the major points raised during preparation of an environmental impact statement.

The 1970s saw other legislative changes as well. While the provisions of the Administrative Procedure Act for rulemaking (as opposed to case-by-case decisions) had been only sporadically used by agencies between 1946 and 1970, the Clean Air Act made rulemaking a central part of the way that the new Environmental Protection Agency would go about its business. This model was also followed two years later in the Clean Water Act, and continued in other legislation. Given the fact that giving an opportunity for public comments on proposed rules is fundamental to the rulemaking process under the APA, the widespread use of rulemaking in the CAA and CWA meant, in turn, a widespread commitment to public participation.<sup>9</sup>

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<sup>9</sup> For a more thorough discussion of U.S. law involving public participation, see John E. BONINE, Susan CASEY-LEFKOWITZ, Claudia SALADIN, Jennifer GLEASON, *Country*

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*Proposals for International Development of Democratic, Participation, and Environmental Rights*

An ad hoc Working Group has been established by the Commission on Environmental Law of the IUCN/World Conservation Union. Its members came to the conclusion that the World Summit on Sustainable Development in Johannesburg should recommend negotiation and adoption of a global convention to implement Principle 10 of the Rio Convention.

Furthermore, prior to the European/North American Regional PrepComm for the World Summit, in Geneva in September 2001, the representatives of 80 nongovernmental organizations adopted a statement on various issues relevant to the Summit. The portion on environmental and participatory rights included the following:

**Governance and Rights**

Despite promises made at the Earth Summit, strong governance structures to support sustainable development have not been created. Strengthening governance should be built on principles of accountability, transparency, subsidiarity and participation of civil society. In addition, the United Nations Environment Programme must be strengthened and its financing must be increased and stabilized.

**Environmental and social rights.**

Global sustainability requires recognition that human rights include the right to a favourable and healthy environment including social rights and equitable access to resources; the right of participation of members of the public in decision making; the right of access to information; and the right of access to justice.

**We call on the WSSD**

- To launch a negotiation process for a global convention, building on Rio principle 10, to implement these environmental rights, with participation of civil society in the negotiation process,
- To develop programmes to enhance the integration of environmental and human rights issues, as proposed by the consensus decision of the 56<sup>th</sup> meeting of the UN Commission on Human Rights.

My recommendation is that this text be taken as the basis for a declaration by the lawyers gathered for the World Conference in Limoges.

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*Report On Public Participation -- United States Of America* (prepared for the 4<sup>th</sup> Pan-European Environment Ministers Conference, Aarhus, Denmark, June 23-25, 1998) (1998).