

## **A SURVEY OF ENVIRONMENTAL LAW AND ENFORCEMENT AUTHORITIES IN CHINA**

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### **SUMMARY**

This paper provides a basic picture of enforcement of environmental law in China, a key issue in the 1990s. Part I briefly surveys the historical development of environmental protection and current environmental problems. Part II reveals the driving forces to ensure enforcement: a legal framework and implementation measures. Part III analyzes enforcement tools and response to violations. Part IV discusses the factors that affect enforcement and examines the roles and responsibilities of different groups of people. The author argues that the most enlightened environmental goals would not be achieved without effective enforcement.

### **1 INTRODUCTION**

As a developing country, China is taking steps to develop economic prosperity and improve standards of living, which increases the tremendous challenge to manage its environmental problems. Rapid economic development in the past twenty years exploited natural resources and speeded energy consumption at the expense of the environment. The government leaders, realizing that development should be handled so that environmental protection and economic progress simultaneously accelerate and limit each other,<sup>1</sup> accepted the term of "sustainable development", which within the context of China's Agenda 21, means rapid economic development aimed at improving the quality of life for its people in a manner which maximizes the efficiency of resources and minimizes environmental degradation.<sup>2</sup>

Hard work in the 1980s to establish a legal and management framework promoted the nation's capacity to protect the environment. Progress has been made in ecological environmental agriculture and forests, water and soil conservation, and industrial pollution control.<sup>3</sup> However, despite these accomplishments, China's efforts are weakened by inadequate enforcement and compliance with regulations. Enforcement issues were not emphasized until 1990.<sup>4</sup>

#### **1.1. Trends in environmental problems**

Reforms and open policy accelerated the nation's economic growth.<sup>5</sup> A calculation based on constant price showed that from 1978 to 1996, the average annual growth rate in gross national product (GNP) was 10%.<sup>6</sup> Spectacular economic success produced severe environmental problems. A study revealed that environmental degradation caused economic loss almost equal to one-fifth of the total national income.<sup>7</sup> Generally speaking, the trends in environmental problems are that certain parts have been controlled, however, the nation's environmental status is degrading and the prospect is one of crisis.<sup>8</sup>

Coal is the chief source of energy, which provides 73% of the total commercial energy consumption.<sup>9</sup> In 1994, SO<sub>2</sub> emissions were 18 million tons and expected to rise to 23 million tons a year by 2000.<sup>10</sup> China is now the third largest contributor to global climate change, after the United States and Russia.<sup>11</sup> In the absence of major breakthroughs in combustion technology

and conversion of coal, air pollution can be expected to deteriorate with advances in urbanization, industrialization and growing household energy consumption. As coal continues to be a primary source of energy, air pollution from coal combustion will be a persistent problem.<sup>12</sup>

Expanding industrial production discharges a large amount of wastes into the environment, resulting in a sharp contradiction between pollution control and industrialization.<sup>13</sup> More than 40 of the country's large cities lack adequate water supplies.<sup>14</sup> Accelerated industrialization focuses on developing energy supplies, transportation and communications as well as infrastructure and basic industries like iron and steel which are heavily polluting industries. The control of industrial pollution poses a formidable task, while the inadequacy of mechanisms defy early fundamental solution. The major source of water pollution is industrial waste containing toxic chemicals and heavy metals. In 1994, discharges of waste water reached 36.53 billion tons, which includes 21.55 billion tons of industrial waste and 80% were discharged into rivers, lakes and the sea without any treatment.<sup>15</sup> Industrial solid wastes will soon reach 250 million tons a year.<sup>16</sup> The booming township and village enterprises were started at a very low technological level and have no incentive to control pollution. Inadequate pollution control threatens the ecological and agricultural system of the vast rural areas.<sup>17</sup>

Urbanization has become the common trend of development of all countries of the world, irrespective of historical background and social system. With the advances of China's economy, urban construction which includes infrastructures and public facilities such as housing, transportation, communications, water supply, drainage, heating and gas supply, cause strains to the environment.<sup>18</sup> Currently, only 20% of the sewage has been treated in cities.<sup>19</sup>

Overpopulation poses burdens to the ecological environment. Soil erosion, expansion of desertification and salinization, soil loss and the decrease of its organic substances have posed grave difficulties for China's agricultural development.<sup>20</sup>

## 1.2 Development of environmental management

The cornerstone of environmental protection in China is the promulgation of the Environmental Protection Law for trial implementation in 1979 by the Standing Committee of the National People's Congress. Before that, there were only several pieces of policies or guidelines concerning water conservation, soil erosion control and "three industrial wastes (liquid, gaseous and solid)" recycling.<sup>21</sup> The First National Conference on Environmental Protection showed the government's awareness and placed environmental protection on its agenda, however, environmental management institutions were few or suffered from a lack of staff.<sup>22</sup> The two fundamental elements of the 1979 law were the requirements to establish the environmental protection institution nation-wide and to set forth the basic framework and principles for environmental laws.<sup>23</sup> The 1982 People's Republic of China Constitution amendment confirmed the nation's goal to protect people's living environment and natural resources. Since then, a series of laws on environmental protection and natural resource conservation have been enacted.<sup>24</sup> In 1989, the general Environmental Protection Law was enacted which marked that the environmental protection legal regime would finally be established by the early 1990's.

As economic and social development changed rapidly, it called for a response in China's statutes. Several years of implementation revealed the fact that non-enforcement harmed the requirements of environmental legislation. After the first round of legal drafting in the 1980s, rule makers began to evaluate the effectiveness of regulations. The other motivation for China to improve its environmental legal framework and strengthen domestic enforcement is its responsibility under the international environmental conventions and treaties which it joined.<sup>25</sup>

The Environment and Resources Protection Committee newly established by National People's Congress announced in March 1994 its actions to draft and revise environmental laws over the next few years, which it intends to be substantially stricter and compatible with enforcement.<sup>26</sup>

In 1993, the State Council issued a circular on enhancing the enforcement of environmental law which also calls for the new administrative legislation activities to promote enforcement. The nation-wide enforcement inspection campaign was initiated which has lasted for four years so far.<sup>27</sup> The National Environmental Protection Agency) is drafting the directive to strengthen environmental enforcement on behalf of the States Council.<sup>28</sup>

## **2 BASIC DRIVING FORCES BEHIND ENVIRONMENTAL ENFORCEMENT: LAW AND IMPLEMENTATION MEASURES**

### **2.1 Environmental legal regime**

China's legal system of environmental law is a complete and independent system composed of numerous interrelated environmental laws, regulations and rules.<sup>29</sup> The foundation for the framework of environmental protection law in China is the Constitution,<sup>30</sup> which provides the duty of the State to protect and improve the living environment.

Article 26. The state protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public hazards. The state organizes and encourages afforestation and the protection of forests.

Article 9. The state ensures the rational use of natural resources.... Appropriation or damaging of natural resources by any organization or individual by whatever means is prohibited.

The 1989 Environmental Protection Law is the general guidance and basic regulatory structure of environmental law. It provides fundamental principles, rules, basic requirements and legal responsibilities for nature conservation and pollution control. It requires that environmental concerns be incorporated through environmental planning into its national economic and social development planning.<sup>31</sup> An environmental management system has been established, under which the State Council's National Environmental Protection Agency has been delegated the authority to manage environmental protection at the national level, while local government's Environmental Protection Bureaus have responsibility for the environmental management and enforcement under their jurisdiction. The system also assigns the responsibilities to other State Council's agencies to coordinate environmental management.<sup>32</sup>

There are also some specific environmental laws concerning the conservation of natural resources and areas of pollution control which were enacted by the Standing Committee of the People's Congress, such as Marine Protection Law, Forestry Law, Mineral Resource Law, Water Pollution Control Law and Air Pollution Control Law, etc.

The environmental administrative regulations dealing with the management, supervision, and procedures to facilitate the enforcement of environmental laws and policies are issued by the State Council and its agencies. For instance, the State Council issued the Rule on Levying Pollution Emission Fees to enforce article 28 of the Environmental Protection Law. The law is authorized to issue implementation guidelines for its programs independently or in partnership with other agencies. One example is that it was delegated by the Water Pollution Control Law to promulgate the Implementing Regulation on Water pollution Control Law which was approved by the State Council.

When the environmental requirements are ambiguous or conflict with each other or in the absence of clear statutory language, interpretation will solve the questions at hand to facilitate enforcement. Interpretative bodies have their authorities based on who issues the regulation or came from the delegation of the law. The Legal Committee under the Standing Committee of the National People's Congress tells what Congress' intent of the law is, and the State Council answers questions about the regulations it enacted. Normally, when passing a new regulation, the State Council delegates the authority of interpretation to an agency. The National Environmental Protection Agency exercises its duty by direct delegation from laws or interpretation of regulations and rules it passes. For instance, article 45 of the Regulation on Noise Control which was passed by the State Council authorizes the agency to interpret it. To questions arising from local environmental bureaus concerning the intent of legal issues, the agency will issue interpretations directly to the bureaus, published it in its own publication or Chinese Environmental News and disseminated to environmental bureaus at the provincial level who will then distribute it to all local environmental bureaus in that province.

As a compliment to national laws and regulations, local regulations play an important role in regional environmental protection.<sup>33</sup> Local regulations deal with environmental problems which are not regulated by national laws. Some local programs may provide legal experience and precedents for national programs after several years of practice. When lawmakers at the national level try to impose a new policy for which it either lacks experience or is controversial, they will select several provinces or cities to field trial it in local regulations and gain legal experience, then impose it into national law. One example was the issuing of permits for preventing water pollution. In 1987, eighteen provinces and cities were selected to issue water effluent permits, after several years of field tests, the Implementing Regulation on Water Pollution Control Law in article 9 provided permit requirements to facilities when they discharge pollutants into a body of water. Traditionally, control of water pollutants is based on their density or concentration. Several provinces like Shanxi and Jiansu tried to control total amounts of released pollutants in their local regulations. The amended water pollution prevention law which was passed on May 15, 1996 recognizes this program in article 16.

However, shortcomings exist in the legal regime itself which pose a barrier in the law if it is to be enforced effectively. The government primarily relied on technical or political staff, instead of legal counsel to assist in handling environmental matters. Certain issues lack specific regulations to apply. This can be seen in the management of toxic and harmful chemicals, desertification and land use. Some issues only have policies rather than regulations to enforce, such as the management of ozone depletion which relies on a national plan.<sup>34</sup> For existing regulations, some provisions reflect central planning and are not flexible to take account of social realities. For instance, the Environmental Impact Assessment is subject to be pre-reviewed by a firm's superior department. But the reality is that firms turn independent and don't have superior departments under the current situation. This pre-review requirement doesn't apply to private-owned enterprises which are several millions in quantity and lead to severe environmental pollution.<sup>35</sup> When enforcing the regulations, the enforcement officials always find that the provisions are not specific enough to be enforced or lack necessary procedures.

## 2.2 Environmental standards

Environmental standards are the most important part of the environmental legal regime. They are the basis for pollution control. The National Environmental Protection Agency is in charge of issuing the national environmental quality standards, while local governments at the provincial level establish their local environmental quality standards for items which are not included in the national standards.<sup>36</sup> In accordance with the national quality standards as well as

economic and technological reality, the agency enacts the national emission standards. For issues which are not covered by national emission standards, local governments at the provincial level are responsible, or they can set emission standards more stringent than the national's.<sup>37</sup>

## 2.3 Measures to enforce the regulations

### 2.3.1 Environmental Impact Assessment

Every capital construction project, technological renovation project and regional development project which might affect the environment is required to complete an Environmental Impact Assessment (EIA) statement or fill in the forms of environmental impact report before construction.<sup>38</sup> The assessment includes: (1) general information of the project such as nature of the project, technical process and situation of pollutants, etc. (2) environmental status around the project. (3) analysis and prediction of short-term and long-term impacts of the projects. (4) proposals concerning monitoring. (5) cost and benefit analysis. (6) evaluation of the pollution the project is likely to emit, its impact on the environment, and the measures to prevent and control it.<sup>39</sup> The facility can't commence the project until the assessment has been reviewed and approved by the environmental agency.<sup>40</sup>

The Environmental Impact Assessment is an effective mechanism to prevent pollution in China, especially for preventing new sources of pollution. However, only 60.8% of projects evaluate their environmental impact.<sup>41</sup> The assessment requirements do not ask that the papers assess the alternatives to the proposed project. It also only focuses on the separate project and lacks the requirement for regional or area-wide impact evaluation. Some time it falls to just paperwork due to improper government intervention and inadequate public participation.<sup>42</sup>

### 2.3.2 Three simultaneities

"Three simultaneities" is designed to ensure control of new facilities which means installations for the prevention and control of pollution at a construction project which must be designed, built and operated together with principle parts of the project simultaneously so as to prevent new sources of pollution.<sup>43</sup> The design of the pollution control instrument is imposed in the Environmental Impact Assessment requirement and subject to the review by the local environmental bureau. Only after approval by the bureau, should the project put into operation. Prior approval is required for necessary dismantle and idle.<sup>44</sup>

### 2.3.3 Monitoring

Monitoring includes self-monitoring by firms and inspection monitoring by environmental bureaus. The National Environmental Protection Agency is authorized to issue guidelines and establish monitoring network in cooperation with other agencies<sup>45</sup>. The national network has four levels: national, provincial, city and county. Several regional networks, such as the offshore monitoring network and the Huaihe River Valley monitoring network, have also been established.<sup>46</sup> Most of the large and medium enterprises have their own monitoring equipment.

### 2.3.4 Permit

Emission permit systems have been widely applied in the international community to control pollution. China began its pollution permit field test in the mid-1980s but is still in its infant stage. The Environmental Protection Law, Water Pollution Law and Air Pollution Law do not have provisions on this matter. The only legal requirement is the Implementing Regulation on Water Pollution Law which was approved by the State Council and issued by the agency in 1989. Due to lack of legal position and support, permits can only be required at certain severely

polluted areas and facilities. In 1994, 13,747 permits were issued in 240 cities. The current permit system in China is still a single permit mainly in air and water. Further research has been done to extend the water pollution permit system to the entire nation.<sup>47</sup> In revising Water Pollution Law, law-makers intended to impose a permit system into the statute which unfortunately was not adopted by the Standing Committee of the National People's Congress. Losing this chance to obtain legal support will halt the development of a permit system.

Combined with the emission permit system, broadly applied is the pollution emission report and registration system. It requires facilities to report to the local environmental bureau on their pollutant's categories, quantities and concentrations directly or indirectly discharged into the environment, as well as technical information on treatment. The local environmental bureau registers the situation and keeps the file. Facilities should report to the environmental bureau any change about the pollution discharge.<sup>48</sup> This system provides the environmental agency with the newest data on each facility.

### 2.3.5 Inspection

Environmental law delegates to the environmental protection bureaus at various levels the duty to inspect facilities on site and the facilities are required to provide required information and cooperated with the inspection.<sup>49</sup> Several provinces, such as Henan, Hubei, as well as Beijing, Tianjing have established inspector institutes specifically in charge of the inspection function which is separate from the environmental protection agencies. Each inspector has to show his or her ID which is issued by the environmental bureau at the province level.<sup>50</sup>

Apart from the rest of the world, China uses collective action through a campaign to enhance the masses' environmental consciousness against violations. One way is the inspection campaign which is normally launched by each province. The National Environmental Inspection Campaign initiated in 1993 which has been lasting for four years promotes local government enforcement of environmental requirements and the fight against violations. A 1994 inspection campaign revealed that 3,000 violations had been discovered in 10 provinces. One example of the campaign's influence on local government is that Henan province launched its pollution control program on Huaihe River which planned to shut down 61 heavily polluted facilities in 1994, clean up 15 major polluters in 1995 and build 5 municipal sewage facilities before 2000.<sup>51</sup>

### 2.3.6 Economic incentive

According to the "Polluter Pays" principle, the Chinese government levies fees on pollutants discharged by facilities. As long as a facility discharges pollutants into a body of water, it falls under the requirement to pay fees. If the facility's pollutants exceed the national or local standards, it has to pay additional fees and should eliminate and control the pollution.<sup>52</sup> Different from water pollutants, only if the pollutants emitted by facilities exceed national or local emission standards, should facilities pay fees, which also means facilities do not have an obligation to pay a fee if they emit pollutants which fulfill the emission standards.<sup>53</sup> Eighty percent of the fees must subsidize facilities for pollution control, while 20% are used to subsidize environmental monitoring instruments and other administrative costs of environmental protection agencies.<sup>54</sup> The program coordinates the economic development and environmental protection and helps to balance the environmental, social and economic efficiencies. The environmental agencies can concentrate money to deal with major pollutant sources and comprehensive contamination. At the same time, it enhances the environmental agency's capacity.

However, several issues pose a barrier to the effectiveness of enforcement through levying fees. The fees charged for excessive emission of pollutants are lower than the cost of pollution control instruments, so facilities would rather pay the emission fees than control pollution. Emission fees also are allowed to enter the production cost which facilities can shift to the

consumers and shade their responsibilities. The program itself doesn't cover all pollutants, such as sulfur dioxide, and only the pollutant of the most excessive discharge is subject to a levying fee regardless of the fact that some facilities discharge over two kinds of pollutants through a blow-off pipe.<sup>55</sup> Also, there lacks a scientific method to fairly distribute the fee as a subsidy among facilities.<sup>56</sup>

### 3 ENFORCEMENT TOOLS

Environmental protection agencies, both national and local environmental bureaus, are delegated authorities to take action when the regulated community fails to comply with environmental laws. They also can call upon enforcement actions in associating with other agencies. The enforcement tools include administrative actions, judicial actions and criminal prosecutions.

#### 3.1 Administrative tools

Administrative tools ensure the environmental agency's ability to order regulated community to comply with laws or to take necessary measures to protect the environment. Administrative orders are broadly used to deal with environmental matters in China. Local Environmental Protection Bureaus mainly undertake the enforcement tasks in their jurisdiction.

The environmental bureau has to decide whether to bring an action within 10 days after disclosing the violation or after citizen complaints. At least two officials work on the case, examining the severity of the violation, and providing suggestions which will be subject to approval by the Review Committee of the bureau. It is required that an order state the nature of the violation, valid evidence, related regulations and the decision.<sup>57</sup> The regulated party can appeal to the environmental bureau at one level higher than it for rejudging or it may bring a law suit before a court against the environmental bureau within 15 days of receiving the order directly. It is at the violator's discretion to select either administrative appeals or judicial review. This is different from the procedure in the U.S. which requires violators to exhaust their administrative appeals before seeking judicial review.<sup>58</sup> Administrative orders are not self-enforcing, in that the environmental bureau shall apply to the courts for compulsory enforcement in the event of noncompliance.<sup>59</sup> In order to promote the role of judicial in protection of the environment, some local environmental bureaus work closely with the courts. Some have even established a courtroom to specially deal with environmental cases.<sup>60</sup>

##### 3.1.1 Warning

The environmental bureaus can issue warning letters for light violations. The purpose is to notice the party not to let its action lead to worse pollution in order to avoid penalties. It can be applied separately or adjunct to other tools.

##### 3.1.2 Fines

Environmental laws generally authorize administrative penalties for most violations. For example, a \$ 35,000 fine was imposed on the Capital Iron and Steel Corporation in Beijing in early 1993 under the air pollution control law. The penalties are assessed based on severity, per violation, which can be any amount but not exceeding the statutory limit. The fine is the most significant enforcement tool in China. The amount of fine isn't stated in laws such as water and air pollution control laws but in their implementing regulations. The newly adopted Solid Waste Pollution Control Law is the exception which states the amount in the text and imposes the highest amount.<sup>61</sup> Environmental bureaus at different levels have different limitations on fines.<sup>62</sup>

Some environmental laws have penalty provisions limiting penalties based on the person who is responsible for the violation. For example, the Regulation on Preventing Ships from Polluting the Ocean imposes penalties not to exceed 20% of one month's income of the violator.

### 3.1.3 Deadline for completion of required action—compliance deadline

If a company emits pollutants exceeding the standards and causes severe pollution, it is required under environmental laws to take actions to eliminate and control the pollution, and achieve full compliance within a certain date.<sup>63</sup> The decision for such a deadline is issued by the government where the company is located. The environmental bureau sets the requirements, inspects, and ensures its enforcement. Non-achievement within the deadline will subject the violator to penalties including additional charges for emission fees, fines, and even shut down. The environmental bureau has the authority for the first two penalties. Because the shut down has an essential influence on the economy, any shut down is decided by the government.<sup>64</sup> Since compliance deadlines for small businesses are decided by the government, it causes excessive paper work for the government. In order to deal with the most substantial issues, there is a trend to delegate the authority to environmental bureaus in some local environmental regulations. For instance, the city of Wuhan passed a rule which authorizes its local environmental bureaus to set deadlines. If the regulated party refuses to fulfill its duty, the competent agency will assign a third party to eliminate the pollution and recover the cost.<sup>65</sup>

### 3.1.4 Injunction

Typically, the environmental agency has authority to enjoin an enterprise temporarily from operation and the government orders the regulated party to shut down. The government applies its authority under two conditions. One relates to compliance deadlines, the government will shut down the facility if it can not fulfill the requirements within the deadline. The other is subjected to the polluting facilities located in a special protected area such as drinking water source or in residential areas due to wrong-design in the past. Under this circumstance, the government issues a decision that orders the facility to shut down its physical operation in this special area and relocate in another area.<sup>66</sup>

Under the "three simultaneities" requirement discussed above, if the pollution prevention equipment for the project has not been completed or fails to meet the required standards, and the principle project has put into operation, the environmental agency may order the regulated party to suspend its operation and concurrently impose a fine.<sup>67</sup> Regulations also allow the environmental agency to require the regulated party to re-install pollution prevent equipment which has been dismantled or left idle without approval.<sup>68</sup>

### 3.1.5 Permit revocation

The Implementing Regulation on Water Pollution Control Law authorizes the environmental bureau to revoke permits under certain circumstances.<sup>69</sup> When the permittee fails to comply with a permit condition, the environmental agency may first order it to achieve the requirement. Only when the permittee still severely violates the permit, will the environmental agency determine to terminate the permit.

## 3.2 Dispute settlement by environmental agency

A firm who pollutes the environment and harms other persons has to compensate for damage. When a dispute arises between the firm and other persons over liability, parties may request the environmental agency to be the mediator to settle the case.<sup>70</sup> Based on fairness and willingness, the environmental agency will provide a proposal. As long as the parties agree with

the terms of the proposal, the proposal turns to be the agreement binding the parties. If a party doesn't agree, it may file a civil action for the liability against another party before a court and the civil settlement process automatically stops if the court accepts the case. Civil settlement by the environmental agency is not the necessary process. The parties may also bring a law suit directly before the courts.

### 3.3 Judicial enforcement

The courts' function in protecting the environment in China is not as strong as it is in the U.S. For example, there are no authorities to provide environmental agencies with recourse to the courts for enforcing environmental requirements, except the compulsory implementation of the administrative decisions by the courts at the request of the environmental agency. Courts in China include the People's Supreme Court, local courts at different levels and specific courts such as maritime court and railway communication courts. The system of courts consists of several branches: civil, criminal, commercial and administrative, plus an implementation branch. Courts assert their duty to handle environmental issues in the following respects: civil litigation which is claimed by plaintiff against the polluter, judicial review of administrative actions filed by the regulated party, and criminal sanctions to fight environmental damage.

#### 3.3.1 Civil litigation

Citizens or organizations may file actions before courts against firms whom they think pollute the environment and cause damage to their property or harm their health.<sup>71</sup> The plaintiffs can be one person, one organization or a group. Courts handle the case according to the procedural requirements stated in the Civil Litigation Law. Courts can mediate the case based on the willingness of parties before final judgment. Parties may appeal to a higher level court once.

#### 3.3.2 Administrative litigation

The Administrative Procedure Law delegates to the regulated community the right to sue administrative agencies to protect their legal rights. Environmental laws restate these provisions. In 1994, 228 cases were completed by the courts and environmental agencies won 212.<sup>72</sup> The environmental agencies are liable for their illegal activities. However, not every administrative activity is subject to judicial review but certain ones which relate to (1) environmental administrative penalties; (2) decisions on turning down an application for environmental permit or license; (3) not performing authorized duties; (4) illegally requesting a regulated party to conduct an environmental act; and (4) other activities stated in regulations.<sup>73</sup> Regulations and rules issued by environmental agencies which have binding effects, and those activities which the environmental agencies have final judgment delegated by regulations are not subject to review by courts.

When courts hold that the environmental agencies don't properly perform their duties or violate the regulated parties' legal rights, they will revoke the agencies' decision and request them to reissue a new decision or act within a specified period of time.<sup>74</sup> Normally, the courts only review whether the environmental agencies properly perform rather than the legitimacy of administrative activities themselves. It is the environmental agencies' discretionary activities to make the decision. However, the courts may make their own decision on the environmental matter at hand when the courts find the administrative activities substantially lack fairness.<sup>75</sup>

### 3.3.3 Criminal sanctions against environmental degradation

In the battle against environmental degradation, one of the most effective weapons is the criminal sanction. In China, the public security authorities—police, are to investigate the cases of environmental crimes, the prosecutorial authorities are the legal supervisory body to exercise the power of prosecution on behalf of the state, and the courts exercise the power of judgment. Environmental agencies are consultant agencies to facilitate the investigation and provide information.

The legal rules on crimes against the environment can be found both in environmental laws and criminal laws. The Environmental Law states:

If a violation of this Law caused a serious environmental pollution accident, leading to the grave consequences of heavy losses of public or private property or human injuries or deaths of persons, the persons directly responsible for such an accident shall be investigated for criminal responsibility according to law.<sup>76</sup>

Water, air and solid waste laws also provide that violations of these requirements shall be imposed through criminal liabilities by referring to the related provisions 115 or 187 of the Criminal Law.<sup>77</sup> The Criminal Law has provisions prohibiting various types of environmental degradation, however, it has no special chapter or category of “crimes against the environment”, nor does it use that term. This makes it difficult for the courts to apply these provisions to judge environmental crimes. For example, the crimes of poisoning, causing severe accidents due to violation of the regulations on management of hazardous substances and neglect of duties provided in articles 115 and 187 are difficult to apply to all the activities which pollute and damage the environment. Also, current law is silent on such issues as liability of legal persons (corporate entities) which are the main part of environmental crimes, liability for activities which are potentially dangerous, and liability in the absence of either intent or negligence. In 1994, there were 3001 environmental pollution accidents, including 141 serious cases. Most of them were settled by administrative sanctions or only paid compensations rather than being imposed criminal penalties.<sup>78</sup>

The trend is to specify and clarify environmental crimes and penalties. The National Environmental Protection Agency is soliciting experts to prepare a set of amendments to the Criminal Law which will be submitted to the Standing Committee of the National People’s Congress next year. Some commentators call for setting up a precedent rule for environmental criminal penalty.<sup>79</sup>

## 4 ROLES AND RESPONSIBILITIES

### 4.1 Government

The State Council is responsible for the nation’s environmental quality, while local governments at various levels are in charge of the environmental quality of areas under their jurisdiction.<sup>80</sup> They have the obligation to take measures to improve environmental quality. However, the priority of government is economic development. The country invests a meager 0.7 percent of its gross national product in environmental protection.<sup>81</sup> Experts have admitted that at least 2 percent of the country’s gross national product would be necessary merely to prevent a worsening of water shortage and air pollution.<sup>82</sup> Less environmental budgets make the government have few resources of technical and regulatory capacities to devote to the environment. It is difficult to balance between maintaining economic and social development and managing environmental degradation. Even environmentalists also admit that economic

growth has a higher social value.<sup>83</sup> A survey-based study shows that 27 percent of those surveyed disagreed to take away funding from developmental projects to environmental friendly projects; and 71 percent were strongly against the idea if it required cutting the other governmental services, such as housing and price subsidies.<sup>84</sup> This leads to the fact that the national policy on environmental protection evolves and builds on the basis of the level of national economic and social development which means that environmental management could not hinder economic growth.<sup>85</sup> When setting environmental requirements, law-makers have to take the polluter's economic capacity into consideration, since the purpose of requirements are not to shut down the facilities.

Economic reforms caused decentralization in China.<sup>86</sup> Local governments accumulated more independent power to regulate their policy. Accordingly, some local governments tend to override the wishes of the central government in enforcing national laws and enforce them only when the laws benefit their local interest.<sup>87</sup> The political accomplishments of a governor or mayor are evaluated by the economic development during their five years of administration which causes a situation in which they always favor short-term economic advantage, even if that involves sacrificing the environment, especially when conflicts exist between environment and economic benefits. 1995 nation-wide inspections revealed that environmental protection lacks financial support. Most provinces integrate environmental protection into their social and economic plan, however, the funding for the environment is not involved. In order to attract investment in their region, local governments are willing to ease environmental criteria. City of Fuzhou revoked the noise pollution fee imposed by the State Council in its regulations. Investors always are afraid of the governmental bureaucracy which requests new projects to go through a lot of agencies to get approved. A city in GuangDong province simplified the process and cut certain agencies, including the environmental bureau. The local environmental bureau lost its authorities and some heavy polluting projects were built in the area. In order to "protect" some firms who pay a lot of taxes to its local treasury but pollute the environment, local governments intervene in the discretion authority of environmental bureaus which protect the firm from its legal obligation to control its pollutants.

#### 4.2 Cooperation between agencies

Environmental laws call for environmental protection within the authorities of the State Council's agencies. The agencies are also responsible for "the supervision and management of the prevention and control of environmental pollution"<sup>88</sup> and "the protection of natural resources".<sup>89</sup> When an issue concerning environmental matters is subject to several agencies's authorities, these agencies may work together to promulgate a regulation or rule. The Regulation on Automobile Emission Pollution Management is such a case which was enacted by the National Environmental Protection Agency, Ministry of Public Security and Ministry of Transportation etc. In order to facilitate cooperation between agencies, the Environmental Protection Committee under the State Council has been established to provide chances for all agencies involved in environmental protection to exchange information and feedback, to consult with each other, to find financing and to negotiate on some issues. Some important policies are also subject to discussion in the Committee. For example, in 1986, the Environmental Protection Committee in association with the State Planning Commission and the State Economic Commission passed the Regulation on Environmental Management of Construction which provides the procedure for the Environmental Impact Assessment and the requirement of "three simultaneities".

Since many agencies can also issue special declarations and administrative decisions to ensure compliance directives passed by higher level authorities regarding environmental protection, the possibility is that each agency may make its own decisions that deviate from

what the national policies are designed to achieve.<sup>90</sup> Accordingly, the poor cooperation between different agencies happens very often which leads to the situation that in some areas, authorities are overlapping while in some areas, no other agency likes to regulate and environmental agencies do not have authority to do it. One example is the management of automobile emissions. The public transportation agencies are delegated the authority to monitor emissions,<sup>91</sup> however, the capacities and availabilities of them are not enough for this job while the environmental agencies who have the monitoring equipment and staff do not have the authority. Some provisions require agencies such as business and industry, land and planning to cooperate with environmental agencies in which they will not agree on the project, issue a permit or license, and assign land to the project if the environmental agencies does not approve the Environmental Impact Assessment. Unfortunately, some agencies are reluctant to work together with the environmental agency.

### 4.3 Environmental agencies

Under the law, the National Environmental Protection Agency is authorized to conduct unified supervision and management of environmental protection which on the face of it looks like the agency has a lot of power in protecting the environment. However, the concept of “unified” is not clear, especially when the authorities are overlapping with other agencies, it is hard to decide how the cooperation works. Sometimes, the agency has to persuade other agencies to enforce their legal obligation to deal with environmental matters.

The enforcement approaches are that the agency plays the role of determining law and policy at the national level and substantial exercise of the implementation is done at the local level of environmental bureaus. So the key to success in environmental protection work depends on how the local environmental enforcement officials handle environmental problems and how they condition the decision situations.

The environmental bureaus at the provincial level basically issue their local legislation and policies, and also directly deal with the regulated community which are mostly large enterprises. City and county environmental bureaus enforce the environmental program under their jurisdiction. The capacity in the local level, especially in county environmental bureaus, lack financial and personal resources. In some areas, the environmental bureau is one department of another agency and does not have an independent role. Local environmental bureaus were easy to attack during the governmental institutional reforms. In later 1992 and early 1993, during the institutional reforms, some local environmental bureaus’ authorities were weakened and some of the independent bureaus were merged into other bureaus.

Many local environmental bureaus do not have enough financial resources and personnel from the government. Monitoring equipment and technology are rather backward and lack inspection vehicles and telecommunications. Forty to sixty percent of local environmental bureaus’ monitoring stations don’t have necessary capacity for their job.<sup>92</sup>

Environmental enforcement is very complex combining legal, technical and science issues. As we talked about the legal framework, Chinese environmental regulations normally provide general requirements and sometimes the language is not clear enough. When enforcing the regulations, environmental enforcement officials have to develop measures that combine law and technology, to create a process which specifies the various environmental standards and different operational methods. Their capacity is the main determinant of the effectiveness of enforcement which currently is still backward at the county level. Since environmental protection agencies are really new, most staff came from other agencies and very few persons are specialized in the environment. There is not sufficient technical expertise to monitor ongoing performance. The officials lack regulatory and administrative skills necessary to effectuate pollution control law. A survey revealed that only 56% of those reviewed mention that they had

received some kind of formal training.<sup>93</sup> The training was mostly a short term pre-working seminar which did not provide technical training, particularly for pollution control. The technical parts of the job - the sampling procedures, the use of chemicals and equipment - were supposed to be learned by working together with the more senior and experienced officers. This has been changed gradually but still very slow. The Environmental Management Institute was established in 1981 to train environmental employees at the local level. The National Environmental Protection Agency established several training centers in cooperation with universities to design courses in majors, such as environmental law, monitoring, pollution control and information analysis.<sup>94</sup>

#### 4.4 Industry

Industrial product accounts for 70% of GNP in China. "*One of the intended effects of environmental laws and regulations is to provide a level playing field for industry, so that it can contribute to a better quality of life without depleting resources or damaging the environment and jeopardizing current and future generations' health and economy.*"<sup>95</sup> Chinese environmental laws set up strict standards for industry to comply with. One of them is to request industry to establish its own environment management institution and to carry out its environmental duties.<sup>96</sup> Environmental protection institutions have been established in industrial enterprises, especially in large and medium sized state owned enterprises. Some are independent environment institutions with professional staff in charge of environmental protection work. Some were established and affiliated with safety and technical offices. Small businesses normally assign one person or relevant office to deal with environmental matters. Enterprises have to integrate the environmental protection into their routine business plan which should be consistent with environmental requirements.<sup>97</sup> Most enterprises have monitoring institutions equipped with monitoring instruments. They regularly self-monitor the pollutants and report data to the environmental agencies. To ensure the firms comply with their responsibility, environmental agencies negotiate with the firms to reach an agreement which involves detailed measures on how they may operate and measures they need to take to comply with environmental standards, and provide rational pollution control goals. Enterprises also should educate their employees to develop their capacity for voluntary compliance.

The industrial groups have more interest in development than in the environment. When law-makers issue a law or a standard, industry always argues that the law or the standard is too strict for enterprises to apply. Individual enterprises are reluctant to invest more money in installing equipment to control pollution. Some enterprises do not have environmental institutions or lack professionals in charge of environmental management. The status of township enterprises is even worse. They only focus on their benefits and ignore the environmental requirements. An iron mineral factory at a county in Sichuan province dumped its wastes in the river which led to the flood and caused serious damage to the county.<sup>98</sup>

#### 4.5 Citizens

Citizens are an important resource for detecting certain types of violations which can provide the necessary information for the environmental agency.<sup>99</sup> Chinese Environmental law admits citizens' right to protect the environment and to complain on actions which pollute or damage the environment.<sup>100</sup> Citizens may report through mail or by visiting environmental agencies' offices to notify of possible violations. In 1994, 2,112 letters had been received and 2,362 people complained and filed 1,718 environmental damage cases to environmental bureaus in Beijing. About 95% of the cases have been settled.<sup>101</sup>

Though some project's Environmental Impact Assessments were sent to citizens for their comments, there are no explicit provisions concerning public hearings in the rulemaking process until the Administrative Penalty Law which provides public hearing principles and requires citizens to be noticed on administrative actions. When making a rule, the National Environmental Protection Agency normally sends the draft to other agencies, local environmental bureaus and certain experts at universities or research institutions for comments. During this period, some citizens may be informed about the relevant environmental issues, but these are rather narrow and they lack formal channels to express their comments. It is not convenient for the public to access updated information since the information is not broadly disseminated. Newly amended water pollution prevention law imposes the requirements for public opinion to a project's impact assessment which will enhance the public participant in environment.

Public awareness about their environmental rights has been promoted during the past few years, however, well-organized citizens' groups concerned with protecting the environment are very few, so the burden for government keeping its promise to protect the environment is not strong enough. There is a need to encourage public organizations, such as labor unions, youth league, and the women's federation to participate in environmental protection.

The strategy to approach public awareness is education on environmental knowledge to promote their ability to voluntarily protect the environment, report violations and superintend the government. There now are different training courses in education. The training of government officials normally integrates environmental issues into other training courses to enhance their awareness of the environment and to support their job. Some universities have established environmental departments to train professional experts in environmental technology and management. Also primary education of juveniles is very common at various schools. In 1989, the City of Chaozhou at Gouang Dong province was awarded the "Global 500" award by UNEP.<sup>102</sup>

## 5 CONCLUSION

The framework of environmental legislation and enforcement measures have been established, however, China still lacks the will to achieve compliance with and efficient enforcement of environmental requirements, which weakens the results of requirements which are envisioned by environmental laws. This is a significant barrier for the country to achieve its goals to protect the environment and public health. A sharper emphasis on enforcement from the government will develop the nation's capacity to deal with environmental degradation burdens from rapid economic development. The new efforts to improve its environmental legal system will promote the environmental compliance and enforcement in China.

## ENDNOTES AND REFERENCES

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12. National Report, supra note 3.
13. Id.
14. Head, John W. Using Criminal Sanctions to Fight Environmental Damage in the P.R.C. East Asia Executive Reports, Sept. 15, 1995 (hereinafter Head).
15. 1994 Report, supra note 10.
16. Head, supra note 14.
17. National Report, supra note 3.
18. Id.
19. White paper, supra note 6.
20. National Report, supra note 3.
21. Xi, Wang and Blomquist, Robert F. *The Developing Environmental Law and Policy of the People's Republic of China: An Introduction and Appraisal*. Georgetown International Environmental Law Review, 39-40, 1992 (hereinafter Wang & Blomquist).
22. Zhang & Jin, pgs. 54-55, supra note 8.
23. Id, page 4.
24. Statutes addressing water and air pollution, forestry, grasslands, fisheries, mineral resource, land use, soil and wildlife conservation, and marine protection were enacted in 1980's, while water and soil conservation law, and agriculture law was promulgated in 1992 and 1993 respectively.
25. Ross, Lester. *The Next Wave of Environmental Legislation; Special Report: China's Environment*. The Chinese Business Review, Vol. 21, No. 4, July, 1994, (available In LEXIS NEXIS Library).
26. Two laws have already been amended and a new law has been adopted by NPC so far. The Law on Prevention and Control of Air Pollution Amendment was enacted on August 29, 1995, and the Law on Prevention and Control of Water was just amended on May 15th, 1996. The Law on the Prevention and Control of Solid Waste was adopted on October 30, 1995 and took effect on April 1, 1996. The Environmental Protection Law, the Marine Environmental Protection Law as well as forest, fisheries, grasslands and mineral law will be amended in the next few years. The new statutes on noise control, toxic and harmful chemicals management, natural resource conservation, desertification prevention and energy savings will be completed by 1998. The above information came from the unpublished paper presented by Hu Baoli at the National Environmental Legislation Workshop, April 9—11, 1996.

27. In 1993, the State Environmental Protection Committee (SEPC) under the State Council and the Environmental and Resources Protection Committee (ERPC) of the National People's Congress co-launched a nation-wide campaign to inspect the enforcement situation of environmental law and natural resource law.
28. Report on the National Environmental Legislation Workshop. Unpublished Paper by Legislation and Policy Division of NEPA.
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30. The Constitution of the People's Republic of China, 1982. The National People's Congress enacted Constitution in 1975, revised it in 1978 and 1979, and adopted a new Constitution in 1982 which contained the language acknowledging environmental protection duties of the government.
31. Environmental Protection Law, article 4.
32. *Id.*, article 7.
33. Local regulations refer to (1) rules and regulations adopted by People's Congress and their Standing Committees at the provincial level, capital cities of provinces and large cities which are designated by the State Council; (2) rules and regulations issued by the governments at and above the county level.
34. *National Plan in Phase-out Substances Which Deplete the Ozone Layer*. Available from *Common Responsibility of Human Beings* (in Chinese). Environment and Science Press, 1993.
35. *China Environmental Enforcement Report*. Represented at the UNEP's Beijing workshop by Legislation Division of NEPA, 1994, (hereinafter Enforcement Report).
36. Environmental Protection Law, article 9.
37. *Id.*, article 10.
38. *Id.*, article 13. The early regulation for EIA was the Management of Construction Projects issued in 1986 by the SEPC, National Planning Commission, and National Economic Commission.
39. *Id.*
40. *Id.* Most projects EIA are reviewed by environmental agencies at province, city or county level depending on their investment. Projects whose investment exceed 200 million yuan (\$ 25 million) are reviewed by NEPA.
41. White Paper, *supra* note 6.
42. Wang & Blomquist, 65, *supra* note 21.
43. Environmental Protection Law, article 26.
44. *Id.*
45. *Id.*, article 11.
46. China Environment Yearbook 1995. Chinese Environmental Science Press. (hereinafter 1995 Yearbook).
47. Chinese Environmental Science and Research Institute is responsible for technical support.
48. Environmental Protection Law, article 27; Water Pollution Law, article 14; Air Pollution Law, article 11, and Solid Waste Law, article 31.
49. Environmental Protection Law, article 14.
50. Rule on the Management of Inspection Identification, passed by NEPA in 1992.

51. *1994 National Environmental Enforcement Inspection Report*, by Xie Zhenhua, Administrator of NEPA, 1995 Yearbook, *supra* note 46.
52. Water Pollution Law, article 15.
53. Air pollution Law, article 12. Though during the revision of Air Pollution Law, law-makers intended to strict the requirement to charge fee upon emission of pollutants, not on exceeding the standards, objections from industries prevented the NPC from accepting the idea.
54. Rules on the Management of Emission Fees, article 10.
55. Hu Baolin, *Enforcement of Pollution Discharge Fee in China*, published in Proceeding, Volume 1 for the Forth International Conference on Environmental Compliance and Enforcement, Thailand, April 22-26, 1996,
56. *Id.*
57. Rule on Environmental Administrative Sanction, article 20, issued by NEPA on July 7, 1992. Compilation of Laws and Regulations on Environmental Protection, 2nd ed. Chinese Environmental Science Press, 1993. (hereinafter Compilation).
58. *United States v. Beatty, Inc.*, 401 F. Supp. 1040.(N.D. Ky. 1975).
59. Environmental Protection Law, article 40.
60. 1995 Yearbook, p. 310, *supra* note 46.
61. The Law on the Control of Solid Waste Pollution impose 1,000,000 RMB(\$1=8.5 RMB) by the Customs as maximum amount which exceeds 20,000 RMB for Water and Air Pollution Control laws.
62. Implementing Regulation on Water Pollution Control Law, article 35. The environmental bureau at county level has the authority to impose a penalty not exceeding 10,000 RMB, while the bureau at city level's authority is not more than 50,000 RMB. Any amount beyond their authority is subject to the approval of its superior environmental bureau. The bureau at province level can fine up to 200,000 RMB which is the highest amount the environmental bureau has been authorized.
63. Environmental Protection Law, article 29.
64. *Id.*, article 39.
65. Zhang Kunmin, ed., *Environmental Implementation in China* (in Chinese), 261-267, University of Policy and Science Press, 1993. (hereinafter implementation). Also see Marine Environmental Protection Law, article 41 which delegates the right to Marine Protection Agency. Recover cost is seldom used in China.
66. Water Pollution Prevention Law, article 19.
67. Environmental Protection Law, article 36.
68. *Id.*, article 37.
69. Implementing Regulation on Water Pollution Control Law, article 34.
70. Environmental Protection Law, article 41.
71. *Id.*, article 6.
72. China Environmental Yearbook, 1994. Environmental Science Press, (hereinafter 1994 Yearbook).
73. Implementation, 235-247, *supra* note 65.
74. Administrative Procedure Law, article 54.
75. Implementation, 235-247, *supra* note 65.
76. Environmental Protection Law, article 43, 44.
77. The Criminal Law was adopted in 1979.

Article 115 provides that whoever violates the regulations on the control of articles of an explosive, combustible, radioactive, poisonous or corrosive nature, giving rise to a major accident in the course of production, storage, transportation or use and causing serious consequences, is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the consequences are especially serious, the sentence is to be not less than three years and not more than seven years of fixed-term imprisonment.

Article 187 states that state personnel who, because of neglect of duty, cause public property or the interests of the state and the people to suffer major losses are to be sentenced to not more than five years of fixed-term imprisonment or criminal detention.

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80. Environmental Protection Law, article 16.
81. Elizabeth Economic, *supra* note 11.
82. *Id.*
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85. *Id.*
86. Nillel, Michael Irl. "Chinese Characteristics" in *Corporate Clothing: Questions of Fiduciary Duty in China's Company Law*. *Minnesota Law Review*. Vol. 80, 1995. Also see Clarke, *supra* note 5.
87. Beijing closed more than 1,000 unauthorized development zones which were offering tax concessions and other incentives to encourage foreign investment outside of central government supervision. *Id.* Also see Kevin Murphy, *For Many China Firms, and Order to Sink or Swim*, *International Herald Tribune*. August 13, 1993 (available in LEXIS-NEXIS Library).
88. Environmental Protection Law, article 7. These include the state administrative departments of marine affairs, the harbor superintendency administration, public security, transportation, and railways, etc.
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92. Enforcement Report, *supra* note 35.
93. Chan, *supra* note 84.
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97. *Id.*
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99. Cheryl Wasserman, *Overview of Compliance and Enforcement in the United States: Philosophy, Strategies and Management Tools*, Proceedings for the International Enforcement Workshop, May 8-10, 1990. Utrecht, The Netherlands.
100. Environmental Protection Law, article 6.
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102. Twenty Years of Environmental Protection in China, *supra* note 94.