

**PROMOTING AND STRENGTHENING PUBLIC
PARTICIPATION IN CHINA’S ENVIRONMENTAL IMPACT
ASSESSMENT PROCESS: COMPARING
CHINA’S EIA LAW AND U.S. NEPA**

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TABLE OF CONTENTS

Introduction.....	282
I. The Importance of Public Participation in the EIA Process	284
A. Why EIA?.....	284
B. Why Public Participation is Important to the EIA Process	286
II. Public Participation in the United States Under NEPA.....	287
A. The National Environmental Policy Act of 1969.....	287
B. NEPA Process	290
C. Public Participation in the NEPA Process.....	294
III. Public Participation in China Under the EIA Law.....	297
A. The Evolution of EIA in China	297
B. 2003 Environmental Impact Assessment Law	299
C. Public Participation Under the EIA Law.....	303
IV. Recent Measures to Define the Public’s Role in China’s EIA Law ..	304
A. Has SEPA Exceeded its Authority?	304
B. The Timing and Form of Public Disclosure and Public Involvement	305
V. Recommendations.....	307
A. Suggestion—Expand the scope of public participation to include all categories of projects and plans.	307
B. Suggestion—Create additional processes to ensure that public involvement occurs before EIA documents are submitted for approval.....	308

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C. Suggestion—Increase opportunities for public enforcement of EIA non-compliance	310
Conclusion	311
Appendix A.....	313
Environmental Impact Assessment Law of the People’s Republic of China	313
Appendix B.....	326
Measures of the State Environmental Protection Administration on Public Participation in Environmental Impact Assessment	326

INTRODUCTION

Chinese citizens experienced unprecedented change with respect to their legal right to participate in decisions affecting the environment when, in 2003, the National People’s Congress of the People’s Republic of China enacted the Environmental Impact Assessment Law of the People’s Republic of China (EIA Law)¹. Although environmental impact assessment (EIA) had existed in China—at least conceptually—since 1973, prior to 2003, the public had been effectively absent from the process.² The enactment of the EIA Law marked a watershed moment for public participation in China, as public involvement became a required component of the environmental decision-making process.

The extent of public involvement in China’s EIA process is unclear, however. In November 2005 the State Environmental Protection Administration of China (SEPA)³ issued a set of draft measures for comment in an effort to clarify and strengthen the role of public participation provided under the EIA Law.⁴ Subsequently, on February 22, 2006, SEPA released provisional guidelines (SEPA Guidelines) after reviewing comments received on the Draft Regulations.⁵ Thus, it is clear

1. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.); *see infra* Appendix A (author’s translation).

2. *See* Yan Wang et al., *Environmental Impact Assessment of Projects in the People’s Republic of China: New Law, Old Problems*, 23 ENVIRON. IMPACT ASSESSMENT REV. 543, 545 (2003) (noting that in 1973 the First Conference for National Environmental Protection introduced the “Environmental Quality Assessment Program” on a provisional basis to address industrial pollution).

3. SEPA is equivalent in both stature and function to the U.S. Environmental Protection Agency.

4. Measures of the State Environmental Protection Administration on Public Participation in Environmental Impact Assessment (draft for comments released November 2005) [hereinafter Draft Regulation]. An unofficial English translation of the November 2005 Draft Regulations SEPA released for comment has been reproduced in Appendix B of this article.

5. Sun Xiaohua, *Public to Help Assess Impact on Environment*, CHINA DAILY, Feb. 23, 2006,

that the process is still in a state of flux, and that SEPA may further revise the rules.⁶

Nevertheless, these are exciting times for the citizens of China. The recent developments in the EIA Law exemplify the efforts China is making to develop a comprehensive and effective legal system for environmental protection.⁷ China's recognition of a public right within this system is particularly salient. Although initially a public right to involvement may not have been naturally equated with the Chinese EIA process,⁸ its emergence now evidences a serious attempt on the part of the government to create a legal framework that envisions environmentally sustainable economic development.

The environmental costs of China's breakneck economic development over the past two decades have been well documented.⁹ China's Deputy Minister of the Environment, Pan Yue, succinctly frames China's environmental outlook:

Our raw materials are scarce, we don't have enough land, and our population is constantly growing. Currently, there are 1.3 billion people living in China; that's twice as many as 50 years ago. In 2020, there will be 1.5 billion people in China. Cities are growing, but desert areas are expanding at the same time; habitable and usable land has been halved over the past 50 years. [China's G.D.P. miracle] will end soon because the environment can no longer keep pace. Half of the water in our seven largest rivers is completely useless. One-third of the urban population is breathing polluted air.¹⁰

Deputy Minister Yue's observations underscore a pressing need in China to promote and develop a strategy of environmentally sustainable development, to raise the quality of its peoples' lives in a lasting way.¹¹

at 2, available at http://www.chinadaily.com.cn/english/doc/2006-02/23/content_523022.htm.

6. Yingling Liu, *SEPA Releases New Measure on Public Participation in Environmental Impact Assessment Process*, WORLDWATCH.ORG, Feb. 24, 2006, <http://www.worldwatch.org/features/chinawatch/stories/20060224-2>.

7. See Yang Cheng, *Gear Up*, CHINA DAILY, Feb. 27, 2006, at 8, available at http://www.chinadaily.com.cn/english/doc/2006-02/27/content_524205.htm (noting that nine environmental protection laws, some 250 regulations and about 500 environment standards are being enacted in China).

8. Thomas L. Friedman, Op-Ed, *How to Look at China*, N.Y. TIMES, Nov. 9, 2005, at A27

9. See generally ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* (2004) (providing an exhaustive overview of the extent of environmental degradation in China as a result of unprecedented economic development).

10. Friedman, *supra* note 8 (quoting China's deputy minister of the environment, Pan Yue, in a March 7, 2005 interview with *Der Spiegel*, a German news agency) (alteration in original).

11. See Marie-Claire Cordonier Segger, *Governing and Reconciling Economic, Social and Environmental Regimes*, in SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW 561, 587 (2005) (noting that implicit in the concept of sustainable development

Crafting a clear legal right of public participation in the Chinese EIA process is a step in that direction.

We endeavor in this article to evaluate SEPA's recent efforts to clarify the public's role in China's EIA process by examining the scope and timing of public participation in the EIA Law through the comparative lens of the U.S. National Environmental Policy Act of 1969 (NEPA).¹² In Part II of this paper we highlight several ways in which public participation can enhance the EIA process. In Part III we focus on NEPA, which pioneered the concept of EIA as a legal prerequisite to environmentally significant proposals and development. In Part IV we consider the Chinese EIA process, briefly tracing its development from legislative inception in the late 1970s to its recent reincarnation in the 2003 EIA Law. Part V outlines the recent SEPA Guidelines and the developing right of public participation in the EIA Law. In Part VI we compare and contrast the opportunities for public involvement under the EIA Law and NEPA. In addition, we suggest how the public's role within China's EIA process may be further clarified so as to ensure a solid participatory right. Finally, we conclude with commendation and encouragement for China; that it continue to support and strengthen the public's role in environmental assessment, which will lead to a more effective EIA process and an increased harmony among China's economy, society, and environment.

I. THE IMPORTANCE OF PUBLIC PARTICIPATION IN THE EIA PROCESS

Generally speaking, where there is a decision to be made within the EIA process, there is an opportunity for public participation. But why should the public have any involvement in the process? Public participation is important for reasons that transcend the scope and topic of this article. As it pertains to the EIA process, however, the relevancy and value of public participation in environmental decision-making inhere in the goals and purposes underlying EIA. Thus, in order to answer the question of importance, we must briefly discuss the purpose of the process.

A. *Why EIA?*

Environmental impact assessment is a universally recognized strategy for sustainable development.¹³ Broadly stated, EIA is an attempt to

is the recognition that "development cannot exceed the limits of the environment").

12. National Environmental Policy Act of 1969 (NEPA), § 102(2)(C), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (2000)).

13. *See, e.g.*, 2002 Johannesburg Plan of Implementation of the World Summit on Sustainable

improve the quality of human life in a lasting way by examining and documenting the potential environmental impacts of a proposed activity and also considers alternatives that may prevent or mitigate any perceived negative effects, thereby enabling fully informed, environmentally conscious decision-making.¹⁴ By design EIA is anticipatory, or precautionary, and so it is important that it be undertaken as early as possible prior to, or during the proposal stage of development.¹⁵ Additionally, the prediction and prevention of potential environmental harm is often a least-cost alternative.¹⁶ Therefore, in addition to being a sustainable development tool, EIA can also be a cost-saving measure.

At the outset, it is important to note that when it comes to the technical environmental analysis, overall, EIA favors process over substance. This is because the purpose of EIA is to ensure that actions are not undertaken without first fully comprehending and contemplating their environmental consequences. Thus, while the identification of potentially significant impacts through environmental assessment may impede the progress of a proposal by requiring additional procedure, it will not necessarily thwart the proposed action. The underlying assumption is that decision-makers will act accordingly and take the environment into consideration once they learn the results of an EIA. In other words, EIA simply seeks to inject environmental considerations into the decision. It matters most that the process is undertaken so that the environmental impacts of a proposed action are exposed prior to the ultimate decision of whether or not to

Development, III 19(e), (listing environmental impact assessment as an essential practice for implementing sustainable development), available at http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf. The concept of “sustainable development” gained global notoriety following the 1972 United Nations Conference on the Human Environment in Stockholm and the resulting Stockholm Declaration, June 16, 1972. United Nations Conference on the Human Environment, June 5-16, 1972, *Declaration*, U.N. Doc. A/Conf.48/14/Rev. 1 (June 16, 1973). The term itself is susceptible to varying definitions. “The standard definition assumes that present development must not compromise ‘the ability of future generations to meet their own needs.’” FRANK B. FRIEDMAN, *PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT* 65 (9th ed. 2003) (quoting *WORLD COMM’N ON ENV’T & DEVT., OUR COMMON FUTURE* 43 (1987)). For a concise history of the derivation and evolution of the term, see *id.* at 71–77.

14. See generally DAVID P. LAWRENCE, *ENVIRONMENTAL IMPACT ASSESSMENT* (2003) (discussing the process and general purposes of EIA).

15. See, e.g., 40 C.F.R. §§1501.1(a), 1501.2 (2006) (“integrating the NEPA process into early planning to ensure appropriate consideration of NEPA’s policies and to eliminate delay”).

16. JACOB I. BREGMAN & ROBERT D. EDELL, *ENVIRONMENTAL COMPLIANCE HANDBOOK* 275–76 (2d ed. 2002). This least-cost notion can be viewed as a corollary of the sustainable development concept. No doubt the costs of preparing environmental assessments, as well as the expense of delay, can be burdensome. Yet balking at EIA in the face of such burdens adopts a narrow perspective that overlooks the fact that the costs of prevention would pale in comparison to the environmental, social, and economic costs associated with unbridled development. Indeed, an ounce of prevention may be worth a pound of cure.

proceed with the proposed action.

B. Why Public Participation is Important to the EIA Process

Public participation is critical to both development and conservation efforts. Sustainable development is the successful integration of economic, environmental, and social values.¹⁷ Without adequate and meaningful public participation, the EIA process lacks the necessary social component that makes it a truly effective sustainable development tool. Open and participatory environmental decision-making allows an informed citizenry to contribute to the efforts of a transparent and accountable government in producing higher quality decisions concerning the environment. The foregoing statement reveals many of the ancillary benefits of including the public in the process, namely, public education, as well as governmental transparency and accountability. But it is the integration of these elements that creates the true benefit of public participation: a system capable of producing knowledgeable and inclusive environmental decisions.

Greater involvement in the EIA process educates and informs the public, which increases environmental awareness.¹⁸ Moreover, logic dictates that the substantive quality of decisions greatly improves when the people affected by the decisions participate in making them.¹⁹ Involving the public in the environmental decision-making process makes sense for this reason and several others.

Including citizens' voices in decision-making promotes governmental accountability and increases the likelihood that decisions will take into account the concerns of those directly affected by them.²⁰ Promoting public participation fosters transparency and utilizes a wide base of opinions to strengthen the decisions ultimately made and instill public trust in institutions.²¹ Additionally, public participation is more likely to generate public support for the eventual outcomes of the EIA process, which will resolve or at least mitigate conflict among competing interests.²²

17. The environmental impact assessment statutes of both China and the United States embrace this concept. *See* Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 1, *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.); 42 U.S.C. § 4331(a) (noting that both laws were enacted to devise a system that limits the impact humans have on the environment while promoting positive development).

18. THOMAS C. BEIERLE & JERRY CAYFORD, *DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS* 15 (2002).

19. *Id.* at 14.

20. *Id.*

21. *Id.* at 15.

22. *See id.* (noting that public participation early on in the U.S. decision-making process is

Public participation can also help to overcome deficiencies in regulatory oversight associated with limited government resources.²³ Citizens have an intimate understanding of local environmental threats and violations of applicable laws, and can offer this knowledge to broaden government consideration and heighten awareness of these local issues. In addition, citizens can supplement potentially scarce government resources for monitoring and enforcement, ultimately saving the government time and money.

EIA lies at the crossroad where economic, environmental, and social values intersect. Balancing these values requires a holistic approach, a collaborative effort between governments, business sectors, and the public. In order to achieve lasting environmental protection and sustainable economic growth and development, public participation must figure prominently in the EIA process.

II. PUBLIC PARTICIPATION IN THE UNITED STATES UNDER NEPA

In the decades since NEPA was enacted, EIA has become a popular environmental management tool throughout the world.²⁴ In this section we introduce the EIA process under NEPA (NEPA process), which provides a framework for our comparison with the EIA Law of China. First, we discuss the general purposes, policies, and administration of NEPA. This section continues with a brief outline of the NEPA process as promulgated by the statute and implementing regulations. Finally, the section concludes with a detailed examination of the opportunities for public participation in the NEPA process.

A. *The National Environmental Policy Act of 1969*

In the United States, NEPA sets forth a national EIA process applicable to all federal proposals having a significant impact on the human environment.²⁵ Heralded as the preeminent U.S. environmental law,²⁶

often a good indicator of potentially litigious issues).

23. *Id.* at 14.

24. See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW, & SOCIETY 475 (3d ed. 2004) (describing NEPA as an “international milestone” that is modeled by many countries and international institutions); see also Council on Environmental Quality, International Environmental Impact Assessment (EIA) Agencies, <http://ceq.eh.doe.gov/nepa/eia.html> (containing links to EIA agencies in over thirty-five countries, as well as several nongovernmental organizations and international organizations involved in EIA). U.S. President Richard Nixon signed NEPA on January 1, 1970.

25. National Environmental Policy Act of 1969, § 102(2)(C), Pub. L. No. 91-190 83 Stat. 852

NEPA seeks to balance an array of environmental concerns against other “essential considerations of national policy” and urges the U.S. government “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations.”²⁷

To achieve its stated purposes, NEPA requires all “major Federal actions significantly affecting the quality of the human environment” to undergo EIA.²⁸ In other words, all federal agencies must follow the procedures outlined in NEPA before they carry out an environmentally significant proposed action or plan.²⁹ The most prominent component of the EIA process under NEPA is the requirement that agencies prepare a “detailed statement” in anticipation of significant decisions.³⁰ This detailed statement—better known as an Environmental Impact Statement (EIS)—consists of a written report outlining the potential environmental costs associated with a proposed action or plan, the unavoidable impacts associated with implementing the proposal, and any alternatives thereto.³¹

NEPA emphasizes process rather than the substantive outcome of the impact assessment.³² In other words, an EIS prepared in accordance with NEPA requirements will not prevent an agency from proceeding with a proposed action. But the underlying rationale for the EIS requirement is clear: it forces federal agencies to contemplate the environmental

(1970) (codified as amended at 42 U.S.C. § 4332(2)(C) (2000)).

26. NEPA has been labeled the “national charter for protection of the environment” by the United States Environmental Protection Agency. 40 C.F.R. § 1500.1(a) (2006).

27. 42 U.S.C. § 4331. The Act’s lofty and expansive purposes have led one expert to liken NEPA to an “environmental bill of rights.” FREDERIC MARCH, NEPA EFFECTIVENESS: MASTERING THE PROCESS 1 (1998).

28. 42 U.S.C. § 4332(2)(C).

29. Each federal agency is required to promulgate regulations implementing the action-forcing procedures of NEPA, which are then approved by the CEQ. 40 C.F.R. § 1507.3 (2006).

30. The operative “action-forcing” language of the Act reads:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the federal government shall— . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action

42 U.S.C. § 4332(2).

31. 42 U.S.C. § 4332(2)(C).

32. *Stryker’s Bay Neighborhood Council v. Karlan*, 444 U.S. 223, 228 (1980) (holding that beyond the procedural EIS requirements “NEPA requires no more”).

consequences of a proposal *before* approving an action or plan.³³ It is then the agency's task to weigh the environmental impacts of the proposed action "consistent with other essential considerations of national policy" when deciding whether or not to grant approval.³⁴ When implemented properly, the EIS is an effective instrument for ensuring that environmental concerns are factored into federal decision-making.

Essentially, "NEPA is a broad stop-and-think, disclose-to-the-public administrative law."³⁵ The breadth of NEPA's mandate—its applicability to *all* federal agencies—makes it unique among U.S. environmental laws;³⁶ nevertheless, the general EIA process promulgated by NEPA has become a globally recognized approach.³⁷

1. Applicable to Federal Agency Actions

Typically, environmental decision-making associated with the NEPA process rests in the lap of the federal agency undertaking the action that is subject to EIA. Private projects that require federal funding or approval are also subject to NEPA.³⁸ Compliance with NEPA may involve several agencies that have concurrent legal authority over a proposed action or plan, and where that is the case, they shall determine which one agency will be the "lead agency."³⁹ The lead agency is then responsible for ensuring that EIA procedures—primarily consisting of EIS preparation—are carried out consistent with the goals and policies of NEPA and in cooperation with the other designated agencies.⁴⁰ Each federal agency is individually responsible for implementing and adhering to NEPA's requirements and the U.S. Environmental Protection Agency (EPA) is required to review and

33. PLATER ET AL., *supra* note 24, at 472 (describing NEPA as a "stop-and-think" approach to administrative decision-making); *see also* NICHOLAS C. YOST, *NEPA DESKBOOK* 6 (3d ed. 2003) (noting that NEPA was intended to require agencies to consider environmental consequences in addition to the public benefit).

34. 42 U.S.C. § 4331.

35. PLATER ET AL., *supra* note 24, at 472.

36. YOST, *supra* note 33, at 5. Although several other U.S. environmental laws, the Clean Air Act and the Clean Water Act, for example, fulfill the same purposes as NEPA, they do so with less sweeping applicability and more particularized legal force. MARCH, *supra* note 27, at 2.

37. *See* PLATER ET AL., *supra* note 24 475; *see also* Nicholas A. Robinson, *IUCN as Catalyst for a Law of the Biosphere: Acting Globally and Locally*, 35 *ENVTL. L.* 249, 283–84 (2005) (tracing the rise of national EIA laws following NEPA).

38. *See* 40 C.F.R. § 1508.18 (2006) (summarizing case law); *United States v. S. Fla. Water Mgt. Dist.*, 28 F.3d 1563, 1572 (11th Cir. 1994) (holding that despite government's involvement in settlement, NEPA requirements were not triggered).

39. 40 C.F.R. § 1501.5 (2006).

40. *Id.* § 1501.6.

comment publicly on all EISs prepared pursuant to NEPA.⁴¹

2. The Council on Environmental Quality Regulations

On the rare occasion when agencies disagree about the environmental impacts of a proposal, such disputes are submitted to the Council on Environmental Quality (CEQ) for resolution.⁴² The CEQ is a three-member advisory panel within the Executive Office of the President,⁴³ and although it is not itself subject to NEPA regulations for purposes of EIA,⁴⁴ CEQ plays an instrumental role in the EIA process as the promulgator of NEPA regulations.⁴⁵ Because the statutory language of NEPA is relatively devoid of specific procedural guidance, NEPA must be read in conjunction with CEQ's regulations.⁴⁶ These regulations are the starting point for analysis of any issue relating to public participation in the NEPA process and they receive great deference from U.S. courts.⁴⁷

B. NEPA Process

The epicenter of the NEPA process is the EIS requirement. An agency

41. *Id.* § 1504.1; *see* Clean Air Act, § 309, 42 U.S.C. § 7609 (2000) (requiring the EPA Administrator to “review and comment in writing on the environmental impact of any . . . newly authorized federal projects for construction and any major federal agency action . . . to which section 4332(2)(C) of this title [i.e., NEPA] applies”). To put this seemingly onerous task in perspective, in each of the past twenty years the number of EISs filed has ranged between 450 and 600 annually. Council on Env'tl. Quality, General Data for EISs Filed 1970 to 2004, *available at* http://ceq.eh.doe.gov/NEPA/EIS_Statistics_1970_to_2004.pdf.

42. *See* 40 C.F.R. § 1504 (2006) (describing the process of “environmental referrals”). In practice, environmental referrals are rare. MARCH, *supra* note 27, at 165; YOST, *supra* note 33, at 7–8.

43. 42 U.S.C. § 4342 (establishing the CEQ).

44. *See* 40 C.F.R. § 1508.12 (2006) (excluding from the definition of “Federal agency,” and thereby excluding from the NEPA process, the Congress, the Judiciary, the President and the performance of the Executive Office of the President). Although Congress is not subject to NEPA requirements, the NEPA process does pertain to legislative proposals to Congress that affect the quality of the human environment. 42 U.S.C. § 4332(C). The process for a legislative EIS is less onerous, however. *See* 40 C.F.R. § 1506(b) (2006) (eliminating scoping and the second draft requirements applicable to most ordinary EISs).

45. 40 C.F.R. §§ 1500–1508 (2006). Additionally, CEQ advises the President on environmental policy issues, and produces an annual report on the state of the environment. 42 U.S.C. § 4344; PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1111 (2d ed. 1996); *see also* YOST, *supra* note 33, at 7 n.34 (describing the fluctuating size of the organization over the past several Presidential Administrations).

46. *See* 40 C.F.R. § 1500.3 (2006) (stating that CEQ's regulations are “applicable to and binding on all Federal agencies . . . except where compliance would be inconsistent with other statutory requirements”).

47. *See* *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (“CEQ's interpretation of NEPA is entitled to substantial deference.”); PERCIVAL ET AL., *supra* note 45, at 1111.

must conduct a screening process⁴⁸ to determine whether or not the proposed action requires the preparation of an EIS.⁴⁹ If, upon screening, it is determined that an EIS is necessary, then, and also prior to the preparation of the EIS, an agency must conduct a scoping process to determine what issues or impacts the EIS will address specifically. These three steps in the NEPA process—screening, scoping, and the preparation of a detailed report—are fairly typical of EIA processes worldwide, including China.⁵⁰

1. Screening: Environmental Assessment

The NEPA process begins with a preliminary assessment of the likelihood that a proposed action will have a significant environmental impact. Unless the proposed action is subject to a categorical exclusion,⁵¹ an agency must prepare an Environmental Assessment (EA) to determine whether or not the proposed project requires the preparation of a more comprehensive EIS.⁵² Accordingly, depending on the outcome of the EA, it may be the first step of the NEPA process or, in some cases, the last.⁵³

If, based on an EA, an agency makes a “finding of no significant

48. In NEPA parlance, the screening process consists of, and is referred to as, an environmental assessment. *See infra* text accompanying notes 51–53.

49. In other words, whether the proposed action will “significantly affect[] the quality of the human environment.” 42 U.S.C. §4332(C).

50. *See generally* ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES (Norman Lee & Clive George eds., 2000) (discussing environmental assessment in developing countries and countries in transition as well as discussing stages in the EA process).

51. When federal agencies promulgate internal procedures implementing NEPA’s mandate, they have the authority to categorically exclude certain actions that would otherwise be subject to the EIS requirement. 40 C.F.R. § 1507.3(b)(ii) (2006). Categorical exclusions are actions having no significant environmental impact, and for which no EA nor EIS is required. *Id.* § 1508.4. In addition to categorical exclusions, exigent circumstances or other legal exemptions (e.g. national security concerns) may preclude NEPA process for particular actions. BREGMAN, *supra* note 16, at 351. Many agencies maintain lists of actions that are categorically excluded from the NEPA process. *See, e.g., id.* at 351–52 (reprinting the list of categorical exclusions developed by the U.S. Department of the Army). Categorical exclusions usually apply to “everyday type minor actions . . . of a housekeeping nature and rarely affect[] industrial activities.” *Id.* at 292.

52. 40 C.F.R. §§ 1501.3, 1508.9(a)(1) (2006). The EA must include a brief description of the proposal’s necessity, alternatives to the proposal, and the environmental impacts of both the proposal and alternatives. *Id.* § 1508.9(b). As a precursor to the more extensive EIS process, an EA is designed so that agencies can prepare them easily and expeditiously. *See id.* § 1508.9; *see also* BREGMAN, *supra* note 16, at 292 (“Almost all of the data collected [during an EA] is that which is already available, rather than new material.”).

53. Of course, agencies are at all times free to forego EA and proceed directly to the EIS process. *See* 40 C.F.R. § 1501.3 (2006) (noting that the preparation of an EIS obviates the need for an EA). More often an agency will skip the EA because it knows at the outset that an EIS will be required for the particular action, it need not prepare an EA. *Id.* § 1501.3(a).

impact” (FONSI), it need not thereafter prepare an EIS, and the NEPA process ends.⁵⁴ But the agency is required to make the FONSI available to members of the local public who are directly affected by the agency action.⁵⁵ Additionally, CEQ regulations require that where a FONSI pertains to a novel or controversial action, the public shall be allowed thirty days to review the agency’s findings before an ultimate determination can be made regarding the EA.⁵⁶

Alternatively, where it is determined on the basis of an EA that the environmental impacts of the proposed project are significant so as to warrant the preparation of an EIS, the agency’s immediate next step is to publish a notice of intent (NOI) to prepare an EIS in the *Federal Register*.⁵⁷ The NOI must contain a brief description of the proposal, its alternatives, and the planned scoping process, including whether, where, and when any scoping meetings are to take place.⁵⁸

2. Scoping

Once it has been determined that an EIS must be prepared, a scoping process should be conducted “as soon as practicable” to clarify the scope and significance of the issues that are to be addressed in the assessment.⁵⁹ The CEQ regulations stress that scoping should be “an early and open process,”⁶⁰ and occasionally may occur concurrently with the preparation of an EA.⁶¹ The scoping process operates to provide further notification of the proposed action to interested persons and agencies.⁶² Additionally, scoping is an opportune moment for agencies to set time limits for the entire NEPA process.⁶³ Most importantly, it is at this point in the NEPA process where the benign issues can be disposed of so that, moving forward, particular focus can be placed on the more significant or controversial issues.⁶⁴

54. *Id.* § 1501.4(e). A FONSI is a separate documentation requirement that either incorporates or summarizes the findings of the EA, namely, the reasons why an EIS is not necessary for the proposed action. 40 C.F.R. § 1508.13 (2006).

55. *Id.* § 1501.4(e)(1). Generally, environmental documents flowing from the NEPA process are available to the public upon request under the Freedom of Information Act, 5 U.S.C. § 552 (2002). *Id.* § 1506.6(f).

56. *Id.* § 1501.4(e)(2).

57. *Id.* §§ 1501.7, 1508.22; BREGMAN, *supra* note 16, at 284.

58. 40 C.F.R. § 1508.22.

59. 40 C.F.R. §§ 1500.5, 1501.7, 1508.25 (2006).

60. 40 C.F.R. § 1501.7 (2006).

61. *Id.* § 1501.7(b)(3).

62. *Id.* § 1501.7(a)(1); YOST, *supra* note 33, at 13.

63. 40 C.F.R. §§ 1501.7(b)(2), 1501.8 (2006).

64. 40 C.F.R. § 1501.7 (2006). Scoping meetings are a suggested method for achieving clarity, but are not mandated. *Id.* § 1501.7(b)(4).

3. The “Detailed Statement” or Environmental Impact Statement

The poster-child of NEPA, the EIS embodies the Act’s principal requirement that all federal agencies prepare a “detailed statement” for actions significantly affecting the environment.⁶⁵ CEQ regulations pertaining to the form and content of an EIS are extensive and detailed.⁶⁶ At a minimum, the EIS process involves preparation of a draft and a final EIS.⁶⁷

A draft EIS, once prepared, is to be furnished to any person, organization, or agency that is involved with the proposed action, or upon specific request.⁶⁸ The agency preparing the EIS is required to solicit comments from affected parties, experts, and the public,⁶⁹ who are usually afforded no less than forty-five days to review and comment on the draft.⁷⁰

After the time for commenting on the draft EIS has closed, the agency must address all substantive comments in the final EIS by either amending its analyses, or by explaining why a particular comment does not warrant agency response.⁷¹ Once all substantive comments and responses have been incorporated, the agency must file the final EIS with the U.S. EPA,⁷² and redistribute it to interested parties and the public.⁷³

The agency may not make a decision on the proposed action until at least thirty days after the EPA has published public notice of the final EIS in the *Federal Register*, or 90 days after the draft EIS is made public, whichever is later.⁷⁴ This ensures that there is adequate time for

65. 40 C.F.R. § 1508.11 (2006).

66. 40 C.F.R. § 1502 (2006); *see id.* § 1502.10 (suggesting a standard format that agencies should follow, and requiring, among other things, that the EIS contain analysis of (1) the purpose and need for the proposed action, (2) alternatives including the proposed action, (3) the affected environment, and (4) the environmental consequences of the proposed action).

67. *Id.* § 1502.9. Some agencies incorporate a third, preliminary draft into their EIS process, which is scrutinized internally by the agency prior to producing a draft EIS to be reviewed by the public and other agencies. MARCH, *supra* note 27, at 13.

68. 40 C.F.R. § 1502.19. Agencies will publish a notice of availability in the *Federal Register* containing information on how to obtain a copy of the draft EIS, and may also publish notice in local media for proposals of heightened local interest. *Id.* § 1506.6(b); BREGMAN, *supra* note 16, at 281, 356.

69. 40 C.F.R. § 1503.1(a).

70. *Id.* § 1506.10(c). The time period for commenting is flexible and may be extended or reduced. *Id.* § 1506.10(d).

71. *Id.* § 1503.4.

72. *Id.* § 1506.9. The EPA publishes public notice of all EISs it receives on a weekly basis in the *Federal Register*. *Id.* § 1506.10(a).

73. *Id.* § 1502.19. The key difference between circulation of the draft and final EIS is that the agency is not required to solicit comments on the final EIS, but anyone is free to submit comments on it before the agency makes a final decision. *Id.* § 1503.1(b).

74. *Id.* § 1506.10.

commenting and for agency consideration.⁷⁵ Once the agency has rendered a decision on the final EIS, the EIS process is finalized through the preparation of a concise and public Record of Decision (ROD) stating, in particular, “whether all practicable means to avoid or minimize environmental harm from the alternatives selected have been adopted, and if not, why they were not.”⁷⁶ Again, it is important to stress that “the EIS is not an end in itself, but rather a tool to promote environmentally sensitive decision making.”⁷⁷

C. Public Participation in the NEPA Process

Because public participation is an important and integral part of the NEPA process, it is perhaps surprising to note that it does not factor more prominently among the provisions of NEPA.⁷⁸ Although section 101(a) alludes to government cooperation with “concerned public and private organizations”⁷⁹ and section 102(c) requires public disclosure of EISs,⁸⁰ there is little else in the statute that would hint to the extent of the public’s role in the NEPA process. Subsequent decisions by U.S. courts have interpreted NEPA to require public participation.⁸¹ In 1979, most of the principles established by case law were incorporated in the CEQ regulations.⁸² These regulations “are by far the most important source of law governing public participation under NEPA,” providing extensive, detailed guidelines for public participation.⁸³ Accordingly, as we proceed to examine the scope of public participation in the NEPA process, our focus in this section will be primarily on the CEQ regulations.

Federal agencies are required by the regulations to involve the public in the environmental decision-making process “to the fullest extent

75. YOST, *supra* note 33, at 18.

76. 40 C.F.R. § 1505.2(c); YOST, *supra* note 33, at 18 (proclaiming the ROD to be “second in importance only to the EIS”).

77. YOST, *supra* note 33, at 13.

78. See National Environmental Policy Act of 1969, § 101(a), Pub. L. No. 91-190 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4331(a) (2000)) (calling for government cooperation with “concerned public and private organizations” in furtherance of NEPA’s goals and policies); *id.* § 101(c), § 4331(c) (recognizing “that each person has a responsibility to contribute to the preservation and enhancement of the environment”).

79. *Id.* § 4331(a).

80. *Id.* § 4332(2)(C).

81. See Joseph Feller, *Public Participation Under NEPA*, in THE NEPA LITIGATION GUIDE 102, 104–07 (Karin P. Sheldon & Mark Squillace eds., 1999) (outlining principles of public participation under NEPA stemming from judicial interpretation, and collecting cases).

82. See YOST, *supra* note 33, at 7 n.29 (listing the regulatory history of the CEQ regulations).

83. Feller, *supra* note 81, at 107.

possible.”⁸⁴ In describing the purposes of NEPA, the regulations characterize public scrutiny as an essential component to the statute’s implementation and, therefore, procedures must ensure that the public has access to high quality information “before decisions are made and before actions are taken.”⁸⁵ Particularly important is the fact that, unlike the statute itself, the CEQ regulations create avenues for public participation not only during preparation of an EIS, but also in instances where no EIS is required—in other words, for proposed actions that are environmentally insignificant.⁸⁶

CEQ regulations providing for notice and disclosure of EIA documents, public hearings, and commenting pave the avenues for public involvement in the NEPA process.⁸⁷ In general, agencies are required to “[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents.”⁸⁸ In all instances, notice must be mailed to anyone requesting it.⁸⁹ For proposed actions of national concern, notice must be published in the *Federal Register* and mailed to “national organizations reasonably expected to be interested in the matter.”⁹⁰ Where the effects of a proposed action are discrete, or primarily of local concern, the regulations provide several methods by which agencies can provide notice.⁹¹

The regulations leave it to the agencies to craft their own procedures regarding when public hearings or public meetings might be “appropriate” in the NEPA process.⁹² This agency discretion applies to scoping meetings as well. Short of actually requiring public hearings, the regulations instruct that hearings might be “appropriate” where there is substantial controversy or interest surrounding the proposed action, or where another agency requests a hearing.⁹³ Where a draft EIS is to be the topic of a public

84. 40 C.F.R. § 1500.2 (2006).

85. *Id.* § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”).

86. *See*, Feller *supra* note 81, at 108–09 (explaining that references to “NEPA procedures” in the CEQ regulations include the preparation of EAs and FONSIIs).

87. *See generally* 40 C.F.R. § 1506.6 (2006) (noting that CEQs current NEPA regulations require agencies to involve the public when creating new categorical exclusions).

88. *Id.* § 1506.6(b).

89. *Id.* § 1506.6(b)(1).

90. *See id.* § 1506.6(b)(2) (requiring agencies to maintain a list of such organizations).

91. *Id.* § 1506.6(b)(3)(i)–(ix).

92. *Id.* § 1506.6(c).

93. *See id.* § 1506.6(c)(1)–(2) (requiring agencies to hold public hearings whenever appropriate).

hearing, agencies must make the draft EIS available to the public fifteen days prior to the hearing.⁹⁴

Agencies must make NEPA-related “environmental documents,” including EAs, FONSI, NOIs, and EISs,⁹⁵ available to the public pursuant to the Freedom of Information Act.⁹⁶ The public is afforded no less than forty-five days to comment on draft EISs.⁹⁷ By contrast, the regulations do not expressly mandate a public comment period for EAs or FONSI, although agencies commonly circulate EAs for public comment,⁹⁸ Furthermore, U.S. courts have interpreted NEPA and the CEQ regulations to require public comment for both EAs and FONSI.⁹⁹ CEQ regulations do, however, mandate a thirty-day “public review” period where FONSI is controversial or unprecedented.¹⁰⁰

Looking at the avenues of public participation that have been created in the NEPA process—disclosure, hearings, and commenting—the CEQ regulations not only clarify the public’s role in the NEPA process, they also broaden the scope of participation beyond the limited references to public participation appearing in the text of NEPA. Opportunities for public involvement exist at every step in the process. Agencies are required to provide public notice of all NEPA-related environmental documents as they become available. Public hearings, although not mandated by the regulations, are common agency practice, especially where controversial or otherwise significant proposals are being assessed. Furthermore, opportunities for the public comment on environmental documents exist throughout the NEPA process, in both the screening and EIS phases. The scoping phase is one area of the NEPA process where the agency obligation

94. *Id.* § 1506.6(c)(2).

95. 40 C.F.R. § 1508.10 (2006).

96. The regulations only expressly require the public availability of EISs, including comments and underlying documents. 40 C.F.R. § 1506.6(f) (2006). Nevertheless, EAs and FONSI are subject to the same disclosure requirements. *See id.* § 1506.6(b) (requiring public notice of the *availability of environmental documents*) (emphasis added); 40 C.F.R. § 1501.4(e)(1) (2006) (requiring agencies to make FONSI available to the affected public); *id.* § 1501.4(e) (requiring public involvement in the preparation of EAs). Furthermore, EAs are by definition public documents. 40 C.F.R. § 1508.9(a) (2006).

97. 40 C.F.R. § 1506.10(c) (2006). Agencies may but are not required to afford public comment on a final EIS. 40 C.F.R. § 1508.9(a) (2006).

98. *See Feller, supra* note 81, at 116–18.

99. *See id.* at 105 n.19, 117 (collecting cases). In the Second Circuit case of *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), the court deemed it to be the agency’s responsibility to provide the public with “an opportunity to submit relevant facts which might bear upon the agency’s threshold decision” whether an EIS is required. It should be noted that while several courts have adhered to the holding in *Hanly*, decisions on this issue have not been uniform. *See Feller, supra* note 81, at 105 n.19 (citing cases in disagreement with *Hanly*).

100. 40 C.F.R. § 1501.4(e)(2) (2006).

to involve the public is somewhat lacking.

III. PUBLIC PARTICIPATION IN CHINA UNDER THE EIA LAW

Recent developments, including China's EIA Law and the SEPA Guidelines, build upon a rich history of environmental legislation that is continually adapting to China's transition toward industrialization. Before discussing the 2003 EIA Law, and to provide context within which to highlight the changes the law brings about, we provide a brief overview of two early regulations that have helped shape the EIA process in China.

A. *The Evolution of EIA in China*

Conceptually, EIA in China traces back to 1973 when the First Conference for National Environmental Protection introduced the "Environmental Quality Assessment Program" on a provisional basis to address industrial pollution.¹⁰¹ It was not until 1979, however, that the first formal EIA was conducted pursuant to the requirements of the Environmental Protection Law adopted on a provisional basis in September of that same year.¹⁰² Up until the time when the Environmental Protection Law was finalized in 1979, the EIA process was merely administrative and not statutorily mandated.¹⁰³

According to the Environmental Protection Law, the EIA process is triggered by development activity (i.e. new construction, additional construction, or reconstruction).¹⁰⁴ Furthermore, the law places the primary responsibility of environmental protection on businesses and institutions, requiring developers to "pay adequate attention to the prevention of pollution and damage to the environment when selecting their sites,

101. Wang et al., *supra* note 2, at 545.

102. *Id.* at 546. The EIA was conducted for a copper mine. *Id.*

103. R.B. Wenger, Wang Huadong & Ma Xiaoying, *Environmental Impact Assessment in the People's Republic of China*, 14 ENVTL. MGMT. 429, 430 (1990).

104. Article Six of the Environmental Protection Law states, in pertinent part:

All enterprises and institutions shall pay adequate attention to the prevention of pollution and damage to the environment when selecting their sites, designing, constructing, and planning production. In planning new construction, reconstruction, and extension projects, a report on the potential environmental effects shall be submitted to the environmental protection department and other relevant departments for examination and approval before designing can be started.

Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 6, available at http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm (P.R.C.).

designing, constructing, and planning production.”¹⁰⁵ Before a developer can begin designing a project, it must submit a report of potential environmental harm to Chinese environmental protection officials for review and approval.¹⁰⁶ The environmental impact report must assess the pollution the project is likely to produce, the environmental impacts of the project, and stipulate any preventive or curative measures that will address the impacts.¹⁰⁷

In 1998, passage of the Ordinance of Environmental Management for the Construction Projects (OEMCP) made construction projects of all sizes subject to EIA, pollution control, and energy efficiency requirements.¹⁰⁸ The OEMCP further qualifies the EIA requirements pertaining to construction projects such that not all construction projects require a detailed environmental impact report. Three categories of construction projects are recognized under the OEMCP, and the detail of the environmental impact report varies, respectively, with the likelihood that the proposed project will cause significant environmental harm.¹⁰⁹

Significantly, the EIA process at this point did not include a provision for public notification or involvement. As one commentator explains, “EIA originated in China very much as a top-down administrative instrument, in response to serious environmental deterioration and external pressure from international funding organizations. . . . [T]here was no preconceived notion that the public should be involved in the EIA process.”¹¹⁰ But with the adoption of the EIA Law in 2003, Chinese citizens were granted a participatory right in the EIA process for the first time.

105. *Id.*

106. *Id.*

107. *See also* Wang et al., *supra* note 2, at 551–52 (noting that environmental protection and management in China fall under the general purview of the state environmental protection agency).

108. Wang et al., *supra* note 2, at 549.

109. Article seven of the OEMCP describes the three categories as follows:

Category A—projects which are likely to cause a range of significant adverse environmental impacts need to produce an Environmental Impact Report (EIR);

Category B—projects which are likely to cause a limited number of significant adverse environmental impacts need to fill in an Environmental Impact Form (EIF);

Category C—projects not expected to cause significant adverse environmental impacts do not require EIA, but should fill in an Environmental Impact Registration Form (EIRF).

Ordinance on Environmental Management for Construction Projects, art. 7 (1998); Yan Wang et al., *supra* note 2, at 552 (noting that only the three listed categories of construction projects require an environmental impact report).

110. Wang et al., *supra* note 2, at 563.

B. 2003 Environmental Impact Assessment Law

The 2003 Environmental Impact Assessment Law (EIA Law) builds on the existing EIA framework in two significant ways. First, it expands the EIA mandate to encompass government plans, as well as construction projects.¹¹¹ Second, and more important for our purposes, the EIA Law makes public participation a required component of the process.

Prior to 2003, EIA in China was singularly project-based, applying only to individual construction projects.¹¹² But the EIA Law adds a Strategic Environmental Assessment (plan-based) overlay to the existing EIA process, whereby government plans for land use and regional development, as well as plans for industry, agriculture, energy, transportation, urban development, tourism, and natural resource development must now undergo EIA.¹¹³ In principle, environmental impact assessment can be undertaken for an individual project such as a hydroelectric dam, an athletic stadium, airport, or assembly plant (project-based EIA) or for plans, programs, and policies, which is commonly referred to as Strategic Environmental Assessment (SEA).¹¹⁴ China's recent embrace of SEA is an attempt to more effectively address problems of pollution and resource scarcity by attacking them at their sources.¹¹⁵

Notwithstanding the different labels, the same basic environmental assessment procedures apply to both project- and plan-based EIA in China.¹¹⁶ In describing the EIA Law process below, our focus will be primarily on the project-based process as opposed to plan-based, but we highlight key differences where they exist.

111. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), ch. 2, available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

112. Wenger et al., *supra* note 103, at 430; see *supra* note 109 and accompanying text.

113. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), arts. 7, 8, available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.). "[T]he significance of [SEA] has attracted increasing attention from EIA experts and officials since the 1990s" and the first official SEA was undertaken for the Air Pollution and Control Law of the People's Republic of China in 1998, nearly five years before SEA became law. Bao Cun-kuan, Lu Yong-sen & Shang Jin-cheng, *Framework and Operational Procedure for Implementing Strategic Environmental Assessment in China*, 24 ENV. IMPACT ASSESSMENT REV. 27, 28, 39 (2004).

114. SEA gained international recognition after the 1991 Espoo Convention. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (entered into force Sept. 10, 1997).

115. Sun Xiaohua, *Forum Aims to Seek Cleaner Nation*, CHINA DAILY, Aug. 29, 2005, at 2, available at http://www.chinadaily.com.cn/english/doc/2005-08/29/content_472887.htm.

116. See generally Bao et al., *supra* note 113, at 27 (describing the SEA process in China). In NEPA practice, this distinction is of little importance because the definition of a "major federal action," which triggers EIA, incorporates both projects and plans. 40 C.F.R. § 1508.18 (2006).

1. EIA Law Process

In practice, EIA investigations typically involve four phases: investigation design or scoping, evaluation of existing environmental quality, prediction of potential environmental impacts, and assessment and analysis (a cost-benefit analysis) of the environmental impacts.¹¹⁷ The results of the EIA investigation are compiled in an environmental impact report, which is used as the basis for decision-making by personnel in environmental protection departments.¹¹⁸

The EIA Law leaves largely intact the pre-existing three categories of EIA documentation requirements for construction projects as established by the OEMCP.¹¹⁹ The most comprehensive documentation requirement applies to projects having a “major potential environmental impact” and for which developers must prepare an environmental impact report (EIR).¹²⁰ Projects having a “light potential environmental impact” require an environmental impact report form (EIF).¹²¹ Finally, for projects having a “very small environmental impact,” developers need only fill out and submit an environmental impact registration form (EIRF).¹²² There is no impact assessment necessary where an EIRF is all that is required for the project.¹²³ Collectively, these are referred to as “EIA documents.”¹²⁴

The EIA Law is organized into separate chapters applicable to plans and projects, respectively. The only EIA document mentioned among the provisions relating to plans is the EIR. SEPA or the relevant environmental protection bureau is the entity responsible for coordinating plan-based EIRs. Developers are responsible for coordinating project-based EIA documents. For construction projects and plans requiring EIA (in other words, for EIRs and in project-based EIFs) the EIA documents are prepared by licensed impact assessment organizations.¹²⁵ SEPA administers the

117. Wenger et al., *supra* note 103, at 432–33. A variety of approaches are used for predicting and analyzing environmental impacts, ranging from ad hoc methods to fairly sophisticated mathematical models. *Id.* at 431.

118. *Id.* at 437.

119. Neal Stender & Zhou Jing, *The New EIA Law and Environmental Protection in China*, CHINA L. & PRAC., Dec. 2002, at 10.

120. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 16(i), *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

121. *Id.* art. 16(ii).

122. *Id.* art. 16(iii).

123. *Id.*

124. *Id.* art. 16.

125. Wang et al., *supra* note 2, at 553. *See also* Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 19, *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

licensing system and maintains a list of certified organizations.¹²⁶ In order to ensure the effectiveness of the assessment, the EIA Law also mandates that these organizations be independent third parties, unrelated to the government.¹²⁷

EIRs are most analogous to the EIS requirement under NEPA because they require the most comprehensive impact assessment of the three types of documents required by the EIA Law.¹²⁸ An EIR consists of an analysis of the potential impact of the project, and must include:

- (a) an overview of the proposed project;
- (b) a description of the existing environment;
- (c) an analysis, forecast, and assessment of the likely environmental impacts
- (d) a description of environmental protection measures incorporated into the project, including technical and economic feasibility analyses;
- (e) an economic analysis of the project's environmental impact;
- (f) recommendations for implementing environmental monitoring; and
- (g) an overall conclusion of the environmental impact assessment.¹²⁹

Plan-based EIRs do not require an economic analysis, but must include an environmental impact analysis, a description of mitigation measures, and an ultimate conclusion as to the likely impact the plan will have on the environment.¹³⁰

It is not clear from the text of the EIA Law what is actually required of the developer who must complete an EIF or EIRF. The EIF is characterized only as a "special assessment."¹³¹ Furthermore, the Law does not describe the form or contents of either document, but leaves it to the discretion of SEPA to determine these at a later time.¹³² Notably, however, EIA is not necessary for projects that require an EIRF; it is simply a form to be "filled

126. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 19, available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

127. *Id.*

128. *C.f. id.* art. 16(i)–(iii).

129. *Id.* art. 17.

130. *See id.* art. 10 (noting that EIRs for special permits must reach a conclusion by viewing the potential environmental impact in conjunction with measures that may alleviate the adverse impact).

131. *Id.* art. 16(ii).

132. *Id.* art. 17.

in and submitted.”¹³³ Accordingly, it can be inferred that this requirement amounts to little more than a check-the-box formality for construction projects that fall into this category.

2. Screening

The EIA screening process—the determination of whether EIA is necessary for a proposed project—is perhaps the most striking procedural difference between the EIA Law and NEPA. Under the EIA Law, SEPA is to produce a catalog classifying which type of EIA document is necessary for particular construction projects.¹³⁴ As opposed to the preliminary EA process under NEPA, the EIA Law screening process is pre-determined. Accordingly, a project requiring an EIRF is much like an agency’s FONSI under NEPA. But, unlike the EA process leading up to a FONSI, in China there exist no provisions for public involvement at this stage in the EIA Law process.

3. EIA Administration

Environmental protection and management in China fall under the general purview of the State Environmental Protection Agency (SEPA).¹³⁵ SEPA is charged with the overall responsibility for coordination and oversight of EIA at the national level.¹³⁶ Additionally, environmental protection bureaus (EPBs) conduct environmental protection operations at the provincial, county, and municipal levels consistent with national laws.¹³⁷

Approval of EIA documents is divided between SEPA and EPBs at the provincial, county, and municipal levels.¹³⁸ Four project types require SEPA approval: specifically, (1) projects involving state secrets or nuclear facilities (2) cross-boundary projects involving two or more provinces; (3) projects that are likely to produce cross-boundary pollution, the impacts of which cannot be agreed to by the different provinces; and (4) projects valued at or over 20 million yuan (approximately US\$2.5 million).¹³⁹ For

133. *Id.* art. 16(iii).

134. *See id.* art. 16 (requiring SEPA to create the “Construction Project Environmental Impact Assessment Classification Administration Catalogue”).

135. Wang et al., *supra* note 2, at 551.

136. *Id.*

137. *Id.*

138. Wang et al., *supra* note 2, at 553.

139. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 23, available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.); *see* Wang et al., *supra* note 2, at 553 (citing OEMCP art. 11).

all other construction projects requiring EIA, approval authority rests with one of the local EPBs depending on the nature or size of the project.¹⁴⁰

C. Public Participation Under the EIA Law

In broad and ambiguous terms, the EIA Law sets forth a novel policy in Chinese EIA, which is to encourage the public to participate in the EIA process “in appropriate ways.”¹⁴¹ Two significant provisions of the EIA Law, applicable to plans and projects, respectively, give teeth to this new policy by requiring some form of public participation in the preparation of an EIR before it is submitted for approval.¹⁴²

The form of public participation is broadly delineated; the only requirement being that some opportunity is to be made available prior to the completion of a draft EIR.¹⁴³ Responsible entities are given the option of holding a hearing or adopting “other forms” of soliciting public opinion on the EIR.¹⁴⁴ For plan-based EIRs, this requirement appears to be conditioned on whether or not the environmental impacts of the proposed plan “involve environmental rights and interests of the public.”¹⁴⁵ There is no indication of how or when such rights and interests are implicated. On the other hand, the participation requirement for project-based EIRs is only limited “in conditions where secrecy is required by State stipulations.”¹⁴⁶

The EIA Law places an additional requirement on the entity drafting an EIR to consider all opinions of the relevant departments, experts, and the public on the draft EIR, and to include their reasons for accepting or rejecting the opinions in the EIR submitted for approval.¹⁴⁷ This requirement applies regardless of whether the EIR concerns a plan or

140. Wang et al., *supra* note 2, at 553. To describe all EPBs as “local” is inaccurate and an oversimplification. EPBs operate at several different levels of the government, their jurisdictions encompassing a province, an autonomous region or municipality, or a county, respectively. *Id.*

141. *See* Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 5, *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.) (“The State encourages relevant work units, experts and the public to participate in environmental impact assessments in appropriate ways.”).

142. *Id.* arts. 11, 21.

143. *See id.* (“The Special Plan drafting organ shall, before the drafts of such plans are submitted for examination and approval, hold evidentiary meetings or testimony hearings or adopt other forms of soliciting opinions on the environmental impact report from relevant work units, experts and the public.”).

144. *See id.* (noting that the drafting organ has the discretion to choose the form to solicit public opinion).

145. *Id.* art. 11.

146. *Id.* art. 21.

147. *Id.* arts. 11, 21.

project.¹⁴⁸

Similar to NEPA, the text of the EIA Law makes only limited references to the scope of public participation in the EIA process. Although the participation requirement is only broadly defined, the EIA Law makes clear the fact that public participation is to play some role in the draft EIR stage of both plan- and project-based EIA. Yet in the context of an institutional system that is currently experiencing huge reform, there are gaps between law and practice. In an effort to address this, the provisions for public participation in the EIA Law are in the process of being supplemented.

IV. RECENT MEASURES TO DEFINE THE PUBLIC'S ROLE IN CHINA'S EIA LAW

Recently promulgated SEPA Guidelines are an effort to “fill in the gap” between the law and practice concerning public participation in Chinese EIA.¹⁴⁹ The Guidelines, which became effective March 18, 2006, clarify the process for soliciting public opinion during the drafting of EIRs for all plans and projects that require them.¹⁵⁰ The new Guidelines reaffirm the broad public participation mandates established by the EIA Law, and explain the rights and obligations of both developers and the public in detail.¹⁵¹

A. *Has SEPA Exceeded its Authority?*¹⁵²

Interestingly, under the EIA Law, only construction projects that require EIRs are referenced in the provisions mandating public participation.¹⁵³ By comparison, the SEPA Guidelines appear to expand the

148. *Id.*

149. Sun Xiaohua, *Public to Help Assess Impact on Environment*, CHINA DAILY, Feb. 23, 2006, at 2, available at http://www.chinadaily.com.cn/english/doc/2006-02/23/content_523022.htm (quoting vice-minister for SEPA, Pan Yue); see generally Measures on Public Participation in Environmental Impact Assessment (promulgated by State Env'tl. Prot. Admin. Feb. 24, 2006, effective Mar. 18, 2006) (P.R.C.) [hereinafter SEPA Guidelines]; see *infra* Appendix B for an English translation of the Draft Regulations.

150. See SEPA Guidelines, art. 2 (referencing articles 11 and 21 of the EIA Law, which prescribe public participation for plans and projects, respectively).

151. See *id.* arts. 6, 7, 16 (directing the responsible entities to disclose EIA information, solicit public opinion, and include their consideration of the public opinions received in the draft EIR prior to submitting it for approval).

152. Interview with Professor Li Zhiping, Professor Sun Yat-sen University, at Zhongshan University of Law (Jan. 2, 2006).

153. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's

scope of public participation to cover projects with less significant environmental impacts, and for which less extensive EIFs are all that is required.¹⁵⁴ Such an expansion of the existing EIA Law calls into question the legality of these provisions in light of existing rules regarding China's legislative hierarchy. The People's Congress is the sole body authorized to make law in China—in this case, the EIA Law.¹⁵⁵ Accordingly, SEPA, being without any power to make law itself, may only implement the EIA Law.

Squarely stated, the question is whether SEPA has exceeded its authority by mandating public participation for projects other than those requiring an EIR. The answer to this question turns on how one chooses to interpret article two of the SEPA Guidelines in light of the EIA Law: whether the provisions are, in fact, more expansive than the EIA Law, and whether such an expansion could be considered a legislative act on the part of SEPA. Even if SEPA were deemed to have exceeded its authority, we think such a finding would only nullify the few provisions that reference EIFs, and leave the substance of the Guidelines intact as they pertain to projects and plans that require an EIR. Obviously, this issue is ripe for further investigation.

Nevertheless, we will proceed to outline the Guidelines as they purport to apply to both EIRs and EIFs. The SEPA Guidelines refer repeatedly to these documents collectively as “EIA documents.”¹⁵⁶ We adopt the same nomenclature.

B. The Timing and Form of Public Disclosure and Public Involvement

The SEPA Guidelines require public disclosure of EIA information at the outset of an EIA investigation and prior to the designated time for public participation. In general, developers, agencies, or the organizations that have been commissioned to conduct EIA investigations (whom we

Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 11, 21, *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

154. *See* SEPA Guidelines art. 2 (encouraging public participation for projects constructed in “environmentally sensitive zones” and projects requiring an EIF); *see also id.* art. 8 (outlining a simplified or streamlined process for public disclosure and solicitation of public opinions for environmentally sensitive projects referenced in article two).

155. The Law on Legislation (adopted by Nat'l People's Cong., Mar. 15, 2000) LAWINFOCHINA (P.R.C.).

156. *See* SEPA Guidelines art. 2 (noting that EIA documents refers to “the activities of soliciting opinions of units, experts and the general public during the approval of environmental impact reports or environmental impact report forms by the departments in charge of environmental protection”).

refer to collectively as the “responsible entities”¹⁵⁷ are encouraged to solicit the views of the public prior to submitting EIA documents to the environmental agency for approval.

Within 15 days from commencing an EIA investigation, a responsible entity must make public the details of the project or plan that is subject to EIA.¹⁵⁸ Among other things, this initial disclosure must identify the initiating developer or agency, as well as the organization that has been hired to conduct the EIA investigation, and the “major items and methods of soliciting public suggestions and opinions.”¹⁵⁹ Thereafter, once the responsible entity has finalized a draft EIA document, it must publish notice of the availability of EIA information and solicit suggestions and opinions about the EIA document from the public prior to submitting it for approval.¹⁶⁰

The Guidelines suggest several ways in which a responsible entity might solicit public comments on EIA documents; including: questionnaires, expert consultations, workshops, debates, and hearings.¹⁶¹ Discretion rests with the responsible entity to choose the form and time of public participation, which they must then include in the notice of EIA availability, along with a summary of the possible environmental impacts of the project or plan, and the major issues about which they wish to receive public input.¹⁶² This notice must be made available at least ten business days prior to the time set for public participation. Notice may be published in newspapers, on websites, or by posting abridged versions of the EIA documents in public places.¹⁶³

The Guidelines envision the involvement of a broad spectrum of individuals and organizations in the EIA process. Responsible entities are encouraged to seek representation from residents, experts, and social organizations, when soliciting comments on EIA documents.¹⁶⁴ When the time for public comment has passed, the responsible entity is then required to clearly explain why certain opinions were accepted and others were rejected and include these explanations with the draft EIA document when

157. *See id.* art. 4 (allowing developers and agencies to delegate the organization of public participation activities to the units they have commissioned to conduct the EIA).

158. *Id.* art. 6.

159. *Id.*

160. *Id.* art. 7.

161. *Id.* art. 11; *see also* Yingling, *supra* note 6. Notwithstanding these forms of involvement, citizens are free to communicate their opinions and suggestions by telephone, fax, letter or email to the responsible entities or the approving environmental agency once the EIA information has been disclosed. SEPA Guidelines art. 12.

162. *See* SEPA Guidelines art. 7 (outlining the contents of the public notice).

163. *Id.* art. 9.

164. *Id.* art. 13.

it is filed for approval.¹⁶⁵ Finally, if any member of the public feels that the responsible entity has not clearly explained its decision to reject an opinion, they may send their comments directly to the environmental agency in charge of approving the EIA.¹⁶⁶ It is not clear exactly what the agency is required to do in response to public complaints of non-compliance.

V. RECOMMENDATIONS

China's recent efforts toward a more open, representative, and participatory process recognize the vital role the public plays in implementing an effective sustainable development strategy. Effective public participation requires, at the very minimum, genuine opportunities for participation and clearly defined procedures for such participation.¹⁶⁷ Ensuring greater public access to information, participation in environmental decision-making, and access to justice are keys to maximizing EIA Law effectiveness.¹⁶⁸

A. Suggestion—Expand the scope of public participation to include all categories of projects and plans.

Whether a project or plan requires an EIR, an EIF, or an EIRF, some form of public participation should occur prior to any project's approval. We are mindful of the potential that this suggestion may require action from the People's Congress and not just SEPA. Nonetheless, public involvement ought to apply to each of the three categories of EIA documentation. The

165. *Id.* art. 16.

166. *Id.* art. 17.

167. China was among the 172 countries that agreed to create greater public access into their national environmental decision-making processes during the 1992 Earth Summit in Rio De Janeiro, Brazil. Report of the United Nations Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf.151/26, Annex I, (June 14, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> [hereinafter Rio Declaration].

168. These three principles, or "pillars," are set forth in Principle 10 of the Rio Declaration as follows:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Rio Declaration, princ. 10.

EIA Law process permits the threshold determination as to the likely environmental impacts of a project—which dictates the level of EIA investigation a project must undergo prior to approval—to occur without any public involvement. In other words, there is no public participation at the screening stage of the Chinese EIA process.

By contrast, U.S. courts have continually required some sort of opportunity for public involvement in the screening stage of the NEPA process, despite the fact that there is no regulation requiring disclosure of draft EAs. Shortly following the enactment of NEPA, the U.S. Court of Appeals, Second Circuit, held that agencies “must give notice to the public of [a] proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency’s threshold decision” whether an EIS is needed.¹⁶⁹ Recently, a district court halted a major logging project because the U.S. Forest Service failed to circulate a draft EA or involve the public in some other manner.¹⁷⁰ Even where an agency finds that EIA is unnecessary (i.e. a FONSI), CEQ regulations require agencies to make FONSI available to the public and to provide an opportunity for public comment in some instances.¹⁷¹

Similar to a FONSI, Chinese projects that require EIRFs have been determined to have very little or no environmental impact and thus do not undergo EIA.¹⁷² Yet, unlike the U.S. NEPA process, the Chinese EIA Law process does not provide a pre-decisional opportunity for public participation for environmentally insignificant projects. The participatory right need not be extensive. But the Chinese public ought, at the very minimum, to have an opportunity for informed involvement prior to EIA approval. Making public a one or two page document that briefly outlines the basis of the government’s decision to classify a particular project as requiring an EIRF could accomplish this.

B. Suggestion—Create additional processes to ensure that public involvement occurs before EIA documents are submitted for approval.

The quality of EIA documentation is impacted by the stage in the process at which public participation is undertaken.¹⁷³ Ideally, the public

169. Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

170. Sierra Nevada Forest Prot. Campaign v. Weingardt, 376 F. Supp. 2d 984 (E.D. Cal. 2005).

171. 40 C.F.R. § 1501.4(e)(1)–(2) (2006).

172. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 16(iii), available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

173. Norman Lee, *Reviewing the Quality of Environmental Assessments*, in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES 137, 138 (Norman Lee & Clive George

should have an opportunity to provide feedback on a project or plan early enough in the drafting of the EIA document so that they may contribute to the formation of the ultimate conclusions about the environmental impacts that form the substance of the draft EIA document.¹⁷⁴ That public participation under the SEPA Guidelines occurs after the draft EIA document has been finalized does not render the public's involvement ineffective. However, participation initiated any time after the EIA document has been submitted for approval is likely to be too late because, by that point, the institutional and economic incentives for EIA approval are probably overwhelming.

Article seventeen of the Guidelines attempts to ensure the public's participatory right by allowing individuals to submit their comments directly to the approving agency if the citizen feels that the responsible entity has not considered or clearly explained why it rejected an opinion.¹⁷⁵ Additionally, article twelve could be interpreted to permit the public to submit comments to the approving authority for any reason and at any time after the finalized draft EIA document has been disclosed to the public.¹⁷⁶

Without a stronger requirement that the approving agency take appropriate action when they receive such complaints, these provisions do little to ensure a participatory right in the event that the responsible entity fails to ever solicit public opinion. Although responsible entities are required to solicit public opinion on draft EIA documents before submitting them for approval, we are concerned that it may be too easy for responsible entities to ignore this requirement, that is, for EIA documents to end up in the hands of the approving agency without having first been subject to public review. Additionally, we are concerned that even where responsible entities solicit public opinion prior to seeking approval of a draft EIA document, the opportunity afforded for public comment may be too brief or inconspicuous such that it severely diminishes the public's right of involvement.¹⁷⁷ Additional procedures that provide more particular time

eds., 2000)

174. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 17, available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.); SEPA Guidelines art. 7.

175. SEPA Guidelines arts. 16, 17.

176. *Id.* art. 12.

177. A group of journalists, academics, and nongovernmental activists convened on March 19, 2006, the day after the SEPA Guidelines became effective, and expressed concern that "the proposed public comment period on EIA reports—currently a minimum of 10 days—is too short to ensure adequate public participation." Yingling, *supra* note 6. "They also raised skepticism about an exemption for projects deemed to be 'state secrets,' worried that this term would likely be abused by developers to shun their environmental responsibilities. A possible way to avoid any manipulation, they suggest, is to make public the formal State Council documents that grant such status." *Id.*

frames for public participation would address these concerns.

For example, responsible entities could be required to execute some form of public participation within thirty days of making their initial public disclosure under article six of the guidelines. This would mean that within thirty days of making an initial EIA information disclosure, the responsible entity would have to publish notice of the form and time for public participation pursuant to articles seven and nine of the Guidelines.

The length of time we have suggested is arbitrary. To the point, the important consideration in designing an appropriate length of time should be to ensure that, whatever the time frame, the public can participate meaningfully and on an informed basis. Above all, the length of time should be applied consistently in every case, absent the rare situation where haste may be required. This consistency is important for three reasons. First, it will provide the public with greater certainty about when they may expect to participate. Second, it will more clearly define the obligations of responsible entities. Finally, it will put all parties, including the approving agency, on notice so that a failure of a responsible entity to solicit public opinion within the prescribed time period will be glaringly apparent and quickly remedied. The responsible entity would still choose the form of public participation, but the establishment of a particular time frame for soliciting public opinion following the initial EIA information disclosure will ensure that this choice is actually implemented.

*C. Suggestion—Increase opportunities for public enforcement
of EIA non-compliance.*

Public participation can be a viable and perhaps administratively cost-effective means of ensuring industry compliance with the conditions placed on development or operation pursuant to EIA. Commentators note that circumvention of pollution control requirements continues unabated due to a combination of passive compliance and lax enforcement at the local level.¹⁷⁸

Passive compliance, to the extent it continues today, may be attributable to the failure of the law to impose adequate penalties imposed on developers that will incentivize compliance.¹⁷⁹ In addition, local EPBs are legally allowed to keep up to 20% of the fines they collect to cover their

178. See Carlos Wing-Hung Lo, Shui-Yan Tang & Shek-Kiu Chan, *The Political Economy of EIA in Guangzhou*, 17 ENVTL. IMPACT ASSESSMENT REV. 371, 378 (1997) (noting how enforcement problems in the Guangzhou EBP have allowed developers to delay, or forego altogether, the installation of pollution controls).

179. *Id.*

expenses.¹⁸⁰ In such a situation, the “polluter-pay-as-you-go” scenario is a win-win situation for both the developer and the agency involved. In other words, it is cheaper for the developer to continue to not comply, and it is essential to an EPB’s operating budget to continue collecting fines.

The EIA Law attempts to address both of these issues. The maximum fine for developer non-compliance increases from 100,000 to 200,000 yuan (approximately \$25,000 US) under the EIA Law.¹⁸¹ In addition, administrative sanctions and criminal liability are imposed on individuals who practice favoritism, or who abuse or neglect their duties within the environmental authority responsible for approval.¹⁸² While we are uncertain as to the efficacy of these changes in law, we recommend that allowing the public to play a part in the enforcement mechanism can only improve the overall process and promote the effectiveness of EIA in China.

Though every city and county in China has a special Xinfang Office set up for receiving public complaints—and, theoretically, this includes environmental complaints such as non-compliance with EIA—these offices can only serve as a sounding board for public concerns because they are without any authority to act.¹⁸³ Ideally, there should be a formalized process for filing complaints specifically pertaining to EIA with the authority responsible for enforcement. We think this suggestion should be well received because it would lead to the public policing of EIA and help to offset some of the administrative burdens attendant to enforcement.

CONCLUSION

A fundamental principle of the both NEPA and the EIA Law is the promotion of “harmonious development of the economy, society and environment.”¹⁸⁴ By opening the door for public participation in the EIA

180. *Id.* at 379.

181. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 31, *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.); Stender & Zhou, *supra* note 119.

182. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 35, *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.); Stender & Zhou, *supra* note 119.

183. *See* Wenger et al., *supra* note 103, at 434 (noting that “such potential actions are a far cry from formal public participation”).

184. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 1, *available at* http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.); *see also* National Environmental Policy Act of 1969 (NEPA), § 101(a), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4331(a) (2000)). (“[I]t is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other

process, China is already progressing toward this end. Public participation has long been recognized as an integral component of environmental decision-making, leading to greater governmental accountability and more effective decisions about how to prevent or mitigate environmental damage that may result from human activity.¹⁸⁵

The limiting factor to growth and progress in both China and the U.S. is no longer the ability to raise capital or increase production but the ability to achieve economically sustainable development.¹⁸⁶ As China continues to undergo considerable infrastructural development fueled by foreign investment, it becomes increasingly apparent that it must balance economic and environmental objectives. A robust and effective EIA process is a necessary step toward achieving this balance.

requirements of present and future generations . . .”).

185. See Rio Declaration, princ. 10 (noting that “environmental issues are best handled with the participation of all concerned citizens, at the relevant level.”); see also BEIERLE & CAYFORD, *supra* note 18 (noting that Greater involvement in the EIA process educates and informs the public, which increases environmental awareness); Crescenda Maurer, Suzanne Ehlers & Andrew Buchman, *Aligning Commitments: Public Participation, International Decision-making, and the Environment*, WORLD RESOURCES INST. ISSUE BRIEF, May, 2003, at 1.

186. “More mechanisms to incorporate environmental and social externalities will be needed to enable capital markets to achieve their intended purpose—to consistently allocate capital to its highest and best use for the good of the people and the planet.” Al Gore & David Blood, Op-Ed, *For People and Planet*, WALL ST. J., Mar. 28, 2006, at A20 (“[W]e believe that sustainable development will be primary driver of industrial and economic change over the next 50 years.”).

APPENDIX A

***Environmental Impact Assessment Law of the
People's Republic of China***¹⁸⁷

Adopted on 28 October 2002 at the 30th Session of the
Standing Committee of the 9th National People's Congress

Presidential Decree No. 77 of the People's Republic of China

Effective September 1, 2003

CHAPTER I.

GENERAL PRINCIPLES.

Article 1.

This Law is enacted in order to carry out a sustainable development strategy, to prevent adverse impact on the environment after the implementation of plans and construction projects, and to promote harmonious development of the economy, society and environment.

Article 2.

The environmental impact assessment referred to in this Law means a method and system for analyzing, forecasting and assessing the potential impact on the environment after implementation of plans and construction projects, for putting forward strategies and measures to prevent or alleviate adverse impacts on the environment, and for carrying out follow-up and monitoring.

Article 3.

Plans drawn up within the scope specified in Article 9 hereof, and construction projects impacting the environment in the territory of the People's Republic of China or other maritime areas under the jurisdiction of the People's Republic of China, shall have an environmental impact assessment carried out in accordance with this Law.

187 Unofficial Translation Courtesy of Coudert Brothers

Article 4.

Environmental impact assessment must be objective, open and fair, and comprehensively consider the potential impact after implementation of plans or construction projects on all types of environmental factors and the ecosystem constituted by such factors, in order to provide a scientific basis for decision-making.

Article 5.

The State encourages relevant work units, experts and the public to participate in environmental impact assessments in appropriate ways.

Article 6.

The State strengthens the establishment of a fundamental database and assessment index system for environmental impact assessment, encourages and supports scientific research into the methods and technical standards of environmental impact assessment, establishes necessary environmental impact assessment information-sharing systems, and raises the scientific nature of environmental impact assessments.

The State Council administrative department in charge of environmental protection, together with relevant State Council departments, shall organize the establishment and improvement of an environmental impact assessment fundamental database and assessment indication system.

CHAPTER II.

ENVIRONMENTAL IMPACT ASSESSMENT FOR PLANNING.Article 7.

Relevant departments of the State Council, people's governments at or above the level of municipalities (with districts) and their relevant departments, for plans of which they have organized the drafting, on land use, plans of exploration, utilization and development in the areas, river basins and sea areas, shall in the course of drafting organize and conduct environmental impact assessments and shall provide writings or explanations on the environmental impact of these plans.

The environmental impact writings or explanations of the plans shall provide analysis, forecasts and assessment on potential environmental impact after plan implementation, and set forth countermeasures and steps that prevent or alleviate adverse environmental impacts. Then these writings or explanations shall be part of the draft plans and be submitted to the plan examination and approval authority.

The examination and approval authority will not examine and approve

any draft plans without environmental impact writings or explanations.

Article 8.

The relevant departments of the State Council, people's governments at or above level of municipalities (with districts), and their relevant departments shall organize and conduct environmental impact assessments on relevant Special Plans concerning industry, agriculture, pasturage, forestry, energy, water conservancy, communication, urban construction, tourism and exploration of natural resources (hereinafter called the "Special Plans") prepared by them before the drafts of such Special Plans are submitted for examination and approval, and shall submit environmental impact reports to the authority responsible for examining and approving such Special Plans.

Guidance plans among the Special Plans listed in the preceding paragraph shall go through environmental impact assessment in accordance with the provisions of Article 7 hereof.

Article 9.

The specific scope of plans for which environmental impact assessment is specified to be conducted in accordance with the provisions of Articles 7 and 8 hereof shall be specified by the State Council administrative department in charge of environmental protection jointly with the relevant departments of the State Council, and shall be reported to the State Council for approval.

Article 10.

Environmental impact reports for Special Plans shall include the following contents:

- (i) analysis, forecast and assessment on the potential environmental impact after implementation of the plans;
- (ii) measures and countermeasures to prevent or alleviate adverse environmental impacts; and
- (iii) an environmental impact assessment conclusion.

Article 11.

Towards Special Plans that may possibly cause adverse environmental impact and involve environmental rights and interests of the public, the Special Plan drafting organ shall, before the drafts of such plans are submitted for examination and approval, hold evidentiary meetings or testimony hearings or adopt other forms of soliciting opinions on the environmental impact report from relevant work units, experts and the

public. But cases in which secrecy is required by State regulations are excepted.

The Special Plan drafting organ shall conscientiously consider the opinions of relevant work units, experts and the public on the drafts of the environmental impact report, and shall attach the explanations of its acceptance or non-acceptance of such opinions to the environmental impact report submitted for examination.

Article 12.

The Special Plan drafting organ shall, when submitting the draft of the plan for approval, attach the environmental impact report and send it to the examination and approval authority for examination. The examination and approval authority shall not examine and approve a draft plan without an attached environmental impact report.

Article 13.

Before the people's government at or above the level of municipalities (with districts) examines and approves the draft of a Special Plan and makes a decision, it shall first designate the administrative department in charge of environmental protection administration designated by the people's government, or other department, to assemble representatives of relevant departments and experts to form an examination group to conduct examination of the environmental impact report. The examination group shall provide written opinions.

The experts participating in the examination group as specified in the preceding paragraph shall be determined by random selection from the expert list of the corresponding profession in the expert database established according to the stipulations of the State Council administrative department in charge of environmental protection.

For environmental impact reports of draft Special Plans of which the relevant departments of the people's governments at provincial level and above are in charge of examination and approval, examination methods shall be formulated by the State Council administrative department in charge of environmental protection, together with relevant State Council departments.

Article 14.

When examining and approving the draft Special Plans, the relevant department of the people's governments at or above the level of municipalities (with districts) or the people's governments at provincial level and above, shall make the conclusion of the environmental impact

report and the examination opinion thereon an important basis for decision-making.

In the event that the relevant authority does not adopt the conclusion and examination opinions of the environmental impact report in examining and approving the draft plans, it shall make an explanation and record it for future reference.

Article 15.

After the implementation of a plan having major impact on the environment, the drafting authority shall promptly organize a follow-up assessment of the environmental impact and report the assessment result to the examination and approval authority. If it is discovered that there is an obvious adverse impact on the environment, measures for improvement shall be put forward in good time.

CHAPTER III.

ENVIRONMENTAL IMPACT ASSESSMENT FOR CONSTRUCTION PROJECTS.

Article 16.

The State carries out construction project environmental impact assessment classification administration based on the extent of environmental impact of the construction projects.

The construction work unit shall organize the preparation of an environmental impact report, environmental impact report form or fill in and submit an environmental impact registration form (hereinafter collectively referred to as "Environmental Impact Assessment Documents") according to the following stipulations:

- (i) in case of a major potential environmental impact, an environmental impact report shall be drawn up and a comprehensive assessment of any resulting environmental impact shall be carried out;
- (ii) in case of light potential environmental impact, an environmental impact report form shall be drawn up and an analysis or special assessment of the resulting environmental impact shall be carried out;
- (iii) in case of very small environmental impact, it is not necessary to carry out an environmental impact assessment, but an environmental impact registration form shall be filled in and submitted;

A construction project environmental impact assessment classification administration catalogue will be drawn up and announced by the State

Council administrative department in charge of environmental protection.

Article 17.

An environmental impact report for construction projects shall include the following contents:

- (i) overview of the construction project;
- (ii) status quo of the surrounding environment of the construction project;
- (iii) analysis, forecast and assessment of the potential environmental impact of the construction project;
- (iv) measures taken by the construction project for environmental protection as well as technical and economic demonstrations;
- (v) analysis of economic gains and loss of the construction project's environmental impact;
- (vi) recommendations for implementing environmental monitoring of the construction projects; and
- (vii) conclusion of the environmental impact assessment.

For construction projects relating to water and soil preservation, there also must be a water and soil preservation proposal approved by the administrative department in charge of water supply.

The content and format of environmental impact report forms and environmental impact registration forms will be determined by the State Council administrative department in charge of environmental protection.

Article 18.

Construction project environmental impact assessments shall avoid duplicating plan environmental impact assessments.

A plan that is made into a single complete construction project will have an environmental impact assessment carried out as a construction project, and will not have a plan environmental impact assessment carried out.

A construction work unit may simplify the environmental impact assessment contents for specific construction projects that have been included in plans that have already gone through environmental impact assessment.

Article 19.

Organizations accepting entrustment to provide technical services to construction project environmental impact assessments, after going through verification of qualifications by the State Council administrative department

in charge of environmental protection, will be issued with a qualification certificate and will provide services to environmental impact assessments according to their grading and assessment scopes as set forth in the qualification certificate and will be accountable for the assessment conclusions. The qualification terms and administrative rules for an organization providing technical services to a construction project environmental impact assessment will be formulated by the State Council administrative department in charge of environmental protection.

The State Council administrative department in charge of environmental protection shall announce the list of organizations that have obtained qualification certificates to provide technical services to construction project environmental impact assessments.

Organizations providing technical services to construction project environmental impact assessments shall not have any related interests with the administrative department in charge of environmental protection responsible for examination and approval of construction project Environmental Impact Assessment Documents or with other relevant examination and approval authorities.

Article 20.

The environmental impact report or environmental impact report form in Environmental Impact Assessment Documents shall be prepared by an organization with corresponding environmental impact assessment qualifications.

No work unit or individual shall designate, for any construction work unit, the organization responsible for preparing the environmental impact assessment for its construction projects.

Article 21.

Except in conditions where secrecy is required by State stipulations, for construction projects that may have a major impact on the environment and for construction projects for which an environmental impact report is required, the construction work unit shall, prior to the submission for approval of the construction project environmental impact report, hold evidentiary meetings or testimony hearings or adopt other forms of soliciting the opinions of relevant work units, experts and the public.

Explanations of adoption or rejection of the opinions of relevant work units, experts and the public shall be attached to the environmental impact report submitted by the construction work unit for approval.

Article 22.

Construction project Environmental Impact Assessment Documents shall be submitted by the construction work unit to the administrative department in charge of environmental protection having examination and approval authority in accordance with stipulations of the State Council; if the construction project has an industry department in charge, the environmental impact report or environmental impact report form shall, after going through preliminary examination by the industry department in charge, be submitted to the administrative department in charge of environmental protection having examination and approval authority, to be examined and approved.

Examination and approval of marine environmental impact reports for oceanic construction projects shall be handled in accordance with the *PRC Marine Environment Protection Law*.

The examination and approval authority shall make an examination and approval decision and give written notice to the construction work unit within 60 days after receipt of an environmental impact report, within 30 days after receipt of an environmental impact report form, or within 15 days after receipt of an environmental impact registration form, respectively.

No fees shall be received or collected for the preliminary examination, or examination and approval, of construction project Environmental Impact Assessment Documents.

Article 23.

The State Council administrative department in charge of environmental protection shall be responsible for examination and approval of Environmental Impact Assessment Documents for the following construction projects:

- (i) construction projects of nuclear facilities and top-secret projects and with other special characteristics;
- (ii) construction projects that straddle the borders of administrative regions of provinces, autonomous regions or municipalities directly under the central government;
- (iii) construction projects approved by the State Council or the relevant department authorized by the State Council.

Limits on examination and approval authority over construction project Environmental Impact Assessment Documents other than those set forth in the above paragraph will be determined by the people's government of provinces, autonomous regions and municipalities directly under the central government.

In the event that a construction project may cause an adverse impact on

the environment straddling administrative regions, and the relevant administrative departments in charge of environmental protection come to different conclusions in their environmental impact assessments of such a project, then its Environmental Impact Assessment Documents will be examined and approved by the relevant administrative department in charge of environmental protection at the joint next level higher up.

Article 24.

After construction project Environmental Impact Assessment Documents go through examination and approval, if any major changes occur in the nature, scale, location or adopted manufacturing technique or measures for preventing pollution and ecological damage, the construction work unit shall re-submit for approval the construction project Environmental Impact Assessment Documents.

In the event that work begins on a construction project more than five years from the date of approval of the Environmental Impact Assessment Documents for such a project, the Environmental Impact Assessment Documents shall be re-submitted for renewed examination and verification of Environmental Impact Assessment Documents. The original approval authority shall, within 10 days after receipt of the Environmental Impact Assessment Documents for the construction project from the construction work unit, give written notice of its opinion to the construction work unit.

Article 25.

Where construction project Environmental Impact Assessment Documents are not examined by the examination and approval authority stipulated by law or are not approved after examination, such examination and approval authority shall not approve its construction and the construction work unit shall not begin work on construction.

Article 26.

In the course of a construction project, the construction work unit shall simultaneously implement the countermeasures and steps for environmental protection raised in the environmental impact report, the environmental impact report form and the examination and approval opinions of the examination and approval authority of the Environmental Impact Assessment Documents.

Article 27.

In the course of the construction and operation of a project, if conditions arise that are inconsistent with Environmental Impact

Assessment Documents that have gone through examination and approval, the construction work unit shall organize a post-assessment of the environmental impact, adopt corrective measures, and report for the record to the original examination and approval authority of the Environmental Impact Assessment Documents and construction project approval authority. The original examination and approval authority of the Environmental Impact Assessment Documents may also instruct the construction work unit to prepare a post-assessment of environmental impact and take corrective measures.

Article 28.

The administrative department in charge of environmental protection shall conduct follow-up inspections on the environmental impact after the construction projects have gone into operation or utilization, and shall make a thorough investigation into the reasons and responsibility for the creation of serious environmental pollution or ecological damage. If it is due to the reason that the construction project Environmental Impact Assessment Documents prepared by the organization providing environmental impact assessment technical services are untrue, such organization shall be investigated for legal responsibility in accordance with Article 33 hereof; if it is due to the reason that the staff of the approval authority neglected or breached their duties, or approved construction project Environmental Impact Assessment Documents that should not be approved according to law, they shall be investigated for legal responsibility in accordance with Article 35 of herein.

CHAPTER IV.
LEGAL LIABILITY.

Article 29.

In the event that a plan drafting organ violates the provisions hereof, commits fraud or neglects its duty when organizing the environmental impact assessment, causing the environmental impact assessment to be seriously untrue, the person in charge who is directly responsible and other directly responsible persons shall receive administrative penalties according to law from higher level authorities or supervisory authorities.

Article 30.

In the event that a plan approval authority, in violation of the provisions hereof, approves a draft plan in which the writings or explanations on environmental impact required by the law to be written are not written, or

approves a draft Special Plan in which the environmental impact report required by law to be attached is not attached, the person in charge who is directly responsible and other directly responsible persons shall receive administrative penalties according to law from higher level authorities or supervisory authorities.

Article 31.

In the event that a construction work unit fails to submit the construction project Environmental Impact Assessment Documents for approval in accordance with the law or fails to re-submit for approval of the construction project Environmental Impact Assessment Documents or to apply for renewed examination and verification of Environmental Impact Assessment Documents in accordance with Article 24 hereof and begins work on construction without authorization, the administrative department in charge of environmental protection that has the examination and approval authority over the construction project Environmental Impact Assessment Documents shall instruct the work unit to stop construction and to carry out the supplemental formalities within a time limit and, if the time limit is exceeded without subsequently handling the formalities, may impose a fine of Rmb50,000 to Rmb200,000, and administrative penalties according to law, on the person in charge who is directly responsible and other directly responsible persons in the construction work unit.

In the event that the construction project Environmental Impact Assessment Documents do not go through examination and approval, or do not gain the consent of the original examination and approval authority upon renewed examination and verification, and the construction work unit begins work on construction without authorization, the administrative department in charge of environmental protection with examination and approval authority over such construction project Environmental Impact Assessment Documents shall instruct the work unit to stop construction, and may impose a fine of Rmb50,000 to Rmb200,000, and administrative penalties according to law, on the person in charge who is directly responsible and other directly responsible persons in the construction work unit.

If the construction work unit of an oceanic construction project commits illegal acts set forth in the above two paragraphs, it will be punished in accordance with the *PRC Marine Environment Protection Law*.

Article 32.

If a construction project fails to carry out an environmental impact assessment as required by the law, or the Environmental Impact

Assessment Documents have not gone through examination and approval according to law, and the examination and approval authority, without authorization, approves the construction project, the person in charge who is directly responsible and other directly responsible persons shall receive administrative penalties according to law from higher level authorities or supervisory authorities; if a crime is constituted, criminal responsibility shall be investigated according to law.

Article 33.

If an organization entrusted to provide construction project environmental impact assessment technical services neglects its duty or commits fraud in the course of the environmental impact assessment, causing Environmental Impact Assessment Documents to be untrue, the administrative department in charge of environmental protection that grants qualification for environmental impact assessments may reduce the organ's grade of qualification or suspend its qualification certificate, as well as penalize it with a fine of one to three times the charges received; if a crime is constituted, criminal responsibility shall be investigated according to law.

Article 34.

If the authority in charge of preliminary examination, examination and verification, or examination and approval of construction project Environmental Impact Assessment Documents receives or collects expenditures in the course of examination and approval, its higher authorities or supervisory authorities will order refunds; and, if circumstances are serious, will impose administrative penalties according to law on the person in charge who is directly responsible and other directly responsible persons.

Article 35.

If the staff of the administrative department in charge of environmental protection or other departments practise favouritism, abuse their powers, neglect their duty, or illegally approve construction project Environmental Impact Assessment Documents, they will receive administrative penalties in accordance with the law; if a crime is constituted, criminal responsibility will be investigated according to law.

CHAPTER V.
SUPPLEMENTARY PROVISIONS.

Article 36.

The people's governments of provinces, autonomous regions and municipalities directly under the central government may, in accordance with the actual circumstances in each area, require an environmental impact assessment to be carried out for the plans prepared by the people's governments at the county level under their jurisdiction. Specific procedures will be established by provinces, autonomous regions and municipalities directly under the central government with reference to Part Two hereof.

Article 37.

Procedures for construction project environmental impact assessments for military facilities will be established by the Central Military Commission in accordance with the principles hereof.

Article 38.

This Law shall come into force as of September 1 2003.

APPENDIX B

*Measures of the State Environmental Protection Administration on
Public Participation in Environmental Impact Assessment*

(Draft for Comments)¹⁸⁸

CHAPTER I.
GENERAL PRINCIPLES

Article 1. – Purpose.

In order to promote and standardize public participation in environmental impact assessments (hereafter referred to as EIA), these Measures are formulated in accordance with the provisions of the Law on Environmental Impact Assessment of the People's Republic of China and of other laws and regulations.

Article 2. – Scope of application.

The State encourages public participation in the EIA of construction projects and of government plans and programs.

These Measures should apply to the soliciting of opinions of units, experts and the general public during the EIA process:

The EIA of special project plans covered by Article 11 of the Law on Environmental Impact Assessment of the People's Republic of China that might create adverse environmental impact and which directly involve the environmental rights and interests of the public;

The EIA of construction projects covered by Article 21 of the Law on Environmental Impact Assessment of the People's Republic of China for which an EIA report should be compiled;

The EIA of construction projects covered by the provisions of the Construction Project Environmental Impact Assessment Classification Administration Catalogue that are built in environmentally sensitive zones and that should be accompanied by an EIA report;

188. Draft Translation by The China Law Center, Nov. 18, 2005. Special thanks to Alex Wang of NRDC Beijing for providing the authors with this translation.

The activities of soliciting opinions of units, experts and the general public during the approval of environmental impact reports or environmental impact report forms (hereafter referred to as EIA documents) by the departments in charge of environmental protection;

Plan EIAs relating to land use, regional planning, watershed areas and marine areas should be carried out with reference to these Measures.

Article 3. – Public participation principles.

Public participation should implement the principles of openness, equality and broadness.

Article 4. – General obligations of information disclosure.

When construction units and agencies that compile the special project plans (hereafter referred to as construction units and compilation agencies) conduct EIA and compile EIA documents, and when the departments in charge of environmental protection examine and approve EIA documents, they should in accordance with the provisions of these Measures use appropriate and feasible forms of public participation and disclose relevant EIA information, except for that deemed to be exempted by the State from disclosure as classified information.

Construction units and compilation agencies may entrust the work of organizing public participation activities to EIA units that are responsible for the construction project EIA and plan EIA or other organizations and institutions (hereafter referred to as entrusted units).

CHAPTER II.

GENERAL REQUIREMENTS OF PUBLIC PARTICIPATION.

Article 5. – General requirements of information disclosure.

Construction units, compilation agencies and departments in charge of environmental protection should, using methods that facilitate public knowledge, disclose EIA related information to the general public in accordance with the provisions of these Measures.

Article 6. – Requirements of first-time information disclosure.

Construction units that compile environmental impact reports and agencies that compile special plans should, within 15 business days after EIA work has been conducted by entrusted units, disclose the following information and publicly solicit suggestions and opinions from the general

public on EIA work on construction projects or special plans:

- Name and overview of construction projects or special plans;
- Name and contact information of construction units or special plan compilation agencies;
- Name and contact information of entrusted units;
- Procedure and primary content of EIA work;
- Major items and methods of soliciting public suggestions and opinions.

Article 7. – Public notice of EIA document information.

Construction units, compilation agencies and entrusted units should notify the public of EIA document information after the EIA documents have been finalized but before the documents are submitted for examination and approval, and solicit public suggestions and opinions about the EIA documents.

Public notice of EIA documents should include the following major content:

- Summary of construction projects or special plans;
- Outline of possible environmental impact of construction projects or special plans;
- Main points of responses and measures to prevent or alleviate adverse environmental impact;
- Main points of EIA conclusions raised in the EIA documents;
- Methods and places for the general public to consult the abridged version of EIA documents;
- Scope and major issues of concern related to soliciting public opinions;
- Specific forms and time for soliciting public opinions.

Article 8. – Requirement of simplification of environmental impact forms for public information disclosure.

Medium and small-sized construction projects to be built in the environment-sensitive areas covered by the Construction Project Environmental Impact Assessment Classification Administration Catalogue for which environmental impact forms should be compiled may have the relevant information in simplified or bulletin forms when the forms are disclosed to the public. The notice should contain the methods and places for the public to consult the environmental impact forms, the scope and major issues of concern on which public opinions are sought and the specific forms and times for soliciting public opinions.

Article 9. – Major methods of information disclosure.

When construction units, compilation agencies and entrusted units issue information notices in accordance with Article 7 of these Measures and need to solicit public opinions, they should, 10 business days in advance, adopt the following methods to disclose materials related to the construction project:

- Publish the notice in publicly circulated newspapers, public websites or special websites in the areas that may be affected by the construction projects or special plans;
- Disseminate relevant materials free of charge;
- Provide the abridged version of EIA documents at specified places for public consultation;
- Build special webpages for the information to be disclosed;
- Put up links on public websites or special websites so the public can access EIA documents;
- Other familiar and convenient ways for the public to access the information.

Article 10. – Requirements of information disclosure by examination and approval agencies.

The departments in charge of environmental protection that examine and approve or that organize the examination and approval of EIA documents should disclose the name and other primary information of the EIA documents submitted to be examined and approved during the time of acceptance, examination and approval on the websites and bulletin boards of such agencies or in other government-run publicly circulated materials or through other familiar and convenient ways for the public to access the information.

Article 11. – Organization forms of public participation.

Construction units, compilation agencies and entrusted units or departments in charge of environmental protection may adopt various forms to solicit public opinions, such as surveys, expert consultancy, workshops, discussion meetings, hearings, etc.

Article 12. – Other forms for the public to provide feedback.

Apart from the forms mentioned in the previous article, after relevant information is disclosed, the public may put forward suggestions and opinions related to EIA work or EIA documents to construction units, compilation agencies, entrusted units or departments in charge of environmental protection that are approving EIA documents by means of

telephone, fax, letters, e-mail or other means.

Article 13. – Scope of public participation.

The scope of seeking public opinions on construction project EIA documents should include units, social organizations, residents committees, villagers committees and other grassroots-level people's self-governance organizations, individual residents, residents representatives or lawyers entrusted by residents, experts in the relevant fields and units and individuals concerned with the public's environmental rights and interests who are located in the areas affected by the construction projects (including possible risks and accidents) and who might be impacted environmentally during project construction or post-construction.

The scope of seeking public opinions on plan EIA should include enterprises and institutions, social organizations that might be impacted, experts in fields related to the plan and other units and individuals concerned with environmental public interest and the public's environmental rights and interests.

Article 14. – Principles for selecting representatives for public participation.

Construction units, compilation agencies and entrusted units or departments in charge of environmental protection should, in accordance with the principles of openness, equality, broadness and representativeness, take into consideration such factors as profession, region, expertise, expressiveness and intensity of environmental impact, and reasonably select the units and individuals from whom to solicit opinions.

Article 15. – Preservation of public opinions.

Construction units, compilation agencies and entrusted units should record and preserve for record-keeping purposes the original written opinions that were solicited. After the examination and approval of EIA documents have been completed, the entrusted units should return all the original documents to the construction units or compilation agencies, which should register, file and preserve the opinions.

Article 16. – Acceptance of public opinions.

Construction units or compilation agencies should append explanations of what public opinions were accepted and which were not accepted to the EIA documents that are submitted for examination and approval.

Departments in charge of environmental protection, when examining and approving EIA documents, should organize experts to verify the aforementioned explanations and seriously consider the public opinions

during the approval process.

Article 17. – Protection of the right to participate.

When the public believes that construction units, compilation agencies or entrusted units have not provided any clear explanations as to why a certain opinion has not been accepted, they may refer the matter to the departments in charge of environmental protection that examine and approve the EIA documents. The public may append clear and specific suggestions and opinions in written form, and the departments in charge of environmental protection that examine and approve the EIA documents may carry out verification.

CHAPTER III.

ORGANIZATIONAL FORMS OF PUBLIC PARTICIPATION.

SECTION 1.

PUBLIC OPINION SURVEY AND EXPERT CONSULTANCIES.

Article 18. – Requirements for public opinion surveys.

Public opinion surveys may take such forms as the questionnaire and should be completed during the process of compiling the EIA documents.

When a questionnaire is used, the content should be designed in such a way that it is simple, popular, clear and easy to understand and should be designed to avoid questions that may induce answers.

Questionnaires should be distributed within the areas affected by the special plan or construction projects and take into consideration the specific situation, the comprehensive consideration of the scope of impact, the reaction of society, and the human and material resources needed to implement public participation, based on which the appropriate number of the questionnaires should be determined.

Article 19. – Requirements for expert consultancies.

Expert consultancy may be conducted in written form, and either with experts individually or with groups of experts in relevant units and research institutes.

The experts and units consulted should produce clear opinions on the matter consulted in written form, which individuals should sign with their names and units should stamp with their seals.

When consulting with expert groups, different opinions should be recorded in the reply.

SECTION 2.

WORKSHOPS AND DISCUSSION MEETINGS.Article 20. – Requirements for workshops and discussion meetings.

Construction units, compilation agencies and entrusted units or the departments in charge of environmental protection responsible for the examination and approval of EIA documents should reasonably determine the main agenda of the workshops or discussion meetings according to the scope, type and intensity of the environmental impact.

Article 21. – Time requirements for workshops and discussion meetings.

The organizers of the workshops or discussion meetings should inform the participating units and individuals in writing of the time, location and main agenda five business days in advance.

Article 22. – Results of the workshops and discussion meetings.

The organizers of the workshops or discussion meetings should compile meeting minutes or a discussion summary based on the real-time records of the meeting proceedings five business days after the event and file them for examination.

Meeting minutes or discussion summaries should accurately record differing opinions expressed by the participants.

SECTION 3.

HEARINGS.Article 23. – Special provisions for hearings conducted by environmental protection departments.

Hearings organized by departments in charge of environmental protection responsible for the examination and approval of EIA documents shall apply the provisions of the Interim Measures on Administrative License Hearings related to Environmental Protection. If the Interim Measures do not have applicable provisions, the provisions of these Measures on hearings shall apply.

Article 24. – Public notice requirements for hearings.

When construction units, compilation agencies and entrusted units decide to hold hearings, they should notify the public within the scope potentially impacted by the construction project or special plan of the time, location, hearing subjects and application procedures for the hearings 10 business days in advance, in the mass media or by other means through

which the public can learn about the hearing.

Article 25. – Application and selection of representatives.

Units and individuals should apply to participate in a hearing in accordance with the requirements and methods notified by the hearing organizer. Applicants may at the time they apply raise their own suggestions and key points of their opinions.

When selecting public representatives, the hearing organizers should make comprehensive consideration in accordance with the provisions of Article 14 of these Measures and the order of application. The number of public representatives selected for the hearings normally should not exceed 20.

Article 26. – Organizational form of hearings.

When the hearing organizer holds a hearing, it must have one chairperson and one recorder. Construction units, compilation agencies and entrusted units should dispatch their own representatives to participate in the hearings.

When the selected public representatives cannot attend the hearing for cause, they may entrust others to act as proxy to participate in the hearing or to submit on behalf of the representative, to the hearing organizer, clear and specific suggestions or opinions in written form signed by the representative. When selected representative from units participate in the hearing, they should produce a certificate from their units.

Article 27. – Relevant requirements for hearing representatives.

The participants in hearings should truthfully express the opinions of the masses and all segments of society on construction projects. They should observe hearing discipline, safeguard the order of the hearing and safeguard state secrets and commercial secrets.

Article 28. (Discipline of the hearing)

The participants in hearings should observe the following disciplines:

The participants may only begin their statements after obtaining permission from the chairperson;

Mobile phones and other communication devices should be turned off or set to silent mode;

No noise, disruption or other activities that obstruct the smooth order of the hearing shall not be allowed.

Article 29. – Requirements of the audience [*pangtingren*].

Individuals may apply to the hearing organizer to attend the hearing in accordance with the provisions of the public notice by producing their valid ID. The total number and selection of individuals shall be determined by the hearing organizer.

The audience should observe the hearing discipline. The audience does not have the right to speak during hearings. They may express their suggestions and opinions to the chairperson and relevant agencies and units after the hearing is finished.

Article 30. - News coverage of the hearing.

News media should apply to the organizer in advance if they intend to cover the hearing.

Article 31. - Hearing procedures.

Hearings shall be conducted in accordance with the following procedures:

- The chairperson announces the agenda of and rules of discipline for the hearing and introduces the hearing participants;
- Representatives from construction units, compilation agencies and entrusted units make general introduction of the EIA documents;
- Participating representatives for the public express their issues and opinions on the EIA documents and the construction units, compilation agencies and entrusted units make interpretations and explanations in respect of these opinions;
- Participating public representatives make statements;
- The chairperson concludes the hearing.

Article 32. – Hearing record [heading added by tr].

The hearing organizer must make a record of the hearing proceeding.

The hearing record should contain the following items and should be signed by the chairperson and the recorder:

- Main agenda of the hearing;
- Name and occupation of the chairperson and recorder;
- Basic information of the hearing participants;
- Time and location of the hearing;
- General introduction of the EIA documents by the construction units, compilation agencies and entrusted units;
- Issues and opinions raised by the participating public representatives and interpretations and explanations made by

the construction units, compilation agencies and entrusted units;

The handling of relevant matters during the proceeding by the chairperson;

Other matters that the chairperson deems worthy of recording.

After the hearing is closed, the hearing record should be sent to the hearing participants for verification and signing. If the participants refuse to sign on the record without reasonable basis, such refusal should be entered into the record.

CHAPTER IV.

SUPPLEMENTARY PROVISIONS.

Article 33.

The State Environmental Protection Administration shall be responsible for the interpretation of these Measures.

Article 34.

These Measures shall enter into force as of _____.