

# THE SEVEN DEGREES OF RELEVANCE: WHY SHOULD REAL-WORLD ENVIRONMENTAL ATTORNEYS CARE NOW ABOUT SUSTAINABLE DEVELOPMENT POLICY?

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## I. INTRODUCTION

As an environmental law professor, one of the most intriguing ideas to come along in the past few years is the notion of sustainable development.<sup>1</sup> This amorphous, ubiquitous concept offers almost limitless potential for theoretical musings, scholarly publication, heated debate, and all else that make up academia. I'm really having fun with sustainable development!

But speaking as a practicing environmental attorney, I am sick to death of hearing about sustainable development. What is it? What do I do about it? How do I make it happen? What am I supposed to tell my client to do, or not to do? I need answers to those questions, and I am not finding them in law review articles, policy papers, and engineering journals. Don't talk to me about sustainable development until you have the answers.

I exaggerate, of course, but only to make the point that the title of this Essay is a serious question for many environmental attorneys in industry, in government, in consulting—in the real world. For the average environmental law attorney dealing with a multitude of clients, projects, issues, and decisions, until a concept is grounded in tangible “hard” law to apply<sup>2</sup> for all practical purposes it is irrelevant.

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1. At its broadest, sustainable development is the philosophy (1) that today's progress must not come at tomorrow's expense and (2) that human progress thus must be sustained not just in a few places for a few years but for the entire planet into the distant future. See Jonathan Lash, *Toward a Sustainable Future*, 12 NAT. RESOURCES & ENV'T 83, 83 (1997). The prevailing working definitions and sources of policy designed to reduce that philosophy to real-world law and policy are discussed *infra*. It is difficult to provide citations to a comprehensive set of authorities and commentaries defining what sustainable development is as a matter of law and where the law of sustainable development is found—indeed, that is the central point of this Essay. This Essay is by no means an attempt to canvass all the law and commentary relevant to sustainable development, but rather to explore whether that body of work is relevant to anything else. For a thorough bibliography of sustainable development literature, see ENVIRONMENTAL ISSUES AND SUSTAINABLE FUTURES: A CRITICAL GUIDE TO RECENT BOOKS, REPORTS, AND PERIODICALS (Michael Marien ed., 1996).

2. The distinction between “hard” and “soft” law to apply has been explored most fully in international law commentary:

The question of whether there is a “soft law” in international law has been the subject of recent debate. To some extent we recognize a limited normative force of certain norms even though we concede that those norms would not be enforceable by an international court or other international organ. In this respect there is a kind of “soft law.” To say that it does not exist because it is not of the “enforceable” variety that most legal norms exhibit might blind us to another dimension of the reality of international practice.

INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 55 (Anthony D'Amato & Kirsten Engel eds., 1996). My point is that this distinction between enforceable “hard” law and unenforceable, but normatively significant, “soft” law is not limited to international law questions and thus helps us understand how powerful concepts like sustainable development grow in

Even in stating this I exaggerate, because it is certainly the case that many practicing environmental attorneys enjoy addressing theoretical developments and contribute greatly to the process of turning them into tangible operating principles. The problem is that few clients will pay to support those pursuits until there is serious momentum behind the development of hard law principles.

Unquestionably, sustainable development is for the most part an idea in the domain of commentary and government policy pronouncements rather than of statutes, cases, and other hard law to apply.<sup>3</sup> Should practicing environmental attorneys nonetheless bother at this point to participate in the policy debate, to stay informed, to try to influence and shape the operating principles of sustainable development? I believe the answer is yes. Sustainable development has progressed far enough as a policy idea to be relevant to real-world environmental attorneys. I contend further that it would be folly for any such person not to “get with the program”, as nascent as it may be, if he or she intends to be considered a serious, informed environmental attorney in, say, ten years. In short, whatever one thinks of sustainable development as a policy, it is hard to argue that sustainable development is not relevant already and will not become increasingly so over time.

I suspect that for many readers I am preaching to the choir—they are already convinced of the importance of sustainable development as a policy idea even if not convinced of the merit of its policy contents. But the question I pose is, how does one convince others to share this conviction? Two overarching themes are important to this process.

First, it is important to portray relevance in the real world as a matter of degree. Relevance of emerging law builds like the seasons change—if you get outside and look hard for the subtle signs, you notice the process unfolding gradually, but if you stay cooped up in your office, you are surprised one day to see it is not summer anymore. The trick is to notice the changes before the seasons pass you by.

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relevance to domestic law practitioners.

3. As a crude representation of this status, a LEXIS search in November 1997 for the phrase “sustainable development” produced over 800 documents from the law review and environmental regulation databases, while producing less than thirty documents from databases containing federal and state documents and judicial opinions. None of the cases and few of the other documents contained the search terms in ways meaningful to the use meant in this Essay. Many of the documents that do use the term in that sense do so only in passing. Illustrations of how sustainable development is treated in these various levels of legal authority are provided *infra*.

Second, it is useful to emphasize that the relevance of an idea in the real-world sense can become entrenched, and the development of its law inevitable, well before there are clear technical measurements and a coherent body of law to apply. In the evolution from amorphous idea to hard law to apply, there is some inflection point past which the process must progress in order to achieve law to apply. Once the process has passed that point, moreover, the progression to hard law to apply becomes virtually irreversible. For someone interested in the real-world relevance of the idea, that inflection point is the signal that the critical mass of momentum has been achieved.

To illustrate how these two themes are in operation for sustainable development, Part II of this Essay portrays the evolution of legal and policy ideas as moving through *seven* degrees of real-world relevance.<sup>4</sup> To demonstrate where sustainable development is in that model, I use as an example another powerful idea that has emerged in environmental policy in the past decade—environmental justice.<sup>5</sup>

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4. I developed this “seven degrees of relevance” model specifically for the purpose of answering the question posed by this Essay, but it strikes me as being applicable generally to the question of how policy ideas in environmental law and other fields evolve toward having relevance to practicing attorneys. My research assistant has been driven to fits trying to determine whether such an approach has been taken elsewhere, though I cannot say we have canvassed all the literature of legal epistemology. The closest analogy I have found is to the concept of “graduated normativity” some commentators use to explain the significance of “soft” law in international law. See INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 2, at 57-62; see also Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT’L L. 420, 429-31 (1991) (describing the “contagion” which affects the transformation of “soft” law instruments into “hard” ones). Some of the distinctions I make between the “degrees” are subtle, though they seemed relevant to me when I was practicing environmental law full time. Of course, it is less critical to the model that the process be divided into seven degrees than to demonstrate that relevance of ideas is a matter of degree in general and that it precedes the evolution of fully-formed law to apply. That focus, moreover, is not the same as asking how law itself evolves; rather, I am reporting the evolution of sustainable development policy and law as a given and asking when in that process it ought to matter to practicing attorneys. For a discussion of various theories of the evolution of law, see J. B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996).

5. Environmental justice refers to the “fair treatment of people of all races, cultures and income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.” Solicitation Notice for Fiscal Year (FY) 1994 Environmental Justice Grants to Community Groups, 58 Fed. Reg. 63,955, 63,956 (1993). The topic of environmental justice, and whether injustice truly exists, has exploded in the last decade into legal and social commentary; see, e.g., DAVID E. NEWTON, ENVIRONMENTAL JUSTICE: A REFERENCE HANDBOOK (1996); Symposium, *Urban Environmental Justice*, 21 FORDHAM URB. L.J. 431 (1994); Symposium, *Class, Race, and Environmental Regulation*, 63 U. COLO. L. REV. 839 (1992); and legal academic texts, see, e.g., KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE (1995). This Essay does not attempt to survey the full breadth of environmental justice law and commentary. For thorough bibliographies of the law, commen-

Environmental justice is about one degree ahead of sustainable development in the seven degrees of relevance model. Environmental justice is just on the brink of reaching the hard law to apply status that makes heads turn; sustainable development is not there yet.

Nevertheless, Part III concludes the Essay with my contention that sustainable development has passed the inflection point—it is inevitable that a law of sustainable development will evolve—and the only questions are how fast and in what form. Clearly, real-world environmental attorneys ought to be interested in those questions. Indeed, the next few years will define what sustainable development law in the United States will look like for decades thereafter, and relatively small efforts at this stage to influence the shape and content of the law could have relatively large consequences for the long term. There has not been and never will be a more important time for practicing environmental law attorneys to tune in to sustainable development policy.

## II. THE SEVEN DEGREES OF RELEVANCE—TURNING POLICY IDEAS INTO LAW TO APPLY

Not all ideas are relevant or ever become relevant beyond the sense of being topics of discussion.<sup>6</sup> But as ideas take on meaning beyond discussion points, at what stage of development does it make sense for busy environmental attorneys to take note of the emergence of an idea and its evolution toward hard law to apply? The first step in answering that question is to get a feel for the different degrees of relevance the idea takes along the way.

### A. *First Degree: The Idea Becomes Widely Expressed through a Generally-Accepted Norm Statement*

What makes ideas such as environmental justice and sustainable development so elegant and so powerful is their capacity to be easily captured as normative statements. Often this occurs as a result of efforts to combine several co-evolving policy developments under one

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tary, and legal materials pertaining to the environmental justice issue, see Carita Shanklin, *Pathfinder: Environmental Justice*, 24 *ECOLOGY L.Q.* 333 (1997); Adam D. Schwartz, *The Law of Environmental Justice: A Research Pathfinder*, 25 *ENVTL. L. REP.* (Envtl. L. Inst.) 10543 (1995).

6. Any doubt that sustainable development is a widely discussed topic is quickly dispelled by plugging “sustainable development” into any Internet search engine, which produces thousands of “hits” evidencing the grass-roots level and international scope of sustainable development dialogue. The presence of an idea on the World Wide Web, of course, does not alone make it relevant to practicing environmental law attorneys.

umbrella statement. For example, early in its emergence the environmental justice movement took civil rights, pollution regulation, contaminated lands remediation, and environmental enforcement and melded them into one very simple and very powerful idea—that the benefits of environmental protection must be equitably distributed over racial and income lines.<sup>7</sup>

For sustainable development, that synergistic move arose through the 1987 World Commission on the Environment and Development, better known as the Brundtland Commission, named after its chairperson, when it defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>8</sup> At the core of this concept is “[a] process in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.”<sup>9</sup> The Brundtland Commission thus pulled together environmental, social, and economic agendas into a concise statement with a strong normative theme in which no one of these agendas predominates and all three agendas focus on intergenerational sustainability. The increasing use of the label—sustainable development—allows its advocates to avoid the need to explain what lies behind it.<sup>10</sup>

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7. One of the founders and leading advocates of the environmental justice movement described its central thesis in highly normative terms, alleging that “[c]ommunities consisting primarily of people of color continue to bear a disproportionate burden of this nation’s air, water, and waste problems” and that such “[e]nvironmental racism exists within local zoning boards as well as the Environmental Protection Agency.” Robert D. Bullard, *The Threat of Environmental Racism*, 7 NAT. RESOURCES & ENV’T 23 (Winter 1993). For a discussion of Professor Bullard’s founding and continuing role in the environmental justice movement, see Shanklin, *supra* note 5, at 353 n.74.

8. See WORLD COMM’N ON ENV’T AND DEV., OUR COMMON FUTURE 43 (1987). For some background on this report and its importance to the origin of *domestic* sustainable development policy, see Donald A. Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States*, 5 DICK. J. ENVTL. L. & POL’Y 175, 197-98 (1996).

9. OUR COMMON FUTURE, *supra* note 8, at 43.

10. Indeed, the principles embodied in the Brundtland Commission’s definition had previously been expressed for domestic purposes in the National Environmental Policy Act of 1969 (NEPA), which defined the “continuing responsibility of the Federal government to . . . (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; [and] (3) attain the widest range of beneficial uses of the environment without degradation . . . .” 42 U.S.C. § 4331(b) (1995). That these ideals are now expressed much more succinctly through the sustainable development label illustrates the potency of re-

Understanding what the label means at this early stage of development separates those “in the know” from those who are not. If one is an environmental attorney who likes to be in the know, this is where relevance begins and it is time to get in the game.

*B. Second Degree: Advocating the Opposite of the Norm Is No Longer a Tenable Policy Position*

Another feature that contributes to the power of these ideas is their capacity to be expressed as a binary set of options, which makes it difficult to engage for very long in a debate about the merits of the norm statement. If you are not *for* the norm statement, you can only be against it, and being against it makes one look out of touch. Who, for example, is for environmental *injustice*?<sup>11</sup>

Sustainable development has clearly made it to this stage. Consider the label: it is not “sustainable *environment*” or “sustainable *economy*.” Either of those labels would have opened up a rehash of the old preservationism versus resourcism debate that paralyzed environmental law for decades, and both ignore the social equity dimension that environmental justice has brought into focus.<sup>12</sup> Not everyone is pleased with the new idea and its melding of economic,

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ducing norm statements to such easily expressed phrases. Of course, while it may be the Brundtland Commission’s report that will be recalled as the primary origin of domestic sustainable development law, NEPA may play an important role in rediscovering a pre-existing national commitment to what we today call sustainable development, and thus will provide a starting point for building a domestic law and policy base of sustainable development. See John Dernbach et al., *U.S. Adherence to Its Agenda 21 Commitments: A Five-Year Review*, 27 ENVTL. L. REP. (Envtl. L. Inst.) 10504, 10520 (1997) (describing NEPA as “part of the legal and policy foundation necessary to build such a strategy”); James McElfish, *Back to the Future*, ENVTL. F., Sept.—Oct. 1995, at 14. On the other hand, some commentators have suggested that NEPA’s purely procedural focus and lack of post-decision monitoring may make it ineffective, or even counterproductive, in the effort to craft law for sustainable development. See David Hodas, *Law, Externalities and Sustainable Development*, WIDENER L. SYMPOSIUM J. (forthcoming June 1998) (manuscript at 57, on file with author).

11. The contention that environmental protection regulation has led to racial and income inequality has been challenged, however, as paying too little attention to causes of disparate impact other than alleged discrimination. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L. J. 1383 (1994).

12. See J. Baird Callicott & Karen Mumford, *Ecological Sustainability as a Conservation Concept*, 11 CONSERVATION BIOLOGY 32, 34 (1997) (discussing sustainable development’s transformation of the resourcism versus preservationism debate). The same process of distilling competing labels to one dominant expression of the norm took place in the environmental justice arena, as an early competitor label was “environmental racism.” See Nelson Smith & David Graham, *Environmental Justice and Underlying Societal Problems*, 27 ENVTL. L. REP. (Envtl. L. Inst.) 10568 n.3 (1997) (noting that “justice” and “racism” are antonyms).

social, and environmental ideals,<sup>13</sup> but anyone who clings to the old labels or offers newer versions of them is quickly neutralized by the sustainable development label. This reality is illustrated forcefully by the recent report of the President's Council on Sustainable Development ("PCSD"),<sup>14</sup> the vision statement of which describes a "sustainable United States" that will "protect its environment, its natural resource base, and the functions and viability of natural systems on which all life depends."<sup>15</sup> You cannot be against sustainable development as so stated and expect to be taken seriously anymore in the policy-making world.

At this stage the real-world relevance of the idea of sustainable development is apparent mainly to those environmental attorneys who are in the unfortunate position of having a client that is not yet on board the bandwagon. Consider a client who retains lawyers and consultants to help obtain authorization of an energy intensive strip-mining project in a pristine area that acts as habitat for sensitive species and whose rural residents are mainly low income and minority. We all know instinctively that would be a hard sell. Why? Because it is tantamount to openly challenging the sustainable development norm.

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13. See, e.g., John F. Potter, *Sustainable Development: Are We Being Conned?*, 17 THE ENVIRONMENTALIST 147, 147 (1997) ("[t]he glib and frequent use of the political phrase 'sustainable development' leaves most of us currently being conned"); Bill Willers, *Sustainable Development: A New World Deception*, 8 CONSERVATION BIOLOGY 1146 (1994) (objecting to the economic component of the sustainable development message); see generally Gary D. Meyers and Simone C. Muller, *The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy*, 4 BUFF. ENVTL. L. J. 1, 3 (1996) (discussing the debate focusing on various proposed sustainable development definitions); J. William Futrell, *The Transition to Sustainable Development Law*, ENVTL. L. INST., Research Br. No. 3, Apr. 1994, at 5 ("some American environmentalists see the sustainable development movement as a threat undermining the environmental protection efforts of the last generation").

14. President Clinton commissioned the PCSD by executive order on June 29, 1993, to "develop and recommend to the president a national sustainable development action strategy that will foster economic vitality." Exec. Order No. 12,852, 58 Fed. Reg. 35,841 (1993). The PCSD issued its report in February 1997. See THE PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, *SUSTAINABLE AMERICA: A NEW CONSENSUS* (1997) [hereinafter *SUSTAINABLE AMERICA*]. For further background and description of the PCSD's work and its place in the emerging domestic sustainable development policy, see Brown, *supra* note 8, at 202-03; Dernbach et al., *supra* note 10, at 10507-08; Lash, *supra* note 1, at 83; see also *infra* notes 22-33 and accompanying text.

15. *SUSTAINABLE AMERICA*, *supra* note 14, at iv.



C. *Third Degree: The Charge of Acting Contrary to the Norm Can No Longer Be Left Unaddressed*

In the strip mine example above, there is no reason why the project applicant has to openly challenge the sustainable development norm by drawing attention to the short-term economic benefits and long-term ecological and social detriments of the project. The applicant's strategy will be to present the matter simply as complying with applicable regulations and leave it at that.

That strategy will not be effective, however, if a significant challenge to the proposed project can be mounted based merely on the allegation that the project works contrary to the norm statement. In these times any challenge to a proposed action made on the basis that it will exacerbate environmental *in*justice has to be taken seriously by the environmental attorneys working on behalf of the project. Even where the allegation is unsubstantiated and mainly rhetorical, even where the project clearly is not working any environmental injustice, one cannot ignore the allegation.<sup>16</sup> Indeed, even though they ultimately failed to prevail, very early into the history of the environmental justice movement its advocates succeeded in getting courts to pay attention to and rule upon their claims, notwithstanding the fact that there was virtually no explicit law to apply.<sup>17</sup>

Sustainable development has reached this stage as well. It is difficult to imagine a proponent of an intensive mining or industrial project ignoring the charge of *unsustainability*. It would not be enough to say that the regulations do not require proof of sustainability, so that the charge is irrelevant. That response, though most likely legally accurate under current law, would be immediately portrayed as an admission of unsustainability, and would make everyone associated with the review of the project quite uncomfortable. This

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16. As Carol Dinkins, current Chair of the ABA Section on Natural Resources, Energy, and Environmental Law, put it, "[c]laims of environmental racism or inequity will continue to be made both in litigation and in complaints to government agencies; companies, therefore, will be compelled to address this issue." Carol Dinkins, *Impact of the Environmental Justice Movement on American Industry and Local Government*, 47 ADMIN. L. REV. 337, 352 (1995).

17. See, e.g., *Bean v. Southwestern Waste*, 482 F. Supp. 673 (S.D. Tex. 1979) (unsuccessful civil rights challenge to siting of a waste disposal facility), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986). Civil rights claims generally have not been successful foundations for environmental justice claims even in more recent cases. See, e.g., *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1990); see generally, Luke Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523 (1994); Olga Moya, *Adopting An Environmental Justice Ethic*, 5 DICKINSON J. ENVTL. L. & POL'Y 217 (1996); Kathy Seward Norther, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485 (1997).

approach might not spell disaster for the project, as regulators ultimately may be inclined to adhere to the law as expressed in the regulations rather than be accused by the applicant of unfairly and illegally inventing new permitting criteria,<sup>18</sup> but the process unquestionably will be made more expensive, time consuming, and difficult for the applicant by the introduction of sustainability issues.

This stage of relevance, at which the allegation of noncompliance receives attention and demands a response, thus presents a special problem for environmental attorneys on both sides of the allegation as well as for any governmental authority caught in the middle. The project accused of environmental injustice or unsustainable development is faced with the dilemma of proving a negative. This challenge is exacerbated by the fact that at this stage there are no agreed upon measurement standards for evaluating project performance. How can one prove a project promotes sustainable development if all we have is the Brundtland Commission's definition and the PCSD's vision statement? The project's advocates had better be ready with an answer. And for the persons challenging the project, how do they prove the allegations once the project proponent makes

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18. This has been the result in some environmental justice cases. See, e.g., *In re Chemical Waste Management of Indiana, Inc.*, 1995 WL 395962, at \*5 (EPA Env. App. Bd. June 29, 1995) ("[I]f a permit applicant meets the requirements of [the Resource Conservation and Recovery Act] and its implementing regulations, the Agency must issue the permit, regardless of the racial or socio-economic composition of the surrounding community."); *In re Genesee Power Station Limited Partnership Permittee*, U.S. EPA, PSD Appeal Nos. 93-1 through 93-7, (EPA Env'tl. App. Bd. Sept. 8, 1993), reprinted in ELIZABETH GLASS GELTMAN, MODERN ENVIRONMENTAL LAW 27 (1997). In its original *Genesee Power* opinion, the EPA Appeals Board held that an air pollution permit application that complies with applicable regulations cannot be denied on grounds of local land use impacts, including charges of environmental racism. See GELTMAN, *supra*, at 32. The EPA Environmental Appeals Board's original decision also found that there was no evidence in the record of discriminatory intent. See *id.* at 32-33. After the original decision was issued, EPA's Office of General Counsel moved to modify the opinion by excising the language suggesting that the permit review process could not consider environmental justice issues. See *In re Genesee Power Station Limited Partnership*, U.S. EPA, PSD Appeal Nos. 93-1 through 93-7, 1993 WL 473846 (EPA Env'tl. App. Bd. Oct. 22, 1993) (order on motion for clarification). With the applicant's concurrence in that motion the Appeals Board later issued such a revised opinion. See *In re Genesee Power Station Limited Partnership Permittee*, U.S. EPA, PSD Appeal Nos. 93-1 through 93-7, 1993 WL 484880, at \*6 (EPA Env'tl. App. Bd. Oct. 22, 1993). Without this turn of events the progression of environmental justice into higher degrees of relevance may have been impeded. See MANASTER, *supra* note 5, at 213-17. Litigation over the project also took place in state court, where environmental justice claims failed but environmental impact review procedures were imposed on state environmental permitting programs. See *NAACP v. Engler*, No. 95-38228-CV (Cir. Ct. County of Genesee, May 29, 1997) (transcript of decision from bench); see generally, Michael B. Gerrard & Monica Jahan Bose, *The Emerging Law of Environmental Justice*, 34 Chem. Waste Lit. Rep. (BNA) 587, 589 (1997).

its case in response? Since there are no agreed upon standards, whatever data and arguments the project proponent puts forth will force its opponents into a corner. Both sides had better have something more up their sleeves than just the facial allegations. But what?

*D. Fourth Degree: Failure Affirmatively to Portray an Action as Consistent With the Norm Is Seen as a Significant Deficiency*

If allegations of noncompliance with the norm are repeatedly made in different settings and receive attention by adjudicators in many of those settings, new project applicants will see what is happening and begin to anticipate the argument by compiling a record of compliance ahead of time. Eventually the question of compliance with the norm will become a part of the affirmative case for a project rather than being raised, if at all, by the opposition. And as that trend develops, eventually the presentation of the affirmative case will be expected and failure to do so will be perceived as cause for concern. It is no longer unusual in project siting decisions, for example, for companies to conduct environmental justice evaluations as one of their internal site selection screening criteria and to use the results to reduce the chances of any environmental justice concerns being raised.<sup>19</sup>

This stage has been reached for sustainable development as well. Corporate attorneys should be aware that their business clients are ahead of them in this respect, a good sign that attorneys soon had better be conversant in the language of sustainable development. For example, recently the CEO of Monsanto—not a small business player—declared that “far from being a soft issue grounded in emotion or ethics, sustainable development involves cold, rational business logic.”<sup>20</sup> Not surprisingly, therefore, the same theme is being

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19. See Michael B. Gerrard, *Building Environmentally Just Projects*, N.Y. ENVTL. L., May 1996, at 1, 1-2 (discussing this and other proactive measures project developers make affirmatively to portray their projects as environmentally just); Dinkins, *supra* note 16, at 352 (“With the environmental equity movement gaining increased publicity and momentum, it is important for companies to anticipate the possible legal and political consequences of their activities and resolve, or better yet, prevent, any claims of environmental racism or environmental injustice.”).

20. Joan Magretta, *Growth through Global Sustainability: An Interview with Monsanto’s CEO, Robert B. Shapiro*, HARV. BUS. REV., Jan.—Feb. 1997, at 79, 81. Even many strident environmentalists not normally aligned with “big business” interests are espousing the view that market dynamics and business profit motives may provide important foundations from which sustainable development policy can be infused into broader social agendas. See, e.g., Paul Hawken, *Natural Capitalism*, MOTHER JONES, Mar.—Apr. 1997, at 40.

taught at today's business schools,<sup>21</sup> and nine members of the PCSD—over one third of the total—were major corporate representatives.<sup>22</sup> Businesses already are spending substantial sums of money attempting to influence domestic sustainable development policy.<sup>23</sup>

Indeed, some legal profession organizations appear to be sensing this trend in their traditional client base. For example, in 1997 the quarterly journal of the ABA's Section on Natural Resources, Energy, and Environmental Law published a symposium issue on sustainable development<sup>24</sup> and the Section's Special Committee on Climate Change and Sustainable Development issued a "white paper" on climate change issues as they relate to sustainable development goals.<sup>25</sup> Clearly, attention to and affirmative endorsement of sustainable development norms has moved beyond academic conferences and publications and made inroads into the practicing bar.

#### *E. Fifth Degree: Important Governmental Authorities Establish the Norm As an Explicit Policy Goal*

Beyond providing a forum for airing allegations of noncompliance with the norm, the first four degrees of relevance involve very little explicit endorsement of the norm by relevant governmental authorities. Many ideas may linger at the fourth degree for a long time. For some ideas, however, a breakthrough occurs when a significant level of governmental endorsement of the norm is experienced. Indeed, given its close association with civil rights issues al-

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21. See Stuart A. Hart, *Strategies for a Sustainable World*, HARV BUS. REV., Jan.—Feb. 1997, at 67. The Management Institute for Environment and Business, a program of the World Resources Institute, provides extensive training materials for business schools and businesses designed to demonstrate and communicate to the business community the opportunities of sustainable development. See World Resources Institute, (visited Mar. 17, 1998) <<http://www.wri.org/wri/meb/>>. A recent Institute survey found that over half of the 67 "top" business schools offer courses and activities on business and the environment. *MBA Programs at the Cutting Edge*, ENVIROLINK, Winter 1998, at 1.

22. See SUSTAINABLE AMERICA, *supra* note 14, at 177-84.

23. See Earle Eldridge & Traci Wilson, *Carmakers Lobby Against Global Warming Treaty*, USA TODAY, Oct. 3, 1997, at B1 (automakers mount \$13 million advertising campaign against proposed treaty requiring mandatory domestic carbon emission reductions).

24. See Symposium, *Sustainable Development*, 12 NAT. RESOURCES & ENV'T 83 (1997). The Editorial Board of the journal, of which I was Executive Editor from 1993-97, had rejected the sustainable development symposium topic several times before approving it in 1996, on the ground that the topic was too esoteric and not of sufficient interest to practicing environmental attorneys. Needless to say, I was on the losing side of those votes.

25. See AM. BAR ASS'N, SEC. OF NAT. RESOURCES, ENERGY, AND ENVTL. L., SPECIAL COMM. ON CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT, WHITE PAPER ON CLIMATE CHANGE (1996) [hereinafter WHITE PAPER].

ready planted firmly in law to apply, it did not take long for environmental justice to experience this important surge in relevance.<sup>26</sup>

Sustainable development has just entered this stage, marked by the issuance of the PCSD's *Sustainable America* report.<sup>27</sup> The PCSD itself was a bipartisan, crosscutting panel<sup>28</sup> reflecting sustainable development's core trio of economic, environmental, and equity agendas.<sup>29</sup> As the opening salvo in the formation of official domestic sustainable development policy, the report does not suffer from a shortage of aspirational statements and rhetoric.<sup>30</sup> Of more concern to practicing environmental attorneys, however, the report also contains policy recommendations and detailed action proposals that could provide the seeds of policy changes that would have meaningful impacts on the practice of environmental law. For example, the report recommends promotion of voluntary "extended product responsibility" systems whereby manufacturers and others in commerce would ensure "responsibility for the environmental effects throughout a product's life cycle by all those involved in the life cycle."<sup>31</sup> Actions and tools recommended to support such a program

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26. There are now a number of governmental programs designed to identify and address instances of alleged environmental injustice. *See, e.g.*, Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994) (directing executive agencies to develop strategies for identifying and addressing instances of environmental injustice); U.S. EPA, Environmental Justice Strategy: Executive Order 12898, EPA/200-R-95-002 (1995) (report of the EPA Office of Environmental Justice on implementation of Executive Order 12898); 40 C.F.R. § 7.35 (1997) (EPA rules to implement Title VI of the Civil Rights Act of 1964 in connection with environmental justice claims); Environmental Justice in EPA's NEPA Compliance Analysis, 61 Fed. Reg. 36,727 (1996) (EPA draft guidance on the integration of environmental justice analysis into environmental impact analysis documents). For a concise history of the significant developments of the early 1990's leading to entrenchment of environmental justice as a focal point of governmental programs, see Dinkins, *supra* note 16, at 338-41. Current information on government programs aimed at environmental justice issues changes rapidly and updates are available at the Environmental Protection Agency's web page on the topic. *See* U.S. EPA, (visited Mar. 17, 1998) <<http://www.epa.gov/swerosps/ej/>>.

27. *See supra* note 14.

28. *See* SUSTAINABLE AMERICA, *supra* note 14, at 177-84 (members included nine corporate representatives, seven government agency representatives, seven conservation group representatives, and several other nongovernmental organization representatives).

29. The first three of the PCSD's ten stated national goals relate to the environment, the economy, and equity, respectively, such that all Americans are ensured "the opportunity to achieve economic, environmental, and social well-being." *See id.* at 12-13. In its even more platitudinal "we believe" statement, the PCSD contends that "[e]conomic growth, environmental protection, and social equity are linked. We need to develop integrated policies to achieve these national goals." *Id.* at vi.

30. The report includes a "vision statement," a "we believe statement," and an introductory chapter devoted mainly to elaborating on those themes. *See id.* at iv, v-vi, 1-9.

31. *Id.* at 40.

include taxes, fees, subsidies, deposit/refund systems, and so-called "take-back" schemes in which product manufacturers accept responsibility for retired products from their end users.<sup>32</sup> Although these and many of the PCSD's other policy recommendations are framed mainly in terms of voluntary efforts, it is not difficult to imagine how many of them could be embodied in a more direct form through law.

To be sure, *Sustainable America* is a long way from hard law to apply, but it is unmistakably a step that advances rather than stalls or reverses the evolution of sustainable development policy. Indeed, much has happened toward that end since the PCSD issued *Sustainable America*. For example, the PCSD itself has issued additional reports focusing on translating its policy recommendations into concrete measures,<sup>33</sup> and it has been given a renewed charter to continue that process.<sup>34</sup> The report has prompted other studies of national sustainable development policy.<sup>35</sup> More significantly, sustainable development has become a universal term of art, used with the implicit assumption that its content and scope are broadly understood by the public, within federal agencies as diverse as the Environmental Protection Agency,<sup>36</sup> National Marine Fisheries Service,<sup>37</sup> Department of Agriculture,<sup>38</sup> Economic Development Administration,<sup>39</sup> Department of Energy,<sup>40</sup> Council on Environmental Quality,<sup>41</sup> and United States

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32. See *id.* at 42. For a description of "take back" and other sustainable development approaches focusing on product life cycles, many of which have already taken hold in other countries as concrete law to apply, see Gary A. Davis et al., *Extended Product Responsibility: A Tool for a Sustainable Economy*, ENV'T, Sept. 1997, at 10.

33. See PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, BUILDING ON CONSENSUS: A PROGRESS REPORT ON SUSTAINABLE AMERICA (1997).

34. The PCSD has been authorized "to continue its work by continuing to forge consensus on policy, demonstrating implementation, getting the word out about sustainable development, and evaluating progress." 62 Fed. Reg. 45,283, 45,283 (1997).

35. See, e.g., SUSTAINABLE AMERICA: AMERICA'S ENVIRONMENT, ECONOMY AND SOCIETY IN THE 21ST CENTURY (Daniel Sitarz ed., 1998).

36. See 62 Fed. Reg. 52,720 (1997) (announcing availability of funding assistance for "brownfields" redevelopment projects that promote local sustainable development programs).

37. See New England Fishery Management Council, 62 Fed. Reg. 17,576 (1997) (announcing meeting at which agency's Director of Sustainable Development will discuss financial assistance for communities with latent fishing capacity).

38. See Robert Myers et al., *Developing an Enduring American Agriculture*, 12 NAT. RESOURCES & ENV'T 110 (1997) (describing the work of the Department's Director of Sustainable Development).

39. See Economic Development Assistance Programs, 61 Fed. Reg. 67,434 (1996) (announcing availability of Department of Commerce funding for, among other things, economic development projects consistent with the PCSD's sustainable development vision).

40. See Center of Excellence for Sustainable Development, 62 Fed. Reg. 29,722 (1997) (announcing availability of funding through the Department's Center of Excellence for Sus-

Information Agency<sup>42</sup> to name but a few. Many state policy pronouncements also use the term as if it is universally accepted and understood.<sup>43</sup> Although virtually none of these official governmental uses of sustainable development amounts to hard regulatory law to apply, the message flowing out of official channels is loud and clear—sustainable development is a fully endorsed norm statement of environmental *policy*.

*F. Sixth Degree: Actions are Denied or Delayed Necessary*

*Authorization on the Basis of a Perceived Failure to Facilitate the Norm*

Lawyers tend to really take note of an idea when it causes them to lose a case. And often long before there is a well-defined body of law to apply for an idea, some cases will be lost on the ground of failure to meet the widely-espoused and officially-endorsed norm. In other words, as courts, agencies, and other authorities begin to test the weight and direction of the newly-emerged official policy principles, real-world legal consequences are felt. Any lawyer will tell you that this is when, at the latest, the idea is sufficiently relevant to warrant his or her professional attention. Indeed, environmental justice has just entered this stage, with a smattering of permit denials or significant complications now being experienced around the nation even though no well-developed body of law to apply exists.<sup>44</sup> In essence,

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tainable Development, for projects promoting sustainable community development); Notice of Solicitation Availability, 62 Fed. Reg. 32,313 (1997) (announcing funding available for projects that promote sustainable development in developing nations).

41. See American Heritage Rivers Initiative, 62 Fed. Reg. 33,647, 33,650 (1997) (describing promotion of local community sustainable development as one of the criteria for special designation of ten American Heritage Rivers)

42. See College and University Affiliations Program, 62 Fed. Reg. 51,721 (1997) (announcing funding for international exchange programs that support sustainable development).

43. See ME. REV. STAT. ANN. tit. 10, § 929-B (West 1997) (requiring a state economic development council to develop “[a] plan for the State’s economy based on economic opportunity for all citizens and a shared commitment to sustainable development”); MINN. STAT. ANN. § 116C.693 (West 1997) (declaring it to be the policy of the state to locate wind energy conversion systems “in an orderly manner compatible with . . . sustainable development”); TEX. EDUC. CODE ANN. § 88.604 (West Supp. 1998) (establishing a center to study the “roles of marine and intermodal transportation for sustainable development”); VT. STAT. ANN. tit. 10, § 2222 (Supp. 1997) (“It is the policy of the state of Vermont to encourage sustainable development . . .”); WASH. REV. CODE ANN. § 90.61.040 (West Supp. 1998) (requiring that the state land use study commission identify land use law reforms needed to “achieve economically and environmentally sustainable development”).

44. See, e.g., In re Louisiana Energy Services, L.P., 45 N.R.C. 367, 1997 WL 458771 (May 1, 1997). In *Louisiana Energy Services*, the Nuclear Regulatory Commission’s Atomic Safety and Licensing Board concluded that the Executive Order on environmental injustice, see *supra*

the *policy* of environmental justice is just now beginning to coalesce into the *law* of environmental justice, and practicing environmental attorneys have taken note.<sup>45</sup>

Alas, sustainable development is not at this stage yet. The PCSD's *Sustainable America* report unquestionably lacks the teeth to produce this result, and there has been no broad initiative thus far to create law that explicitly builds upon the PCSD's work. At the federal level, no new laws have been enacted and no existing laws have been interpreted as mandating what amounts to sustainable development.<sup>46</sup> No federal court has imposed such a standard on any proj-

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note 26, requires the agency to consider environmental justice impacts as a substantive licensing criterion and thus remanded a nuclear material license to agency staff review on the ground that substantial evidence of environmental injustice was present in the record but not adequately taken into account at the staff level. *See id.* at 412. Significantly, the Board thoroughly reviewed the evidence presented which, in the Board's opinion, tended to show that the project site may have been selected with race in mind. *See id.* at 391; see generally Gerrard & Bose, *supra* note 18, at 588-89. In other cases, most notably the Shintech, Inc. chemical plant matter in Louisiana, permits have been seriously delayed and complicated based on environmental justice concerns, although in some instances the ostensible grounds given for the administrative outcome have involved other legal bases. *See, e.g.,* Paul Hoversten, *EPA Puts Plant on Hold in Racism Case*, USA TODAY, Sept. 11, 1997, at 3A (describing decision of EPA, following intense opposition on environmental justice grounds, to deny a permit application for the Shintech chemical plant construction based on finding that proposed emissions would exceed federal standards). For a discussion of the contentious debate surrounding the Shintech matter, see Terry Carter, *EPA Steps In to Clear the Air*, A.B.A. J., Nov. 1997, at 32 (for example, a state economic development official charged the law students in the legal clinic that opposed the plant as having engaged in "environmental dilettantism" and "elitist social engineering").

45. *See* Gerard, *supra* note 19; Dinkins, *supra* note 16.

46. A distinction must be drawn between recently enacted environmental protection laws on which Congress has slapped the "sustainable" label in their title and laws which substantively integrate the trilogy of sustainable development principles. For example, the Sustainable Fisheries Act of 1996, Pub. L. 104-297, amended the Magnuson Fishery Conservation and Management Act, 16 U.S.C.A. §§ 1801-1883 (West 1985 & Supp. 1998), to require federal agencies to review the consequences of their actions in or affecting a new regime of protected areas known as "essential fish habitat." *See* 62 Fed. Reg. 19,723 (1997) (proposed regulations of National Marine Fisheries Service for delineating essential fish habitat). Although this new program may advance the environmental sustainability component of sustainable development, there is scant evidence in the amendatory law of a conscious effort to craft an integrated sustainable development approach. Similarly, although judicial expansions of environmental protection requirements under existing environmental laws may be touted as sustainable development success stories, ultimately a comprehensive body of sustainable development law cannot be brought about through that route either. In short, domestic environmental law is not the only component of sustainable development, and thus expanding the reach and impact of environmental protection laws through incremental legislative amendment and judicial interpretation may be a necessary, but is surely not a sufficient, means of achieving an integrated sustainable development law. *See* Nicholas A. Robinson, *Comparative Environmental Law: Evaluating How Legal Systems Address "Sustainable Development,"* 27 ENVTL. POL'Y & L. 338 (1997) (describing environmental law as "one of the primary pillars supporting each nation's patterns of 'sustainable development'" and discussing how environmental law can contribute toward that agenda).



ect as a matter of constitutional requirement or raw judicial fiat. It is unlikely that federal law will stand in the way of any project on sustainable development grounds in the absence of new legal initiatives designed specifically for that purpose. Consistent with their reputation as being on the leading edge of innovation, a few states have included references to sustainable development in narrowly defined regulatory programs,<sup>47</sup> but there has been insufficient time for those measures to produce judicial interpretations that define constraints on particular projects or other activities.<sup>48</sup>

No lawyer has yet lost a case for failure to live up to the sustainable development norm notwithstanding its wide and official endorsement. And until a case is lost or seriously challenged on such grounds, it is difficult to speak of a *law* of sustainable development.

*G. Seventh Degree: The Norm is Fully Transformed into Law to Apply—Measurable, Rationalized, Routine Standards of Environmental Evaluation, Authorization, and Performance.*

There is no shortage of hard environmental law to apply, and there seems to be no limit to how many new ideas the established body of environmental law can incorporate into law. The transition into this final degree of relevance, where the norm has been embodied in a set of measurable, rationalized, routine standards, begins a stage in which the body of law may evolve, continuously building upon the norm statement. The key trait of this stage, however, is that the battle over whether to adopt the norm into a body of law to apply is long since over and the only task remaining is to translate the norm into statutory, regulatory, and judicial script.

Environmental justice has not reached the point at which a body of law to apply has formed that embodies the norm statement. There certainly is no independent body of environmental justice law. For now, government authorities must employ other legal regimes as sur-

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47. See, e.g., MINN. STAT. ANN. § 4A.07 (West 1997) (requiring a state planning agency to prepare a model land use ordinance “to guide sustainable development,” though adoption by local governments remains optional); N.Y. ENVTL. CONSERV. LAW § 57-0121(6) (McKinney 1997) (among the duties established for a land use council with regulatory jurisdiction over the Long Island Pine Barrens is the development of a “sustainable development plan” to eventually guide regulatory decisions).

48. Many sustainable development scholars believe that, notwithstanding the global dimensions of many issues dealt with under the umbrella of sustainable development, “in the United States in particular, state and local governments are an indispensable factor in achieving a sustainable future.” See Brown, *supra* note 8, at 203.

rogates in order to take an environmental justice focus.<sup>49</sup> Although that approach does not preclude explicit consideration of environmental justice issues,<sup>50</sup> it provides only an indirect way of forming hard law out of the policy content. It is too soon to say what form the direct law of environmental justice will take in, say, ten years, and whether it will develop through legislation, judicial opinion, or administrative reform.<sup>51</sup> But there is little doubt there will be some body of environmental justice law to apply by then, and it will be as relevant as the Endangered Species Act, Superfund, wetlands protection laws, and all other current bodies of hard law to apply that started out some time ago as mere ideas.

Will sustainable development reach this stage also? Most likely so, though the questions of where, when, and in what form are harder to answer. As did environmental justice, which had a long and well-developed history of civil rights law from which to draw, sustainable development can build on over three decades of federal and state environmental law. Also, just as environmental justice involved the fusion of organized environmental and civil rights constituencies, sustainable development integrates broadly supported environmental, economic, and social agendas. But sustainable development is more difficult: although the goal is as easy to articulate as is that of environmental justice, the scope and depth of policy and lifestyle changes needed to bring it about are mind boggling.<sup>52</sup> The devil, in other words, will be in the details.

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49. See, e.g., Steven A. Herman, *Enforcement Helps Realize EPA's Commitment to Environmental Justice to Improve People's Lives*, NAT'L ENVTL. ENFORCEMENT J., Oct. 1997, at 9 (discussing EPA's "environmental justice" criminal and civil docket, which in reality consists of cases in which existing authorities were focused on matters that had some overtone of environmental justice concerns).

50. For example, the EPA has promulgated regulations to implement Title VI of the Civil Rights Act, see 40 C.F.R. pt. 7 (1997), and recently outlined the procedures it will use under those regulations to investigate claims that issuance of environmental permits causes environmental injustice. See U.S. EPA, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (visited Feb. 19, 1998) <<http://www.es.epa.gov/oeca/oej/titlevi.html>>. A court recently held that environmental justice claimants have a private right of action under EPA's Title VI regulations to challenge issuance of a hazardous waste permit that allegedly will disproportionately affect minority neighborhoods. See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997).

51. For example, will a project survive environmental justice scrutiny by showing that its site selection process was conducted on a purely color-blind basis, or will proof of no disparate racial or income impact also be required? See Gerard, *supra* note 18, at 589-90. To what extent will proof of discriminatory intent be required of opponents to a project? See Wesley D. Few, *The Wake of Discriminatory Intent and the Rise of Title VI in Environmental Justice Lawsuits*, 6 S.C. ENVTL. L.J. 108 (1997).

52. See John C. Dernbach, *Pollution Control and Sustainable Industry*, 12 NAT. RE-

Much of the work toward defining the content of sustainable development law and policy is taking place at the international level.<sup>53</sup> Yet the fact that sustainable development rhetoric today may roll off the tongues of so many international diplomats hardly makes sustainable development relevant to domestic practitioners.<sup>54</sup> To be sure, some international law issues on the horizon directly implicate domestic sustainable development implementation policy.<sup>55</sup> None-

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SOURCES & ENV'T 101, 101 (1997) (achieving sustainable development will "require massive changes in the industrial sector" and "a dramatic reduction in three things: pollution, materials consumption, and energy consumption"). It is quite possible, however, that the law of sustainable development will eventually catch up with and then subsume the law of environmental justice, as social equity is the important third leg of sustainable development policy.

53. The United Nations channels its work on sustainable development through the Commission on Sustainable Development, which is serviced by the Department of Economic and Social Affairs' Division for Sustainable Development. Their work is covered in the journal ENVIRONMENTAL POLICY AND LAW, and can be monitored through the Division's web page found at <<http://www.un.org/esa/sustdev>> (visited Mar. 17, 1998). In general, although many international law scholars are hopeful that the United Nations and other international regimes will contribute to the translation of sustainable development ideology into a practical body of law, most agree that at present "[t]he international legal system does not yet have the legal tools nor the institutional capacity to deal with the challenge." See Susan H. Bragdon, *The Evolution and Future of the Law of Sustainable Development: Lessons from the Convention on Biological Diversity*, 8 GEO. INT'L ENVTL. L. REV. 423, 426 (1996).

Indeed, even in the international law realm it would be premature to say that sustainable development has progressed past the Fifth Degree of relevance. Recently, for example, the International Court of Justice, in adjudicating the dispute between the Republic of Hungary and the Slovak Republic over the Gabčíkovo-Nagymaros dam project on the Danube River, refused to apply the concept of sustainable development with any legal force in resolving the dispute. See *Gabčíkovo-Nagymaros Project (Rep. Hungary v. Slovak Rep.)*, 1997 I.C.J. (Sept. 25) (visited Feb. 17, 1998) <<http://www.icj-cij.org>>, reprinted in 37 I.L.M. 168 (1998). The court recognized that the "need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development," but left it to the parties to negotiate that reconciliation. See 37 I.L.M. 168, 200 (1998). The majority thus declined to adopt the vision of the court's Vice President Weeramantry, that the "principle of sustainable development is . . . a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community." *Gabčíkovo-Nagymaros Project (Rep. Hungary v. Slovak Rep.)* (visited Mar. 17, 1998) <<http://www.icj-cij.org>> (separate opinion of Vice-President Weeramantry), reprinted in 37 I.L.M. 204, 207 (1998).

54. The greatest contribution the United Nations has made to the process of translating the international rhetoric into *domestic* policy is its "Agenda 21" document, which purports to outline the actions necessary at domestic levels to achieve global sustainable development. See U.N. CONF. ON ENV'T & DEV., AGENDA 21, U.N. Doc. E.92-38352, A/CONF. 151/26 (1992), reprinted in 31 I.L.M. 881 (1992). In its June 1997 Special Session, the United Nations General Assembly issued a statement outlining the central policy objectives of sustainable development with respect to specific issues of trade, water quality, energy policy, toxic chemicals, and so on. See U.N. GASS, PROGRAMME FOR THE FURTHER IMPLEMENTATION OF AGENDA 21, A/S-19/33 (1997), reprinted in 27 ENVTL. POL'Y & L. 423 (1997). For a thorough discussion of Agenda 21 and how far the process has yet to go in the United States, see Dernbach et al., *supra* note 10; Brown, *supra* note 8, at 198-202.

55. For example, following the expression of global carbon emission reduction goals in the

theless, of far greater importance and immediate impact to practicing environmental attorneys will be the mood of their business clients, the activism of environmental and social groups, and the impetus for policy making at local, state, and federal levels. As Professor John Dernbach summarizes, however, notwithstanding the PCSD's opening effort and its rapidly growing acceptance as a statement of official policy, there are five systemic factors of domestic law and policy that impede sustainable development from reaching even the degree of relevance that environmental justice has just recently reached: (1) the United States has no coherent overall commitment to sustainable development; (2) the United States has not educated the general public about the need for sustainable development or its implications; (3) the United States has achieved relatively little on the major new issues of sustainable development identified at international levels; (4) most stories of successful steps toward sustainable development in

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1992 Climate Change Convention, see United Nations Framework Convention on Climate Change of 1992, May 9, 1992, 31 I.L.M. 849 (1992) (entered into force Mar. 21, 1994), international debate focused on whether countries will use voluntary or internationally enforceable mandatory domestic constraints to meet the goals. See William C. Burns, *Global Warming—The United Nations Framework Convention on Climate Change and the Future of Small Island States*, 6 DICKINSON J. ENVTL. L. & POL'Y 147 (1997); David Hodas, *The Climate Change Convention and Evolving Legal Models of Sustainable Development*, 13 PACE ENVTL. L. REV. 75 (1995) (providing a history of the Climate Change Convention and its emergence from a series of international measures relating to sustainable development). Going into the negotiations held on that issue in December 1997 in Kyoto, Japan, authorities in the United States were divided on the position to take with respect to an international agreement that would impose mandatory domestic controls on carbon and other "greenhouse gas" emissions. See, e.g., S. Res. 98, 105th Cong. (1997) (advocating opposition to mandatory measures unless also imposed on developing nations); see generally John Lanchberry, *What to Expect from Kyoto*, ENV'T, Nov. 1997, at 5; Jonathan Martel & Elizabeth Stringer, *Kyoto Summit Reflects Government Commitment to Advancing Framework for Climate Protection*, 28 ENV'T REP. (BNA) 1185 (Oct. 10, 1997); *Kyoto and the U.S. Economy*, ENVTL. F., Nov.—Dec. 1997, at 40. The negotiations concluded with an agreement to require developed nations to reduce total emissions to prescribed levels, but with opportunities for "carbon sink" credits and emissions trading with developing nations that will effectively reduce the actual required reductions. See Joseph Romm et al., *A Road Map for U.S. Carbon Reductions*, 279 SCIENCE 669 (1998). Debate is now even more rancorous as to whether the United States should ratify the agreement. See Bud Ward, *Kyoto: The Mother of E-Law Battles*, ENVTL. F., Jan.—Feb. 1998, at 4. Clearly, if the United States ratifies the agreement, it will require immediate implementation of some form of "hard law" at the domestic level, thus propelling sustainable development further along my degrees of relevance model. See WHITE PAPER, *supra* note 25, at 53 ("imposition of legally-binding emission limitations, even if relatively modest, will have profound implications for a broad range of legal practices"). The entire Kyoto agreement is available with cross-references and links to related materials at Pace Energy Project, Global Warming Central, Kyoto Protocol to the United Nations Framework Convention on Climate Change. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/CP/197/L.7/Add.1 (1997) reprinted in 37 I.L.M. 22 (1998). See also Pace Energy Project (visited Mar. 17, 1998) <<http://www.law.pace.edu/env/energy/kyoto.html>> .

the United States are based on application of existing laws rather than on implementation of new environmental law initiatives; and (5) the United States has made progress on some social and economic issues that are part of the sustainable development agenda, but not on many others.<sup>56</sup> Although progress is being made on each of these factors, it is far too early to predict the outcome in terms of the finished product of most relevance to real-world environmental attorneys—that is, the hard law to apply.

### III. CONCLUSION—WHY TO FOCUS REAL-WORLD ATTENTION ON SUSTAINABLE DEVELOPMENT *NOW*

Sustainable development, as it moves from Fifth Degree to Sixth Degree relevance, is entering what might be called a phase of extreme *nonlinearity*.<sup>57</sup> The policy goal is in place, is broadly supported, but is not focused; no significant development project has felt any “bite” from sustainable development policy; no meaningful body of law to apply exists; and any number of legal frameworks could arguably fit the loosely-stated policy goal. Thus, we must choose between alternate policy paths, none of which appears indisputably superior at this time and all of which involve high levels of uncertainty. In this setting, relatively minor events and decisions of today could have enormous consequences for tomorrow. No decision can be seen as simply incremental, or as part of a linear progression toward predictable ends. Rather, every decision is potentially critically important to the formation of the entire agenda. In other words, decisions made now at local, state, and federal levels are perhaps the most important decisions that will *ever* be made about sustainable development.

This reality suggests that now is the time for real-world environmental attorneys to focus their attention on the emerging law of sustainable development. The law of sustainable development we

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56. Dernbach et al., *supra* note 10, at 10507-19.

57. I use the term nonlinearity to capture the sense that the law of sustainable development is unpredictable, not capable of being extrapolated from current trends, and subject to potentially large alterations in the direction of its evolution as a result of seemingly small events. For a discussion of the property of nonlinearity and how legal systems often experience nonlinearity in this sense, see J. B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996). For an excellent historical discussion of how one lawyer's work, in this case the publication of a practice tips treatise, can have such a nonlinear influence on legal evolution, see Jeff L. Lewin, *The Genesis and Evolution of Legal Uncertainty About "Reasonable Medical Certainty,"* \_\_ MD. L. REV. \_\_ (forthcoming 1998).

will be applying twenty years from now is being determined today by what may seem to be relatively small and innocuous decisions and events. Although that may appear daunting—how can anyone monitor and respond to all the small events?—in fact, the nonlinearity factor means that relatively small expenditures of effort at this stage can produce meaningful results. Practicing attorneys working together or on their own at this critical juncture of nonlinearity thus can measurably shape the output of sustainable development law. It will be hard for them to change sustainable development law in twenty years; it will be easier for them to influence what it will look like then by doing something today. In twenty years real-world environmental attorneys will simply be practicing sustainable development law; today they have a chance to make it.