The 2014 Revisions of China’s Environmental Protection Law

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After several years of wrangling and four formal readings, the Standing Committee of the National People’s Congress finally adopted the Revision of China’s 1989 Environmental Protection Law (EPL) on 24 April 2014 (“2014 EPL” or “2014 Revisions”).

Through the introduction of modern regulatory principles and approaches appropriate for contemporary governance challenges, the legislation resets the baseline and framework for the country’s environmental efforts. Even though it is not slated to become effective until 1 January 2015, it has already been hailed as a radical transformation of China’s environmental legal system that will strengthen pollution control requirements. As others have recognised, however, the ultimate effectiveness of the new law will depend on its implementation and enforcement, something that is not assured in view of ongoing challenges faced by China’s environmental governance system.

Even though the country has embarked on a torrid pace of environmental law reform, its institutional infrastructure and capacity to implement laws lag far behind. China has approximately 3'000 environmental protection bureaus (EPBs) with about 180'000 staff at the provincial and local level. However, the central government’s Ministry of Environmental Protection (MEP) has less than 400 employees to oversee and address local protectionism and corruption issues. The number of lawyers with environmental law training, within the private bar and the government, is small. And environmental NGOs still play a limited, though growing role. The result has been laws with high aspirations, but inconsistent implementation and enforcement, as well as a significant gap between legal theory and practical reality. These governance capacity limitations, including the need for serious ongoing political commitment to the law’s mandates and the availability of new resources for implementation, will constrain the ideal of full implementation.

Despite these constraints, the new legislation is likely to work constructively with an array of
factors that are positively advancing China’s current environmental efforts, especially civil society organisations engaged in environmental issues. These changes will open new opportunities for progress in China’s environmental governance system. Below, I discuss some of the most significant and interesting aspects of the new legislation.

I. Background observations

The 2014 Revisions come almost 25 years after enactment of the original 1989 Environmental Protection Law. Adopted first on a trial basis in 1979 as China’s first modern environmental legislation, the 1979/1989 Environmental Protection Law (“1979/89 EPL”) set out key principles for the nation’s pollution control system that were later implemented through a number of media-specific laws. Many of these key principles have been retained in the 2014 EPL, such as the three “synchronicities” (requiring the design, construction, and operation of pollution control equipment concurrent with analogous processes for the rest of an industrial construction project), the application of pollution fees, and requirements for environmental impact assessment. As a whole, however, the 2014 Revisions provide an important set of updates to the country’s foundational legislation for the environment.

Compared to the original 47 articles in six chapters, the 2014 EPL has significantly grown in size, now consisting of 70 articles in seven chapters. Apart from a general principles section (Chapter 1), the 1979/89 EPL consisted of five substantive chapters that addressed “Supervision and Management” (Chapter 2), “Protection and Improvement” (Chapter 3), “Prevention and Control of Environmental Pollution and Other Public Hazards” (Chapter 4), and “Legal Liability” (Chapter 5). The 2014 EPL retains these chapter headings, but has significantly rewritten many of the articles, added new ones, and created a wholly new chapter on “Information Disclosure and Public Participation.”

At the macroscopic level, the 2014 Revisions exhibit at least three important features. First, and the most obvious, is the insertion of a new chapter 5, addressing a completely new subject matter, the role of civil society in environmental protection. Like other changes within the legislation, this new chapter codifies a number of ongoing practices and programmes as well as authorising new ones. Other chapter headings have been retained.

A second distinguishing feature is the level of regulatory specificity, a stark contrast to the generic statements of policy and principles of its 1979/89 predecessor. As is discussed in greater detail below, a number of the new articles and changes appear to be direct legislative responses to undesirable local government level practices and policies. At the same time, the revised EPL appears to recognise and provide a formal legal basis for developments that have been brewing for some years, including policies that have been urgently called for by those within as well as outside of the government.

The third important feature is the pervasiveness of governance as an underlying theme of the 2014 Revisions. It is especially visible in the new and amended accountability provisions as well as chapter 5’s civil society engagement and transparency articles. Chapter 5 strengthens the governance system by granting civil society an enhanced role. The effect is to shift some implementation responsibility to a set of actors that has significant pent-up energy and desire to change China’s environmental conditions for the better. Despite the fact that the 2014 EPL was undoubtedly the product of policy compromises, provisions such as those in chapter 5 also evidence an enhanced legislative commitment to a more robust system of governance. A declaration of victory would be premature. However, in the context of China’s many ongoing challenges, these developments give reason for optimism for the future.

II. Environmental information disclosure
Among the most significant changes to the EPL are the environmental information disclosure (EID) provisions, mostly in the new chapter 5. These articles guarantee rights to environmental information to the public (art. 53), require environmental departments to disclose environmental data, regulatory information and regulatory compliance records (art. 54), and mandate industry disclosure of pollution emissions (art. 55). The process of preparing environmental impact reports must engage the public, and the report must be published (art. 56). Violation of disclosure requirements is punishable by fine and subject itself to public disclosure (art. 62).

The 2014 EPL’s explicit legislative commitments to transparency and public participation are founded on the rationale that, as articulated by MEP Vice Minister Pan Yue in a 2010 speech, informed public participation in environmental decision-making processes can “effectively prevent [the] ‘will of . . . officialdom’ and abuse of power[,] . . . give full play to the role of media and society [in] supervis[ing] . . . law enforcement conduct[,] and []force the violators to make corrections in time.” MEP’s promotion of environmental transparency is long-standing and dates back to at least the 2008 Environmental Information Disclosure Directive, the Measures on Open Environmental Information (for Trial Implementation), which implemented the State Council’s Regulations of the P.R.C. on Open Government Information. Since then, the availability of environmental information to the public has increased significantly. As with other environmental regulatory programmes, however, implementation has been inconsistent. Practical and ready access to such information remains a bottleneck. As a result, environmental NGOs, especially the Institute of Public and Environmental Affairs (IPE) led by environmental activist, former journalist, and 2012 Goldman Environmental Prize recipient Ma Jun, have sought to fill that gap by collecting available pollution data and making it available on-line.

With the disclosure provisions of the 2014 EPL coinciding generally in scope with the 2008 Directive, MEP now has formal legislative backing for its transparency requirements, separate from State Council authorisation. The clarity of the provisions will provide a firm legal footing for disclosure mandates, making official recalcitrance to information requests by NGOs less likely and encouraging more consistent implementation. It is not immediately clear, however, whether the new EPL disclosure provisions will lead to a significant broadening of available environmental information, beyond what is already accessible under the 2008 MEP Directive. It is possible that entities such as IPE will be able to leverage this legal authority to make their work more effective. It is less clear whether the new EPL provisions will lead to the creation of an official government pollutant release and transfer register, akin to the Toxic Release Inventory in the US.

III. Public interest litigation

A second significant advance in the 2014 EPL is its legislative support of the emerging role of environmental public interest litigation. Under the new article 58, social organisations that are registered at the municipal government level and have engaged in environmental activities for at least five years are provided standing to bring cases regarding “environmental pollution, ecological damage, and public interest harm.” The provision is the outcome of a significant political battle over the desirability of public interest litigation of the type seen in US citizen suits. Unlike environmental tort claims, already authorised by the law and used by NGOs such as the Center for Legal Assistance to Pollution Victims (CLAPV) to help individuals recover for personal injuries or property damage, article 58 authorises suits on behalf of the public.

As the strongest governmental endorsement yet, the provision eliminates ambiguity about the legal basis of environmental public interest cases. It will be less likely that courts will refuse to accept such cases, a common problem in the past. And since the article is the substantive counterpart to a provision in the 2012 Civil Procedure Law that provides general authority for public interest litigation, the stage appears to be set for the filing of more such cases. In fact, the Supreme People’s Court established an environmental division earlier this summer and recently
released draft regulations on environmental public interest litigation in, seeking public comments by the end of October 2014. The handful of environmental NGOs that have active litigation programmes, such as the All China Environment Federation and CLAPV, are likely to rely on this new authority in their cases. Potential objects of litigation may be some of the most serious polluters or other entities of opportunity, located in jurisdictions with sympathetic courts and government leaders.

Even in this area, it is not clear how much and how quickly things will change, at least in the short-term. Environmental public interest litigation has already been the subject of experiments in the new environmental courts, though success has been quite limited. Litigants are faced with a number of bottlenecks for effectively utilising this provision. There is limited availability of trained environmental lawyers to bring such cases. The courts have little capacity to properly adjudicate them, in part because of pressing needs for judicial training on issues such as natural resource damages assessment and other technical environmental litigation issues. And the continuing protectionist influence of local government officials over the local courts remains significant. Availability of funding and other resources to support such litigation, in light of article 58’s explicit prohibition against economic gain for the plaintiff, will present challenges as well.

Even in countries with active environmental public interest litigation, however, the primary and ultimate steward of environmental enforcement activities remains the government. Thus, public interest litigation is unlikely to solve China’s environmental enforcement deficit in the absence of significantly enhanced law enforcement activity by EPBs and other government departments such as the procuratorate. Over time, environmental public interest litigation could bring greater awareness to pollution issues and to the power of the law in redressing it. Positive reactions to such litigation could also include a growth in interest, capacity, and expertise in the private defence bar, judiciary and government departments in environmental law, enhanced awareness and appreciation by polluters of their compliance obligations, and higher levels of engagement by civil society in policing environmental compliance. The creation of a virtuous cycle of enforcement, awareness, and compliance, and the emergence of a culture of environmental compliance could be the most valuable outcome of more environmental public interest litigation.

IV. Daily penalties

Article 59, regarding daily penalties, introduces a significant new principle to environmental regulation in China. It addresses the persistent problem of environmental penalties that are too low to create an effective deterrent to non-compliance. Similar to provisions in US environmental law, article 59 allows penalties to cumulate each day after a polluter has received a compliance order. The rate is based on the base penalty provision in the specific media pollution law. Daily penalty cumulation, however, is not triggered until post correction order, in contrast to the American approach, which allows for cumulation of penalties from the start of a violation. Nevertheless, the result significantly reduces the incentive to delay compliance after a violation has been found and leads to potentially much higher fines that can more effectively recapture the economic gain of non-compliance.

The concept of the daily penalty provision had been the subject of discussion within MEP for a number of years. While it was not included in the 2008 Water Pollution Prevention Law, authorization of daily penalties here suggests support by the central government of tougher environmental enforcement efforts by MEP and local EPBs. Similar to other enforcement provisions, however, article 59’s practical effect in enhancing deterrent fines will depend on how local EPBs and MEP specifically apply and enforce the provision, which historically, has been a struggle.

V. Other notable provisions
Apart from the preceding three sets of issues, the 2014 EPL contains other notable provisions. For example, article 12 designates June 5th as China’s official Environment Day. Article 52 encourages participation in environmental pollution liability insurance. The idea of pollution liability insurance has been discussed within MEP for a number of years, and it makes its legislative debut here. Its novelty and lack of precedent, as well as questions of availability in the marketplace and business interest in such insurance coverage, suggest that this provision will primarily serve as a starting point for policy discussions about the role of pollution liability insurance in the governance system.

Article 64 confirms that pollution and ecological destruction can give rise to liability under China’s Tort Liability Law. Of course, such cases have been brought for some years already, and tort litigation has become the de facto vehicle for NGOs to address environmental concerns through the courts. Article 64 does not alter or expand liability, though it does formally acknowledge tort litigation as an integral part of the environmental governance system.

Article 57 acknowledges the environmental complaint mechanism developed by local EPBs over the past two decades. The complaint mechanism’s origins can be found in China’s petitioning system, also referred to as “letters and visits,” which MEP adapted through its 1990 Measures Concerning the Management of Environmental Protection Complaints to environmental issues. Since then, the mechanism has become an integral part of compliance monitoring and a tool for citizens to register their environmental concerns with officials. The complaint mechanism’s operation has been relatively uncontroversial, though researchers have raised questions about its effectiveness in contributing to environmental improvement. The new EPL provisions provide specific legislative authority for the complaint mechanism, but they are unlikely to prompt changes in the current state of affairs.

Two further articles address accountability issues. Article 68 is designed to enhance accountability of local government officials for ensuring effective and uncorrupted environmental enforcement. It articulates a set of specific administrative punishments for offenses, such as illegally granting permits, failing to take enforcement actions, or complying with information disclosure requirements. Article 45 of the 1979/89 EPL already authorised administrative penalties for abuse of power, neglect of duty, or corruption. However, the 2014 EPL’s specific articulation of prohibited behaviour and penalties appears to be a legislative endorsement of enhanced accountability.

In the same vein, article 63 sets out administrative detention penalties for polluters that fail to comply with orders to cease construction activities, pollution discharges, or illegal uses of pesticides, as well as for purposeful evasion of pollution prevention or control requirements. A violation can now result in up to 15 days of detention. These detention measures are generally consistent with other powers of the public security authorities, though the involvement by public security officials in environmental enforcement processes is relatively new. Under the right circumstances, these violations can also trigger criminal penalties. Unfortunately, criminal prosecutions for environmental violations have rarely been initiated, except in the most egregious instances.

Article 63’s focus on such “lesser,” non-criminal violations appears to create a new penal tool that can be used to target persistent problematic behaviours undermining the integrity and credibility of environmental monitoring and enforcement processes. The new tools increase the likelihood that this category of “lesser” environmental violations will actually meet with a punitive response rather than go unpunished. Since the approach is relatively novel, it is difficult to predict how the provision will be implemented.

A final notable set of provisions concerns environmental impact assessment (EIA). Articles 61
and 65 articulate specific legislative authorisation for EIA enforcement remedies directed at the failure to submit proper EIA documentation prior to commencing project construction as well as the submission of fraudulent EIA documentation. These explicit remedies will eliminate legal ambiguity about the arsenal of options available when project promoters are recalcitrant in complying with EIA obligations. However, it is less clear whether these provisions also repudiate the final outcome of the so-called 2005 Environmental Assessment Storm. There, environmental officials ordered a halt to construction activities at a number of large construction projects due to EIA non-compliance. However, those orders were ultimately reversed by the State Council. A third provision, article 14, extends EIA obligations beyond specific projects to the development of economic and technical policies. While likely of little immediate consequence, the provision follows an international trend, exemplified in the European Union’s Strategic Environmental Assessment Directive, to apply EIA to programmatic activities and not just specific projects.

VI. Outstanding issues and prospects

The 2014 EPL Revisions were part of a multi-year environmental law reform programme that saw passage of the Water Pollution Control Law Revisions in 2008, but is still awaiting successful conclusion of the amendments to China’s Air Pollution Control Law and further subjects for legislation such as climate change and soil pollution. In the face of daunting pollution and resource management challenges, the enactment of the Revisions comes at critical juncture in time and represents the accomplishment of an important environmental legislative reform priority.

Legislative success, however, does not by itself provide a direct answer to more pressing questions. How will the EPL Revisions affect the implementation and enforcement of environmental law? How will it enhance the effectiveness of China’s environmental governance system and improve environmental quality?

The answers will depend on forces independent of the legislation. Will sufficient resources be devoted to the implementation of this and other environmental laws? Will the political culture become more supportive of the rule of law and make enforcement and compliance a higher priority? Will institutional attitudes and commitment, especially within ministries and departments other than MEP, become more sympathetic toward the importance of environmental protection as a national objective and local value? The specificity of the new legislative provisions bodes well in this regard. It suggests that on a number of specific policy debates, after a significant internal deliberative process, the central government came down in favor of enhanced environmental protection and more robust governance structures.

But there is also a less positive reality. Since the restructuring of government departments and elevation of the then-State Environmental Protection Administration to the current-Ministry of Environmental Protection in 2008, financial and staff resources, as well as powers provided to the MEP, have increased only incrementally. The transformation of the environmental governance system that was expected then has yet to materialise. Insufficient resources and structural challenges will continue to be a drag on China’s progress toward a more effective environmental governance system and improved environmental quality.

Nevertheless, the provisions of the EPL Revisions related to governance are cause for optimism in two respects. First, the Revisions create or affirm a set of tools that have the potential to enhance accountability of polluters and environmental officials. Even if the ideal of full implementation is constrained by limited political follow-up and inadequate resources, these tools will be available for use by a growing set of progressive-minded and environmentally conscious jurisdictions, officials and judges.

The other cause for optimism can be found outside of government, where civic engagement and activity are increasing. The new chapter 5 confirms and enhances the role of civil society entities,
which have become increasingly sophisticated over the years. They can be expected to fully avail themselves of the new authorities. Possibly most intriguing, the EPL Revisions’ legislative acknowledgment and creation of a formal role for civil society for the first time in the history of China’s modern environmental governance system has set the stage for a potential structural transformation of the governance system and the possibility of long-term positive change.

References


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