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Tseming Yang*

The seriousness of China’s environmental challenges has been apparent for some time. Its population size and torrid economic growth have already made it the world’s largest greenhouse gas emitter, surpassing the United States many years ahead of previous estimates. Yet, only in recent years has the serious impact of pollution and environmental degradation on China itself become visible to the rest of the world. Nowadays, China is oftentimes pointed to as the nation with the world’s worst urban air pollution problems, including the highest levels of sulfur dioxide emissions, severe water pollution issues, and serious problems of agricultural soil contamination.

One of the most recent and serious pollution accidents occurred in November 2006. An industrial accident at a PetroChina plant in China’s northern city of Jilin released 100 tons of benzene compounds and related chemicals into the Songhua River, which contaminated the water supply for millions of people. The subsequent several day loss of municipal water to the downstream city Harbin caused panic among the four million residents and a temporary mass exodus. The incident also led to diplomatic strains with the Russian government some weeks later when the toxic spill poured into the Amur River, the Songhua River’s extension into Russia.

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China’s preference of economic development over environmental protection has traditionally been justified by the larger societal needs for social development and poverty alleviation. Unfortunately, the consequences of economic development have not all been positive. Pollution and land seizures by local government to enable economic development efforts have been blamed for an increasing number of mass protests and upheavals.\(^8\) In some instances, such conflicts have turned violent and resulted in equally severe government crack-downs.\(^9\)

The Chinese government has taken notice of many of these issues, enacting over two dozen major environmental laws and promulgating many more subsidiary regulations. Many of these new laws are transplants of American and European models of environmental regulation, which incorporate modern public health and safety standards and regulatory methodologies. China’s environmental condition, however, raises the inevitable question: Will such efforts be enough? Is the future of China’s environment the image of gloom and doom presented by some Western media reports? Or, is China ready to leapfrog its way to environmental sustainability and prosperity, skipping many decades of environmental conflicts and regulatory evolution? Given its importance to the global environment, the answers are important for not only China, but also the rest of the world.

The Vermont Journal of Environmental Law’s March 2007 Symposium titled, “China in Transition: Environmental Challenges in the Far East,” brought together some of the leading experts on China’s environmental and energy regulatory system to address these questions. This issue of the Journal contains both the transcript of the Symposium presentations as well as the formal written contributions by some of the conference participants. The views and descriptions presented in person and in these articles are insightful and enlightening, reflecting at once sober assessment and hopeful expectation. As a whole, they provide an unprecedented set of insights into the most pressing contemporary issues of environmental law and policy in China. The articles provide a detailed inquiry into the issues raised at the Symposium.

The article of Professor Wang Canfa, one of China’s most prominent environmental lawyers and arguably the best-known in the foreign press, provides an overview of the state of environmental law and litigation from

\(^8\) Vivian Wu, 200 Angry Villagers Loot Leather Plants, S. CHINA MORNING POST, Apr. 12, 2006, at 7.

the frontlines. In addition to giving an overview of the breadth and scope of China’s environmental legislation, his piece provides a diagnosis of the problems of enforcement and implementation. Probably the most interesting among his findings is the apparently low rate of actual prosecution of environmental crimes over a five year time period following enactment in 1997. Prosecution was sought in less than 5% of cases, even when considering only the total number of reported “grave accidents.” According to Professor Wang, the typical punishment meted out instead of criminal penalties is usually administrative. The article also suggests legal reforms that would improve regulatory implementation and enforcement. While the challenges of reforming the system are evident, there is also optimism to be found in the cases brought by his Center for Legal Assistance to Pollution Victims.

Alex Wang’s piece considers more specifically the role of law in China’s current environmental regulatory system. Drawing on parallels in the evolution of environmental regulatory systems in the United States and other industrialized nations, he notes some recent developments in China’s environmental laws. The primary focus of his article is on the use of environmental tort claims and litigation to vindicate pollution harms. His piece provides an uncommonly detailed examination of critical legal principles and a fascinating account of environmental litigation in a high-profile pollution tort case in Fujian province with an evaluation of the outcomes. The article concludes with a review of currently discussed proposals to facilitate and possibly regulate public interest litigation.

Professor Wang Mingyuan’s article examines issues related to the contemporary implementation of China’s energy laws. In his piece, he traces the historical backgrounds of both the 1997 Energy Conservation Law and the 2005 Renewable Energy Law. His critique of the two schemes focuses on the deficiencies in their regulatory design, including insufficient effort to operationalize legislative goals and to account for the operation of markets. Many of the problems identified, such as lack of implementation resources and insufficient enforcement authority, ultimately reflect the pervasive weakness of governmental regulatory structures that are designed to accomplish important central government policies. His discussion is instructive in illustrating that the regulatory deficiencies hampering the implementation of China’s pollution control statutes is not unique to that context.

Patti Goldman’s article focuses in detail on the lessons that the evolution of environmental litigation in the United States holds for two issues of importance to China’s burgeoning public interest environmental lawyers: standing and environmental impact assessments. Her piece
recounts the meandering path of standing doctrine in the United States and the policy considerations in the design of broad versus narrow standing criteria. These issues will gain greater visibility and significance as more environmental lawsuits are brought in China. She also considers some of the extensive history of environmental impact assessment litigation in the United States as it bears on a newly revitalized environmental impact assessment process in China.

The article by Jesse Moorman and Zhang Ge on China’s 2003 Environmental Impact Assessment Law and the implementation of the public participation provisions delves into an issue of much current interest to the Chinese environmental community. Environmental impact assessments were already required under Chinese law preceding the 2003 EIA law. However, the 2003 legislation greatly expanded the involvement of the public in the environmental impact assessment process. In addition to explaining the benefits of extensive public participation in such processes, their article provides a comparative analysis with respect to the American experience under the National Environmental Policy Act. For those unfamiliar with the EIA law in China, Moorman and Zhang also provide a detailed explanation of the recently promulgated public participation implementation guidelines by China’s State Environmental Protection Administration. They also set out recommendations for improving the process through greater public access to information, enhanced public participation in decision-making, and increased access to justice. Of course, even though the 2003 law and the 2006 SEPA guidelines are promising, assessment of their implementation and effectiveness will have to be left to future commentary.

Finally, Professor Li Zhiping’s article on the protection of peasant farmers’ environmental rights in the countryside provides an empirical counterpoint to the doctrinal and regulatory discussions of China’s environmental laws. Her survey of inhabitants in Guangdong’s rural countryside is unprecedented in providing a contemporary perspective on the awareness of peasants about environmental rights and laws. Most of the attention of government regulation and research has focused on the environmental problems in the urban areas. Yet, the majority of China’s population and a rapidly increasing portion of China’s environmental problems are rural. Her article provides evidence of not only the deterioration of the environmental quality in rural areas, as measured by inhabitants’ perceptions, but also the increasing awareness and concern with such pollution issues. Her piece also explains the limited capabilities of rural residents in obtaining recourse for environmental harms, the nature of the limitations, and potential solutions. Professor Li’s analysis sheds
light on an important but under-researched area of Chinese environmental law.

Together with the Symposium transcripts, the articles provide an important snapshot of some of the most pressing issues in China’s environmental regulatory system. For American scholars and lawyers interested in environmental law in China, they also provide much needed analysis of contemporary legal and policy issues. Though the future of China’s environment remains to be seen, there is no question that its path will be profoundly affected by the regulatory and legal issues identified by the authors here.
INTRODUCTION

The Forbidden City in the heart of Beijing served as the imperial palace for a succession of Chinese emperors who ruled during the Ming (1368–1644) and Qing Dynasties (1644–1911). The collapse of the dynastic period in 1911 gave way to the founding of the People’s Republic of China (PRC) and its first president, the revolutionary leader Sun Yat-sen. Today, the Forbidden City’s vast complex of ornate temples, immense walls, plazas, and gardens is known as the Palace Museum and is among the most popular tourist destinations in all of China. In December 2006, I was privileged to walk among these sites, mindful of the rich and complex history that had unfolded both within and outside the walled city.

Contrasts and contradictions abounded in this space but none were more disquieting than the sight of a Starbucks outlet right in the heart of the Forbidden City. In a flash, I registered a series of mental notes of what was wrong with this picture: a sign of globalization gone awry; a surrender to the western tendency to commercialize and commodify historic, even sacred, spaces and places; an unfortunate embrace of western tastes and lifestyles, and the profligate demands on the world’s environmental and energy resources that are often associated with such choices. At the same time, the opportunity to observe and reflect on the challenges and opportunities for a U.S.-Chinese partnership on environmental law and policy was too compelling to ignore.

STARBUCKS IN THE FORBIDDEN CITY:
REFLECTIONS ON THE CHALLENGES AND OPPORTUNITIES
FOR A U.S.–CHINESE PARTNERSHIP ON ENVIRONMENTAL
LAW & POLICY

N. Bruce Duthu*
time, I recognized that the troublesome Starbucks represented a chosen, not an imposed, cultural element in the landscape that is modern China. At a deeper level, my principal concern with seeing the Starbucks outlet in the Forbidden City is reflected in a statement by Zhang Jianyu, program manager of Beijing’s Office of Environmental Defense: “The fundamental problem is that China is following the path of the United States, and probably the world cannot afford a second United States.”

The concern here is not with Starbucks per se, but rather the culture of consumerism and the ideology of ecological imperialism that often underlies such far-flung corporate expansions.

These concerns, and the central concern of this essay, call attention to the paramount importance of sustainable growth in both the United States and in China. Despite vast differences in history, culture, government, and religious traditions, exacerbated by centuries of mutual misunderstanding and inattention to the other, the United States and China are traveling surprisingly parallel tracks when it comes to exploiting the world’s storehouse of natural resources to fuel their respective economies. Vaclav Smil, a respected authority on China’s environmental and energy policies, notes that:

[i]n this respect alone China and the United States are more alike than we might be inclined to recognize; however, they are also the global leaders in the production of greenhouse gases and in energy consumption, as well as in resistance to international efforts to reduce pollution. Considering this uncanny commonness of our status as environmental pariahs, a better understanding of the ecological adversity bred by the Chinese can prove illustrative for us.

In this sense, the juxtaposition of Starbucks in the Forbidden City serves as a potent reminder of the limits of growth and the obligation of nations like China and the United States to recognize the lasting impact their economic, social, and political choices will have on the planet and the world’s populations.

This essay describes the efforts of two institutions, Vermont Law School and Sun Yat-sen University in Guangzhou, China, to call attention


to those particular ecological concerns and their plans to help redirect the course and nature of development, particularly in China, in accord with principles of sustainable growth. It should be noted at the outset that these institutional plans are designed to complement the numerous and varied home-grown efforts within China that are already in place or are being developed to respond to the urgent ecological constraints that impact China’s future growth and prosperity.

I. THE CHINESE ECONOMIC “MIRACLE” AND ITS COSTS

It is undeniable that China’s remarkable rise as an economic superpower—the nation’s economy is second only to the United States—has translated into improved living conditions for millions of Chinese citizens, though the benefits of that economic growth have been distributed rather unevenly between coastal and inland cities and between rural and urban populations. Western media sources regularly report astounding growth rates in the Chinese economy—on average, over 10% for each year since 2003—although these rates may not accurately account for the estimated $650 billion in nonperforming loans held by Chinese banks.

A more pressing issue for China today is determining how it will confront the serious challenges posed by the negative social, economic, and environmental costs that have accompanied this unprecedented growth and development. As noted above, China is among the world leaders in pollution emissions. A staggering “sixteen of the world’s twenty most polluted cities” are located in China. China’s principal environmental ministry, the State Environmental Protection Administration (SEPA) acknowledges that “living in China’s most-polluted cities is a pulmonary disaster equivalent to smoking two packs of cigarettes a day.”

Much of the air pollution stems from the proliferation of coal-fired

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11. See Jensen & Weston, supra note 8, at 15.
power plants throughout China. Reliance on this energy source has profound negative social and health impacts on the Chinese population generally. For example, coal mining and production is a largely unregulated industry that costs the lives of thousands of Chinese miners every year. Viewed globally, eight in ten coal-mining related deaths take place in China.

China’s citizens are not oblivious to these ecological and personal dangers and they have demonstrated publicly, and at times even violently, to protest the government’s dereliction of duty or blatant disregard of these serious environmental problems. In 2005 alone, the Chinese Ministry of Public Security catalogued over 87,000 incidents of civil unrest or protests, about 51,000 of which related to environmental complaints. It is important to note that the 1982 Chinese Constitution expressly protects China’s citizens when they engage in these protest activities. Article 41 provides the following protections for citizens who challenge certain government actions:

Citizens of the People’s Republic of China have the right to criticize and make suggestions regarding any state organ or functionary. Citizens have the right to make to relevant state organs complaints or charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty; but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited.

The state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them.

Citizens who have suffered losses as a result of infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law.

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12. See Weston, supra note 4, at 77.
13. Id. at 76.
14. Id. at 77.
The 1982 Constitution also obligates the state to serve as a proper steward of the nation’s natural resources and environment. Article 26 provides that “[t]he state protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public hazards. The state organizes and encourages afforestation and the protection of forests.”

While many of these public protests led to positive responses by government and business leaders, the government commonly responds with repressive and violent means. One of the most notorious recent clashes occurred in December 2005 in the village of Dongzhou in Guangdong Province, where villagers rose up to challenge the siting of a power plant on lands they claimed were illegally taken from them. Official reports acknowledged that government forces killed three villagers while recent commentary suggests that about 20 people were killed, making it “the deadliest use of force by the party-state since the [1989] Tiananmen [Square] massacre.” It is clear that environmental activists ignore the longstanding Chinese premium on social stability at their peril, even if achieved through repressive means.

Despite these significant setbacks, the growing record of citizen activism in environmental cases suggests that ecological considerations will have significant influence in shaping the course and nature of China’s pursuit of development and prosperity.

II. PARTNERSHIP ON ENVIRONMENTAL LAW & POLICY

Against this backdrop of a still nascent environmental movement in China, academic leaders from Vermont Law School (VLS) and Sun Yat-sen University (SYU) School of Law in Guangzhou (capital of Guangdong Province) met in April 2004 to sign a memorandum of agreement pledging to work as institutional partners on strategies to help mitigate the negative environmental and social costs generated by China’s virtually unchecked economic growth and development. The initial efforts under this partnership involved the sponsorship of collaborative research projects on environmental law and policy undertaken by pairs of students from both institutions. Supported by a grant from the Lingnan Foundation and working under the supervision of their respective faculty members, the student researchers came together on the SYU campus in Guangzhou to present their findings to a university audience. At least two published

17. Id. art. 26.
18. Shapiro, supra note 10, at 57.
research projects have already emerged from these collaborative efforts.\textsuperscript{19}

In September 2006, VLS received a three-year $1.8 million grant from the United States Agency for International Development (US AID) to fund the VLS-SYU Partnership for Environmental Law in China. By facilitating the transfer of knowledge and technology through conferences, training sessions and workshops, and creating further opportunities for collaborative research by faculty and students, the partnership seeks to advance environmental and energy law and policy in China under the rule of law. In particular, this initiative seeks to address the serious environmental problems and energy needs that are associated with China’s ever-growing market economy by focusing on the following three core strategic objectives:

1. Strengthen individual and institutional capacity among Chinese educational, governmental, non-profit organizational, and business sectors to become more effective environmental and energy problem-solvers, giving due consideration to issues of individual and property rights.

2. Improve the enabling conditions—policies, systems, laws, and regulations—within China’s legal infrastructure that will advance the development, understanding, and enforcement of environmental and energy law in China in a manner that facilitates the development of and reliance upon the rule of law.

3. Enhance municipal, provincial, national, and international networks among individuals and institutions in China in a manner that advances the internalization and sustainability of best practices in environmental protection and energy regulation.

Early initiatives in pursuit of these core strategic objectives include co-sponsorship of the Vermont Journal of Environmental Law’s annual Symposium that brought together some of the leading activists and policy-makers working to improve China’s record on environmentalism and sustainable growth. Another major gathering of legal scholars, governmental officials, business leaders, and citizen groups will take place in May 2007 on the SYU campus in Guangzhou. This event will focus attention on China’s energy efficiency needs and sustainable development, with a particular focus on the latest and most comprehensive draft national legislation on energy conservation to be enacted by the PRC. The draft

legislation covers energy use in multi-sector areas of the economy, including industrial production, building and construction, transportation, and power generation.

Finally, the institutional partners will select a cohort of faculty scholars and student researchers who will be in residence at VLS for varying periods of time conducting research, enrolling in classes, and otherwise working actively to enhance their personal and professional capacities to become more effective problem-solvers in the area of environmental and energy law and policy.

CLOSING THOUGHTS

This partnership is but one of many existing in China that calls attention to the serious ecological considerations implicated in the course of economic development in both China and the United States. While most of the project activities will shine the spotlight on developments in China, there will be numerous opportunities to reflect candidly on developments in both nations and employ those strategies that offer the most promise for each nation to engage in sustainable development. For example, it is noteworthy that China has enacted efficiency standards for automobiles constructed or sold in China that are far more stringent than US standards. By 2008, as noted by energy expert Amory B. Lovins, “it will be illegal to sell many inefficient U.S. cars [in China.] If American automakers do not innovate quickly enough, in another decade [we] may well be driving a super efficient Chinese-made car. A million U.S. jobs hang in the balance.”

Policy-makers both in the United States and China are slowly beginning to understand the important link between forward-looking environmental and energy policies and sustainable growth. These are not mutually exclusive goals but achieving them will require the concerted and coordinated actions of citizen activists, academics, business leaders, and government officials. This partnership is a modest but important contribution in service of those objectives.

Chinese environmental laws and regulations are abundant, but suffer from a lack of proper adherence and enforcement. This deficiency remains prevalent because: legislative objectives remain unachieved; enforcement is superficial; excessive time exists between noncompliance and enforcement; available punishment for noncompliance is inadequate; injured parties are not properly compensated; and some environmental crimes receive administrative instead of criminal punishments.

In order to overcome these current deficiencies, Chinese authorities should:
- establish an Environmental Supervision Bureau within SEPA responsible for “spot” law enforcement;
- transform the environmental protection agency into smaller, detached entities;
- reform current assessment methods of local governmental compliance and achievement;
- replace the traditional Gross Domestic Product (GDP) analysis with a Green GDP;
- reform current judicial management mechanisms;
- free courts from the influence of local governments;
- establish environmental public interest legislation;
- and create a successful procedure for enhancing public participation in Chinese environmental protection.

**Wang Canfa**

Abstract

Chinese environmental laws and regulations are abundant, but suffer from a lack of proper adherence and enforcement. This deficiency remains prevalent because: legislative objectives remain unachieved; enforcement is superficial; excessive time exists between noncompliance and enforcement; available punishment for noncompliance is inadequate; injured parties are not properly compensated; and some environmental crimes receive administrative instead of criminal punishments.

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- and create a successful procedure for enhancing public participation in Chinese environmental protection.

**Wang Canfa** is a Professor at the China University of Political Science and Law in Beijing and Director of the Center for Legal Assistance to Pollution Victims (CLAPV). Professor Wang has finished more than 30 compilations on environmental law, is a Ph.D. advisor at the China University of Political Science and Law, and a Superintendent for the Institute for Environmental and Resource Law of China University of Political Science Law. Professor Wang is a Member of the Standing Committee of the Chinese Society of Environmental Sciences. He is also a Member of the Standing Committee and Vice-President of Professional Committee on Environment and Resource Law of the Chinese Legal Society. Professor Wang lectures part-time at Hebei University of Science and Technology and Fuzhou University and is an attorney at Beijing Fada Law Firm. The author would like to thank Articles Editor Andrew E. Kohn of the Vermont Journal of Environmental Law for his extensive editing assistance.

† The translation of all Chinese materials is the author’s, as is the responsibility for any inaccuracy in the translation. This article follows the Chinese practice of placing the family name before the given name. Therefore, all sources cited in short form use the author’s family name. The original Chinese text for most laws and their implementing regulations cited herein can be found on the Law Info China database located at http://www.lawinfochina.com.
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I. THE CURRENT SYSTEM OF CHINESE ENVIRONMENTAL LAWS, RULES, AND REGULATIONS

Chinese environmental legislation began in 1978 with formal recognition in the Constitution of the People’s Republic of China, Article 26, requires that “[t]he state protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public nuisance.” This provision mandates environmental protection as a specific constitutional component and one of the important responsibilities of the state. Since this declaration, environmental protection legislation in China has been consistently developing. Rapid growth over the past 29 years has fostered the formation of a detailed environmental legal system. This system has expanded to influence the functions of local governments, including the incorporation of legislation from pollution control and prevention to natural resource protection and conservation. At present, environmental law in China consists of: legislation addressing comprehensive environmental protection; special litigation for pollution prevention; natural resource protection and conservation; expansion of environmental protection into other areas of legislation; and the ratification of international conventions and treaties focusing on environmental protection. A comprehensive list of this legislation can be found in the Appendix.

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3. Id. at 53–56.
A. Provisions on Environmental Protection in Non-Environmental Legislation

On April 12, 1986, the National People’s Congress (NPC) adopted the General Principles on Civil Acts of the People’s Republic of China. Article 83 stipulates:

In the spirit of helping production, making things convenient for people’s lives, enhancing unity, and mutual assistance; and being fair and reasonable, neighboring users of real estate shall maintain proper neighborly relations over such matters as water supply, drainage, passageway, ventilation, and lighting. Anyone who causes obstruction or damage to his neighbor shall stop the infringement, eliminate the obstruction and compensate for the damage.

In addition, on March 14, 1997, the NPC amended the Criminal Law of the People’s Republic of China. Section Six, the Crime of Impairing the Protection of the Environment and Resources, of Chapter Six, Crimes of Obstructing the Administration of the Public Order, includes nine articles. These articles address major infractions which include: serious pollution accidents; illegally treating imported solid waste; unauthorized importation of solid waste; illegally acquiring aquatic products; illegal timber acquisition; illegal occupation of cultivated lands; illegal catching and/or killing of endangered species under special state protection; illegal purchase, transport, and/or selling of endangered species and their products; and illegal mining. Other violations include smuggling solid waste, breaching the duty of environmental supervision and control, illegally approving the requisition or occupation of land, and negligence in animal and plant quarantine.

5. Id.
7. Criminal Law (promulgated by the Nat’l People’s Cong., Jul. 6, 1979), art. 338–46, LAWINFOCHINA (last visited Mar. 8, 2007) (P.R.C.). Major accidents (as defined by the State Environmental Protection Administration of PRC) mean serious environmental accidents. These are defined as any environmental accidents which cause: direct economic loss over 50,000 Yuan; people to show apparent symptoms of being poisoned; people to suffer from radiation or disability; a group of people to show symptoms of being poisoned; negative impact on social stability as a result of environmental pollution; or relatively serious damage on the environment.
9. Id. at 632–35.
Furthermore, on December 6, 2001, the Supreme People’s Court adopted the *Several Provisions on the Evidence of Civil Litigation*. Judicial interpretation of Article Four articulates the burden of proof for compensation of environmental damage as the following: “if the litigation of environmental damage compensation is caused by the environmental pollution, then the injurer shall bear the burden of proof of the statutory exemptions and the fact that there is no causation between his act and the damages.” According to this provision, after the injured party brings an action against a polluter, the polluter shall bear liability if he can prove causation between the damage and his polluting act. The injured party, however, must only prove an injury and resulting damages caused by the polluters action, or inaction.

### B. International Conventions and Treaties on Environmental Protection Approved by China

China has been actively participating in global efforts of environmental protection through its involvement in international conventions and treaties. For example, China has joined 48 international conventions on environmental protection to date, including the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity, the International Tropical Timber Agreement, the International Convention for the Regulation of Whaling, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, among many others. These conventions are implemented by multiple agencies within the Chinese government.

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11. *Id.*
12. WANG, supra note 2, at 167–68.
II. PROBLEMS WITH ENVIRONMENTAL LAW ENFORCEMENT IN CHINA

After a few decades of development, with special emphasis on the past decade, China’s environmental legislation has formed a strong base and is now actively developing effective implementation strategies.\(^{19}\) Over this period, it has become apparent that many issues remain unresolved and require urgent attention. For example, the implementation of environmental laws falls under the jurisdiction of administrative agencies rather than under the jurisdiction of the judiciary.\(^{20}\) Formal supervisory power over the implementation of environmental laws rests with the legislature. In reality, however, the government is not properly enforcing this supervisory power.\(^{21}\) According to existing legislation, non-governmental organizations (NGOs) and citizens should play a role in the implementation of environmental laws.\(^{22}\) Currently, no institution of citizen litigation or public-profit litigation exists, and public participation in the Environmental Impact Assessment (EIA) is limited in scope.\(^{23}\) While the development of environmental laws in China shows promise, there is a long way to go in realizing satisfactory public involvement in the legal system.

A. Problems with Implementation

In order to address environmental challenges, China enacted its *Environmental Protection Law*.\(^{24}\) Article One clearly states the law’s objective as “protection and improving of the environment.”\(^{25}\) Although progress exists in the protection of ecosystems, the Chinese environment is deteriorating as a whole, even with localized areas of improvements.\(^{26}\) One

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19. JIN, *supra* note 8, at 27.
21. Id.
23. Id.
major problem is air pollution in large cities, as it remains severe and heavy with particulate matter. For example, of the 555 cities monitored in 2002, 279 cities (50.3%) have registered occurrences of acid rain.

Water shortages and pollution are also major problems affecting the environment. Water consumption has reached unsustainable levels in China. As a result, drinking water is in severe shortage. Of the seven major water systems, level five quality accounts for 40.9% of human consumption. The disposal rate for municipal domestic sewage is only 22.3%, as rural areas lack treatment and discharge facilities. Marine pollution has increased, and in 2003 there were 80 registered marine pollution accidents, polluting an area up to 90,262 hectares. These recorded accidents have economically damaged the fishery, recording losses as high as RMB 2,740,000,000 Yuan (US$354,069,071).

As a whole, the Chinese ecosystem is in grave danger. Trends show soil and water erosion facilitating the expansion of an arid, desert-like climate into one-third of the country’s territory. All of these problems are direct evidence that the objectives outlined in the environmental laws have not yet been achieved. This is further demonstrated by the environmental protection plan. This plan, created by various government administrative departments, has the stated legal objective not to improve the environment but to only mitigate environmental deterioration.

B. Superficial Enforcement of Environmental Mechanisms

There are many environmental management mechanisms within Chinese environmental laws regulating various behaviors. These mechanisms include various precautionary approaches to prevent pollution, regulations governing the operation of various facilities, environmental recovery institutions, and enforcement obligations of environmental

28. Id.
29. Id.
30. Id. Level Five is the lowest level of water quality monitored in China on a one to five scale.
31. Id.
33. Id.
34. 2002 REPORT, supra note 27.
These regulations have not been fully implemented. For example, China’s Environmental Impact Assessment Law (EIA Law) requires the assessment of construction projects affecting the environment. Article 17 specifically lists the required elements for this assessment. According to the State Environmental Protection Administration (SEPA), environmental assessments for construction sites exceeded 90% since 1998, and increased to 98.3% in 2002. If these statistics are accurate, and all environmental assessments have been conducted and approved by the appropriate departments, there would be substantially less environmental pollution. The fact remains that China’s environmental condition is continually deteriorating. As an example, 1,921 pollution accidents occurred in 2002 alone. While SEPA has addressed 82 serious violations, 80% of the 70 approved steel construction projects have yet to comply with the EIA Law. These statistics show that regulation of construction projects is superficial, reaching only as far as the environmental assessment. Those agencies responsible for drafting reports tend to falsify them in order to satisfy construction entities. For example, in one report, the real distance between a proposed plant and a residential district was 20 meters, while the EIA report stated the distance at 400 meters. Consequently, the construction project was approved and later
caused severe pollution.\textsuperscript{45}

\textbf{C. Lax Investigation and Delayed Punishment of Illegal Activities}

Chinese environmental laws create regulations for various activities and establish corresponding penalty provisions. Ideally, thorough implementation of environmental laws would forbid illegal actions and protect the environment. In reality, many violations cannot be investigated and punished in time; and these offenders are often free from corrective responsibilities. This problem has greatly influenced the effectiveness and authority of the environmental legal system. The “three-simultaneity” institution stipulates that environmental protection facilities involved in construction projects must be designed, constructed, and implemented along with the main buildings under construction.\textsuperscript{46} According to the law, this scheme applies to all construction projects likely to cause environmental pollution and damage.\textsuperscript{47} Although this scheme has been in effect since the 1970s,\textsuperscript{48} some construction projects with severe environmental consequences began construction without environmental supervision or approval.\textsuperscript{49} As a consequence, this lax enforcement is one reason small enterprises responsible for environmental harm remain active and perpetuate new pollution emissions.

\textbf{D. Unavailability of Adequate Compensation for Pollution Victims}

Severe pollution inevitably leads to environmental disputes. In 2005, complaints submitted to environmental authorities within SEPA numbered more than 50,000.\textsuperscript{50} Many of these conflicts are not settled in a timely fashion, with some remaining in dispute for over 10 years.\textsuperscript{51} This lax enforcement has discouraged public involvement and reduces incentives for polluters to comply with existing legislation. As long as no added cost

\textsuperscript{45} Id.
\textsuperscript{46} \textsc{Wang}, supra note 2, at 93. The concept of “three-simultaneity” is a social term common in Chinese culture and is explained in the regulation Environmental Protection Management of Construction Projects, Article 16, Nov. 18, 1998.
\textsuperscript{47} Id. at 94.
\textsuperscript{48} Id. at 93.
\textsuperscript{51} \textsc{CLAPV}, supra note 43.
associated with pollution exists, there is no reason for the polluter to invest millions of dollars in compliance. Within the Chinese government there is no appraisal agency to determine causation between the polluter’s action and the pollution, and no detailed law that determines proper procedures for assessment. With no direct procedure to redress pollution victim’s claims, the public often remain confused and uninformed, distant from a process unable to effectively aid them, even when claims are brought to appropriate authorities.

E. Environmental Violators Often Receive Administrative Punishments Instead of Criminal Penalties

Worldwide, the application of criminal liability to environmental polluters has proved an effective tool. China has recognized the necessity and successes of these criminal laws and has developed a limited number of environmental criminal articles and penalties that have yet to be fully implemented. In the five years since the revision of China’s Criminal Law, the total number of serious environmental accidents has increased to over 387. Each of these accidents, according to the Criminal Law, constitutes an environmental crime. Unfortunately, less than 20 cases have been prosecuted to date under this newly revised criminal code, accounting for less than five percent of the violations. This lack of prosecution can be attributed to two reasons. First, environmental authorities are reluctant to transfer environmental crimes to judicial authorities. Second, there is a general lack of environmental awareness and relevant experience within the judicial community.

F. The Lack of Authority Within Relevant Environmental Protection Administrations

Administration of environmental protection in China, according to the legal provisions, is subject to the corresponding administrative departments. Most environmental violations in China are caused by

52. WANG, supra note 2, at 137.
53. Id. at 148.
58. On Limitations of Legislation on Environmental Administration Mechanism of China and
pollution enterprises.\(^5^9\) In Pingnan County of Fujian Province, the amount of tax levied on a chemical factory with heavy pollution accounts for 25% of the county’s income.\(^6^0\) If these various government departments enforce environmental protection, polluters will pay large fines and thus divert money from the local community. As a result, local governments tend to interfere with the environmental protection agency and its punishment of pollution enterprises.\(^6^1\) Also, the environmental protection agency is subject to decisions from the corresponding administrative departments while the power to order company renovations within a certain deadline and to stop operations is authorized through local governments.\(^6^2\) The environmental protection agency does not have such power.\(^6^3\)

III. WHY IS ENVIRONMENTAL LAW IMPLEMENTATION LAX IN CHINA?

There are four main reasons explaining why current implementation of environmental laws in China is lax. The first is largely due to unrealistic legislation resulting from inadequate legal research, rapid creation of legislation, frivolous legislation, and the inability of current legislation to adapt new laws and rules. Second, local governments favor economic benefit over environmental protection. Third, a legislative void exists between administrative departments and the NPC Standing Committee and court system. Lastly, public participation remains underdeveloped in China.

A. Unrealistic Legislation

Since 1978, a relatively complete body of Chinese environmental law has formed. This body of law includes constitutional articles, environmental laws, and other legislation and rules containing environmental provisions.\(^6^4\) This environmental legal system has safeguarded the people’s environmental rights. Throughout its development, however, problems have materialized.

One major problem includes inadequate legal research which has led to
disjunction between provisions of the act and the practice of environmental protection. A good example is the drafting process of the *Law of the People’s Republic of China on the Prevention and Control of Environmental Pollution by Solid Waste*. Lawmakers did not have the necessary basic information detailing both the research on the pollution mechanism of solid wastes and the availability of disposal technology methods for solid waste. Government supervision of the disposal process for solid waste was drafted in the 1990s. This inadequate research has led to the lax enforcement and compliance of the law. The NPC Standing Committee report indicates that the disposal rate of municipal domestic garbage in 2003 was 58.2%. It remains common for most counties and towns to dispose of wastes without any treatment.

Another problem is the rapid pace in which legislation is initially created. In order to successfully accomplish departmental agendas, agencies create legislative deadlines for the adoption of certain laws. Officials then focus on influencing alliances to pass this legislation, rather than the applicability and workability of the legislation itself.

Some Chinese legislation is presented in an attempt to meet international trends and results in superficial influence. China has developed some laws and regulations that are hard to find in other developed countries. These provisions, however, are rarely used and hold little influence. Notwithstanding frivolous legislation, no relevant department has ever suggested the need for required environmental legislation such as the *Law of Recovery of Waste and Used Electric Appliances*. In addition, with this frivolous legislation comes an emphasis on substantial, subject-driven legislation, ignoring the needed procedural and implementation mechanisms. There are many substantial environmental laws in China with inadequate procedural laws. These laws contain many general provisions with a few liability provisions, incorporating small fines that do not deter violations.

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66. *Id.*
67. *Id.*
68. JIN, *supra* note 8, at 109.
69. *Id.*
70. *Id.* at 110.
72. *Id.*
73. *Id.*
A final obstacle facing environmental legislation in China is that many of the current regulations are unable to adapt to new laws and rules. The National People’s Congress (NPC) adopts any environmental law and regulation that must be implemented in conjunction with those adopted by various government departments. Despite the passage of several years since their approval, many environmental laws still have no viable means of implementation. For instance, the Law of the People’s Republic of China on the Prevention and Control of Environmental Pollution by Solid Waste, adopted in 1995, has no implementing regulations. The Law of the People’s Republic of China on Prevention and Control of Pollution from Environmental Noise, adopted in 1996, also has no implementing regulations. In many cases where implementation problems exist, solutions may be found in SEPA interpretations of the existing problem.

B. Local Governments Favor Economic Benefits Rather Than Environmental Protection

The implementation of environmental laws depends on local governments and environmental protection departments. Since 1992, the GDP has served as the core measure of China’s economic status and is the primary standard against which the achievements of local governments are measured. The government tends to make short-term actions in pursuing economic benefits because of the importance of the GDP. Many local governments pursue GDP growth instead of comprehensive, coordinated, and sustainable development. These entities are slowly realizing that the public needs both economic growth and environmental protection. The objective of this sustainable development includes economic growth, social development, and environmental protection together. Such ideas are crucial in the implementation of environmental laws.

75. Id.
76. Id.
77. WANG, supra note 2, at 246.
78. Id.
79. Id.
81. Id.
82. Id.
83. Id.
84. Id.
C. Confining Justice within Administrative Departments

Environmental management mechanisms are subject to administrative laws. These laws are not well-developed and do not have comprehensive administrative organization or administrative procedures for coping with them.\(^{85}\) As a result, China’s administrative departments cannot establish a system in the style of the NPC Standing Committee and court system.\(^ {86}\) China neither possesses any specific law addressing the organization of environmental management departments at the central government, nor has any regulations or provisions at the local level.\(^ {87}\) The relevant provisions governing environmental management mechanisms and their responsible divisions are scattered throughout various laws and regulations.\(^ {88}\) Due to the lack of explicit regulations on environmental management organization, they are subject to frequent changes.\(^ {89}\) This legislative void allows for specific cities to have environmental protection administrations while others do not. It also permits some government departments to have two titles, and can force organizational reforms that suggest possible staff reductions.\(^ {90}\) All these factors greatly influence the judicial enforcement mechanisms of environmental management departments.

D. The Citizen’s Role is Neglected in Environmental Protection

Public participation is important for social growth, and more importantly, it directly supports the development of democracy.\(^ {91}\) Public participation also requires a balance between economic interests and environmental protection. Although, in China, this participation remains underdeveloped. Article Five of the EIA stipulates that the state should encourage relevant entities, experts, and the general public to participate in the assessment of impacts on their environment.\(^ {92}\) Articles 11 and 12 separately state that public opinion should be included in the approval of

\(^{85}\) On Limitations of Legislation on Environmental Administration Mechanism of China and the Ways of Perfecting It, supra note 20.

\(^{86}\) Id.

\(^{87}\) Id.

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) Id.


EIA program reports and construction projects. The specific number of participants and the procedure, however, has not been explained in the EIA law. The chapter on legal responsibilities does not properly define what should happen when this public participation is violated, with the effect of making public participation meaningless throughout the EIA process.

Laws dictating the responsibilities of specific environmental mechanisms grant too much freedom to violators while remaining weak when enforcing obligations. For those who abuse their power or leave without fulfilling their duties, environmental legislation states that only the individual directly responsible for the situation should face an administrative punishment, with no responsibility for the relevant entity. In order to correct this error, China should adopt institutions of “citizen litigation” and bestow any entity and/or citizen with the right to bring actions against inattentive administrative departments. This institution would ensure obligations of the various administrative departments to move from the abstract legal realm to that of implementation in practice. For example, in the United States the Endangered Species Act (ESA) provides for citizen suits. Section 1533 “allows any person to bring suit to stop the federal government from violating the ESA or for a failure by the Secretary of Interior to perform any act or duty required by ESA.”

IV. POTENTIAL REFORMS TO ADDRESS CONSTRAINTS IN THE CHINESE LEGAL SYSTEM

Scholars and officials in China have recognized the problems of implementing environmental law. In recent years, reforms have steadily increased. The following suggested reforms are intended to improve the
efficiency and strengthen the legal force of the numerous Chinese environmental laws.

A. The Suggested Establishment of an Environmental Supervision Bureau in SEPA to Focus on Spot Law Enforcement

The primary problem with Chinese environmental law is enforcement. To implement and enforce the various environmental laws, the Environment Supervision Bureau (ESB) was created within SEPA in July 2002. The ESB is charged with spot law enforcement, including: drafting and implementing policies, regulations, and rules to monitor the environment and pollution discharges; guiding and coordinating solutions to pollution problems within local communities, departments, and across jurisdictions; and investigating large-scale pollution accidents and ecosystem destruction.

In 2003, the ESB actively pursued its obligations. It carried out 2,290,000 inspections of 410,000 machines (with some machines inspected multiple times). Of these inspections, 1,015,000 dealt with pollution prevention. The ESB also inspected 197,000 newly built and rebuilt projects, 52,000 of which were given a specific deadline to make improvements, and 118,000 of which were issued discharge licenses. The ESB has proven successful and SEPA has established five regional supervision centers for environmental law enforcement.

B. Transforming the Environmental Protection Agency into a Detached Agency

China has managed to accomplish reforms in some provinces by transforming environmental protection administrations at the local level into detached agencies. The responsibilities of these new agencies are “environmental monitoring and pollution fee collecting.” The municipal

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104. STATE ENVTL. PROT. ADMIN., CHINA ENVIRONMENTAL YEARBOOK 2003, at 218 (on file with the author) (hereinafter 2003 YEARBOOK).
105. Id.
administrations are left to deal directly with personnel, finances, and project approval. For example, thirteen environmental protection bureaus at the district and county level in Xian City, Shanxi Province, all transformed into detached agencies in 2003.

The first step for such a transformation is a financial audit. The second step is to determine each agency’s responsibilities and staffing requirements. The final step is to separate the individual detached agency from the county’s financial budget. After this process is complete, the environmental protection departments are not subject to resistance from county governments. This is an important step in safeguarding the independence of the environmental protection administration.

C. Replacing the Traditional GDP with a Green GDP

Green GDP (GGDP) is a supplement to the traditional GDP. It is calculated by deducting the cost of natural resource extraction and ecological damage from the traditional GDP; in other words, the GDP is adjusted for environmental costs. There have been many discussions about the GGDP in China. One of the most popular opinions is that the traditional GDP is limited because it represents only economic development without any concern for the environment.

When considering a traditional GDP calculation, many people tend to misunderstand economic development. According to China’s environmental laws, the local government is responsible for environmental quality. Local governments should be more concerned with their region’s environmental quality and work to slowly reduce ecological deterioration.

China is in a period of industrialization and is operating under the traditional outlook of “exhaust much and produce much.” The high rate of inefficient natural resource consumption, not to mention the extremely

106.  Id.
109.  Id.
110.  Id.
114.  Id.
high rate of pollution discharge threatens sustainable use of those resources. Because China is a country dependant on resource exploitation, the calculated adjustment of the GGDP is of great importance.

In response to these concerns, the China Statistics Administration and SEPA jointly established a research team on GGDP in early 2004. The team is actively researching and testing solutions to the above problems. China hopes to accomplish a complex GDP calculation based on the traditional model that would deduct resource and environmental costs in the areas of forestry, water, mines, and soil, among others. As a result, China will establish a GGDP system and make it the key factor in assessing local governments' achievements. SEPA and the National Bureau of Statistics of China published their first joint GGDP report—Report on Green GDP Calculation of China for 2004—on September 7, 2006.

D. Reforming Judicial Management Mechanisms

One large problem with enforcement is that the defendants in environmental civil litigation are usually the major supporters of local economies. Furthermore, most pollution activities involve administrative acceptance. This generated income is seen as a greater asset than local ecological protection. As a result, local polluters often receive minimal punishments.

The existing judicial management mechanism is principally guided by the local Chinese Communist Party (CCP) Committee and supervised by

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117. See DING WEIPING, JIANGSU PROVINCE TAIZHOU STATISTICS BUREAU, DEVELOPING A SCIENTIFIC APPROACH TO “GREEN GDP” (2004), available at http://www.zzstjj.gov.cn/tjzs/itjzm/200411/2235.html (P.R.C.) (describing the ways the traditional GDP calculation fails to take into account environmental degradation, leading ultimately to a reduction in overall wealth).


119. See浅谈环保执法的障碍及对策 [Removing Barriers to Enforcement of the Environmental Protection Law: An Abstract], (Nov. 12, 2004), http://dotnet.mblogger.cn/mystar/ (noting the primacy of economic concerns in the politics of regional protectionism as a barrier to effective enforcement).

120. Id.

121. See Discussion, supra Part II.E (discussing administrative punishments).
the high court, which is responsible for trial and personnel affairs.\textsuperscript{122} Thus, the first step in reforming the judicial management mechanism is to enhance the independence of the judiciary and to adopt a “vertical” management mechanism. Only through this reform can China avoid local protectionism.

This vertical mechanism has been adopted in some regions. The Supreme People’s Court issued a \textit{Five-Year Reform Compendium of the People’s Court} on October 20, 1994, which stated that by the end of 1999, the superior people’s courts of all provinces, autonomous regions, and cities directly under the jurisdiction of the central government should adopt vertical management and practice this program as long as appropriate.\textsuperscript{123} Although this vertical mechanism has not been implemented throughout China, the trend is bound to continue and grow throughout the country.

\textbf{E. Suggested Procedures and Methods for Enhancing Public Participation}

There are only general regulations in China’s environmental laws concerning public participation.\textsuperscript{124} Concrete provisions that outline procedures and methods for this participation are absent, making public involvement superficial.\textsuperscript{125} The \textit{Law of Administrative Approval}, Article 36, states that administrative departments should inform concerned parties when certain actions have the possibility of affecting those parties’ interests.\textsuperscript{126} This notice gives all parties involved the opportunity to present their point-of-view and interest in the proposed action. Both parties, for and against the proposal, should then have their opinions considered by the administrative department.\textsuperscript{127} According to the Article, any administrative approval concerning the rights of various parties cannot be granted until the department has heard the opinions of those parties.\textsuperscript{128} The United States Endangered Species Act also allows for public comment of proposed listings, stating “[t]he Secretary shall, prior to final approval of a new or

\textsuperscript{125.} \textit{Id.}
\textsuperscript{127.} \textit{Id.}
\textsuperscript{128.} \textit{Id.}
revised recovery plan, provide public notice and an opportunity for public review and comment on such plan.\textsuperscript{129}

The Public Participation Principle (PPP) of environmental law contains the following components: knowledge of the issue, participating in the decision-making process, and the right to bring a lawsuit where environmental rights have been infringed.\textsuperscript{130} In order to achieve a balanced environmental law enforcement and supervision system, China should fully execute the enforcement functions of responsible departments, the supervisory functions of the public, and the self-monitoring functions of enterprises. Furthermore, China should encourage both public and environmental NGO participation.

These reforms involve inherent difficulties and obstacles. Reforming the judicial management mechanisms presents a difficult and unavoidable problem.\textsuperscript{131} To reform the judicial system, including the appointment of judges and the precedent of a court, would be to reform the political system. There is also a question of whether there should be a responsible department governing all NGOs. The development, however, of China’s environmental legal system, and a strong relationship between legal provisions and principles, are sure to solve the above mentioned problems. It is also true that environmental protection is a global task and China’s domestic legislation must reflect its global responsibilities.

V. EXAMPLES OF ENVIRONMENTAL CASES PROMOTING LAW ENFORCEMENT IN CHINA

The cases below offer a good approach to judicial implementation of environmental laws. The judicial system can not only improve pollution victims’ environment, but can also compel pollution enterprises to manage their emissions, while observing environmental laws and regulations.


A. Improving the Environment Through Litigation: 97 Families in Shiliang River Reservoir of Jiangsu Province v. 2 Factories in Limmu County of Shandong Province for Pollution Damages

The Plaintiffs were 97 families in Shilianghe River Reservoir who had bred fish in net cages since July 1997. From July 1999 through June 2000, large fish kills occurred within the reservoir on three separate occasions. The confirmed cause of these incidents was found to be Linmu County Paper Mill of the Shandong Province and Linmu Chemical Plant of Shandong Province. Together the plants discharged a sizeable amount of sewage into the reservoir, suffocating the fish in large numbers. The Plaintiffs brought action in the Intermediate People’s Court of Lianyungang City of Jiangsu Province, requesting an injunction for the two parties, damages in the amount of RMB 5,652,000 Yuan (US$ 730,185), and attorney’s fees. The court found in favor of the Plaintiffs and required the Defendants to bear joint liability. The Defendants appealed to the High People’s Court of Jiangsu Province on April 16, 2002. After a hearing, the court affirmed the judgment of the intermediate court. More than a year since the judgment became effective, however, Defendants had yet to compensate the families. The Center for Legal Assistance to Pollution Victims (CLAPV) and its lawyers became involved and were able to secure RMB 5,600,000 Yuan (US$ 723,467) in payment. The most important effects of this litigation are that the defendants dare not discharge sewage into the reservoir again, and fish are once again abundant.

133. Id.
134. Id.
135. Id.
136. Linmu County Paper Mill is now the Jinyimeng Company.
137. Id.
138. Id.
139. Id.
140. Id.
141. Id.
142. Id.
B. Encouraging Public Participation in Environmental Protection Via Administrative Litigation: 182 Families in Beijing v. Planning Committee of Beijing

On December 10, 2001, the Planning Committee of Beijing issued a construction project planning license to two research institutions. Under the direction of the Public Health Department, the plan was to build an animal lab. The lab was to be sited only 19.06 meters away from a residential area, while various laws and regulations require the distance to be at least 20 meters. In order to stop the project, the residents applied to the Legal Affairs Office of Beijing for administrative review. The office granted the review and affirmed the decision of the planning committee. The residents then commenced administrative litigation with the support of CLAPV and won the case. The court required the Planning Committee of Beijing to cancel the license. The committee appealed the decision to the No.1 Immediate People’s Court of Beijing, but later withdrew the appeal. The judgment from the administrative litigation was put into effect and the license was cancelled. This was the first case in Beijing where residents sued the government’s planning department and won. Not only did residents fully participate in the process, but through media coverage, many other people learned of their rights and gained confidence in participating in environmental protection. Since this case, other residents have brought actions against the Planning Committee of Beijing.

145. Id.
146. Liu Shaoren, Should this Kind of Permit be Issued? CHINA NEWS, May 10, 2003 (on file with author).
147. Id.
148. Hu Xiying Tianjin, 为环境不被污染居民状告规划部门案胜诉 [Environmental Pollution is Not the Case in Favor of Residents Sued the Planning Department], Center for Legal Assistance to Pollution Victims (CLAPV) (July 27, 2003), http://www.clapv.org/new/show.php?id=599; Lui Shaoren, Should This Kind of Permit Be Issued?, CHINA NEWS, May 10, 2003.
149. See Zhong Xinxuan, 北京市民告规划委案胜诉 [Beijing Residents in Favor of Planning Committee Document], Center for Legal Assistance to Pollution Victims (CLAPV) (Oct. 8, 2003), http://www.clapv.org/new/show.php?id=683 (describing the court decision to reject the permit approval).
151. Zhong, supra note 149.
152. Yangruying, 百旺家苑业主诉北京市规划委案开审 [Owners of the Beijing Municipal
C. Local Government Action Protecting Polluters and Hindering Enforcement of Environmental Laws: Li Jianguo and Four Victims in Laoting County of Hebei Province are Accused of Disrupting the Social Order by Assembling in a Crowd and Blackmail.

Li Jianguo and four other victims were peasants living on the bank of the Tingliu River, Laoting County of Hebei Province. In February 2000, Lefeng Steel Plant which lies to the east of Li Jianguo’s village, began to manufacture steel. According to the related laws and regulations, the steel plant was a severe polluter and should have been closed. It had not completed either an environmental protection examination or approval procedures during its construction and there were no active environmental protective measures in place. The factory seriously polluted the local environment. In May 2000, crops and vegetation around the plant began to wither and die. The village leader, Zhao Wentu, and several other victims reported the incidents to the local authorities and the county environmental protection agency, but nothing was done. Because of this inaction, 100 villagers blocked the door to the plant, stopping steel production and the noxious emissions. The villagers elected six people as representatives, including Li Jianguo. These representatives petitioned the government to close the plant in accordance with pertinent environmental laws and regulations. Meanwhile, the crowd was disbanded by the police and the representatives were arrested and released on bail pending a trial.

In October 2000, Li Jianguo and other villagers sought legal assistance from CLAPV, and in December 2000 they sued the government of Laoting County. They requested that the court require the government to fulfill
its duties in accordance with the law and to order the plant closed.\textsuperscript{165} During the litigation, the plant offered to compensate the victims if they would withdraw their suit.\textsuperscript{166} In January 2001, Li Jianguo and other victims accepted the compensation of RMB 300,000 Yuan (US$ 38,757) and withdrew their claims.\textsuperscript{167}

On February 6, 2003, however, the six representatives were again detained for the crimes of racketeering and inciting a mob; unfortunately because of a SARS outbreak,\textsuperscript{168} CLAPV could not offer legal assistance.\textsuperscript{169} On May 7, 2003, the People’s Court of Laoting County held that the six village representatives had committed the crimes of inciting a mob and racketeering and sentenced them to a maximum of four years imprisonment.\textsuperscript{170} Li Jianguo and the others appealed the decision and the Intermediate People’s Court of Tangshan City sent the case back for a re-trial.\textsuperscript{171} CLAPV offered legal assistance and the trial was to be covered by numerous newspapers and media outlets,\textsuperscript{172} but nothing was reported by the media.\textsuperscript{173} On March 25, 2004, the People’s Court of Laoting County found that the defendants committed the above crimes and sentenced the individuals anywhere from one to four years in prison.\textsuperscript{174}

The Defendants appealed once again. CLAPV consulted numerous criminal and environmental law experts, who determined the defendants had not violated existing Chinese law.\textsuperscript{175} The last decision from the Intermediate People’s Court of Tangshan City canceled the racketeering crime, but the mob incitement was upheld.\textsuperscript{176}

Many difficulties exist for pollution victims attempting to safeguard

\begin{itemize}
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Li, \textit{supra} note 153.
\item \textsuperscript{169} Nobody could go to the court in Hebei Province during the SARS outbreak.
\item \textsuperscript{170} Criminal Decision Writ No.214 (Laoting County People’s Ct., 2003) (on file with author).
\item \textsuperscript{171} Criminal Ruling Writ No.344 (Tangshan City Interm. People’s Ct. 2003) (on file with author).
\item \textsuperscript{172} The media included People’s Daily, China National Radio, Farmers’ Daily, People’s Consultative Conference Newspaper, China Reform Newspaper, and China Chemical Industry Newspaper.
\item \textsuperscript{173} The local government has many ways of preventing the exposure of negative news.
\item \textsuperscript{174} Criminal Decision Writ No.205 (Laoting County People’s Ct. 2004) (on file with author).
\item \textsuperscript{175} The legal experts’ report which was sent to the Intermediate People’s Court of Tangshan City has not been opened to the public. The legal experts determined that the defendants had not met the conditions of racketeering as provided in Article 274 of the Criminal Law of People’s Republic of China and also has not met with the conditions of mob incitement in the first paragraph of Article 290 of Law.
\end{itemize}
their environmental rights. First, victims are generally poor and lack knowledge. Second, governments are unable to collect all the information required to make an informed decision. Third, local governments are more likely to favor polluters because of the economic benefit that polluters create. Fourth, courts cannot adjudicate independently because of interference from local governments. And finally, there is not enough legal assistance in China to support all the pollution victims.

CONCLUSION

The Chinese government has created, and continues to expand, comprehensive environmental protection over the past 20 years and there is hope that this trend will continue into the future. Implementation, the biggest problem facing Chinese environmental law, is also the next great area of possible growth. With superficial enforcement, minimal compensation to pollution victims, and misplaced administrative oversight, there is little reason for polluters or their victims to comply with or seek protection under existing laws. To overcome these problems, the Chinese government should reform current judicial management mechanisms, limit the involvement of local government in environmental compliance issues, and create procedures that will encourage public participation in protecting their local environment. As the Chinese economy grows, a shift from GDP measurements to GGDP assessments will help enforce the constitutional principles of environmental protection. The Chinese government has a rare opportunity to look at the mistakes of the Western industrialization process and create effective legislation to combat past environmental degradation. The public holds the key to effective implementation. Effective legislation will help ensure that the Chinese population will protect their environment and natural resources, and continue to help China grow and prosper.
APPENDIX

I. Special Legislation on Pollution Prevention

On August 23, 1982, the National People’s Congress (NPC) Standing Committee adopted the Law on Marine Environmental Protection of the People’s Republic of China. The NPC Standing Committee later amended this law on December 25, 1999. Its purpose is to “protect the marine environment and resources, prevent pollution damage, maintain ecological balance, safeguard human health and promote the development of marine programmes.” The law pertains to the internal and territorial seas and all other sea areas under the jurisdiction of the People’s Republic of China. “It provides for the establishment, management and protection of special marine reserves, marine sanctuaries and seashore scenic and tourist areas by central and local authorities.” This law also provides for the formulation and submission of environmental impact statements for coastal construction projects. Article Five establishes state authority to be in charge of the implementation of this law. Pollution prevention efforts are particularly applied to: coastal construction projects; offshore oil exploration and exploitation; land-source pollutants; discharge of oils, oil mixtures, wastes and other harmful substances into the sea by vessels; and dumping of wastes into the sea. Additionally, Chapter Nine establishes legal liability for violations that cause or are likely to cause pollution damage to the marine environment.

On May 11, 1984, the NPC Standing Committee adopted the Law on the Prevention of Water Pollution of the People’s Republic of China. The NPC Standing Committee later amended this law on May 15, 1996. The purpose of this law is “to prevent and control water pollution, protect

178. Id.
179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
187. Id.
and improve the environment, ensure people’s health, guarantee the effectively utilization of the water resource, [and] promote the development of the modernized socialism construction." The law applies to the pollution prevention and control of groundwater and surface water body including rivers, lakes, channels, canals, and reservoirs of the People’s Republic of China. It, however, does not extend to the sea area. The law provides that such water protection should be incorporated into the working plan of the State Council and people’s government of each level. Additionally, the water pollution prevention and control countermeasures and actions should be adopted. This law also establishes that the environment protection department of the State Council should establish water environment quality standards.

On September 5, 1987, the NPC Standing Committee adopted the Law on the Prevention and Control of Atmospheric Pollution of the People’s Republic of China, which was amended on August 29, 1995 and then April 29, 2000. Article One provides, “this Law is formulated for the purpose of preventing and controlling atmospheric pollution, protecting and improving people’s environment and the ecological environment, safeguarding human health, and promoting the sustainable development of the economy and society.” Article Two establishes that the State Council and the local people’s governments shall: incorporate the protection of the atmospheric environment into the national economic and social development plans, make rational plans for the geographical distribution of industry, improve scientific research in the prevention and control of atmospheric pollution, and adopt measures to prevent and control atmospheric pollution. Additionally, the State, as provided in Article Three, is to take “measures to control or gradually reduce, in a planned way, the total amount of the major atmospheric pollutants discharged in different areas.” Article Six stipulates that the administrative department for environmental protection under the State Council shall establish the national standards for atmospheric environment quality. Additionally,
Article 46 establishes legal liability for any unit or individual that violates the law, depending on the circumstances of the particular case.\textsuperscript{199}

On October 30, 1995, the NPC Standing Committee adopted the Law on the Prevention and Control of Environmental Pollution by Solid Waste of the People’s Republic of China.\textsuperscript{200} The law went into effect on April 1, 1996, and was later amended by the NPC Standing Committee on December 29, 2004.\textsuperscript{201} While this law provided fairly comprehensive provisions for controlling pollution in the production process, it came up short with regards to the recycling and disposal of used products and packages.\textsuperscript{202} In response, the revised law created a system of extended producer responsibility which stipulates that “the central government will carry out the compelling recovery system for part of products and packing, [and] the administrative department of the State council will establish the catalogue and methods.”\textsuperscript{203} The law also outlines the duties of the solid waste producer when separation, M&A, property transfer, withdrawal, dissolution, and bankruptcy occur.\textsuperscript{204} Additionally, the revision promotes sustainable development and the need for a “circular economy by focusing “on the principles that polluters should take charge in accordance with the law and organizations [sic] and individuals should be encourage to pay attention to the concept of recycling.”\textsuperscript{205}

On October 29, 1996, the NPC Standing Committee adopted the Law on Prevention and Control of Pollution from Environmental Noise of the People’s Republic of China, which went into effect on March 1, 1997.\textsuperscript{206} The purpose of the law is to prevent and control environmental noise pollution, protect and improve the living environment, ensure human health, and promote economic and social development.\textsuperscript{207} This law defines environmental noise pollution as noise which exceeds the environmental noise emitted limits set by the State and impairs people’s daily life, work, and study.\textsuperscript{208} Article Five provides “local people’s governments at various levels shall, when drawing up urban and rural development plans, give full

\begin{itemize}
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Law on the Prevention and Control of Environmental Pollution by Solid Waste (promulgated by the Nat’l People’s Cong., Oct. 30, 1995) LAWINFOCHINA (last visited Mar. 8, 2007) (P.R.C.).
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id. art. 28–29.
\item \textsuperscript{204} Id. art. 29.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Law on Prevention and Control of Pollution from Environmental Noise (promulgated by the Nat’l People’s Cong., Oct. 29, 1996) LAWINFOCHINA (last visited Mar. 8, 2007) (P.R.C.).
\item \textsuperscript{207} Id. art. 1.
\item \textsuperscript{208} Id. art. 2.
\end{itemize}
consideration to the impact of noise emitted by construction projects and regional development and renovation projects on the living environment of the neighbourhood [sic], make unified plans and rationally arrange the layout of the function areas and the buildings, in order to prevent or minimize environmental noise pollution.209 This law establishes prevention and control measures specifically for noise resulting from industry, construction, traffic, and social activities.210

On June 28, 2003, the NPC Standing Committee adopted the Law on the Prevention and Control of Radiation Pollution of the People’s Republic of China, which went into effect on October 1, 2003.211 The purpose of this law is to prevent and control radioactive pollution, protect the environment, ensure human health, and promote the development and peaceful use of nuclear energy and technology.212 The law establishes pollution and control measures for “radioactive pollution discharged in the course of site selection, construction, operation, and decommissioning of nuclear installations and in the cause of development and utilization of nuclear technology, uranium (thorium) and accompanying radioactive mines in the territory of the People’s Republic of China and in the territorial waters under its jurisdiction.”213 Article Three presents an important aspect of this law as it stipulates that, when concerning the prevention and control of radioactive pollution, the State should apply the principles of putting prevention first, combine prevention and control measures, exercise rigorous control, and give priority to safety.214

II. Legislation on Natural Resources Protection

On September 20, 1984, the NPC Standing Committee adopted the Forest Law of the People’s Republic of China, which was amended on April 29, 1998.215 This law was formulated to: protect, nurture, and rationally utilize the forest resources, speed up the greening of the country’s territory, bring into play the roles of the forest in terms of storing water, saving soil, adjusting the climate, improve the environment, and supply

209. Id. art. 5.
210. See generally id.
212. Id.
213. Id. art. 2.
214. See generally id.
The law applies to the conduct of forest and forest tree cultivating, planting, logging and utilization, and in the operation and management of forests, trees and woodlands.\textsuperscript{217} Article Four divides the forests into five categories: (1) protection forests, (2) timber stands, (3) economic forests, (4) firewood forests, and (5) special use forests, which includes environmental protection forests.\textsuperscript{218} The law also provides certain protective measures for the forest resources including: a quota on forest cutting and the encouragement of forest planting in order to expand the area of forest coverage; economic support or long-term loans to the collectives and private individuals who plant and cultivate forests according to relevant stipulations of the central and local people’s governments; comprehensive utilization and saving on the use of timber and encouragement of the development and utilization of timber substitutes; forest cultivate levies used exclusively for forest planning and cultivation purposes; ensuring that coal and paper sectors shall apportion out of their output of coal, pulp, and paper a certain amount of funds to be used exclusively for the nurturing of mine timber and timber for paper making; and a forestry fund system.\textsuperscript{219}

On June 18, 1985, the NPC Standing Committee adopted the Grassland Law of the People’s Republic of China, which was amended on December 28, 2002 and then went into effect on March 1, 2003.\textsuperscript{220} The purpose of the law is to protect, develop and make rational use of grasslands, improve the ecological environment, maintain the diversity of living things, modernize animal husbandry, and promote the sustainable development of the economy and society.\textsuperscript{221} The law establishes provisions for activities pertaining to grassland planning, protection, development, use, and management.\textsuperscript{222} Article Three stipulates, “the State applies the principles of scientific planning, all-round protection, giving priority to the development of key grasslands, and rational use, in order to promote the sustainable use of grasslands and the harmonious development of the ecology, economy and society.”\textsuperscript{223}

On January 20, 1986 the NPC Standing Committee adopted the Fishery
Law of the People’s Republic of China. The purpose of this law is: (1) to enhance the protection of fishery resources, (2) increase the development and reasonable utilization of fishery resources, (3) develop artificial cultivation, (4) protect fishery workers’ lawful rights and interests, and (5) boost fishery production.

On June 25, 1986, the NPC Standing Committee adopted the Law of Land Administration of the People’s Republic of China, which was amended on August 29, 1998 by NPC and then went into effect on January 1, 1999. In following the constitutional provisions of the People’s Republic of China, the purpose of this law is: (1) to strengthen land administration, (2) maintain the socialist public ownership of land, (3) protect and develop land resources, (4) make proper use of land, (5) effectively protect cultivated land, and (6) promote sustainable development of the society and economy. Under Article Four, the State formulates overall plans for land utilization. Such plans define the purposes of use of land and classify land into three categories: (1) land for agriculture, (2) land for construction, and (3) unused land. In addition, the State “shall rigidly restrict conversion of land for agriculture to land for construction, keep the total area of the land for construction under control, and give special protection to cultivated land.”

On January 21, 1988, the NPC Standing Committee adopted the Water Law of the People’s Republic of China, which was amended on August 29, 2002 by NPC and then went into effect on October 1, 2002. The law was formulated to promote “the rational development, utilization, preservation, and protection of water, for the prevention and control of water disasters, and for the sustainable utilization of water resources.” In addition, water resources shall be owned by the State. Article Four provides that the development, utilization, preservation, and protection of water resources and the prevention and control of water disasters shall be carried out


225. Id. art. 1.


227. Id. art. 1.

228. Id.

229. Id. art. 4.

230. Id.


232. Id. art. 1.

233. Id. art. 3.
through comprehensive planning.\textsuperscript{234} Such “planning shall seek both a temporary solution and a permanent cure, with emphasis on multipurpose use and achieving maximum benefits to take advantage of the multiple functions of water resources and harmonize water use in production and the environment.”\textsuperscript{235}

On August 29, 1996, the NPC Standing Committee adopted the \textit{Mineral Resources Law of the People’s Republic of China}, which went into effect on October 1, 1996.\textsuperscript{236} This law was enacted to develop the mining industry and promote the exploration, development, utilization, and protection of mineral resources.\textsuperscript{237} Mineral resources belong to the State.\textsuperscript{238} As such, those seeking to explore or mine mineral resources shall separately make an application according to the law and shall register after obtaining the right of exploration or mining upon approval.\textsuperscript{239} The State protects the right of exploration, mining from encroachment, and the order of production and other work in the mining and exploration areas from interference and disruption.\textsuperscript{240} In addition, the State applies the principles of unified planning, rational geographical distribution, multi-purpose exploration, rational mining and multi-purpose utilization.\textsuperscript{241}

\textbf{III. Legislation on Nature Conservation and Biodiversity Conservation}

On June 7, 1985, the State Council promulgated the \textit{Provisional Regulation on the Management of Scenic Resort}.\textsuperscript{242} Article 10 provides that all important scenic spots, cultural relics, historical remains, and famous and/or ancient trees shall be investigated and certified.\textsuperscript{243} Furthermore, protective measures shall be established and implemented for these resources.\textsuperscript{244}

On January 8, 1988, the NPC Standing Committee adopted the \textit{Law of the People’s Republic of China on the Protection of Wildlife}, which went

\begin{footnotes}
\footnote{234. Id.}
\footnote{235. Id.}
\footnote{237. Id. art. 1.}
\footnote{238. Id. art. 3.}
\footnote{239. Id.}
\footnote{240. Id.}
\footnote{241. Id. at art. 7.}
\footnote{243. Id.}
\footnote{244. Id.}
\end{footnotes}
into effect on March 1, 1989. The purpose of this law is to protect and save rare or near extinct species of wildlife, to protect, develop and rationally utilize wildlife resources, and to maintain ecological balances.

On March 1, 1992, the Forestry Ministry promulgated the *Implementation Regulation on the Protection of Terrestrial Wildlife*. This law was formulated in accordance with the *Law of the People’s Republic of China on the Protection of Wildlife*. Article Two defines the term “terrestrial wildlife” as species of wildlife which are precious or being endangered and the species which are beneficial or of important economic and scientific research value. Article Seven establishes the creation of surveys and records of wildlife resources in order to provide the basis for the planning of the protection and development of wildlife resources and the preparation of the list or revised list of wildlife species under special protection by the State or local authorities. This law also prohibits any damage to the living and breeding areas or the living conditions of wildlife under special protection by the State or local authorities.

On September 17, 1993, the Agricultural Ministry promulgated the *Implementation Regulation on the Protection of Aquatic Wildlife*. This law seeks to manage and conserve wild aquatic animal resources. The competent departments of fishery administration shall establish surveys of wild aquatic animals on a regular basis, in order to provide the basis for the planning of the protection and development of wild aquatic animal resources and the preparation of the list or revised list of wild aquatic animal under special protection by the State or local authorities. The law prohibits catching or killing wild aquatic animal species under special protection. However, the catching of a wild aquatic animal, however, may be allowed upon issuance of a license and for the following purposes: scientific research or production of medicines; education or exhibition;

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246. *Id.*
248. *Id.* art. 1.
249. *Id.*
250. *Id.*
251. *Id.* art. 8.
253. *Id.*
254. *Id.*
255. *Id.*
domestication or breeding of wild aquatic animal; or other special reasons.256

On June 29, 1991, the NPC Standing Committee adopted the Law of the People’s Republic of China on Water and Soil Conservation.257 This law was enacted to prevent and control soil erosion, protect and rationally utilize water and soil resources, mitigate disasters of flood, drought and sandstorm, and improve the ecological environment and the development of production.258 Article Four provides, “the state shall, in relation to the work of water and soil conservation, implement the policy of prevention first, overall planning, comprehensive prevention and control, adoption of measures suited to local conditions, strengthening management and stress on beneficial results.”259

On December 1, 1994, the State Council promulgated the Regulation on the Management of Natural Reserves.260 The purpose of this law is to strengthen the development and management of natural reserves and to protect the natural environment and natural resources.261 Article Two provides natural reserves refer to areas under special protection and management that are set aside from the land, terrestrial bodies of water or oceans. According to the law, special attention is placed on locations of protected objects, such as representative natural eco-systems, natural concentration and distribution areas of precious and endangered wild fauna, flora species and natural relics.262

Additionally, under Article 11, natural reserves can be divided into national natural reserves or local natural reserves.263

On September 30, 1996, the State Council promulgated the Regulation on the Protection of Wild Plant, which went into effect on January 1, 1997.264 This law was enacted to protect, develop and rationally utilize wild

256. Id.
258. Id. art. 1.
259. Id.
261. Id. art. 1.
262. Id.
263. Id.
264. Regulation on the Protection of Wild Plants (promulgated by the Nat’l People’s Cong.,
plant resources, retain the biodiversity, and maintain ecological balances.\textsuperscript{265} The law generally provides for the protection and administration of wild plants.\textsuperscript{266} Article 10 establishes two categories for wild plants, one under special protection by the state and one under special protection by localities.\textsuperscript{267}

On May 23, 2001, the State Council promulgated \textit{Regulations on Safety of Agricultural Genetically Modified Organisms}.\textsuperscript{268} The purpose of this law is to strengthen the safety administration of agricultural genetically modified organisms (GMOs), safeguard human health and safety of animals, plants, and microorganisms, protect the environment, and promote research on agricultural GMOs.\textsuperscript{269} The law provides measures related to the research and testing, supervision and inspection, production and processing, marketing, and import and export of GMOs.\textsuperscript{270} Article Three defines GMOs as “animals, plants, microorganisms, and their products whose genomic structures have been modified by genetic engineering technologies for the use in agricultural production or processing.”\textsuperscript{271} Additionally, Article Eight provides for a labeling system of GMOs.\textsuperscript{272}

\begin{itemize}
\itemsep 0em
\item 265. Id. art. 1.
\item 266. Id.
\item 267. Id.
\item 269. Id. art. 1.
\item 270. Id.
\item 271. Id.
\item 272. Id. art. 3.
\end{itemize}
THE ROLE OF LAW IN ENVIRONMENTAL PROTECTION IN CHINA: RECENT DEVELOPMENTS

Alex Wang

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† Where noted, the translations of Chinese materials referenced herein are the author’s, as is the responsibility for any inaccuracy in these translations. This article follows the Chinese practice of placing the family name before the given name. The original Chinese text for most laws and their implementing regulations cited herein can be found on the Law Info China database located at http://www.lawinfochina.com. Due to confidentiality concerns, the identities of interviewees referenced in this article have been kept anonymous. Information regarding all interviews is on file with the author.
INTRODUCTION

In a rural village, set on the edges of a narrow mountain valley, a group of farmers go to court seeking relief from industrial pollution that has threatened their health and destroyed the crops that are the basis of their livelihoods. The defendants are two local factories that use a primitive industrial process to reduce copper ore. The process generates massive amounts of smoke and stench that decimate much of the surrounding forests and crops and cause local residents chronic headaches and coughing. The farmers ask for compensation and a court order halting the pollution. The court refuses to order a stop to the polluting activities because such an order would “blot out two great mining and manufacturing enterprises, destroy half of the taxable values of a county . . . and deprive thousands of working people of their homes and livelihood.”

This is a story that is all too familiar in China, reflecting the persistent distance between environmental degradation and a legal system struggling to keep pace with a rapidly growing economy. This particular case, however, does not come from China at all. Rather, it is the 1904 United States case of Madison v. Ducktown Sulphur, Copper & Iron Co., which arose out of an environmental dispute in southeastern Tennessee. As in China today, the industrial revolution in the United States brought with it increasing harm to the public from pollution and greater environmental conflict. In the United States, state and federal governments muddled through decades of inadequate environmental regulation and often unsatisfactory court decisions. It was not until the 1970s that the United

2. Id.
3. For example, federal regulation for air quality did not emerge until the 1950s and until the 1970 Clean Air Act such regulation was largely lacking in any effective enforcement or implementation measures. See, e.g., Air Pollution Control Act of 1955, Pub. L. No. 84-159, § 1, 69 Stat. 362 (codified as amended at 42 U.S.C. §§ 7401–7432 (2000)); Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7432 (2000)) (authorizing the creation of advisory air quality criteria, but establishing only a seldom used conference
States passed a series of robust environmental laws and opened the door to a generation of environmental advocates who would use law and the courts to improve the environment.

There is some comfort in knowing that developed countries like the United States, Japan, and England were able to reverse decades of environmental degradation. The difficulty is that China’s environmental problems are arguably moving faster and on a larger scale than anything the world has ever seen before.

How can China remedy its environmental problems given the pace and scale of change? In recent years, China has recognized the key role that the legal system must play in addressing ever-worsening environmental problems. For example, the State Council, China’s highest executive body, has specifically called for the “perfection of the legal assistance system for pollution victims, and research and establishment of an environmental civil and administrative public interest litigation system.” A robust debate has emerged in Chinese government, academic, and civil society circles regarding the exact form that such a public interest litigation system might take. This debate raises questions from the mechanical (e.g., how many days of notice should the government receive before the commencement of a suit?) to the existential (e.g., what is the “public interest?”). More generally, China is moving forward on a broad range of legal approaches to environmental protection, including expansion and standardization of environmental impact assessment procedures, encouragement of information disclosure-based regulation, and the creation of public hearing procedures.

This article will first address the context of China’s environmental challenges and discuss a number of recent developments in the utilization of legal procedures as an enforcement mechanism; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (codified as amended at 42 U.S.C. §§ 7401-7432 (2000)) (authorizing, inter alia, the creation of Air Quality Control Regions, but still only containing the conference procedure of the Clean Air Act of 1963 for enforcement).


5. See Hua Wang et al., Public Ratings of Industry’s Environmental Performance: China’s Greenwatch Program, in INT’L CONF. ENVTL. COMPLIANCE & ENFORCEMENT 1 (2002), available at http://www.inece.org/conf/proceedings2/52-Public%20RatingsChina.pdf (noting the key components of the “Greenwatch” program, an example of disclosure-based regulation in Jiangsu Province). China’s State Environmental Protection Administration (SEPA) has issued a notice encouraging environmental protection bureaus nationwide to implement industrial environmental information disclosure systems similar to “Greenwatch.” Id. at 2.

of law and litigation for environmental protection in China. Next, this article will examine more closely the legal framework that allows for environmental litigation in China, with a focus on the most prevalent form of Chinese environmental litigation—pollution compensation lawsuits. This article will also highlight key issues related to this type of litigation from the perspective of a major environmental class action lawsuit from Fujian Province. Finally, this article will discuss a number of the current proposals for an environmental public interest litigation system in China, which seek to overcome some of the shortcomings in the existing environmental litigation regime.

I. THE ENVIRONMENTAL CONTEXT: THE HIGH COST OF “POLLUTE FIRST, CONTROL LATER”

The United States (U.S.) and other developed nations, such as Japan and the United Kingdom, all followed what the Chinese refer to as the “pollute first, control later” (xian wuran, hou zhili) model of development, in which focus on environmental protection came only after a certain degree of economic development was achieved. Since the advent of Deng Xiaoping’s “reform and opening” (gaige kaifang) in the late 1970s, China has likewise aggressively followed a “pollute first, control later” path of development. Though a tremendous amount of work has been done in China in the realm of environmental protection, where economic development and environment protection have bumped up against each other in the bare-knuckled, high-growth capitalist environment that is China today, economic development has invariably prevailed. This is reflected in
the organizational structure of the government and in policies and governance practices. This can be seen most clearly in the system of government performance assessment, in which economic growth is one of the primary metrics of performance and environmental performance measures are virtually non-existent. It is also reflected in the relatively low-status of China’s primary environmental enforcer, the State Environmental Protection Administration (SEPA). SEPA also has a relatively small amount of staffing relative to the size and population of China, with some 2,200 employees (219 administrative staff in Beijing and some 2,000 staff in various SEPA-affiliated national offices and centers).

The prioritization of economic development has produced a sustained period of impressive economic growth and an extensive reduction of poverty. Between 1978 and 2005, China’s Gross Domestic Product (GDP) grew by an average of 9.4% per year and China rose from 48th in the world in 1978 to become the world’s fourth largest economy in 2005, behind only the U.S., Japan, and Germany. Between 1981 and 2001, China reduced the number of its people living in extreme poverty by a staggering 400 million, and the proportion of the population living in poverty fell from 53% to 8%.

10. Matt Perrement & Nick Young, Premier Pledges Green Performance Assessment Amidst Dust-Filled Skies, CHINA DEV. BRIEF, Apr. 24, 2006, http://www.chinadevelopmentbrief.com/node/559. Proposals have been made to add environmental criteria into government performance criteria. Id.
11. See ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA, supra note 9, at 15. The status of China’s top environmental agency, however, has improved gradually over the years. It began as the Environmental Protection Bureau, set up in 1974 with a staff of twenty as a unit of the State Council. After a series of incarnations, SEPA was created and placed directly under the State Council in 1998, replacing the sub-ministry level National Environmental Protection Agency (NEPA). Nonetheless, SEPA is still considered a relatively weak agency. Id.
This economic growth, however, has come at a great environmental cost. The environmental impacts of China’s growth are, by now, well known. China has 16 of the 25 most polluted cities in the world.\(^{15}\) China is the world’s leading emitter of sulfur dioxide,\(^{16}\) and China’s mercury emissions continue to rise.\(^{17}\) Additionally, China could surpass the U.S. to become the leading emitter of carbon dioxide by as early as 2009.\(^{18}\) In China, 300 million people, a population roughly that of the entire United States, do not have access to safe drinking water,\(^{19}\) and an estimated 400,000 people die prematurely each year because China’s air pollution is below legal standards.\(^{20}\) The government’s own estimate puts the initial cost of environmental clean-up at a minimum of US$135 billion.\(^{21}\) Environmental damage costs China anywhere from 3-8% of the country’s GDP.\(^{22}\)

Severe environmental problems have led to significant social unrest. In 2005, there were some 50,000 disputes over environmental pollution, according to SEPA Minister Zhou Shengxian.\(^{23}\) From 2001 to 2005, Chinese environmental authorities received more than 2.53 million letters and 430,000 visits by 597,000 petitioners seeking environmental redress.\(^{24}\) Officials have expressed concern that China’s environmental problems are a leading threat to social stability.

In response, the upper levels of Chinese government have expressed the


\(^{16}\) *China Leads World in Sulfur Dioxide Charge*, XINHUA, Aug. 3, 2006, available at http://english.cri.cn/2946/2006/08/03/272@122190.htm (“In 2005, China discharged 25.49 million tons of sulfur dioxide, the most in the world.”).


need to move beyond the “pollute first, control later” mode of
development. In December 2005, the State Council, China’s leading
executive body, issued a Decision on Implementation of Scientific
Development and Strengthening of Environmental Protection, stating that:

The environmental situation remains extremely grim. Although environmental protection in China has made positive progress, the grim environmental situation has not changed . . . . Developed countries experienced environmental problems in stages along their 100 year industrialization process. China has seen all of these problems appear in a concentrated 20 year period . . . . Environmental pollution and ecosystem destruction have caused enormous economic losses, harmed the health of the masses, and affected societal stability and environmental safety . . . .

At present, some places emphasize GDP growth and pay short shrift to environmental protection . . . . Environmental protection should be placed in a more significant strategic position.

In April 2006, the head of China’s State Council, Premier Wen Jiabao, emphasized in a speech before the Sixth National Environmental Conference the need for China to transition from a singular focus on economic development to a mode of development that placed the environment on par with economic development. There has been particular recognition in China of the need to reform the legal system to address ever-worsening environmental challenges. The Decision, for example, notes that “environmental protection laws and regulations are not up to the task. The environmental protection legal system is not complete . . . and where laws exist they are not followed and enforcement is not strict.”

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27. Id.
28. Id. (author’s translation).
II. RECENT DEVELOPMENTS: LEGAL TOOLS FOR ENVIRONMENTAL PROTECTION

For China, the challenges of using the law for environmental protection are formidable. Unlike the U.S. with its long history and culture of using law and the courts, China essentially began in 1979 to rebuild anew a legal system that had been entirely dismantled in the previous few decades.29 China’s court system remains weak, with poorly trained judges and regular intervention in cases by local governments that often have a financial interest in the polluting enterprises.30 Chinese environmental laws are often lacking in effective enforcement provisions.31 Moreover, despite stated intentions to implement a rule of law system for environmental protection, China has not traditionally had a culture of utilizing lawyers, courts, or the law in general to resolve disputes.32

Since the passage of the draft Environmental Protection Law in 1979,33 China’s environmental law framework has grown to include at least two dozen major statutes and countless State Council regulations, standards, and other legal-norm-creating documents. The major laws include the Law on the Prevention and Control of Atmospheric Pollution,34 Law on the Prevention and Control of Water Pollution,35 and the Environmental Impact Assessment Law.36 Laws now cover forestry, fisheries, wildlife protection, marine areas, desertification prevention, clean production, solid waste,

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The amount of work put into developing a legal framework for environmental protection has been impressive. It is now generally accepted that China’s environmental laws are relatively complete and that enforcement is now the real problem. This is true in part. However, like early U.S. environmental laws, China’s environmental laws, though broad in coverage, still suffer from weaknesses that limit their effectiveness. Provisions are often vague and more akin to policy statements. They frequently “encourage” rather than “require.” Perhaps most importantly, enforcement provisions are often extremely weak.

The Environmental Impact Assessment Law (EIA Law) offers a good example of this. The EIA Law requires an environmental impact assessment to be completed prior to project construction. However, if a developer completely ignores this requirement and builds a project without submitting an environmental impact statement, the only penalty is that the environmental protection bureau (EPB) may require the developer to do a make-up environmental assessment. If the developer does not complete...
this make-up assessment within the designated time, only then is the EPB authorized to fine the developer.\textsuperscript{42} Even so, the possible fine is capped at a maximum of about US$25,000, a fraction of the overall cost of most major projects.\textsuperscript{43} The lack of more stringent enforcement mechanisms has resulted in a significant percentage of projects not completing legally required environmental impact assessments prior to construction. The allowance for “make-up” environmental assessments creates a loophole around the fundamental \textit{raison d’etre} for environmental impact assessment (i.e., to build environmental considerations into the development of projects and plans before they are completed). Chinese environmental officials and scholars are well-aware of these weaknesses in the law and openly acknowledge that they are the result of compromises in the legislative process and concerns about limiting economic growth.\textsuperscript{44}

Despite these problems, there are signs that law and public advocacy could play a larger role in China. China’s leaders increasingly speak of “ruling the country according to law,” enshrining the principle in the Constitution in 1999 and, as Randall Peerenboom has noted, “there is considerable direct and indirect evidence that China is in the midst of a transition toward some version of rule of law.”\textsuperscript{45}

Moreover, as environmental consciousness increases, people in China are beginning to turn to the courts and the law in general to advocate for their rights. Cases handled or supported by non-governmental organizations (NGO), Government-Organized NGOs (GONGOs), and “public interest” lawyers are an influential, though still limited, aspect of this phenomenon. The Center for Legal Assistance to Pollution Victims (CLAPV), a Beijing-based environmental law NGO, is perhaps the best-known of a new generation of environmental legal advocates. Since its inception in 1999, it has handled over 70 cases and obtained favorable results in nearly half of them.\textsuperscript{46} The government-sponsored All-China Environment Federation (ACEF) has taken on 23 environmental matters covering over 3,000 people since its founding in 2005, according to media

\begin{footnotes}
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Interviews on file with author; see also Lu Hui, \textit{China Fails to Achieve Pollution Control Goal in 2006}, XINHUA, Feb. 12, 2007, \url{http://news.xinhuanet.com/english/2007-02/12/content_5731364.htm} (reporting that Zou Shengxian, Director of the State Environmental Protection Administration said, “[l]ocal protectionism has resulted in rampant violation of the environment”).
\textsuperscript{45} RANDALL PEERENBOOM, \textit{CHINA’S LONG MARCH TOWARD RULE OF LAW} 6 (2002).
\textsuperscript{46} Xu Kezhu & Alex Wang, \textit{Spotlight on NGO Activism in China: Recent Developments at the Center for Legal Assistance to Pollution Victims (CLAPV)}, \textit{CHINA ENVTL. SER.}, 2006, at 103, available at \url{http://www.wilsoncenter.org/topics/pubs/CEF_SpecialReport.8.pdf}.
\end{footnotes}
In Yunnan Province, an environmentalist named Li Bo has established a center for rights-based environmental conservation advocacy in the wake of a successful campaign to protect indigenous land rights against illegal tourism development in the Tibetan village of Jisha. Professor Wang Jin and several other professors and students at Peking University Law School brought a novel suit on behalf of the Songhua River, a species of fish, and an island in an ultimately unsuccessful attempt to press for relief with respect to the Songhua River benzene spill in 2005. Some of these disparate efforts have shown promising initial success.

However, public interest litigation of this sort requires the expertise and funding that only comes from the creation of more established, well-funded organizations dedicated to the work. To make public interest litigation more effective, laws and policies will need to be instituted to encourage the development of environmental public interest law organizations, such as CLAPV.

Another development is the advent of informal local community coalitions turning to legal advocacy to protect their interests. The White Swan Residential Development in Guangzhou opposed the construction of high-voltage transmission towers only a short distance from residents’ homes and discovered clear violation of the EIA Law’s requirement to conduct an environmental impact assessment prior to construction. The residents, who feared the health and property value impacts of the transmission towers, filed suit and used the attention garnered by the lawsuit to lobby various levels of government, ultimately obtaining an agreement by the power company to bury the offending power lines. Similar cases have arisen in Beijing, Hangzhou, and elsewhere and the communities have informally provided each other with strategic advice.

The Bai Wang Jia Yuan Residential Development case in Beijing involved transmission towers built in anticipation of the 2008 Beijing
Olympics and, while ultimately unsuccessful, led to the first public hearing on environmental impact assessment pursuant to the new Administrative Licensing Law. In another case, a residential community in Shenzhen opposed the construction of an underground traffic tunnel between Hong Kong and Shenzhen because the exhaust outlets were located too near to their homes. Several residents examined the environmental impact statement for the project and, suspecting errors, conducted their own environmental impact assessment. The new assessment found grave inaccuracies in the original report and dangerous levels of pollution in violation of relevant environmental standards. Although residents did not succeed in preventing the project in this case, residents’ actions reflect a new awareness of, and willingness to use, legal procedures as tools for advocacy.

As in other jurisdictions around the world, even where Chinese court cases are ultimately unsuccessful, litigation has often served as a catalyst to negotiated solutions or government enforcement. An example of this was an administrative lawsuit against an environmental protection bureau in Hebei Province for approval of a highly-polluting plant that refined silver from film sludge. The case ultimately resulted in two court rejections on lack of standing grounds. Nonetheless, the plaintiffs’ advocates used the court case to highlight gross errors in the approved environmental impact statement (EIS) and caused the State Environmental Protection Administration to suspend the firm that authored the EIS and render the EIS invalid. Without a valid EIS, the factory was ordered to cease operation and remains shuttered as of this writing.


55. Interviews on file with author; see also Qie Jianrong, Huan Bao Zong Ja Dai Wei Gui Huan Ping Zai Kai Fa Dan-Ji Ceng Huan Ping Shen Pi Can Zai San Da Wen Ti [SEPA Issues a Fine With Respect to an Illegal EIA–Basic-level EIA Approval Has Three Major Problems], FA ZHI WANG, Dec. 14, 2005 (author’s translation).

56. Interview on file with author.

57. Id.
III. THE LEGAL FRAMEWORK FOR POLLUTION COMPENSATION CASES

Although there are a variety of channels for dispute resolution in China, environmental litigation and the role of lawyers and courts have received a great deal of interest from government, academic, and civil society in China in recent years. The next part of this article explores the existing legal foundation for environmental litigation in China, and the way these cases are brought. The vast majority of environmental litigation cases in China are what are known as “pollution compensation cases” (wuran sunhai peichang anjian), in which plaintiffs seek compensation for losses caused to property or health by environmental pollution.

The following discussion will set forth the key legal provisions governing this type of environmental litigation. The next section will discuss a number of issues with respect to environmental litigation in practice from the perspective of an environmental class action from Fujian Province decided in 2005.

The legal basis for pollution compensation claims can be found in the General Principles of Civil Law (“General Principles”) and the Environmental Protection Law. Article 124 of the General Principles states that:

Any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.

Article 41 of the Environmental Protection Law (EPL) states that:

A unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses.

A number of specialized environmental protection statutes on air,

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58. The focus here will be on key legal provisions related to civil litigation seeking compensation for damages from pollution. This is the most prevalent kind of environmental litigation. Administrative cases challenging, for example, the approval (or lack thereof) of projects that have environmental impacts constitute a less common, but nonetheless important, type of environmental litigation.


water, solid waste, noise, and other issues also contain provisions concerning liability for pollution. The EPL sets forth certain defenses to liability. For example, if the harm is caused by pollution that resulted solely from natural disaster where reasonable precautionary measures were promptly taken then no liability attaches.

A. No-Fault Liability

Chinese law sets forth a no-fault liability regime for pollution compensation cases; that is, a plaintiff is not required to show a violation of applicable emissions standards or other fault by the defendant. Note that the “in violation of state provisions” language in Article 124 of the General Principles has engendered some debate as to whether no-fault liability should apply in environmental cases. Scholars generally believe that Article 41 of the Environmental Protection Law, which does not require a violation of law as a condition to liability, controls. The primary argument relies on general principles of Chinese statutory interpretation, which hold that in cases of conflict specialized provisions supersede more general ones, and newer provisions supersede older provisions.


62. Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 41, available at http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm (P.R.C.) (“If environmental pollution losses result solely from irresistible natural disasters which cannot be averted even after the prompt adoption of reasonable measures, the party concerned shall be exempted from liability.”).


64. See Yuhong Zhao, Environmental Dispute Resolution in China, 16 J. ENVTL. L. 157, 175 (2004) (highlighting the lack of liability in the Environmental Protection Law).

argument is not merely academic. It is not uncommon for defendants to claim lack of violations as a defense to liability and for courts to accept this argument or utilize it as a basis for reducing compensation.\(^{66}\) A clarification of this no-fault regime for pollution compensation cases is reportedly included in a draft amendment to the General Principles that is under consideration by the National People’s Congress.\(^{67}\)

**B. Reversal of Burden of Proof in Environmental Cases**

Another key element of pollution compensation cases is the reversal of the burden of proof. This is clearly set forth in Article 4, Section 3 of the Supreme People’s Court Various Regulations Regarding Evidence for Civil Suits, which states that: “in compensation lawsuits concerning environmental pollution, the polluter carries the burden of proof with respect to...demonstrating the lack of causal link between the polluter’s actions and the harmful result.”\(^{68}\) In practice, however, courts are still known to require plaintiffs to produce evidence sufficient to demonstrate causation.\(^{69}\) Given the difficulty of proving causation in environmental pollution cases, this reversal of burden of proof is often the critical determinant of outcome in environmental litigations.

**C. Statute of Limitations**

Article 42 of the EPL sets forth a three year statute of limitations for claiming compensation, which starts at such time when “the party becomes aware of or should become aware of the pollution losses.”\(^{70}\) This is one year longer than the typical statute of limitations for tort cases under Chinese law.\(^{71}\) In the Rongping Case,\(^{72}\) described below, the court tolled...
the statute of limitations during the period that plaintiffs were actively seeking resolution through administrative channels.

D. Remedies

The General Principles of Civil Law provide for ten primary forms of civil liability, including “cessation of infringement” (tingzhi qinghai); “compensation for losses” (peichang sunshi); “removal of obstacles” (paichu fangai); “elimination of dangers” (xiaochu weixian); and “restoration of original condition” (huifu yuanzhuang).73 The Environmental Protection Law specifically mentions: (a) elimination of harm (paichu weihai);74 and (b) compensation for losses75; and in practice these are the two most common types of claims for relief in environmental pollution cases. “Elimination of harm” refers to three types of remedies: cessation of infringement, restoration of original condition, and elimination of dangers.76 “Cessation of infringement” refers to an injunction to halt an ongoing harm. “Restoration of original condition” requires the infringing party to conduct clean-up or reparation of damage already caused. “Elimination of dangers” refers to situations where harm has not yet occurred, but a substantial threat of harm exists.

With respect to damages compensation, recovery may be had for actual damages and so-called emotional damages (jingshen sunhai), which are akin to pain and suffering.77 Punitive damages are not available in pollution compensation cases.

E. Class Actions

Another aspect of pollution compensation cases is the prevalence of class actions or group lawsuits. Polluting activities often affect large numbers of people in similar ways. Class actions are governed by

75. Id.
provisions of the Civil Procedure Law (1991). Article 54 concerns class actions in which the number of litigants is fixed. Article 55 concerns cases in which the number of plaintiffs or defendants is not fixed. With Article 55 class actions, “the people’s court may issue a public notice, stating the particulars and claims of the case and informing claimants to file at the people’s court within a fixed period of time.” Class actions may have two to five representatives.

In either type of class action, the representatives’ actions are binding on the class. However, “modification to or waiver of claims of action, or confirmation of the claims of the other party, or resorting to compromise by the representatives shall be subject to the approval of the party they represent.” Article 55 also provides that judgments or orders of the court “shall be effective for all the claimants who have filed at the court,” and shall be binding on those with similar claims who initiated legal proceedings during the prescribed litigation period. Additionally, the Civil Procedure Law dictates that “[t]he same judgments or orders shall be binding on the claimants who have not filed at the court but initiated legal proceedings during the limitation of action.”

Recent guidelines issued by the All-China Lawyer’s Association placing certain restrictions on cases with ten or more plaintiffs may, in practice, limit utilization of class action procedures.

F. Costs

Costs of litigation, including attorney’s fees, court costs, and expert fees, can be high in any country. A particularly onerous requirement of Chinese law is the “case acceptance fee” (anjian shouli fei), which is calculated as a percentage of the total amount of relief requested. Plaintiffs must pay anywhere from 0.5 to 4% of the relief requested as an

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80. Id. art. 55.
81. Id.
82. Id.
83. Id.
85. Id.
acceptance fee. Plaintiffs often also face so-called “other litigation costs” that are levied at the court’s discretion and which can be a source of abuse. If a losing defendant does not pay the amount ordered by the court, the plaintiff must pay a fee to institute execution (zhixing) proceedings. Proposals to prohibit arbitrary levying of “other litigation costs” and to place the cost of execution proceedings on the party that owes payment are currently under consideration.

Appraisal fees in pollution compensation cases can also be prohibitive. In pollution compensation cases, appraisals by a certified, court-appointed entity typically provide the key court evidence regarding damages and causation. In the Rongping Case, noted below, appraisal fees totaled 100,000 yuan (US$12,903). Fees on this order of magnitude can equal many years of salary for an average individual in China. In this regard, the pooling of financial resources allowed by class actions may be the most likely way to surpass this barrier.

IV. THE CASE OF ZHANG CHANGJIAN ET AL. V. RONGPING CHEMICAL PLANT

The case of Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (the “Rongping Case”) provides an illustration of how these legal principles are carried out in practice and how various legal and non-legal factors potentially affect the outcome of cases. This case concerned

87. Id. art. 5. Plaintiffs must pay 50 yuan for the portion of requested relief less than 1,000 yuan; 4% on the portion greater than 1,000 up to 50,000 yuan; 3% on the portion greater than 50,000 up to 100,000 yuan; 2% on the portion greater than 100,000 up to 200,000 yuan; 1.5% on the portion greater than 200,000 up to 500,000 yuan; 1% on the portion greater than 500,000 up to 1,000,000 yuan; 0.5% on the portion greater than 1,000,000 yuan. Id.
88. Id. art. 19.
89. Interview with environmental lawyer (Feb. 6, 2007) (on file with author).
91. Interview with environmental lawyer (Feb. 6, 2007) (on file with author).
92. Interview with environmental law expert (Feb. 8, 2007) (on file with author).
94. The World Bank, China Quick Facts, http://web.worldbank.org/ (follow “Countries” hyperlink; then follow “China” hyperlink; then follow “Data and Statistics” hyperlink; then follow “Facts and Figures” hyperlink) [hereinafter The World Bank, China Quickfacts]. The average income in 2005 was US$1,290US. Id.
95. Ping Nan Lv Se Zhi Jia [Pingnan Home of Green], http://www.pnlszj.ngo.cn/cn (last visited Mar. 15, 2007). Ping Nan Lv Se Zhi Jia is an organization started by the lead plaintiff in the
pollution emanating from Fujian Province (Pingnan) Rongping Chemical Ltd., Asia’s largest producer of potassium chlorate, which is located in the southeastern province of Fujian (the “Rongping Plant”). Plaintiffs alleged that pollution first commenced in 1992 with the construction of the first stage of the plant. The most serious harms occurred, however, after 1998 when the second stage of the plant was constructed. It was then that villagers began to notice that local timber stands, bamboo, fruit trees, and crops began to wither and die. The volume of fish and shrimp in the local waters decreased markedly. Villagers began to experience a variety of illnesses that were not common before the factory began production and incidences of cancer increased markedly.

Beginning in 1999, Mr. Zhang Changjian, a local “barefoot doctor,” and a number of other villagers first attempted to obtain relief through a letter writing campaign to various government agencies. In 2001, Mr. Zhang organized a formal petition that he sent to China’s State Environmental Protection Administration (SEPA). The actions of the villagers drew attention from national media and, ultimately, led to SEPA designating the plant one of the 55 worst polluters in China. In 2002, with the assistance of the Beijing-based Center for Legal Assistance to Pollution Victims (CLAPV), Mr. Zhang and four other villagers, acting as class representatives (susong daibiao ren), filed a class action lawsuit in the Ningde Municipality Intermediate People’s Court that included more than 1,700 plaintiffs. Plaintiffs requested the following relief:

1. A court order for defendant to immediately stop the infringement,
2. 10,331,440 yuan (US$1.3 million) in compensation for losses to crops, bamboo, timber, etc.

Rongping case, Zhang Changjian.

98. Oster & Fong, supra note 96.
99. Id.
100. Id.
101. Id.
102. Id.
103. Lawyers Wang Canfa and Zhang Jingjing from CLAPV, as well as a local lawyer named Lin Dingbin represented the class.
105. Duan, supra note 97.
3. 3,203,200 yuan (US$413,316) in emotional damages, and
4. a court order for defendant to clean up waste within the plant and in
the back mountains.

Plaintiffs prevailed at the Intermediate People’s Court and on appeal to
the Fujian Provincial High People’s Court. The final judgment ordered
defendant: (a) to immediately stop the infringement, (b) to pay plaintiffs
684,178.2 yuan (approximately US$88,000) in compensation for losses to
crops, bamboo, timber, etc, and (c) to clean up chromium-containing waste
in the factory and in the back mountains within one year. Plaintiffs’
request for “emotional damages” (jingsheng sunhai peichang) was denied.
The 77,683 yuan case acceptance fee was allocated as follows: 45,000 yuan
to plaintiffs; 32,683 yuan to defendant. However, plaintiffs’ portion of
the acceptance fee was waived by the court. Responsibility for paying the
100,000 yuan appraisal fee was placed on defendant.

Despite the relatively modest amount of compensation per plaintiff
ultimately achieved, the legal victory was hailed as a landmark by domestic
and international media, and was selected as one of the “ten most influential
Chinese lawsuits of 2005” by a consortium led by the Legal Daily and the
All-China Lawyers Association.

While one case is an insufficient sample from which to draw definitive
conclusions, some preliminary lessons can be drawn from this case.

A. External Issues

Local protectionism and pressures on judicial independence were
present in this case. Indeed, the local government had a strong interest in
maintaining the factory in operation as it accounted for a third of the
county’s tax and other revenues. Under such circumstances, it is
typically very difficult to obtain judgment against such an entity because of
the economic benefit to local government and the sway that government
holds over all hiring, firing, promotion, and budgeting decisions at the

106. Schafer, supra note 104.
107. Id.
108. Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Pingnan Interm. People’s
Court, Apr. 2005) (on file with author).
109. Id.; Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Fujian Provincial High
People’s Court, Nov. 2005).
110. Fa Zhi Ri Bao “2005 Zhong Guo Shi Da Ying Xiang Xing Su Song” Ping Xuan Jie Xiao
[Legal Daily “2005 China Ten Most Significant Impact Litigations” Selection Announcement], XINHUA,
111. Oster & Fong, supra note 96.
Plaintiffs were able to file the case in the Intermediate People’s Court because it was considered to have met the threshold set forth in the law as a case of “significant impact within the particular jurisdiction.”113 This decision to commence the litigation at the Intermediate People’s Court was likely helpful to plaintiffs. The Intermediate People’s Court was located more than a two-hour drive from the site of the factory. The basic level court, located within the same county as the factory, would have been most susceptible to local factors. This jurisdictional decision also allowed for appeal to the provincial High Court, located in Fuzhou City. The simple physical distance from the factory site, along with the tendency towards higher quality judges in the upper-level courts, may have combined to give plaintiffs a fairer trial.

Beginning in 2006, Supreme People’s Court rules have made it more difficult to file a class action above the basic level courts. On December 30, 2005, the Supreme People’s Court issued a “Notice Regarding Problems with the Acceptance of Class Action Lawsuits by the People’s Courts,”114 which stated that class action lawsuits with large numbers of litigants should be accepted by the basic level People’s Court.115 Cases with significant impacts within the area under the jurisdiction of the High People’s Court should be handled by the Intermediate People’s Court. If strictly followed, this guidance would appear to force cases to be accepted at a court one level lower down than required by the Civil Litigation Law,116 and could potentially exacerbate pressures from local protectionism for these cases.

Plaintiffs clearly faced great pressure in their village. Lead plaintiff, Zhang Changjian, was assaulted while collecting water samples, and his wife was attacked at their home.117 The county government shut down Mr. Zhang’s clinic.118 When the villagers attempted to raise funds on their own to pay for a lawsuit, their donations box was confiscated.119 The plaintiffs’ lawyers believe that the difference between the requested compensation and

115. Id.
117. Oster & Fong, supra note 96.
118. Id.
119. Interview with environmental lawyer (Feb. 7, 2007) (on file with author).
the actual amount of compensation granted may be the result of local protectionism.\textsuperscript{120}

It is possible, for example, that local protectionism resulted in lower compensation estimates in the key reports upon which the courts relied.\textsuperscript{121} The court used an appraisal report authored by Mr. Tang Qingshan, a senior engineer from the Ningde Municipality Bureau of Forestry (the “Tang Report”), in determining compensation.\textsuperscript{122} Mr. Tang was commissioned by the court, with the approval of both parties, to do the primary appraisal of damages for the case.\textsuperscript{123} The court also relied on a report with calculations of the economic value of damages described in the Tang Report and a Pingnan County report entitled “Ping Township Xiping Village Pollution Situation Due to Rongping Chemical Factory.”\textsuperscript{124}

\textbf{B. Difficulties in Obtaining Remedies}

Even when the court decides in favor of plaintiffs, it can be difficult to enforce orders to stop infringements or to obtain payment of compensation. This was the situation in the Rongping case.

First, the court ordered the defendant to immediately “stop infringement” (\textit{tingzhi qinhai}) against the plaintiffs, but did not specify how this was to be accomplished.\textsuperscript{125} As of the publication of this article, it is unclear whether the defendant has taken any action in response to this order. The plaintiffs’ lawyers acknowledge that the request for relief should have provided the court with a more specific recommendation.\textsuperscript{126} Because the relief order was not specific, it will be difficult for plaintiffs to seek enforcement or even to know whether the defendant has complied. As was the case in\textit{Duckworth}\textsuperscript{127} in the United States, it is difficult at present in China to obtain an injunction against polluters to stop production or even to install equipment to reduce pollution, because of costs involved and the potential negative impacts on economic growth.\textsuperscript{128}

Second, at the time of this writing, over a year after the final decision in

\begin{itemize}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Ping Township Xiping Village Pollution Situation Due to Rongping Chemical Factory} (on file with author).
\item \textsuperscript{125} See Duan, \textit{supra} note 97 (noting the court ordered the defendant to “immediately stop causing damage to the plaintiffs”).
\item \textsuperscript{126} Oster & Fong, \textit{supra} note 96.
\item \textsuperscript{127} Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 666–67 (1904).
\item \textsuperscript{128} Xu & Wang, \textit{supra} note 46, at 103–104.
\end{itemize}
this case, plaintiffs still have not received any of the funds. The factory has paid the funds to the county court; however, the court refuses to release the money until a system has been established for determining how to allocate the money among the plaintiffs in the class.\textsuperscript{129}

Although the court granted significantly less relief than requested, and enforcement of the court’s decision has been difficult to obtain, plaintiffs nonetheless prevailed. This victory came despite the various pressures militating against a court victory. A number of factors may have contributed to this outcome.

\textit{C. Media and Central Government Attention}

Lawyers on the case believe that the high-level of media attention on the case contributed to the favorable outcome for plaintiffs.\textsuperscript{130} Central government scrutiny may have also played a role. The State Environmental Protection Administration was aware of the case and had listed the defendant as one of the 55 worst polluters in the country.\textsuperscript{131}

\textit{D. Presence of a Large Class}

The lawyers on the case noted that the presence of a large class helped to bring about a ruling for plaintiffs by helping to sustain media and government attention. This attention created the possibility of unrest if an unfair ruling were issued. Moreover, the large class made the economic aspects of this lawsuit much more feasible. While a US$10,000 case acceptance fee and US$12,903 appraisal fee could easily equal many years of salary for an average Chinese citizen,\textsuperscript{132} such an amount divided among 1,721 plaintiffs amounts to a mere US$13.31 per person.

Courts have discretion to divide class actions into individual cases and courts in China almost always do so.\textsuperscript{133} Experts have posited a number of theories as to why this is so prevalent in practice. First, courts can increase their revenue by separating class actions into individual cases. The court in the Rongping case not only maintained the class, but also waived 45,000 yuan of the acceptance fees allocated to the plaintiffs and so only

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{129}.] Oster & Fong, \textit{supra} note 96.
\item[	extsuperscript{130}.] Interview with environmental lawyers (Feb. 7–8, 2007) (on file with author).
\item[	extsuperscript{131}.] Oster & Fong, \textit{supra} note 96.
\item[	extsuperscript{132}.] The World Bank, China Quick Facts, \textit{supra} note 94.
\item[	extsuperscript{133}.] Yuhong, \textit{supra} note 64, at 177. It is not entirely clear why the class was not separated in the Rongping Case; however, the administrative burden of handling nearly 2,000 cases if the class action were separated may have contributed to maintenance of the class.
\end{enumerate}
\end{footnotesize}
would have claimed 32,683 yuan (US$4,217). This particular court did not act to maximize court fees. Second, one important metric of work achievement for a court is the number of cases handled. A court can boost its case load numbers by separating class actions into individual cases. Third, courts sometimes claim that class actions may lead to social instability.

Concern about the impact of class actions on social stability seems to have prompted the All-China Lawyers Association’s (ACLA) recent guidelines placing restrictions on “collective cases” (quntixing anjian), or cases with more than ten plaintiffs. These guidelines may limit the willingness of lawyers to take on such cases. For example, the “[ACLA] Guiding Opinion Regarding Lawyers Handling Collective Cases” (“Guiding Opinion”), among other things, requires lawyers taking collective cases to report such cases immediately to the local court, bar association, and relevant government agency. If lawyers discover any problem or trend that may lead to a conflict, the lawyer has the duty to report to the courts and administrative agencies immediately. Law firms that take on such cases also have new obligations, which include reporting to the local bar association and having at least three partners, including the director of the firm, sign on to take responsibility for the case. Anecdotal evidence suggests that such restrictions will have a chilling effect on the willingness of lawyers to take on pro bono environmental lawsuits. For example, many pro bono environmental cases have traditionally been taken by mid-level associates, who may be reluctant to go to three partners in the firm to seek approval for the case.

E. Knowledge of Correct Legal Doctrine

In the Rongping case, the judges in both trials correctly applied the doctrines of no-fault and reversal of burden of proof. The defendant presented evidence that the factory’s equipment was modern and that a provincial environmental protection bureau inspection had shown its air and

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136. Id.
137. Id.
138. Id.
139. Interview with environmental law expert (Feb. 7, 2007) (on file with author).
water emissions to be in accordance with standards. However, the court correctly noted that:

In accordance with the “Supreme People’s Court Certain Regulations Regarding Evidence in Civil Litigation” in compensation litigation brought about by environmental pollution, the polluter has the burden to raise evidence to show the lack of causal connection between his behavior and the harmful result . . . . So, although [defendant] has provided evidence that its environmental protection certification is in order, its machinery is first rate, its emissions of the “three wastes” [gas, water, industrial residue] meet standards, there have been no pollutant accidents, and related expert testimony, but whether or not pollutant discharges meet standards is not the criteria by which we determine whether liability attaches to a polluting unit.  

Moreover, the defendant claimed that another nearby factory caused the harm to crops, bamboo, fruit trees, and timber stands. The court correctly placed the evidentiary burden on the defendant and held that the defendant had provided no appraisal evidence to demonstrate causation between the emissions from the nearby factory and the damage suffered by plaintiffs.

Furthermore, lawyers for the plaintiffs believe that the judge applied the correct legal doctrine in the initial court decision because the judge had received specialized environmental law training. The courts’ application of the correct legal doctrine could also be attributed to the lawyers for plaintiffs, who were among the most experienced environmental litigators in China.

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141. Id.
142. Id.
143. Schafer, supra note 104. The judge at the Intermediate People’s Court had taken part in an environmental law training held by the Center for Legal Assistance to Pollution Victims (CLAPV). Lawyers for plaintiffs, who were from CLAPV, do not believe that the relationship between CLAPV and the judge through these trainings created any improper or unethical influence on the decision. Id.
144. See id. (noting that CLAPV has taken more than 80 cases).
V. PUBLIC INTEREST LITIGATION IN CHINA

Certain sectors of the Chinese government have recognized the value of environmental litigation. To expand the impact of environmental litigation on environmental protection, various sectors of the government are exploring the possibility of establishing some form of public interest litigation to address many of the barriers found in traditional pollution compensation litigation. These include the high cost of litigation, the reluctance of local residents to sue, and the difficulties of causation.145 The State Council December 2005 Decision previously mentioned specified “public interest litigation” as a favored tool for environmental protection.146

Broadly speaking, there are two types of proposals being forwarded, (1) broadened standing for citizens and legal persons, including NGOs, to bring lawsuits in the public interest, and (2) expanded authority for the procuratorate (now authorized to bring and supervise criminal cases) to bring civil suits on behalf of the public interest.147 One initial point to note is that there is no clear definition of what constitutes the “public interest.” The notion of “public environmental rights and interests” (gongzhong huanjing quanyi) has appeared in Chinese law; however, a specific definition has not been provided.148 One expert has posited that any continuing pollution or “ecosystem destruction” (shengtai pohuai) is an

145. Interestingly, none of the Chinese proposals reviewed for this essay included proposals to ease the burden of proving causation, which was a primary outcome of the creation of citizen suit provisions in the U.S. This may reflect the belief that the reversal of burden of proof in pollution compensation cases already provides sufficient and reasonable assistance to plaintiffs, and that the primary task now is to ensure that judges decide cases according to the existing legal principles.


147. The procuratorate plays a similar role to a prosecutor in the United States, but also has a much broader role in supervising the courts. The Supreme People’s Procuratorate is structurally at the same level as the Supreme People’s Court. See The Supreme People’s Court, http://english.gov.cn/links/supremeprocuratorate.htm (last visited Mar. 19, 2007) (stating that the Supreme People’s Procuratorate is authorized “to handle charges, appeals, and reports made by citizens” among other functions).


Toward special plans which may possibly cause adverse environmental impact and involve environmental rights and interests of the public, the special plan drafting organ shall . . . hold evidentiary meetings or testimony hearings or adopt other forms of soliciting opinions on the environmental impact report from relevant units, experts and the public.

Id. (author’s translation).
appropriate object of public interest litigation, consistent with the goal of obtaining injunctions against harmful activity or orders to restore damage done.\textsuperscript{149}

\textit{A. Expanded Standing for Citizens and Legal Persons}

The first type of public interest litigation refers to a system that allows citizens and legal persons (particularly officially registered environmental NGOs) to bring either civil or administrative lawsuits on behalf of the public interest. In early 2005, this form of public interest litigation garnered a great deal of media and scholarly attention when Liang Congjie, the founder and chairman of China’s first registered environmental NGO, Friends of Nature,\textsuperscript{150} submitted a proposal entitled “Rapidly Establish a Complete Environmental Public Interest Litigation System” to the Chinese People’s Political Consultative Conference.\textsuperscript{151} The proposal called for, among other things, an amendment to relevant laws to allow any work unit or individual to sue when the “public interest” has been harmed and to eliminate the statute of limitations for environmental public interest cases.\textsuperscript{152} Some proposals clarify that non-governmental environmental organizations should have standing to sue, but that they must be officially registered environmental NGOs.\textsuperscript{153} This sort of NGO litigation is well-suited to situations where there might be no clear plaintiff (such as in cases of harm to endangered species or damage to national forests) or where potential plaintiffs may be afraid to sue or otherwise lack the capacity to sue. Such a system might include something akin to the advanced notice requirements set forth in U.S. citizen suit provisions. This requires the plaintiff to first notify relevant government agencies and the proposed

\begin{footnotesize}
\begin{enumerate}
\item[149.] Xu & Wang, supra note 46, at 103–104. In contrast, China’s current system mainly provides for compensation. Id.
\item[152.] Id.; see also Wang Jin, Zhong Guo Huan Jing Gong Yi Su Song: He Shi Cai Neng Fu Chu Shui Mian [When Will China’s Environmental Public Interest Litigation Come Into Our Lives?], \textit{Shi Jie Huan Jing [World Environment]}, June 2006, at 18; Chen Wan Zhi Wei Yuan: Wan Shan Xian Xing Fa Lv Tui jin Gong Yi Su Song [Committee Member Chen Wanzhi: Perfect the Existing Law and Promote Public Interest Litigation], \textsc{Legal Daily}, Mar. 9, 2006, http://www.legaldaily.com.cn/bm/2006-03/10/content_280024.htm.
\end{enumerate}
\end{footnotesize}
defendant in advance of filing suit to allow the opportunity for the
government to commence enforcement action and the proposed defendant
to remedy the situation on its own.154

B. Procuratorate Public Interest Litigation

Another proposal is to make the procuratorate (broadly speaking, akin
to prosecutors in the United States) a permissible plaintiff in civil and
administrative public interest lawsuits.155 Although the law does not
explicitly provide for it, procuratorates have already brought civil lawsuits
with respect to environmental damage. For example, in May 2004, the Yan
Jiang Procuratorate in Sichuan Province sent a letter to eight stone materials
factories that were causing serious local river pollution requesting that they
stop pollution or face civil lawsuit brought by the procuratorate.156 The
procuratorate took this action after local environmental protection bureau
orders to correct the pollution went unheeded.157 Moreover, local residents
were reluctant to bring suit because they believed the cost to be prohibitive
and their chances of success in the courts to be slim.158 The first known
instance of procuratorates bringing civil lawsuits occurred, not in the
environmental arena, but with respect to the sale of state-owned property at
below legally-stipulated prices. The Henan Province Fangcheng County
Procuratorate successfully sued the local Industry and Commerce Bureau,
asking the court to annul the sales contract.159 Since 1997, at least 200 such
cases have been brought around China.160 In the 70 cases with known court
decisions, the procuratorate prevailed in every one.161 Defendants did not
appeal a single one of these cases.162

Since 1997, procuratorates in a number of places, including Shanxi,
Sichuan, and Hunan, have brought civil environmental claims against
polluters; however, such cases to date have always been “bootstrapped”
onto criminal suits that are clearly within the current legal authority of the

(2000).
155. Jiang Wei & Duan Housheng, Lun Jian Cha Ji Guan Ti Qi Min Shi Su Song [Discussing
Civil Litigation By the Procuratorate], (XIAN DAI FA XUE) MODERN LAW SCIENCE, Dec. 2000.
156. Bie Tao, Huan Jing Gong Yi Yu Huan Jing Gong Su [Environmental Public Welfare and
Environmental Public Prosecution], GREEN VISION, 2005.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id.
162. Id.
procuratorate. Given the efficacy of procuratorate-led public interest litigation, it is no wonder that environmental officials are supportive of a public interest litigation system that involves the procuratorate.

Nonetheless, it would be a mistake for China to only allow government-led public interest litigation. A system that allows both government and public litigation to protect the environment would, however, be optimal. The sheer magnitude of China’s environmental challenges requires a broader system that includes government litigation and wider support for public citizen enforcement. The United States long ago recognized that citizen litigation could provide an indispensable supplement to scarce government enforcement resources and serve to supervise recalcitrant government agencies as well. China’s State Environmental Protection Administration, with some 300 employees at the national level, suffers from an even greater lack of resources and could benefit even more from enforcement assistance from the public and the procuratorate.

CONCLUSION

Environmental law and public involvement in enforcement have played a constructive and indispensable role in environmental protection in the U.S. and other countries. The environmental challenges in China today are immense, but so are the opportunities for environmental improvement if the legal tools and involvement of the public, so effective elsewhere, can be harnessed in the name of environmental protection.
ISSUES RELATED TO THE IMPLEMENTATION OF China’s ENERGY LAW: ANALYSIS OF THE ENERGY CONSERVATION LAW AND THE RENEWABLE ENERGY LAW AS EXAMPLES

Wang Mingyuan*

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† The translation of all Chinese materials are the author’s, as is the responsibility for any inaccuracy in the translation. This article follows the Chinese practice of placing the family name before the given name. Therefore all sources cited in short form use the author’s family name. The original Chinese text for most laws and their implementing regulations cited herein can be found on the LawInfoChina database located at http://www.lawinfochina.com.
INTRODUCTION

Focusing on the Energy Conservation Law and the Renewable Energy Law as examples, this paper analyzes and discusses the difficulties and challenges in their implementation and the root causes of these difficulties. This paper points out that the implementation of the Energy Law requires a complex engineering system involving the government, the market, and civil society participation. Beyond certain factors—such as the government’s intervention and enforcement ability, public awareness, the energy supervisory system, the level of technological advancement, and market development—the key lies in the forceful execution of the supervisory and managerial duties of the government. To this end, the political and legal checks and balances and accountability systems should be strengthened in order for the government and the relevant authorities to perform their duties on energy supervision. Moreover, energy supervision should include greater public participation and should shift from the traditional energy development model, i.e., resources allocated solely by the government (one hand), to a new model that involves the market, the government, and the community (three hands).

I. RAISING THE QUESTIONS

With the development of China’s market-oriented reform, and the constitutionalization of the basic strategy of “managing state affairs according to law,” laws are playing an increasingly important role in our economic, social and political life, and energy is no exception. Apart from the four already existing energy laws—the Electric Power Law (1995), the Coal Law (1996), the Energy Conservation Law (1997), and the Renewable Energy Law (2005)—relevant departments of the State are studying and drafting a comprehensive energy law, as well as other specific laws on petroleum, natural gas, nuclear energy, energy utilities, etc. They

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are also looking into amending the Electric Power Law, the Coal Law, and the Energy Conservation Law, and endeavoring to promote a safe, economically viable, reliable, and environmentally friendly system for energy supply and utilization by improving various legal systems.\(^5\)

In ancient times it was said that “having laws is not enough.”\(^6\) It is important to create laws, but it is even more important and difficult to implement them. The implementation of the Energy Law involves many dominant players such as the government, state-owned enterprises (SOE), and the general public. Its implementation is faced with a wide array of impediments and challenges, including the general level of technological development, the maturity of the market, the public’s awareness, government management, and the degree of community participation.

The comprehensiveness and complexity of the scope of the Energy Law is not on par with that of the existing Electric Power Law and the Coal Law, which are typical sectoral policies and administrative laws. The Energy Conservation Law and the Renewable Energy Law, however, fall under the category of public policies and administrative laws, and will therefore serve as the basis for discussion of the potential implementation problems of energy law in China.

II. DIFFICULTIES IN IMPLEMENTING THE ENERGY CONSERVATION LAW

A. An Assessment of the Implementation of the Energy Conservation Law

According to the Report by the Law Enforcement Inspection Group of the Standing Committee of the National People’s Congress on the Implementation of the People’s Republic of China Energy Conservation Law,\(^7\) since the law came into effect on January 1, 1998, the State Council and its relevant departments and local governments have done much work and achieved certain results. Energy consumption per GDP unit decreased from 1.56 Tce per 10000 RMB in 1998 to 1.43 Tce in 2005 (all based on the comparable price of 2000).\(^8\) Energy consumption per production unit for the main energy-consuming products also decreased gradually, and

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8. *Id.*
energy efficiency has increased to some extent. However, most recently the energy consumption per GDP unit has increased rather than decreased. The coefficient of energy consumption elasticity (the consumption growth rate compared to the overall economic growth rate) during the tenth Five-Year Plan period had an annual average of 1.04, its highest value since the beginning of the “Reform and Opening-Up.” Even if the average annual elasticity coefficient remains under 1.0 in the coming 15 years, the primary energy consumption in China would surpass five billion TCE by 2020, which is fundamentally unaffordable. One can safely say that the policy priority of energy conservation and many of the mechanisms stipulated in the Energy Conservation Law have not been faithfully implemented. Energy conservation work, by and large, adapted the basic national conditions of energy shortage, as well as the basic requirements of economic and social development.

B. Analysis of the Causes

Various factors explain why the Energy Conservation Law has been reduced to a mere scrap of paper. A systematic analysis of the root causes and a remedial prescription for this illness will be the prerequisites for improving China’s energy legislation, policies, and their implementation. The analysis below will therefore focus on the following aspects: shortcomings of the legislation and policies; obstacles in the government’s supervisory system framework and enforcement ability; the offsetting effect of related policies; constraints related to the lack of public awareness and weak government investment; and the impact of market and economic structure.

1. Shortcomings of the Legislation and Policies

“[T]here must be laws to go by, the laws must be observed and strictly enforced, and law-breakers must be prosecuted.” These are the basic requirements for the construction of a legal system. “[T]here must be laws to go by” is not only a prerequisite for the implementation of the law, but
also one of the important factors influencing the state and the outcome of implementation.

a. Formulation Process, Background, and Ideology

The drafting work of the Energy Conservation Law began in 1982.16 The former State Economic Commission and the State Planning Commission proposed a general outline of the Energy Conservation Law in 1984.17 In 1986, the State Council promulgated the Interim Regulations for the Management of Energy Conservation. The former State Planning Commission then developed an outline draft of the Energy Conservation Law for discussion in 1990.18 After having been amended 11 times, a draft was submitted for review and approval.19 On July 14, 1993, the former State Planning Commission and the State Economic and Trade Commission submitted the draft to the State Council. The draft was later amended by the State Council’s Bureau of Legislative Affairs and discussed and adopted at its Executive Meeting.20 On April 30, 1995, it was submitted by the State Council to the Standing Committee of the National People’s Congress for review and deliberation. It was eventually adopted on November 1, 1997, after several amendments and deliberations.21

It is obvious that, at different stages of studying and drafting the Energy Conservation Law, the State’s former economic and planning authorities played key and dominant roles. The law was drafted by administrative departments and embodies departmental aspirations, interests, power balances, and a scramble for enforcement rights. This implies that, in studying and drafting the law, the process of dividing functions and responsibilities among the departments led to conflicts and possibly even to a stalemate. Unfortunately, legislators thought that the State Council, not the law, should stipulate the division of the state’s energy conservation authorities’ duties. Additionally, at that time, institutional reform was underway, and the related organizational structure and functions were not yet clearly defined. As a result, the Energy Conservation Law did not define the duties or the division of work for the competent authorities.22

The formulation and implementation of the Energy Conservation Law

17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
spanned the transition from a planned commodity economy to a socialist market economy. Meanwhile, market reforms in the energy sector, on the whole, lagged behind. Therefore, the law is strongly tainted with the characteristics and concepts of a planned economy and does not handle well the relationship between market mechanisms for energy conservation and government supervision. In this regard, Professor Xiao Qiangang, who once partook in the research and drafting of the Energy Conservation Law, pointed out that:

the theoretical values of the Energy Conservation Law follow the ideas of the planned economy, and create an energy conservation mechanism that does not meet the requirements of a market economy and does not adequately combine a compelling and inducing character. The responsible departments did not do a good job. Many mechanisms are not mature and incomplete. They overlooked how government should position itself under the conditions of a market economy framework.23

In fact, since 1980, the Chinese government has been actively involved in energy conservation, gradually setting up energy conservation institutions with managerial functions at various levels of government.24 Energy engineers and energy administrative bodies were also introduced into large- and medium-sized SOEs, and special personnel were assigned to be in charge of the energy conservation administration.25 This government-based, direct-intervention administrative approach, utilizing administrative plans and guidelines as major tools, was largely effective in the planned economy system.26

With the gradual establishment of the market economy system, the original energy conservation departments, as well as their goals and measures, have become less effective. The overall change and restructuring of the relationship between the market, the government, and the social structure posed a fundamental challenge to energy conservation administration, policies, and laws. Unfortunately, although great changes have taken place in China’s economy, society, government, and energy situation in the eight years since the Energy Conservation Law was enacted,

25. Id.
26. Id.
the energy conservation administration, its mechanisms, main policies, and
the systems set by the law have not been assessed, amended, and improved.
Likewise, no effective energy conservation mechanism has been established
that is better suited to a market economy system. It was not until March 23,
2006, that the Finance and Economic Committee of the National People’s
Congress set up the Amending and Drafting Group of the Energy
Conservation Law. This group formally initiated the amendment work of
the law.27

b. The Scope of the Law

The clauses of the Energy Conservation Law were designed mainly for
the industrial sector, and they do not, or rarely, if ever, cover energy
conservation for sectors such as construction, transportation, commerce,
residential use, government institutions, or public service units. Therefore,
the law does not seem to create a comprehensive and integrated political
and legal system for effective energy conservation. With growing
urbanization and social development, inefficient use of energy in
construction, transportation, commerce, and residential areas is becoming
increasingly prominent.28 Concerns are also being leveled at the wasteful
consumption habits of governmental departments and public institutions.
For example, an investigation carried out in July 2005 on the energy
consumption habits of 48 municipal and district government departments in
2004 showed that per capita volumes of energy consumption, water
utilization, and electricity utilization in these governmental bodies were
respectively four, three, and seven times the average residential
consumption in Beijing.29

c. The Law’s Operative Nature

Generally speaking, the Energy Conservation Law is only a policy
statement and a policy framework law; it is hardly operative. This is
mainly embodied in the following aspect: the provisions of the law are
overly principle-oriented, lacking, or weak, in terms of enforcement and
punitive measures towards violators.

27. Implementation of Energy-Saving Inspection Should Focus on the Energy Challenge,
28. Fang Ye & Li Jiapeng, The Root Cause of Energy Waste is the Inadequacy of the Legal
Systems, ECON. REFERENCE (Dec. 15, 2005).
Law Enforcement Encounters the Power Vacuum, XINHUA, Sept. 26, 2005,
The law consists of six chapters and 50 articles.\textsuperscript{30} Chapter II, \textit{Energy Conservation Management}, and Chapter IV, \textit{Betterment of Energy Conservation Technology}, mainly stipulate the State and the related government departments’ macro-regulatory functions, administrative supervision, and the relevant rules and measures at their disposal. Chapter III, \textit{Rational Use of Energy}, deals with the legal obligations of the following non-governmental players: energy users, key energy users, production units that make energy intensive products and equipment, energy production and sales units, etc.\textsuperscript{31} However, the law stipulates few punitive measures to deal with violators of these clauses. Moreover, regarding the governmental department’s macro-regulatory and supervisory functions, the law not only offers a great deal of discretion, but also refrains from imposing any political supervision and accountability, nor does it stipulate any corresponding administrative or judicial support mechanism.\textsuperscript{32} The designs of the legal and policy systems are poorly correlated and coordinated, having imperfect complementary measures, regulations, and standards.

The following issues were crucial during the legislation process and have an important effect on implementation: whether to stipulate specific technical norms for energy conservation; whether to set up a regular meeting system within the State Council on energy conservation; how to divide duties and authority; whether to levy an energy tax; whether to offset special funds earmarked for energy conservation; whether to implement an energy conservation examination system for investments in fixed assets; and how to regulate corporate in-house energy conservation management.\textsuperscript{33} The lawmakers, on the whole, made negative decisions on these issues.\textsuperscript{34} Generally speaking, the goals and measures of the energy conservation policy are not clearly stipulated in the Energy Conservation Law. The necessary supporting conditions, such as an organizational structure, guaranteed funding, enforceable measures, fiscal and tax incentives, an agreement on energy conservation, technology, and intermediary services, are weak or nonexistent. The energy conservation policy lacks comprehensiveness. A new energy-saving mechanism that combines market regulation, government supervision, and community participation has yet to be set up.

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Weilian, \textit{supra} note 17, at 11–13.
\textsuperscript{34} Id.
As for this phenomenon, an official at the Environment and Resources Comprehensive Utilization Department pointed out that

Now our country has an Energy Conservation Law, but there is no enforcement body for the Law; there are provisions in principle that energy conservation must be carried out, but there are no punitive measures for violating these provisions; there is a policy orientation to encourage energy conservation, but the relevant fiscal and tax incentives are simply lacking.\(^{35}\)

Some scholars figuratively described the above-mentioned situation as, “When you want money, there is none; when you want an institution, you don’t have any; when you want personnel, there is none; and when you want power, you don’t have any.”\(^{36}\)

Moreover, due to the traditional concept that legislation should be outlined and not spelled out in detail, coupled with the infighting and contradictions between the different governmental departments during the preparation of the draft law, the policy objectives and measures defined in the Energy Conservation Law remain a general outline. This means that it is up to the State Council and the pertaining departments to spell out the norms, rules and regulations, and specifications and standards.

For example, Article 12 of the law stipulates

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\text{[F]easibility studies for engineering projects involving investments in fixed assets must include proof of rational use of energy. Investments in fixed assets shall be designed and undertaken in conformity with the standards of rational use of energy and for energy conservation. The designated examining and approving organs may reject projects which fail to conform to the standards of rational use of energy and energy conservation or not grant its seal of approval on completion.}\]

Article 20 stipulates that the “state shall exercise strict management of energy conservation in key energy-using units.”\(^ {38}\) Moreover, “[t]he


\(^{38}\) Id.
The supervisory department for energy conservation under the State Council shall, together with the relevant departments under the State Council, set the requirements and formulate measures for energy conservation in the key energy using units.\textsuperscript{39}

The formulation of the complementary rules, statutes, specifications, and standards is an important component of any further extension of the legislation on energy conservation, but it is also one of the fundamental prerequisites to implementation. Until this is done, China’s energy-saving legislation and policymaking process will not be complete. In practice, however, due to the lack of complementary statutes, implementation rules, and relevant policy measures—including rational energy-use standards, energy-saving design specifications, and the lack of clear punitive and incentive measures—many localities, sectors, enterprises, and people have seen energy conservation work as optional. It is difficult for many mechanisms to be put into effect.

More than 20 provinces, autonomous regions, and municipalities directly under the central government have promulgated up to 70 bylaws and regulations on energy conservation.\textsuperscript{40} Some local governments have also established energy conservation monitoring centers and have launched energy saving campaigns using creative practices.\textsuperscript{41} However, in most cases, these bylaws are duplicative or watered-down versions of the Energy Conservation Law and are ill-adapted to local conditions and requirements. Due to the shortcomings and limitations of the initial law, the complementary energy saving bylaws and policy measures are inherently fraught with shortcomings.

2. Obstacles in the Government’s Supervisory System and Enforcement Ability

Article 8 of the Energy Conservation Law stipulates:

The supervisory department for energy conservation under the State Council shall be in charge of supervising and managing energy conservation work throughout the

\textsuperscript{39} Id.


\textsuperscript{41} Local energy conservation supervision centers have been established in cities such as Shanghai and Gansu. These centers are in charge of energy conservation enforcement and have introduced some creative measures, such as the development of energy saving contracts between enterprises and local governments.
country. The relevant departments under the State Council shall supervise and manage the work within the respective scope of their functions and responsibilities. The energy conservation administration departments in local governments above county level shall be in charge of managing and supervising energy conservation under their jurisdiction. The relevant departments of the local people’s governments at or above the county level shall supervise and administrate the conservation work within scope of their respective functions and responsibilities.\(^4^2\)

While these provisions embody the principle of integrated management and shared responsibility, they do not clearly stipulate whether the energy conservation administration department belongs to the planning department or the economic department, or the respective scope of duty of the other relevant departments. The specific law enforcement organ is also not clear.

With the development of a market economy and governmental restructuring, the competent industrial authorities have been dissolved or consolidated, resulting in the disappearance of the corresponding industrial energy saving administrations.\(^4^3\) Moreover, the energy saving departments under various levels of the governments have not been strengthened—on the contrary, they have been downsized, weakened, or dismantled, leading to a severe insufficiency in the government’s energy conservation supervisory force.\(^4^4\) In the past, the state’s energy saving work was jointly undertaken by the former State Planning and Development Commission and the former National Economic and Trade Commission; now, however, it is administered by the Energy Conservation Division of the Environmental and Resources Comprehensive Utilization Department under the NDRC. The lack of effective enforcement mechanisms at the grassroots level—the level that holds punitive powers—is one of the key factors undermining efficient enforcement of the Energy Conservation Law.

3. The Offsetting Effect of Related Policies

Although the state continues to stress the importance of “giving priority
to energy conservation." in practice, the role of market mechanisms in the allocation of resources has not been strengthened. Some important relevant policies are irrational and conflict with the energy conservation goal, thereby leading to unsatisfactory results in the implementation of energy conservation and its relevant laws and policies.

For example, the planned economy ideology of high product prices, low resource prices, and disregard for the environmental costs has not been fundamentally changed. Such irrational policies have led to low energy prices that fail to reflect the scarcity of resources, the environmental costs of both production and consumption, and costs related to safety, health, and labor protection. This in turn induces companies to produce beyond capacity and abuse resources, leading not only to frequent safety and health accidents but also to serious waste, destruction of energy resources, and infringement of the energy saving policy goal. Some positive policies, such as the fuel tax and the official car reform, intended to promote energy conservation in transportation, or the heating fee reform initiative, intended to promote energy conservation in buildings, have yet to be implemented.

4. Constraints Related to the Lack of Public Awareness and Weak Government Investment

Due to the influence of the extensive economic development model, Chinese society, in general, attaches great importance to energy supply and exploitation and is relatively unaware of energy conservation and energy efficiency. This has been further exacerbated by the prevailing development concept and the notion that strong GDP growth is the best measure of achievement in public service. Many governmental
departments are unaware of the extreme importance of energy conservation and lack a sense of urgency, let alone the inclination to act. Some localities and departments still compare expected growth rate goals, and only talk idly of energy conservation and environmental protection. Some think that emphasis on energy conservation is merely money spent in vain and an investment with no output; some think that the emphasis on energy conservation is a thankless task that does not reflect achievement in public service; while others think that energy conservation emanates from market behavior in which the government should not interfere. In terms of financial investment, energy conservation work lacks stable fiscal support. The state’s investment in energy conservation is also relatively low and tends to decrease year by year. The proportion of the state’s investment in energy efficiency, as a proportion of total energy investment, dropped from 13.2% in 1983 to 4.5% in 2003. Furthermore, government funding available for energy conservation is not only scarce, but also scattered among various departments. This renders it impossible to effectively support the fulfillment of the energy conservation goal in a concentrated and systematic manner.

In fact, energy efficiency and energy conservation is a very important kind of “resource” that is easily quantifiable, assessable, and manageable. Practice has shown that promoting energy conservation does not work without market mechanisms and should also be an important component of the government’s responsibilities. This is because the market cannot reflect the true value of energy conservation and the long-term socio-economic development goals. In a market economy, the state’s management and supervision responsibilities include: applying the necessary legal, economic, and administrative measures to encourage energy conservation; increasing substantially the cost of wasteful energy consumption; and supporting research and development and the promotion of energy saving products and technologies. Additionally, the governmental bodies, significant energy consumers themselves, should lawfully adopt effective measures to save energy.

53. Tieying, supra note 7.
54. Id.
55. Id.
56. Id.
57. Id.
59. Id.
5. Technology Support

Comprehensive technology support is one of the prerequisites for the realization of energy saving goals. However, it is difficult to adapt energy saving technologies to China’s energy efficiency needs. The following explain why:

a) China’s energy technology level is generally low. For example, coal consumption for each kilowatt hour of thermal power generation in 2004 was 379g standard coal, 67g higher than in developed countries. Heating the surface of a building consumes two to three times more energy than it would in developed countries with similar climates. Freight and cargo vehicles carrying a one hundred-ton load per kilometer consume twice what they consume in industrialized countries;60
b) Research and development of energy-saving technologies and its dissemination is unsuited to China’s energy conservation needs. Research and development institutions and intermediary agencies are few, indigenous innovation capacity is scarce, and very few technologies and products use indigenous intellectual property rights;61 and
c) Energy saving standards are unable to stimulate technological innovation and development in the field of energy conservation. Energy saving standards are overly adapted and accommodating of the existing technological level, include few requirements for future energy conservation standards, and lack foresight for new energy saving standards.62

6. The Impact of Market and Economic Structure

To achieve energy efficiency improvement and energy conservation, it is necessary to enhance public awareness of energy conservation through legal and political guidelines and standards. However, market competition and profit-driven interests will be the fundamental incentive mechanisms. For this reason, it is necessary to consider the issues of energy scarcity as well as to establish and maintain a rational energy pricing mechanism, using price signals as a guide to improving energy efficiency. At the same

61. Tieying, supra note 7.
62. Id.
time, we must encourage the companies to improve their market positioning, management structures, and corporate culture. We must also ensure a favorable competitive environment for both energy producers and consumers.

China is, on the whole, in the process of economic transition. The market economy mechanisms, in particular the energy market mechanisms, are far from mature. The situation of “high product prices, low resource prices and disregard for the environmental cost” is still salient. The energy structure is still heavily reliant on coal, and the economic structure is heavily reliant on chemical industries—a structure that is difficult to improve in the short term. With the strong impetus of economic development, the financial crisis, and energy supply exceeding demand in China after 1998, the demand for energy conservation waned; the conditions for the implementation of the Energy Conservation Law were not sufficiently ready. In such a situation, the government was duty-bound to undertake the responsibilities of economic manager and regulator. These responsibilities include: establishing and maintaining a market competition mechanism; formulating and implementing relevant laws and policies to boost technological progress; promoting extensive economic restructuring; shifting the economic growth pattern to focus more on the qualitative aspects of development; and establishing a government administration model better suited to a market economy, including an energy-saving management model.

III. CHALLENGES IN IMPLEMENTING THE RENEWABLE ENERGY LAW

On January 1, 2006, the Renewable Energy Law came into effect. This law was drafted by legislators taking into account the economic, social, energy, and environmental conditions in China and assimilating domestic and foreign experiences and lessons. It is, therefore, relatively perfect as far as energy legislation in the existing energy law system goes. In principle, the law establishes the overall goal of renewable energy development, a corresponding safeguard system, and a law enforcement mechanism. It identifies the legal relations between the different actors,

namely government, corporate actors, and the general public, in developing renewable energy. The law also promotes the development of renewable energy against the backdrop of a socialist market economy and market reforms in the energy sector.66 Observers hold great expectations with regard to the development of renewable energy in China, especially in terms of the country’s industrialization process.67 However, whether or not this bright horizon for the development of renewable energy in China can be sustained by the government through legislation depends on multiple factors, such as: the formulation of relevant complementary provisions; further revision and improvement of the legislation; reform of governmental organizations; and an improved understanding of the fundamental relationships among technology, market, and society, all of which remain highly complicated and uncertain.

The Renewable Energy Law and the Energy Conservation Law have many factors in common. On the whole, they are merely policy framework laws requiring further development in terms of operative guidelines, rules and regulations, and technical specifications. Both also face many limitations in their implementation. In implementing the Renewable Energy Law, lessons should be taken from the implementation of the Energy Conservation Law to avoid falling into the same trap again. The following sections discuss the main challenges China faces in implementing the Renewable Energy Law.

A. Formulating Complementary Measures and Further Improvement of Legislation and Policies

The Renewable Energy Law is merely a framework law that is still in need of more than ten complementary provisions. These provisions are the responsibility of the State Council and the competent departments of energy, pricing, construction, and standardization at the central or provincial level.

Some complementary provisions have already been developed, namely Interim Measures for the Administration of Land Use for Wind Power Plant Project Construction and Environmental Protection,68 Directory for

66. Id.
Renewable Energy Industrial Development,\textsuperscript{69} Trial Measures for Renewable Energy Generation Pricing and Expense Amortization,\textsuperscript{70} Provisions for the Administration of Renewable Energy Generation,\textsuperscript{71} and Technical Specification for Application of Solar Energy Water Heating Systems in Residential Buildings.\textsuperscript{72} Many important complementary provisions, however, have not yet been issued. Such provisions include regulations for water power generation, long and medium term goals for national renewable energy exploitation and utilization, preferential tax provisions for the use of renewable energy in industrial development projects, and a renewable energy development and utilization plan.

These complementary provisions are not only indispensable organic parts of the renewable energy legislation in China; they are also important prerequisites for its effective implementation. The relevant government entities have a legal duty to enact these provisions. Moreover, the lack of complementary provisions shows that renewable energy legislation in China is incomplete and that the government organs in question are not very effective in performing their legal duties. These omissions could lead to a situation whereby there are no rules to follow, thus limiting the actual effect of the Renewable Energy Law.

In order to boost the healthy, sustained development of the renewable energy industry in China, these complementary provisions must be formulated and improved, and the legal awareness of the government, corporate actors, and the public on renewable energy must be increased, so as to spur the effective implementation of the legislation. Future development should combine improved legislation, reform of the supervisory system, and improved systemic and organic integration of technology, market, and society. As part of this effort, perfecting the renewable energy supervisory system goes hand in hand with reforms in both government and the energy sector. The general trend should be to integrate functions of the relevant energy supervisory departments by establishing a powerful energy supervisory organ, much like a Ministry of


Energy, at the national level. The substance of renewable energy legislation should be oriented to strengthening market mechanisms and the role of the civil society, so that the “three hands,” i.e., the government, the market, and the civil society, will cooperate and function jointly, so as to give maximum consideration to social equity while upgrading the economic efficiency and sustainable development of the renewable energy industry. For this reason, the public should be entrusted with legal standing and rights in policymaking and implementation of renewable energy laws. Moreover, until the development of renewable energy reaches a stage where it is based on market mechanisms, the current feed-in law system should be replaced, either by renewable portfolio standards or some other market-based system. Additional laws or regulations should be formulated within the framework of the Renewable Energy Law and its complementary provisions to encourage the use of different types of renewable energy—such as small-scale hydropower, wind energy, biomass, or solar energy—according to their level of technological development and market orientation. Such reforms will lead to a renewable energy legislation system with the Renewable Energy Law as the foundation and individual laws and regulations as the structure.

B. Supervisory System and Law Enforcement Mechanism

With respect to the renewable energy supervisory system, Article 5 of the Renewable Energy Law stipulates that the competent department under the State Council shall administer all national development and exploitation of renewable energy. The State Council departments of science and technology, agriculture, water conservancy, land resources, construction, environmental protection, forestry, ocean, and meteorology are responsible for the administration of renewable energy exploitation and utilization within their respective scopes of duty. Above the county level, the relevant departments of the local people’s government are responsible for the administration of renewable energy exploitation and utilization within their own administrative regions. Moreover, Article 27 stipulates that power enterprises should record and preserve accurate and complete information about renewable energy generation, except for inspection and supervision from power supervisory organs, which are required to inspect these enterprises in accordance with stipulated procedures and keep confidential

74. Id.
any commercial secrets or other sensitive information about the units inspected. The competent department under the State Council refers here to the NDRC, and the power supervisory organs refer to the State Electricity Regulatory Commission and its branches.

The renewable energy supervisory system established by the law is a simple confirmation of the present situation; it contains no innovation or reform. All the existing shortcomings—such as a multiplicity of policies from various departments, overlapping functions, repeated construction, overly elaborate procedures, and difficulties in coordination—have all remained unsolved. These shortcomings result in reduced efficiency, confusion in administration, and the weakening of the state’s macro regulatory power. Furthermore, as a result of multiple government organizational reforms, the organs in charge of renewable energy exploitation and utilization have been weakened, and the human resources are severely insufficient. As a result, it is hard to raise these issues to the top of the agenda and complete the work that is needed to improve enforcement of the Renewable Energy Law.

In terms of the enforcement mechanism, the Renewable Energy Law stresses the state’s role in macro regulation and guidance. Naturally, the enforcement mechanism can hardly do without “official enforcement” led by the government. Economic analyses illustrate that government intervention in response to market malfunctions and failures can also turn out to be flawed, and should therefore be effectively restricted and corrected. Besides traditional internal power restricting mechanisms, such as division of authority and internal checks and balances, the international community places great emphasis on the role that the general public, especially civic organizations, plays in the formulation and implementation of environmental laws and policies. The public’s legitimate environmental rights—namely the right to information, the right to participate, and a role in mediating conflicts of interest between different parties—must be protected in order to achieve the goal of “society limiting power.” Article 9 of the Renewable Energy Law requires clearly that “opinions should be

75. Id.
76. The National Development and Reform Commission, the Ministry of Commerce, the Ministry of Agriculture, the Ministry of Water Resources, and the State Electricity Regulatory Commission respectively all are in some way in charge of renewable energy affairs.
solicited from relevant units, experts and the general public and a scientific feasibility study must be made in drafting a renewable energy exploitation and utilization plan.”80 This language embodies both a scientific and democratic spirit, though in reality, it is merely a principled policy declaration and not an actual operative rule. In terms of the formulation of complementary rules and standards, the determination of development goals, license examination and approval, monitoring, and law enforcement, the Renewable Energy Law grants no such rights to the general public. Hence, with respect to its renewable energy legislation, China has not set up an enforcement mechanism that combines government administration with general public involvement and social checks and balances; its enforcement simply depends on the government’s force for implementation.

The renewable energy legislation and policy implementation mechanism is run almost entirely by the government. The resulting policies lack stability and continuity, government malfunctions become commonplace, government in-house supervision and restriction mechanisms are often a formality, social checks and balances are nonexistent, and the certainty and effectiveness of renewable energy policy implementation is substantially reduced, thereby hindering the chances of realizing the goals of the legislation. Additionally, factors such as the limitations of the supervisory mechanism itself, insufficiency in law-enforcement ability, and the lack of willingness to enforce laws, may also have adverse effects on the enforcement of the Renewable Energy Law.

C. Awareness of the Concept of Developing Renewable Energy

On February 28, 2005, the Renewable Energy Law was adopted with 162 affirmative votes, one abstention, and zero negative votes.81 This overwhelming support shows that legislators not only place a particular emphasis on promoting renewable energy development in China in accordance with the law, but that they recognize this need almost unanimously.

In practice, even though the State has made clear that renewable energy exploitation and utilization is an area of high priority and that key public and private actors are encouraged to be involved, some local governments are enthusiastic about, and spare no effort in, starting thermal power plants,
while renewable energy generation projects are often “pending discussion.”

The objective cause of this phenomenon is that most thermal power projects are larger in scale, attract greater investment, bring about faster results, and are more profitable than renewable energy projects. Moreover, their contribution to local economic and GDP growth is more evident. The subjective cause is that local governments underestimate the severe situation of conventional energy and turn a blind eye to pollution and destruction of the environment; they lack the fundamental awareness of the urgency of developing renewable energy.

The source of this conventional thinking is the sole consideration of economic price, with disregard for the social and environmental costs. More deeply, however, these notions stem from local governments’ development concept, that is, their concept of the manifestation of public achievement, and their alienation from their functions.

1. Unscientific Development Concepts and the Incorrect Concept of Political Merit

In the 1980s, the state put forward a development strategy of “placing focus on economic construction,” in view of the urgent need to develop the economy and improve the people’s standard of material and cultural life. The traditional GDP calculation method does not take into account costs related to resource degradation, environmental deterioration, or other social costs. When combined with a highly centralized “personal rule” political structure and the predominance of GDP as a supreme indicator for political merit, such a strategy induced local governments—especially some Party heads—to blindly pursue local GDP growth for their own self-interest, without showing concern for the social and environmental costs.

2. Alienation and Dislocation of the Local Government from their Functions

The original function of government—to make up for flaws and failures in the marketplace in the interest of the general public—concentrated
mainly on issues that the market cannot account for effectively, like compulsory education, public health, and environmental protection.

However, under the existing system in China, local governments have their own economic interests and have become special market players. They often think only of local economic growth and leave such matters as maintaining macroeconomic balance, sustainable development, environmental protection, etc. to the central government and the whole society. In short, the “corporatization” phenomenon exists evidently in local governments, as does severe alienation and departure from their original function.87

The central government must consider the interests of the whole society and maintain macroeconomic stability and sustainable, long-term economic growth. It depends for this on local governments at different levels to implement its policies and guidelines. However, with local governments becoming “quasi-enterprises” due to their independent economic interests, their interests often come into conflict with the central government’s economic policies, including environmental protection and renewable energy development policies. Thus, local governments either agree outwardly and disagree inwardly, or openly disobey the central government in the process of implementation.88 Overcoming these deep-rooted conflicts of interest is an important factor for the State’s effective macro regulatory control and administration.

In terms of social acceptability, the people’s environmental protection awareness is very poor due to low economic and social development levels in China, coupled with a stagnating process of political and legal reforms. Many local governments do not understand the importance and urgency of developing renewable energy and pursue the development of thermal power projects while disregarding renewable energy projects.89 Furthermore, the willingness of the general public to “pay” voluntarily for renewable energy is also very low. For example, the inhabitants of Shanghai were encouraged to purchase “green electricity” in a big campaign launched in

88. Id.
November 2005. However, by the end of December, only five households in the northern region of Shanghai had subscribed to the program. The main reason for the program’s lack of popularity was that every household using “green electricity” had to pay an extra RMB 5.3 each month.  

D. Technology and Market Conditions

From the perspective of technological maturity, renewable energy can be divided into four categories: economically feasible technology, industrialized technology based on government encouragement, technology in research and development, and future technology. The renewable energy enterprises in question are, however, usually small in scale, technologically backward, and inconsistent with respect to product quality. Because of shortcomings in legislation and weak law enforcement, external costs like pollution from conventional fossil fuels are hard to internalize. Limitations in both technology and market conditions mean that most renewable energy products are costly and uncompetitive. Other technological barriers to industrial development or renewable energy products include imperfect technological guarantees and service systems for renewable energy, lack of technological standardization, and weak resources for evaluation of their success.

Although the renewable energy industry is growing gradually in China—some individual technological products like small hydroelectric power plants and solar heaters have entered into a stage of industrialized development—most of the important technologies are still undeveloped. For example, technologies for wind power, biomass, solar energy generation, and tidal energy have reached or approached the commercial level in Western countries, while in China they are still in the research and development or demonstration stages. In short, the foundation for large-scale industrialization is not available in China, and both renewable energy technology and products are still in the early stages of industrial development.
From the perspective of the market, the energy industry is one of the last “fortresses” of China’s planned economy. The energy industry in China did not begin the process of “separation of government administration from enterprise management” and the transition from a planned economy to a market economy until the National Electricity Corporation was established in 1997 and the Ministry of Power Industry was disbanded in 1998. However, the administrative system of “power control by multiple authorities,” which developed under the planned economy, has great inertia. The orientation and prospects for the State’s systematic reform in the whole power control system is still unclear. This means that the road to privatization of state-owned electricity companies and their market-oriented reform will be tortuous and very long. The lack of open, fair, regulated, and orderly market competition mechanisms in the energy sector is a fundamental hindrance to renewable energy development and to the Renewable Energy Law’s implementation.

CONCLUSION

In the period of rapid economic and social transition in China, the implementation of the Energy Conservation Law and of the Renewable Energy Law face unique problems, but they also face some common barriers, namely shortcomings in the laws and policies themselves, insufficiency of the supervisory system and government enforcement ability, monopoly over the law enforcement mechanism, weakness of social awareness and recognition, and limitations due to immature technical and market conditions. Overall, these energy laws merely provide a basic policy and system framework. Specific policy goals and system tools, including government administrative systems, law enforcement organs, funds, and complementary rules and standards are not yet developed.

Therefore, the promulgation of a national energy law does not end the

96. The nominal duty scope of the State Electricity Regulatory Commission consists of market supervision, power transmission supervision, power supply regulation, price and finance, auditing work, power safety, etc. However, in the existing management pattern of the electric power industry, project approval right, price approval and regulatory right and industrial policy establishment right are all exercised by National Development and Reform Commission, the enterprise financial management right by the Ministry of Finance, and the personnel appointment and dismissal right by National Assets Control Commission. Besides, local government and competent authorities having jurisdiction also have their own limit of authority. China State Power Information Network, Power Reform—State Power Supervision Commission, http://www.sp-china.com/powerReform/spsc.html (last visited Feb. 23, 2007).
legislating and policymaking process. Subsequent energy rulemaking and policymaking, led by administrative organs, has thus far proven to be uncertain and insufficient. In the case of the Energy Conservation Law, no specific policy goals, rules, or guidelines have been put in place even several years after the law came into effect. Furthermore, as China is a large country with unbalanced regional development, uniform national legislation often fails to consider local characteristics and is not specific or adaptable to local needs.

It is thus clear that there are certain inherent limitations in the Chinese legislative system. In particular, the weak supervisory mechanism of the legislative body over the administrative organs seems to be an important “source” of the incomplete energy legislation and policymaking process. Moreover, the lack of assessment and feedback mechanisms results in legislation and policy that cannot be modified or improved in a timely fashion during the implementation. Dislocation of government roles and functions, as well as weak law enforcement ability, hinders the realization of policy goals. The absence of public and judicial involvement leaves unsatisfactory law enforcement by the government untouched, uncorrected, or even exacerbated. All these important factors severely harm the implementation of the current energy law. Exacerbated by the constant evolution of economic, social, energy, environmental, and government administrative systems, the cases where laws and policies are divorced from, or even in conflict with, reality becomes more evident and their harmful effects more salient.

Strengthening and improving the implementation of energy laws is complex, and it involves multiple entities, such as the government, market, and society. However, the key breakthrough point of China’s legal reforms with respect to environmental protection is the forceful execution of the government’s supervisory duties. Thus, it is important to strengthen the cyclic mechanism of law formulation (implementation – assessment – feedback – law modification – re-implementation – reassessment – re-feedback – law re-modification). Moreover, it is also necessary to constantly improve related energy legislation and policies, to enhance political and legal supervision, and to encourage accountability of the government and its relevant departments in performing their energy supervisory duties. China must also strengthen the general public’s involvement, shifting from the traditional energy development model with the government “running a one-man show,” that is, “one hand” allocating resources, to a new model of cooperation involving the market, the government, and the civil society, that is, “three hands” allocating resources.
Theoretically, under such a new development mechanism, not only does the role of the “invisible hand” need to be guaranteed in order to improve efficiency, but also the role of the “visible hand” of effective regulation should be ensured in order to overcome any failure in the market. At the same time, the social hand’s full participation should be guaranteed to contain failures in the two systems, i.e., government and market. Building and cultivating this mechanism is an important basis for the effective implementation of the energy laws and for the healthy development of the energy industry in China. It is also a reform process of replacing an old mechanism with a new one.
INTRODUCTION

The rapid pace of economic development in China, and the sheer size and density of China’s population, have given rise to a myriad of environmental challenges. The World Bank has listed 16 Chinese cities among the 20 cities with the worst air pollution in the world; a problem that may worsen with the exponential increase in the number of cars on the road.1 Most rivers in urban areas are unsuitable for drinking or fishing.2

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1. See, e.g., ImpactLab.com, The World’s Top 20 Polluted Cities, http://www.impactlab.com/modules.php?name=News&file=article&sid=8462 (last visited March 15, 2007) (citing the World Bank’s determination and noting that in addition to China’s coal burning power stations, increasing car ownership will continue to worsen air quality in these cities); see also Leta Hong Fincher, Worldwatch Institute: 16 of World’s 20 Most-polluted Cities in China, VOA NEWS, http://www.voanews.com/english/archive/2006-06/2006-0628voa36.cfm?CFID=36234535&CFTOKEN=81782323 (last visited Mar. 15, 2007) (stating that the Worldwatch Institute announcement that out of the twenty most polluted cities in the world, sixteen are located in China); Energy Information Administration, Department of...
The demands for drinking water in drought-stricken areas are spurring mega-water projects, and energy demand has led to the Three Gorges Dam, with more controversial hydroelectric projects in planning stages.3

In China, the reports of environmental disasters are growing in frequency, and when they occur, the consequences tend to be enormous, given the size of the impacted populations. Toxic pollution spills near highly populated cities have deprived millions of adequate water supplies for weeks, closing businesses and necessitating mass distribution of bottled water.4 Flooding on the Yangtze River in 1998 killed more than 3,000 people and destroyed more than 5,000,000 homes.5 The problems loom large.

In the last couple of decades, China has adopted numerous environmental laws, some applying generally to environmental matters and others dealing with particular environmental problems, such as water and air pollution.6 China’s State Environmental Protection Agency (SEPA)


2. Louisa Lim, China Warns of Water Pollution, BBC NEWS, Mar. 23, 2005, http://news.bbc.co.uk/1/hi/world/asia-pacific/4374383.stm (noting that Beijing officials reported 70% of China’s rivers and lakes where polluted and approximately 360 million people lacked access to safe drinking water); Yingling Liu, China’s Drinking Water Situation Grim: Heavy Pollution to Blame, Aug. 3, 2006, WORLDWATCH INSTITUTE, http://www.worldwatch.org/node/4425 (discussing the industrial pollution that threatens China’s drinking water supply).

3. See generally ELIZABETH C. ECONOMY, THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGES TO CHINA’S FUTURE 205–07 (2004) [hereinafter ECONOMY] (providing a brief history of the Three Gorges Dam); see also STEPHANIE HEMELRYK DONALD & ROBERT BENEWICK, THE STATE OF CHINA ATLAS: MAPPING THE WORLD’S FASTEST GROWING ECONOMY 87–93 (2005) (discussing the extensive demands on China’s water resources and noting that the Three Gorges Dam project may not be sufficient to counter the increasing threat of flooding on the Yangtze River); Jim Yardley, Seeking a Public Voice on China’s Angry River, N.Y. TIMES, Dec. 26, 2005, at A1 (comparing a proposed project to build an extensive dam projects on the Nu River in Yunnan Province with the already-constructed Three Gorges Dam); Eric W. Orts, Environmental Law with Chinese Characteristics, 11 WM. & MARY BILL RTS. J. 545, 549–52 (2003) [hereinafter Orts, Chinese Characteristics] (noting the Three Gorges Dam as a “leading contemporary example of the scale and seriousness of the environmental and cultural devastation that can result in the name of economic progress”).

4. See, e.g., ECONOMY, supra note 3, at 1–7 (discussing various events that rendered drinking water supplies unfit for human consumption); UNITED NATIONS ENVIRONMENT PROGRAMME, THE SONGHUA RIVER SPILL CHINA: FIELD MISSION REPORT 6–15 (2005), available at www.unep.org/PDF/China_Songhua_River_Spill_draft_7_301205.pdf (describing the November 2005 spill of over 100 tons of benzene into the Songhua River in Jilin Province and the monitoring and mitigation measures that followed); U. N. Envt. Programme, Chinese River Contamination Resulting from a Petrochemical Explosion and Toxic Spill, Nov. 24, 2005, http://www.unep.org/PC/apell/disasters/china_harbin/info.htm (reporting on the Songhua River spill and noting that authorities were providing water for affected cities, including Harbin).

5. ECONOMY, supra note 3, at 9.

6. See, e.g., State Envtl. Prot. Admin. (SEPA), Environmental Laws,
issues regulations and has investigation and enforcement powers. At the provincial level, the Environmental Protection Bureaus exercise similar authority. Yet, violations of environmental laws run rampant. The environmental agencies lack the resources, and sometimes the will, to exercise their investigation and enforcement authority to cabin in polluting industries that contribute to the local tax base.

In China, there is a growing interest in using public interest environmental litigation to curtail pollution and depletion of natural resources, as well as to enhance compliance with environmental laws. Toward that end, Chinese lawyers and officials have sought to learn about United States (U.S.) public interest environmental litigation. This interest in exploring environmental litigation is occurring alongside China’s movement toward a rule-of-law system. The Chinese constitution expressly articulates the rule of law, and China’s entry into the World Trade Organization (WTO) carries explicit obligations to develop a certain degree of transparency and provide legal remedies, at least in the commercial context. This evolution is in early stages, moving at a variable and


7. See e.g., Ferris & Zhang, Reaching out to the Rule of Law, supra note 6, at 590–93 (discussing SEPA’s environmental investigation enforcement mechanisms).
8. See id. at 595 (explaining how the provincial governors and municipal mayors appoint the directors of the Environmental Protection Bureaus, which do not usually welcome outside “intervention by authorities such as SEPA”).
inconsistent pace, depending on the geography, the subject matter, and the point in time. For example, although the Civil Procedure Law directs judges to apply the law to the facts of the case, some decisions still appear to be result-oriented and announce conclusions without providing a legal basis.\textsuperscript{11} And even obtaining judicial decisions, let alone other information about the progression of a lawsuit, often poses a difficult challenge.

This article offers the perspective of a U.S. environmental litigator, drawing from the U.S. experience, to provide strategies for overcoming barriers to effective citizen advocacy in China. The U.S. experience has not been a panacea, and the jurisprudential constructs that have proven effective in U.S. courts may flounder in other legal and political systems. Accordingly, this article offers an assessment of the efficacy of key U.S. trends over the last three decades, while recognizing that the nuances of the Chinese legal system and culture will dictate whether it would be efficacious to borrow or deviate from the Unites State’s experiences.

This article addresses two areas of potential opportunity for greater citizen participation and enforcement in China. The first is broadening who has standing to bring lawsuits to compel compliance with environmental laws. Access to the courts has been essential in fostering litigation to prevent environmental harm in the United States. The second is ensuring effective interpretation and implementation of China’s Environmental Impact Assessment Law (EIA Law).\textsuperscript{12} The enactment of this law is a laudable achievement, marking a large step forward in enhancing public participation in environmental decision making, and ensuring consideration of environmental impacts. Such consideration will also continue to shape the development of decisions affecting the environment. This article attempts to draw from the U.S. experience, both successes and failures, as

\textsuperscript{11} Civil Procedure Law (promulgated by the President Apr. 9, 1991, effective Apr. 9, 1991), art. 138, LAWINFOCHINA (last visited Mar.15, 2007) (P.R.C.) (setting forth the requirements for judgment orders); see also ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 149 (3d ed. 2004).

There are several differences between Chinese court decisions and American common law, some observations include, “the typical judgment of a Chinese court is short and does not set out lines or steps of legal reasoning . . . the precise relationship between [statutory provisions] in their application to the case will not usually be discussed at length, [and] there is no established doctrine of precedent.”

China addresses potential expansion of standing and implementation of the EIA Law. The article first compares U.S. and Chinese litigation to obtain compensation for harm from pollution. Next, it draws lessons from the standing jurisprudence, as it has evolved in the United States. And finally, this article reviews some strengths and pitfalls of implementing the use of environmental impact statements.

I. LITIGATION TO SEEK COMPENSATION FOR VICTIMS OF POLLUTION

Most environmental litigation in China seeks compensation for the harm caused by pollution to individuals, with the bulk of environmental cases concern noise and dust.\(^\text{13}\) Such litigation is authorized by statutes that create a right to compensation for harm caused by pollution. For example, China’s 1989 Environmental Protection Law provides: “A unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and to make compensation to the unit or individual that suffered direct losses.”\(^\text{14}\) If a dispute over compensation cannot be resolved, the injured party may sue for compensation, subject to a three-year statute of limitations.\(^\text{15}\) However, the statute also provides a defense: “If environmental pollution losses result solely from irresistible natural disasters which cannot be averted even after the prompt adoption of reasonable measures, the party concerned shall be exempted from liability.”\(^\text{16}\) The 1984 water pollution law has the same liability provision, as the Environmental Protection Law, but provides additional defenses: “If the loss from water pollution is caused by a third party intentionally or negligently, the third party shall be liable to make compensation.”\(^\text{17}\) Also, “[i]f the loss from water pollution is caused due to the victim’s own fault, the pollutant discharging unit shall bear no liability for it.”\(^\text{18}\)

In the United States, compensation cases would generally arise under

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15. Id. art. 42.

16. Id. art. 41.


18. Id.
the Anglo-American common law, which establishes reciprocal rights and duties. When one breaches such a duty in a manner that interferes with another’s rights, the victim must be “made whole,” generally through payment of compensation for the resulting harm. For example, under the law of nuisance, if a farmer raises pigs in the city and causes noxious odors that interfere with others’ use and enjoyment of their property, the pig farmer would owe compensation to the city dwellers, and a court may order the pig farmer to stop causing the odorous intrusion. As another example, under the common law of negligence, a person is negligent if he or she fails to exercise reasonable care, and that failure causes harm to people who are foreseeably at risk. Negligence also forms the underpinnings for toxic tort litigation; the controlling standards of reasonable care have evolved over time as pollution control technologies become available and the public grows to believe that polluting conduct is unacceptable. In a lawsuit under the U.S. common law, whether based on negligence or nuisance, the plaintiffs would need to prove a breach of a duty as a threshold issue.

In contrast, Chinese law creates no-fault liability to compensate those harmed by pollution, eliminating the need to prove the existence and breach of a duty or some other form of fault. To be entitled to compensation, the plaintiff bears the burden of proving the following two elements: 1) the defendant caused pollution; and 2) the plaintiff suffered harm that is

19. See RESTATEMENT (SECOND) OF TORTS § 7 (1965) (defining “injury as the invasion of any legally protected interest of another); see also Friends For All Children v. Lockheed Aircraft, 746 F.2d 816, 826 (D.C. Cir. 1984) (“When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.”).

20. See, e.g., Spur Industries v. Del. E. Webb Development Co., 494 P.2d 700, 706 (Ariz. 1972) (enjoining the operation of a feedlot operation because the court found that it was both a public and private nuisance for the residents of a nearby development community); see also WILLIAM H. RODGERS, ENVIRONMENTAL LAW 116–19 (2d ed. 1994) (discussing rights theories in the context of nuisance law, including “frictional minimization” and “non zero sum game”).

21. See, e.g., Johnson v. A/S Ivarans Rederi, 613 F.2d 334, 347 (1st Cir.1980), cert. denied, 449 U.S. 1135 (1981) (holding that where conditions rendered plaintiff’s injury foreseeable, the defendant had a duty to exercise reasonable care to protect against dangerous conditions); see also JAMES A. HENDERSON, JR., RICHARD N. PEARSON & JOHN A. SILICIANO, THE TORTS PROCESS 175–76, 297–98, (5th ed. 1999) (discussing the standard of reasonable care and the importance of foreseeability in determining proximate cause).

22. See generally WILLIAM H. RODGERS, supra note 20, at 112 (noting that current environmental law is an “amalgam” of statutory and common law, and the impact of technology has shaped the doctrines in many areas of the law, including nuisance, negligence, trespass, and strict liability).

23. E.g., Terrell v. Alabama Water Service Co., 15 So. 2d 727, 729 (Ala. 1943) (“Negligence and nuisance are distinct torts . . . . [b]ut in either event there must be a breach of duty owing by defendant to plaintiff.”).
associated with that type of pollution. The burden then shifts to the defendant to prove that the plaintiff’s injuries were caused by an act of nature, his or her own actions, a third party, or some other cause.

Chinese law authorizes lawsuits seeking compensation for harm caused by pollution, but there are few other causes of action or available remedies. The Center for Legal Assistance to Pollution Victims has brought numerous cases seeking redress on behalf of people who have been injured by pollution. For example, it has sought damages for the following: 1) the loss of an orchard due to sulfur dioxide poisoning from a copper plant; 2) for noise and dust pollution from a coal plant operating just meters from residences; for the loss of duck eggs due to wastewater pollution; and 3) for a fish kill from industrial pollution discharges. However, it is difficult to amass sufficient proof to prevail in environmental compensation cases; even when the plaintiffs prevail in court, they may encounter further obstacles when seeking to collect damage awards.

The right to obtain compensation for injuries caused by environmental pollution is analogous to the U.S. common law right to be made whole from tortuous or negligent conduct that causes environmental harm. While the films *A Civil Action* and *Erin Brockovich* have sensationalized toxic tort

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25. See Zhao, *supra* note 24, at 181–82 (distinguishing the defendant’s burden of proof in environmental disputes after the plaintiff has alleged harm and causation).


27. See The Center for Legal Assistance to Pollution Victims (CLAPV), http://www.clapv.org. (last visited Mar. 15, 2007). CLAPV is a non-governmental organization established in October 1998 dedicated to improving enforcement of environmental laws. It provides legal representation to pollution victims, trains lawyers, judges, and enforcement personnel, and works to improve environmental laws and practices. It works in conjunction with the Environmental Law Clinic at the China University of Political Science and Law, and serves as both an educational institution and a public-interest legal services agency.


29. See, e.g., Zhao, *supra* note 24, at 180–81 (citing lack of scientific knowledge, expertise and resources as obstacles that hinder plaintiffs’ abilities in meeting their burden of proof in environmental disputes).


31. A film based upon the real-life battles led by a single mother and paralegal against a California power company suspected of polluting a city’s water supply. *Erin Brockovich*, (Universal
actions, the vast bulk of public interest environmental litigation in the United States focuses on prevention and cleanup, rather than after-the-fact compensation for individualized harm from pollution. Most of what is considered public interest environmental litigation in the U.S. falls in the category of administrative law, and seeks to prevent or minimize environmental harm upfront.32

Earth Day 1970 marked a shift away from pure common law toward statutory and administrative schemes for curtailing pollution and protecting natural resources in the United States. After millions of Americans took to the streets demanding greater environmental protection, Congress passed over two dozen environmental laws.33 For these laws to spur effective citizen enforcement in the courts, however, the courthouse door had to be opened to environmental interests.

II. BROADENING ACCESS TO COURTS TO PREVENT ENVIRONMENTAL HARM34

Liberalizing citizen standing was an essential prerequisite to the evolution of public interest environmental litigation in the United States. Under the common law, a person had to have a legal interest that was directly and adversely affected in order to go to court.35 This requirement

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33. See, e.g., Editorial, Then/Now: Reflections on a Millennium: A New Way of Living With Nature, N.Y. TIMES, Dec. 19, 1999, § 4, at 12 (noting the citizen uprising that led to the establishment of Earth Day in 1970, along with an increase in federal legislation relating to environmental protection); see also Jeffery G. Miller, Theme and Variation in Statutory Preclusion Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement, 29 HARV. ENVTL. L. REV. 1, 3 (2005) (discussing Congress’ reaction to Earth Day and the public unrest over the “fragmented, state-led” environmental regulation leading up to 1970).


35. See, e.g., Sierra Club v. Morton, 405 U.S. 727, 740 (1972) (noting that Article III standing requires a plaintiff’s interests to be directly and adversely affected in order to ensure that judicial “review will be sought in the hands of those who have a direct stake in the outcome”); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473
allowed people who had suffered financial, health, or property harm to utilize the courts and seek redress for their injuries. Under this approach, most environmental litigation fell into two categories. First, people sought financial compensation from wrongdoers who caused harm to their health or property.36 Second, people went to court to stop nuisances that interfered with their enjoyment of their property, such as noxious odors or toxic spills.37 The only people who could bring such cases were the individuals whose legal rights had been violated by the person being sued.38

Many environmental injuries are less direct or personal. For example, water pollution discharges may pollute a lake that is used but not owned by people in the community for fishing and recreation; commercial development may destroy pristine lands and lead to extinction of wildlife species. Oftentimes, individuals will be not able to demonstrate a directly affected legal interest that would have enabled them to establish standing under the common law.39 The common law’s expansion of standing to encompass other interests, such as use of natural areas, recreation, and interests in common resources, would be necessary to allow claims seeking redress for many types of environmental harms to be pursued in court.

In addition, much of environmental harm results from many actors. For example, multiple actors collectively pollute the air or water, use up natural resources by dewatering streams or logging forests in ways that have adverse spillover effects like landslides, flooding, or loss of biodiversity. When the “tragedy of the commons” is to blame, rather than a single identifiable actor, it is difficult to prove that a particular defendant is responsible for the harm. This also makes it difficult to win the types of cases that could be brought under the common law.40 In such situations, it


37. See, e.g., Spur Industries v. Del. E. Webb Development Co., 494 P.2d 700, 705 (Ariz. 1972) (explaining the court’s finding that a nearby feedlot constituted a nuisance to developer and residents of development community because of the odor and flies associated with extensive manure production).

38. See, e.g., id. (noting that “[t]here is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living,” as previously advertised by the developer).

39. See, e.g., Boomer, 257 N.E.2d at 871 (noting that the disposition of private rights “may sometimes greatly affect public issues” but cautioning that this involves “a rare exercise of judicial power”).

40. See Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243, 1245 (1968) (explaining that pollution creates a tragedy of the commons; as humans put increasing amounts of waste into the environment, they decrease the quality and quantity of natural resources, such as air, water, and soil).
is far more effective and cost-efficient to prevent pollution or depletion of natural resources in the long-run, rather than remediate such environmental harm after it occurs. 41 Shifting the focus of environmental litigation away from compensation for specific environmental injuries toward prevention required a broadening of the standing doctrine. This involved encompassing individuals who were less directly and personally impacted by environmental harm. Furthermore, this expansion occurred both through judicial decisions that broadened the interests giving rise to standing, as well as legislative authorization of citizen lawsuits to enforce environmental laws.

A. Judicial Expansion of Standing

In 1972, the U.S. Supreme Court broadened standing in Sierra Club v. Morton, a landmark case involving a challenge to the construction of a mega-ski resort on Mineral King Mountain, adjacent to Sequoia National Park. 42 Prior to this case, courts had required plaintiffs to have a direct and often economic or personal interest to have standing, 43 which is analogous to the direct interest requirement in many Chinese laws. 44 In Sierra Club, the Supreme Court broadened the type of interests that could give rise to standing beyond economic and personal interests. 45 It held that a party would have standing if its activities, past-times, or uses of the area would be adversely affected by proposed development. 46 Thus, the Court added harm to aesthetic, environmental, and recreational interests to the types of

41. See id. at 1245–46 (proposing the use of “administrative law” and “corrective feedback” mechanisms in order to legislate temperance for better management of the commons).
42. Sierra Club v. Morton, 405 U.S. 727 (1972). This case eventually led to the Forest Service’s preparation of an environmental impact statement that revealed severe environmental impacts and recommended that the project be scaled back significantly. Due to these revelations and growing public opposition, the resort was never built, and the mountain area was added to the national park.
43. See, e.g., Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968) (determining that local utilities had standing to protect their economic interests against the Tennessee Valley Authority’s sale of electricity to local communities under the Tennessee Valley Act of 1933, as amended in 1959); FCC v. Sander Bros. Radio Station, 309 U.S. 642, 476–77 (1940) (ruling that economic injury to a competitor radio station was a relevant consideration in determining that the respondents had established standing under the Communications Act of 1934); but see Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir.1965) (rejecting the argument that a party had to have an economic interest to participate in a hydroelectric license proceeding).
45. Morton, 405 U.S. at 734, 738–40 (noting also that pursuant to Administrative Procedure Act, 5 U.S.C. § 702, a party seeking judicial review under or, a member of an organization seeking review, “must allege facts to show that he himself is adversely affected” to establish standing).
46. Id. at 734.
injuries that could give rise to standing.\textsuperscript{47}

The evolution of standing based on environmental harm was also an essential prerequisite to expanding citizen enforcement of environmental laws. Without such liberalized standing, there would be an imbalance in the courts. Based on their financial interests, industries would have standing to challenge more stringent regulation of their industries by the government, while people who are harmed by pollution would not be able to go to court to challenge weak government regulations. Nor would there be meaningful remedies for violations of environmental laws seeking to prevent environmental harm, particularly environmental harm that is caused by many actors over time. Liberalized standing rules have evened the playing field, thereby allowing citizen voices to be heard in court, and ensuring that environmental prevention laws will be heeded.

In \textit{Sierra Club}, the Supreme Court addressed another key standing question—whether organizations have standing to bring environmental litigation.\textsuperscript{48} The Sierra Club had sought standing based on its status as an established environmental organization.\textsuperscript{49} The Court rejected that approach. While a dissenting opinion supported giving trees standing by allowing groups that protect forests to sue on their behalf,\textsuperscript{50} the majority required a particularized injury.\textsuperscript{51} Rather than have standing in its own right, organizations like the Sierra Club have standing to sue only on behalf of their members to promote their collective goals.\textsuperscript{52} Interestingly, other countries, such as Greece, Brazil, and the Philippines, have allowed recognized organizations to enforce certain environmental laws, without the need to demonstrate an individualized injury or direct loss due to the violation.\textsuperscript{53}

Under U.S. law, organizations may bring suits on behalf of their members provided that: (1) at least one member has standing; (2) the case is germane to the association’s purposes; and (3) participation of individual members is not necessary to obtain relief.\textsuperscript{54} For example, the American

\textsuperscript{47} Id.
\textsuperscript{48} Id. at 739–40.
\textsuperscript{49} Id. at 730.
\textsuperscript{50} Id. at 749, 752 (Douglas, J., dissenting); see also C. Stone, \textit{Should Trees Have Standing? Toward Legal Rights For Natural Objects} 10–23 (1974) (describing historical bases for standing to sue on behalf of the environment).
\textsuperscript{51} Id. at 734–735.
\textsuperscript{52} Id. at 739.
\textsuperscript{54} Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333, 343–44 (1977) (discussing the requirements of organizational standing and holding that the Washington State Advertising Commission, as state agency could assert claims on behalf of its members).
Lung Association has frequently brought lawsuits seeking to compel EPA to issue standards restricting air pollution, and fishing groups have standing to challenge actions that degrade rivers that support fisheries.55 However, such organizations would not be able to sue for money damages for the harm to a member’s health or property because membership participation would be necessary to prove the person’s injuries and the amount of compensation that should be paid.56

In practice, environmental organizations have brought litigation to obtain compliance with environmental laws, to stop pollution, or to restore the commons. Administrative law challenges to a discharge permit’s compliance with the law are quite common, as are citizen suits to force enterprises to comply with their permits or to obtain restoration of areas harmed by illegal discharges.

In the 1990s, some cases established limitations on access to the courts for the type of administrative law and citizen suit cases typically pursued by environmental organizations.57 The new constraints derived from unique features of Article III of the U.S. Constitution, which limit federal court jurisdiction to actual “Cases” or “Controversies,” and the constitutional separation of powers doctrine. This doctrine separates the legislative, executive, and judicial functions into three separate branches of government with constraints on the extent to which courts can engage in policy-making functions.59 Under these constitutional principles, some have argued that

55. See generally Am. Lung Ass’n v. U.S. Envtl. Prot. Agency, 134 F.3d 388 (D.C. Cir. 1998) (challenging EPA’s failure to promulgate air pollution standard); Safe Air for Everyone v. U.S. Envtl. Prot. Agency, 475 F.3d 1096 (9th Cir. 2007) (challenging EPA’s approval of a of an amendment to Idaho’s State Implementation Plan, which farmers to burn plan debris that is leftover in the fields after harvesting); see also Pacific Coast Fed’n of Fishermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv., 265 F.3d 1028, 1035–36 (9th Cir. 2001) (challenging four biological opinions that would have allowed twenty three timber sales in Southwest Oregon).


57. E.g., Lujan v. Nat’l Wildlife Fed’n (Lujan I), 497 U.S. 871, 891 (1990) (holding that the Bureau of Land Management’s Land Withdrawal Review Program was not a final agency action because NWF could not “seek wholesale improvement of this program by court decree” but rather had to “direct its attack against some particular ‘agency action’ that causes it harm”); Lujan v. Defenders of Wildlife (Lujan II), 504 U.S. 555, 564, 568 (1992) (holding wildlife conservation organization claiming that a regulation under the Endangered Species Act should apply to federal agency action in foreign nations, lacked standing because members of the organization failed to establish an imminent injury and redressability).


environmental organizations should lobby the legislature or petition executive branch agencies to take particular actions, rather than go to court to seek direct implementation or enforcement of environmental laws.\[^{60}\]

Government agencies have argued that general harm to the environment is too abstract or vague to present a case or controversy that could be decided by a court.\[^{61}\] In one case, *Lujan v. National Wildlife Federation*, individuals who used lands “in the vicinity” of the areas newly opened up to mining were unable to show a concrete enough injury.\[^{62}\] In another case, *Lujan v. Defenders of Wildlife*, the Court held that intent to return to a region at some time in the future was too remote to challenge a decision to fund construction of a dam in that area.\[^{63}\]

These new restrictions on environmental standing threatened to turn the question of standing into a mini-lawsuit that had to be litigated before the plaintiff(s) could present the merits of their case to the court.\[^{64}\] In response some courts required the plaintiff to offer substantial evidence of their interest and how it was harmed by the challenged action in an initial proceeding before evidence of the legal violation would be heard.\[^{65}\] And

\[^{60}\]See, e.g., Massachusetts v. U.S. Envtl. Prot. Agency, No. 05-1120, slip op. at 22 (Apr. 2, 2007) (Roberts, C.J., dissenting) (explaining that the proper place for petitioners to seek recourse for their “broad-ranging injury” is the legislative and executive branches, not the federal courts) (citing *Lujan II*, 504 U.S. at 576); *Lujan II*, 504 U.S. at 576 (explaining the function of the judicial branch “is, solely, to decide on the rights of individuals,” while “[i]ndicating the public interest . . . is the function of Congress and the Chief Executive.” (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)); *Lujan I*, 497 U.S. at 891 (explaining that plaintiffs should bring their complaints to “the offices of the Department or the halls of Congress” rather than “seek wholesale improvement of this program by court decree”).

\[^{61}\]See, e.g., *Lujan II*, 504 U.S. 555 (1992) (upholding a joint regulation under the Endangered Species Act promulgated by the Secretary of the Interior and Secretary of Commerce because members of environmental organization did not establish that their injury was “actual or imminent” to meet Article III standing).

\[^{62}\]See id. at 561.

This case explains that the standing rules “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.”

\[^{65}\]See, e.g., Fla. Audubon Soc’y v. Bentsen, 94 F.3d 658, 666, 670–71 (D.C. Cir. 1996) (determining that plaintiffs’ claim that a federal tax credit for the fuel additive ethyl tertiary butyl ether would increase demand for ethanol and in turn increase agricultural pollution failed to establish “either an injury to their particularized interest or that defendant’s actions created a ‘substantial probability’ of
sometimes the courts demanded more evidence than would be required to prove a violation of the underlying environmental law.66

The restrictions also had the effect of promoting prosecution of environmental claims in piecemeal fashion. For example, the Lujan cases sought to prevent environmental harm by challenging either the “wholesale” withdrawal of public lands from protected status or the funding of large projects that threatened to wipe out endangered species.67 By requiring the environmental organizations to wait until they had evidence that environmental harm to individuals was imminent or had occurred in a palpable way,68 judicial review was not only delayed, but also was shifted away from the program as a whole to individual parcels of land or projects proceeding under the program.

Fortunately, in 2000 another Supreme Court case, Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc., established that environmental plaintiffs do not need to prove the merits of their claims in order to establish standing to bring the lawsuit.69 In that case, a wastewater treatment plant discharged mercury in excess of amounts allowed in its National Pollution Discharge Elimination System (NPDES) permit.70 The Court held that the plaintiffs did not have to prove that the discharges caused harmful pollution.71 It was sufficient for them to show that the pollution prevented them from using the waters as they had done in the past and otherwise planned to do so in the future.72 For example, an individual who refrains from engaging in activities, such as fishing, swimming, and boating, because of reasonable concerns about pollution discharges, has standing without needing to prove the discharges have, in fact, caused health or environmental harm.73 This approach promotes the goals and structure of the Clean Water Act (CWA), which has a citizen suit provision that allows citizens to enforce the requirements to obtain and comply with water discharge permits.74

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66. See, e.g., id. at 664–65 (requiring plaintiffs in procedural-rights cases to show that the agency violated a procedural requirement, as well as that agency action was “substantially likely” to result in a “demonstrable increase in risk to their particularized interest”).
68. Lujan I, 497 U.S. at 891; Lujan II, 504 U.S. at 564.
70. Id. at 175–76.
71. Id. at 181.
72. Id. at 183–84.
73. See id. at 181–82 (referring to affidavits submitted by members of plaintiff environmental organization and noting that “[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff”).
Three lessons can be learned from this U.S. experience. First, the U.S. courts wisely decided that environmental injuries should be on a par with economic and personal harm. All of these types of injuries should be sufficient to allow injured parties to seek redress in the courts. A contrary approach would create an uneven playing field with polluters having access to courts to seek weaker environmental protections and victims of pollution left without judicial vehicles for challenging weak protections.

Second, the U.S. courts require environmental organizations to demonstrate that one or more of their members are injured sufficiently in their own right to bring the lawsuit. Since requiring such an injury to an organizational member is a feature of U.S. constitutional limitations on the jurisdiction of the courts, there is no analytical or policy reason for extending it beyond U.S. borders. In fact, many states have adopted principles that allow organizations to bring lawsuits without demonstrating injury to one or more members, and the U.S. constitutional limits on federal court jurisdiction does not bar such cases in state courts. Allowing organizations to bring environmental litigation avoids placing the burden of such litigation on individuals who often lack the resources and capacity to prosecute the case. A nongovernmental organization (NGO) that tracks environmental issues will have far greater knowledge and institutional capacity to develop an environmental prosecution. Moreover, to the extent that the injury to membership requirement limits the number of environmental cases, it is not clear if this requirement actually does so in the United States. In addition, there may be no need for such a limitation in China due to the limited number of environmental NGOs and the extensive prerequisites and government oversight of accreditation.

civil action . . . against any person including . . . the United States and any other government instrumentality or agency . . . for either violating an effluent standard or limitation or order, or for failure to “perform any act or duty under the CWA”).

75. Friends of the Earth, 528 U.S. at 180–84.
76. Id. at 181 (citing Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333, 343 (1977)).
77. See, Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 ECOLOGY L.Q. 755, 863 (2001) (encouraging judges to state law to define injury when plaintiffs who are arguing a common injury do not have to “jeopardizing their public nuisance case, their ability to sue as an organization, or their right to bring a class action”).
Third, some U.S. courts began to turn the proof of standing into a mini-trial of the merits, which imposed excessive burdens on the plaintiffs and the courts. The Supreme Court wisely put an end to such burdensome standing requirements. It undermines the credibility and strength of both the environmental laws and the legal system to prevent affected parties from having their day in court. Instead, the extent of injuries should be assessed as part of the merits and remedy, rather than to keep viable enforcement cases from being heard at all.

B. Legislative Expansion of Standing: Citizen Suits

As previously mentioned, Earth Day spurred legislation aimed at improving air and water quality and preventing the spread of harmful toxic wastes. These prevention-oriented statutes follow a similar model that: 1) establishes minimum federal standards; 2) requires polluting facilities to obtain permits that incorporate and adapt these standards to the particular enterprise; and 3) authorizes governmental and citizen suits to enforce both the requirement to obtain a permit and compliance with the particular permit. The CWA is illustrative.

Images of Ohio’s Cuyahoga River catching on fire due to oil pollution and newspaper headlines declaring that “Lake Erie is Dead” spurred Congress to enact the Federal Water Pollution Control Act, commonly known as the CWA. Congress’ goals in enacting this statute included reducing water pollution in order to, “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to attain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife . . . .” Under the CWA, it is unlawful for any person to discharge a pollutant into navigable waters without a NPDES permit. Congress designed the NPDES Permit Program to include federal

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80. *See*, *e.g.*, *Friends of the Earth*, 528 U.S. at 181–82 (requiring plaintiffs to demonstrate injury only to themselves rather than the environment because the Court did not intend to “raise the standing hurdle higher than the necessary for achieving success on the merits in an action alleging noncompliance with a NPDES permit”).
83. *See*, *e.g.*, Press Release, Great Lakes Fishery Committee, Lake Erie Committee, Phosphorus Targets Achieved in Lake Erie (Feb. 17, 1998) available at http://www.glfc.org/pressrel/prlecpos.htm (last visited Mar. 15, 2007) (noting that “[b]y the late 1960s, Lake Erie was suffering from too much phosphorus and was labeled with headlines such as ‘Lake Erie is Dead’”).
84. 33 U.S.C. § 1251(a).
85. *See id. § 1311(a) (“[T]he discharge of any pollutant by any person shall be unlawful” unless in compliance with a permit.”); id. §1342(a) (EPA “may, after opportunity for public hearing,
Environmental Protection Agency (EPA) effluent limitations aimed at lowering point source pollution, through the use of the most advanced pollution control technology available. The EPA generally establishes discharge standards for various industries based on available pollution control technology. The CWA also requires permits to contain sufficient pollutant release limitations to allow the waterway receiving the pollutant to meet state water quality standards.

The CWA also provides for citizen participation in EPA rulemaking proceedings to establish the best pollution control standards for particular industries. In addition, citizens have the right to appeal permits to ensure compliance with the CWA and state water quality standards. For example, appeals may raise issues such as whether the permit will protect designated uses such as fishing or drinking water, and whether the permit requires the best available technology for controlling certain sources of pollution. Both challenges to EPA regulatory standards and to the adequacy of particular permits are governed by U.S. administrative law and the ordinary principles of standing described above.

Of particular importance to public interest environmental litigation, the issue a permit for the discharge of any pollutant . . . upon condition that such discharge will meet” CWA requirements."

86. Id. § 1311(b)(1)(A)(i), 1314(b), 1342(a)(1).
87. Id. §§ 1311(b)–(e); see also E.I. Du Pont Nemours & Co. v. Train, 430 U.S. 112, 126–28 (1977) (holding that EPA has authority under § 1311 of the CWA to issue industry-wide regulations to limit discharges by existing plants).
88. See id. § 1313(c)(2)(A) (providing state water quality standards consist of three components: (1) the “designated uses” of the waters; (2) “water quality criteria” necessary to protect such uses; and (3) an “anti-degradation” requirement, prohibiting deterioration or degradation of surface waters from current conditions); id. § 1342(b) (noting that EPA can delegate permitting authority to states provided the states meet certain minimal standards and procedures); see also Water Quality Standards, 40 C.F.R. § 130.3 (2006) (explaining that a “water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses”).
89. See id. §§ 1314(b)(1)–(3) (providing factors and considerations that the EPA must take into account when consulting with federal and state agencies and other interested persons in determining effluent limitation regulations).
91. Id. § 1251(a); id. §§ 1311(b)(1)(A)(i), (b)(2)(A)(i), (b)(2)(B); see also Ass’n of Pacific Fisheries v. U.S. Envtl. Prot. Agency, 615 F.2d 794, 805–806 (9th Cir. 1980) (holding that the EPA conducted a proper cost-benefit analysis of a proposed technology in determining the “best practicable control technology currently available” in effluent guidelines for the canned and preserved seafood processing industry); Natural Resources Defense Council v. U.S. Envtl. Prot. Agency, 16 F.3d 1395, 1401 (4th Cir. 1993) (holding, in part, that EPA was accorded deference in determining that state water quality standards were scientifically defensible and protective of designated uses because EPA’s determination was “reasonable and [was] supported by substantial evidence in the administrative record”) (citing Shanty Town Assocs. Ltd. v. U.S. Envtl. Prot. Agency, 843 F.2d 782, 790 (4th Cir. 1988)).
CWA authorizes citizen suits to compel dischargers to obtain permits and to enforce the conditions imposed through water discharge permits. The citizen must provide notice to the alleged violator 60 days prior to filing a lawsuit in order to give the violator an opportunity to correct the violation. The notice also provides the government enforcement body an opportunity to step in and prosecute the case.

If the violation is not corrected and the government does not bring its own enforcement action, the citizen may sue to remedy the violation of the CWA. In the lawsuit, the citizen must prove that the discharger did not have a valid permit or the discharger was in violation of the limits imposed by the permit. The citizen need not prove that the discharge caused particular environmental harm on the theory that the government has already made findings of harm in establishing the pollution standard and issuing the discharge permit. If the polluter believes the discharges are benign, its remedy is not to violate the permit at will, but rather to seek a change in either the pollution standards or the permit. The violation could also consist of a failure to submit public reports of discharges, which are generally required by the permit.

While a governmental enforcement action can seek criminal penalties, citizen suits are limited to civil remedies. Within this constraint, 

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92. 33 U.S.C. §§ 1365(a)(1)–(2); see also § 1365(g) (defining “citizen” as “a person or persons having an interest which is or may be adversely affected”).

93. Id. § 1365(b)(1)(A).

94. Id. § 1365(b)(1)(B); see also Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 175 (2000) (“[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the [CWA] and thus . . . render unnecessary a citizen suit.”) (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)).


96. Id. §§ 1365(a)(1)–(2); see, e.g., Friends of the Earth, 528 U.S. at 176 (noting the lower court’s finding that the defendant had violated the mercury limits in its permit 489 times between 1987 and 1995).

97. E.g., Friends of the Earth, 528 U.S. at 176, 181 (referring to the record of defendant’s violations and the plaintiffs burden demonstrating injury to satisfy standing under Article III).

98. See United States v. Weitzenhoff, 35 F.3d 1275, 1284–85 (9th Cir. 1994) (holding that the EPA must show that the defendant knowingly discharged pollutants, and not that defendant knew he was violating a statute or a permit).

however, the range of remedies is quite broad. First, the court may order the polluter to pay civil fines of up to $32,500 for each day the law or permit is being violated.101 These fines must be paid to the U.S. Treasury, not the party bringing the citizen suit.102 Rarely do courts order payment of the maximum penalties. Instead, they balance the severity of the violation, the impact of the pollution, the need for deterrence, and the extent to which corrective actions have already been undertaken in determining the amount of civil penalties to levy.103 Second, the court may enjoin future violations of the permit and may order the polluter to remedy harm caused by the past violations.104 Often such remedies call for restoration of the riparian or wetland environment where the violation occurred.105 Finally, the court may award the citizen its costs of bringing the lawsuit, including its attorneys’ fees and the costs of expert witnesses.106

Citizen suits are designed to increase society’s enforcement capabilities beyond those funded by the taxpayers. The theory is that people who are directly impacted by pollution will have an incentive to act as “private attorneys general” and bring actions to prevent it or clean it up.107 Since the

102. See Pub. Int. Research Group v. Duffryn Terminals, Inc., 913 F.2d 64, 82 (3d Cir. 1990) (noting the consistent case law supporting that “penalties in citizen suits under the Act must be paid to the Treasury.”); S. REP. NO. 92-414 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3744 (referring to citizen suits and noting “that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant”).
103. 33 U.S.C. § 1319(a) (2000); e.g., Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77, 87 (2d Cir. 2006).
105. E.g., United States v. Deaton, 332 F.3d 698, 714 (4th Cir. 2003) (holding that the trial court did not abuse its discretion in issuing a remediation order because it adequately considered factors including ”maximal environmental benefit,” overall practicality, and congruity between “the degree and kind of harm” that the court intends to remediate); United States v. Pozgai, 999 F.2d 719, 736 (3d Cir. 1993) (upholding the lower court’s restoration order in light of defendant’s repeated acts of noncompliance); United States v. Weisman, 489 F. Supp. 1331, 1342–43 (M.D. Fl. 1980) (determining that a restoration order was appropriate in part because the plan would “undo the defendants’ environmental alterations to the wetland and to restore the area”).
107. See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass’n, 453 U.S. 1, 13–17 (1981) (discussing Congress’ intent to allow citizens to act as “private attorneys
private parties and attorneys are, in essence, doing the government’s work, Congress did not believe they should have to bear the costs of successful litigation. Accordingly, where a citizen suit is successful in promoting the Act’s purposes, the polluter must pay the cost of the enforcement action. The fee-shifting provisions of the CWA and other environmental statutes have helped fund public interest litigation and establish the expertise and capacity to bring such litigation on a regular basis.

C. The Type of Harm that Must be Proven to Have Standing Varies Depending on the Nature of the Legal Claim

Standing is often discussed as a monolithic concept, with the implication that once an entity has standing to bring one type of environmental claim, it could also bring other types of claims and seek additional remedies. In reality, U.S. courts require litigants to establish standing when they assert each claim, and the type of harm and causation that plaintiffs must prove varies, depending on the nature of the legal claim and the relief the party is seeking.

The following list presents a continuum: starting with the least harm required for lawsuits seeking compliance with informational or public participation rights on one end of the continuum, and concluding with the highest burden for lawsuits seeking compensation for personal harm from pollution at the other end.

- If the plaintiff is seeking to exercise a public right to gain access to information or to participate in a public process, the burden is minimal since the right attaches to all interested members of the public.
- To seek an adequate environmental impact statement, the plaintiff would not need to prove that the underlying

108. See 33 U.S.C. § 1365(d) (2000) (allowing the court to award litigations costs, including “reasonable attorney and expert witness fees”).

109. See CONF. REP. NO. 91-1783 (1970) as reprinted in 1970 U.S.C.C.A.N. 5374, 5388 (discussing the Senate’s amendment providing the courts with discretionary power “to grant reasonable attorney and expert witness fees”); see also Michael Wietecki, Comment, True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney’s Fees into the Minnesota Environmental Rights Act, 14 MO. ENVTL. L. & POL’Y REV. 147, 168–69 (2006) (noting that provisions such as § 7604(d) of the Clean Air Act award reasonable attorney and expert witness fees has encouraged public interest litigation).

110. See, e.g., FEC v. Akins, 524 U.S. 11, 20–24 (1998) (holding that voters who were denied information regarding campaign donors satisfied the “injury in fact” requirement of standing because the Federal Election Campaign Act required public disclosure).
project will cause harm, but merely that the plaintiff would be affected by the project and that there is sufficient evidence to potential harm to warrant an analysis in an environmental impact statement.\footnote{See Lujan v. Defenders of Wildlife (\textit{Lujan II}), 504 U.S. 555, 572 n.7 (1992) (explaining that a plaintiff asserting a procedural right, \textquotedblleft to protect his concrete interests can assert the right without meeting all the normal [standing] standards for redressability and immediacy\textquotedblright).} 

- To enforce a zoning standard, the plaintiff may need to be impacted by the project, but need not prove that the project will cause particular harm if the zoning standard is violated because the legislative body already made that judgment.\footnote{See, e.g., Guillot v. Brooks, 26–544 (La. App. 2 Cir. 3/1/95); 651 So.2d 345, 349 (holding plaintiffs had standing to file suit to enforce ordinance against air traffic from nearby airfield that \textquotedblleft spooked horses\textquotedblright\ and \textquotedblleft scared\textquotedblright\ children because of additional testimony that the price of plaintiffs\' property had likely diminished in value); see also Pinewoods Associates v W.R. Gibson Dev., 837 S.W.2d 8, 13 (Mo. App. 1992) (noting the rule that adjoining or confronting property owners do not have to prove special damages to enjoin violations of the zoning ordinance).} 

- To require adherence to a permit or regulatory standard, the plaintiff need not prove that violation of the standard will cause personal injury, since the permit or standard embodies a judgment that the enterprise must abide by the limit.\footnote{E.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC) Inc., 528 U.S. 167, 181–185 (2000) (holding affidavits from members of plaintiff environmental organization established a sufficient injury in fact to their aesthetic and recreational interests in a nearby river).} 

- To obtain compensation from harm from pollution, the plaintiff would need to be the person harmed by the pollution.\footnote{E.g., Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 312 (3d Cir. 1985), cert. denied, 474 U.S. 980 (1985) (denying injunctive relief to enjoin chemical plant that was responsible for groundwater contamination because the plaintiff did not suffer a harm sufficiently distinct from the general public); see also \textit{RESTATEMENT (SECOND) OF TORTS} (1971) § 821C (\textquotedblleft In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference\textquotedblright).} 

Accordingly, a litigant need not show that he or she suffered extensive harm in order to pursue compliance with procedural requirements mandating public access to certain information or public participation in government decision-making. Since the legislature has required dissemination of information or public participation, those rights attach to all interested members of the public and a specific interest in the matter is generally all that must be shown.\footnote{E.g., Pub. Citizen v. U.S. Dep\’t of Justice, 491 U.S. 440, 449–451 (1989) (noting that “when an agency denies requests for information under the Freedom of Information Act, refusal to}
held that broad standing rules apply to lawsuits seeking preparation of an adequate environmental impact assessment before embarking on a project. To bring such a case, a plaintiff organization must show only that it or its members may be affected by the environmental impacts of the underlying project. The plaintiff need not show that providing the information or preparing the assessment would necessarily lead to a different outcome. Congress has already made the judgment that federal agencies must abide by these procedural obligations and that doing so will lead to better informed or more environmentally-sound decisions. By enforcing the law’s informational requirements, the courts are furthering Congress’ design and are allowing citizens to enforce requirements imposed for both their benefit and the benefit of common resources.

Toward the middle of the standing continuum, a lawsuit seeking to enforce a permit requires a showing that the permit violation affects his or her behavior, as illustrated in the Friends of the Earth case in part III. A. of this article. There is no need, however, to prove that the discharges have caused or will cause harm to the environment since the legislature or regulators made that judgment when they established the standards incorporated into the permit. And in such a case, it may be possible to obtain a remedy that requires the clean-up of illegally polluted sites. Administrative law suits challenging the adequacy of an individual permit because, for example, the permit omits mandatory pollution control standards, call for a similar showing. However, cases challenging broader government actions may need to wait until some harm from the program can be demonstrated at a project level and the challenge can target the particular project.

permit appellants to scrutinize the ABA Committee’s activities to the extent Federal Advisory Committee Act allows constitutes a sufficiently distinct injury to provide standing to sue”.

116. See Lujan II, 504 U.S. at 572 n.7 (distinguishing the standing requirement for plaintiffs asserting procedural versus private rights).

117. See id. at 573 n.8 (noting, however, that the a plaintiff asserting a procedural right still must possess a “threatened concrete interest”).


120. Id. at 181–82 (2000).

121. Id. at 184–85.


123. E.g., Lujan v. Nat’l Wildlife Fed’n (Lujan I), 497 U.S. 871, 890–91 n.9 (1990) (ruling that the Bureau of Land Management’s “land withdrawal review program” was not specific enough to constitute an “identifiable ‘final agency action’ for purposes of the APA”).
At the heavier burden end of the standing continuum, lie compensation cases. In order to seek compensation from a polluter for harm caused by pollution, the plaintiff must be among those harmed by the pollution.\textsuperscript{124} Even after liberalized standing in the prevention and cleanup context, U.S. law still requires those who seek money damages to have a legally protected interest, in property or their individual health and well-being, in order to seek compensation.\textsuperscript{125}

As China grapples with how to expand standing, the various types of injuries and claims should be considered in terms of which interests should suffice to bring which claims. In addition, the impact of citizen standing should be assessed. Individuals directly harmed by pollution may have the motivation to seek compensation in their own right, although there certainly are financial, evidentiary, and political obstacles to pursuing compensation. In contrast, citizens generally lack comparable financial incentives to seek compliance with the EIA law or environmental standards. Inadequate financial resources, corruption, and an unwillingness to confront local businesses may prevent governmental bodies from enforcing environmental laws against local enterprises that contribute to the local economy and wield political power. In light of these realities, society may benefit by empowering citizens to serve as private prosecutors to enforce environmental laws.

III. ENVIRONMENTAL IMPACT ASSESSMENTS

In 2003, China enacted a law requiring environmental impact assessments (EIAs) for all major construction projects.\textsuperscript{126} This requirement is not limited to governmental actions, but extends to private actions.\textsuperscript{127} The basic EIA requirements are similar to the mandates established by the U.S. National Environmental Policy Act (NEPA).\textsuperscript{128}

\textsuperscript{124} See supra note 111 and accompanying text.

\textsuperscript{125} E.g., Ohio Forestry Ass’n, Inc. v. Sierra Club, 523 U.S. 726, 738–739 (1998) (noting that if plaintiffs were objecting to a final decision by the Forest Service to close off a specific area to off-road vehicles, then the plaintiffs could assert an imminent concrete injury in their “interest in the use of off-road vehicles in that area”); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining that in order to satisfy the injury in fact requirement of standing, plaintiffs must suffer an invasion of a “legally protected interest” which is “concrete and particularized” and “actual or imminent,” not “conjectural” or “hypothetical”).


\textsuperscript{127} Id.

However, one major difference is that NEPA applies only to major federal actions, but covers actions of all types, while China’s EIA law applies to all major construction projects, even those that lack a major federal role. Another difference is that a key remedy under the Chinese EIA law is to fine and reprimand people who do not discharge their EIA duties. In contrast, U.S. NEPA requirements are enforced through the APA, which authorizes courts to set aside decisions based on a failure to prepare an adequate environmental impact statement, to remand the decision to the agency, and to prevent implementation of the action before fully NEPA compliance occurs. The U.S. courts do not, however, enforce NEPA by punishing individual civil servants who violate its terms. SEPA has the authority to stop construction projects that are proceeding without environmental impact assessments, much like U.S. courts’ authority under the Administrative Procedure Act (APA). In the absence of citizen standing to enforce the China’s EIA Law, the public may not be able to enforce the public participation rights created by the law or prevent environmental harmful behavior occurring without compliance with the EIA requirement.

NEPA has been called the U.S. “Environmental Bill of Rights,” and indeed, the implementing regulations call it “our basic national charter for protection of the environment.” It requires every federal agency to prepare an environmental impact statement for every major federal action

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131. 5 U.S.C. § 706 (2000) (stating, in part, that the “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law,” as well as those that are “without observance of procedure required by law”).


“significantly affecting the human environment.”

This requirement gives effect to the adage “look before you leap.” Federal agencies must prepare environmental impact statements early enough in the process to prevent irreversible commitments of resources and to avoid rationalizing decisions already made. An environmental impact statement is designed to serve two purposes: (1) to infuse environmental considerations into decision-making by informing the decision-makers of the proposal’s environmental effects and the effects of viable alternatives; and (2) to involve the public in the assessment of environmental impacts and to disclose those impacts fully and fairly to the public.

As China implements its EIA law, two lessons could be learned from the U.S. experience. First, in the early years after passage of NEPA, many agencies viewed the requirement to prepare an environmental impact statement to be discretionary. It took a series of court decisions to confirm the mandatory nature of the requirements of the law. The application of NEPA to all major federal actions was essential to closing loopholes under which agencies could pick and choose when to prepare an environmental impact statement.

Some of NEPA’s greatest successes have occurred when an environmental impact statement that was not necessarily welcomed by the agency caused the agency to reverse course.

- A 1997 environmental impact statement revealed that a proposed new hydropower dam would undermine government efforts to restore salmon to the river. The

136. 42 U.S.C. § 4332(2)(C) (2006); see also Hanly v. Mitchell, 460 F.2d 640, 647–48 (2d Cir. 1972) (noting that the court must perform a factual inquiry in deciding whether an federal action was “major” in terms of cost and planning, and also whether it significantly affected the quality of the human environment).

137. See 42 U.S.C. § 4332(2)(C)(v) (2000) (requiring “any irreversible and irretrievable commitments of resources” involved in a proposed federal action); see 40 C.F.R. § 1502.5 (2006) This regulation requires agencies to begin preparing "an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal . . . so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made . . . ."


139. See Nicholas C. Yost, NEPA’s Promise–Partially Fulfilled, 20 ENVTL. L. 533, 546 (1990) (providing an overview of the judicial interpretation of NEPA prior to 1990). The author of this article was the general counsel of the Council Environmental Quality who had lead responsibility for drafting the NEPA implementing regulations).

140. Id. at 545–46 (discussing Methow Valley, 490 U.S. 332 (1989) and Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989)).
Federal Energy Regulatory Commission decided not to license the new dam and it has since removed a defunct dam that was blocking salmon access to many miles of productive river habitat. Salmon are now rebounding in that river.\textsuperscript{141}

- In the Pacific Northwest, environmentalists, timber workers, and local communities submitted comments on a draft environmental impact statement that presented an alternative to extensive logging of old-growth forests that would thin younger tree stands, yet produce the same amount of timber. The Forest Service adopted the citizen alternative, and the logging proceeded with full support of all the players who had previously been fighting each other and the government over logging policies on the forest.\textsuperscript{142}

- In the 1990s, an environmental impact statement documented new technologies that could produce tritium for nuclear warheads. The environmental impact statement led the Department of Energy to cancel plans to build new expensive nuclear reactors. Then Secretary of Energy, Admiral James Watkins, testified before Congress and concluded, “Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country.”\textsuperscript{143}

In none of these situations did the agency envision that it would abandon or significantly modify the proposed project at the outset, yet when faced with an objective presentation of the environmental impacts, that option became compelling.

Second, the U.S. Supreme Court weakened NEPA through judicial interpretation in ways that many believe are at odds with congressional intent. While NEPA injects environmental impact considerations into


\textsuperscript{142} For an informed discussion on NEPA case law prior to 1990, see Yost, supra note 139, at 546 (providing an overview of the judicial interpretation of NEPA). The author of this article was the general counsel of the Council Environmental Quality who had lead responsibility for drafting the NEPA implementing regulations.

\textsuperscript{143} Id.
government decision-making, the Supreme Court has limited the agencies’ obligation to taking a “hard look” at the environmental consequences.\footnote{144} As one opinion summarized, “once an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure the agency has considered the environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of action to be taken.’”\footnote{145} NEPA does not fulfill the congressional intent behind it, or the policy goal of reducing harmful pollution by allowing agencies to consider environmental destructive alternatives without employing the mitigation identified as necessary in the environmental impact statement.\footnote{146} Judicially divorcing NEPA from any mandate to adopt environmentally-sound decisions has fed into attacks on NEPA in recent years from the regulated industry and federal agencies who complain that NEPA is a bureaucratic, paper-pushing exercise that burdens agencies without environmental benefits.\footnote{147}

Even under these weakening judicial interpretations, NEPA has had powerful impacts on agency decision-making in two ways. First, an objective analysis of a project’s environmental impacts often has a salutary effect, compelling the decision makers to select environmentally-defensible courses of action. Second, the environmental impact statement creates a record that federal agencies cannot disregard under administrative law principles. While an agency may have discretion to decide what projects to pursue, it cannot act contrary to the evidence before it, which includes the evidence embodied in an environmental impact statement.

An EIA could have a similar impact under the Chinese law. First, under China’s Administrative Procedure Law, a court will uphold an administrative act if the evidence for it is conclusive, the application of law

\footnote{144} See, e.g., Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976) (“The only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’”\footnote{145}(quoting Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97–98 (1983)).

\footnote{145} Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976)). The dissent in Strycker’s Bay objected to converting judicial review into “the essentially mindless task of determining whether an agency ‘considered’ environmental factors” and ultimately allowing the agency to ignore them. Id. at 231 (Marshall, J., dissenting).

\footnote{146} See Yost, supra note 139, at 545–46 (discussing Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) and Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)).

and regulations is correct, and the legal procedure has been followed. Conversely, a court can cancel in whole or in part or direct the defendant to make a new administrative act if the court finds inadequate evidence, erroneous application of the law or regulations, violation of legal procedure, the act exceeded authority, or abuse of power. It appears that the EIA process will be combined with hearings on administrative approvals. The EIA, therefore, affords a public opportunity to provide evidence to be considered in the administrative action and that may provide a record on which administrative approvals must be based.

Second, China’s EIA law directs construction units to “implement countermeasures and steps for environmental protection raised in the environmental impact report.” This language in the EIA law suggests that measures identified in the EIA to mitigate environmental harm must be implemented. In other words, the plain language of China’s EIA law does not relegate EIAs to mere disclosure and “consideration” of environmental impacts, but envisions implementation of environmentally-protective measures as a result of the EIA.

CONCLUSION

Up until now, environmental litigation in China has primarily sought compensation for people who have been harmed by pollution. Such litigation can promote justice for the injured and hold polluters accountable for illegal and irresponsible conduct. It can also force polluters to internalize costs of polluting and can have a deterrent effect by exposing the wrongdoing and exacting a price for it.

In the United States, the expansion of citizen standing and the implementation of NEPA have provided more effective and direct mechanisms to prevent pollution and deter polluters from violating environmental standards. EIAs compel objective disclosure and consideration of the environment in critical decisions. They give the public information and a forum to advocate for integration of environmental impacts into decision-making early in the process, and before the harm is done. Citizen standing has enabled the public to enforce environmental

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**CHINA IN TRANSITION:**  
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1. The following speeches and panels were presented during a two day symposium at Vermont Law School on March 1–2, 2007, titled “China in Transition: Environmental Challenges in the Far East.” The Symposium was organized by the *Vermont Journal of Environmental Law* with support provided by U.S. A.I.D. and Vermont Law School. These speeches are also available in audio format at the *Vermont Journal of Environmental Law* website: www.vjel.org.
Thank you. Thank you every one. Hello. The first thing I want to say is I feel so lucky and so happy to be in the beautiful state of Vermont. And also I want to thank Dean Jeff Shields for inviting me here to attend this event. I want to thank Professor Tseming Yang. When he was in Beijing we had several nice discussions which lead to this visit in Vermont. I want to thank everybody here, because right now is time after work but you’re still willing to be here and attend this event. I’m very happy and excited that you all are here. And I feel especially lucky to meet Professor Jeremy Cohen who is the Chinese law specialist here. I wanted to meet with him several years ago but I didn’t make it. And also Professor Jeremy Cohen is a special professor at China University of Political Science and Law. I feel extremely fortunate to meet him here. I’m also very happy to meet Professor Li Zhiping from Sun Yat-sen University School of Law, and also Alex Wang from the Natural Resource Defense Council’s Beijing office. Actually I can speak a little bit English, but my familiarity with English is not comparable to my familiarity with environmental law in China. So I decided to go ahead with this presentation in Chinese.

The topic of my presentation today is Chinese environmental law enforcement, current deficiencies, and suggested reforms. I’m going to talk about five topics tonight. The first one is the current system of Chinese environmental laws, rules, and regulations. The second topic is about deficiencies in environmental law enforcement in China.
going to discuss why there is not sufficient environmental law in China. I’m also going to discuss the potential ways of reforming in order to address China’s environmental legal problems. I’m also going to give you several cases in order to tell you how the environmental law is enforced in China. Since the time is limited but the content is complicated, I’m not going to discuss every topic in detail. Since the time is limited we’re not going to discuss the work we do with the Center for Legal Assistance to Pollution Victims, I’ve saved that content for tomorrow’s presentation. So, please come on tomorrow. I hope tomorrow’s snowstorm will not make you guys stop and not come in to attend this event, so please come.

China started legislation on environmental law about three decades ago, that’s at the end of 1970s. On September 13, 1979, the Chinese government issued provision Environmental Protection Law, and that’s the first environmental law in China. So the development of China’s environmental legislation system is at least two decades behind the environmental legislation in Western countries. But since it started developing it developed very quickly, and in the past 20 years there has been a set of relatively comprehensive environmental law system, it’s actually the law branch which is developing the most quickly in China.

Starting from 1979 ‘til now, it’s about 25 years and China has now established a relatively comprehensive environmental law system. And there are a couple contents of this law system. The first one is the comprehensive environmental protection laws. This system includes the provision in the constitutional law related to environmental protection. This system also includes the Environmental Protection Law, which in 1979 was still a provisional law. And then in 1989 it was amended, and it is still in effect today. Regarding other legislation, many environmental professors don’t include it in the formal system, but I think they’re very, very important. So I include it in my system. The first one is the Urban Planning Law. The second one is the Regulation on Urban Planning and Construction. And the second major part in this environmental law system is the Pollution Prevention and Control Law. And nowadays the law on environmental pollution prevention and control is relatively comprehensive. It includes a law on marine protection, the law on the prevention and control of water pollution, the law on the prevention and control of air pollution, the law on the prevention and control of environmental pollution from solid waste, and the law on prevention and control of pollution from environmental noise, and also the law on the prevention and control of radiation pollution.
The third major part in this law system is related to controlling toxicants and pollution of dangerous materials, and that they are basically administrative regulations instead of formal laws. Under this part there are regulations on secure management of hazardous chemicals, regulations on management of nuclear materials, regulation on management of radioactive materials, regulation on the export of nuclear materials, regulations on emergency reaction to a nuclear accidents from nuclear power plant, regulation on supervision of chemicals, regulations on the secure management of civil nuclear facilities, regulations on the management of pesticide, and regulations on the labor protection for using toxic materials in work places.

And in the fourth part of the law system are laws regarding ecological preservation. And as you can see from the PowerPoint, there are several laws under this category. And the most important two are the law on protecting wild animals and regulations on the protection of wild plants. The regulation on the administration of genetically modified organisms in agriculture. And the last part in the law system is laws regarding natural resources protection, and includes forest law, grassland law, fishery law, the law on land administration, water or the law on mineral resources, the law on coal resources, the administration of sea area, and the law on energy efficiency and saving. And another part under the law system is regarding management of special areas. Many environmental law professors in China don’t include this part as the overall law system, but I think they’re very important so I include them here. They include regulation on environmental management of construction projects, the law on promotion of clean production, the law on environmental impact assessment, the law on renewable energy and finally the law on energy conservation.

And another part under the law system is regarding environmental responsibilities and procedures on how to seek remedies. And this part of the law includes regulation on management discharge fee, provisions on environmental crimes in the criminal court and provisions on civil liability in general rules of civil law, and the explanation on environmental crimes from the Supreme People’s Court and also the explanation on civil litigation from the Supreme People’s Court. And I want to make a special note here, in China the judicial explanation is also part of the legal system. It’s not only law and regulation but also judicial interpretation from the Supreme Court in China.

The next part in the law system is regarding international conventions and treaties on environmental protection approved by Chinese government. Our Chinese government has participated and
approved 48 international conventions, and these conventions became part of the environmental law system in China. And they can be directly applicable. In order to save time I won’t discuss each convention here.

So the next topic is about deficiencies in environmental law enforcement in China. In the past two decades the environmental law system in China has experienced significant development and nowadays has established a relatively comprehensive law system. However, there are many problems in the development of the law.

One of the major problems is that environmental law nowadays informs mainly under the administrative system, and the judicial system doesn’t have much role in enforcing environmental law in China. Though theoretically the legislature has some supervising power over the enforcement of the environmental law in China, in practicality such power has not been used. Although the law stipulates NGOs, non-governmental organizations and public also has a role to play in China’s environmental law enforcement. However since there is no sufficient procedures and process to allow this type of involvement. The public interest litigation is very limited in China, and also the public and NGOs involvement in environmental impact assessment is not enough.

There are several deficiencies in environmental law enforcement in China which needs to be resolved immediately. The first one is some objectives in the legislation remain unachieved. China enacted the Environmental Protection Law as a basic law in environmental protection. The first article of this law clearly stipulates the objective of environmental protection and improvement. However, it should not be overlooked that although there exists some progresses in the protection of the ecosystem and the environment, the environment is deteriorating as a whole, except for improvements in certain areas and aspects. Even the urban planning plan and the environmental protection plan made by the administrative agencies in China is inconsistent with the legal objective of that plan because their plan is not to make the environment better but only to mitigate a deterioration.

And another problem is enforcement of some environmental management mechanisms is still at a very superficial level. There are many detailed environmental management systems in China’s environmental laws, which covers all of the following aspects. The first is the precaution systems ahead of environmental pollution and damages. The operation systems of the environmental protection facilities during normal business process. The environmental recovery
system and also the responsibility undertaken system. And even the penalty, obligations of the environmental protection supervisors are stipulated. For the government employees who does not perform their obligations there also are criminal penalty obligations being stipulated. However, a lot of this environmental regulations are not fully implemented. For example, China’s Environment Impact Assessment law clearly stipulates that the assessment a system of the environmental impact of construction projects. According to the statistics of the State Environmental Protection Administration, which is SEPA. SEPA is equivalent to EPA in United States, construction projects that have been undertaken the environmental impact assessment exceeds over 90% ever since 1998, and in 2002 the percentage is even up to 98.3%. Actually all the environmental projects which carry out environmental impact assessments, it’s fewer than 50%. And even for those construction projects which have environmental impact assessments there are many cheatings been going on. For example the real distance between a gas station and residential area is within 20 meters, but in the EIA, environmental impact assessment report the distance turned out to be 400 meters. Consequently the construction project is approved, but causes severe pollution later.

And the third issue is some illegal actions cannot be investigated and punished in time. China’s environmental laws not only stipulates the protection requirements of all kinds of activities, but also stipulates the corresponding punishment. If all the environmental laws had been fully enforced it would surely safeguard the environment and deter future illegal actions. But in reality the fact is that many illegal actions cannot be investigated and punished in time. Those offenders are free from responsibility. This significantly undermined the authority of the law. For example, there’s a rule in China’s environmental law called three simultaneities rule, I will explain it later. It is one of the basic rules of China’s environmental law. It stipulates that the environmental protection facilities of construction projects must be designed, constructed and put into use with the main buildings at the same time. So that’s the reason why there’s three simultaneities. According to the law this rule applies to all the construction projects likely to cause environmental pollution and damages. This rule has been in effect since 1970s. However, even until now some construction projects with severe environmental influences still began to construct without any environmental supervision or approval. At the beginning of this year, SEPA made investigations and discovered over 80 projects which did not comply with this three simultaneities rule. The cost of these
construction projects was over 200 billion yuan.

And another problem is that many environmental disputes cannot be resolved reasonably and fairly, and many pollution victims cannot get appropriate compensation. Since the pollution is getting more and more serious, there are increasingly more environmental disputes. According to the statistics of SEPA, the complaints submitted to environmental authorities regarding environmental damages are more than 50,000 cases in 2002. And every year there’s at least 20% to 30% increase in environmental complaints. A lot of these disputes have not received reasonable settlements in time, and there are even some disputes remain unresolved for over 10 years. And this not only greatly affected people’s environmental rights, but also make polluters lack of motives and pressures to reduce pollution. As long as pollution costs no additional compensation responsibilities who would like to invest millions of dollars to reduce pollution? Therefore, many environmental disputes cannot be solved reasonably and the pollution victims cannot receive sufficient compensation. This too explains why China has not managed to deter pollution effectively.

And another problem is that some environmental criminals receive an administrative punishment instead of criminal penalties. Using criminal liability and penalties on environmental polluters is proved to be one of the most effective solutions to solving environmental disputes in the worldwide. China has also realized a necessity of using criminal law in environmental protection, and do have some articles regarding criminal penalties for environmental crimes. However, these stipulations have not been executed or enforced formally. In 1997, the Chinese government put criminal penalty in the criminal court, and since then to 2002 that’s five years. And during these five years there has been particularly serious environmental pollution cases of 387. According to the criminal law, each of these serious environmental pollution accidents is an environmental crime. However, in fact, only less than 20 cases have been prosecuted. That is to say the percentage of actual prosecution is less than 5%. And when I was giving lectures in China, people asked me how many environmental laws are actually enforced, Professor Wang answers no more than 10%. This provision within criminal law has not been fully enforced. Instead environment protection bureaus use an administrative fine to replace the criminal penalties.

And the final problem regarding China’s environmental law enforcement is that environmental protection administration’s lack of authority. According to current legal provisions, environmental
protection agencies in China are subject to the corresponding administration departments in each level of Chinese government. Most of this illegal environmental action is caused by pollution enterprises. Such enterprises usually compose the main aspect of local economic development because they have paid no environmental protection cost and they are the main revenue producers in the local economy. For example, in Pingnan County of Fujian province, the amount of taxation levied on a chemical plant with heavy pollution accounts for 25% of the county’s financial income. Thus, once the environmental protection department is going to punish the pollution enterprises, the local government tends to interfere. The head of the local environmental protection bureaus are appointed by the local government, so they are hesitant to enforce the environmental laws in pollution cases. So the polluting enterprises avoid their legal responsibilities.

Next I want to address why there are so many enforcement problems, what are their reasons. And there are complicated reasons for why there’s not sufficient enforcement of environmental law in China. It includes the political reasons, I mean the drawbacks within the political bureaucracy, and also the economic development. Some of the reasons are with the legislation and also the ability of the enforcement staff to actually carry out the enforcement activities. The first main reason is that some of the legislation has deviated from reality in taking no enforcement condition into account when they are drafted. Though China’s environmental laws have experienced significant development in the past 20 years, however many of these laws are not actually enforceable. The legislators didn’t make any investigation into the reality, and they don’t count how much cost would there be if such legislation came into effect. Take the Law on the Prevention and Control of Environmental Pollution by Solid Waste, for example, the pollution mechanism, the disposal technology and the government supervision on the disposal process, are lacking the basic researchers needed, even before the law was drafted. Also it has not been emphasized enough on the reality of inadequate construction funds. All this caused the unsatisfying enforcement of this law. The NPC, which is the National People’s Congress, standing committee report indicates that the disposal rights of municipal domestic sewage in 2003 is only 58.2%. It’s still very common that many counties and towns discharge waste without any treatment. All these problems obviously conflict with the legal provisions.

Many of the legislative agencies draft the laws just in order to finish their task. In order to accomplish the agenda stated by the
legislative plan, the legislation agencies tend to set a deadline for the adoption of a certain law. This result in the fact that relevant officials devote themselves to appealing to the counselors rather than to care about whether the law can really be observed. Another problem is in order to speed up the legislative process, so many people will just basically cut the useful part of the legislation in order to reach a consensus in order to pass the law. The legislation sometimes stipulating some laws an urgent need to catch international. Some legislative departments submitted legislation proposal in order to appeal to the international community. An example would be the Clean Production Law. Now China has a law regarding clean production, which would probably be the first in the world. The reason why there is such a law is because the legislators want to appeal to the international community. But actually in effect, this law has not been enforced there at all.

One problem related to the legislation is there’s been too much emphasis on substantial legislation, but there’s not enough attention to procedure laws. However, there are not detailed procedures or processes regarding how these laws are going to be enforced. So basically this equals to no enforcement at all.

Another problem regarding China’s legislation is that the implementing regulations cannot keep up with the laws and regulations in time. Sometimes when the NPC, the National People’s Congress, attempts to draft laws, since there are conflicting opinions among the subordinating agencies, the NPC cannot draft a law because there is no consensus. So the NPC delegates the authority to draft implementation regulations to the state council. The state council is the executive branch of the Chinese national government. And the state councils face a similar problem too, because there are always conflicting interests among its subordinated agencies. So finally the state council also does nothing. That is the reason why there are few implementing regulations to the environmental laws.

Another reason of lack of enforcement is that local governments pursue economic benefits while overlooking environmental protection. Currently in China, the central government actually is paying a lot of attention to environmental protection. However, when it reaches to the local level many of these laws are not enforced. The reason why the local government doesn’t pay enough attention to environmental protection is because the way the valuation of the local government officials is based on his achievement of GDP, instead of the quality of the environment in the local area. For example, in some areas the
pollution is really serious. However, the local GDP is really high. So the head of this local government still can get promoted from the head of the county to the head of the city or even to the head of the province. The drawbacks within the administrative hierarchy enforcement power of the local environmental protection bureau, because they are appointed by the local government.

Another problem is that the opinions of the public are neglected in the environmental administration and the environmental legislation. In China, the government has a lot of administrative power, a belief it can do anything it wants without any participation from the public. However, environmental protection requires public participation. For example, in a county there are a lot of people and a lot of enterprises, but there may be only ten people within the local environmental protection bureaus. So it’s not possible for them to enforce every environmental law in every enterprise. So there has to be public participation. Actually, in Chinese environmental law every city’s NGO has a responsibility to protect the environment. And they’re encouraged to report those pollution activities. However, in reality, when these NGOs or citizens report those environmental pollutions nobody would care.

Then how do we deal with these deficiencies in the environmental law enforcement in China? Now many scholars and officials in China have proposed the following ideas, in terms of reform. And the first reform idea is to establish specialized environmental supervision bureau with the SEPA in charge of law enforcement. Also learning from the American experience, SEPA established five original supervision centers for environmental law enforcement in order to avoid local government’s interference with the environmental law enforcement. Another idea is to transform environmental protection bureaus at the basic level into detached agency. Here basic level means the lowest level in the administrative hierarchy. And the idea basically is to let these local environmental protection bureaus be no longer affiliated with the local government. Instead they are under the supervision of the environmental protection bureau of higher level. So, there is a vertical supervision system instead of being controlled by the local government. Another idea is to reform the assessment message of local government achievement, replacing traditional GDP with green GDP. Another reform idea is to reform the judicial management mechanisms in China in order to free court from the influence of local government. And another idea is to establish the procedural message to enhance public participation.
Last spring, SEPA drafted a new rule called Message on Public to Participate in Environmental Impact Assessment. Last year Professor Wang’s organization, Center for Legal Assistance to Pollution Victims working with (NRDC) to help SEPA draft a new law on the message on public participation in environment impact assessments. And this year SEPA is going to draft a new rule on publishing environmental information. Of course, enforce these reforms will face a lot of difficulties. However, there will be some difficulties in terms of the reform of judicial system. As you may know, in China the judges are appointed by the local people’s congress. However, there has been strong influence from the Chinese Communist Party on the local congress. Also, there are some special problem with participation and environmental NGOs. As you may know the regime in Eastern European countries changed because there were a lot of NGOs in the country at that time. So, the Chinese Communist Party is a little bit afraid if there are too many environmental NGOs the regime may change also in China. The Chinese Communist Party learned a lot of experience and lessons from the change of regime in Eastern European countries and it doesn’t want such things happen also in China. So that’s a reason why NGOs develop very slowly in China.

However, the environmental laws in China are getting more and more detailed, and there are more implementing regulations. The laws are getting increasingly consistent with the goals of the general environmental policy that is to protect the environment. China has been experiencing significant development both politically and economically. So, I’m confident that the current problems with China’s environmental law enforcement will be conquered in the future as China’s economy continues to develop. Environmental protection has become a common task for people from every country. And in order to fulfill its responsibilities under the international environmental conventions the Chinese government will do everything it can to make its environmental law enforcement more and more consistent with the international practice. Therefore, I’m very confident in the development of China’s environmental law and enforcement in future.

Originally, Professor Wang planned to talk about three cases his organization has been dealing with, and it’s actually three important environmental cases. However the time is limited for today. So he will save the content for tomorrow. And again, please come. Thank you, everyone. I can answer questions. Is there anyone with questions that they want to ask Professor Wang? I can answer any questions.
AUDIENCE QUESTIONS

Audience
Professor, thank you for coming here, for being so candid about the issues and the challenges that face your country. We have many of those same problems here. We try to walk the walk, but we don’t always do it. I wonder can these issues—are they being discussed as candidly in China as you have been able to discuss them tonight? Is there a dialogue going on in China at this time?

Professor Wang Canfa (translated)
In an academic conference you definitely can. But in the meetings with Communist Party you probably won’t.

Professor Jerome Cohen
You’ve given us a wonderful report. The only question I have is about your optimistic conclusion. I agree China is making great progress. But I worry about the time. Is the progress going to be done in time to meet this horrendous challenge? A challenge that affects us as well as those in China. It seems to me we need more vigorous leadership from the 17 party congress that’s about to convene this fall, as well as the National People’s Congress that will convene next week. Time is the problem. Is there going to be enough time?

Professor Wang Canfa (translated)
Professor Cohen knows a lot about China. And Professor Wang thinks in the near future the environmental deterioration will continue in China. However, he thinks central government has been paying more and more attention to the environmental protection in China. For example, at the end of 2005 the state council issued a policy document focused on improving China’s environmental protection. Since then China’s environmental policy changed significantly from prioritizing economic development to prioritizing environmental protection. With such change in the overall policy, the enforcement of China’s environmental laws will hopefully make big improvements in the future. Also, in the coming National People’s Congress convention in March, that probably will not be special decisions on environmental protection. However, in the Chinese government’s 11th five year plan the content regarding environmental protection has increased dramatically than past years. However, the key problem right now is how to enforce the central government’s policy idea in the local level.
Audience

I was wondering if you could maybe comment to follow up on Professor Cohen’s question on the recent promotion of Xie Zhenhua. Xie Zhenhua, for those of the audience who don’t know was the director of the SEPA, of the State Environmental Protection Administration up until about a year and a half ago, just before the big in Songhua River. And he was supposed to resign, and a new person took over. And then just a month ago he was promoted to the deputy director of the National Reform Commission, which is one of the very powerful commissions in China. And so, part of the reason why he resigned, was forced to resign was for him to take responsibility for this environmental disaster and he is now being promoted. I’m wondering what your thoughts are about that.

Professor Wang Canfa (translated)

There are some political reasons behind resignation. Actually, the Songhua River oil spill caused some tension between China and Russia. So there has to be someone to stand up and take the responsibility. So the person who should be taking responsibility is probably the premier. But however you can’t ask the premier to step down. So instead Mr. Xie Zhenhua resigned. Another reason is there may be another person who should take the responsibility, and that’s the president of China’s biggest gas company. However, that guy made significant contribution to China’s economic development. So it may not be appropriate, again, to ask him to step down. So that’s a reason why Mr. Xie Zhenhua resigned. However, after his resignation he became the deputy director of China’s national development and reform commission. That’s actually not a promotion, it’s the same political rank. So he’s back to his job again without promotion. Another person who should take responsibility is the mayor of Harbin City. However the vice mayor of Harbin City committed suicide after this event. So if you ask the mayor of Harbin city to step down, again, there may be another person committing suicide. So, one thing after another became the scapegoat in this case.

Audience

I’m from Canada. And rest assured that you’re not alone. And your efforts are supported by others. And we are very aware of the problems in China, and there’s people really concerned and want to help, in a humble way.
Professor Wang Canfa (translated)
Thank you.

Audience
The efforts that you are doing shows that China is by yourself showing the problems to the world. And except that others also are interested by these problems. In fact as the professor mentioned before, time is of the essence. But I think that time is going to be favorable to us, because we wouldn’t be in this room tonight if we didn’t believe there was a solution.

Professor Wang Canfa (translated)
Nowadays there are more and more people in China paying attention to environmental protection. But the problem is still with the enterprises because they are really the entity polluting the environment. I think one of the proposals to deal with it is through legislation, and ask for public participation of every citizen in China. And particularly those pollution victims should bring action in court, exactly as Professor Wang’s organization, Center for Legal Assistance to Pollution Victims, did is to help the citizens in China with their environmental litigation. Also another key is environmental protection. Nowadays in China, the citizens’ awareness in terms of environmental protection is not as high as the citizens in the United States. Many people are just wasting resources. For example, use plastic bags instead of paper bags.

The last couple of days Professor Wang visited Oregon University School of Law for an activity there. And he went to the library and found there are lots of environmental magazines and journals in the library, for example, the Harvard Law Review. And there is even a special magazine for environmental lawyers. However, in China there’s not even one specialized environmental journal. So he thinks this is the area that we should pay attention to, and that is environmental education. Thank you, thank you everybody.
KEYNOTE: AN INTRODUCTION TO LAW IN CHINA

Professor Jerome Cohen

Friday, March 2, 2007

Many months ago, when Professor Tseming Yang broached the idea of this conference with me, I replied that I would surely be interested in participating if it could be held during ski season. Of course, when visitors come to Vermont in winter, they are sometimes disappointed by a lack of snow. But today nature has vindicated my hopes with a vengeance, and I am impressed that so many of you have managed to surmount the elements to get here.

I want to congratulate Vermont Law School on its accomplishments, especially on its good judgment in emphasizing the environment and in sponsoring the *Vermont Journal of Environmental Law*. I also want to congratulate Professor Wang Canfa for last night’s very comprehensive, interesting and frank appraisal of China’s progress in environmental law, its problems and its prospects. I learned a great deal. I’m not a specialist in this field. My major incentive for attending this conference is to learn more, not to go skiing.

When I started to study about China, it was still possible for a single scholar responsibly to tell people about the entire contemporary Chinese legal system. Soon after, following the outbreak of the Cultural Revolution in 1966, although the excitement was titillating, there was even less formal legal content to master. Nevertheless, to some social scientists interested in law, China at that time seemed more fascinating than other major countries precisely because in many respects the country continued to function despite the absence of a conventional Western-type legal system. To be sure, there were political and military interruptions and sometimes chaos. Yet, the society and economy endured. Not long after the end of that cataclysm, following Chairman Mao’s death in 1976, one of my first students published a book about this new Chinese phenomenon called “Law

Without Lawyers.” Of course, there wasn’t even much law in that era. One wondered how a nation could hold itself together without legislation and a structured court system, not to mention a legal profession. During that period even Communist legal observers from the Soviet Union and Eastern Europe professed to be puzzled, indeed shocked, at China’s lack of legal institutions. Then Deng Xiaoping completed his return to power in December 1978, and that ended the country’s brief experiment with radical legal innovation. Deng and his colleagues decided that, in order to achieve their ambitious modernization goals, China did need something that resembled a formal legal system.

The National People’s Congress is about to convene its annual session. It usually meets for about a week. But this time its legislative agenda is so crowded that the meeting has been extended to eleven days. It has several controversial draft laws on the agenda, and I am eager to see what will emerge. In the autumn an even more important meeting will take place. As Professor Wang made clear last night, the real power in China, of course, is the leadership of the Chinese Communist Party—the Politburo and especially its nine-member Standing Committee. This fall the 17th Party Congress that supposedly provides guidance to the Party leaders every five years will convene in Beijing, and it will be important to see what, if anything, it and the Party leaders decide to do about what is now China’s increasingly formal legal system. Should they proceed with further Western-style norms and forms? Should they stop where they are? Have they gone too far? Should they try to reverse things? Would it be possible to do so at this point? This is an immediate and practical problem, not just a theoretical question.

You have in your materials a short talk I gave in January at the annual meeting of the Association of American Law Schools. If you would like to pursue the subject, you may look at some recent articles I have published in the Far Eastern Economic Review.

Let’s start with a quick historical perspective—a little bit of instant China for busy people. The effort that Deng Xiaoping began in 1978 to import and adapt a Western legal system for purposes of China’s modernization was certainly not the first such effort that Chinese leaders have made. At the end of the nineteenth century, the rapidly declining Qing or Manchu dynasty began to show interest in Western

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law, especially Continental European rather than Anglo-American law. The would-be modernizers of that era had two purposes in mind. Their immediate purpose was more political than strictly legal—to rid the nation of foreign extraterritorial jurisdiction, the power that foreign consuls and courts were then exercising to adjudicate civil and criminal cases on Chinese soil. A spirit of nationalism was developing in China during that period, and the country’s leaders became aware of the fact that extraterritoriality was not a normal method of sovereign international intercourse. Indeed, it was a humiliating symbol of China’s second-class status in the world.

The second purpose of China’s early modernizers in looking to Western law was related to the first but of a longer run nature. They wanted China to become strong and follow the example of Japan, which, in forty years, had adapted the forms and norms of Western justice and thus managed to throw off the incubus of extraterritoriality. Japan seemed to have made the importation of Western law an instrument of self-strengthening and become so powerful that in the war of 1894-95 it defeated Mother China from which, a thousand years earlier, it had imbibed much of its culture. Public international law was the first Western legal subject to enter China’s educational system, and it started to be taught not in a law school, for there were none as yet, but in a newly-established military academy. Foreign law was seen as a weapon to be utilized in the nation’s defense, and we should bear this in mind.

The late imperial attempt to absorb European law continued after the Revolution of 1911 put an end to the last of the dynasties, and it expanded after Chiang Kaishek seized nationwide power in 1927-28. Over the next decade Chiang’s regime adopted codes of law that are, by and large, still in effect in Taiwan, to which he fled after losing to the Communist Revolution in 1949. This first Chinese effort to adapt Western law, from the end of the nineteenth century to the middle of the twentieth, deserves far greater attention than it has received. Unfortunately, for a variety of reasons, its practical impact was limited. It developed Chinese-language equivalents for Western legal terms and produced impressive codes of law, and it gave China experience using Western-type law in its contacts with foreigners. But China was such a huge, populous, traditional, and economically backward land that implementing major legal changes proved very difficult. Bringing change to the vast rural areas was, and still is, especially challenging. For example, by 1949, after decades of effort to establish modern courts, only one-quarter of China’s 1800-odd counties had done so.
Here I should say a word about the pre-modern Chinese legal tradition. Many people do not understand that China had a great legal tradition for some 2,000 years. The imperial legal system, embracing, and enforcing Confucian norms, at its higher reaches employed some officials who were learned in the law and conscientious in its application. The emperor himself, although in principle not subject to the law, was nevertheless restrained by its spirit on numerous occasions. By the time of the last dynasty the accretions of the centuries had made legislation very complicated. Although this gave the magistrate at the county seat, the lowest level of imperial government, considerable discretion in applying the law, he had to exercise that discretion carefully to avoid rejection of his decisions or recommendations by appellate authorities and even his own punishment. The traditional system was very different from any that prevailed in the West by the nineteenth century.

Yet some of the few Westerners who began to visit China as early as the sixteenth century had a fairly good opinion of the legal system of the then Ming dynasty. In comparison with the Inquisition that they had left behind, some travelers from the Iberian Peninsula formed a favorable opinion of Chinese trials that they witnessed. To be sure, the magistrate was authorized to employ torture and frequently did. But at least torture was regulated in detail by law. Moreover, the trial was held in public rather than in the dank, dark dungeons of the Inquisition.

By the mid-nineteenth century, however, Western views of the imperial legal system had begun to change radically. Not because the Chinese system had changed in any major way. It had not. What had changed was the West. In the seventeenth century England had gone through two great revolutions that advanced slowly developing concepts of constitutional law from which we benefit today. The eighteenth century witnessed the American Revolution and the written constitution and Bill of Rights that it spawned as well as the French Revolution with its emphasis on the rights of man. Thus, what had changed were the spectacles through which Westerners were viewing legal developments in other lands.

Some Westerners had political or economic motives for criticizing the traditional Chinese system. The term “human rights” was not yet in use. Yet, when the English wanted to conjure up excuses for invading China in 1839 in order to open up the country to business including the opium trade, one of their major complaints was the failure of the Chinese judicial system to give what we today call “due process” to those foreigners unfortunate enough to become embroiled in it.
We must not ignore history, not only because of its intrinsic value but also for practical reasons. My own experience in dealing with China in business law, human rights, and legal education suggests that the impact of the Chinese tradition is abiding in many, if not all, respects. Yesterday Professor Wang noted that contemporary Chinese law and practice emphasize substantive matters much more than procedural ones, and that this trait is increasingly thought to be a defect in the legal system. Well, this defect came from somewhere—from the legal experience of the imperial dynasties.

China’s second great effort to import and adapt foreign law began in 1949. Although we Americans don’t think of the Soviet system as a Western system, from the perspective of China it surely was. Of course, Marx himself was a Westerner, and Russia, despite its large Asian minority population, was perceived to be a white, Western regime. When Japan in 1905, ten years after its defeat of China, went on to humiliate Russia, one of the original imperialist powers, Chinese leaders began to see what a self-strengthened China might do some day. The Bolshevik Revolution dramatically altered Russia in 1917, but Lenin, who had studied law and practiced briefly, was wise enough not to throw out the pre-1917 legal system. In 1864 the Czar had imported elements of the Continental European system of Switzerland, France and Germany. Lenin retained that system, but put a socialist gloss on it, thereby providing continuity together with some ideological flourishes. By the time the Chinese Communists seized power in 1949, the Soviet system, although highly repressive, had achieved a degree of legal sophistication, and it was that system that Chairman Mao decided to import. Thus, from 1949 until 1957 China’s new leaders, rather than steal a page from Lenin’s book by retaining and adding some socialist flourishes to Chiang Kaishek’s version of a European legal system, instead totally abolished the pre-existing system and imported the Soviet model lock, stock and barrel. Soviet law professors came to teach in China. Soviet law books were translated into Chinese. Many who were to become China’s leading legal scholars, some still active even today, were sent to Leningrad, Moscow and other Soviet cities to study Russian language and Soviet law.

Yet this second Chinese effort to import Western law did not last very long. In 1957-58 Chinese leaders, in a notorious and harsh mass political campaign led by Chairman Mao and administered by Deng Xiaoping, imposed the Anti-Rightist Movement upon the country, and this was almost immediately followed by the Great Leap Forward. That potent combination put an end to the brief reign of Soviet law.
Ironically, at the same time in Moscow, after Khruschev denounced Stalinism at the January 1956 Soviet 20th Party Congress, the Soviet Union ended some of the worst excesses of its legal system as part of the process of “deStalinization”. But China went the other way, into a more radical and lawless phase, culminating in the Cultural Revolution, which demolished whatever shreds remained of the Soviet legal model. That was a time when Chairman Mao and his wife Jiang Qing boasted: “All is chaos under Heaven. The situation is excellent” and one editorial in the People’s Daily, the voice of the Chinese Communist Party, was titled: “In Praise of Lawlessness.”

The Cultural Revolution caused many arbitrary killings and suicides and a huge amount of cruelty and suffering. Over a hundred million people were profoundly affected. Deng Xiaoping’s son was pushed out of a window and crippled for life. Such a nightmare had to create a strong reaction. After the nightmare ended, Deng, who himself had suffered, decided that China had had enough of “class struggle” and that the country had to catch up with all the nations around it that had developed more rapidly than the Central Realm during the previous thirty years. Law was to become a principal instrument of China’s belated modernization push.

Law was invoked to serve a number of critical functions. First of all, every political system needs a legal system to communicate and enforce its policies and norms and to structure its government. Another role that Deng wanted the legal system to play was economic. Buyers need to know that sellers will come through with the promised goods or pay the consequences. The domestic economy, Deng recognized, needed a legal system to enhance its predictability and the stability of expectations. Moreover, the new leaders wanted to end China’s relative economic isolation and reach out to the world’s most developed countries in order to benefit from foreign trade, technology transfer and investment, and this too required a formal legal system.

Also, the country had just emerged from a horrible twenty-year period, and many people, including Communist officials, were demanding protection of “the basic rights of the person.” They were not yet using the term “human rights,” although the Communists prior to “Liberation” had used it to condemn Chiang Kaishek’s oppression.

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Until recently, after the Party gained control of the country, it regarded “human rights” as exclusively a Western political slogan designed to discredit governments with which the Western powers disagreed. Nevertheless, the post-Mao leaders recognized the need for a legal system that would be seen to protect people against arbitrary rule. In addition, China was seriously troubled by crime and needed a legal system that would be seen to effectively suppress what was deemed to be anti-social conduct. It also required more competent institutions for settling interpersonal disputes and complaints against the state, since no government can ignore the accumulation of a large number of unsettled grievances.

When we compare the situation in 1978 with that of today, of course we see tremendous progress. There is no doubt that China now has a formal legal system. If we look for the existence of adequate norms, just consider, for example, what Professor Wang showed us last night about the proliferation of environmental laws and regulations in recent decades. Similar legislative strides have been made in virtually every field. Moreover, these norms have been supplemented by those enshrined in an enormous number of recently concluded multilateral and bilateral international commitments. All of this is a huge achievement. I don’t know of another national elite in history that has done more to produce legislation, regulations, guidance and other norms in so short a time.

Of course, norms are not enough. A country has to have institutions, and in 1978 one was hard-pressed to find any significant legal institutions in China. Now China has gradually rebuilt its court system, brought back its prosecutors and rehabilitated and expanded its long absent legal profession. Today it has perhaps 200,000 judges, 160,000 prosecutors and 140,000 lawyers. There are roughly 625 law schools and law departments.

When I first visited China in 1972 even though the Cultural Revolution was still going, its most violent phase had passed—I was eager to get acquainted with my Chinese counterparts. I went out to Peking University but couldn’t find any law professors. They were all either at home or down on the farm having their thoughts remolded. The next year, although legal education had not yet resumed, I went back and managed to find a few law teachers. They were different from their American counterparts in two respects. First, they looked a lot healthier since they had acquired good suntans working in the fields while most of us had been laboring in the library. Second, they were very silent. American law teachers like to talk. I’m Exhibit A. But my
new Chinese acquaintances had little to talk about except some bad experiences they weren’t allowed to relate, and in any event they were too intimidated by the political campaigns of previous years to say anything at all.

That was legal education in the early 1970s. Today it is booming. As early as 1981 I asked a Peking University student why she was studying law. “Oh,” she said, “law’s the ‘hot ticket.’” And it has been ever since. Legal scholarship has also begun to flourish. When I lived in Beijing from 1979-81 its bookstores had no special section for legal materials. Now publication of law books and law reviews is big business, and quality is improving daily. The legal system is not yet nearly transparent enough, but, under the stimulus of China’s WTO obligations, it is making progress on this front as well.

Perhaps the most important thing to note about the new situation, and that was evident last night because Professor Wang is a principal symbol, is that there is now a new elite of overlapping legal specialists who did not exist in 1978 and who are increasingly influential: judges, prosecutors, lawyers, legislative and administrative officials, corporate counsel and law professors and scholars. Every government agency now has legal experts. It’s not like 1979 when a man came to me who was in the First Ministry of Machine Building’s Law and Contracts Division. He said he wanted to study law abroad. When I asked why, he replied: “Look, every day my colleagues and I have to negotiate with the giants of the world’s automotive industry and their lawyers. (They were negotiating with Volkswagen at the time). We in the Law and Contracts Division have only one problem. We don’t know anything about law or contracts!” That is not the situation today. These elites, especially the law professors—and Professor Wang embodies that—are influential people. They are not only scholars who teach and publish but they also lobby for and participate in law reform, often handle concrete cases and sometimes serve in government, the courts or the legislature.

China’s legal progress has been especially prominent in certain fields, for example, in the area of foreign investment and business and financial law. Yet the courts have thus far not begun to play an important role in some of these fields including public regulation of business. I was struck by what Professor Wang said last night, that, in environmental law, enforcement in the courts is not yet a major factor. It may be that public interest litigation of this type will become increasingly significant in China. I am glad to note that two of our able N.Y.U. graduates, Alex Wang, who is at this conference, and his wife
Ms. Hyeung-Ju Roh, are working with Chinese colleagues including Professor Wang in the hope of expanding the role of the courts in this respect. But at the moment, the role of administrators overshadows that of the courts as it has always done in China. That is still also the case with regard to foreign investment, trade and technology transfer, although both arbitration and litigation are becoming increasingly significant despite the persistence of serious doubts about their fairness.

There have been three big pushes behind the rapid development of the financial/economic legal system. The first was the desire in 1979 immediately to attract foreign investment. At that time outsiders did not appreciate how much China intended to rely upon cooperation with foreign capitalist enterprises for its capital needs rather than the World Bank, the International Monetary Fund, the Asian Development Bank and foreign governments. The second big push came in 1992 when Deng Xiaoping fostered the development of capital markets, and stock exchanges were established in Shanghai and Shenzhen. The third big push began in the late 1990s as China prepared to enter the WTO. These economic policies have had transforming effects upon the Chinese legal system.

Of course, there are some weak links in the Chinese legal system. Criminal justice is the weakest of them, and that’s why I take part in efforts to improve that aspect. The era of making gross generalizations about China’s legal progress is coming to a close, as each aspect and area require careful scrutiny and analysis. This is why I value the opportunity to take part in conferences such as this. Of course, whether we study topics such as regulation of the environment, protection of intellectual property rights, control of the securities markets or enforcement of judgments and arbitration awards, we see one common problem—the weakness of the Chinese central government.

Most Americans have grown up on the assumption that China is run by a totalitarian dictatorship led by the Politburo Standing Committee, whose rule supposedly reaches every village. But that is a skewed view of the actual situation. Once I started working in China I learned that in many, not all, respects the country is more like a series of feudal baronies. The reach of the central Party and government authorities is limited, except for those matters that are accorded the highest priority, such as suppression of what used to be called “counterrevolution,” espionage, political democracy and the Falungong. Highest priorities evoke extraordinary efforts on a nationwide basis, but no government can give everything its highest priority. Every government agency has to make choices about how to allocate scarce
resources, even at the local level. I remember when I was interviewing a former public security officer from Fuzhou while in Hong Kong in 1964, in the days before China enacted a criminal code, I was trying to find out what conduct was deemed “criminal” and what conduct, although disapproved, was not to be punished as a “crime.” When I asked about adultery, the ex-policeman replied: “If we tried to punish all the adulterers, we wouldn’t have time to pursue the counterrevolutionaries!”

So every system has to have priorities, and in most cases, even in China, the central government’s writ does not run very far. It doesn’t have the financial resources because of an inadequate tax system. Moreover, local power-holders are extremely important. We heard last night that one of the problems of environmental regulation in China—and of all regulation—is “local protectionism.”

Another major problem, of course, is corruption, which has increased greatly in China. It affects the judiciary as well as other government institutions, and is one of many distorting influences upon the judiciary’s operation. Another is politics. Party control of the courts is still universal, although manifested to different degrees in different places and times and with regard to different legal issues. A political-legal Party committee that corresponds to every level of government and court gives guidance to the courts at its level, often in actual cases. Moreover, wholly apart from outside Party instructions, in important cases the judges who hear the case generally do not get to decide it. Rather the court’s “adjudication committee” composed of the highest court administrators usually decides the case and is often influenced by factors other than the legal merits.

The biggest problem in achieving fair adjudication in China, and it affects commercial arbitration as well as court decisions, is “guanxi,” that network of family, friendships and other contacts and reciprocities by which Chinese live and that seems to undermine all hope of evenhanded enforcement of the law. How to control and restrict its application? How to apply legal ethics? Of course, as I said to Professor Wang at breakfast, we have “guanxi” in America—classmates, relatives, friends, etc—but we generally know its limits with respect to our legal system. To be sure, further empirical research may teach us that those limits are wider than we realize in America, but, in comparison with China, our situation seems under better control. I hope I’m not being naive. In any event, “guanxi” seems to have a special impact in China.

I’ll give you just one example. Not long ago, I asked a fortyish
Chinese businessman whether he used lawyers in his work. “No,” he said, “I don’t need lawyers. I use standard trade contracts for both my local and international business.” I said: “But don’t you have disputes?” “Oh, of course I have disputes,” he replied. I said: “Then don’t you need a lawyer to help you in disputes?” He responded: “Why should I hire a lawyer? My wife is a judge.” Through her he could go to whatever local court he had to in order to get the case taken care of. This attitude permeates Chinese society and demoralizes many of its younger lawyers. One experienced Beijing litigator told me: “I wish I were just doing corporate work. I don’t like going into court. It’s like a crapshoot. You don’t know whether the judge has been reached. It’s too unpredictable and arbitrary.”

In my own sad experience, and I’ve written about this in the Far Eastern Economic Review,\(^8\) even China’s leading international arbitration organization suffers from similar distorting influences. It is a challenge for any legal institution to escape the influence of the environment within which it has to operate. Some Chinese institutions, such as the Beijing Arbitration Commission, are striving especially hard to overcome these problems and appear to be making progress, but only time and research will tell. In the interim, all of us who deal with the Chinese legal system have to recognize its limitations and use it the way Chinese criminal defense lawyers deal with the criminal process, where they are required to fight with one arm tied behind their back.

The struggle to establish a genuine rule of law in China, in the sense of government under law and a functioning and impartial system for arbitrating and litigating important disputes, will be under way for a very long time. As already mentioned, we need to know much more about the actual conduct of the Chinese legal system, and Chinese scholars and law reformers recognize that they do too. Empirical legal research is just beginning to take off in China, and foreigners occasionally also manage to make a contribution. The other day I read a very good book by a Dutch scholar from Leiden named Benjamin Van Rooij.\(^9\) Some of you know him. I’m sure he has worked with Professor Wang. He has done an empirical study of efforts to enforce


environmental protection in some villages near Kunming. It demonstrates the desirability and importance of such research as well as the difficulties that confront this research. I assure you that in my field, criminal justice, empirical research confronts even greater difficulties because of the sensitivity with which the Chinese government regards even inquiry into minor, mundane criminal cases.

Yet the effort has to be made. Many Chinese scholars, lawyers and officials are reaching out for cooperation, and we should positively respond to their requests, but with open eyes. What can we do? I am delighted at what Vermont Law School is doing in collaboration with Sun Yatsen University Law School and Professor Li. Projects such as yours put flesh on the bare bones of often tired slogans exhorting us to enhance “mutual understanding.” They not only help each side to learn about the other but also improve our professional techniques as well as our substantive knowledge. In addition, they provide moral support for Chinese scholars who sometimes risk their professional position or even their personal security in controversial areas such as the environment. We need more projects like this, and we need more American professors to go to China as Professor Yang did on a recent Fulbright grant. We also need more Chinese to come here to teach, do research and study.

At New York University Law School, I am pleased to note, we have just established a U.S.-Asia Law Institute that will focus on Greater China. One of our first projects has been to join Shanghai Jiaotong University Law School in setting up a Center for Chinese and American Law in Shanghai. At NYU we also welcome each year about 35 students from China, mostly LL.M. candidates but a few J.D. and J.S.D. candidates as well, in addition to about 15 students a year from Taiwan. We also have distinguished visiting scholars from China and have begun to invite Chinese experts to join us as visiting professors. Other law schools are making similar efforts. For example, on a recent visit to the University of Indiana Law School in Indianapolis I was surprised to find some 30 students from China. This is terrific progress. There’s nothing sadder than to receive an email such as I got this morning from an able Chinese law student who bemoans the fact that she can’t find the money to come here for advanced study. I get these messages every week. So there’s a lot more to be done.

Whether we focus on the environment, criminal justice or other topics, we have to conclude that China is making legal progress, but not rapidly enough to meet its formidable challenges. I am confident, however, that if the Chinese and we in America and other countries
significantly increase our cooperation, as the Chinese popular song goes, “Tomorrow will be even better.”

AUDIENCE QUESTIONS

Audience
I wondered if you could comment on one observation or issue. Law in China, as you explained, has a long history. It appears that most of the recent attention and efforts at reform, however, have focused mostly on business law—contract, intellectual property, international trade, for example. Public law fields, like the environment, food safety, drug safety, seem to have been neglected. The steady stream of stories out of the Chinese media about huge failures with respect to pollution, food scares, and contaminated or counterfeit drugs seem to confirm that. For example, a few years ago, there was a scandal involving substandard baby milk powder that did not meet nutritional standards. Hundreds of infants were hospitalized for malnutrition and several babies died. Can you comment on this issue?

Professor Cohen
Well, law reform in China often comes in spurts as a result of tragedy, as you point out. People die because food has been polluted or you have false labeling. They get serious about punishing intellectual property violations if it turns out that the trademarks were false and somebody was really harmed; and that’s perfectly understandable. The trouble is, there are so many conflicting interests now in China. Although China does not have a conventional western style democratic system, it does have, as you know well, and as we heard last night, many conflicting interests. The Chinese have lobbying of a very intense nature. Chinese government owned enterprises are very influential. They often are the biggest obstacles to public law reform.

Yet, there is a kind of public opinion in China, however restrained. The Internet is playing an increasing role. The newspapers, having now to make a living rather than get supported by the government, are trying to appeal to popular interests. So these kinds of unhappy incidents do play up and develop more of a role for law reform. I wouldn’t exaggerate how much is being done in the private field; that’s also been very slow. The National People’s Congress is now considering, as you know and it may enact finally, a real property law. And a labor contract law—wildly controversial—may finally come out. These
things take, sometimes, decades. Of course in our own legislative congressional system we have similar problems.

One problem in comparative law, especially looking at China, is you have to compare apples to apples. We like, instinctively, to compare our theory with their practice, and that leads to some distortions. You have to look at: how does our criminal justice system really work? And we see many unpleasant aspects there. Sometimes Chinese see them to a greater extent than we do. That’s the advantage of having foreigners looking at your own legal system. So there is this public law problem. China is increasingly under pressure. Look at the AIDS problem, for example. On the one hand, they must exterminate the problem; on the other hand, they don’t want to wash their dirty linen in public. That wonderful woman, Dr. Gao, at first wasn’t allowed to come to this country; she’s in New York now, however. Which shows you there is repression, but there is also more and more collaboration in China, among intellectuals, lawyers, and scholars who are speaking out. Sometimes this has an impact. There is progress being made in all these fields, but it’s fitful, it’s uneven, and it requires a terrific amount of energy. You have to admire this relatively small group. You know, a few thousand people can write a lot of law, but it takes hundreds of thousands to administer the legal system. It just has to be stimulated further. The leadership is perfectly ambivalent. They’re stuck. I think, if today they had to decide whether or not to import a western legal system, maybe they wouldn’t do it; but they are stuck with it. They inherited this from Deng Xiaoping. Now, the legal system has its own momentum. They have halfway imported an adversary system. Can the Communist Party live with an adversary system? Taiwan is just taking that on now.

One point I should have mentioned is that we have to look at Taiwan; we have to look at South Korea, places that are similar, very similar culturally to China, and have similar circumstances and challenges. They are small places in comparison with China. Taiwan has 23 million people. Less than the size of greater Shanghai. South Korea has 45 million or so, half of Shandong Province’s population. But nevertheless, these are very significant examples of Confucian cultures that have made a genuine transition to something that has to be recognized as a variant of the rule of law, just as Japan has done.

Something will happen in China. But I like the Chinese phrase “everything takes time.” That is, a process. Rome wasn’t built in a day. But we can’t just sit back and say, “history will take care of the problem,” because there’re real live people involved. I have friends in
jail in China. I can’t sit back and say, “well tomorrow will be better and just let education take its course,” and international contact and all that. I think we all have to try to help, but be realistic about it. The nice thing is, this is not an American missionary impulse that’s stimulating this. We are responding to impulses now within in China. One of the big questions will be whether China is going to finally ratify the U.N. Convention on Civil and Political Rights. If they do that, it will have an impact on Chinese justice, just as profound as the entry into the WTO has had on Chinese economic and administrative law.

Professor Wang Canfa (translated)
I think Professor Cohen gave a very wonderful presentation on China’s legal system. Professor Cohen knows Chinese law very well. Professor Cohen’s comment on Chinese law’s historical development and current situation is very objective and Professor Cohen knows a lot of the litigation problems in China and particularly guanxi China’s litigation. But, what I want to tell you [that] it is not every lawyer [who] takes a lawsuit guanxi. There are some lawyers who like to use law as the tool to proceed with the case. For example, I mean sometimes I help the pollution victims with the litigation, even though I know that I may lose the case; but I won’t use my guanxi case. I have many classmates and students who work in the court. Also, one of my classmates is currently vice president of the Supreme Court in China. When I litigated for pollution victims, I lost some good cases. But I won’t ask for help from my classmates and students who work in the courts because I don’t think going for guanxi is consistent with my personal values. Even if I win the case through guanxi. I don’t and that’s consistent with the rule of law concept in China. There are some lawyers in China, particularly lawyers, who don’t pay attention to guanxi. They pay more attention to the influence of the specific case. But if you want to win a case in China you’ve got to try to use your guanxi on that.

Professor Cohen
Good. Of course, I tried to make that clear that you have uneven development and you have different practices. I’ll give you an example. In the intellectual property field, the three basic rubrics are patent, trademark, and copyright. The patent area seems to be run quite legally—playing it straight administratively and especially on judicial review of patent decisions. But copyright and trademark are more, or less regulated, more subject to all these distorting influences, and you
have to know each field. Secondly, as a practicing lawyer, whether you’re a foreigner as I was in China or Chinese, you have ethical dilemmas to confront. One of them is that you know the other side is using *guanxi*. What should you do? Should you say, “Well in America we don’t do this, and the best people in China don’t do this, therefore I’ll let my client lose” or do you say, “I’m gonna do this”? Well, you’re not gonna do this, I’m sure, if the other side is engaging in corruption. *Guanxi* may be one thing, but corruption may be another. You’re faced with all these ethical questions because you have a duty to the client and you have to be honest with the client. This is a problem that one has in daily life. These are not abstract philosophical, purely academic questions. These are problems of interaction in the legal system.

Well, I’ve used up too much time. I apologize to my revolutionary successors. And I look forward to learning from them and I thank you for your interest.
Panel: Energy: China’s Current Status and Future Outlook

Panelists: Robert Jones and Fredrick Weston

Friday, March 2, 2007

Robert Jones

Well, thank you for that very kind and lovely introduction. Actually I really didn’t expect to be here today addressing you. In fact I thought that I would just come along for the ride with my wife, Margret Kim, who’s sitting in the front row, as Margret will be speaking to you later on this afternoon. Margret and I co-founded the Ecolinx Foundation about four and a half years ago with the express purpose of assisting China’s transition to a more sustainable environment and energy future. And over the last four years or so, we’ve been very active in China. We go there about every two or three months, on average. And we’ve been focusing on the area of public participation, building capacity in public participation in the environment, and environmental governance. And of course Margret will be telling you a lot about that a bit later this afternoon. I am not a lawyer nor am I an engineer, but as mentioned earlier, I’m an Entrepreneur or an ecopreneur, as I’ve dubbed myself. And I have two (2) great passions in life, apart from my wife. And they are the environment and China. And my roots in China go way back to the sixteen hundreds when my ancestors first went to it’s southern shores. I was born and brought up in Hong Kong. And I learned how to speak Cantonese before I could even speak English, which I still seem to have some trouble with today.

When you think about China, what images come to mind? The mist shrouded peaks of Wuling? The Forbidden City? Oceans of

10. Robert Jones is the President and Co-Founder of the Ecolinx Foundation.
11. Fredrick (Rick) Weston is a Director of The Regulatory Assistance Project.
cyclists perhaps? Or even the Great Wall itself? And incidentally it’s never been determined whether the Great Wall was built to keep marauding barbarian hordes out or the Chinese people in. But anyway, that’s another story for another time perhaps. But when I think about China, I think about the single most ravaged environment in the world. The air in her major cities is so thick with coal dust, vehicle exhaust fumes, and a cocktail of other pollutants that the inhabitants live in an almost perpetual murky twilight. By some estimates China has 16 out of twenty 20 of the worlds most air-polluted cities; at least according to the World Bank. And nine out of ten of the world’s most polluted rivers. And during this century China is expected to become the world’s next super power.

But in actual fact China is already an environmental and energy super power with the capacity to wreak havoc on ecosystems the world over. With 1.3 billion people, a rapidly expanding economy, and one that’s seemingly on steroids, and the desire to emulate higher consumption patterns in the west. China’s declaration to quadruple her GDP by 2020, this highly combustible mix poses an enormous threat to the global environment. China is now the second largest consumer of energy in the world after the United States, of course. And is responsible for about 14% of the world’s greenhouse gas emissions.

Second, again, only to the United States. And there are some reports that China will probably overtake the US in GHG emissions by as quickly as 2010. Also if China were to attain the same level of affluence that we have here in the United States, we will need the equivalent resources of three worlds. And unfortunately this world is the only one we’ve got at the moment. Therefore any attempt by the international community to reduce greenhouse gas emissions is bound to fail without China’s active cooperation. And this also bears some thinking about. Through our extravagant consumption patterns we Americans consume, or some might say devour, about 50 times more goods and services than an average person in China. At the present time only a small minority in that country can afford an even pale imitation of the American excess. But as that minority grows, so too does the threat to the global environment. In fact, over the last twenty five years or so since the late Premier Dung Shao Ping first began his market reforms, incomes in China have tripled and quadrupled, allowing literally tens of millions of people to claw their way out of absolute poverty to join the ranks of the only conventionally impoverished and also the rapidly expanding ranks of the Chinese middle class. Now that may not seem like a lot to you, but in actual
fact that’s a very significant improvement.

And for the first time in Chinese history most people in that country can now afford to keep warm in the winter, but unfortunately with the use of high polluting high sulfur coal and biomass. And it’s this coal which makes up about 70% of China’s energy mix. And China’s rapid industrialization that are the reason why China today has the dubious distinction of being the second largest emitter of greenhouse gases in the world after the United States. More than 70% of all new coal fired power plants are expected to be located in China in the foreseeable future. Currently, coal makes up nearly 70% of the energy mix as previous stated, oil a little under 20%, about 2% for nuclear, 3% for natural gas, 5–6% for hydro, and a tiny, miniscule 1%, if that, for renewables.

But coal isn’t the only culprit in China. Of growing concern are the rapidly increasing numbers of automobiles on China’s roads. As of the end of last year China had about 25 million cars on its roads. And by some of the more dire predictions, China will have maybe as many as 150 million cars by 2015, which is about 18 million more than we had in this country in 1999. And this will be due in no small part in the Chinese government using the auto industry as an engine of economic growth. No pun intended.

With the wholesale use of tens of millions of refrigerators and air conditions and the like, China is the largest emitter of CFCs, Chlorofluorocarbons (CFCs), which are responsible for the gaping hole that we now have in the ozone layer above the Antarctic. I’m not saying that China is solely responsible for this, because she isn’t, we all are in one way or another.

So China finds herself in a classic catch-22. Can an increasingly stressed Communist party afford to threaten a new found economic gains of literally tens of millions of Chinese with environmental reform, especially at a time when so many find themselves having to join the ranks of the unemployed as China shifts to a market economy? And particularly as China steps up reform of the state owned enterprises. Also, there is this veritable flood of humanity and impoverished farmers to the urban centers of China from the countryside. So we see China paying lip service to the concept of environmental reform but with very little in the way of concrete measures to show for it. And a case in point was China’s response to, or some might say lack of response to, the massive flooding which occurred in 1998 in the Yangtze basin when literally millions of people were displaced, and this was due largely to environmental factors like deforestation and
overgrazing. And unfortunately much of the world was seemingly oblivious to this environmental catastrophe, particularly in the United States, as we were so apparently mesmerized by such earth-shattering subjects as stains on various items of Monica Lewinsky’s wardrobe, remember her, and the dalliances of former President Clinton.

So what to do? I believe it’s time for us to welcome China with open arms, especially as China becomes increasingly more important on the global stage. At the same time we need to try to ratchet down the level of criticism of China and the China bashing, which reaches fever pitch at times, and give that country the benefit of our environmental and energy technology and expertise. And, help China find that very delicate balance between growing her economy and preserving her environment. Because by preserving her environment, China also helps us preserve ours.

So what does the future hold? What can we expect to see in China over the next, say, decade? Well the sad fact of life is that China will continue to rely heavily on her vast reserves of coal, at least into the foreseeable future. But a number of things have happened recently and in the recent past and are continuing to happen in China that give us some hope for optimism. There is the 20% reduction target by 2010, which was announced by the eleventh five-year plan. There is the renewable energy law, which passed in 2005, which became effective in January 2006 along with its implementing regulations. And there, of course, is the comprehensive energy law, which is being formulated as we speak. And we should be hearing a lot more about that over the next several months to a year. Then there are the fuel economy standards in China which are actually more stringent than the ones that we have here than our CAFE standards. And of course there is the clean development mechanism, the CDM, of the Kyoto protocol, which China ratified in 2002. And this has resulted in nearly 60% of all of the CDM projects being located in China. And this should have a very positive effect on China’s sustainable development plans.

So to recap, China faces some enormous challenges. But thankfully the powers that be in Beijing are beginning to come to the realization that business cannot continue as usual. Of course, how they address these problems is going to be interesting to observe, especially in the absence of legal and political reform. We won’t know, of course, for several years down the road what will happen, but we cannot afford to be complacent. We cannot simply wait and see. All the more reason why it’s so very important for far-sighted, progressive institutions like
the Vermont Law School to be engaged in China and help China realize a more sustainable future. ‘Cause China will have and indeed already has such a profound effect on all of us, on the entire world. Thank you very much for your kind attention.

FREDRICK WESTON

My father would have been impressed by that resume. My mother would have believed that. While we’re getting this set, since Mark Levine couldn’t make it I’m back-filling a little bit. Robert did a terrific job of setting the stage. I’m going to sort of fill in with a number of revealing statistics that will frighten you, if Robert’s alone did not. And then I’ll talk a little bit after that about some of the work that my organization is doing. We’re funded by a group called the Energy Foundation out of San Francisco. Alex Wang is also partly funded by the Energy Foundation and I’m going to talk about some of the work that the Energy Foundation’s grantees are doing. But I’ll focus in the end largely on the electric industry.

As David said, I was at the Public Board for a while. I’m not a lawyer. I played one for those 11 years, but I’m not a lawyer. I do have to start with one thing that sort of caught my attention. It’s funny. One of the programs for this event misnamed the Regulatory Assistance Project and called it the Vermont Regulatory System. Now if any of the current regulators in Vermont had seen that they would have reacted. We are already often considered officious intermeddlers in Vermont regulatory affairs. I heartily deny it, but I did get a kick out of it.

OK. I’m just going to sort of go through this Gattling-gun style, some fun facts to know and tell about China. Robert gave you the statistics. China is 70% coal in its energy mix. Hydro, oil, nuke, and natural gas fill out the rest. China’s just recently opened a gas line from the west to the east and it’s going to begin importing LNG. And it plans to add 24 to 32 nuclear plants by 2020. Four times the current capacity.13 That’s a good day in China. I’m partly exaggerating. I just returned from a month in Beijing. I spend about two months a year there. And every morning one wakes up and checks the air. It does affect what you might be doing that day. Here, as you can see, is a

projection of carbon dioxide emissions in China from coal use over the next 20 years, going from about 2,000 million metric tons to over 500 thousand in the next 15, 20 years. So we’re talking about more than doubling, perhaps even tripling. Oil use is going up. By 2020 China will import 80% of its oil. Ten years ago it was a net exporter of oil and it now imports 45%. And of course with the growing use of cars this has changed.

On the left is a graph showing the changes in gross domestic product since 1978. Rapid growth during the ‘90s as you can see. And that slope looks to be maintaining itself. In fact in 2006 China’s GDP growth was the largest it had been in 15, at least 10 years. It’s huge. Roughly rising at 10% per year. Electricity use is rising at 15% per year. So energy intensity, in fact, is going down. It’s going the wrong way. And that graph on the right, can I go the other way. I can. OK.

As you see energy intensity. The upper line is the increase in energy use. The middle line is gross domestic product. So energy intensity, the amount of energy being used per unit of GDP is going up, which is the wrong direction.

And I’ll show you the graph about how China had done earlier and you’ll see how that’s changed. This slide speaks for itself. The World Bank estimates that China’s annual pollution costs amount to around 8% of GDP per year. As Robert had said, 16 of the world’s 20 most polluted cities are in China. Respiratory and heart diseases from polluted air kill a half a million people per year. And cause over 75 million asthma attacks.

This is an interesting one. Forty percent of US mercury pollution originates overseas. That means that 60% comes from within the United States and I don’t want, I don’t want that fact not to be appreciated. And China admits 25% of the world’s global mercury. And these are maps of how that moves.

And this is the, this is the graph of the numbers that we’ve been talking about. US carbon dioxide emissions in million metric tons a year, if I’ve read that correctly, about 6,000. China is second and the prediction, as you said [referring to Robert Jones], 2010 will be when China catches up. I just heard two days ago it’s going to be 2009, but it’s frightening nevertheless. Here on this graph the numbers are different because it’s carbon, not carbon dioxide. So, when you think of carbon you multiply by about 3.6 to get the equivalent tons of carbon dioxide. But you can see how quickly China’s carbon dioxide emissions are rising. And as we see it looks like this graph is already out of date. This also speaks for itself. Changes, expected changes in
world gross domestic product over the next 15 years. China and the U.S., of course, are the world’s two great carbon dioxide emitters and we are the two that aren’t part of the Kyoto protocol. China has signed it but not yet ratified it.

Just some additional statistics. Seventy-five percent of the greenhouse gas emissions in the world originate in the industrialized countries and 80% of the cumulative emissions originate in industrialized countries. So let’s not have any misapprehension about who’s the bad actor here. The bad actors. But as Robert has said, if the average Chinese consumed as much energy as the average American, China alone would be emitting the entire world’s current CO$_2$ emissions plus 22%.

Population. We know these numbers. Let’s take a look at GDP per capita. And you see, of course, the great reverse. And so, as GDP increases in China, so will emissions output. The U.S. has 4% of the world’s population, we consume 25% of the world’s oil. China, with 20% of the world’s population consumes 8% of the oil but twice as much coal. That was on an earlier slide. China uses twice as much coal. China’s GDP is one eighth, as you can see, of ours. In per capita terms, China’s economy is ranked 100 in the world. Energy consumption per capita, again, these are statistics that I’m sure you all have a sense of.

OK. So I’m just going to flip through them. If you want copies of the slides you can get them from me, or I think from Amanda or and there are notes. In fact the notes associated with them fill out some of these statistics.

I put this up here just to give you an idea of how quickly, in 13 years Chinese industrialization, particularly in the output of minerals, has increased. Industry is 63% of GDP and the raw materials sector is growing much faster than expected. It’s extraordinary. And here’s a statistic that I find . . . I thought it was wrong. And I’ve seen it twice now and I just couldn’t believe it. China has built roughly 80 thousand high-rise buildings per year for the last 15 to 20 years. Now I do know, I’ve heard this one as well. Eighty percent of the world’s construction cranes are in China. There is nowhere you can look in any city and not see many, many construction cranes.

You’ve seen this. I’ve already shown you this one. Here’s a projection of future world oil use and the key thing here is that China and India are expected to consume more oil by the year 2025 than all other regions of the world. Robert talked about vehicle growth. Here’s where China is as of, I’m not sure what year this was. This may be
2004 I think. But as you said, by 2015—other numbers I’ve seen say later, but in any case soon enough—the Chinese vehicle population’s expected to exceed that of the US. Crude oil imports, once again, these are the areas from which they come. If you’ve been reading the news you know that China is investing heavily in Africa for energy and mineral purposes. This is just another graph showing how oil use is going up in China. It’s the, I guess, the lavender line is the one that would be business as usual in China if there’s no change in how China uses oil.

Electricity growth. This is the one that I have more involvement with or more knowledge of. You can see that as of about, as of 2000, installed capacity was 300 gigawatts. What does that mean? Here in New England we have 30 gigawatts, 30,000 megawatts of capacity that we use to serve all of New England. New York is 35, 37, somewhere in that range. California is in the fifties. Margaret can correct me if I don’t remember the numbers exactly. In China every year they’re adding 75 gigawatts, at least, of new capacity. That’s more than twice of all of New England’s, every year. And most of it, the large majority of it is coal fired. OK. So that gives you an idea.

So let’s put it another way. More than 1,000 megawatts of new power plants are being brought on line in China every week. It’s phenomenal. Vermont’s peak load, by the way, is slightly more than 1,000 megawatts. OK. The development targets for 2020. These are the official government targets. They want to quadruple the GDP by, it should be 2020. But they want to double, only double energy use in that period. So we’ll see what happens. President Hu called for in 2003 when this target, this development target was set, President Hu called for what was translated as the “Three Trancendences.” One is to “transcend old resource wasteful technology, maximize recycling and move to sustainable development.” Two is to “transcend traditional ways for great powers to emerge in the world to effectively reject hegemony and pursue peaceful ascendancy.” And then three is to “transcend outdated approaches of social control, job assignments, etc., and strengthen, as we heard today, the rule of law and build a harmonious stable society.” It is a laudable goal. And here’s sort of what needs to happen. There’s a great deal of energy waste in China and it needs to be utilized. Here you see relative statistics showing greenhouse gas emissions per dollar of output. This is analogous to the energy intensity statistics that you often see. Energy usage per dollar of output. But you can see that technologies in China are older and less efficient than they are elsewhere. And so this is why
you see the differences here. Comparing old installed investment to current standards as well. OK. Some solutions.

I’m going rapidly go through some of the things that are being done largely, obviously by the Chinese, but some of the programs that the Energy Foundation is funding and I’ll talk a little bit about something that we’re working on specifically in China these days. The low-carbon program in China, of the Energy Foundation, which has, is established in Beijing. It’s called the CSEP, the China Sustainable Energy Program. It’s funded by the Packard Foundation and Hewlett Foundation. Their low-carbon program has done some work, done some modeling. And their hope is with a multi-sectoral approach to dealing with energy use and emission controls. You know, environmental controls. That bottom line, the yellow one might be sustained over the next, again a couple of decades. And that’s million metric tons of carbon equivalent output. So it’s a very ambitious target given that the base line is, as you see, rising fairly rapidly.

OK. I spoke earlier about some of the efficiency gains. I alluded to them, in China. For many years China prior to the late ‘90s invested heavily in energy efficiency to improve the economic and thermal efficiency of its industries. And you see without those investments where energy use would be. That’s the peak of the green area in 1998 had those efforts not been made. So, there have been phenomenal improvements in the use of energy in China. However in the later ‘90s, starting in the ‘90s and certainly toward the end, investment in energy efficiency began to fall off. And this is a percent of total energy investment, these numbers.

OK. One of the programs that the government has just begun in 2006 is called the Top-1000 Enterprises Program. And the idea here is through government investment and other lending, the objective is to save 100 million tons of coal by 2010 which would reduce CO2 output by 242 million tons. This is–Robert alluded to the goal by 2010 of reducing energy usage by 20%–this is the centerpiece of that program. We’ll see how it goes. We know however that China is already behind in making that 2010 objective. So we’ll see what happens.

But this is all...they’re targeting all the energy intensive industries naturally in China. I’m not going to spend time on this one. I’m not really familiar with the programs that the Energy Foundation is engaged in with some of its grantees and partners in the Chinese government. But I did want to point out this: recently adopted fuel economy standards, fleet economy standards for automobiles in China are 20% more stringent than ours. That should tell you something.
And I love this one: after 2008 about 90% of the SUVs currently on the roads being sold in China will no longer be allowed to be sold. If you want more information on that I can get some for you. And here’s what is expected to happen as a consequence of those fleet efficiency standards: roughly 900 million barrels of oil will be saved by 2030 and 490 million metric tons of carbon dioxide.

OK. The renewable energy law, I think you may have alluded to it, calls for 15% of all electricity to be provided by renewable sources by 2020. Robert talked about the energy law that’s currently being debated and developed. For a couple of years now an electricity law has been under development. It was put on hold as a consequence of some severe power shortages during the last several years. And we’ll see what happens with that.

China is trying to restructure its electric industry quite significantly to develop wholesale competitive markets for generation. There had been hopes at one point or another for retail competitive markets, but a variety of events both in China and certainly elsewhere, California for example, have put that idea on hold. And I frankly think that’s a very good idea. I happen not to be one who believes that retail competition in the electric industry really works. But we can save that for another discussion. In any case, the 15% goal is a government mandated goal.

And these are the, you can see what the shares are that they hope will make a difference. There are to date about a thousand megawatts of wind concessions throughout the country. The hope is by 2010 there will be over thirty five hundred. Appliance efficiency standards are being developed and put in place. That, again, as you can see from these numbers are, if, if they go, if they’re enforced, if manufacturers in fact stick with, you know, adopt them and stick with them, these are the kinds of savings that are expected. So we’ll see. We will see.

Let me just turn a couple of pages here. Building codes: I’ll flip a page here. There are six implementation pilots around the country. We talked about the 85,000 or 80,000 buildings per year. None of these have been built so far to modern efficiency, building energy codes. We’ll see what happens. There are, as I say, six implementations, six pilots, and we’ll see if some improved building codes go into effect.

The final point is local building materials. There are, of course, a scarcity of building materials and as you know this has affected the prices, the world prices, of steel and other commodities.

OK. Very quickly. Electric power. The work that I get involved in is utility regulatory reform. In 2002, China created the State Electricity Regulatory Commission, SERC. Sort of the equivalent of
the Federal Energy Regulatory Commission here in the US except that it has much less authority. It doesn’t have pricing authority over wholesale markets and that’s a significant problem. We’ve been advocating quite strongly that that be changed. They are seriously talking about new pricing policies, particularly with respect to how generation is priced for the purposes of dispatch. And by dispatch we’re talking about what machines get turned on to provide power as demand increases during the day and over time. Pricing matters because the more efficient units are going to be the less expensive unless they are uncontrolled dirty coal. So that’s another issue.

But the general matter is that more efficient plants will be dispatched first in a marginal cost-based system, which China does not have. And as a consequence, just from the manner in which they manage the day to day operations of the grids, more pollution is occurring than needs to. And this is one of the things that we’ve been working on them with. We’ve been trying to persuade the provincial and central governments that energy efficiency is less expensive than supply and should be treated as a resource and thus paid for through electricity rates prices, just as we do here in many states in the United States—and you all, and those of you here in Vermont should be familiar with Efficiency Vermont. Same idea. It’s a resource. Efficiency is a more cost-effective resource than alternative generation and we’re working with the Chinese to help them think about how best to go through that, how to do that. And it involves least-cost planning, how to plan for the future of the grid, and investment.

Very quickly. One project we’re involved with right now in Guangdong is called the Efficiency Power Plant, where we’ve actually designed a set of efficiency programs that will target high-usage, high-volume consumption industries for energy efficiency investments. And the way the investments work is that they’re savings. They’re reductions in the energy that they use. It will look like, will mirror, the output of a three hundred-megawatt coal-fired power plant. So in fact you’re treating efficiency as a power plant and you’re financing it the same way that you finance a power plant.

And the Asian Development Bank, the folks that we’re working with and the folks in Guangzhou and in Jiangsu and Shanghai, where the numbers that you see here, are the original proposals that we put together a couple of years ago. In Shanghai we think we’re going to be moving forward with it as well. But it’s just another way of thinking about energy efficiency programs. Treat them as power plants and move forward.
I won’t go into Kyoto except that clean development, the CDM components of the Kyoto Protocol, actually can work here and could in fact provide some funding for such things as efficiency power plants. There is a national goal for reducing sulfur dioxide emissions. It’s not yet mandatory. There are pilot trading schemes. They do have a pollution levy, which is terrific. It operates on the principle that the polluter ought to pay. It’s a fee per metric ton of pollutants. It has the effect of linking the emissions of pollutants to the output of electricity, so you have a very strong incentive for improving the efficiency with which you produce electricity. And there’s no move yet to impose a carbon cap and trade program in China.

And I’ll just leave it with this. The challenges are immense, obviously. That’s what you’ve been hearing today. There are a lot of really terrific international experiences that China has been looking at that I think we’ll be taking advantage of in the years to come. And I would just say that there’s this trap that we sometimes hear in our meetings with folks in China: that we need to develop first and then we can clean up. Well, the economic impacts of not cleaning up as you develop, the economic and public health impacts, are huge as we’ve already seen. And there’s every reason to think about China leap-frogging the mistakes that we’ve made. And there’s, well there’s, I guess we have, and this gives you an idea of all the things that can be done to move toward a low carbon path. And I’ll just leave it at that.

Thank you very much.

AUDIENCE QUESTIONS

Thank you. Excellent presentations. We have, I understand, we’re supposed to run this panel until a quarter of. So we have a little time for questions. As moderator I’ll think I’ll take my prerogative and ask the first one: maybe it’s just an all-American thing but we rush to technology fixes, and so I’m going to ask about a possible technology fix - integrated coal gasification, gasification, IGCC\(^4\). It’s something that seems to me the United States could take advantage of. And perhaps China as well in as much as they are, we and they are, so coal rich.

Coal gasification basically is a chemical plant that takes coal and turns the by-products into natural gas and it’s burned off. Natural gas is used to burn and make electricity so it’s somewhat cleaner, fairly, quite

\(^{14}\) Integrated Gasification Combined Cycle.
a bit cleaner. And then the other by-products are used as feed stocks for certain industries for production. In addition to IGCC there’s a hope and an assumption that there’s an ability to sequester the carbon that comes out of such a plant. That often times is looked at more hopeful than otherwise because there are various attempts around the world to try to sequester carbon. IGCC. Are things being done with respect to that technology? What are the forecasts for that?

Robert Jones
I believe they’re being looked at now but that’s about as far as it’s gone at this point. But yes, of course, given China’s huge reserves of coal, of high polluting dirty high sulfur content coal, I think this would be a natural for China. And we have the technology in the United States and we should be talking very seriously to the Chinese government about it.

Rick Weston
And it has come up in discussions. I would just add that of course the issue is sequestration. And with the amounts of carbon dioxide we’re talking about, putting back in the ground or in the oceans is huge. And we have no idea whether such geologic sequestration is going to succeed for any significant length of time. We just don’t know. But it certainly needs to be pursued.

Audience
I was hoping that either one of you or both might be able to address China’s increasing pursuit of natural resources outside of that country. Both for consumer, just general consumption purposes. But by also more of the energy context, the pursuit of oil in countries such as Africa. And perhaps comments on the ensuing political and environmental effects.

Rick Weston
I think your question actually answers itself. And I have to say that I don’t, I haven’t given much thought yet to the issue. And I don’t know more than what I’ve read recently in the papers. And certainly there has been discussion of the geopolitical impacts of China, China’s significant investments in sub-Saharan Africa. Looking for, you know, supporting mineral extraction, oil and other minerals there. And I don’t know what to say other than that China is obviously going to play a very, very significant role in development and political, the political
future of such areas. And I don’t have any great insight other than to say, as I said a moment ago that it’s certainly affecting the global prices of many commodities. Forgive me for being less knowledgeable on this subject.

**Moderator**

Can I just add to that? When I was in the Peace Corps in 1982 to ‘85 in Rwanda, China built a highway from the town where I lived to another town. It was a fabulous road, and (Rwanda) benefited from it. It was an excellent piece of work. They made friends. Now if you look at the history in Africa the British, the Belgian, the French, and their relationship with Africa, you look at the abject poverty that Africa represents today. Making friends with Africa is probably a good idea. And I’m sure they’re ready to make friends with anybody who will be a friend to them. Other questions? Yes ma’am.

**Audience**

This is for Rick. You indicated that you are working with the Chinese, and you mentioned that Asian development thing [referring to the Asian Development bank]. But, this sort of leads into our next panel, what exactly is the context? At what levels are you working with in government?

**Rick Weston**

All. Primarily though with the central government. We’re spending, my work which is to help the Chinese think about regulatory reforms, to support clean energy initiatives. One thing that, in this country as well, that we don’t fully appreciate is that government oversight of monopoly network industries, and in this case we’re talking about electricity, has profound impacts on the behavior of those industries and thus on the environmental profile of them. So there’s a very strong nexus between environmental regulation and economic utility regulation as we traditionally think about it.

And utility regulators often don’t appreciate what their decisions, you know, what the outcomes what the effects of their decisions are. So we’re spending a lot of time talking with both, working with both SERC and the National Development and Reform Commission which is sort of the equivalent of our Department of Energy, but it actually has pricing authority over retail and wholesale and electricity use in the country. The national, the central government authority works with its provincial equivalents to set prices, at both wholesale and retail. So
we’re working with these folks providing advice. That we’re, as I say we’re funded by the Energy Foundation, to talk about what kinds of policies would, they ought to be, we think they ought to be thinking about as they further reform the sector.

So, national government level, provincial level, so we’re working with folks in Guangdong right now. We’ve been...we were in Jiangsu for quite a while. And now it looks like we’re going to be going back. Shanghai as well. We provide some advice when we can on the rewrites of the energy and electricity laws. But we also work with other NGOs. Alex Wang is here from NRDC\(^ {15}\) and his organization and ours have been working together on these energy efficiency power plants that we’ve been talking about. Primarily though we work with other grantees, as well—I shouldn’t say primarily—we work with other grantees of the Energy Foundation. And those grantees are typically, for lack of a better word, think tanks that are attached to various organs of the government or the State Grid Company, the state power company. They all have there own sort of think tanks that do a lot of the nuts-and-bolts analysis of various policies.

And they’re funded both by the government and in certain cases by the Energy Foundation. Our work with the Asian Development Bank is actually fairly new. And the idea there is that the ADB is funding the analysis of the EPPs\(^ {16}\). And it may in fact end up funding the EPPs themselves or commercial lending from in the country would fund them.

**Moderator**

Another question?

**Audience**

Although it wasn’t the first time you mentioned it, I read an article about nuclear energy. Is that something that’s being considered as clean air cheap solution?

**Robert Jones**

Well it’s very debatable how clean nuclear energy really is. I believe that China will double its capacity of nuclear facilities within the next ten years or so. But yes, it’s definitely on the table and it’s going to be a very important part of the energy mix. I’d like to see

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15. Natural Resources Defense Council
16. Energy Efficiency Power Plant
other forms of energy, personally, but you know, China needs to get energy from where ever it can basically. So I guess we have to live with that fact.

**Rick Weston**

I think, I’ll just add that, sure folks think about nuclear energy and call it non-emitting, but of course we know that is not true. And that the full fuel cycle for nuclear energy is, has a very significant carbon footprint.

**Audience**

I’d be curious to hear about whether the countries that are downwind and downstream of China have any leverage on their activities: the dams that they’ve constructed on the Yukon River, and with the air pollution that drifts over from China. Do these countries have any influence or leverage on China’s internal processes or are they pretty much?

**Rick Weston**

You know I might not be the person to answer that question. Perhaps Professor Wang could. I have, I’ve met with Korean officials and Japanese officials occasionally in China. But the degree to which their influence in policy, the degree to which we’re influencing policy—I mean I can’t begin to measure it. But yes there are certainly concerns about as you say the downwind impacts.

**Robert Jones**

Yes, that’s a huge issue for South Korea and Japan, but there’s very little they can do about it. And as you know, Rick said I don’t think they have much influence. So maybe my wife Margret could answer that question a little better being South Korean or Korean American.

**Moderator**

Thank you. Professor Cohen? Yes sir.

**Professor Cohen**

I just wondered—can you say to what extent the Chinese perceptions of what their neighbors and the United States are doing effects their own willingness to take necessary measures? This is such a ball of wax. Do they say well, we’ll do something but we’re helpless too because the United States isn’t pulling it’s weight and expects us
to . . . I’m thinking of the analogy of this whole currency valuation. Why should China take us seriously in our huge pressure on them to alter their currency valuation when we refuse to take steps to reduce our consumption of imports. Is there an analogy here in the energy field?

Rick Weston
I think yes, there is. You’re absolutely right. In the meetings I’ve had and workshops that we’ve been involved in these issues come up. When is the United States going to take action. That sort of thing. We, frankly our response to that is always “don’t do what we did.” You know? We’re not doing it right. We’re here to talk to you about what you can do. But you’re absolutely right.

One thing I find very interesting, and I greatly appreciate the Chinese in this respect is they are very, very . . . the folks we work with are very, very curious about what the rest of the world is doing in the way of clean energy policy. And they want, they have a voracious appetite for what’s going on in Europe, in South America, in America, and what has been done.

We just brought fifteen folks over from Guangdong and Beijing for a week in California to meet with folks from California and Vermont, from Efficiency Vermont, to talk about ways to deliver energy efficiency. And by all accounts it was a very, it had a very profound impact on the study tour. And folks went back to Beijing and were really geared up on these kinds of issues. So there’s a, I guess what I would say is that there’s, you know, a great interest in good policy. They want to see what the world is doing and, you know, the United States may or may not get its act together, but they’re moving, they’re trying to move forward in certain respects.

Professor Cohen
Well, there’s two questions in addition. One is a question of equity in terms of sacrifice, and the other is just the intrinsic hopelessness of their situation that they do everything. Are they still going to be victims of what’s going on around them or are they so much more the malefactor that they don’t have to or we don’t have to worry about whether they clean up their act or not, they are going to suffer because they’re more of the problem. On every item you mentioned, we’re the ones.

Rick Weston
Yup.
Professor Cohen
We’re still consuming more, using more, and wasting more than they are.

Rick Weston
Yup. I guess I agree with you. I don’t know what else to say. But you’re absolutely right. And still, 75 gigawatts of new cold generation are built in China every year. I don’t…there’s a paradox, an irony. I don’t know what to say. But there are folks who are very concerned about it. And yet these machines are being built, in many cases without siting approval. Sorry that I’m not able to

Robert Jones
It’s very unfortunate that the United States has absolutely no credibility. Especially in regard to Kyoto, the Kyoto protocol, and the non-ratification of that. We live and hope of course, and lots of things are happening on Congress right now as we speak, leading hopefully toward active participation in the future in that accord. But China’s stance is that we in the west are responsible for what’s happened with the global climate, so we need to clean it up. And to a very large extent I would agree with that assessment. We need to step up to the plate. We need to assume our position as global leaders as the only super power. So it’s really up to us to step up to the plate and do what needs to be done.

Well I think there are innumerable opportunities for students to get involved in China through corporate America.

In fact, what we’re doing through our foundation is we’re going to set-up an internship program for young Chinese environmental professionals and get them in through the back door, so to speak, to American corporations in China. Because they’ve been complaining to us for years now that there are no opportunities for environmental jobs in China. So they just go and they gravitate towards whatever there is out there. But this will give them the opportunity to actually get involved in the environment and put to practice some of the things that they have learned in University.

Rick Weston
I would agree with that and merely add that experience matters. And it’s not absolutely necessary that one started immediately in China to affect good policy outcomes that will in the long run have an impact on both China and America. And I think that there are lots of
opportunities in regulation. For example our field, my field here in America, there’s still thirty states in America that are not doing good things. And to move out into those areas would be terrific as well.
Professor Li Zhiping

Friday, March 2, 2007

PROFESSOR LI ZHIPING

Thank you very much. Thank you Tseming for your wonderful introduction. And I’m really very excited to have this opportunity to come back to Vermont again. I was here for one semester in 2004, and I spent a very productive and very happy time here. I would like to thank Vermont Law School and the Vermont Journal of Environmental Law for making this opportunity for me to come back again and give a presentation here. I will go through my presentation very quickly because the time is maybe a little behind schedule.

My topic is about the petition on peasant’s environmental law in transition. There are several main points including an introduction, the environmental change in peasants’ eyes, and peasants’ understanding of environmental protection and environmental protection law—and there many difficulties in the protection of peasants’ environmental rights. And the last one I would like to put forward is some counter measures.

I will begin with the introduction. My presentation is based on a survey. And this survey was conducted by the students of my environmental law clinic and my environmental law classes. And this survey lasted from July to October—almost half a year—during last year. About 13 students were involved in these activities. The way we are doing the survey is in two major ways. The first one is the interview, and the other one is questionnaire. We have already collected 350 questionnaires so far, so my analysis was basically on this questionnaire.

The purpose of the survey is to gather peasants’ opinion about their environmental rights. The students have done a lot of research on this topic, and I would like to share some of their findings with you.

17. Professor, Sun Yat-sen University Law School, Guangzhou, China.
environment, and the peasants’ sense of environmental rights and peasants’ ability, and the obstacles they face, to protect their environmental rights.

Why do we focus on peasants’ environmental protection? As we all know, in the past several decades, great effort has been put into environmental protection. But most of this effort was put into the city. And we can say that almost all the legislation, and all the systems and institutions relate to the city, and not to rural areas. The peasants are the biggest weak group in China in many aspects, especially in environmental protection. So, I think it’s time that we focus our efforts on rural areas environmental protection.

Our survey was conducted in Guangdong Province, so I would like to give some idea to you about the province. Because, as you know, we have already discussed Guangdong province, so this is the map you are already familiar with. This is the map of China, and Guangdong is in the southern part, yes, in here. So it’s near the South China Sea. It’s right in the south, in China. And this is the map of Guangdong province. And here is Guangzhou—the capital city of Guangdong province—and also a huge super city of China. And here is Hong Kong. Here is Macau. And this area is the most urbanized, industrialization area in China. And the majority of our survey was conducted in this area. It also included some other areas as the east in Shantou, and the north, and in the rest of the province. So it almost covered all 11 cities of Guangdong province and included each type of area typical of this province.

So, how significant is this province in this region? I can show you some numbers. It contributes about 11% of China’s GDP, and about 12% of China’s total financial income or about 31% of China’s total world exports. All these three areas are being listed as the number one place in China for decades. So maybe we can see it as the most powerful province in China.

It is also the most economically dynamic area in the world. Some people say that 31% of China’s world export comes from Guangdong province. So some people even said that if there is traffic jam in Guangdong it will cause a shortage in world supplies! So many people will think that maybe, you will have many opportunities to meet Chinese products from Guangdong.

So the economy was developed so quickly. How about the environment? I’m not going to show you the figure in the formal way. I just would like to show you some pictures from the peasants’ eyes. The peasant—the word I use here—is equal to farmer. There is no
difference between the peasant and the farmer in China, so I need to give some explanation to this.

The second part is about the environmental change in peasants’ eyes. When we asked about the change to the environmental rights this year, about 44% of the respondents said it’s getting worse, 30% of people think there is no change, and 21% of people answer it’s getting better. And almost half of the respondents worry about the quality of environment. So, when did this happen?

You can see from the chart most of the people think that this happened within ten years or five years. It reflects that this change happened since the 1990s. And since the 1990’s, if we consider most of the environmental impacts are up here, several years—even ten years—behind the people’s behavior, it means that those changes were caused by people’s behavior since late 1980’s and early 1990’s. And these periods just are the key time that Guangdong Province carried out its industrialization and urbanization. So this is about the time.

So what’s the main phenomenon of environmental change? We can see that the people listed solid waste as the number one, water second, air the third, and noise the fourth. It also reflects that people’s living condition has risen.

Because in the past there was almost no waste in rural areas, almost everything could be re-used as fertilizer. But now they get so much waste, it means they have consumed more than they produced, such as plastic and metal just like this. So the waste problem in rural areas has become more and more serious. As we surveyed, some of the villagers have already established a system to correct for this waste. But since there are no central rural waste areas, what they do is just move this waste from one place to another place, but the problem still exists.

About air quality, about 45% of people answer it’s getting worse, 40% of people think it’s really bad, and 26% of people think there is no change. Only 8% of people think it’s getting better. So, as you know, generally speaking, air quality in the rural area is much better than in the city, but it still has already become very serious question now.

And about the quality of drinking water, I need to add more words on this. According to our survey about 15% of the respondents still fetch their drinking water from nature directly, such as spring water and well water, and some even from the river. So 15% of the people still fetch their drinking water from nature. How do people think about the quality of those drinking waters? Near 30% of the respondents think it’s getting worse, 28% think it’s always good, 17% think it’s always bad, and 16% think it’s getting better. So we can tell that if we add
those people that think the water is getting worse or very bad, the number is almost 50%. So, almost half of all those people who fetch drinking water from nature are facing environmental deterioration problems now.

So, how about the situation of farmland? As we surveyed, 34% of the respondents think there has been no big change, 33% think it’s getting worse and has led to reduction of crops, 11% think it’s getting worse and unsuitable for cultivation anymore, and only 2.8% of people think it’s getting better. So it’s very serious in Guangdong Province.

And when we asked, do you and your family members ever suffer from environmental pollution, there are almost 34% people who answer yes. So it’s quite common for the people in the rural area, they suffer from the environmental damage.

When we ask the reason for the environmental change that is the biggest reason, the people think that it is impact by factory pollution discharge. Second is the peasants’ lifestyle, and third is rural building and developing activities. When we ask, are there any enterprises in your village, about 65% of the people answer yes. What are those factories in the villages? We can say from this chart, most of them are chemical, electroplating, mining, hardware, and papermaking. All these factories are highly polluting enterprises.

As to the people’s knowledge about their local environmental situation, we can tell from this chapter that people have very, very little knowledge about the situation of the local environment. About 54% of people think about it a little, 29% are not so clear, only 11% answer very much. But how do you know? It is very interesting. The people got the majority of the information about their environment this way, you can see it’s split, just by their physical feeling – by their eye and what they touch. And hearsay is almost the main way to get the information.

Very few people can get government announcements and get notice from village committees. So, people have really few means to get precise environmental information. Why does this happen? Because even the government doesn’t have such information because the budget is seriously insufficient in China. Sometimes the government keeps this information confidential, so it’s very hard for a peasant to get environmental information. Separate I will talk about the peasants’ understanding of environmental protection and environmental right.

As to the attitude of polluting enterprises, we know the peasant has clearer and more reasonable mind about factories being nearby. About 54% of people object to those polluter enterprises, but about 40% of
people, they don’t mind and even welcome them. So, what’s the main reason for this? You can tell that people still have very high expectation that they can bring job and business opportunities to them.

About the willingness to change the situation, if it is being damaged by pollution, we can tell here that 41% of people answer very much. And nearly 40% of people think sometimes. So, we take up these two parts and you can see they’re willing to change the environmental situation, very strong, really high. But if we consider the means for today, it’s a totally different picture. When we ask the men to safeguard their environmental rights, most of the people will chose to complain to the village committee, and the second option is to complain to the government. And these two parts take up almost 75%.

And peasants hope not to report to the government, that the government can—that they have power to stop this environmental issue. What they hope, it says, is that they want the government to represent them, to negotiate with the factory, to serve as a source of power for them. Because, as we know, the village committee has no power to regulate the factory and to treat their environmental issues, so what they hope is just that they have some organization, some institution, to do this job for them. Only 9% of people will negotiate with the polluter directly, and only 2% people will sue to the court, and also less than 1% will choose petition.

And the survey shows a very different picture to us than other surveys. Maybe some people will think that the petition in China is very popular, especially in the rural area. Because they are peasants, they have no legal knowledge, so they cannot. But as we surveyed, we cannot find this preference. So I think maybe Guangdong is just different from the other provinces, or maybe the opinion and situation has changed. So, the chapter shows us that the peasant greatly rely on government—across the government organization—and the means they take to safeguard their right are negative and positive.

So, how do they deal with the environmental problem issue? We also have some data to show here. The methods they take to deal with environmental pollution are very positive, very positive, such as the way to treat polluted drinking water. Most of the people will choose to buy bottled water. And then the second choice is to still drink polluted water. And the survey is finding other water sources. Maybe the question is will they also find another source. And when we asked, how do you deal with the polluted farmland, you can see here, almost 30% of the respondents will choose to give up agriculture and find a job outside. And 24% of people will choose just nothing. So, we have
asked them about whether they want to leave their hometown to make a living outside. Almost half of the people choose yes.

So giving up agriculture and moving out has become a main method for peasants to deal with environmental issues. There are several reasons for this. First is that the peasants do not depend so heavily on agriculture, and agriculture does not attract peasants very much. The second reason, peasants have more chance to find other job in the cities. And thirdly, in Guangdong, the population movement is very, very frequently. It is the home of the oldest, biggest migrant worker group of China, so it provides quite a suitable condition for peasants to move.

But, is this good or bad for the environment? I think it’s really, really very bad for environmental protection. Because the people move out, the problem still exists, they cannot solve them by themselves. But it means they just move out, just escape and leave the problem behind. But people choose to move out because they also have another reason, it is about the ownership of the land. So far, Chinese law does not allow the people, the individual, to own land. So most of the peasants only own a contract to the farmland for no longer than 30 years. So for them, maybe they are not so concerned about the quality of the farmland because they think it’s not their property.

So, about the difficulty in protecting peasants’ environmental right, we have concluded several such difficulties. The first one is peasants’ high expectation on government for many environmental issues. As I mentioned before, the peasants rely heavily on the government. We showed the data just now. But the government is far from satisfying these demands. For example, we still have many holes in law and regulation. The institution and system are far from enough to protect the environment in rural areas. The resources—the financial support—are far from enough to meet the demand of rural areas. So, as a result, the public good of environmental protection in rural areas is in serious shortage.

So, when we ask, what are the main difficulties in improving the environment—people will choose a lack of government support as the first reason. So, we can say the peasants rely much on the government. They are also very disappointed in the government. The government can be the biggest force to improve environment. They also can be the biggest barrier to protect the environment. The other expert has talked much about that.

The second difficulty is that peasants depend on the environment, whereas there is little ability as a group to ensure environmental
We think the peasants have more of a dependence on nature than urban residents. First their living conditions are strongly related to natural consequences and their productivity also strongly relies on nature’s conditions. And peasants are vulnerable in two aspects. It’s a doubly vulnerable group: vulnerable to polluters and also vulnerable to urban residents. Compared to the polluters they are weak in negotiation and compared with the urban resident they are weak in environmental resources of preventing the environmental transformation. So, their environmental rights are more easily damaged by the polluter and other humans’ behavior.

Peasants’ lack of relative knowledge and the complicated polluter issues are the third difficulty. I will not go into so much detail. And the fourth difficulty is peasants’ poverty, whereas the litigation costs are high.

So, what’s the countermeasure? We all can list a number of questions about the problems to the rural area, but how to deal with them? When we think of the solution—the way out—we always face an obstacle. Maybe we all know what the problem is, but the solution is hard to find. What we propose here involves some thinking, especially on our research.

The first thing, we need to strengthen the growth of grassroots organizations in rural regions. Because they’re peasants, they need organizational support. So, the best way is to better use the organizational resources. So, what are the available organization resources in rural areas? We can say it is the village committee. The village committee is a self-regulated organization in rural areas. It has been established everywhere now. It is still short of manpower and resources, but it is the nearest group to the peasants, and also they know the situation of the peasant. Because they are elected by peasants directly, they are willing to the help the peasants more than other organizations. So, we must make greater effort to improve this organization, to give them more support to represent the peasants in the court and in negotiations with enterprises, and then give them a more fundraising to protect their environment.

We need to fill in the gaps in the laws and regulations. As I mentioned earlier, the environmental regulation in China is urban environmental legislation. And although those environmental issues in the city and in rural areas have much in common, they still have a lot of differences. So we need additional rural environmental protection regulation. And to strengthen the environmental currency in rural regions is also a very urgent need. As has been mentioned just now,
people don’t have enough information about the environment, we have no monetary equipment located in rural areas, and the majority of environmental protection resources are located in the city. So, we need to extend those monetary forces to improve the peasants’ protection ability on their environmental rights. In this field, I think we can do a lot.

We hope that we can have more environmental protection education, more training, and also more legal aid for them. Extending the existing legal aid system to cover the worst rural areas is also a very useful way to protect the peasants’ environmental rights. Although China has already established a legal aid system, so far its major focus is also on the urban areas. In recent years, as we know, the Chinese Government has already put forward more resources to extend the legal aid system. We hope that it will be a main way for the peasants to protect their environmental rights.

So, just very briefly about the solution, we are still in the early stage for these issues. So thank you very much for your attention.

I would like to take some of your questions.

AUDIENCE QUESTIONS

Moderator
Can we take maybe just a couple minutes for just a couple questions?

Professor Li Zhiping
So, I will ask Anne Marie to…

Professor Li Zhiping
You mean the village committee. The village committees are a quasi-governmental organization. It was formed by the law. We have our village committee organization law. It required every village to establish such an organization. The main function for this organization is to deal with the public affairs in rural areas and to mediate disputes between the peasant and also represent the peasant and to reflect their opinion to the government.

Professor Jerome Cohen
That ties in. You have not grasped her question. It ties in with the question I wanted to ask. You point out that there’s a restriction on
access to legal knowledge. That’s one problem. There’s also a lack of legal or specialized personnel. So knowledge, people. Do the knowledge and people come from the outside of the village? Outside agitators, organizers, NGOs, lawyers, barefoot lawyers? You have a whole range of outside people. So what’s the relationship between people on the outside and people in the village? Who stirs up the masses?

**Professor Li Zhiping**

This comes up in the land ownership incidents in Guangdong. Some people have been killed. There have been huge struggles. And the government blames outside agitators who give the local people the knowledge and the inspiration.

**Translator**

The villagers are very welcome of outside help from media, NGO’s, government or scholars. Actually sometimes the villagers themselves would directly ask outsiders for help.

**Translator**

Currently, the Chinese government is very sensitive to NGO’s activity in areas, and particularly in some sensitive cases. Now some key people in the Chinese government threatened the local farmers not to involve outside NGO’s in their environmental protection activities. However, if we interfere with the environmental protection from a harmonious society perspective, the government actually welcomes such activity. So it really depends on which perspective you are using to interfere.

**Audience**

Can I just say one thing? The key point is in many villages of China, the village and township leaders do not want the masses of people to get legal knowledge. Because when they get legal knowledge then they have a grievance, they have a weapon that causes conflict between local leaders and local people. Even if the local people want to carry out the national law, often the local people want to carry out the national law and the local leaders don’t want to do that because it contradicts their own needs and interests.

**Translator**

Professor Li basically agrees with what you said, but she also
mentioned in terms of attitude of local governments, it really depends on where the problem is coming from. So, for example, if the problem is coming from local government itself, then it doesn’t want the local farmers to be too involved in those environmental protection activities. But if the problem arises from, for example, the outside enterprise, the investments of outside enterprises or higher level of government, the local government is actually quite willing to cooperate with the local farmers in terms of environmental protection.
Panelists: Professor Wang Canfa, Margret Kim, Alex Wang, and Patti Goldman

Friday, March 2, 2007

Professor Wang Canfa

Thank you. Ladies and gentlemen good afternoon. You really get drowsy after lunch so in order to keep all of you alert Professor Wang put a lot of photos of his beautiful colleagues, handsome guys and beautiful women, in his PowerPoint. So when you feel a little bit drowsy just pay attention to the PowerPoint, not my speech. There are three questions. The first is improve the rule of law in Rymangton Field. The second and the main one is the business our centers, rules and it’s a fact. This is the center’s logo. It’s the arm and its law, Rymangton Law. It means protecting the earth with legal arms. The center was established in 1998 and it was approved by China University of Political Science and Law, the traditional ministry of the PRC.

Translator

And the small point here, the Judicial Ministry means Department of Justice.

18. Wang Canfa is a Professor at the China University of Political Science and Law in Beijing and Director of the Center for Legal Assistance to Pollution Victims (CLAPV).
19. Margret Kim is the former Public Advisor to the California Energy Commission and Co-Founder of the Ecolinx Foundation.
20. Alex Wang is Attorney and Director of the China Environmental Law Project for the Natural Resources Defense Council (NRDC). Mr. Wang has chosen not to publish his presentation given at the Symposium, his article is included in this book on p. 191, and an audio presentation can be heard via the Vermont Journal of Environmental Law website located at www.vjel.org.
21. Patti Goldman is the managing attorney of Earthjustice’s Northwest office.
Professor Wang Canfa
These are pictures, you can see my central walls are composed of scholars. They are from some universities in China. These professors are from Peking University. This professor is from Beijing University, my university. Another volunteer is from the Salmon Law Firm. They are lawyers in China. My center has three missions. The first is the rising consciousness of law and the protection of rights of the public. The second mission is improving the capacity of the administrative agency and the traditional bodies. The third is promoting the enforcement of Chinese environment law. My center’s organization is composed of, the director, the deputy director, the consulting department, the litigation department, the administrative office, the research and the (cleaning) department, the protector of the development department. My center’s main job is to be in the business of helping pollution victims for free. This line means any pollution can qualify. The center has been called to the Hoke country, under Tibet. We have answered 19, 487 calls during the seven years. The reply letters count three hundred and thirty-two received visitors, the five hundred and twelve proposing. This is my center. The volunteer receives a visitor. This is the legal consultant teaching rights. Last summer we organized the volunteers in western China.

We also provide legal assistance for the citizens on the street. I tried to have a truck.

Translator
Professor Wang said he wants to have a truck so that the can ship his volunteers to anywhere in China he wants to, in order to promote environmental education.

Professor Wang Canfa
My center’s second work is having a pollution lawsuit and the paid part of the (quarter) and the lawyer’s for the pollution. If their case is fateful and typical, the pollution victims are very poor.

Translator
As you can tell from the chart in the past seven years Professor Wang’s organization has represented pollution victims in eighty-nine cases altogether. During these eighty-nine cases there are seventy-five civil cases, ten administrative cases, and four criminal cases. Some of the audience may have questions regarding the number of cases
received by Professor Wang’s organization. There are only altogether eighty-nine cases. You may think this number is too few. There are reasons for this.

First one, there is restriction on the funding. If there is not sufficient funding Professor Wang’s organization cannot take many cases. As you may know, each case involves a lot of money and for Professor Wang also mentioned a specific case. In this case the appraisal fee alone in this case is one hundred and fifty thousand (150,000) RMB which is, I think, twenty thousand US dollars. So that’s a lot of money.

And on the other hand, the reason is that Professor Wang uses a special calculation method to calculate the number of cases. For example, if a case involves the trial of first instance and the trial of second instance Professor Wang will calculate this as one case only. But there are many professors in China who would calculate it as two cases.

If these cases involve more than one litigant. For example, some of Professor Wang’s cases involve over a thousand litigants. Professor Wang will still count it as only one case. As you may see from the chart shown on the screen, Professor Wang gave us a calculation of all the cases he did in terms of the result of the cases. Do you want me to go through the numbers, or if you can see I probably just won’t.

Please pay attention to unsettled cases. In this chart as you can see there are a total of forty-two cases which are unsettled because the court won’t take these cases for a lot of reasons. Some of them are political considerations.

Please pay attention to the number of the cases lost, twenty-four out of ninety-seven altogether. So in these twenty-four cases the plaintiff means the pollution victims lost the case. But as a result of the litigation the factories are closed. So, on the other hand this is a good result of the case, even though they lost the case itself.

This is a picture showing Professor Wang helping pollution victims file lawsuits. And this is a picture showing three lawyers from Professor Wang’s organization litigating a case in Fujian Province. These four pictures show Professor Wang himself and his volunteers meeting with pollution victims in different provinces including Fujian Province and Guizhou Province.

Another main activity that Professor Wang’s organization is doing is to provide environmental training to lawyers, judges, and environmental officials in order to promote or enhance their capacity of handling environmental cases, and also to promote their environmental
consciousness. Until last year there have been six training sessions held for this environmental training to judges and lawyers. And the total number of lawyers being trained in these six programs is two hundred and thirty-nine. There are a hundred and ninety-nine judges trained in these six training sessions. We also provide free legal training to government officials responsible for environmental enforcement. This picture is showing the environmental legal training classes in 2004.

**Professor Wang Canfa**
The government from the America was having a lecture.

**Translator**
Another major activity of Professor Wang’s organization is holding some seminars on environmental law and to promote international and inner-country exchange and improving the environmental legislation in China.

**Professor Wang Canfa**
This picture is the conference held at Beijing with the Japanese scholar. This picture is another workshop in Western China. When we research environmental litigation it is a very difficult question. This picture is the international symposium on the litigation for composition, which means the law. This workshop has a very important effect on the environmental law in China.

**Translator**
The center also holds some lectures on environmental law and some seminars on environmental cases with the news media in order to let the public know their environmental laws and rights. The center also studies some key questions on environmental law in China and puts forward proposals on improving environmental legislation and its enforcement. The center has been raising a lot of wonderful proposals to the Central Legislation in China.

Next he wants to discuss the work being done in his center on China’s environmental protection. Their work protects victims’ environmental rights and interests. And we are going to discuss a case that happened in the Shiliang Reservoir. And we’re going to discuss the details soon. His work also creates pressure on polluting enterprises and administration agencies who don’t perform their statutory duties. His work forced a lot of polluting facilities in the Tianjin-Hebei
Province to be closed. His work also promotes public awareness of protecting the environment. He once litigated a case in Pinang County in China and after this case the local residents there established an NGO, an environmental NGO to deal with the environmental protection cases in future. The environmental training provided also improved the ability of lawyers and judges to deal with the environmental cases. Many of his colleagues, who are lawyers in his organizations, have been paying visits to the United States.

Also the Center’s working to improve environmental legislation, for example, the solid waste law, the environment damage compensation law, and public participation in environmental protection. He will go quickly through the cases Professor Wang did. I will just give a very brief description of the case.

The first case is the ninety-seven households and villages of Donghai County in Jiangsu Province who sued two factories in Shandong Province for damages for polluting the Shilianghe Reservoir. The Shilianghe Reservoir is a big reservoir along the Huai River. It is located in Donghai County of Jiangsu Province, which borders Shandong Province. In order to promote the development of local economy and improve the living standards of farmers around the reservoir the government of Donghai County in compliance with the national fisher law encouraged local villagers to use net cages for fishing in the reservoir. There have been over two thousand cages of fish since the year 2000.

However the influence of polluted water from upstream in October 2000 and May 2001 caused the deaths of all the fish and shrimp in the reservoir. With the direct economy cost of over eleven million (yen) equivalent to about 1.4 million U.S. dollars. According to the investigation of the local environmental bureau protection bureau and fisher environment-monitoring center, the polluted water came from a paper mill and the chemical plant in Shandong Province. The villagers who suffered serious economic loss transported the dead fish to the neighboring county and asked the local government for compensation. The local government admitted there was pollution and promised to compensate.

However, when these villagers left the local government took no action at all, even though the villagers continuously went to the state environmental protection administration and provincial government of Jiangsu and Shandong Province to call for attention to this case, and the news media reported on this case. The problem remained unresolved.

These ninety-seven households sent a representative to visit
Professor Wang’s center, and with the help of the center, these villagers brought an action for environmental damages. In the trial of first instance the court ordered the paper mill and the chemical plant to compensate these ninety-seven households 5.6 million yuen equivalent to seven hundred thousand (700,000) US dollars.

Defendants appealed to the Supreme Court of Jiangsu Province and the court decided to affirm the decision. In July 2004 these ninety-seven households received the full amount of damages and defendants are prohibited from discharging polluted water secretly. The quality of the water in the reservoir has improved and the villagers raise more and more fish in the reservoir.

Now also in other cases, in Beijing one hundred and eighty-two households and residents sued the Beijing Municipal Urban Planning Commission for illegal issuance of permits. In this case the Beijing Municipal Urban Planning Commission issued a construction permit to two research institutes for building an animal laboratory, and the distance between this lab and the residential buildings is only 19.06 meters, while according to a national law such distance needs to be at least twenty meters. So in order to let the Planning Commission vacate the permit residents first went through the administrative process but without any success. So they filed this case to court with the support of Professor Wang’s center. And then finally they won the case and the court asked the Planning Commission to vacate the permits. This is the first case in Beijing where the residents sued the Planning Commission of a government and won. As a result of this case there are more and more residents in Beijing are now suing the Planning Commission.

And the final case is 1,722 people suing the biggest potassium chlorite plant in Asia in order to protect residents and trees in the whole county from pollution. And finally with the help of Professor Wang’s center this case was won. And we also discuss the case a little bit more in the question and answer session.

And this case was rated as one of the top ten most influential litigations in 2005 in China. Ford Motor Car Company awarded this environmental protection award to Professor Wang and his center. Professor Wang was awarded a prize as the person of the year 2005 in green China. Professor Wang was also rated one of the top ten rights fighters by a Chinese human rights web site. Chicago Tribune also gave a special report on Professor Wang’s work and listed him along with the Mexican president and the Palestinian Prime Minister as the eleven people who are going to have significant impact in the world in 2007.
Professor Wang Canfa
Thank you. Thank you everyone.

[Applause]
Honestly some of you may be wondering, Margret Kim, public adviser, California Energy Commission? What’s that got to do with China? I mean when I looked up my name and title and where I was coming from, I questioned that myself. And thought maybe the Journal was getting desperate to get someone to speak. That’s why I wanted to briefly explain to you what a public advisor is.

A public advisor is a statutorily created position at the California Energy Commission. And it is an independent council position appointed by the governor of California as an administrative watchdog, and makes decisions largely in power plant citing decisions. I’m no longer at the California Energy Commission as public advisor effective, which became effective two weeks ago.

I’ve been transferred to California Environmental Protection Agency as their China program director and special council to the California EPA Secretary to be posted in Beijing. So we’re moving to Beijing in two weeks.

I wanted to thank the Vermont Law School for this wonderful opportunity because it is important for me to share with you my experience and my continuing efforts in China. This is all the more meaningful at a personal level in light of what happened to me a few months ago, which in my opinion was rather shocking. I started receiving strange email, almost like hate emails, and my assistant rushed over to my office and said, “tell me what I’m to do. I keep getting phone calls.” “Phone calls from whom,” I asked. “About what?” And she said, “Phone calls from within the Energy Commission. Staff people are interested. It’s about you and what you’re doing in China. They don’t like it. They don’t think you should be sharing with the Chinese guest or that you should be going to China to talk about procedural rights, public participation, administrative law.” I said, “that is shocking. After all this is good for us, it’s good for China.” And much to my surprise my assistant said, “Margret I’m afraid I’ll have to agree with them. China is our enemy, don’t you know? They’re gonna learn the democratic ways and use that against us someday.” I was thinking, this is California, I know its Sacramento but it’s California. And I started feeling, oh, maybe the rest of the country may feel the same way. But because I’m here it reassures me that this is not the case.
So what is it that I have been doing for the past several years that’s so troubling? It’s in my own way to bridge the rule of law and the environmental law through sharing what we do in the government in terms of promoting public participation, public comments, public disclosure of information, conducting public hearing in the environmental review process.

But how I got started in this work is rather interesting because my background is that I come from the private sector. In a law firm as a litigation partner and later as a general consultant to a large Korean conglomerate. And I never really had a chance to deal with the public. And when I went from the service general council to the California Resources Agency I was tasked to draft environmental impact (NEPA) impact laws and regulations. And in that process you have to engage the public. But I never really thought it was very useful. I thought why can’t we just have expert lawyers get involved and that should be sufficient? In fact I even hired a special council to deal with the public. We had a 1-800 number assigned to get public comments and what not.

It was not until I moved to California Energy Commission as the public advisor responsible for procedural rights, and especially it was not until I actually got involved in China, that I really got to realize the true value and appreciate our open government system. I assume most of you are environmental law students but how many of you consciously think about public participation when studying environmental law? Oh, better than me. Without procedural rights, of course, substance of law has really no meaning.

This is what I’ve realized in China. I looked at their environmental laws and some were very good. But there was lack of compliance and enforcement. And in my opinion it’s largely due to the inability of the civil society groups and the public members to meaningfully participate. What I mean by as “meaningfully” is to have the opportunity to comment, to attend hearings, to testify, and to litigate. And so my experience in China for the past few years has been wearing one hat as the government official but the other hat through the non-profit that Robert and I formed, the Ecolinx Foundation.22

And I know that there are other NGOs, US and European NGOs, such as Earthjustice and the NRDC assisting the civil society groups, but I thought that we needed to have a balance. So our focus has been mostly on sharing government perspective, government information, and how do we do things within the government and to share that with

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the State and Environmental Protection Administration, which is the equivalent of the US’s EPA.

And one reason was, if there are other foundations and non-profits helping the civil society groups, and if the government and local and central government officials feel that they’re not increasing their capacity, the easiest thing for the Chinese government to do is to just clamp-down on the NGOs. It hasn’t been easy, but we’ve trained throughout China as far north as Harbin and as west as Xingjiang and south as the Hainan Islands. And basically the training was on the administrative licensing process.

How do we have early outreach to let the communities know that we’re going to consider a power plant? By conducting workshops. The ABCs of how to conduct workshops. How to conduct public comment hearing as well as evidentially hearing. How to respond to the comments instead of ignoring them. Cause once you ignore them they will feel cynical about it and they will go back to maybe some more protests. How to communicate unpopular decisions. Very often the Chinese officials would say, we can’t satisfy everyone. So we might as well not go through this process but that is not the reason. And also on appealing administrative decisions. We’ve also assisted in developing guidelines for SEPA’s training arm on public participation.

I think that Professor Wang Canfa yesterday mentioned the law that they passed last year, which is the measure on public participation. And we’ve also provided guidelines, implemented guidelines for that. And I must admit that there has been a marked difference in attitudes toward public participation.

In the beginning I felt like they were sixty to a hundred people just sitting there kind of frozen and I felt like they were there because they were compelled to be there. And I wasn’t sure whether they were listening. And towards the end, as they warmed up, they admitted there is no need for this. Just like how I originally thought. They said we are engineers, we are experts, we are government people, we have all the answers. We are trying to protect the public; they don’t need to know.

So some people also thought that in the US we were crazy to allow anyone to participate in government decision making. Of course the Europeans have this tendency to approach it from a different perspective. They’re also there in China but they talk about selective and qualified participation. And, of course, that is not the case here. And some even suspect that, that maybe you in the west, the US would like to slow us down. That’s why you’re introducing this whole idea of public participation.
I know they are trying to slow down their economy and that may not be a bad way. But most recently, last November, we had a delegation for a whole six weeks. And this was partly from the passing of the measure of public participation law. They called and said we want to come and we want training. So I immediately thought it must be an environmental impact assessment technical training. They’re always interested in technology. And they said, “no, no.” We only want to talk to people on public participation, which was surprising. They came. And they said, “also Margret we want to talk to people on the street. We want to know if what you’ve been saying is really true.” I said to them, “you can’t really stop people on the street but we will organize a group of civil society groups and reporters to talk about their role in public participation.”

And at the end, the leader from SEPA, there with fifteen people, said, “you know, this is not just about protecting our environment, this is going to bring democracy to our country.” I was shocked. I know the meaning of democracy is slightly different there than here. But I was thinking I hope he will not lose his job when he returns. I haven’t spoken to him since so I don’t know what happened to him.

So where is China on public participation? Progress is slow and incremental, but with Chinese characteristics. In fact there is a commentary that Robert and I wrote, if you’d like to learn a little more about our work.

I was talking to a professor at Beijing University recently and he was concerned. “Margret, I don’t think the public participation approach is working. We’ve had 86,000 protests in 2005 largely due to land use issues and pollution. And we’ve tried to hold one or two public hearings and that is after the decision is pretty much made and it didn’t work. More protests. Angry people.” I told them, “of course it won’t work because the public participation process is not occurring early enough and you’re picking and choosing, you know, it’s a cafeteria approach.” A little bit of European methods here a little bit of American methods there. It’s not inclusive enough to have a limited number of people who can actually testify. And they don’t disclose the information.

The report, the very hearing, is about commenting on the report, but the reports are withheld because most of the time its considered to be state secret. And they said we need to protect the public from information. So of course it didn’t work. They were more outraged.

And I say Chinese characteristics because I think of South Korea. And South Korea has democracy, but because of the political history
they are extremely suspicious and cynical about government. And so even today, while we have public participation law, when I talk to NGOs they still feel that political climate is still uncertain. The law, while they do have law, is still unclear. And they need to be cautious, and they feel that they still have to be invited to participate in government decision making. I believe that more training is needed throughout China at all levels. And I truly hope that Vermont Law School will also join in this effort to promote public participation in environmental review. Thank you.

[Applause]

**PATTI GOLDMAN**

Well, I too was a little concerned coming after lunch and realizing I was last and the cookie malaise would set in. So I put together some PowerPoint images last night to hopefully keep your attention. Well, I am, first in the interest of transparency and disclosure, I’m not a China expert at all. I consider myself very much a student probably in the 101 series. And I first went in China just in 2005 and I went to one of Professor Wang’s training sessions. And was called the American expert, but to explain public interest environmental litigation in the United States. And there was tremendous interest among Chinese lawyers in trying to expand public interest environmental litigation. And I was just amazed at the thirst for information about our system. And the desires to push for law reform and expansion of what I do.

And so what I’ve been doing since I’ve had several other trips there and we’re now working with the Asia Law Institute which is the ABA’s rule of law program, and the All China Lawyers Environment and Resources Committee. And what we’re trying to do is look at well what could you do and the question I keep asking, I have no answers but I’ll ask you throughout my presentation, is if you could make some changes, what would have the greatest effect and is it feasible? And that’s the kind of questions we’ve been asking around this subject.

So today, what I want to talk about is citizen enforcement. And

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24. *Id.*
that’s my bias, so another disclosure. I firmly believe that citizen enforcement is essential to environmental protection. You can have all the laws on the books. They can be the best laws on the books, but they’re not going to mean anything unless they’re enforced. I also think in any system the government is not up to the task. I think throughout the world there are insufficient resources for all the enforcement that needs to happen in any government. I can’t imagine, I mean I challenge you if there’s a situation where that’s not true, but also even if there were resources, there’s often not a lack of political will.

You’ve heard about “guanxi” (relationships) through the networks or the local government’s connection to the industry are dependent on the local polluter for tax base or for jobs and a sort of a social security system. Well in our system here, think of politicians dependent on political contributions from well-heeled industries. Whatever the reason, we often have a lack of political will to enforce the laws. So, that’s my premise. You can disagree with that, but that’s the premise on which I’m doing this presentation.

And I look at citizen enforcement has having three elements. First, access to information about what’s happening. It could either be government information about government actions or information about discharges, air discharges, water discharges, waste impacts on your health.

The second is an opportunity to participate in the decision making. You’ve heard a lot of talk about the environmental impact assessment law in China. And it has made inroads in both of these areas—in providing more information to the public and opportunities for public participation. And then the last, which is what I’m going to talk about, is access to legal redress. And there are a lot of issues you could approach with this, the lack of legal expertise, and the financial obstacles to bringing a case.

I’m going to talk about the legal obstacle of standing. And to do that, I’m going to go back first and talk about our situation in this country before we had liberalized standing. Which in many ways I think is analogous to the kinds of rights and remedies in China today. And then look at three questions about potential expansion that may or may not fit the Chinese system.

So for those of you who are law students, this is my attempt to reduce your semester of torts to one little icon. So, if you go back forty, fifty years, we had environmental litigation but it was basically common law, rights and remedies. And the rights were personal or
property and individual, uniquely individual. So an individual whose rights were infringed could go to court and seek compensation for the infringement of their rights. And the other kind of litigation we had would be more in the area of nuisance. And there again, it’s a right, it’s a property kind of right. Maybe a right to bottle the integrity, but it’s something that is held by the person and when it’s infringed, the individual could go to court and seek abatement of the nuisance. I pick the pigs as one of the best known nuisance kinds of cases.

And in China there is litigation that is analogous to both of these. I think Professor Wang was talking about a paper mill. There it seemed like one of the remedies was abatement, not just money damages. And many of the other cases that have been discussed are compensation for the people that are harmed. The purpose of the compensation is to make the victims whole. The only people that can really bring that case are the people whose rights are infringed, who are trying to be made whole.

Well we had an earth shattering event and change in our environmental law predicated on Earth Day, where there was a huge demand for more responsiveness of our laws. And in particular prevention and restoration. Two kinds of remedies that were not available under the common law system. And after Earth Day you had, I think it was more than two-dozen laws passed and signed by then President Nixon, a little bit Ford. And they looked at different kinds of rights and remedies. So you had the needs to have discharge permits that would restrict pollution and they would get at some issues that were not attainable with the kind of compensation scheme.

For example, incremental contributions to the environmental damage by multiple actors, or prevention before the harm occurs, or restoration. You know, if they get, I have another slide I didn’t put here of, you know, the headlines about Lake Erie is dead. Well, you know, it goes to stop the pollution but also clean-up, which is something that you wouldn’t necessarily get if you’re just trying to make victims whole.

So as these new laws moved into these new areas, there were new rights. And then the courts started recognizing new rights and new interests that could give rise to standing. The key case, and here I don’t know if any of you have seen it, the Mineral King case. This is Mineral King. From the law books you may know it better as Sierra Club versus Morton.25 It was actually the first case that was started by the

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people that started my organization and it went to the Supreme Court and established our broadening of standing.

So here’s Mineral King, it’s in the Sierra Nevada National Forest, excuse me. And while Disney was going to build this huge mega project there of amusement park, hotels, huge amounts of traffic and it would fundamentally alter the character of this area. So Sierra Club challenged that decision on multiple different grounds. And it established two principles in the Supreme Court.

The first is injuries do not need to be personal or economic. And the court issues a very broad pronouncement that esthetic environmental and recreational interests can give rise to standing. The second was that organizations can sue. And it wasn’t a home run victory for Sierra Club in that case, because what Sierra Club wanted was the right to sue in its own right.

The right for an organization to speak for the trees, to be the representative of the environment. And what the Supreme Court said instead is Sierra Club could sue on behalf of its members. But it would have to prove some members were injured. That those members essentially could go to court on their own, but Sierra Club is going to go to court in a representational capacity. The lawsuit then also has to be germane to the organization’s interest and the individual members do not have to be necessary for the case or for the remedy. So for example you could never have a representational kind of case for compensation for damages because the individual members are essential.

So that brings me to my three questions that I want to pose. The first is that China, in looking at organizational standing, could deviate from the US model as some other countries have, and organizations could have standing to sue in their own right. So the first question is should environmental NGOs have standing to sue in their own right, to basically speak for the trees?

My first observation on that is that there would be advantages to an organization to be able to sue in their own right. My practice, or anyone who does what I do, we spend a tremendous amount of time and effort proving that individual members are harmed by the action that we’re trying to challenge. I once was interviewing a young lawyer who was fascinated with the issues and we were working on a standing case that was going to the Supreme Court. And he said, you know, I really don’t want to deal with those issues. I just want to get to the merits. And I said, maybe you should go somewhere else.

It is just a core piece of the work that you do of, you know, you’ve
documented the problem, you’ve got your experts lined up, you’ve figured out the law and then the organization has to figure out, OK which ones of our members go to this place or are exposed to this problem. And then they have to speak up. They have to provide evidence that they are injured. So if the concern is that individuals don’t want to step forward, because maybe there would be retaliation or it puts a burden on them, if an organization can sue in its own right then you insulate the individuals from having to basically bear the brunt of the burden or be exposed.

So in thinking about this issue, the reason we have membership standing is really grounded in Article III of the United States Constitution.

The Supreme Court has said Article III creates limited federal court jurisdiction to hear cases or controversies. And it has said that in order for there to be a real controversy you need to have a party that’s got a stake, that’s harmed, it’s adverse to bring it to the court and without that kind of individual harm there isn’t enough of a controversy.

Well obviously this doesn’t need to pertain to be exported to a country that has no similar constraints and doesn’t have that kind of case or controversy requirement. The second and I was actually was rereading the Christopher Stone piece “Should Trees have Standing?” that he wrote when the Mineral King case was being heard. And there actually is a lot of precedent for representative standing for people to represent others or objects. Like in guardianship cases for minors, in cases where there’s fiduciary. Even corporations are often in there as a trustee for the entity.

So there could be that kind of a model for NGOs to represent the environment. There could be all sorts of different questions. Which NGO, what are their duties, how do you make sure they are meeting those duties? And then I think the last caution that I put here is one that would be huge, which is if NGOs could sue on behalf of the environment that gives the government more power over who can sue. And the Chinese government already has a tremendous amount of power over registering NGOs, a potentially decertifying NGOs. So to raise the stakes around litigation would only enhance that power.

So my second question, if you look at the Mineral King case, the Supreme Court issued a broad pronouncement that all environmental, aesthetic, recreational injuries give rise to standing. And it was

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answered in a broad brush way. But the answer could be more incremental or more particular. And so I would encourage in looking at the issue of standing, not to look at it across the board for all injuries and all claims but to break it down. So for example one of the options is that the pollution victims who are suing for compensation or abatement could be suing instead for prevention.

And I was interested to see the, what is it, the Beijing Municipal Urban Planning Commission case. Where it seemed like it was just that kind of case where people were participating in an administrative law proceeding to challenge an approval, it sounded like it was an approval of that animal laboratory. Which is instead of seeking compensation after the fact, trying to prevent the harm. So it puts people who are clearly injured, clearly have a stake and have standing to seek the after the fact remedy going to court to seek prevention.

Another option is to look at different kinds of economic injury. It’s seen in evolution of our system, there’s a lot more acceptance of economic types of injuries before there was these aesthetic kinds of injury. While it seems that a lot of the cases in China are based on personal harm or a property kind of right, there could be other economic interests that could give rise to standing.

And let me give an example. Some of the cases in China have been kind of fish farms, or people who have had a right to basically grow fish and have a fish farm and have invested in it and then the fish have been killed. And so it’s analogous to a property kind of right. Well in many of our cases out in the Pacific Northwest on salmon issues, we represent fishing interests. Commercial fishing, recreational, subsistence fishing. They don’t have a property right, unless it’s an Indian tribe. It’s not a property right. It’s an interest, it’s an economic dependency, its a right to get a license if licenses are given out. But if there are no fish, then there’s no right. And so they have been in court suing to prevent harm. Dams that would cause extinction of fish runs, pollution that would wipe out runs or degradation of their habitat that would diminish the runs as well. So again it’s prevention but it’s a different kind of interest—economic, but not property right—not our traditional kinds of rights.

We’ve also represented ecotourism kinds of businesses. In the fishing context the people who sell the fishing gear or do the fly fishing tours, or the boats. And they all have an economic interest in helping fisheries. They don’t have a property right in it, but they will suffer economic loss if there are no fish to catch. We also have in some of our cases asserted property value interests that are a little unusual. For
example, somebody who lives near a national forest and has valued the access to the forest and the beautiful vistas, then trying to challenge a logging project that would basically create a deforested landscape. And the argument was that the property values would diminish because of that action.

So my last question is that standing should not be looked at as a monolithic concept. But instead the question should be: standing to do what? And that the different interests that are required to have standing varied depending on the claim asserted and the remedy that is sought. And sometimes also vary depending on who the defendant is, particularly government or non-government.

So in the classic cases in China, the individuals are the only ones that can sue for compensation for harm to their person or their property. On the very other end of the spectrum, if the right is the right of access to information that is available to all people, all citizens, then everybody has that right. And that pretty much is the principle in this country for any, like discharge reports or freedom of information act kind of rights. That’s pretty much a right everybody would have. For environmental impact statements it’s closer to that kind of access to information right.

The way our courts have dealt with it is anyone who would be impacted by the project, if it causes the environment harm would have standing to sue to compel preparation of an environmental impact statement or to challenge its inadequacy. And if you’re challenging a zoning decision like the animal laboratory case, I think the general rule is the zoning is there for the benefit of the other people within that zone I guess, if you will. And anyone that would be injured or harmed or affected by a different incompatible use would have standing to try to challenge that deviation from the zoning scheme. I’m kind of trying to go in order where it’s harder and harder to get at the end here.

In terms of permits, there we have citizen suits, which liberalize standing directly. But again the principle is if you are affected by the resource and there’s going to be pollution into that resource that’s enough to have standing. And the litigant does not need to show that this discharge is going to cause the harm. The theory is, the government decided that in the standards and the permit and the citizens should be able to enforce those standards. If the polluter wants to pollute more the answer is to go to change the permit or the standards, not to just violate the permit. And now we get to the harder kinds of cases.

And the last three that I have up here are government actions. I
think some of our most restrictive standing doctrine has been developed in cases challenging government actions. The one, so the first is an inadequate government permit. In that situation your classic kind of administrative licensing kind of case, an individual could have standing on a particular license, on a particular matter if it affects them. And actually the law in China is similar on administrative licenses. It’s just that the interests that are recognized there are more your personal property interests.

In this country long ago it was recognized that that’s not very fair to let the people who want less regulation to be in court but not the people that want more regulation. And so we recognize both kinds of harm to get in court. Justice Scalia might not agree with that, but that’s down the law that we have. But the two situations that are the hardest are challenging government policies, particularly broad policies and broad programs. And here the theory is that’s the prerogative of the political branches. And if you don’t like it elect someone else. And when you get to that point of challenging policies you’ve got to have a clear violation of statute, a clear abuse of process in order to be able to have a right. And to be able to get into court there are a lot of limits on how much you can prove that you’re impacted, and often you can’t prove it enough because it’s a broad kind of policy.

And then the last situation, you might be impacted, there might be a kind of standing showing, but it would be if the government was not enforcing laws. That’s almost an impossible case to bring. And there the theory is the government has prosecutorial discretion to decide when to enforce and that citizens don’t have the right to go reorient the priorities or the use of resources. So with this kind of illustration of the various kinds of claims I want to give you a flavor of how to look at standing. I think it’s important to break it down, so that you know what are the interests so who has to show what kind of interest in order to go to court to get a remedy. That while standing and the cause of action are distinct things they often do merge as you start to figure out if you can get into court to assert them.

But my, I guess my threshold proposition at the beginning that citizen enforcement is essential is reinforced when I went through and started to think what is the hardest claim to bring. And it is suing the government for not enforcing. And that brings me back and reinforces the point that I think it is essential to have citizen enforcement, to have an effective environmental regime.

[Applause]
AUDIENCE QUESTIONS

**Moderator**

Thank you for four excellent presentations. I feel as though there’s so much to discuss. But we’ll try to take two or three questions at least. So let’s open the floor to questions and please address them to individual speakers or generally.

**Audience**

This question can be for everybody; Professor Wang Canfa might be able to best address it. I’m wondering first is there a distinction between law and equity in the Chinese system similar to the Anglo-American traditions? And secondly if in the realm of the equity and injunctions in the US there’s, you know, we would use something like an economic balancing analysis, cost benefit analysis often times. I’m wondering if under the government with Communist ideology whether those sorts of economic considerations have the same kind of weight or whether there’s a more heavily rights based sort of rule.

**Professor Wang Canfa (translated)**

You raise a very good question. In China, when we decide cases, we first go to the law. If there are no specific provisions in the law, we will also look into equality and justice this type of concept order to make the make the most reasonable decision. However something with Chinese characteristics that in China if there is no law we will probably go into policy. That’s what we called government policy or the policy of the Chinese Communist Party. So that policy would be a sort of main guideline in terms of deciding cases when there’s no related law in the legislation.

Also, in some cases, if there is no specific law, a judge may have some discretion in his deliberation of the cases, but that’s not common. In law there is no requirement to do a cost benefit analysis when you deliberate a decision, however in fact when judges make their decisions they will also take economic factors into account.

One example is the case Professor Wang just mentioned, the Beijing Residence sued Urban Planning Commission to vacate the permit it has already issues to build animal laboratory. The reason why the residents could win that case is exactly because the laboratory has not yet been built. So if it is, if it has been built it’s very difficult for the residents to win the case. If, you know, those economic factors take into account. Another case there are also residents suing Beijing Urban
Planning Commission, but these residents lost the case because the building has already been built. So, when the judges deliberate the decision, it is just not consistent with the economic considerations. So, they decided not to vacate the permit and let the building continue. Therefore when judges are considering the decision they would take economic factors into account.

**Patti Goldman**

There’s one thing I just want to share because I know when I was first in China and there was this discussion of substance and procedure and I completely misunderstood what it meant. Because as an environmental lawyer I think I want a substantive victory because to me a substantive victory means they did the wrong thing and they can’t turn around and do it again. The law says: you may not do X. And a procedural victory means you get a remand from a process but you don’t know what the outcome is. And so I had this bias that I always want substance, but there was a wonderful presentation that Professor Wang Canfa’s group did that was the dean of the Shanghai Law School. And he was explaining what procedural means is, there’s law and there’s process and there’s evidence and the judge will go through and write a decision that applies the law to the facts, logically come to a result and explain it in a way that you can see what it is and it’s accountable. And a substantive result would be you win because I say so. And when you start thinking of it that way, I mean a lot of what Wang Canfa was saying in answer to your question is, a lot of the same factors come in that we would think of as equity. But there isn’t that distinction between law and equity and it isn’t limited to a remedy after there’s a violation. It kind of gets jumbled together in deciding if there’s a violation.

**Moderator**

I’m reminded of Professor Cohen’s comment earlier this morning about the form not mattering so much as the substance and the result.

**Professor Cohen**

I wanted to follow up Alex Wang’s point. That last spring the All China Lawyer’s Association issued a so called. That said in all mass cases defined when cases have ten or more litigants the lawyer is suppose to immediately report to the law enforcement authorities including the police, become an agent of the police of the government is being retained. It also precludes lawyers not to take part in mediation
of controversies involving mass cases. Now what is happening in practice? Has this so called guiding opinion affected his organization’s work?

**Professor Wang Canfa (translated)**

Actually the ink pad of these guidelines will be significant on Professor Wang’s center’s work. The main consideration for issuing such guidelines is to try to constrain mass action in order to maintain social stability. According to the new guideline, Alex Wang has just mentioned, if lawyer wanted to take mass action cases which means the case involved more than ten people, he has to report not only to his partners of the firm but also to the All China Lawyers Association so that just puts a lot of obstacles in terms of the procedures and processes.

Both Department of Justice and Supreme Court of China jointly issue a document to let the Trial Court, which is the lawyer’s court in China, to make hearings on those mass actions. Actually, according to the original law in China in the past, mass action cases usually have big influence so the most appropriate court to hear these cases should be the intermediate court in China. And, if the parties are not satisfied with the judgment, they can either appeal to the Supreme Court of each province or even appeal the Supreme Court of China. But things, according to the new rule only the lowest court, that’s the trial court in China to hear that type of case. This case will never have a chance to appeal to the Supreme Court of China. And the Supreme Court of each provinces also makes there own rules according to the document from the Supreme Court of China. And put more constraints on the procedures and process in order to initiate mass action.

Last year the Dean of the University School of Law and the Dean of the Peking University School of Law and also the former presidents for China University of Political Science and Law had a discussion to, regarding this rule. They are considering to ask the National People’s Congress to vacate the rule issued by the Supreme Court of China, which is illegal. And then the former president of China University of Political Science and Law said we should probably not go to the Supreme Court of China first. Let’s just go to, for example the (Shando) Province Supreme Court to set it’s own rule regarding the rule just now I mentioned it’s illegal instead of saying directly that the Supreme Court of China’s rule is illegal because of the political considerations. So you can see it’s really difficult to have rule of law in China at this point because even the court itself doesn’t follow the law. Thank you.
Moderator
How much time do we have? So we’ll take one last question.

Audience
I have a quick question. In doing the math. So with about a hundred victims that comes out to about fifty six thousand yen which is about eight thousand (8,000) US dollars. How much of that have you been paid in lawyer’s fee or have you ever been paid a lawyer’s fee? I mean the question is relevant because there’s such a, there’s an insignificant environmental law baring China at this point. Fewer attorneys in all of China probably are equivalent to the number of attorneys in California alone. And so to the extent that, I think I know what the answer is, to the extent that, you know, they have difficulty paying lawyers, I mean how can you ever have lawyers representing the clients?

Professor Wang Canfa (translated)
Professor Yang raises a very important question regarding attorney fee for environmental cases. Actually regarding the case Professor Yang just discussed there is a, there was an agreement between the lawyers and the plaintiff in this case saying that if the farmers won the case the lawyer would receive 5% of all the compensation as the attorney fee. However after those farmers received compensation they refused to pay the lawyers. But since Professor Wang’s center is a nonprofit organization, it’s not about money making. So he has already made effort to pre-warn those lawyers that there may be a chance the lawyers can’t receive any payment after litigating the cases.
Panelists: Dr. Irene Klaver\(^{27}\) & Marcia Mulkey\(^{28}\)

Friday, March 2, 2007

DR. IRENE KLAVER

Thank you for your generous introduction of our panel. Unfortunately, due to the weather, I will not be the last one to talk today. I had my spiel ready, invoking a traditional image of philosophy: Appropriately the philosopher gets the last word to bring sense and order to the events of the day, like the owl of Minerva who flies over Athens at dusk to reflect on what happened in the city of Athens. But the snow intervened and I have to depart earlier and leave it to the EPA, to Marcia, to close the day. I’m sure, it will make more sense.

What is a philosopher doing here you might wonder. I think it’s an excellent move of the \textit{Vermont Journal of Environmental Law} to invite one to this Symposium. Especially one from the University of North Texas, because we are not just a philosophy program, but an environmental philosophy program—the only one in the world with this focus. Just like you are not just a law school but an environmental law school. And just like you, we house the first and premier journal in the field: Environmental Ethics. The \textit{Journal} started in the 1970s and was one of the first to discuss Christopher Stone’s article, which discussed whether trees have standing, an idea that has been invoked a couple of times today.\(^{29}\)

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\(^{28}\) Director of the National Enforcement Training Institute, United States Environmental Protection Agency.

\(^{29}\) \textsc{Christopher Stone, Should Trees Have Standing? And Other Essays on Law, Morals and the Environment} (1971).
Why philosophy? Well, the strength of philosophy is making connections, something we desperately need in a globalizing world, especially dealing with environmental issues. We need to see how things are connected. One of my favorite philosophers, Ludwig Wittgenstein explained how understanding “consists in the very fact that we ‘see connections.’” This is a transformative process—it changes our interpretative frameworks. I want to start with connecting back to the beginning, the title and openings speech of the Symposium: “China in Transition: Environmental Challenges in the Far East.” As Professor Wang Canfa stated yesterday in his keynote address, the central government in China has implemented a comprehensive environmental law. Its deficiency, however, lies in enforcement. One of the major problems is the enforcement of public policy on the local level. Too often local governments pursue economic benefits over environmental concerns. Professor Wang Canfa emphasized public participation as one of the crucial ingredients for environmental protection. At this last session I want to zoom in again on the importance of public participation. It lies at the heart of the encompassing theme, “China in Transition: Environmental Challenges in the Far East.” Public participation forms a major challenge and embodies the potential for a major transition.

I want to begin with sketching certain tools to facilitate public participation. In order to do that I first want to thank the Journal for this magnificent symposium. I brought a gift for you—for the office of the Journal. It is the “Don’t Mess with Texas” cup. The gift is part of my strategy. Yes. Very well thought out, eh. That’s what we philosophers do. We’re not just thinking about Kant and Hegel. We are thinking about these kind of issues, like public participation through a slogan like “Don’t Mess with Texas.” Who of you is familiar with it? You all know, of course, that you should not mess with Texas, but do you also know the slogan? Yes? Good for you! Amazing, it reached all the way to the East Coast.

Well, rightfully so, it’s an extremely, cleverly constructed slogan of the Texas Department of Transportation. It started in 1986 as a tough talking litter prevention campaign, meant to educate Texans about the litter problem in their Lone Star State. This is of course a hard thing to pull off in a state like Texas. The campaign was featured widely on

television, radio, billboards, and involved local celebrities like Willie Nelson. You know Willie Nelson? Excellent! The campaign basically told people to keep their trash in their truck and off the road—no more burrito wrappers and beer bottles hurdling out of your window, and became wildly popular! It turned into its own product line with cups and caps, t-shirts, and bumper stickers. Of course all made in China.

The campaign was a huge success. 96% of the Texans came to know the slogan—and apparently 100% of a 2007 audience of lawyers in Vermont, too! Most importantly, the campaign actually succeeded in reducing 52% of the litter in the 1990s and it still holds up today. The slogan managed to capture the spirit of Texans themselves. A tough, independent, don’t tell me what to do, kind of folk. Sometimes I regret not being a real Texan, don’t you?

The strength of the slogan, “Don’t Mess with Texas”—and this leads to the point how it is crucial for thinking about methods of public participation—is that it connects very different, in a way, mutually exclusive, worlds or frames of minds. It speaks to the mentality of the independent cowboy, as well as to the world of environmental concern—both appealing to a sense of belonging to Texas. And in Texas those were two worlds that did not mix too well, until the slogan. It forms, what I call, a perfect boundary object between worlds that have little in common, inhabited by people who often despise each other. The crux, the bridging element, is the double meaning/function of the word “mess.” It facilitates transition, the moment and place where the two worlds can meet and work together, and crystallize into a circumstance, a technique of connecting—a concrete connection in a particular activity. Don’t tell a Texan what to do; don’t mess with him; mind your own business. But, also don’t touch his Lone Star State; don’t mess with it; don’t make a mess of it; keep it clean, keep it beautiful. In both cases, there is a convincing appeal to Texas pride.

Don’t Mess with Texas functions as a boundary object, an intermediate between heterogeneous groups. Philosophers Star and Griesemeier developed the term “boundary object” in the context of scientific fieldwork where diverse groups try to achieve common understanding or collaboration across disciplinary divides through “translation of each other’s perspectives.”31 The same applies to many other situations where people from widely different backgrounds have to find common ground.

The question is how to find something that binds people together despite their adversities and that creates a common cause that both of them can endorse without necessarily having to give up their own principles. A cowboy does not have to become an environmentalist and environmentalist does not have to become a redneck. But still they both can stand behind “Don’t Mess with Texas”. That’s the art, to find that connection.

Searching for such a boundary object around water issues, I develop the notion of a water basin mentality. The boundaries of a river are not only formed by its banks or even floodplains, but as much by its watershed or basin—the whole area of land that drains into a river. Only when one can make these connections—from what I call a water basin-mentality—can one understand that good water management is intrinsically related to good land management. One needs to understand how practices in place have effects downstream. A water basin mentality can function as a boundary object to connect people with mutually exclusive water interests and hence facilitate public participation. Where environmental philosophy is often “reduced” to environmental ethics, my focus is on exploring the cultural aspects of environmental thinking. I work together with scientists, policy makers, social scientists, and artists, to see how we can bring environmental issues on people’s agenda, within people’s public imagination, or awareness. A water-basin mentality is a public awareness that water is not just something that comes out of a faucet, but starts somewhere else, in a watershed. I see this awareness as crucial for sound environmental decision making.

In this context I started an initiative, called “River Cultures and Ecological Futures,” in collaboration with Mr. Natarajan Ishwaran, Director of UNESCO’s Division of Ecological and Earth Sciences in Paris. He is also the Secretary of the Man and the Biosphere (MAB) Program. In the initiative UNESCO Biosphere Reserves and linked landscapes of trans-boundary river basins are priority areas for focused interdisciplinary research. Goal is to develop a cultural component in transnational ecosystem based water management and to implement this component in water policy practices. Where in academia the new buzzword is ‘interdisciplinarity’, in water management it is ‘integrated water management.’ But what exactly is integrated boils usually down to hydrology, geology, and engineering. Lacking in the integration is a connection to the social, political, cultural aspects. That is what we focus on. It’s a wonderful project. I think this might be a really nice occasion to work together with the Vermont Law School. If there are
students who are interested in this project come and let me know. It will be good for your program, good for my program to have that exchange.

Back to China. Rivers are excellent vehicles for potential boundary objects, facilitating public participation, especially in contentious stakeholders meetings. Water in China is a huge issue of concern. Many regions of China, especially in the north where almost half of the population lives, are dealing with serious water shortages. Two thirds of China’s 600 cities are struggling with their water supply—aquifers are depleting rapidly, some cities are thinking about reuse—which we actually do in Denton, Texas—some are taking recourse to desalination plants, but turning seawater into drinking water is still an expensive because energy intensive business. Northern China has only 15% of the country’s water supply, but most of the people live there. You all know about the “South-to-North” transfer project one of the major mega-projects to transfer water from the Yangtze River to the Yellow River and other areas.

The Yangtze is one of the rivers we focus on in our “River Cultures and Ecological Futures” project. I want to mention another program related to this, a program at the University of Nijmegen in the Netherlands. I’m originally Dutch. It’s a Dutch twang you hear not a Texas twang, before you started wondering. I am starting a collaboration with Professor Toine Smits who’s the director of the Centre for Sustainable Management of Resources (CSMR). He has set up a fantastic Transboundary Water Management program, to create water managers who are capable of dealing with integrated water management in the broad sense. Also on an international level—it’s a European community funded project. There are students from the Netherlands, Germany, and Norway. And they are in the process of recruiting from China, Mexico, and the United States. Again I would love to include one of you if you are interested in this issue. It is a burgeoning field.

Professor Toine Smits’s is involved with the World Wildlife Fund in a fascinating project around the Yangtze River. It’s called the Yangtze Forum. It was inspired by international experience of the World Wildlife Fund and the Transboundary Water Management program involving problems of implementing integrated river basin management in China. Concepts as integrated river basin management are generally not well known in China. This is an ecosystem based approach of Chinese water management via bottom up analysis. For the Chinese society these kind of public participation processes are a
novel experiment. Provinces and ministries in China used to have a high degree of independence, and cooperation between the organizations is poor. Therefore, the China Counsel for International Cooperation and Development decided to launch a special task force around integrated river basin management. The objective of this task force was to deliver recommendations to premier Wen Jiabao for successful implementation of the integrated river basin management. One of the recommendations was to create a round table for all stakeholders in the Yangtze River basin, the so-called Yangtze Forum. In 2005 the provincial governance, key ministers from China’s water environment, forest, and agricultural sectors gathered for the first time to develop a common strategy and action plan for protection for this entire basin. The next Yangtze Forum is organized this April 2007.

What I’m hoping for is that there will be a water basin mentality created through these kind of projects, these kind of changes in interagency contexts together with public participation, together with an institutional changes on the level of education of engineering schools and water managers education, so that ultimately we can come towards a water basin mentality.

I conclude with a quote of Sandra Postel and Brian Richter from their book on river flows. According to them we need a “fundamental shift in how society uses, manages, and values fresh water—one that recognizes from the outset the importance of healthy ecosystems and humanity’s dependence on them.” And they continue by invoking Einstein that “you cannot solve a problem within the mindset that created it.” The mindset change they advocate sees human water economy as a subset of nature’s water economy and recognizes that human societies depend on healthy ecosystems.

To change a mindset we have to be very creative. One way to start is to initiate international exchange. That’s why this symposium is so timely. China and the United States need to know each other, to become more familiar with each other’s environmental issues, to try to understand each other. Understanding in a sense of connecting with each other a connection that leads to transitions and translations not just from Chinese to English and vice versa, but a translation that connects the local, global and regional through the mindset of public participation in a water basin mentality. Thank you.

Thank you. Well, I’m delighted to be here. I want to start by thanking Vermont Law School and VJEL. All the evidence is that the future of environmental law is in good hands. I plan to start with a little mention of our mutual past, Karin Sheldon. We were environmental lawyers together when there really wasn’t such a thing. I don’t know if you know that country song, “I was country when country wasn’t cool?” That’s sort of us in environmental law. I’ve enjoyed getting to know Tseming Yang more recently and he’s helped me at my efforts to act like an academic. And Pat Parenteau of your faculty and I have a common resume entry. So I’ve got multiple degrees of connection to Vermont Law School and it occurred to me thinking about that, that most environmental lawyers in America probably are no more than a degree or two of separation from some kind of connection with this law school. And that’s something for you all to be very proud of. I also have to tell you that although EPA supports my attendance, and as far as I know I don’t have anything to say that they wouldn’t like me to say, these are my views and not theirs or the U.S. government’s.

And finally, I’ll try not to disappoint those of you who stuck with us and see if I have anything to add—I will say I was heartened and encouraged in most ways to learn that much of what I had to say, somebody has said at least a little snippet of by now. So, that means at least that I’ve figured out China a little better than I feared. And it also means that we are collectively beginning to put together what we all know in a way that helps us have a more meaningful understanding of what’s going on. You all know China’s amazing economic growth story—almost 10% a year or about 10% a year—you know that means their economy doubles every, you do the math, six or seven years. Think about that. I mean it’s just astounding, and add to that hurdling into international markets, hosting the 2008 Olympics.

This is an era of amazing developments in China. And with the time I have I couldn’t even give a basic look at Chinese environmental problems. Fortunately, everybody has a few good nuggets that they’ve shared with you. And each one of them is a gasper if you stop and think about it before it runs past you. Just to add a couple more, almost half of China’s 661 cities—and China has no small cities—do not have sewage treatment at all. Think about that. Raw sewage is going into streams in 40% or so of China’s cities. One-fourth or more of the population does not have drinkable water. And by that I don’t mean that it’s a good idea for you to drink bottled water. I mean it is not
drinkable. It causes defined immediate health problems even to people who are used to it. Virtually every river is subject to massive dam projects. Hydroelectric adoption is fast as it can be. Desertification is moving fast. And since, although it’s relevant to water pollution, it doesn’t scream relevance, we won’t even talk about coal developments. But you heard a little bit about them.

The use of coal, especially high sulfur coal at the rate it’s occurring, is astounding. Just one story is the Laza River where ten times the permitted levels of lead and heavy metals are in the water. In that area we have subsistence farming. The farmers are told, “you can’t eat your food.” What are they going to eat? And of course they have therefore continued to irrigate and eat. And sometimes the solutions are almost comic. You’ve all heard the story about the mountain sprayed green? In time for the Olympics. That takes care of strip mining impacts.

The Yellow River is losing about 40% of its fish population. What is the cure? Dump six million fish a year in there. Think about it. Here is a quote from Pan Yue, vice minister of SEPA, in a written editorial, “In just thirty years China has made economic advances that took western countries a century to accomplish.” Proud man, rightly so. He went on to say, “it is equally true that environmental problems suffered by western countries have been visited upon China within just three decades.” Acknowledging the underbelly of this incredible achievement—and that’s a high level official. That’s one of the reasons for encouragement.

The environment seems to be one of those topics where there is at least somewhat more openness to frankness by government officials, to public criticism, to allowing NGOs to actually be meaningful players. I like to think of it as the stalking horse for democratization across other topics. There’s something about environment that’s either less threatening or more daunting or whatever, that has made it a pretty good example, not withstanding some disturbing things we heard here, of the openness movement.

But the problems are so vast. It will take a massive amount of money, a massive amount of institutional reform, a massive amount of long-term commitment, and more than a little luck. So, Professor Cohen, I don’t know that I’m an optimist. But I am heartened that more and more people throughout the world and especially all those incredibly capable people in China are beginning to think hard about it, and us among them. We get a little credit for how we have spent our time here.

And we’ve heard most of what I have to say. Of course you can’t
talk about government in China without talking about the Communist Party. But the main impression I wanted to leave you with, we heard first thing this morning, which is, in our conception, a centrally planned and operated and commanded government. I don’t think so. Yes, if the issue’s important enough. Environment as it relates to the Olympics, for example, is being very centrally commanded and controlled. But, you still have to understand the Communist Party and its impact. We’re not talking just about a central committee of the Communist Party, but rather a party that operates throughout the system. And in fact environmental protection in China is highly, dysfunctionally decentralized. And that’s a large part of what I want to leave you with today, is some feel for the particulars of that in the environmental context.

The National People’s Congress Committee on Natural Resources and Environmental Protection together with the State Council are sort of the on-going legislative and senior level executive branch, if you will, oversight of the national government’s role. And the national government does certainly more than the federal government had done here in the United States before 1970. They’re past that. There is some setting of meaningful national standards, directions, and so forth.

But by and large the operational implementation is left to SEPA, the State Environmental Protection Administration, which is not unlike EPA. It’s sort of sub-cabinet and not loved by too many, and doesn’t really have too much of its own constituency to take care of it, except that the people understand its importance. And that takes you a long way, my long government career would inform me.

But there are about 300 people working in SEPA. Now, the Vermont Department of the Environment may not have quite 300 people. I don’t know, but I guarantee you that there is no good size state that doesn’t have a whole lot more than that in the United States. EPA has about 18,000 just by comparison. China has what, four times as many people, six times as many people as we have? Having said that, it’s worth noting that there are about 60,000 professionals in the Environmental Protection Bureaus. So, I don’t want to leave you with the impression that there is nobody working on the government side in environment in China.

SEPA is largely a direction setting and policy articulating entity. That’s all they can be. They do some science. They do some public information campaigns. And they make an effort to oversee the environmental protection bureaus. But it’s a losing effort under their current infrastructure and capacities. The commissions of
environmental protection, you heard a little bit about, they’re the so-called planning commissions. I won’t say much about them. But it was cool to hear that they can be sued successfully. Another thing you learn in a long career in government is that sometimes it’s good to be able to be sued successfully. It enhances government—materially.

But mainly I wanted to talk about the environmental protection bureaus at some length. Understanding them is all about understanding the governmental infrastructure in China. Their relationship to the central government is indirect. There’s no direct reporting relationship to SEPA. There’s little or no money coming from SEPA to them. Their relationship to the local government, whatever it may be, provincial EPB or a city EPB, but whichever you are, you are part of the governmental entity where you’re involved. Your money comes from them, your direct reporting chain comes from them, and your fundamental sense of priorities comes from them. And among other things, the heads of all these governmental units are really fixated on results, economic results. And so you’re very much subject to that driver. And you internalize those values as part of that entity.

But the EPBs pretty much—this is that board chart, you can look at it, but we won’t spend any time on it—pretty much are charged with everything, almost everything that matters. EPBs are charged with applying national and provincial law, and that doesn’t just mean enforcing it. It usually means fleshing it out, putting the meat on the bones. It means putting any of the meaningful requirements that implement the larger more hortatory, more general national standards. Anything that is within their jurisdiction, they’re free to make law. And they often make law inconsistent with these national standards.

So, you have a lot of locally made law. EPBs do all the facility specific work, the permitting, and the environmental impact assessments; all the things that dictate the actual applicable terms for individual facilities or projects. They handle complaints. They’re intimately intertwined with the fee structure, including the building permit fees as well as fees to pollute. There is essentially a license to pollute as well as penalties of the more conventional type. And they have access to and often control all the compliance monitoring. So, they are where the rubber meets the road.

Now, there is some directional change underway. This slide is actually a list of recommendations that a task force put together and recommended to go into the eleventh five-year plan. But you will see that it almost all had to do with addressing this problem I’ve just described by giving SEPA more vision, visibility; by doing something
about the EPBs, about where they get their money, about how they’re controlled, about to whom they report, and thinking about the budget differently. It also involved whether their monies all come from the local level and the whole approach about how penalties are used. This has to do with whether they are just income for EPBs therefore maintained at a level so that polluters will keep paying them or whether they are more a tool to accomplish some other things.

Some of this will be adopted. SEPA is clearly moving to regional offices, where they have to have some enforcement, at least oversight capacity. So, some of these kind of reforms will be adopted, but the bolder reforms like linking success at the provincial level to a green GDP instead of mere GDP growth has not yet gotten attraction. In fact, it was expressly rejected.

All you law students are familiar I trust with that not yet over period in our history where there’s this huge debate about the role of the federal government versus the U.S. states—the great federalism debate. And depending on who you talk to and which side of the political spectrum they’re on or what kind of academic career they’ve built for themselves or whatever, you can hear very different takes on this whole question of what ought to be the roles of the central government, what ought to be the roles of the state governments.

You don’t hear a lot of argument for much environmental protection responsibility other than solid waste at more localized levels. But I want to remind us a little bit of that because it’s so salutary for our thinking about this Chinese challenge.

Do you want, a national floor? What are the drivers for having at least the minimum protection level be consistent and established at a national level? Well, one of the first rationales is the transboundary nature of pollution. Water, of course, is the perfect example of that although it’s not the only kind of pollution that moves across jurisdictional lines. Pollution doesn’t quite know how to stop at the border, as we all know. The whole issue of the race to the bottom is whether jurisdictions will compete to be pollution havens. There’s a general sense that they will. That’s debated. And I’m less convinced than I once was that it’s automatic that jurisdictions will compete to be pollution havens.

As a child of the south I had my doubts about states on anything when I was growing up. But these days sometimes I think the states are going to be the saviors of us all. In any event, the notion is that they might compete, and it doesn’t take more than one or two, to destabilize the whole confidence in the notion of a national floor. And in any
event, a level playing field is generally a good thing.

One of the things that’s fascinated me in my career is the arc of industry point of view on this issue of national versus state standards. When I was young all of industry lined up with the devolution of power. These days they want federal preemption. And I don’t think it’s just because they think they have a hospitable federal government right now. I think it really is they’ve come to learn that if you’re gonna operate throughout the system, it’s just healthier to have a common set of standards.

There are issues of political will that are very different depending on at what level of government you operate. Not exclusive of corruption, small corruption is easier to pull off and sustain and keep hidden at lower levels, but far more significant to political will are issues relating to priorities, interests. It’s very, very difficult for even a United States state government to have the strength to take on a truly major economic player in the state and certainly hard for smaller units of government where the stakes are so much greater. There are issues of sources of influences as I’ve said. They’re just different at different levels of government. Not in any improper way, just in a realistic way.

And finally environmental problems are fraught with complexity. They are scientifically difficult. They require, look, I mean we didn’t get it perfect. But can you imagine tackling air pollution without all the kinds of tools we have in the Clean Air Act? And can you imagine simplifying it in any useful way? These are complicated legal problems. They’re complicated technically. They’re complicated from a science point of view, and it just is harder to do the less capacity you have.

So, all of that sort of taken together is the notion of why you want some kind of national floor. Economies of scale are pretty obvious. Generally, although not always, it’s more efficient if you do things at the larger scale. It relates heavily to this notion of capacity. How do you maintain the kind of scientific expertise you have to have in fifty U.S. states? And there’s comparable kinds of questions that relate to China of course. It has led to our sort of favorite solution, cooperative federalism. I want to talk about that just a little bit in my solutions discussion. Which is basically a way of having your cake and eating it too, of having what is offered by centralization, together with some of the real and material advantages that come from governing at a level closer to the people.

Here’s a quick side story. I was fortunate enough to do some work in central Europe shortly after the end of the Soviet Regime, and I was
interested in what my colleagues from government had to say about things. They didn’t trust the press at all. That was fascinating. You would have thought of the free press as liberators, but almost equally fascinating was that there was a trust only in local government in those areas because their experience was all of excessive centralized control, incompetent centralized control, and authoritarian. I don’t think you’ll run into that issue in the same way in China because it isn’t the same dynamic. But it’s sort of indicative that what you trust and what you believe in is a function of what you’ve experienced and what has worked where you have been.

Finally, one of the big arguments for why you want variability is that states and others can be laboratories of creativity. And this is very real. You need only look at climate change regulatory initiatives to see that but for the U.S. states we would have no regulatory action.

Another favorite story of mine is that I understand the State Department when it attends the Climate Change Convention, to which we are a party as opposed to Kyoto. We’re required to say what progress we’re making on greenhouse gas change. And so our State Department talks about all the things the U.S. states are doing, very pride-fully in that forum.

So, it is great to have the kind of initiative that comes from variability. And China has such differences across it that the opportunity for some local areas to take the lead is very welcome. The Beijing Olympics is an opportunity to set a model and it’s being used that way. And ABA and NRDC, the World Bank, the World Wildlife Fund, you’ve heard a lot about their projects. A lot of those peel off one EPB or one community and start an experiment of public participation and so forth. So, you want to preserve that.

So, I guess it’s no surprise for an EPA person that my recommendations do include expanding the central government role. I definitely think that China needs to empower the national level of government in the area of environment considerably, but you want to preserve all those 60,000 professionals that are in EPBs now. You want to engage them. You want to take advantage of what they bring to the table. You need energy and you need leadership at these lower levels of government. You need to find some way to enhance that to get them on a better page. Maybe we need a philosopher or several to get us there. You want to embrace and design a system that will be science based, so you don’t want public participation literally run amuck. You have got to have some, you know, some hard science in there.
You also want one that will be a rule of law, not individuals. I didn’t fully understand all that term meant until I began understanding China. And it’s literally the case that a mayor or whatever can defacto decide what the law is. And we heard stories about that in the judiciary—it’s just hard for us to conceive of. I mean we know that there are things at the margins that feel a little bit like that to us and we’re outraged by them, but in general we so comfortably expect the rule of law over the rule of any man or woman. And you want therefore the advantage of dual, shared, and joint responsibility for the environment. You want a mix of national and local standards but the local shouldn’t be able to undermine the national.

Is this sounding a little bit like the U.S. system? Maybe too much. You want to make some centralized funding sources. We do that too. The federal share has declined, but it’s still enough to make a difference and impact in the behavior of states. You want both general oversight—oversight of the quality of like an EPB program or a provincial program and you want for some, facility specific oversight—oversight of some individual permits. And my experience tells you that at least when it comes to enforcement, it’s healthiest if both levels of government have the capacity to act. You don’t want to limit your enforcement capacity to the national government. Only the biggest cases will ever get brought. But you do want some relatively easy way to fill the gaps left. And it’s not easy to just say we’re gonna have to declare you incompetent systemically in order to do that. Those of you who know our statutes very well recognize that they all have some version of a mix of this with little twists that are different depending on the statute, but they basically involved this kind of partnered multi-level, in some ways arguably duplicative approach.

And so I think that if China can find ways, and I think it’s beginning to buy into at least this enhanced central government role. And it almost can’t avoid preserving the local government role. It’s just too endemic to its system. So it will probably wind up okay. So I will wind up, because of my current job, by touting the role of capacity building, training, information exchange, expertise exchanges. And there’s a place for all of us in that.

**Moderator**

Thank you very much.

**Marcia Mulkey**

Thank you. It was great fun to be here.
AUDIENCE QUESTIONS

Moderator
Oh, thank you Marcia, very much. Any questions for her? Oh, my. Professor Cohen.

Professor Cohen
You reinforced the point I tried to make this morning, of the irony of talking about a Communist totalitarian government that for reform purposes needs to strengthen the central government.

Marcia Mulkey
I thought it was so cool when you said that because I had that insight. And I thought, wow, I had this insight with dabbling in China and here’s somebody who really knows and sees that.

Professor Cohen
If you look at the Supreme Court’s recent five-year plan it’s very similar to this. They’re trying to reduce local authority, enhance the central authority, promote the budget decision making, promote the appointment personnel decision making to get away from this local control. China needs to have a stronger central government. It runs contrary to our initial political view of what China really needs is more experimentation, more federalism type of grandiose laboratories and experimentation. You mentioned we should be weakening the Communist Party, but actually experience suggests in the circumstances in which they find themselves, China would be better off with a stronger more responsible central government.

Marcia Mulkey
Well, I’ve come to that conclusion without anywhere near the depth of experience you’ve had with it. But it seems to me, and I may be wrong about this, that it’s partly because the Communist Party itself in China is not as highly centralized, I mean that the party infrastructure is sort of decentralized too in its own way. But anyway, I must say that my ego was soaring as soon as you said that this morning ‘cause that’s my big insight.

Audience
And it’s a question for both our speaker and for Jerry Cohen. To what extent does the Communist Party have to struggle with it’s loss of
authority? That is its own sense of credibility among Chinese people. As we’re looking at bolstering authority they’re really saddled with the perception that they’re corrupt and that they’re just not going to be taken seriously. How do you deal with that issue as well?

**Professor Cohen**

The party has seventy-one million members. The party is losing the scope of its powers, shrinking gradually. The party’s moral is sagging. Its sense of popular legitimacy is declining. One fascinating area where they’re trying to improve this is the party is importing into it’s own processes for disciplining its own members relative sanctions. They’re importing initial ideals. Before you kick me out of the party I have a right to know what I did wrong. You must produce evidence. I have a right to know. I have a right to have another party member help me defend myself. I have to have a hearing. If I lose the hearing I have a right. All these ideas that are western due process. Judicial ideals that have not yet been implemented well in the judiciary of China itself are already being prescribed and to some extent are beginning to be practiced by the Communist Party in order to stand more legitimacy in the eyes of their own members. I’ve written about this briefly in the talk I gave to the Congressional Executive Commission on China. It was published in *NYU Journal of International Law and Politics* last year.33 It’s one of the most interesting developments in law in China involving areas of the party that isn’t formally involved. Good question.

**Audience**

Actually I have a two-part question. I’m going to direct mine to Jerry.

**Marcia Mulkey**

Maybe we should just bring Jerry [Professor Cohen] up.

**Audience**

It’s all about centralization and centralized power. I guess the first

33. See Jerome A. Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead for China*, 37 N.Y.U. J. INT’L L & POL. 423, 435–36 (2005) (explaining that the Communist Party Charter recognizes Western notions of due process, including notice and the right to be heard, but such provisions have not been well enforced. In recent years, however, local Party Discipline and Inspection Commissions have taken steps to begin resolving this lack of implementation.).
part of the question; I’ve actually been dying to ask these questions. Somebody think about this stupid question. But maybe, I’m just wondering about your comment. One of the issues in the central government is that it’s made up of individuals who at the same time are occupying positions with the state or the central government also occupy positions out in the provinces, right? I mean they have separate interfaces of power. And I’m curious about those influences, I mean the level of centralization that you can possibly expect from China.

Marcia Mulkey
Well, before Jerry answers with some knowledge of China, let me observe that that’s also true of the U.S. system, and that almost everybody who’s engaged in the national government has some sort of prior life. It’s not unusual that it be with a U.S. state or a city government. It might be industry or regulated community. And there is, in my experience, a pretty rapid sort of changing of hats that where you sit is what you see and so forth. On the other hand, there’s a lot of value added from having that experience. So at least in the U.S. system I don’t think that’s fatal. In fact, it might be an asset. But maybe that’s not relevant to the—

Professor Tseming Yang
Right. The governor of Fujian Province is a member of the state council.

Marcia Mulkey
But that’s different. I mean that’s sort of the appointment of people. That sort of goes to the rule of people not of law question.

Professor Cohen
But everybody is. [Some people having already been Wong Dong whatever or Mayor of Shanghai becomes central full-time apparagics defending standing under the Polit Bureau. But others as you say different areas in China. They all come together. And they all have to be bargained with. A consensus has to be forged.

Marcia Mulkey
Absolutely.

Professor Cohen
They offer a lot of resistance.
Marcia Mulkey

Plus these people moved, you know, they move with the party which sort of decides where they get to go. I thought this, the fellow who had been head of SEPA who I met, so I’m embarrassed that I can’t remember his name. Actually, I was pretty impressed by him. He’d been there for a long time. But he was pretty outspoken. I think he’d shown some real leadership. I thought it was somewhat ironic that he sort of took the fall for that mistake. And it is fascinating to hear that he so quickly was rehabilitated by the party, which may mean that he was regarded as not having been the source of that.

Professor Cohen

Efficient holding between those who represent the promises as it were, and those who represent the center. Bargaining is also among those who represent the center. The former, the present Minister of Public Security, a very powerful person, who at the next meeting of the full party, the elevated, the head of the national political party group used to be the governor of Central. Now, although he’s the center person now, loyal to the center, he would like to build up the control of the Ministry of Public Security over all the provincial police organizations. But he also is in opposition to the Ministry of Justice and the Supreme Court. And they’re not represented in the. He’s more powerful; he’s more resourceful, but there are other people in the Polit Bureau who take account of even though they all have central government hats as well as party hats. So it’s really quite.
laws. It has expanded the nation’s enforcement capacity beyond governmental officials, who lack the resources or the political will to proceed, by empowering those most impacted by the pollution to take action to prevent the harm.
PROMOTING AND STRENGTHENING PUBLIC PARTICIPATION IN CHINA’S ENVIRONMENTAL IMPACT ASSESSMENT PROCESS: COMPARING CHINA’S EIA LAW AND U.S. NEPA

Jesse L. Moorman* and Zhang Ge**

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† Special thanks to the Lingnan Foundation for making this collaboration possible, and to Professor Tseming Yang, of Vermont Law School, and Professor Li Zhiping, of Zhongshan University, for their guidance and encouragement, xie xie nin [Thank you].
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). 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. 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) 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. Subsequently, on February 22, 2006, SEPA released provisional guidelines (SEPA Guidelines) after reviewing comments received on the Draft Regulations. Thus, it is clear

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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{11}


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


\textsuperscript{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).

\textsuperscript{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). 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. Broadly stated, EIA is an attempt to

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


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.\textsuperscript{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.\textsuperscript{15} Additionally, the prediction and prevention of potential environmental harm is often a least-cost alternative.\textsuperscript{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

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

\textsuperscript{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”).

\textsuperscript{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. 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. Moreover, logic dictates that the substantive quality of decisions greatly improves when the people affected by the decisions participate in making them. 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. Promoting public participation fosters transparency and utilizes a wide base of opinions to strengthen the decisions ultimately made and instill public trust in institutions. 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.

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. 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. 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. Heralded as the preeminent U.S. environmental law, often a good indicator of potentially litigious issues.

23. Id. at 14.


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.”

To achieve its stated purposes, NEPA requires all “major Federal actions significantly affecting the quality of the human environment” to undergo EIA. In other words, all federal agencies must follow the procedures outlined in NEPA before they carry out an environmentally significant proposed action or plan. The most prominent component of the EIA process under NEPA is the requirement that agencies prepare a “detailed statement” in anticipation of significant decisions. 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.

NEPA emphasizes process rather than the substantive outcome of the impact assessment. 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

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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).


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).


consequences of a proposal before approving an action or plan. 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. 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.” The breadth of NEPA’s mandate—its applicability to all federal agencies—makes it unique among U.S. environmental laws; nevertheless, the general EIA process promulgated by NEPA has become a globally recognized approach.

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. 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.” 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. 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. MARSH, supra note 27, at 2.
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).
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

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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 Envtl. Quality, General Data for EISs Filed 1970 to 2004, available at http://ceq.eh.doc.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 process to determine whether or not the proposed action requires the preparation of an EIS. 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.

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, an agency must prepare an Environmental Assessment (EA) to determine whether or not the proposed project requires the preparation of a more comprehensive EIS. Accordingly, depending on the outcome of the EA, it may be the first step of the NEPA process or, in some cases, the last.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Federal Register}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{59} The CEQ regulations stress that scoping should be “an early and open process,”\textsuperscript{60} and occasionally may occur concurrently with the preparation of an EA.\textsuperscript{61} The scoping process operates to provide further notification of the proposed action to interested persons and agencies.\textsuperscript{62} Additionally, scoping is an opportune moment for agencies to set time limits for the entire NEPA process.\textsuperscript{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.\textsuperscript{64}

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{56} Id. § 1506.6(f).

\textsuperscript{57} Id. §§ 1501.7, 1508.22; BREGMAN, supra note 16, at 284.

\textsuperscript{58} 40 C.F.R. § 1508.22.

\textsuperscript{59} 40 C.F.R §§ 1500.5, 1501.7, 1508.25 (2006).

\textsuperscript{60} 40 C.F.R. § 1501.7 (2006).

\textsuperscript{61} Id. § 1501.7(b)(4).

\textsuperscript{62} Id. §§ 1501.7(a)(1); YOST, supra note 33, at 13.

\textsuperscript{63} 40 C.F.R. §§ 1501.7(b)(2), 1501.8 (2006).

\textsuperscript{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

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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(e). 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. 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.”

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.”

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. Although section 101(a) alludes to government cooperation with “concerned public and private organizations” and section 102(c) requires public disclosure of EISs, 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. In 1979, most of the principles established by case law were incorporated in the CEQ regulations. These regulations “are by far the most important source of law governing public participation under NEPA,” providing extensive, detailed guidelines for public participation. 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.”

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.” 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.

CEQ regulations providing for notice and disclosure of EIA documents, public hearings, and commenting pave the avenues for public involvement in the NEPA process. In general, agencies are required to “[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents.” In all instances, notice must be mailed to anyone requesting it. 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.” 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.

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. 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. 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 FONSIs).
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, FONSIs, 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 FONSIs, 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 FONSIs.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 FONSIs 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 FONSIs 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).
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. Yan et al., supra note 2, at 545.
102. Id. at 546. The EIA was conducted for a copper mine. Id.
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.

designing, constructing, and planning production. 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. 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.

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. 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.

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.” 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 Yan 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. Yan 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).
110. Yan 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{115}

Notwithstanding the different labels, the same basic environmental assessment procedures apply to both project- and plan-based EIA in China.\textsuperscript{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.


\textsuperscript{112} Wenger et al., supra note 103, at 430; see supra note 109 and accompanying text.


\textsuperscript{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.\textsuperscript{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.\textsuperscript{118}

The EIA Law leaves largely intact the pre-existing three categories of EIA documentation requirements for construction projects as established by the OEMCP.\textsuperscript{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).\textsuperscript{120} Projects having a “light potential environmental impact” require an environmental impact report form (EIF).\textsuperscript{121} Finally, for projects having a “very small environmental impact,” developers need only fill out and submit an environmental impact registration form (EIRF).\textsuperscript{122} There is no impact assessment necessary where an EIRF is all that is required for the project.\textsuperscript{123} Collectively, these are referred to as “EIA documents.”\textsuperscript{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.\textsuperscript{125} SEPA administers the

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\textsuperscript{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. \textit{Id.} at 431.

\textsuperscript{118} \textit{Id.} at 437.


\textsuperscript{121} \textit{Id.} art. 16(ii).

\textsuperscript{122} \textit{Id.} art. 16(iii).

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} art. 16.

licensing system and maintains a list of certified organizations.\footnote{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/200210/2002102884000.htm (P.R.C.).} 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.\footnote{Id.}

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.\footnote{C.f. id. art. 16(i)–(iii).} 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.\footnote{Id. art. 17.}

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.\footnote{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).}

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.”\footnote{Id. art. 16(ii).} 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.\footnote{Id. art. 17.} Notably, however, EIA is not necessary for projects that require an EIRF; it is simply a form to be “filled
in and submitted. 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. 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). SEPA is charged with the overall responsibility for coordination and oversight of EIA at the national level. Additionally, environmental protection bureaus (EPBs) conduct environmental protection operations at the provincial, county, and municipal levels consistent with national laws.

Approval of EIA documents is divided between SEPA and EPBs at the provincial, county, and municipal levels. 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). 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. Yan Wang et al., supra note 2, at 551.
136. Id.
137. Id.
138. Yan Wang et al., supra note 2, at 553.
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. Yan 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.
law/law/200210/20021028_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 chose 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

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148. Id.
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).
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

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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).


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”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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\textsuperscript{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).
\textsuperscript{158.} Id. art. 6.
\textsuperscript{159.} Id.
\textsuperscript{160.} Id. art. 7.
\textsuperscript{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.
\textsuperscript{162.} See SEPA Guidelines art. 7 (outlining the contents of the public notice).
\textsuperscript{163.} Id. art. 9.
\textsuperscript{164.} Id. art. 13.
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it is filed for approval. 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. 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. Ensuring greater public access to information, participation in environmental decision-making, and access to justice are keys to maximizing EIA Law effectiveness.

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.
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 FONSIs 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

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. 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. 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.

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. Additional procedures that provide more particular time

ed., 2000)


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

179. Id.
expenses.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{184} By opening the door for public participation in the EIA

\textsuperscript{180} Id. at 379.


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

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.

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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 China187

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
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
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.
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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.

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.

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 ____________.
Abstract

China is facing rapid deterioration of the rural environment. This is a grim problem, which causes great damage to peasants’ health and property; increases poverty; widens the gap between the rich and the poor; and seriously hurts the relationship between humans and nature. All of these effects negatively impact a harmonious, stable society and impede sustainable development. Through social surveys this article analyzes how to protect peasants’ environmental benefits against the special backdrop of social transformation.

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INTRODUCTION

Since China’s “Reform and Opening-Up Policy” was launched by Deng Xiaoping more than twenty years ago, urbanization and industrialization in China has rapidly continued. Unfortunately, a significant growth of environmental problems has accompanied implementation of this policy. Over the past ten years, heavy pollution and environmental damage are now increasingly found in rural, rather than urban, regions. In the course of industrial upgrades and environmental improvements, outdated and polluting industrial projects and facilities are frequently moved from cities to rural, and largely unpolluted, regions. These movements are based on the rationale that such rural areas are still able to absorb large quantities of wastes. In turn, rural regions have emphasized economic development and

† The translation of all Chinese materials are the author’s, as is the responsibility for any inaccuracy in the translation. This article follows the Chinese practice of placing the family name before the given name. Therefore all sources cited in short form use the author’s family name. The original Chinese text for most laws and their implementing regulations cited herein can be found on the Law Info China database located at http://www.lawinfochina.com. Due to confidentiality concerns the interviews in this article remain anonymous. The author has this information on file and can be contacted for further inquiry. The Vermont Journal of Environmental Law primarily publishes pieces focused on legal and policy analysis. This article is different because it is based on an extensive social science survey conducted in the Guangdong Province of China. The Vermont Journal of Environmental Law chose to publish this piece because of its critical insight into the state of mind of the citizens of China regarding their environmental laws and regulations.

3. Id.
job creation in order to alleviate rural poverty.\textsuperscript{4} The result has been an explosion of rural businesses and family factories equipped with old technologies that usually lack pollution control features.\textsuperscript{5} In some circumstances, sewage from one business can pollute a whole river or destroy large tracts of land.

Rural environmental degradation is also exacerbated by the poor land management practices of peasant farmers. Pesticides are frequently applied in excessive quantities, farm animals are raised in unsustainably high numbers, and waste is either poorly-managed or simply disposed of in rivers and on land. Even though peasant farmers benefit from such unsustainable land use practices, ultimately environmental degradation worsens their living conditions, sometimes even forcing them back into poverty.\textsuperscript{6}

Peasant farmers in China rank not only among the poorest social group, they are also the least aware of their environmental rights and remedies.\textsuperscript{7} Without special efforts to provide relief, rural environmental conditions will continue to deteriorate. Such conditions are also likely to widen the existing gap between rural and urban living standards, spawning new social problems and harming society as a whole. Finding solutions to rural environmental problems is therefore an urgent priority and requires an analysis of the unique circumstances of the rural countryside and the social conditions of peasant farmers, which shape and limit available environmental rights and remedies.

This article focuses on the situation of peasant farmers in Guangdong Province, which has been at the forefront of economic development under the Reform and Opening-Up Policy. Through a series of surveys conducted between July and October 2006, the students of the Environmental Law Clinic at Sun Yat-sen University Law School studied the awareness of peasant farmers of their environmental rights and their ability to protect those rights.

The survey methodology consisted of questionnaires left with


\textsuperscript{5} Pan, supra note 2.

\textsuperscript{6} See Peter K. Yu, \textit{China and the WTO: Progress, Perils, and Prospects}, 17 COLUM. J. ASIAN L. 1, 28 (2003) (stating that with or without the WTO, China’s government cannot maintain a balanced society, and the environment is deteriorating as a result).

\textsuperscript{7} KEVIN J. O’BRIEN & LIANJIANG LI, RIGHTFUL RESISTANCE IN RURAL CHINA 28 (2006) ("[P]olicies that instruct local officials to respect villagers’ lawful rights and interests are typically hot in the center, warm in the provinces, lukewarm in the cities, cool in the counties, cold in the townships, and frozen in the villages.") (quotation omitted); see also Huang Xisheng & Guang Hui, \textit{On the Ecological Compensation for the Environmentally Weak Group}, 2 ENV’T. & SUSTAINABLE DEV. 23 (2006).
households, as well as some follow-up meetings with some respondents to clarify answers and collect survey responses. The surveys covered the cities of GuangZhou, ShenZhen, ZhongShan, YangJiang, FoShan, DongGuan, ChaoZhou, JieYang, ShanTou, XingNing, HeYuan, and ShaoGuan, as well as other areas. Survey areas were chosen to provide a broad and representative cross-section of the Guangdong provincial area.

Some of the locations are well-developed urban places located at the center of the Pearl River Delta, like GuangZhou, ShenZen, ZhongShan, and DongGuan. Others are less developed cities in the eastern and western parts of Guangdong, as well as in the mountainous regions, such as the towns of XingNing, HeYuan, ShaoGuan, ChaoZhou, JieYang, and YangJiang. The study deliberately covered places with and without apparent environmental problems in order to allow for meaningful comparisons in environmental conditions and perceptions. Age, education, marital status, and living conditions were the factors considered in the choice of survey areas in order to create a broadly representative sample.

I. THE GENERAL SITUATION OF THE RURAL ENVIRONMENT

Of the 360 respondents, 44.2% think that their environment is worsening, 21.7% consider it to be improving, 31% insist that there is no change in their environmental quality, and nearly 43% show concerns about their environmental situation. The major environmental problems, from most to least pressing, are waste pollution, water pollution, air pollution, and noise pollution.

The survey results show that as living conditions improve in rural areas, waste pollution also increases. In the past, rural solid waste (RSW) had simple ingredients and was reused as fertilizer. RSW is now increasingly composed of more complicated ingredients, such as plastic bags and other plastic products, making it difficult to reuse. The amount of construction waste, breeding waste, and industrial processing waste has risen astonishingly. Peasants no longer make it a priority to reuse RSW for fertilization and as a result large quantities of waste are discarded.

Waste has become the most serious pollution problem in rural environments. Some rural places have launched waste collection programs, but the waste collected is only moved to remote places instead

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8. See infra Appendix A, fig.2.2.

9. In recent years, Guangdong Province has implemented a plan called “One Construction and Three Reforms” in the rural areas. Concentrating on the construction of marsh gas pits, they implemented reform projects of kitchen waste, and pigpen and sheep-pen wastes, in order to improve
of being handled because of the lack of unified planning, handling establishments, and facilities. This may result in even more pollution. Moreover, industrial waste continues to be transferred from urban to rural places with increasing frequency. 

Nearly 12% of the respondents believe their farming lands are worse than they were before and are totally unsuitable for cultivating crops. Slightly more than 33% believe that the land is worsening, leading to a significant reduction of crops. Although 34.2% think the land quality is the same as before, only 2.8% insist their land is improving.

Generally speaking, water quality in rural regions is worse than in urban places. Almost 50% of the respondents still get their drinking water from wells, rivers, and springs. While the quality of tap water is relatively stable, most of the people experiencing a decline in water quality are those who fetch drinking water from natural sources. Of those surveyed, only 17.8% think that their drinking water is always very bad and nearly 30% think it is getting worse.

The air quality in rural areas is generally quite good, but 44.7% of the respondents believe it is getting worse, and 14.7% think it is already very bad. Only 26.1% stated that there is no change in the air quality, and 8% consider it to be improving.

Because of the lack of environmental monitoring facilities in rural regions, peasants primarily judge environmental quality based on their own experiences and feelings. They think that drastic changes in environmental quality have mainly occurred in the past decade, especially within the past five years. This period coincides with the rapid industrial restructuring and urbanization in Guangdong Province.

When questioned about the reasons for environmental change, 54.4% of respondents ascribe it to factory pollutant discharge and 16% attribute it to the rural breeding and development activities, while 17.8% link it to the sanitation conditions in rural areas.

10. The village head expressed this to the author when some villages were investigated in Jieyany city of Guangdong Province from November 11th to 12th, 2006.
12. See infra Appendix A, fig.2.12.
13. See infra Appendix A, fig.2.12.
14. See infra Appendix A, fig.2.12.
15. See infra Appendix A, fig.2.11.
16. See infra Appendix A, fig.2.5.
17. See infra Appendix A, fig.2.14.
18. See infra Appendix A, fig.2.14.
19. Pan, supra note 2.
peasants’ living behaviors. Notably, the survey respondents named factory pollution as the main factor affecting the quality of the rural environment. The main enterprises located in the communities surveyed were hardware, electroplating, chemical, paper, and mining.

Outside investors have established businesses in 62.5% of the respondents’ regions. The survey results suggest that the operation of these businesses is closely related to the condition of the local environment. However, the number of businesses in the rural region does not always correspond with the quality of the environment. While environmental problems in rural regions with businesses can be more serious, some heavily polluted villages do not have many businesses at all. This is because pollutants are transferred from other places or result from local rural waste.

About a third of the respondents are concerned that they have been harmed, or are being harmed, by environmental pollution (polluted property or damaged health). This number shows that environmental pollution has caused widespread and substantial damage.

II. ANALYZING PEASANTS’ SENSE OF, AND ABILITY TO, PROTECT THEIR ENVIRONMENTAL RIGHTS

A. Peasants’ Sense of the Environment

As a whole the peasant’s sense of the environment is not strong. Their understanding of environmental problems varies from one person to the next. Many people simply equate it to a sanitation problem and focus on waste and sewage issues, while others blame living conditions. Those conducting the survey took a considerable amount of time to explain the meaning of environmental problems to rural residents before many of them understood it. Still many individuals refused to answer the survey because they did not understand the questions. Peasants’ understanding of their local environmental problems is also low: 54.2% of respondents chose “a little,” 29.4% “not so clear,” 4.7% refused to answer, and only 11.7% respond “very much.”

20. See infra Appendix A, fig.2.5.
21. See infra Appendix A, fig.2.5.
22. See infra Appendix A, fig.2.7.
23. See infra Appendix A, fig.2.8.
24. See infra Appendix A, fig.2.6.
25. See infra Appendix A, fig.3.1.
Nevertheless, peasants’ attention to the environment has increased greatly. After explaining environmental problems, most of the respondents could share knowledge about the local environmental situation, distinguish good environmental quality from bad, and identify the main reasons for environmental degradation. There also appeared to be a correlation between higher levels of education and a stronger sense of the environment.

Peasants’ environmental sense is also related to their access to environmental information and knowledge. Although their need for environmental information has increased, most respondents still get their environmental information from their own feelings. Other sources, as ranked, include “newspaper and media,” “hearsay,” “government announcements,” and “notice from village committee.” Access to environmental information is mainly by notice from government and village committees who cannot provide enough information. Thus, at present, peasants have limited means to get accurate environmental information. When asked, “Do you hope to get more environmental information?” 53.9% respondents answered “yes,” 25.6% answered “nevermind,” and 10.6% said “no.” This illustrates that even though peasants have considerable need for environmental information, the availability of that information is very limited.

During surveys in the “cancer villages” in Wengyuan county of Shaguan City, our students found that local peasants knew that environmental pollution was quite serious and had already asked the local government for information and monitoring data. However, the town, county, and city governments could not provide exact information about environmental quality. At present, there is no group that has a comprehensive understanding and grasp of the rural region’s environmental situation.

Another topic addressed in the survey was the question of peasants’ attitudes towards nearby factories and local polluting enterprises. Over half of the respondents, 54.4%, stated they opposed the enterprises; 25.8% were indifferent; only 15.3% of those surveyed expressed a welcoming attitude towards these businesses. At the beginning of the Reform and Opening-Up period many places and local peasants granted favors to whomever invested in businesses. Peasants are now more sensible, and many rural

26. See infra Appendix A, fig.3.2.
27. See infra Appendix A, fig.3.2.
28. See infra Appendix A, fig.3.5.
29. Several villages in Xinjiang town of Wengyuan County are called “cancer villages” because the morbidity rates of cancer are much higher than in other nearby villages.
30. See infra Appendix A, fig.3.3.
government officials are more clear-headed regarding the establishment of polluting enterprises.\textsuperscript{31} However, peasants’ attitudes toward polluting enterprises are contradictory. About 40\% of those surveyed were either ambivalent or believed that businesses would bring them benefits.\textsuperscript{32} People in developing regions hope for more job opportunities while those in developed regions are eager to increase commercial opportunities; the former struggle to get rid of poverty, and the latter to pursue wealth. Peasants’ living conditions vary from one region to another. When the relationships between businesses and local people are complicated it is more difficult to handle pollution problems.

B. Peasants’ Willingness and Ability to Access Protection of Their Environmental Rights

1. Peasants’ Willingness to Protect their Environmental Rights.

When asked, “Have you thought about changing your situation if you are damaged by pollution?,” 41.4\% of respondents chose “yes, very much”; 39.7\% said “sometimes, but there is little possibility to take any action”; 13.3\% responded that they had never considered it.\textsuperscript{33} This shows that most peasants are very willing to protect their environmental rights. In articulating their environmental rights, peasants generally emphasize property rights and health rights. Many peasants, especially those in villages where health problems have been obvious in recent years, relate their health problems to the environment. But few people have sued for damages in government institutions or courts.\textsuperscript{34} Many of the victims give up remedy requests because of the difficulties in proving the link between pollution and sickness.\textsuperscript{35} In the rural regions diseases force families into difficult financial situations, or even poverty. Therefore, peasants take the wrong attitude toward diseases. If they are slightly sick, they prefer to do nothing about it until it is serious enough for a small clinic visit.\textsuperscript{36}

\begin{itemize}
    \item \textsuperscript{31} See Swati Lodh Kundu, \textit{Rural China: Too Little, Too Late}, \textsc{Asia Times Online}, July 19, 2006, http://www.atimes.com/atimes/China_Business/HG19Cb01.html (cataloguing numerous protests by rural residents against industrial construction projects in the past two years).
    \item \textsuperscript{32} See infra Appendix A, fig.3.3.
    \item \textsuperscript{33} See infra Appendix A, fig.3.11.
    \item \textsuperscript{34} See infra Appendix A, fig.3.10 (reporting that nearly 43\% of the respondents stated that they thought the government should deal with environmental pollution problems).
    \item \textsuperscript{35} Zhao Yuhong, \textit{Environmental Dispute Resolution in China}, 16 \textit{J. Envtl. L.} 157, 180 (2004).
    \item \textsuperscript{36} See Natasha Wong, \textit{Counterfeit Medicine: Is it Curing China?}, 5 \textsc{Asian-Pac. L. Pol’y J.}
they are confronted with serious diseases for which there is no cure, many people give up on treatment. As a result, it is impossible to get a clear record or document a disease, and it is very difficult to identify symptoms and causes.

Furthermore, there is a special custom in many rural regions to discard everything related to that individual after their death, including disease records and testing documents. Because victims lack awareness to keep evidentiary records, causation is hard to prove and health-based remedies are difficult to obtain. Lastly, subjects of lawsuits correlate to litigation costs. Compensation is limited due to the Chinese court’s association of court fees with the amount of damages sought. In terms of their property rights, peasants are primarily concerned with the effects on a normal harvest. Peasants have little sense of the long-term effects of land, drinking water, and irrigation water pollution.

2. Peasants’ Actions to Protect their Environmental Rights.

a. Peasants’ Choice of Means to Safeguard their Environmental Rights.

When asked about the means they would use to change the pollution situation, 40.8% of the respondents chose “Complain to the village committee”; 34.4% chose “Complain to the government institution”; 9.2% chose “Negotiate with the polluters”; 1.9% chose “Launch a litigation”; and 0.8% chose “Petition.”

5, 172–73, (2004) (discussing how rural Chinese residents turn to traditional Chinese medicine to fill the gap when prescription medicine is unavailable).
37. See CHARLES WOLF, JR. ET AL., RAND NAT’L DEFENSE RESEARCH INST., FAULT LINES IN CHINA’S ECONOMIC TERRAIN 52 (2003) (“The extensive, if rudimentary, socialized healthcare system of the Maoist era has given way, under Deng era’s economic reorientation, to a system that is largely pay–for–service, and full of coverage gaps, especially in rural areas.”).
38. This tradition is very common in rural areas of the Guangdong Province.
39. For example, since the early 1990s the Tangxin village of Xinjiang town of Wengyuan county has suffers property damage costing over 1 million yuan RMB per year caused by pollution of a nearby mining enterprise. When the village committee brought suit in June 2006, the villagers claimed compensation and they only asked for a damage award of 600,000 yuan RMB (less than one year’s loss) because they couldn’t afford the court fee. (Author’s note: Our environmental clinic discovered the facts of this case during our investigation of the region’s environmental problems. The material related to the case is confidential until trial is complete. As such, the author cannot offer a cite for the source of this information at the present time.)
Peasants greatly depend on grassroots organizations and official institutions. The above data shows that 75% of the respondents would first complain to the government and the village committee in hopes that they will solve the problem for them. Of these two, the government would probably handle the environmental problems more effectively, but the respondents are more likely to go to the village committee first because it is the nearest “authority institution” to them. As shown by the above chart, peasants’ response to environmental pollution is passive.

As victims, peasants seldom negotiate directly with polluters or file lawsuits. In the past, there was a view that because peasants had little knowledge about the law they were prone to petition. Yet according to our survey, peasants have no such preference; petitioning is the last choice when other means are available. Therefore, governments should form a new understanding about how peasants use petitioning.

b. Measures to Deal with Environmental Pollution

The survey shows that when harmed by pollution, peasants first choose to forbear and passively adapt to it. In response to the question, “What would you do if the drinking water is polluted?,” 27.5% of respondents choose to “buy bottled water,” 27.1% choose to “still drink the polluted
water,” 15% choose to “find other water sources,” and 12.5% choose to “dig wells.” This suggests that people never plan to, and never hope to, restore the quality of drinking water sources. It also shows that due to the increasing speed of urbanization and improving living conditions, many people may use alternative sources of drinking water such as tap water or bottled water. The rural regions in Guangdong province are better adapted to drinking water pollution than in other places. To some extent, these temporary solutions hide the water pollution problem in rural regions.

In the long run, irrigating with polluted water will harm agricultural production as well as people’s safety. If the deterioration of soil quality affects crops, 30.8% of peasants would choose to “give up cultivation and look for a job outside [rural areas],” 24.7% would choose to “[do] nothing,” 21.9% would choose to “plant other kinds of crops,” while 22.2% gave no response. We should be very concerned that an increasing number of peasants choose to abandon agriculture and leave their hometown when encountering pollution problems. This trend reflects a social transformation and a change in peasants’ perspective: first, peasants do not depend heavily on agriculture; second, peasants find more job opportunities in the cities; third, with the well-developed economy in Guangdong Province and strong population movements peasants have sound reasons for leaving their hometowns; finally, agriculture is not very attractive to peasants.

However, most peasants who are able to move out of the rural regions and earn their livings are literate, healthy, and young. This results in another dilemma for rural environmental protection. First, the ability to improve the environment in the rural region decreases. The migration of young people away from their hometowns results in a serious decline in the ability of rural areas to improve their environment. When the environmental quality deteriorates, there is not enough manpower to restore it. Second, the ability of rural regions to protect their environmental rights declines. In rural regions, generally speaking, it is the young people who handle the environmental issues with the local governments and the

40. See infra Appendix A, fig.2.11.
41. Guangdong is a relatively developed area in China. In other provinces, it is hard for many people to resolve their drinking water problems by buying bottled water. Furthermore, the high rate of urbanization makes it possible to extend tap water access to rural areas.
42. See infra Appendix A, fig.2.13.
43. To be qualified to work in the city one needs more education and training than for work in the rural regions. In addition, the factories usually prefer to recruit younger workers.
44. The village of Jie Yang City is an example. In the past, there was a beautiful landscape with many streams. Now, because the water quantity in the upper reaches of the river has declined, and industrial discharges have simultaneously increased, the streams are filled with dirty sludge. Previously, the village committee would direct the villages to dredge the sludge and clean the streams, but now there are not enough people to do this work.
polluters. Now that many young people are absent, their families at home are unable to protect their own environmental rights. Third, the will to protect environmental rights also declines. The old and infirm people that are left at home are only concerned about the welfare of their young offspring. They consider their own circumstances to be of no importance. Therefore, they take a complacent attitude.

The rural-land property-rights system also aggravates agricultural pollution. Under the existing system, rural lands are owned by the village collectively. Peasants only enjoy contract rights, which are limited by law to thirty years. It is difficult for peasants to foresee what will happen after the contract period ends. Thus, they do not have a vested interest in the long-term quality of the land. In the Pearl River Delta, many peasants rent their farm land and leave to pursue commerce or other jobs. The lessees usually rent the farmland for only a few years, and lessors seldom request them to conserve it. Unconcerned about conservation, both parties are free to pursue greater profit at the expense of land degeneration.

3. Peasants’ Expectations for Environmental Protection Measures

When they are asked “What would you do if there are polluting enterprises near your residential areas?,” of those who responded 60.8% prefer to “control and eliminate the pollution,” 35% would choose to “close the polluting enterprise,” 23.9% would choose “monetary compensation,” and 5.6% would choose to “move and settle in other places collectively.”


[M]ovements of peasants to defend, conserve or recover their ancestral land and livelihood have proliferated during this century . . . [however], it appears that during the last few decades not much progress has been made by such movements, due to the resilience of commercial landed interests and the state acting in their support.

Id.


48. See infra Appendix A, fig.3.15. Note: the numbers total more than one hundred because this was a multiple-choice question and respondents could choose more than one answer.
However, there are still a considerable number of people who would rather close the business altogether. This shows that people have knowledge about the damaging extent of polluting businesses. From the emphasis on both compensation and pollution elimination, we can see that peasants are becoming better informed about pollution issues. They have realized that elimination, instead of compensation, is the best way to root out pollution problems.

4. Peasants’ Understanding of the Difficulties in Improving the Environment

In the survey, 43.9% of respondents chose “lack of governmental support” as the biggest obstacle to improving the environment; 38% chose “enterprises are rich and powerful”; 27.2% consider it to be “lack of legal knowledge”; 15.6% think the biggest obstacle is “illiteracy.” This shows that people have realized the important role of the attitudes of local governments in solving environmental problems. Governments can be the solution, or the biggest barrier, to dealing with environmental problems. Furthermore, this survey shows that peasants have insufficient legal and political knowledge. This has become a significant barrier to improving the environment.

III. ANALYSIS OF THE DIFFICULTIES IN PROTECTING PEASANTS’ ENVIRONMENTAL RIGHTS

A. Contradiction Between Peasants’ High Expectations of the Government and the Government’s Absence from Many Environmental Issues

In various rural regions of China small-scale peasant economies still exist. The loosely structured economic system hardly supports collective actions, especially in providing public services such as environmental protection. Therefore, people rely greatly on the government. This is

49. See infra Appendix A, fig.3.14.
50. See Kundu, supra note 31 (discussing current agricultural trends but noting that “[m]ore than 50 million farmers have been displaced by . . . land grabs with little or no compensation”); see also Zhou Li, Public Goods, Responsibility Ascentain and Development Paradigm Retrospect: On China’s Rural Environmental Protection with a Case Study, http://www.zhinong.cn/data/detail.php?id=4383.
51. See Victor Nee & Su Sijin, Institutional Change and Economic Growth in China: The View from the Villages, 49 J. ASIAN STUDIES 3, 5 (1990) (observing that de-collectivization in the 1980s returned rural communities to the social structure of the “pre-revolutionary [sic] corporate village . . . in
proved by our survey results. Meanwhile, the Chinese government is lacking in its protection of the rural environment. For example, there are deficiencies in laws and policies, finance, and other investments. Current institutions are insufficient, and environmental monitoring is not very effective. As a result, there is a shortage of environmental protection by the government in rural regions. Compared to urban residents, peasants’ environmental rights are not well-protected.

In the survey we found that peasants have a mixed attitude toward the government. They rely on the government to handle their environmental problems. However, they are usually disappointed because more often than not the main obstacle to solving environmental problems is the lack of support from the local government. Although forbidden by the central government of China, as well as SEPA, many times in recent years, local protectionism has become the breeding ground for environmental pollution and damage. The current Environmental Protection Law of China stipulates that local governments should be responsible for the quality of the local environment. Nevertheless, systems assuring that local governments fulfill their environmental protection responsibilities are not yet fully established, and the environmental responsibility investigation system runs inefficiently. Under these circumstances, many local governments do not take responsibility for local environmental protection. Some governments ignore enterprises’ illegal behavior, and this local

which lineages owned and managed communal property and provided limited welfare functions to villagers); see also Huang Jijun, The Most Important Thing in Various Environmental Protection Issues: Summary of the First National Environmental Policy and Legal Issue Meeting, NAT’L ENVT'L NEWS OF CHINA, Dec. 15, 2006, at 1.

52. Nee & Sijin, supra note 51.


protectionism seriously interferes with environmental protection.57

B. Peasants’ Dependence on the Environment and their Vulnerability to Environmental Degradation

Peasants are dually dependent on nature as it provides them with living conditions and production material. First, of all the economic sectors, agriculture in China remains the most reliant on natural processes. Second, peasants draw most means of subsistence, such as drinking water, fuel, foods, and construction materials, directly from natural resources. Thus, the natural environment has a direct influence on peasants’ living and development. Yet, peasants are more vulnerable to environmental degradation than both polluters and urban residents. Compared with polluters, peasants are in a weak bargaining position and protests are often ineffective. Compared with urban residents, peasants are allocated fewer resources and are less able to prevent pollution. This makes peasants most vulnerable to environmental rights violations.

C. Peasants’ Inability to Protect their Environment and the Complexity of Pollution Issues

The standard of living and education of peasants are obviously lagging behind those of urban residents.58 Due to the complexity of pollution issues, even urban residents are unable to deal with environmental problems. Regardless of geography, protecting environmental rights is more expensive than other litigation because of the difficulty in collecting evidence and proving causation. The assistance of professionals, such as lawyers and scientists, is an absolute necessity. These high costs have become the biggest obstacle to peasants’ pursuit of legal actions.

57. See id. China launched a nationwide campaign in 1996 to shut down local enterprises known for high levels of pollution, but nearly 40% of those shut down have since re-opened illegally. Id.

IV. SEVERAL COUNTERMEASURES TO PROTECT PEASANTS’ ENVIRONMENTAL RIGHTS

A. Strengthen the Role of Grassroots Organizations in Rural Areas

Peasants seriously depend on the authorities to safeguard their environmental rights. As such, it is necessary to provide them with appropriate organizational support. It is unlikely that the government will establish more rural environmental protection agencies or organizations in the near future. Therefore, better use of the existing grassroots organizations in rural areas may be more effective. Village committees are now generally established in rural regions. According to the Village Committee Organization Law, the village committee is in charge of a village’s public affairs and welfare, mediating disputes, maintaining social order, reflecting the views of the villagers, and making recommendations to the government. It has an obligation to the village to safeguard the residents’ interests. Although these grassroots organizations have a small number of staff and resources, they are closest to the villagers and understand their suffering the most. Although, there are still many problems, direct election of village committees is now established. As a local, elected, self-governing organization, the committee has an obligation to protect the interests of the village. It represents the best means of advocating for peasants’ environmental interests.

In our survey, we found that the village committees are aware of the local environmental situation and the harm to peasants caused by pollution. We also found that they are willing to come forward to fight for peasants’ interests. Despite this willingness, there are many difficulties. First, committees are often challenged in court on standing issues when launching a lawsuit on behalf of the villagers. Second, they do not have enough

59. Nearly 43% of the respondents stated that they thought the government should deal with environmental pollution problems. See infra Appendix A, fig.3.10.
60. See Embassy of the People’s Republic of China in the United States of America, 470 Million Chinese Villagers Vote in Village Elections Last Year (May 18, 2006), http://www.china-embassy.org/eng/xw/253295.htm (reporting the existence of 629,000 village committees in 2005—190,000 less than the previous year); see also O’BRIEN & LI, supra note 7, at 53–59 (recounting efforts by villagers to achieve democratic accountability from local governments).
62. Id. art. 11.
63. See generally id. (noting the various protected interests of villagers).
64. According to article 108 of China’s Civil Procedure Law, the plaintiff must show that they have a direct interest in the case and some courts may refuse the case based on this unmet burden. Civil Procedure Law (adopted by the Nat’l People’s Cong., effective Apr. 9, 1991), art. 108, LAWINFOCHINA
funding to advocate villagers’ rights. To cope with the administrative review and litigation, committees have to carry out fundraising activities, which are often considered to be the unauthorized collection of fees. Therefore, the law should provide more support for these rural grassroots organizations by reducing legal obstacles to safeguarding the rights and interests of peasants. For example, the law should recognize the committees’ standing as plaintiffs who can bring a lawsuit on behalf of villagers, and allow them to undertake reasonable fundraising activities in order to safeguard peasants’ rights.

B. Fill in the Gaps in Laws and Regulations

The environmental problems of the rural and urban regions have many things in common, but there are some differences. The current environmental legislation is essentially urban environmental legislation, focusing on controlling industrial and urban pollution. Some laws and regulations are not applicable to rural environmental issues. Additionally, there is almost no relevant legislation on specific rural environmental issues, such as soil pollution prevention, poultry waste pollution prevention, and garbage disposal. Therefore, we should improve the legal system of environmental protection by mandating quality standards for soil and water, as well as preventing and controlling pollution from pesticides, fertilizers, industrial waste, agricultural waste, and garbage. Non-point source pollution is a world-wide problem which must be resolved. China should conduct more investigations and studies while learning from the experience of other countries’ environmental laws.

C. Strengthen Environmental Monitoring in Rural Regions

The government’s environmental agencies should provide environmental services beyond urban areas. Their functions must also extend to rural regions. To strengthen the supervision of environmental protection, China must first strengthen the environmental protection sector, extending law enforcement over all rural areas. Second, China must establish relevant environmental agencies at the county and town level, with adequate levels of staff and resources. Third, China must improve the monitoring and management capacity of natural resources. It is necessary

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65. The budget for the village committee is too small to afford paying the court fee.
66. To prevent peasants from bearing an overly heavy burden, the central governmental of China has issued regulations that strictly limit any organization from collecting money from farmers.
to do some investigation and research on environmental issues that are unique to rural regions and come to a consensus on the condition of the rural environment. Only in these ways can China become familiar with the rural environmental situation and explore effective ways to solve environmental problems.

As for the lack of rural environmental protection, officials in charge should be held responsible in accordance with the laws and regulations. China’s central and local governments have introduced a number of regulations holding government departments and their personnel responsible for environmental violations. These provisions must play their rightful role.

D. Improve Peasants’ Ability to Protect their Environmental Rights

First, it is necessary to establish and improve the rural environmental information systems. Peasants must be informed of the relevant information before they can safeguard their rights. They will be able to take appropriate measures and actions to protect their own interests only if they understand their environmental situation. At present, peasants’ requests for improvements to environmental quality are often refused by local governments. The local governments either do not understand the local environmental situation or choose not to disclose the information. Such activities are either in violation of the legislation on public information or of questionable legality. Therefore, the government should remove legal and institutional obstacles to establishing an effective information system.

Second, China should give environmental education to peasants so they can learn how to safeguard their rights. The government should provide various channels of information so that peasants can comprehend the environmental situation, the damage caused by pollution, and applicable environmental laws, as well as environmental dispute-resolution mechanisms. The role of the media is extremely important in environmental education and information dissemination. Peasants have become accustomed to obtaining related information and learning about cases through newspapers, television, radio, and other media. Therefore,

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all social groups concerned with peasants’ environmental interests should focus on the use of the media in helping peasants.

Third, China should support various non-governmental organizations that provide legal services to peasants. Peasants, as the most vulnerable group in Chinese society, are in great need of this support. The government should create a firm legal foundation for non-governmental organizations to provide legal services.

E. The Legal Aid System be Available to All Rural Areas

Although China has established a legal aid system, it mainly provides services in urban areas and almost never benefits rural residents. Peasants are at a disadvantage not only because of their paltry share of China’s recent economic successes, but also because of their meager share of other resources, such as legal services. First, peasants do not have a fixed income, so it is difficult to prove their income status. Second, poverty in the rural areas is overwhelming. Local finance is usually very difficult where peasants compose large portions of the population. As a result, very few financial resources can be used for legal aid, and legal aid agencies therefore cannot meet the needs of rural areas. Third, the applicable legal scope is limited. According to Article 10 of the legal aid ordinance, the applicable scope includes a request for “state compensation,” requests for social security benefits or minimum subsistence pay, requests for pension benefits, claims for alimony, child support, maintenance expenses, payment of remuneration, and other requests. Environmental pollution claims are quite complicated, and include the loss of basic resources and other income. More often than not, it turns out to be a large sum of money and legal aid agencies are unable to provide assistance. Fourth, the peasants do not know about the existence of the legal aid system, nor do they know how to apply.


69. Since the 1990s, China has established a legal aid system for the weak, but due to limited resources, governmental legal aids at all levels mainly target urban residents (municipal citizens in the past and residents, including migrant workers, living in cities at present). They are rarely able to assist the residents living in rural areas.

70. See Wolf, supra note 37, at 11 n.1, 17–18 (discussing difficulties in calculating rural economic statistics and corrupt local taxation practices).

71. See Regulation on Legal Aid (promulgated by the State Council, Jul. 21, 2003, effective Sept. 1, 2003), art. 10, LAWINFOCHINA (last visited Mar. 17, 2007) (P.R.C.).

72. See Benjamin L. Liebman, Legal Aid and Public Interest Law in China, 34 TEX. INT’L L.J., 211, 214 (1999) (stating that “[l]egal aid programs have concentrated in economically developed urban
China’s rural population is relatively large and poverty-stricken. Providing legal assistance to peasants is not only a matter of equitable justice but also of stability of the entire society. The state should establish legal aid mechanisms that correspond with the actual situation of peasants. This mechanism should combine legal assistance from the government and other social groups. The primary short-term objective for the government should be to fully utilize the existing legal aid mechanism while allocating more resources to rural areas. The long-term objective should be to establish legal aid agencies in rural areas that specialize in legal assistance for peasants. From a social perspective, China should encourage community groups, schools, law firms, government departments, and judicial institutions to provide peasants with a wide range of legal services, creating favorable conditions for their ability to preserve and enforce their environmental rights.

areas; lawyers remain out of reach of the majority of China’s rural poor”).

73. China is a large and agricultural country with a population of nearly 1.3 billion. More than 63% of the total population is peasants. Thus, more than two-thirds of the members of society are peasants. According to a survey, by the end of 2005, the rural population living in absolute poverty across the country is 23.65 million, and the low-income population in rural regions is 40.67 million. Information from the State Council’s Poverty Alleviation Office shows that rural poverty decreased by 5.62 million people from 2001 to 2005. JIAN LIU, INT’L FOOD POL’Y RESEARCH INST., THE ACHIEVEMENTS AND EXPERIENCES OF POVERTY ALLEVIATION IN RURAL CHINA (2005), http://www.ifpri.org/pubs/books/ar2004/ar2004_essay03.asp (last visited Mar. 17, 2007) (charting a decline in poverty from 250 million in 1978 to 26.1 million in 2004). The author is the Director of the State Council Leading Group Office of Poverty Alleviation and Development. Id.
APPENDIX:
STATISTICAL ANALYSIS OF THE QUESTIONNAIRE SURVEY OF PEASANT’S ENVIRONMENTAL RIGHT PROTECTION IN RURAL AREAS

(Conducted by students of the Environmental Law Clinic at the Law School of Sun Yat-sen University, July – October 2006)

1. Respondents’ Background

With 360 questionnaires completed, the general backgrounds of the respondents were as follows:

1.1 Gender

1.2 Age
1.3 Education

1.4 Annual Income
1.5 Sources of Income

- Farming: 16.1%
- Raising animals (including fish): 14.4%
- Work Outside of the Village: 30.3%
- Social Welfare for the Elderly: 2.8%
- Other: 21.7%
- No response: 14.7%

1.6 Marital Status

- Unmarried: 27.2%
- Married: 65.8%
- Divorced: 1.7%
- No response: 4.7%
1.7 Respondents with Children

![Bar chart showing percentages of respondents with children, no children, and no response.]

1.8 Respondents’ Location

![Bar chart showing percentages of respondents from different locations.]

- ChaoZhou: 4.4%
- GuangZhou: 4.7%
- ShanTou: 5.0%
- XingNing: 10.8%
- Zhencheng: 16.9%
- ZhongShan: 3.6%
- Shunde: 3.9%
- DongGuan: 5.6%
- JieYang: 29.2%
- ShenZhen: 27.8%
- No Childre: 67.2%
- No response: 5%
2. Respondents’ ideas about environment quality

2.1 Are you satisfied with the current environmental quality?

- Satisfied: 15.8%
- Just like: 37.2%
- Dissatisfied: 29.4%
- Concerned: 14.7%
- No response: 2.8%

2.2 Has environmental quality improved or declined over the past several years?

- Improved: 21.7%
- No change: 30.8%
- Declined: 44.2%
- No response: 3.3%
2.3 When did the environmental quality change?

![Bar chart showing response percentages for different time periods.]

- 22.8% Two years ago
- 36.4% Five years ago
- 23.3% Ten years ago
- 6.9% Twenty years ago
- 10.6% No response

2.4 What are the main areas of the environmental change? (multiple choice)

![Bar chart showing response percentages for different areas.]

- 36.1% Water
- 32.5% Air
- 22.5% Noise
- 44.4% Waste
- 4.4% Other

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1. For multiple-choice questions, respondents could choose more than one answer.
2.5 What are the reasons for the environmental change? (multiple choice)

- Factory Pollutant Discharge: 54.4%
- Rural breeding and developing activities: 16.1%
- Peasant’s lifestyle: 17.8%
- No idea: 8.3%

2.6 Do you and your family members ever suffer property loss and health damage because of environmental pollution?

- Yes: 33.9%
- No: 57.2%
- No response: 8.9%
2.7 What kinds of factories does your village have? (multiple choice)

- None: 27.5%
- Chemical: 18.1%
- Electroplating: 18.3%
- Mining: 7.8%
- Hardware: 23.9%
- Papermaking: 11.1%
- Other: 3.1%
- N/A: 0%

2.8 Are there any investor–established enterprises in your village?

- No: 62.5%
- Yes: 29.4%
- No response: 7.8%
2.9 What is the source of your drinking water?

2.10 How is the quality of your drinking water?
2.11 How do you adapt to this change?

- Dig wells: 12.5%
- Find other water sources: 15.0%
- Still drink the polluted water: 21.7%
- Buy bottled water: 27.5%
- No response: 22.2%

2.12 What is the condition of the farmland?

- Getting worse and unsuitable for cultivation: 11.7%
- Getting worse and leading to reduction of crops: 33.3%
- No Big Change: 34.2%
- Getting Better: 2.8%
- No response: 18.1%
2.13 How do you adapt to this change?

- 30.8%: Give up cultivation and look for a job outside the village
- 21.9%: Plant other kinds of crops
- 24.7%: Do nothing
- 22.2%: No response

2.14 How is the air quality?

- 14.7%: It is very bad
- 44.7%: It is getting worse
- 26.1%: No change
- 8.1%: It is getting better
- 6.4%: No response
2.15  Do you ever think about leaving your hometown?

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, very much, and I’m going to leave.</td>
<td>16.7%</td>
</tr>
<tr>
<td>Yes, but I have nowhere to go.</td>
<td>35.0%</td>
</tr>
<tr>
<td>No</td>
<td>41.7%</td>
</tr>
<tr>
<td>No response</td>
<td>6.7%</td>
</tr>
</tbody>
</table>

3. The sense of environmental rights and remedies

3.1  Do you know the cause of environmental problems?

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very much</td>
<td>11.7%</td>
</tr>
<tr>
<td>A little</td>
<td>54.2%</td>
</tr>
<tr>
<td>Not so clear</td>
<td>29.4%</td>
</tr>
<tr>
<td>No response</td>
<td>4.7%</td>
</tr>
</tbody>
</table>
3.2 How do you know it? (multiple-choice)

- Government announcement: 15.0%
- Newspapers and media: 34.4%
- Told by Science Institute: 3.1%
- Notice from village committee: 12.8%
- Hearsay: 22.5%
- My own feelings: 38.1%

3.3 What is your attitude toward the establishment of polluting enterprises in your area?

- Doesn’t matter: 25.8%
- Welcome: 15.3%
- Objection: 54.4%
- No response: 4.4%
3.4 What are your reasons for not objecting to polluting enterprises?

- Provide more job opportunities: 56.3%
- Provide more opportunities for business: 26.6%
- Other benefits: 17.2%

3.5 Do you want access to more information on the environment?

- Yes: 58.9%
- Don't care: 25.6%
- No: 10.6%
- No response: 5.0%
3.6 Who should provide this information? (multiple-choice)

- Government: 44.7%
- Village Committee: 44.4%
- Polluting Factory: 11.9%
- Villager: 8.6%

3.7 In what ways do you want to get the information? (multiple-choice)

- Government announcement: 35.8%
- Broadcast: 33.3%
- Told by villager: 17.8%
- Meeting: 12.2%
- Newspapers: 43.1%
- Others: 6.7%
3.8 Did you know that there is a department of environmental protection in our country?

![Bar chart showing responses to the question about knowing a department of environmental protection.](chart1.png)

- Yes: 58.9%
- No: 34.7%
- No response: 6.4%

3.9 Do you think that polluting the environment is illegal?

![Bar chart showing responses to the question about polluting the environment.](chart2.png)

- Yes: 60.6%
- Don't know: 24.7%
- No: 9.7%
- No response: 5.0%
3.10 Who should deal with environmental pollution problems? (multiple-choice)

- Government: 42.8%
- Village committee: 21.1%
- Polluting factory: 46.7%
- Tackled by myself: 3.1%

3.11 Have you thought of changing the situation if you are damaged by pollution?

- Yes, very much: 41.4%
- Sometimes, but it is hard to do that: 39.7%
- Never thought of that: 13.3%
- No response: 5.6%
3.12 Do you know who has taken action to change this situation?

3.13 What means do you prefer to change the pollution situation?
3.14 What are the main difficulties in improving the environment? (multiple-choice)

- Lack of governmental support: 43.9%
- Enterprises are so powerful: 38.1%
- Illiteracy: 15.6%
- Lack of legal knowledge: 27.2%
- Other: 9.7%

3.15 What would you do if there were polluting enterprises near your residential area? (multiple-choice)

- Shut it down: 60.8%
- Control and eliminate the pollution: 35.0%
- Move the pollution: 25.6%
- Monetary compensation: 23.9%
- Move and resettle: 5.6%
- Provide drinking water: 10.8%
- Other: 3.6%
SPRING 2007 SYMPOSIUM

CHINA IN TRANSITION: ENVIRONMENTAL CHALLENGES IN THE FAR EAST

March 1 – 2, 2007

at the
Vermont Law School
in
South Royalton, Vermont

Hosted by the
Vermont Journal of Environmental Law
# SYMPOSIUM 2007

## CHINA IN TRANSITION: ENVIRONMENTAL CHALLENGES IN THE FAR EAST

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1. The following speeches and panels were presented during a two day symposium at Vermont Law School on March 1–2, 2007, titled “China in Transition: Environmental Challenges in the Far East.” The Symposium was organized by the *Vermont Journal of Environmental Law* with support provided by U.S. A.I.D and Vermont Law School. These speeches are also available in audio format at the *Vermont Journal of Environmental Law* website: www.vjel.org.
Thank you. Thank you every one. Hello. The first thing I want to say is I feel so lucky and so happy to be in the beautiful state of Vermont. And also I want to thank Dean Jeff Shields for inviting me here to attend this event. I want to thank Professor Tseming Yang. When he was in Beijing we had several nice discussions which lead to this visit in Vermont. I want to thank everybody here, because right now is time after work but you’re still willing to be here and attend this event. I’m very happy and excited that you all are here. And I feel especially lucky to meet Professor Jeremy Cohen who is the Chinese law specialist here. I wanted to meet with him several years ago but I didn’t make it. And also Professor Jeremy Cohen is a special professor at China University of Political Science and Law. I feel extremely fortunate to meet him here. I’m also very happy to meet Professor Li Zhiping from Sun Yat-sen University School of Law, and also Alex Wang from the Natural Resource Defense Council’s Beijing office. Actually I can speak a little bit English, but my familiarity with English is not comparable to my familiarity with environmental law in China. So I decided to go ahead with this presentation in Chinese.

The topic of my presentation today is Chinese environmental law enforcement, current deficiencies, and suggested reforms. I’m going to talk about five topics tonight. The first one is the current system of Chinese environmental laws, rules, and regulations. The second topic is about deficiencies in environmental law enforcement in China. I’m
going to discuss why there is not sufficient environmental law in China. I’m also going to discuss the potential ways of reforming in order to address China’s environmental legal problems. I’m also going to give you several cases in order to tell you how the environmental law is enforced in China. Since the time is limited but the content is complicated, I’m not going to discuss every topic in detail. Since the time is limited we’re not going to discuss the work we do with the Center for Legal Assistance to Pollution Victims, I’ve saved that content for tomorrow’s presentation. So, please come on tomorrow. I hope tomorrow’s snowstorm will not make you guys stop and not come in to attend this event, so please come.

China started legislation on environmental law about three decades ago, that’s at the end of 1970s. On September 13, 1979, the Chinese government issued provision Environmental Protection Law, and that’s the first environmental law in China. So the development of China’s environmental legislation system is at least two decades behind the environmental legislation in Western countries. But since it started developing it developed very quickly, and in the past 20 years there has been a set of relatively comprehensive environmental law system, it’s actually the law branch which is developing the most quickly in China.

Starting from 1979 ‘til now, it’s about 25 years and China has now established a relatively comprehensive environmental law system. And there are a couple contents of this law system. The first one is the comprehensive environmental protection laws. This system includes the provision in the constitutional law related to environmental protection. This system also includes the Environmental Protection Law, which in 1979 was still a provisional law. And then in 1989 it was amended, and it is still in effect today. Regarding other legislation, many environmental professors don’t include it in the formal system, but I think they’re very, very important. So I include it in my system. The first one is the Urban Planning Law. The second one is the Regulation on Urban Planning and Construction. And the second major part in this environmental law system is the Pollution Prevention and Control Law. And nowadays the law on environmental pollution prevention and control is relatively comprehensive. It includes a law on marine protection, the law on the prevention and control of water pollution, the law on the prevention and control of air pollution, the law on the prevention and control of environmental pollution from solid waste, and the law on prevention and control of pollution from environmental noise, and also the law on the prevention and control of radiation pollution.
The third major part in this law system is related to controlling toxicants and pollution of dangerous materials, and that they are basically administrative regulations instead of formal laws. Under this part there are regulations on secure management of hazardous chemicals, regulations on management of nuclear materials, regulation on management of radioactive materials, regulation on the export of nuclear materials, regulations on emergency reaction to a nuclear accidents from nuclear power plant, regulation on supervision of chemicals, regulations on the secure management of civil nuclear facilities, regulations on the management of pesticide, and regulations on the labor protection for using toxic materials in work places.

And in the fourth part of the law system are laws regarding ecological preservation. And as you can see from the PowerPoint, there are several laws under this category. And the most important two are the law on protecting wild animals and regulations on the protection of wild plants. The regulation on the administration of genetically modified organisms in agriculture. And the last part in the law system is laws regarding natural resources protection, and includes forest law, grassland law, fishery law, the law on land administration, water or the law on mineral resources, the law on coal resources, the administration of sea area, and the law on energy efficiency and saving. And another part under the law system is regarding management of special areas. Many environmental law professors in China don’t include this part as the overall law system, but I think they’re very important so I include them here. They include regulation on environmental management of construction projects, the law on promotion of clean production, the law on environmental impact assessment, the law on renewable energy and finally the law on energy conservation.

And another part under the law system is regarding environmental responsibilities and procedures on how to seek remedies. And this part of the law includes regulation on management discharge fee, provisions on environmental crimes in the criminal court and provisions on civil liability in general rules of civil law, and the explanation on environmental crimes from the Supreme People’s Court and also the explanation on civil litigation from the Supreme People’s Court. And I want to make a special note here, in China the judicial explanation is also part of the legal system. It’s not only law and regulation but also judicial interpretation from the Supreme Court in China.

The next part in the law system is regarding international conventions and treaties on environmental protection approved by Chinese government. Our Chinese government has participated and
approved 48 international conventions, and these conventions became part of the environmental law system in China. And they can be directly applicable. In order to save time I won’t discuss each convention here.

So the next topic is about deficiencies in environmental law enforcement in China. In the past two decades the environmental law system in China has experienced significant development and nowadays has established a relatively comprehensive law system. However, there are many problems in the development of the law.

One of the major problems is that environmental law nowadays informs mainly under the administrative system, and the judicial system doesn’t have much role in enforcing environmental law in China. Though theoretically the legislature has some supervising power over the enforcement of the environmental law in China, in practicality such power has not been used. Although the law stipulates NGOs, non-governmental organizations and public also has a role to play in China’s environmental law enforcement. However since there is no sufficient procedures and process to allow this type of involvement. The public interest litigation is very limited in China, and also the public and NGOs involvement in environmental impact assessment is not enough.

There are several deficiencies in environmental law enforcement in China which needs to be resolved immediately. The first one is some objectives in the legislation remain unachieved. China enacted the Environmental Protection Law as a basic law in environmental protection. The first article of this law clearly stipulates the objective of environmental protection and improvement. However, it should not be overlooked that although there exists some progresses in the protection of the ecosystem and the environment, the environment is deteriorating as a whole, except for improvements in certain areas and aspects. Even the urban planning plan and the environmental protection plan made by the administrative agencies in China is inconsistent with the legal objective of that plan because their plan is not to make the environment better but only to mitigate a deterioration.

And another problem is enforcement of some environmental management mechanisms is still at a very superficial level. There are many detailed environmental management systems in China’s environmental laws, which covers all of the following aspects. The first is the precaution systems ahead of environmental pollution and damages. The operation systems of the environmental protection facilities during normal business process. The environmental recovery
system and also the responsibility undertaken system. And even the penalty, obligations of the environmental protection supervisors are stipulated. For the government employees who does not perform their obligations there also are criminal penalty obligations being stipulated.

However, a lot of this environmental regulations are not fully implemented. For example, China’s Environment Impact Assessment law clearly stipulates that the assessment a system of the environmental impact of construction projects. According to the statistics of the State Environmental Protection Administration, which is SEPA. SEPA is equivalent to EPA in United States, construction projects that have been undertaken the environmental impact assessment exceeds over 90% ever since 1998, and in 2002 the percentage is even up to 98.3%. Actually all the environmental projects which carry out environmental impact assessments, it’s fewer than 50%. And even for those construction projects which have environmental impact assessments there are many cheatings been going on. For example the real distance between a gas station and residential area is within 20 meters, but in the EIA, environmental impact assessment report the distance turned out to be 400 meters. Consequently the construction project is approved, but causes severe pollution later.

And the third issue is some illegal actions cannot be investigated and punished in time. China’s environmental laws not only stipulates the protection requirements of all kinds of activities, but also stipulates the corresponding punishment. If all the environmental laws had been fully enforced it would surely safeguard the environment and deter future illegal actions. But in reality the fact is that many illegal actions cannot be investigated and punished in time. Those offenders are free from responsibility. This significantly undermined the authority of the law. For example, there’s a rule in China’s environmental law called three simultaneities rule, I will explain it later. It is one of the basic rules of China’s environmental law. It stipulates that the environmental protection facilities of construction projects must be designed, constructed and put into use with the main buildings at the same time. So that’s the reason why there’s three simultaneities. According to the law this rule applies to all the construction projects likely to cause environmental pollution and damages. This rule has been in effect since 1970s. However, even until now some construction projects with severe environmental influences still began to construct without any environmental supervision or approval. At the beginning of this year, SEPA made investigations and discovered over 80 projects which did not comply with this three simultaneities rule. The cost of these
construction projects was over 200 billion yuan.

And another problem is that many environmental disputes cannot be resolved reasonably and fairly, and many pollution victims cannot get appropriate compensation. Since the pollution is getting more and more serious, there are increasingly more environmental disputes. According to the statistics of SEPA, the complaints submitted to environmental authorities regarding environmental damages are more than 50,000 cases in 2002. And every year there’s at least 20% to 30% increase in environmental complaints. A lot of these disputes have not received reasonable settlements in time, and there are even some disputes remain unresolved for over 10 years. And this not only greatly affected people’s environmental rights, but also make polluters lack of motives and pressures to reduce pollution. As long as pollution costs no additional compensation responsibilities who would like to invest millions of dollars to reduce pollution? Therefore, many environmental disputes cannot be solved reasonably and the pollution victims cannot receive sufficient compensation. This too explains why China has not managed to deter pollution effectively.

And another problem is that some environmental criminals receive an administrative punishment instead of criminal penalties. Using criminal liability and penalties on environmental polluters is proved to be one of the most effective solutions to solving environmental disputes in the worldwide. China has also realized a necessity of using criminal law in environmental protection, and do have some articles regarding criminal penalties for environmental crimes. However, these stipulations have not been executed or enforced formally. In 1997, the Chinese government put criminal penalty in the criminal court, and since then to 2002 that’s five years. And during these five years there has been particularly serious environmental pollution cases of 387. According to the criminal law, each of these serious environmental pollution accidents is an environmental crime. However, in fact, only less than 20 cases have been prosecuted. That is to say the percentage of actual prosecution is less than 5%. And when I was giving lectures in China, people asked me how many environmental laws are actually enforced, Professor Wang answers no more than 10%. This provision within criminal law has not been fully enforced. Instead environment protection bureaus use an administrative fine to replace the criminal penalties.

And the final problem regarding China’s environmental law enforcement is that environmental protection administration’s lack of authority. According to current legal provisions, environmental
protection agencies in China are subject to the corresponding administration departments in each level of Chinese government. Most of this illegal environmental action is caused by pollution enterprises. Such enterprises usually compose the main aspect of local economic development because they have paid no environmental protection cost and they are the main revenue producers in the local economy. For example, in Pingnan County of Fujian province, the amount of taxation levied on a chemical plant with heavy pollution accounts for 25% of the county’s financial income. Thus, once the environmental protection department is going to punish the pollution enterprises, the local government tends to interfere. The head of the local environmental protection bureaus are appointed by the local government, so they are hesitant to enforce the environmental laws in pollution cases. So the polluting enterprises avoid their legal responsibilities.

Next I want to address why there are so many enforcement problems, what are their reasons. And there are complicated reasons for why there’s not sufficient enforcement of environmental law in China. It includes the political reasons, I mean the drawbacks within the political bureaucracy, and also the economic development. Some of the reasons are with the legislation and also the ability of the enforcement staff to actually carry out the enforcement activities. The first main reason is that some of the legislation has deviated from reality in taking no enforcement condition into account when they are drafted. Though China’s environmental laws have experienced significant development in the past 20 years, however many of these laws are not actually enforceable. The legislators didn’t make any investigation into the reality, and they don’t count how much cost would there be if such legislation came into effect. Take the Law on the Prevention and Control of Environmental Pollution by Solid Waste, for example, the pollution mechanism, the disposal technology and the government supervision on the disposal process, are lacking the basic researchers needed, even before the law was drafted. Also it has not been emphasized enough on the reality of inadequate construction funds. All this caused the unsatisfying enforcement of this law. The NPC, which is the National People’s Congress, standing committee report indicates that the disposal rights of municipal domestic sewage in 2003 is only 58.2%. It’s still very common that many counties and towns discharge waste without any treatment. All these problems obviously conflict with the legal provisions.

Many of the legislative agencies draft the laws just in order to finish their task. In order to accomplish the agenda stated by the
legislative plan, the legislation agencies tend to set a deadline for the adoption of a certain law. This result in the fact that relevant officials devote themselves to appealing to the counselors rather than to care about whether the law can really be observed. Another problem is in order to speed up the legislative process, so many people will just basically cut the useful part of the legislation in order to reach a consensus in order to pass the law. The legislation sometimes stipulating some laws an urgent need to catch international. Some legislative departments submitted legislation proposal in order to appeal to the international community. An example would be the Clean Production Law. Now China has a law regarding clean production, which would probably be the first in the world. The reason why there is such a law is because the legislators want to appeal to the international community. But actually in effect, this law has not been enforced there at all.

One problem related to the legislation is there’s been too much emphasis on substantial legislation, but there’s not enough attention to procedure laws. However, there are not detailed procedures or processes regarding how these laws are going to be enforced. So basically this equals to no enforcement at all.

Another problem regarding China’s legislation is that the implementing regulations cannot keep up with the laws and regulations in time. Sometimes when the NPC, the National People’s Congress, attempts to draft laws, since there are conflicting opinions among the subordinating agencies, the NPC cannot draft a law because there is no consensus. So the NPC delegates the authority to draft implementation regulations to the state council. The state council is the executive branch of the Chinese national government. And the state councils face a similar problem too, because there are always conflicting interests among its subordinated agencies. So finally the state council also does nothing. That is the reason why there are few implementing regulations to the environmental laws.

Another reason of lack of enforcement is that local governments pursue economic benefits while overlooking environmental protection. Currently in China, the central government actually is paying a lot of attention to environmental protection. However, when it reaches to the local level many of these laws are not enforced. The reason why the local government doesn’t pay enough attention to environmental protection is because the way the valuation of the local government officials is based on his achievement of GDP, instead of the quality of the environment in the local area. For example, in some areas the
pollution is really serious. However, the local GDP is really high. So the head of this local government still can get promoted from the head of the county to the head of the city or even to the head of the province. The drawbacks within the administrative hierarchy enforcement power of the local environmental protection bureau, because they are appointed by the local government.

Another problem is that the opinions of the public are neglected in the environmental administration and the environmental legislation. In China, the government has a lot of administrative power, a belief it can do anything it wants without any participation from the public. However, environmental protection requires public participation. For example, in a county there are a lot of people and a lot of enterprises, but there may be only ten people within the local environmental protection bureaus. So it’s not possible for them to enforce every environmental law in every enterprise. So there has to be public participation. Actually, in Chinese environmental law every city’s NGO has a responsibility to protect the environment. And they’re encouraged to report those pollution activities. However, in reality, when these NGOs or citizens report those environmental pollutions nobody would care.

Then how do we deal with these deficiencies in the environmental law enforcement in China? Now many scholars and officials in China have proposed the following ideas, in terms of reform. And the first reform idea is to establish specialized environmental supervision bureau with the SEPA in charge of law enforcement. Also learning from the American experience, SEPA established five original supervision centers for environmental law enforcement in order to avoid local government’s interference with the environmental law enforcement. Another idea is to transform environmental protection bureaus at the basic level into detached agency. Here basic level means the lowest level in the administrative hierarchy. And the idea basically is to let these local environmental protection bureaus be no longer affiliated with the local government. Instead they are under the supervision of the environmental protection bureau of higher level. So, there is a vertical supervision system instead of being controlled by the local government. Another idea is to reform the assessment message of local government achievement, replacing traditional GDP with green GDP. Another reform idea is to reform the judicial management mechanisms in China in order to free court from the influence of local government. And another idea is to establish the procedural message to enhance public participation.
Last spring, SEPA drafted a new rule called Message on Public to Participate in Environmental Impact Assessment. Last year Professor Wang’s organization, Center for Legal Assistance to Pollution Victims working with (NRDC) to help SEPA draft a new law on the message on public participation in environment impact assessments. And this year SEPA is going to draft a new rule on publishing environmental information. Of course, enforce these reforms will face a lot of difficulties. However, there will be some difficulties in terms of the reform of judicial system. As you may know, in China the judges are appointed by the local people’s congress. However, there has been strong influence from the Chinese Communist Party on the local congress. Also, there are some special problem with participation and environmental NGOs. As you may know the regime in Eastern European countries changed because there were a lot of NGOs in the country at that time. So, the Chinese Communist Party is a little bit afraid if there are too many environmental NGOs the regime may change also in China. The Chinese Communist Party learned a lot of experience and lessons from the change of regime in Eastern European countries and it doesn’t want such things happen also in China. So that’s a reason why NGOs develop very slowly in China.

However, the environmental laws in China are getting more and more detailed, and there are more implementing regulations. The laws are getting increasingly consistent with the goals of the general environmental policy that is to protect the environment. China has been experiencing significant development both politically and economically. So, I’m confident that the current problems with China’s environmental law enforcement will be conquered in the future as China’s economy continues to develop. Environmental protection has become a common task for people from every country. And in order to fulfill its responsibilities under the international environmental conventions the Chinese government will do everything it can to make its environmental law enforcement more and more consistent with the international practice. Therefore, I’m very confident in the development of China’s environmental law and enforcement in future.

Originally, Professor Wang planned to talk about three cases his organization has been dealing with, and it’s actually three important environmental cases. However the time is limited for today. So he will save the content for tomorrow. And again, please come. Thank you, everyone. I can answer questions. Is there anyone with questions that they want to ask Professor Wang? I can answer any questions.
AUDIENCE QUESTIONS

Professor, thank you for coming here, for being so candid about the issues and the challenges that face your country. We have many of those same problems here. We try to walk the walk, but we don’t always do it. I wonder can these issues—are they being discussed as candidly in China as you have been able to discuss them tonight? Is there a dialogue going on in China at this time?

Professor Wang Canfa (translated)
In an academic conference you definitely can. But in the meetings with Communist Party you probably won’t.

Professor Jerome Cohen
You’ve given us a wonderful report. The only question I have is about your optimistic conclusion. I agree China is making great progress. But I worry about the time. Is the progress going to be done in time to meet this horrendous challenge? A challenge that affects us as well as those in China. It seems to me we need more vigorous leadership from the 17 party congress that’s about to convene this fall, as well as the National People’s Congress that will convene next week. Time is the problem. Is there going to be enough time?

Professor Wang Canfa (translated)
Professor Cohen knows a lot about China. And Professor Wang thinks in the near future the environmental deterioration will continue in China. However, he thinks central government has been paying more and more attention to the environmental protection in China. For example, at the end of 2005 the state council issued a policy document focused on improving China’s environmental protection. Since then China’s environmental policy changed significantly from prioritizing economic development to prioritizing environmental protection. With such change in the overall policy, the enforcement of China’s environmental laws will hopefully make big improvements in the future. Also, in the coming National People’s Congress convention in March, that probably will not be special decisions on environmental protection. However, in the Chinese government’s 11th five year plan the content regarding environmental protection has increased dramatically than past years. However, the key problem right now is how to enforce the central government’s policy idea in the local level.
Audience
I was wondering if you could maybe comment to follow up on Professor Cohen’s question on the recent promotion of Xie Zhenhua. Xie Zhenhua, for those of the audience who don’t know was the director of the SEPA, of the State Environmental Protection Administration up until about a year and a half ago, just before the big in Songhua River. And he was supposed to resign, and a new person took over. And then just a month ago he was promoted to the deputy director of the National Reform Commission, which is one of the very powerful commissions in China. And so, part of the reason why he resigned, was forced to resign was for him to take responsibility for this environmental disaster and he is now being promoted. I’m wondering what your thoughts are about that.

Professor Wang Canfa (translated)
There are some political reasons behind resignation. Actually, the Songhua River oil spill caused some tension between China and Russia. So there has to be someone to stand up and take the responsibility. So the person who should be taking responsibility is probably the premier. But however you can’t ask the premier to step down. So instead Mr. Xie Zhenhua resigned. Another reason is there may be another person who should take the responsibility, and that’s the president of China’s biggest gas company. However, that guy made significant contribution to China’s economic development. So it may not be appropriate, again, to ask him to step down. So, that’s a reason why Mr. resigned. However, after his resignation he became the deputy director of China’s national development and reform commission. That’s actually not a promotion, it’s the same political rank. So he’s back to his job again without promotion. Another person who should take responsibility is the mayor of Harbin City. However the vice mayor of Harbin City committed suicide after this event. So if you ask the mayor of Harbin city to step down, again, there may be another person committing suicide. So, one thing after another became the scapegoat in this case.

Audience
I’m from Canada. And rest assured that you’re not alone. And your efforts are supported by others. And we are very aware of the problems in China, and there’s people really concerned and want to help, in a humble way.
**Professor Wang Canfa (translated)**
Thank you.

**Audience**
The efforts that you are doing shows that China is by yourself showing the problems to the world. And except that others also are interested by these problems. In fact as the professor mentioned before, time is of the essence. But I think that time is going to be favorable to us, because we wouldn’t be in this room tonight if we didn’t believe there was a solution.

**Professor Wang Canfa (translated)**
Nowadays there are more and more people in China paying attention to environmental protection. But the problem is still with the enterprises because they are really the entity polluting the environment. I think one of the proposals to deal with it is through legislation, and ask for public participation of every citizen in China. And particularly those pollution victims should bring action in court, exactly as Professor Wang’s organization, Center for Legal Assistance to Pollution Victims, did is to help the citizens in China with their environmental litigation. Also another key is environmental protection. Nowadays in China, the citizens’ awareness in terms of environmental protection is not as high as the citizens in the United States. Many people are just wasting resources. For example, use plastic bags instead of paper bags.

The last couple of days Professor Wang visited Oregon University School of Law for an activity there. And he went to the library and found there are lots of environmental magazines and journals in the library, for example, the Harvard Law Review. And there is even a special magazine for environmental lawyers. However, in China there’s not even one specialized environmental journal. So he thinks this is the area that we should pay attention to, and that is environmental education. Thank you, thank you everybody.
KEYNOTE: AN INTRODUCTION TO LAW IN CHINA

Professor Jerome Cohen

Friday, March 2, 2007

Many months ago, when Professor Tseming Yang broached the idea of this conference with me, I replied that I would surely be interested in participating if it could be held during ski season. Of course, when visitors come to Vermont in winter, they are sometimes disappointed by a lack of snow. But today nature has vindicated my hopes with a vengeance, and I am impressed that so many of you have managed to surmount the elements to get here.

I want to congratulate Vermont Law School on its accomplishments, especially on its good judgment in emphasizing the environment and in sponsoring the Vermont Journal of Environmental Law. I also want to congratulate Professor Wang Canfa for last night’s very comprehensive, interesting and frank appraisal of China’s progress in environmental law, its problems and its prospects. I learned a great deal. I’m not a specialist in this field. My major incentive for attending this conference is to learn more, not to go skiing.

When I started to study about China, it was still possible for a single scholar responsibly to tell people about the entire contemporary Chinese legal system. Soon after, following the outbreak of the Cultural Revolution in 1966, although the excitement was titillating, there was even less formal legal content to master. Nevertheless, to some social scientists interested in law, China at that time seemed more fascinating than other major countries precisely because in many respects the country continued to function despite the absence of a conventional Western-type legal system. To be sure, there were political and military interruptions and sometimes chaos. Yet, the society and economy endured. Not long after the end of that cataclysm, following Chairman Mao’s death in 1976, one of my first students published a book about this new Chinese phenomenon called “Law

Without Lawyers.” Of course, there wasn’t even much law in that era. One wondered how a nation could hold itself together without legislation and a structured court system, not to mention a legal profession. During that period even Communist legal observers from the Soviet Union and Eastern Europe professed to be puzzled, indeed shocked, at China’s lack of legal institutions. Then Deng Xiaoping completed his return to power in December 1978, and that ended the country’s brief experiment with radical legal innovation. Deng and his colleagues decided that, in order to achieve their ambitious modernization goals, China did need something that resembled a formal legal system.

The National People’s Congress is about to convene its annual session. It usually meets for about a week. But this time its legislative agenda is so crowded that the meeting has been extended to eleven days. It has several controversial draft laws on the agenda, and I am eager to see what will emerge. In the autumn an even more important meeting will take place. As Professor Wang made clear last night, the real power in China, of course, is the leadership of the Chinese Communist Party—the Politburo and especially its nine-member Standing Committee. This fall the 17th Party Congress that supposedly provides guidance to the Party leaders every five years will convene in Beijing, and it will be important to see what, if anything, it and the Party leaders decide to do about what is now China’s increasingly formal legal system. Should they proceed with further Western-style norms and forms? Should they stop where they are? Have they gone too far? Should they try to reverse things? Would it be possible to do so at this point? This is an immediate and practical problem, not just a theoretical question.

You have in your materials a short talk I gave in January at the annual meeting of the Association of American Law Schools. If you would like to pursue the subject, you may look at some recent articles I have published in the Far Eastern Economic Review.

Let’s start with a quick historical perspective—a little bit of instant China for busy people. The effort that Deng Xiaoping began in 1978 to import and adapt a Western legal system for purposes of China’s modernization was certainly not the first such effort that Chinese leaders have made. At the end of the nineteenth century, the rapidly declining Qing or Manchu dynasty began to show interest in Western

law, especially Continental European rather than Anglo-American law. The would-be modernizers of that era had two purposes in mind. Their immediate purpose was more political than strictly legal—to rid the nation of foreign extraterritorial jurisdiction, the power that foreign consuls and courts were then exercising to adjudicate civil and criminal cases on Chinese soil. A spirit of nationalism was developing in China during that period, and the country’s leaders became aware of the fact that extraterritoriality was not a normal method of sovereign international intercourse. Indeed, it was a humiliating symbol of China’s second-class status in the world.

The second purpose of China’s early modernizers in looking to Western law was related to the first but of a longer run nature. They wanted China to become strong and follow the example of Japan, which, in forty years, had adapted the forms and norms of Western justice and thus managed to throw off the incubus of extraterritoriality. Japan seemed to have made the importation of Western law an instrument of self-strengthening and become so powerful that in the war of 1894-95 it defeated Mother China from which, a thousand years earlier, it had imbibed much of its culture. Public international law was the first Western legal subject to enter China’s educational system, and it started to be taught not in a law school, for there were none as yet, but in a newly-established military academy. Foreign law was seen as a weapon to be utilized in the nation’s defense, and we should bear this in mind.

The late imperial attempt to absorb European law continued after the Revolution of 1911 put an end to the last of the dynasties, and it expanded after Chiang Kaisheng seized nationwide power in 1927-28. Over the next decade Chiang’s regime adopted codes of law that are, by and large, still in effect in Taiwan, to which he fled after losing to the Communist Revolution in 1949. This first Chinese effort to adapt Western law, from the end of the nineteenth century to the middle of the twentieth, deserves far greater attention than it has received. Unfortunately, for a variety of reasons, its practical impact was limited. It developed Chinese-language equivalents for Western legal terms and produced impressive codes of law, and it gave China experience using Western-type law in its contacts with foreigners. But China was such a huge, populous, traditional, and economically backward land that implementing major legal changes proved very difficult. Bringing change to the vast rural areas was, and still is, especially challenging. For example, by 1949, after decades of effort to establish modern courts, only one-quarter of China’s 1800-odd counties had done so.
Here I should say a word about the pre-modern Chinese legal tradition. Many people do not understand that China had a great legal tradition for some 2,000 years. The imperial legal system, embracing, and enforcing Confucian norms, at its higher reaches employed some officials who were learned in the law and conscientious in its application. The emperor himself, although in principle not subject to the law, was nevertheless restrained by its spirit on numerous occasions. By the time of the last dynasty the accretions of the centuries had made legislation very complicated. Although this gave the magistrate at the county seat, the lowest level of imperial government, considerable discretion in applying the law, he had to exercise that discretion carefully to avoid rejection of his decisions or recommendations by appellate authorities and even his own punishment. The traditional system was very different from any that prevailed in the West by the nineteenth century.

Yet some of the few Westerners who began to visit China as early as the sixteenth century had a fairly good opinion of the legal system of the then Ming dynasty. In comparison with the Inquisition that they had left behind, some travelers from the Iberian Peninsula formed a favorable opinion of Chinese trials that they witnessed. To be sure, the magistrate was authorized to employ torture and frequently did. But at least torture was regulated in detail by law. Moreover, the trial was held in public rather than in the dank, dark dungeons of the Inquisition.

By the mid-nineteenth century, however, Western views of the imperial legal system had begun to change radically. Not because the Chinese system had changed in any major way. It had not. What had changed was the West. In the seventeenth century England had gone through two great revolutions that advanced slowly developing concepts of constitutional law from which we benefit today. The eighteenth century witnessed the American Revolution and the written constitution and Bill of Rights that it spawned as well as the French Revolution with its emphasis on the rights of man. Thus, what had changed were the spectacles through which Westerners were viewing legal developments in other lands.

Some Westerners had political or economic motives for criticizing the traditional Chinese system. The term “human rights” was not yet in use. Yet, when the English wanted to conjure up excuses for invading China in 1839 in order to open up the country to business including the opium trade, one of their major complaints was the failure of the Chinese judicial system to give what we today call “due process” to those foreigners unfortunate enough to become embroiled in it.
We must not ignore history, not only because of its intrinsic value but also for practical reasons. My own experience in dealing with China in business law, human rights, and legal education suggests that the impact of the Chinese tradition is abiding in many, if not all, respects. Yesterday Professor Wang noted that contemporary Chinese law and practice emphasize substantive matters much more than procedural ones, and that this trait is increasingly thought to be a defect in the legal system. Well, this defect came from somewhere—from the legal experience of the imperial dynasties.

China’s second great effort to import and adapt foreign law began in 1949. Although we Americans don’t think of the Soviet system as a Western system, from the perspective of China it surely was. Of course, Marx himself was a Westerner, and Russia, despite its large Asian minority population, was perceived to be a white, Western regime. When Japan in 1905, ten years after its defeat of China, went on to humiliate Russia, one of the original imperialist powers, Chinese leaders began to see what a self-strengthened China might do some day. The Bolshevik Revolution dramatically altered Russia in 1917, but Lenin, who had studied law and practiced briefly, was wise enough not to throw out the pre-1917 legal system. In 1864 the Czar had imported elements of the Continental European system of Switzerland, France and Germany. Lenin retained that system, but put a socialist gloss on it, thereby providing continuity together with some ideological flourishes. By the time the Chinese Communists seized power in 1949, the Soviet system, although highly repressive, had achieved a degree of legal sophistication, and it was that system that Chairman Mao decided to import. Thus, from 1949 until 1957 China’s new leaders, rather than steal a page from Lenin’s book by retaining and adding some socialist flourishes to Chiang Kaishek’s version of a European legal system, instead totally abolished the pre-existing system and imported the Soviet model lock, stock and barrel. Soviet law professors came to teach in China. Soviet law books were translated into Chinese. Many who were to become China’s leading legal scholars, some still active even today, were sent to Leningrad, Moscow and other Soviet cities to study Russian language and Soviet law.

Yet this second Chinese effort to import Western law did not last very long. In 1957-58 Chinese leaders, in a notorious and harsh mass political campaign led by Chairman Mao and administered by Deng Xiaoping, imposed the Anti-Rightist Movement upon the country, and this was almost immediately followed by the Great Leap Forward. That potent combination put an end to the brief reign of Soviet law.
Ironically, at the same time in Moscow, after Khruschev denounced Stalinism at the January 1956 Soviet 20th Party Congress, the Soviet Union ended some of the worst excesses of its legal system as part of the process of “deStalinization”. But China went the other way, into a more radical and lawless phase, culminating in the Cultural Revolution, which demolished whatever shreds remained of the Soviet legal model. That was a time when Chairman Mao and his wife Jiang Qing boasted: “All is chaos under Heaven. The situation is excellent” and one editorial in the People’s Daily, the voice of the Chinese Communist Party, was titled: “In Praise of Lawlessness.”

The Cultural Revolution caused many arbitrary killings and suicides and a huge amount of cruelty and suffering. Over a hundred million people were profoundly affected. Deng Xiaoping’s son was pushed out of a window and crippled for life. Such a nightmare had to create a strong reaction. After the nightmare ended, Deng, who himself had suffered, decided that China had had enough of “class struggle” and that the country had to catch up with all the nations around it that had developed more rapidly than the Central Realm during the previous thirty years. Law was to become a principal instrument of China’s belated modernization push.

Law was invoked to serve a number of critical functions. First of all, every political system needs a legal system to communicate and enforce its policies and norms and to structure its government. Another role that Deng wanted the legal system to play was economic. Buyers need to know that sellers will come through with the promised goods or pay the consequences. The domestic economy, Deng recognized, needed a legal system to enhance its predictability and the stability of expectations. Moreover, the new leaders wanted to end China’s relative economic isolation and reach out to the world’s most developed countries in order to benefit from foreign trade, technology transfer and investment, and this too required a formal legal system.

Also, the country had just emerged from a horrible twenty-year period, and many people, including Communist officials, were demanding protection of “the basic rights of the person.” They were not yet using the term “human rights,” although the Communists prior to “Liberation” had used it to condemn Chiang Kaishek’s oppression.

Until recently, after the Party gained control of the country, it regarded “human rights” as exclusively a Western political slogan designed to discredit governments with which the Western powers disagreed. Nevertheless, the post-Mao leaders recognized the need for a legal system that would be seen to protect people against arbitrary rule.

In addition, China was seriously troubled by crime and needed a legal system that would be seen to effectively suppress what was deemed to be anti-social conduct. It also required more competent institutions for settling interpersonal disputes and complaints against the state, since no government can ignore the accumulation of a large number of unsettled grievances.

When we compare the situation in 1978 with that of today, of course we see tremendous progress. There is no doubt that China now has a formal legal system. If we look for the existence of adequate norms, just consider, for example, what Professor Wang showed us last night about the proliferation of environmental laws and regulations in recent decades. Similar legislative strides have been made in virtually every field. Moreover, these norms have been supplemented by those enshrined in an enormous number of recently concluded multilateral and bilateral international commitments. All of this is a huge achievement. I don’t know of another national elite in history that has done more to produce legislation, regulations, guidance and other norms in so short a time.

Of course, norms are not enough. A country has to have institutions, and in 1978 one was hard-pressed to find any significant legal institutions in China. Now China has gradually rebuilt its court system, brought back its prosecutors and rehabilitated and expanded its long absent legal profession. Today it has perhaps 200,000 judges, 160,000 prosecutors and 140,000 lawyers. There are roughly 625 law schools and law departments.

When I first visited China in 1972 even though the Cultural Revolution was still going, its most violent phase had passed—I was eager to get acquainted with my Chinese counterparts. I went out to Peking University but couldn’t find any law professors. They were all either at home or down on the farm having their thoughts remolded. The next year, although legal education had not yet resumed, I went back and managed to find a few law teachers. They were different from their American counterparts in two respects. First, they looked a lot healthier since they had acquired good suntans working in the fields while most of us had been laboring in the library. Second, they were very silent. American law teachers like to talk. I’m Exhibit A. But my
new Chinese acquaintances had little to talk about except some bad experiences they weren’t allowed to relate, and in any event they were too intimidated by the political campaigns of previous years to say anything at all.

That was legal education in the early 1970s. Today it is booming. As early as 1981 I asked a Peking University student why she was studying law. “Oh,” she said, “law’s the ‘hot ticket.’” And it has been ever since. Legal scholarship has also begun to flourish. When I lived in Beijing from 1979-81 its bookstores had no special section for legal materials. Now publication of law books and law reviews is big business, and quality is improving daily. The legal system is not yet nearly transparent enough, but, under the stimulus of China’s WTO obligations, it is making progress on this front as well.

Perhaps the most important thing to note about the new situation, and that was evident last night because Professor Wang is a principal symbol, is that there is now a new elite of overlapping legal specialists who did not exist in 1978 and who are increasingly influential: judges, prosecutors, lawyers, legislative and administrative officials, corporate counsel and law professors and scholars. Every government agency now has legal experts. It’s not like 1979 when a man came to me who was in the First Ministry of Machine Building’s Law and Contracts Division. He said he wanted to study law abroad. When I asked why, he replied: “Look, every day my colleagues and I have to negotiate with the giants of the world’s automotive industry and their lawyers. (They were negotiating with Volkswagen at the time). We in the Law and Contracts Division have only one problem. We don’t know anything about law or contracts!” That is not the situation today. These elites, especially the law professors—and Professor Wang embodies that—are influential people. They are not only scholars who teach and publish but they also lobby for and participate in law reform, often handle concrete cases and sometimes serve in government, the courts or the legislature.

China’s legal progress has been especially prominent in certain fields, for example, in the area of foreign investment and business and financial law. Yet the courts have thus far not begun to play an important role in some of these fields including public regulation of business. I was struck by what Professor Wang said last night, that, in environmental law, enforcement in the courts is not yet a major factor. It may be that public interest litigation of this type will become increasingly significant in China. I am glad to note that two of our able N.Y.U. graduates, Alex Wang, who is at this conference, and his wife
Ms. Hyeung-Ju Roh, are working with Chinese colleagues including Professor Wang in the hope of expanding the role of the courts in this respect. But at the moment, the role of administrators overshadows that of the courts as it has always done in China. That is still also the case with regard to foreign investment, trade and technology transfer, although both arbitration and litigation are becoming increasingly significant despite the persistence of serious doubts about their fairness.

There have been three big pushes behind the rapid development of the financial/economic legal system. The first was the desire in 1979 immediately to attract foreign investment. At that time outsiders did not appreciate how much China intended to rely upon cooperation with foreign capitalist enterprises for its capital needs rather than the World Bank, the International Monetary Fund, the Asian Development Bank and foreign governments. The second big push came in 1992 when Deng Xiaoping fostered the development of capital markets, and stock exchanges were established in Shanghai and Shenzhen. The third big push began in the late 1990s as China prepared to enter the WTO. These economic policies have had transforming effects upon the Chinese legal system.

Of course, there are some weak links in the Chinese legal system. Criminal justice is the weakest of them, and that’s why I take part in efforts to improve that aspect. The era of making gross generalizations about China’s legal progress is coming to a close, as each aspect and area require careful scrutiny and analysis. This is why I value the opportunity to take part in conferences such as this. Of course, whether we study topics such as regulation of the environment, protection of intellectual property rights, control of the securities markets or enforcement of judgments and arbitration awards, we see one common problem—the weakness of the Chinese central government.

Most Americans have grown up on the assumption that China is run by a totalitarian dictatorship led by the Politburo Standing Committee, whose rule supposedly reaches every village. But that is a skewed view of the actual situation. Once I started working in China I learned that in many, not all, respects the country is more like a series of feudal baronies. The reach of the central Party and government authorities is limited, except for those matters that are accorded the highest priority, such as suppression of what used to be called “counterrevolution,” espionage, political democracy and the Falungong. Highest priorities evoke extraordinary efforts on a nationwide basis, but no government can give everything its highest priority. Every government agency has to make choices about how to allocate scarce
resources, even at the local level. I remember when I was interviewing a former public security officer from Fuzhou while in Hong Kong in 1964, in the days before China enacted a criminal code, I was trying to find out what conduct was deemed “criminal” and what conduct, although disapproved, was not to be punished as a “crime.” When I asked about adultery, the ex-policeman replied: “If we tried to punish all the adulterers, we wouldn’t have time to pursue the counterrevolutionaries!”

So every system has to have priorities, and in most cases, even in China, the central government’s writ does not run very far. It doesn’t have the financial resources because of an inadequate tax system. Moreover, local power-holders are extremely important. We heard last night that one of the problems of environmental regulation in China—and of all regulation—is “local protectionism.”

Another major problem, of course, is corruption, which has increased greatly in China. It affects the judiciary as well as other government institutions, and is one of many distorting influences upon the judiciary’s operation. Another is politics. Party control of the courts is still universal, although manifested to different degrees in different places and times and with regard to different legal issues. A political-legal Party committee that corresponds to every level of government and court gives guidance to the courts at its level, often in actual cases. Moreover, wholly apart from outside Party instructions, in important cases the judges who hear the case generally do not get to decide it. Rather the court’s “adjudication committee” composed of the highest court administrators usually decides the case and is often influenced by factors other than the legal merits.

The biggest problem in achieving fair adjudication in China, and it affects commercial arbitration as well as court decisions, is “guanxi,” that network of family, friendships and other contacts and reciprocities by which Chinese live and that seems to undermine all hope of evenhanded enforcement of the law. How to control and restrict its application? How to apply legal ethics? Of course, as I said to Professor Wang at breakfast, we have “guanxi” in America—classmates, relatives, friends, etc—but we generally know its limits with respect to our legal system. To be sure, further empirical research may teach us that those limits are wider than we realize in America, but, in comparison with China, our situation seems under better control. I hope I’m not being naive. In any event, “guanxi” seems to have a special impact in China.

I’ll give you just one example. Not long ago, I asked a fortyish
Chinese businessman whether he used lawyers in his work. “No,” he said, “I don’t need lawyers. I use standard trade contracts for both my local and international business.” I said: “But don’t you have disputes?” “Oh, of course I have disputes,” he replied. I said: “Then don’t you need a lawyer to help you in disputes?” He responded: “Why should I hire a lawyer? My wife is a judge.” Through her he could go to whatever local court he had to in order to get the case taken care of. This attitude permeates Chinese society and demoralizes many of its younger lawyers. One experienced Beijing litigator told me: “I wish I were just doing corporate work. I don’t like going into court. It’s like a crapshoot. You don’t know whether the judge has been reached. It’s too unpredictable and arbitrary.”

In my own sad experience, and I’ve written about this in the Far Eastern Economic Review, even China’s leading international arbitration organization suffers from similar distorting influences. It is a challenge for any legal institution to escape the influence of the environment within which it has to operate. Some Chinese institutions, such as the Beijing Arbitration Commission, are striving especially hard to overcome these problems and appear to be making progress, but only time and research will tell. In the interim, all of us who deal with the Chinese legal system have to recognize its limitations and use it the way Chinese criminal defense lawyers deal with the criminal process, where they are required to fight with one arm tied behind their back.

The struggle to establish a genuine rule of law in China, in the sense of government under law and a functioning and impartial system for arbitrating and litigating important disputes, will be under way for a very long time. As already mentioned, we need to know much more about the actual conduct of the Chinese legal system, and Chinese scholars and law reformers recognize that they do too. Empirical legal research is just beginning to take off in China, and foreigners occasionally also manage to make a contribution. The other day I read a very good book by a Dutch scholar from Leiden named Benjamin Van Rooij. Some of you know him. I’m sure he has worked with Professor Wang. He has done an empirical study of efforts to enforce

environmental protection in some villages near Kunming. It demonstrates the desirability and importance of such research as well as the difficulties that confront this research. I assure you that in my field, criminal justice, empirical research confronts even greater difficulties because of the sensitivity with which the Chinese government regards even inquiry into minor, mundane criminal cases.

Yet the effort has to be made. Many Chinese scholars, lawyers and officials are reaching out for cooperation, and we should positively respond to their requests, but with open eyes. What can we do? I am delighted at what Vermont Law School is doing in collaboration with Sun Yatsen University Law School and Professor Li. Projects such as yours put flesh on the bare bones of often tired slogans exhorting us to enhance “mutual understanding.” They not only help each side to learn about the other but also improve our professional techniques as well as our substantive knowledge. In addition, they provide moral support for Chinese scholars who sometimes risk their professional position or even their personal security in controversial areas such as the environment. We need more projects like this, and we need more American professors to go to China as Professor Yang did on a recent Fulbright grant. We also need more Chinese to come here to teach, do research and study.

At New York University Law School, I am pleased to note, we have just established a U.S.-Asia Law Institute that will focus on Greater China. One of our first projects has been to join Shanghai Jiaotong University Law School in setting up a Center for Chinese and American Law in Shanghai. At NYU we also welcome each year about 35 students from China, mostly LL.M. candidates but a few J.D. and J.S.D. candidates as well, in addition to about 15 students a year from Taiwan. We also have distinguished visiting scholars from China and have begun to invite Chinese experts to join us as visiting professors. Other law schools are making similar efforts. For example, on a recent visit to the University of Indiana Law School in Indianapolis I was surprised to find some 30 students from China. This is terrific progress. There’s nothing sadder than to receive an email such as I got this morning from an able Chinese law student who bemoans the fact that she can’t find the money to come here for advanced study. I get these messages every week. So there’s a lot more to be done.

Whether we focus on the environment, criminal justice or other topics, we have to conclude that China is making legal progress, but not rapidly enough to meet its formidable challenges. I am confident, however, that if the Chinese and we in America and other countries
significantly increase our cooperation, as the Chinese popular song goes, “Tomorrow will be even better.”

AUDIENCE QUESTIONS

Audience
I wondered if you could comment on one observation or issue. Law in China, as you explained, has a long history. It appears that most of the recent attention and efforts at reform, however, have focused mostly on business law—contract, intellectual property, international trade, for example. Public law fields, like the environment, food safety, drug safety, seem to have been neglected. The steady stream of stories out of the Chinese media about huge failures with respect to pollution, food scares, and contaminated or counterfeit drugs seem to confirm that. For example, a few years ago, there was a scandal involving substandard baby milk powder that did not meet nutritional standards. Hundreds of infants were hospitalized for malnutrition and several babies died. Can you comment on this issue?

Professor Cohen
Well, law reform in China often comes in spurts as a result of tragedy, as you point out. People die because food has been polluted or you have false labeling. They get serious about punishing intellectual property violations if it turns out that the trademarks were false and somebody was really harmed; and that’s perfectly understandable. The trouble is, there are so many conflicting interests now in China. Although China does not have a conventional western style democratic system, it does have, as you know well, and as we heard last night, many conflicting interests. The Chinese have lobbying of a very intense nature. Chinese government owned enterprises are very influential. They often are the biggest obstacles to public law reform.

Yet, there is a kind of public opinion in China, however restrained. The Internet is playing an increasing role. The newspapers, having now to make a living rather than get supported by the government, are trying to appeal to popular interests. So these kinds of unhappy incidents do play up and develop more of a role for law reform. I wouldn’t exaggerate how much is being done in the private field; that’s also been very slow. The National People’s Congress is now considering, as you know and it may enact finally, a real property law. And a labor contract law—wildly controversial—may finally come out. These
things take, sometimes, decades. Of course in our own legislative congressional system we have similar problems.

One problem in comparative law, especially looking at China, is you have to compare apples to apples. We like, instinctively, to compare our theory with their practice, and that leads to some distortions. You have to look at: how does our criminal justice system really work? And we see many unpleasant aspects there. Sometimes Chinese see them to a greater extent than we do. That’s the advantage of having foreigners looking at your own legal system. So there is this public law problem. China is increasingly under pressure. Look at the AIDS problem, for example. On the one hand, they must exterminate the problem; on the other hand, they don’t want to wash their dirty linen in public. That wonderful woman, Dr. Gao, at first wasn’t allowed to come to this country; she’s in New York now, however. Which shows you there is repression, but there is also more and more collaboration in China, among intellectuals, lawyers, and scholars who are speaking out. Sometimes this has an impact. There is progress being made in all these fields, but it’s fitful, it’s uneven, and it requires a terrific amount of energy. You have to admire this relatively small group. You know, a few thousand people can write a lot of law, but it takes hundreds of thousands to administer the legal system. It just has to be stimulated further. The leadership is perfectly ambivalent. They’re stuck. I think, if today they had to decide whether or not to import a western legal system, maybe they wouldn’t do it; but they are stuck with it. They inherited this from Deng Xiaoping. Now, the legal system has its own momentum. They have halfway imported an adversary system. Can the Communist Party live with an adversary system? Taiwan is just taking that on now.

One point I should have mentioned is that we have to look at Taiwan; we have to look at South Korea, places that are similar, very similar culturally to China, and have similar circumstances and challenges. They are small places in comparison with China. Taiwan has 23 million people. Less than the size of greater Shanghai. South Korea has 45 million or so, half of Shandong Province’s population. But nevertheless, these are very significant examples of Confucian cultures that have made a genuine transition to something that has to be recognized as a variant of the rule of law, just as Japan has done.

Something will happen in China. But I like the Chinese phrase “everything takes time.” That is, a process. Rome wasn’t built in a day. But we can’t just sit back and say, “history will take care of the problem,” because there’re real live people involved. I have friends in
jail in China. I can’t sit back and say, “well tomorrow will be better and just let education take its course,” and international contact and all that. I think we all have to try to help, but be realistic about it. The nice thing is, this is not an American missionary impulse that’s stimulating this. We are responding to impulses now within in China. One of the big questions will be whether China is going to finally ratify the U.N. Convention on Civil and Political Rights. If they do that, it will have an impact on Chinese justice, just as profound as the entry into the WTO has had on Chinese economic and administrative law.

Professor Wang Canfa (translated)
I think Professor Cohen gave a very wonderful presentation on China’s legal system. Professor Cohen knows Chinese law very well. Professor Cohen’s comment on Chinese law’s historical development and current situation is very objective and Professor Cohen knows a lot of the litigation problems in China and particularly guanxi China’s litigation. But, what I want to tell you [that] it is not every lawyer [who] takes a lawsuit guanxi. There are some lawyers who like to use law as the tool to proceed with the case. For example, I mean sometimes I help the pollution victims with the litigation, even though I know that I may lose the case; but I won’t use my guanxi case. I have many classmates and students who work in the court. Also, one of my classmates is currently vice president of the Supreme Court in China. When I litigated for pollution victims, I lost some good cases. But I won’t ask for help from my classmates and students who work in the courts because I don’t think going for guanxi is consistent with my personal values. Even if I win the case through guanxi. I don’t and that’s consistent with the rule of law concept in China. There are some lawyers in China, particularly lawyers, who don’t pay attention to guanxi. They pay more attention to the influence of the specific case. But if you want to win a case in China you’ve got to try to use your guanxi on that.

Professor Cohen
Good. Of course, I tried to make that clear that you have uneven development and you have different practices. I’ll give you an example. In the intellectual property field, the three basic rubrics are patent, trademark, and copyright. The patent area seems to be run quite legally—playing it straight administratively and especially on judicial review of patent decisions. But copyright and trademark are more, or less regulated, more subject to all these distorting influences, and you
have to know each field. Secondly, as a practicing lawyer, whether you’re a foreigner as I was in China or Chinese, you have ethical dilemmas to confront. One of them is that you know the other side is using *guanxi*. What should you do? Should you say, “Well in America we don’t do this, and the best people in China don’t do this, therefore I’ll let my client lose” or do you say, “I’m gonna do this”? Well, you’re not gonna do this, I’m sure, if the other side is engaging in corruption. *Guanxi* may be one thing, but corruption may be another. You’re faced with all these ethical questions because you have a duty to the client and you have to be honest with the client. This is a problem that one has in daily life. These are not abstract philosophical, purely academic questions. These are problems of interaction in the legal system.

Well, I’ve used up too much time. I apologize to my revolutionary successors. And I look forward to learning from them and I thank you for your interest.
ROBERT JONES

Well, thank you for that very kind and lovely introduction. Actually I really didn’t expect to be here today addressing you. In fact I thought that I would just come along for the ride with my wife, Margret Kim, who’s sitting in the front row, as Margret will be speaking to you later on this afternoon. Margret and I co-founded the Ecolinx Foundation about four and a half years ago with the express purpose of assisting China’s transition to a more sustainable environment and energy future. And over the last four years or so, we’ve been very active in China. We go there about every two or three months, on average. And we’ve been focusing on the area of public participation, building capacity in public participation in the environment, and environmental governance. And of course Margret will be telling you a lot about that a bit later this afternoon. I am not a lawyer nor am I an engineer, but as mentioned earlier, I’m an Entrepreneur or an ecopreneur, as I’ve dubbed myself. And I have two (2) great passions in life, apart from my wife. And they are the environment and China. And my roots in China go way back to the sixteen hundreds when my ancestors first went to it’s southern shores. I was born and brought up in Hong Kong. And I learned how to speak Cantonese before I could even speak English, which I still seem to have some trouble with today.

When you think about China, what images come to mind? The mist shrouded peaks of Wuling? The Forbidden City? Oceans of...\[\]

\[10.] Robert Jones is the President and Co-Founder of the Ecolinx Foundation.
\[11.] Fredrick (Rick) Weston is a Director of The Regulatory Assistance Project.
cyclists perhaps? Or even the Great Wall itself? And incidentally it’s never been determined whether the Great Wall was built to keep marauding barbarian hordes out or the Chinese people in. But anyway, that’s another story for another time perhaps. But when I think about China, I think about the single most ravaged environment in the world. The air in her major cities is so thick with coal dust, vehicle exhaust fumes, and a cocktail of other pollutants that the inhabitants live in an almost perpetual murky twilight. By some estimates China has 16 out of twenty of the world’s most air-polluted cities; at least according to the World Bank. And nine out of ten of the world’s most polluted rivers. And during this century China is expected to become the world’s next super power.

But in actual fact China is already an environmental and energy super power with the capacity to wreck havoc on ecosystems the world over. With 1.3 billion people, a rapidly expanding economy, and one that’s seemingly on steroids, and the desire to emulate higher consumption patterns in the west. China’s declaration to quadruple her GDP by 2020, this highly combustible mix poses an enormous threat to the global environment. China is now the second largest consumer of energy in the world after the United States, of course. And is responsible for about 14% of the world’s greenhouse gas emissions.

Second, again, only to the United States. And there are some reports that China will probably overtake the US in GHG emissions by as quickly as 2010. Also if China were to attain the same level of affluence that we have here in the United States, we will need the equivalent resources of three worlds. And unfortunately this world is the only one we’ve got at the moment. Therefore any attempt by the international community to reduce greenhouse gas emissions is bound to fail without China’s active cooperation. And this also bears some thinking about. Through our extravagant consumption patterns we Americans consume, or some might say devour, about 50 times more goods and services than an average person in China. At the present time only a small minority in that country can afford an even pale imitation of the American excess. But as that minority grows, so too does the threat to the global environment. In fact, over the last twenty five years or so since the late Premier Dung Shao Ping first began his market reforms, incomes in China have tripled and quadrupled, allowing literally tens of millions of people to claw their way out of absolute poverty to join the ranks of the only conventionally impoverished and also the rapidly expanding ranks of the Chinese middle class. Now that may not seem like a lot to you, but in actual
fact that’s a very significant improvement.

And for the first time in Chinese history most people in that country can now afford to keep warm in the winter, but unfortunately with the use of high polluting high sulfur coal and biomass. And it’s this coal which makes up about 70% of China’s energy mix. And China’s rapid industrialization that are the reason why China today has the dubious distinction of being the second largest emitter of greenhouse gases in the world after the United States. More than 70% of all new coal fired power plants are expected to be located in China in the foreseeable future. Currently, coal makes up nearly 70% of the energy mix as previous stated, oil a little under 20%, about 2% for nuclear, 3% for natural gas, 5–6% for hydro, and a tiny, miniscule 1%, if that, for renewables.

But coal isn’t the only culprit in China. Of growing concern are the rapidly increasing numbers of automobiles on China’s roads. As of the end of last year China had about 25 million cars on its roads. And by some of the more dire predictions, China will have maybe as many as 150 million cars by 2015, which is about 18 million more than we had in this country in 1999. And this will be due in no small part in the Chinese government using the auto industry as an engine of economic growth. No pun intended.

With the wholesale use of tens of millions of refrigerators and air conditions and the like, China is the largest emitter of CFCs, Chlorofluorocarbons (CFCs), which are responsible for the gaping hole that we now have in the ozone layer above the Antarctic. I’m not saying that China is solely responsible for this, because she isn’t, we all are in one way or another.

So China finds herself in a classic catch-22. Can an increasingly stressed Communist party afford to threaten a new found economic gains of literally tens of millions of Chinese with environmental reform, especially at a time when so many find themselves having to join the ranks of the unemployed as China shifts to a market economy? And particularly as China steps up reform of the state owned enterprises. Also, there is this veritable flood of humanity and impoverished farmers to the urban centers of China from the countryside. So we see China paying lip service to the concept of environmental reform but with very little in the way of concrete measures to show for it. And a case in point was China’s response to, or some might say lack of response to, the massive flooding which occurred in 1998 in the Yangtze basin when literally millions of people were displaced, and this was due largely to environmental factors like deforestation and
overgrazing. And unfortunately much of the world was seemingly oblivious to this environmental catastrophe, particularly in the United States, as we were so apparently mesmerized by such earth shattering subjects as stains on various items of Monica Lewinsky’s wardrobe, remember her, and the dalliances of former President Clinton.

So what to do? I believe it’s time for us to welcome China with open arms, especially as China becomes increasingly more important on the global stage. At the same time we need to try to ratchet down the level of criticism of China and the China bashing, which reaches fever pitch at times, and give that country the benefit of our environmental and energy technology and expertise. And, help China find that very delicate balance between growing her economy and preserving her environment. Because by preserving her environment, China also helps us preserve ours.

So what does the future hold? What can we expect to see in China over the next, say, decade? Well the sad fact of life is that China will continue to rely heavily on her vast reserves of coal, at least into the foreseeable future. But a number of things have happened recently and in the recent past and are continuing to happen in China that give us some hope for optimism. There is the 20% reduction target by 2010, which was announced by the eleventh five year, in the eleventh five-year plan. There is the renewable energy law, which passed in 2005, which became effective in January 2006 along with its implementing regulations. And there, of course, is the comprehensive energy law, which is being formulated as we speak. And we should be hearing a lot more about that over the next several months to a year. Then there are the fuel economy standards in China which are actually more stringent than the ones that we have here than our CAFE standards. And of course there is the clean development mechanism, the CDM, of the Kyoto protocol, which China ratified in 2002. And this has resulted in nearly 60% of all of the CDM projects being located in China. And this should have a very positive effect on China’s sustainable development plans.

So to recap, China faces some enormous challenges. But thankfully the powers that be in Beijing are beginning to come to the realization that business cannot continue as usual. Of course, how they address these problems is going to be interesting to observe, especially in the absence of legal and political reform. We won’t know, of course, for several years down the road what will happen, but we cannot afford to be complacent. We cannot simply wait and see. All the more reason why it’s so very important for far sighted, progressive institutions like
the Vermont Law School to be engaged in China and help China realize a more sustainable future. ‘Cause China will have and indeed already has such a profound effect on all of us, on the entire world. Thank you very much for your kind attention.

FREDRICK WESTON

My father would have been impressed by that resume. My mother would have believed that. While we’re getting this set, since Mark Levine couldn’t make it I’m back-filling a little bit. Robert did a terrific job of setting the stage. I’m going to sort of fill in with a number of revealing statistics that will frighten you, if Robert’s alone did not. And then I’ll talk a little bit after that about some of the work that my organization is doing. We’re funded by a group called the Energy Foundation out of San Francisco. Alex Wang is also partly funded by the Energy Foundation and I’m going to talk about some of the work that the Energy Foundation’s grantees are doing. But I’ll focus in the end largely on the electric industry.

As David said, I was at the Public Board for a while. I’m not a lawyer. I played one for those 11 years, but I’m not a lawyer. I do have to start with one thing that sort of caught my attention. It’s funny. One of the programs for this event misnamed the Regulatory Assistance Project and called it the Vermont Regulatory System. Now if any of the current regulators in Vermont had seen that they would have reacted. We are already often considered officious intermeddlers in Vermont regulatory affairs. I heartily deny it, but I did get a kick out of it.

OK. I’m just going to sort of go through this Gatling-gun style, some fun facts to know and tell about China. Robert gave you the statistics. China is 70% coal in its energy mix. Hydro, oil, nuke, and natural gas fill out the rest. China’s just recently opened a gas line from the west to the east and it’s going to begin importing LNG. And it plans to add 24 to 32 nuclear plants by 2020. Four times the current capacity. That’s a good day in China. I’m partly exaggerating. I just returned from a month in Beijing. I spend about two months a year there. And every morning one wakes up and checks the air. It does affect what you might be doing that day. Here, as you can see, is a

projection of carbon dioxide emissions in China from coal use over the next 20 years, going from about 2,000 million metric tons to over 500 thousand in the next 15, 20 years. So we’re talking about more than doubling, perhaps even tripling. Oil use is going up. By 2020 China will import 80% of its oil. Ten years ago it was a net exporter of oil and it now imports 45%. And of course with the growing use of cars this has changed.

On the left is a graph showing the changes in gross domestic product since 1978. Rapid growth during the ’90s as you can see. And that slope looks to be maintaining itself. In fact in 2006 China’s GDP growth was the largest it had been in 15, at least 10 years. It’s huge. Roughly rising at 10% per year. Electricity use is rising at 15% per year. So energy intensity, in fact, is going down. It’s going the wrong way. And that graph on the right, can I go the other way. I can. OK. As you see energy intensity. The upper line is the increase in energy use. The middle line is gross domestic product. So energy intensity, the amount of energy being used per unit of GDP is going up, which is the wrong direction.

And I’ll show you the graph about how China had done earlier and you’ll see how that’s changed. This slide speaks for itself. The World Bank estimates that China’s annual pollution costs amount to around 8% of GDP per year. As Robert had said, 16 of the world’s 20 most polluted cities are in China. Respiratory and heart diseases from polluted air kill a half a million people per year. And cause over 75 million asthma attacks.

This is an interesting one. Forty percent of US mercury pollution originates overseas. That means that 60% comes from within the United States and I don’t want, I don’t want that fact not to be appreciated. And China admits 25% of the world’s global mercury. And these are maps of how that moves.

And this is the, this is the graph of the numbers that we’ve been talking about. US carbon dioxide emissions in million metric tons a year, if I’ve read that correctly, about 6,000. China is second and the prediction, as you said [referring to Robert Jones], 2010 will be when China catches up. I just heard two days ago it’s going to be 2009, but it’s frightening nevertheless. Here on this graph the numbers are different because it’s carbon, not carbon dioxide. So, when you think of carbon you multiply by about 3.6 to get the equivalent tons of carbon dioxide. But you can see how quickly China’s carbon dioxide emissions are rising. And as we see it looks like this graph is already out of date. This also speaks for itself. Changes, expected changes in
world gross domestic product over the next 15 years. China and the U.S., of course, are the world’s two great carbon dioxide emitters and we are the two that aren’t part of the Kyoto protocol. China has signed it but not yet ratified it.

Just some additional statistics. Seventy-five percent of the greenhouse gas emissions in the world originate in the industrialized countries and 80% of the cumulative emissions originate in industrialized countries. So let’s not have any misapprehension about who’s the bad actor here. The bad actors. But as Robert has said, if the average Chinese consumed as much energy as the average American, China alone would be emitting the entire world’s current CO₂ emissions plus 22%.

Population. We know these numbers. Let’s take a look at GDP per capita. And you see, of course, the great reverse. And so, as GDP increases in China, so will emissions output. The U.S. has 4% of the world’s population, we consume 25% of the world’s oil. China, with 20% of the world's population consumes 8% of the oil but twice as much coal. That was on an earlier slide. China uses twice as much coal. China’s GDP is one eighth, as you can see, of ours. In per capita terms, China’s economy is ranked 100 in the world. Energy consumption per capita, again, these are statistics that I’m sure you all have a sense of.

OK. So I’m just going to flip through them. If you want copies of the slides you can get them from me, or I think from Amanda or and there are notes. In fact the notes associated with them fill out some of these statistics.

I put this up here just to give you an idea of how quickly, in 13 years Chinese industrialization, particularly in the output of minerals, has increased. Industry is 63% of GDP and the raw materials sector is growing much faster than expected. It’s extraordinary. And here’s a statistic that I find . . . I thought it was wrong. And I’ve seen it twice now and I just couldn’t believe it. China has built roughly 80 thousand high-rise buildings per year for the last 15 to 20 years. Now I do know, I’ve heard this one as well. Eighty percent of the world’s construction cranes are in China. There is nowhere you can look in any city and not see many, many construction cranes.

You’ve seen this. I’ve already shown you this one. Here’s a projection of future world oil use and the key thing here is that China and India are expected to consume more oil by the year 2025 than all other regions of the world. Robert talked about vehicle growth. Here’s where China is as of, I’m not sure what year this was. This may be
2004 I think. But as you said, by 2015—other numbers I’ve seen say later, but in any case soon enough—the Chinese vehicle population’s expected to exceed that of the US. Crude oil imports, once again, these are the areas from which they come. If you’ve been reading the news you know that China is investing heavily in Africa for energy and mineral purposes. This is just another graph showing how oil use is going up in China. It’s the, I guess, the lavender line is the one that would be business as usual in China if there’s no change in how China uses oil.

Electricity growth. This is the one that I have more involvement with or more knowledge of. You can see that as of about, as of 2000, installed capacity was 300 gigawatts. What does that mean? Here in New England we have 30 gigawatts, 30,000 megawatts of capacity that we use to serve all of New England. New York is 35, 37, somewhere in that range. California is in the fifties. Margret can correct me if I don’t remember the numbers exactly. In China every year they’re adding 75 gigawatts, at least, of new capacity. That’s more than twice of all of New England’s, every year. And most of it, the large majority of it is coal fired. OK. So that gives you an idea.

So let’s put it another way. More than 1,000 megawatts of new power plants are being brought on line in China every week. It’s phenomenal. Vermont’s peak load, by the way, is slightly more than 1,000 megawatts. OK. The development targets for 2020. These are the official government targets. They want to quadruple the GDP by, it should be 2020. But they want to double, only double energy use in that period. So we’ll see what happens. President Hu called for in 2003 when this target, this development target was set, President Hu called for what was translated as the “Three Trancendences.” One is to “transcend old resource wasteful technology, maximize recycling and move to sustainable development.” Two is to “transcend traditional ways for great powers to emerge in the world to effectively reject hegemony and pursue peaceful ascendancy.” And then three is to “transcend outmoded approaches of social control, job assignments, etc., and strengthen, as we heard today, the rule of law and build a harmonious stable society.” It is a laudable goal. And here’s sort of in a nutshell what needs to happen. There’s a great deal of energy waste in China and it needs to be utilized. Here you see relative statistics showing greenhouse gas emissions per dollar of output. This is analogous to the energy intensity statistics that you often see. Energy usage per dollar of output. But you can see that technologies in China are older and less efficient than they are elsewhere. And so this is why
you see the differences here. Comparing old installed investment to current standards as well. OK. Some solutions.

I’m going rapidly go through some of the things that are being done largely, obviously by the Chinese, but some of the programs that the Energy Foundation is funding and I’ll talk a little bit about something that we’re working on specifically in China these days. The low-carbon program in China, of the Energy Foundation, which has, is established in Beijing. It’s called the CSEP, the China Sustainable Energy Program. It’s funded by the Packard Foundation and Hewlett Foundation. Their low-carbon program has done some work, done some modeling. And their hope is with a multi-sectoral approach to dealing with energy use and emission controls. You know, environmental controls. That bottom line, the yellow one might be sustained over the next, again a couple of decades. And that’s million metric tons of carbon equivalent output. So it’s a very ambitious target given that the base line is, as you see, rising fairly rapidly.

OK. I spoke earlier about some of the efficiency gains. I alluded to them, in China. For many years China prior to the late ‘90s invested heavily in energy efficiency to improve the economic and thermal efficiency of its industries. And you see without those investments where energy use would be. That’s the peak of the green area in 1998 had those efforts not been made. So, there have been phenomenal improvements in the use of energy in China. However in the later ‘90s, starting in the ‘90s and certainly toward the end, investment in energy efficiency began to fall off. And this is a percent of total energy investment, these numbers.

OK. One of the programs that the government has just begun in 2006 is called the Top-1000 Enterprises Program. And the idea here is through government investment and other lending, the objective is to save 100 million tons of coal by 2010 which would reduce CO2 output by 242 million tons. This is–Robert alluded to the goal by 2010 of reducing energy usage by 20%–this is the centerpiece of that program. We’ll see how it goes. We know however that China is already behind in making that 2010 objective. So we’ll see what happens.

But this is all...they’re targeting all the energy intensive industries naturally in China. I’m not going to spend time on this one. I’m not really familiar with the programs that the Energy Foundation is engaged in with some of its grantees and partners in the Chinese government. But I did want to point out this: recently adopted fuel economy standards, fleet economy standards for automobiles in China are 20% more stringent than ours. That should tell you something.
And I love this one: after 2008 about 90% of the SUVs currently on the roads being sold in China will no longer be allowed to be sold. If you want more information on that I can get some for you. And here’s what is expected to happen as a consequence of those fleet efficiency standards: roughly 900 million barrels of oil will be saved by 2030 and 490 million metric tons of carbon dioxide.

OK. The renewable energy law, I think you may have alluded to it, calls for 15% of all electricity to be provided by renewable sources by 2020. Robert talked about the energy law that’s currently being debated and developed. For a couple of years now an electricity law has been under development. It was put on hold as a consequence of some severe power shortages during the last several years. And we’ll see what happens with that.

China is trying to restructure its electric industry quite significantly to develop wholesale competitive markets for generation. There had been hopes at one point or another for retail competitive markets, but a variety of events both in China and certainly elsewhere, California for example, have put that idea on hold. And I frankly think that’s a very good idea. I happen not to be one who believes that retail competition in the electric industry really works. But we can save that for another discussion. In any case, the 15% goal is a government mandated goal.

And these are the, you can see what the shares are that they hope will make a difference. There are to date about a thousand megawatts of wind concessions throughout the country. The hope is by 2010 there will be over thirty five hundred. Appliance efficiency standards are being developed and put in place. That, again, as you can see from these numbers are, if, if they go, if they’re enforced, if manufacturers in fact stick with, you know, adopt them and stick with them, these are the kinds of savings that are expected. So we’ll see. We will see.

Let me just turn a couple of pages here. Building codes: I’ll flip a page here. There are six implementation pilots around the country. We talked about the 85,000 or 80,000 buildings per year. None of these have been built so far to modern efficiency, building energy codes. We’ll see what happens. There are, as I say, six implementations, six pilots, and we’ll see if some improved building codes go into effect.

The final point is local building materials. There are, of course, a scarcity of building materials and as you know this has affected the prices, the world prices, of steel and other commodities.

OK. Very quickly. Electric power. The work that I get involved in is utility regulatory reform. In 2002, China created the State Electricity Regulatory Commission, SERC. Sort of the equivalent of
the Federal Energy Regulatory Commission here in the US except that it has much less authority. It doesn’t have pricing authority over wholesale markets and that’s a significant problem. We’ve been advocating quite strongly that that be changed. They are seriously talking about new pricing policies, particularly with respect to how generation is priced for the purposes of dispatch. And by dispatch we’re talking about what machines get turned on to provide power as demand increases during the day and over time. Pricing matters because the more efficient units are going to be the less expensive unless they are uncontrolled dirty coal. So that’s another issue.

But the general matter is that more efficient plants will be dispatched first in a marginal cost-based system, which China does not have. And as a consequence, just from the manner in which they manage the day to day operations of the grids, more pollution is occurring than needs to. And this is one of the things that we’ve been working on them with. We’ve been trying to persuade the provincial and central governments that energy efficiency is less expensive than supply and should be treated as a resource and thus paid for through electricity rates prices, just as we do here in many states in the United States—and you all, and those of you here in Vermont should be familiar with Efficiency Vermont. Same idea. It’s a resource. Efficiency is a more cost-effective resource than alternative generation and we’re working with the Chinese to help them think about how best to go through that, how to do that. And it involves least-cost planning, how to plan for the future of the grid, and investment.

Very quickly. One project we’re involved with right now in Guangdong is called the Efficiency Power Plant, where we’ve actually designed a set of efficiency programs that will target high-usage, high-volume consumption industries for energy efficiency investments. And the way the investments work is that they’re savings. They’re reductions in the energy that they use. It will look like, will mirror, the output of a three hundred-megawatt coal-fired power plant. So in fact you’re treating efficiency as a power plant and you’re financing it the same way that you finance a power plant.

And the Asian Development Bank, the folks that we’re working with and the folks in Guangzhou and in Jiangsu and Shanghai, where the numbers that you see here, are the original proposals that we put together a couple of years ago. In Shanghai we think we’re going to be moving forward with it as well. But it’s just another way of thinking about energy efficiency programs. Treat them as power plants and move forward.
I won’t go into Kyoto except that clean development, the CDM components of the Kyoto Protocol, actually can work here and could in fact provide some funding for such things as efficiency power plants. There is a national goal for reducing sulfur dioxide emissions. It’s not yet mandatory. There are pilot trading schemes. They do have a pollution levy, which is terrific. It operates on the principle that the polluter ought to pay. It’s a fee per metric ton of pollutants. It has the effect of linking the emissions of pollutants to the output of electricity, so you have a very strong incentive for improving the efficiency with which you produce electricity. And there’s no move yet to impose a carbon cap and trade program in China.

And I’ll just leave it with this. The challenges are immense, obviously. That’s what you’ve been hearing today. There are a lot of really terrific international experiences that China has been looking at that I think we’ll be taking advantage of in the years to come. And I would just say that there’s this trap that we sometimes hear in our meetings with folks in China: that we need to develop first and then we can clean up. Well, the economic impacts of not cleaning up as you develop, the economic and public health impacts, are huge as we’ve already seen. And there’s every reason to think about China leapfrogging the mistakes that we’ve made. And there’s, well there’s, I guess we have, and this gives you an idea of all the things that can be done to move toward a low carbon path. And I’ll just leave it at that. Thank you very much.

AUDIENCE QUESTIONS

Thank you. Excellent presentations. We have, I understand, we’re supposed to run this panel until a quarter of. So we have a little time for questions. As moderator I’ll think I’ll take my prerogative and ask the first one: maybe it’s just an all-American thing but we rush to technology fixes, and so I’m going to ask about a possible technology fix - integrated coal gasification, gasification, IGCC\textsuperscript{14}. It’s something that seems to me the United States could take advantage of. And perhaps China as well in as much as they are, we and they are, so coal rich.

Coal gasification basically is a chemical plant that takes coal and turns the by-products into natural gas and it’s burned off. Natural gas is used to burn and make electricity so it’s somewhat cleaner, fairly, quite

\textsuperscript{14.} Integrated Gasification Combined Cycle.
a bit cleaner. And then the other by-products are used as feed stocks for certain industries for production. In addition to IGCC there’s a hope and an assumption that there’s an ability to sequester the carbon that comes out of such a plant. That often times is looked at more hopeful than otherwise because there are various attempts around the world to try to sequester carbon. IGCC. Are things being done with respect to that technology? What are the forecasts for that?

Robert Jones
I believe they’re being looked at now but that’s about as far as it’s gone at this point. But yes, of course, given China’s huge reserves of coal, of high polluting dirty high sulfur content coal, I think this would be a natural for China. And we have the technology in the United States and we should be talking very seriously to the Chinese government about it.

Rick Weston
And it has come up in discussions. I would just add that of course the issue is sequestration. And with the amounts of carbon dioxide we’re talking about, putting back in the ground or in the oceans is huge. And we have no idea whether such geologic sequestration is going to succeed for any significant length of time. We just don’t know. But it certainly needs to be pursued.

Audience
I was hoping that either one of you or both might be able to address China’s increasing pursuit of natural resources outside of that country. Both for consumer, just general consumption purposes. But by also more of the energy context, the pursuit of oil in countries such as Africa. And perhaps comments on the ensuing political and environmental effects.

Rick Weston
I think your question actually answers itself. And I have to say that I don’t, I haven’t given much thought yet to the issue. And I don’t know more than what I’ve read recently in the papers. And certainly there has been discussion of the geopolitical impacts of China, China’s significant investments in sub-Saharan Africa. Looking for, you know, supporting mineral extraction, oil and other minerals there. And I don’t know what to say other than that China is obviously going to play a very, very significant role in development and political, the political
future of such areas. And I don’t have any great insight other than to say, as I said a moment ago that it’s certainly affecting the global prices of many commodities. Forgive me for being less knowledgeable on this subject.

Moderator

Can I just add to that? When I was in the Peace Corps in 1982 to ‘85 in Rwanda, China built a highway from the town where I lived to another town. It was a fabulous road, and (Rwanda) benefited from it. It was an excellent piece of work. They made friends. Now if you look at the history in Africa the British, the Belgian, the French, and their relationship with Africa, you look at the abject poverty that Africa represents today. Making friends with Africa is probably a good idea. And I’m sure they’re ready to make friends with anybody who will be a friend to them. Other questions? Yes ma’am.

Audience

This is for Rick. You indicated that you are working with the Chinese, and you mentioned that Asian development thing [referring to the Asian Development bank]. But, this sort of leads into our next panel, what exactly is the context? At what levels are you working with in government?

Rick Weston

All. Primarily though with the central government. We’re spending, my work which is to help the Chinese think about regulatory reforms, to support clean energy initiatives. One thing that, in this country as well, that we don’t fully appreciate is that government oversight of monopoly network industries, and in this case we’re talking about electricity, has profound impacts on the behavior of those industries and thus on the environmental profile of them. So there’s a very strong nexus between environmental regulation and economic utility regulation as we traditionally think about it.

And utility regulators often don’t appreciate what their decisions, you know, what the outcomes what the effects of their decisions are. So we’re spending a lot of time talking with both, working with both SERC and the National Development and Reform Commission which is sort of the equivalent of our Department of Energy, but it actually has pricing authority over retail and wholesale and electricity use in the country. The national, the central government authority works with its provincial equivalents to set prices, at both wholesale and retail. So
we’re working with these folks providing advice. That we’re, as I say we’re funded by the Energy Foundation, to talk about what kinds of policies would, they ought to be, we think they ought to be thinking about as they further reform the sector.

So, national government level, provincial level, so we’re working with folks in Guangdong right now. We’ve been...we were in Jiangsu for quite a while. And now it looks like we’re going to be going back. Shanghai as well. We provide some advice when we can on the rewrites of the energy and electricity laws. But we also work with other NGOs. Alex Wang is here from NRDC\textsuperscript{15} and his organization and ours have been working together on these energy efficiency power plants that we’ve been talking about. Primarily though we work with other grantee, as well—I shouldn’t say primarily—we work with other grantees of the Energy Foundation. And those grantees are typically, for lack of a better word, think tanks that are attached to various organs of the government or the State Grid Company, the state power company. They all have there own sort of think tanks that do a lot of the nuts-and-bolts analysis of various policies.

And they’re funded both by the government and in certain cases by the Energy Foundation. Our work with the Asian Development Bank is actually fairly new. And the idea there is that the ADB is funding the analysis of the EPPs\textsuperscript{16}. And it may in fact end up funding the EPPs themselves or commercial lending from in the country would fund them.

\textbf{Moderator}

Another question?

\textbf{Audience}

Although it wasn’t the first time you mentioned it, I read an article about nuclear energy. Is that something that’s being considered as clean air cheap solution?

\textbf{Robert Jones}

Well it’s very debatable how clean nuclear energy really is. I believe that China will double its capacity of nuclear facilities within the next ten years or so. But yes, it’s definitely on the table and it’s going to be a very important part of the energy mix. I’d like to see

\textsuperscript{15} Natural Resources Defense Council
\textsuperscript{16} Energy Efficiency Power Plant
other forms of energy, personally, but you know, China needs to get energy from where ever it can basically. So I guess we have to live with that fact.

**Rick Weston**

I think, I’ll just add that, sure folks think about nuclear energy and call it non-emitting, but of course we know that is not true. And that the full fuel cycle for nuclear energy is, has a very significant carbon footprint.

**Audience**

I’d be curious to hear about whether the countries that are downwind and downstream of China have any leverage on their activities: the dams that they’ve constructed on the Yukon River, and with the air pollution that drifts over from China. Do these countries have any influence or leverage on China’s internal processes or are they pretty much?

**Rick Weston**

You know I might not be the person to answer that question. Perhaps Professor Wang could. I have, I’ve met with Korean officials and Japanese officials occasionally in China. But the degree to which their influence in policy, the degree to which we’re influencing policy—I mean I can’t begin to measure it. But yes there are certainly concerns about as you say the downwind impacts.

**Robert Jones**

Yes, that’s a huge issue for South Korea and Japan, but there’s very little they can do about it. And as you know, Rick said I don’t think they have much influence. So maybe my wife Margret could answer that question a little better being South Korean or Korean American.

**Moderator**

Thank you. Professor Cohen? Yes sir.

**Professor Cohen**

I just wondered—can you say to what extent the Chinese perceptions of what their neighbors and the United States are doing effects their own willingness to take necessary measures? This is such a ball of wax. Do they say well, we’ll do something but we’re helpless too because the United States isn’t pulling it’s weight and expects us
to . . . I’m thinking of the analogy of this whole currency valuation. Why should China take us seriously in our huge pressure on them to alter their currency valuation when we refuse to take steps to reduce our consumption of imports. Is there an analogy here in the energy field?

Rick Weston
I think yes, there is. You’re absolutely right. In the meetings I’ve had and workshops that we’ve been involved in these issues come up. When is the United States going to take action. That sort of thing. We, frankly our response to that is always “don’t do what we did.” You know? We’re not doing it right. We’re here to talk to you about what you can do. But you’re absolutely right.

One thing I find very interesting, and I greatly appreciate the Chinese in this respect is they are very, very . . . the folks we work with are very, very curious about what the rest of the world is doing in the way of clean energy policy. And they want, they have a voracious appetite for what’s going on in Europe, in South America, in America, and what has been done.

We just brought fifteen folks over from Guangdong and Beijing for a week in California to meet with folks from California and Vermont, from Efficiency Vermont, to talk about ways to deliver energy efficiency. And by all accounts it was a very, it had a very profound impact on the study tour. And folks went back to Beijing and were really geared up on these kinds of issues. So there’s a, I guess what I would say is that there’s, you know, a great interest in good policy. They want to see what the world is doing and, you know, the United States may or may not get its act together, but they’re moving, they’re trying to move forward in certain respects.

Professor Cohen
Well, there’s two questions in addition. One is a question of equity in terms of sacrifice, and the other is just the intrinsic hopelessness of their situation that they do everything. Are they still going to be victims of what’s going on around them or are they so much more the malefactor that they don’t have to or we don’t have to worry about whether they clean up their act or not, they are going to suffer because they’re more of the problem. On every item you mentioned, we’re the ones.

Rick Weston
Yup.
**Professor Cohen**

We’re still consuming more, using more, and wasting more than they are.

**Rick Weston**

Yup. I guess I agree with you. I don’t know what else to say. But you’re absolutely right. And still, 75 gigawatts of new cold generation are built in China every year. I don’t…there’s a paradox, an irony. I don’t know what to say. But there are folks who are very concerned about it. And yet these machines are being built, in many cases without siting approval. Sorry that I’m not able to

**Robert Jones**

It’s very unfortunate that the United States has absolutely no credibility. Especially in regard to Kyoto, the Kyoto protocol, and the non-ratification of that. We live and hope of course, and lots of things are happening on Congress right now as we speak, leading hopefully toward active participation in the future in that accord. But China’s stance is that we in the west are responsible for what’s happened with the global climate, so we need to clean it up. And to a very large extent I would agree with that assessment. We need to step up to the plate. We need to assume our position as global leaders as the only super power. So it’s really up to us to step up to the plate and do what needs to be done.

Well I think there are innumerable opportunities for students to get involved in China through corporate America.

In fact, what we’re doing through our foundation is we’re going to set-up an internship program for young Chinese environmental professionals and get them in through the back door, so to speak, to American corporations in China. Because they’ve been complaining to us for years now that there are no opportunities for environmental jobs in China. So they just go and they gravitate towards whatever there is out there. But this will give them the opportunity to actually get involved in the environment and put to practice some of the things that they have learned in University.

**Rick Weston**

I would agree with that and merely add that experience matters. And it’s not absolutely necessary that one started immediately in China to affect good policy outcomes that will in the long run have an impact on both China and America. And I think that there are lots of
opportunities in regulation. For example our field, my field here in America, there’s still thirty states in America that are not doing good things. And to move out into those areas would be terrific as well.
Thank you very much. Thank you Tseming for your wonderful introduction. And I’m really very excited to have this opportunity to come back to Vermont again. I was here for one semester in 2004, and I spent a very productive and very happy time here. I would like to thank Vermont Law School and the Vermont Journal of Environmental Law for making this opportunity for me to come back again and give a presentation here. I will go through my presentation very quickly because the time is maybe a little behind schedule.

My topic is about the petition on peasant’s environmental law in transition. There are several main points including an introduction, the environmental change in peasants’ eyes, and peasants’ understanding of environmental protection and environmental protection law–and there may difficulties in the protection of peasants’ environmental rights. And the last one I would like to put forward is some counter measures.

I will begin with the introduction. My presentation is based on a survey. And this survey was conducted by the students of my environmental law clinic and my environmental law classes. And this survey lasted from July to October–almost half a year–during last year. About 13 students were involved in these activities. The way we are doing the survey is in two major ways. The first one is the interview, and the other one is questionnaire. We have already collected 350 questionnaires so far, so my analysis was basically on this questionnaire.

The purpose of the survey is to gather peasants’ opinion about their
environment, and the peasants’ sense of environmental rights and peasants’ ability, and the obstacles they face, to protect their environmental rights.

Why do we focus on peasants’ environmental protection? As we all know, in the past several decades, great effort has been put into environmental protection. But most of this effort was put into the city. And we can say that almost all the legislation, and all the systems and institutions relate to the city, and not to rural areas. The peasants are the biggest weak group in China in many aspects, especially in environmental protection. So, I think it’s time that we focus our efforts on rural areas environmental protection.

Our survey was conducted in Guangdong Province, so I would like to give some idea to you about the province. Because, as you know, we have already discussed Guangdong province, so this is the map you are already familiar with. This is the map of China, and Guangdong is in the southern part, yes, in here. So it’s near the South China Sea. It’s right in the south, in China. And this is the map of Guangdong province. And here is Guangzhou—the capital city of Guangdong province—and also a huge super city of China. And here is Hong Kong. Here is Macau. And this area is the most urbanized, industrialization area in China. And the majority of our survey was conducted in this area. It also included some other areas as the east in Shantou, and the north, and in the rest of the province. So it almost covered all 11 cities of Guangdong province and included each type of area typical of this province.

So, how significant is this province in this region? I can show you some numbers. It contributes about 11% of China’s GDP, and about 12% of China’s total financial income or about 31% of China’s total world exports. All these three areas are being listed as the number one place in China for decades. So maybe we can see it as the most powerful province in China.

It is also the most economically dynamic area in the world. Some people say that 31% of China’s world export comes from Guangdong province. So some people even said that if there is traffic jam in Guangdong it will cause a shortage in world supplies! So many people will think that maybe, you will have many opportunities to meet Chinese products from Guangdong.

So the economy was developed so quickly. How about the environment? I’m not going to show you the figure in the formal way. I just would like to show you some pictures from the peasants’ eyes. The peasant—the word I use here—is equal to farmer. There is no
difference between the peasant and the farmer in China, so I need to give some explanation to this.

The second part is about the environmental change in peasants’ eyes. When we asked about the change to the environmental rights this year, about 44% of the respondents said it’s getting worse, 30% of people think there is no change, and 21% of people answer it’s getting better. And almost half of the respondents worry about the quality of environment. So, when did this happen?

You can see from the chart most of the people think that this happened within ten years or five years. It reflects that this change happened since the 1990s. And since the 1990’s, if we consider most of the environmental impacts are up here, several years—even ten years—behind the people’s behavior, it means that those changes were caused by people’s behavior since late 1980’s and early 1990’s. And these periods just are the key time that Guangdong Province carried out its industrialization and urbanization. So this is about the time.

So what’s the main phenomenon of environmental change? We can see that the people listed solid waste as the number one, water second, air the third, and noise the fourth. It also reflects that people’s living condition has risen.

Because in the past there was almost no waste in rural areas, almost everything could be re-used as fertilizer. But now they get so much waste, it means they have consumed more than they produced, such as plastic and metal just like this. So the waste problem in rural areas has become more and more serious. As we surveyed, some of the villagers have already established a system to correct for this waste. But since there are no central rural waste areas, what they do is just move this waste from one place to another place, but the problem still exists.

About air quality, about 45% of people answer it’s getting worse, 40% of people think it’s really bad, and 26% of people think there is no change. Only 8% of people think it’s getting better. So, as you know, generally speaking, air quality in the rural area is much better than in the city, but it still has already become very serious question now.

And about the quality of drinking water, I need to add more words on this. According to our survey about 15% of the respondents still fetch their drinking water from nature directly, such as spring water and well water, and some even from the river. So 15% of the people still fetch their drinking water from nature. How do people think about the quality of those drinking waters? Near 30% of the respondents think it’s getting worse, 28% think it’s always good, 17% think it’s always bad, and 16% think it’s getting better. So we can tell that if we add
those people that think the water is getting worse or very bad, the number is almost 50%. So, almost half of all those people who fetch drinking water from nature are facing environmental deterioration problems now.

So, how about the situation of farmland? As we surveyed, 34% of the respondents think there has been no big change, 33% think it’s getting worse and has led to reduction of crops, 11% think it’s getting worse and unsuitable for cultivation anymore, and only 2.8% of people think it’s getting better. So it’s very serious in Guangdong Province.

And when we asked, do you and your family members ever suffer from environmental pollution, there are almost 34% people who answer yes. So it’s quite common for the people in the rural area, they suffer from the environmental damage.

When we ask the reason for the environmental change that is the biggest reason, the people think that it is impact by factory pollution discharge. Second is the peasants’ lifestyle, and third is rural building and developing activities. When we ask, are there any enterprises in your village, about 65% of the people answer yes. What are those factories in the villages? We can say from this chart, most of them are chemical, electroplating, mining, hardware, and papermaking. All these factories are highly polluting enterprises.

As to the people’s knowledge about their local environmental situation, we can tell from this chapter that people have very, very little knowledge about the situation of the local environment. About 54% of people think about it a little, 29% are not so clear, only 11% answer very much. But how do you know? It is very interesting. The people got the majority of the information about their environment this way, you can see it’s split, just by their physical feeling – by their eye and what they touch. And hearsay is almost the main way to get the information.

Very few people can get government announcements and get notice from village committees. So, people have really few means to get precise environmental information. Why does this happen? Because even the government doesn’t have such information because the budget is seriously insufficient in China. Sometimes the government keeps this information confidential, so it’s very hard for a peasant to get environmental information. Separate I will talk about the peasants’ understanding of environmental protection and environmental right.

As to the attitude of polluting enterprises, we know the peasant has clearer and more reasonable mind about factories being nearby. About 54% of people object to those polluter enterprises, but about 40% of
people, they don’t mind and even welcome them. So, what’s the main reason for this? You can tell that people still have very high expectation that they can bring job and business opportunities to them.

About the willingness to change the situation, if it is being damaged by pollution, we can tell here that 41% of people answer very much. And nearly 40% of people think sometimes. So, we take up these two parts and you can see they’re willing to change the environmental situation, very strong, really high. But if we consider the means for today, it’s a totally different picture. When we ask the men to safeguard their environmental rights, most of the people will chose to complain to the village committee, and the second option is to complain to the government. And these two parts take up almost 75%.

And peasants hope not to report to the government, that the government can—that they have power to stop this environmental issue. What they hope, it says, is that they want the government to represent them, to negotiate with the factory, to serve as a source of power for them. Because, as we know, the village committee has no power to regulate the factory and to treat their environmental issues, so what they hope is just that they have some organization, some institution, to do this job for them. Only 9% of people will negotiate with the polluter directly, and only 2% people will sue to the court, and also less than 1% will choose petition.

And the survey shows a very different picture to us than other surveys. Maybe some people will think that the petition in China is very popular, especially in the rural area. Because they are peasants, they have no legal knowledge, so they cannot. But as we surveyed, we cannot find this preference. So I think maybe Guangdong is just different from the other provinces, or maybe the opinion and situation has changed. So, the chapter shows us that the peasant greatly rely on government—across the government organization—and the means they take to safeguard their right are negative and positive.

So, how do they deal with the environmental problem issue? We also have some data to show here. The methods they take to deal with environmental pollution are very positive, very positive, such as the way to treat polluted drinking water. Most of the people will choose to buy bottled water. And then the second choice is to still drink polluted water. And the survey is finding other water sources. Maybe the question is will they also find another source. And when we asked, how do you deal with the polluted farmland, you can see here, almost 30% of the respondents will choose to give up agriculture and find a job outside. And 24% of people will choose just nothing. So, we have
asked them about whether they want to leave their hometown to make a living outside. Almost half of the people choose yes.

So giving up agriculture and moving out has become a main method for peasants to deal with environmental issues. There are several reasons for this. First is that the peasants do not depend so heavily on agriculture, and agriculture does not attract peasants very much. The second reason, peasants have more chance to find other job in the cities. And thirdly, in Guangdong, the population movement is very, very frequently. It is the home of the oldest, biggest migrant worker group of China, so it provides quite a suitable condition for peasants to move.

But, is this good or bad for the environment? I think it’s really, really very bad for environmental protection. Because the people move out, the problem still exists, they cannot solve them by themselves. But it means they just move out, just escape and leave the problem behind. But people choose to move out because they also have another reason, it is about the ownership of the land. So far, Chinese law does not allow the people, the individual, to own land. So most of the peasants only own a contract to the farmland for no longer than 30 years. So for them, maybe they are not so concerned about the quality of the farmland because they think it’s not their property.

So, about the difficulty in protecting peasants’ environmental right, we have concluded several such difficulties. The first one is peasants’ high expectation on government for many environmental issues. As I mentioned before, the peasants rely heavily on the government. We showed the data just now. But the government is far from satisfying these demands. For example, we still have many holes in law and regulation. The institution and system are far from enough to protect the environment in rural areas. The resources—the financial support—are far from enough to meet the demand of rural areas. So, as a result, the public good of environmental protection in rural areas is in serious shortage.

So, when we ask, what are the main difficulties in improving the environment—people will choose a lack of government support as the first reason. So, we can say the peasants rely much on the government. They are also very disappointed in the government. The government can be the biggest force to improve environment. They also can be the biggest barrier to protect the environment. The other expert has talked much about that.

The second difficulty is that peasants depend on the environment, whereas there is little ability as a group to ensure environmental
protection. We think the peasants have more of a dependence on nature than urban residents. First their living conditions are strongly related to natural consequences and their productivity also strongly relies on nature’s conditions. And peasants are vulnerable in two aspects. It’s a doubly vulnerable group: vulnerable to polluters and also vulnerable to urban residents. Compared to the polluters they are weak in negotiation and compared with the urban resident they are weak in environmental resources of preventing the environmental transformation. So, their environmental rights are more easily damaged by the polluter and other humans’ behavior.

Peasants’ lack of relative knowledge and the complicated polluter issues are the third difficulty. I will not go into so much detail. And the fourth difficulty is peasants’ poverty, whereas the litigation costs are high.

So, what’s the countermeasure? We all can list a number of questions about the problems to the rural area, but how to deal with them? When we think of the solution—the way out—we always face an obstacle. Maybe we all know what the problem is, but the solution is hard to find. What we propose here involves some thinking, especially on our research.

The first thing, we need to strengthen the growth of grassroots organizations in rural regions. Because they’re peasants, they need organizational support. So, the best way is to better use the organizational resources. So, what are the available organization resources in rural areas? We can say it is the village committee. The village committee is a self-regulated organization in rural areas. It has been established everywhere now. It is still short of manpower and resources, but it is the nearest group to the peasants, and also they know the situation of the peasant. Because they are elected by peasants directly, they are willing to help the peasants more than other organizations. So, we must make greater effort to improve this organization, to give them more support to represent the peasants in the court and in negotiations with enterprises, and then give them a more fundraising to protect their environment.

We need to fill in the gaps in the laws and regulations. As I mentioned earlier, the environmental regulation in China is urban environmental legislation. And although those environmental issues in the city and in rural areas have much in common, they still have a lot of differences. So we need additional rural environmental protection regulation. And to strengthen the environmental currency in rural regions is also a very urgent need. As has been mentioned just now,
people don’t have enough information about the environment, we have no monetary equipment located in rural areas, and the majority of environmental protection resources are located in the city. So, we need to extend those monetary forces to improve the peasants’ protection ability on their environmental rights. In this field, I think we can do a lot.

We hope that we can have more environmental protection education, more training, and also more legal aid for them. Extending the existing legal aid system to cover the worst rural areas is also a very useful way to protect the peasants’ environmental rights. Although China has already established a legal aid system, so far its major focus is also on the urban areas. In recent years, as we know, the Chinese Government has already put forward more resources to extend the legal aid system. We hope that it will be a main way for the peasants to protect their environmental rights.

So, just very briefly about the solution, we are still in the early stage for these issues. So thank you very much for your attention.

I would like to take some of your questions.

**AUDIENCE QUESTIONS**

**Moderator**
Can we take maybe just a couple minutes for just a couple questions?

**Professor Li Zhiping**
So, I will ask Anne Marie to…

**Professor Li Zhiping**
You mean the village committee. The village committees are a quasi-governmental organization. It was formed by the law. We have our village committee organization law. It required every village to establish such an organization. The main function for this organization is to deal with the public affairs in rural areas and to mediate disputes between the peasant and also represent the peasant and to reflect their opinion to the government.

**Professor Jerome Cohen**
That ties in. You have not grasped her question. It ties in with the question I wanted to ask. You point out that there’s a restriction on
access to legal knowledge. That’s one problem. There’s also a lack of legal or specialized personnel. So knowledge, people. Do the knowledge and people come from the outside of the village? Outside agitators, organizers, NGOs, lawyers, barefoot lawyers? You have a whole range of outside people. So what’s the relationship between people on the outside and people in the village? Who stirs up the masses?

**Professor Li Zhiping**

This comes up in the land ownership incidents in Guangdong. Some people have been killed. There have been huge struggles. And the government blames outside agitators who give the local people the knowledge and the inspiration.

**Translator**

The villagers are very welcome of outside help from media, NGO’s, government or scholars. Actually sometimes the villagers themselves would directly ask outsiders for help.

**Translator**

Currently, the Chinese government is very sensitive to NGO’s activity in areas, and particularly in some sensitive cases. Now some key people in the Chinese government threatened the local farmers not to involve outside NGO’s in their environmental protection activities. However, if we interfere with the environmental protection from a harmonious society perspective, the government actually welcomes such activity. So it really depends on which perspective you are using to interfere.

**Audience**

Can I just say one thing? The key point is in many villages of China, the village and township leaders do not want the masses of people to get legal knowledge. Because when they get legal knowledge then they have a grievance, they have a weapon that causes conflict between local leaders and local people. Even if the local people want to carry out the national law, often the local people want to carry out the national law and the local leaders don’t want to do that because it contradicts their own needs and interests.

**Translator**

Professor Li basically agrees with what you said, but she also
mentioned in terms of attitude of local governments, it really depends on where the problem is coming from. So, for example, if the problem is coming from local government itself, then it doesn’t want the local farmers to be too involved in those environmental protection activities. But if the problem arises from, for example, the outside enterprise, the investments of outside enterprises or higher level of government, the local government is actually quite willing to cooperate with the local farmers in terms of environmental protection.
Thank you. Ladies and gentlemen good afternoon. You really get drowsy after lunch so in order to keep all of you alert Professor Wang put a lot of photos of his beautiful colleagues, handsome guys and beautiful women, in his PowerPoint. So when you feel a little bit drowsy just pay attention to the PowerPoint, not my speech. There are three questions. The first is improve the rule of law in Rymangton Field. The second and the main one is the business our centers, rules and it’s a fact. This is the center’s logo. It’s the arm and its law, Rymangton Law. It means protecting the earth with legal arms. The center was established in 1998 and it was approved by China University of Political Science and Law, the traditional ministry of the PRC.

Translator
And the small point here, the Judicial Ministry means Department of Justice.
**Professor Wang Canfa**

These are pictures, you can see my central walls are composed of scholars. They are from some universities in China. These professors are from Peking University. This professor is from Beijing University, my university. Another volunteer is from the Salmon Law Firm. They are lawyers in China. My center has three missions. The first is the rising consciousness of law and the protection of rights of the public. The second mission is improving the capacity of the administrative agency and the traditional bodies. The third is promoting the enforcement of Chinese environment law. My center’s organization is composed of, the director, the deputy director, the consulting department, the litigation department, the administrative office, the research and the (cleaning) department, the protector of the development department. My center’s main job is to be in the business of helping pollution victims for free. This line means any pollution can qualify. The center has been called to the Hoke country, under Tibet. We have answered 19, 487 calls during the seven years. The reply letters count three hundred and thirty-two received visitors, the five hundred and twelve proposing. This is my center. The volunteer receives a visitor. This is the legal consultant teaching rights. Last summer we organized the volunteers in western China.

We also provide legal assistance for the citizens on the street. I tried to have a truck.

**Translator**

Professor Wang said he wants to have a truck so that the can ship his volunteers to anywhere in China he wants to, in order to promote environmental education.

**Professor Wang Canfa**

My center’s second work is having a pollution lawsuit and the paid part of the (quarter) and the lawyer’s for the pollution. If their case is fateful and typical, the pollution victims are very poor.

**Translator**

As you can tell from the chart in the past seven years Professor Wang’s organization has represented pollution victims in eighty-nine cases altogether. During these eighty-nine cases there are seventy-five civil cases, ten administrative cases, and four criminal cases. Some of the audience may have questions regarding the number of cases
received by Professor Wang’s organization. There are only altogether eighty-nine cases. You may think this number is too few. There are reasons for this.

First one, there is restriction on the funding. If there is not sufficient funding Professor Wang’s organization cannot take many cases. As you may know, each case involves a lot of money and for Professor Wang also mentioned a specific case. In this case the appraisal fee alone in this case is one hundred and fifty thousand (150,000) RMB which is, I think, twenty thousand US dollars. So that’s a lot of money.

And on the other hand, the reason is that Professor Wang uses a special calculation method to calculate the number of cases. For example, if a case involves the trial of first instance and the trial of second instance Professor Wang will calculate this as one case only. But there are many professors in China who would calculate it as two cases.

If these cases involve more than one litigant. For example, some of Professor Wang’s cases involve over a thousand litigants. Professor Wang will still count it as only one case. As you may see from the chart shown on the screen, Professor Wang gave us a calculation of all the cases he did in terms of the result of the cases. Do you want me to go through the numbers, or if you can see I probably just won’t.

Please pay attention to unsettled cases. In this chart as you can see there are a total of forty-two cases which are unsettled because the court won’t take these cases for a lot of reasons. Some of them are political considerations.

Please pay attention to the number of the cases lost, twenty-four out of ninety-seven altogether. So in these twenty-four cases the plaintiff means the pollution victims lost the case. But as a result of the litigation the factories are closed. So, on the other hand this is a good result of the case, even though they lost the case itself.

This is a picture showing Professor Wang helping pollution victims file lawsuits. And this is a picture showing three lawyers from Professor Wang’s organization litigating a case in Fujian Province. These four pictures show Professor Wang himself and his volunteers meeting with pollution victims in different provinces including Fujian Province and Guizhou Province.

Another main activity that Professor Wang’s organization is doing is to provide environmental training to lawyers, judges, and environmental officials in order to promote or enhance their capacity of handling environmental cases, and also to promote their environmental
consciousness. Until last year there have been six training sessions held for this environmental training to judges and lawyers. And the total number of lawyers being trained in these six programs is two hundred and thirty-nine. There are one hundred and ninety-nine judges trained in these six training sessions. We also provide free legal training to government officials responsible for environmental enforcement. This picture is showing the environmental legal training classes in 2004.

Professor Wang Canfa
The government from the America was having a lecture.

Translator
Another major activity of Professor Wang’s organization is holding some seminars on environmental law and to promote international and inner-country exchange and improving the environmental legislation in China.

Professor Wang Canfa
This picture is the conference held at Beijing with the Japanese scholar. This picture is another workshop in Western China. When we research environmental litigation it is a very difficult question. This picture is the international symposium on the litigation for composition, which means the law. This workshop has a very important effect on the environmental law in China.

Translator
The center also holds some lectures on environmental law and some seminars on environmental cases with the news media in order to let the public know their environmental laws and rights. The center also studies some key questions on environmental law in China and puts forward proposals on improving environmental legislation and its enforcement. The center has been raising a lot of wonderful proposals to the Central Legislation in China.

Next he wants to discuss the work being done in his center on China’s environmental protection. Their work protects victims’ environmental rights and interests. And we are going to discuss a case that happened in the Shiliang Reservoir. And we’re going to discuss the details soon. His work also creates pressure on polluting enterprises and administration agencies who don’t perform their statutory duties. His work forced a lot of polluting facilities in the Tianjin-Hebei
Province to be closed. His work also promotes public awareness of protecting the environment. He once litigated a case in Pinang County in China and after this case the local residents there established an NGO, an environmental NGO to deal with the environmental protection cases in future. The environmental training provided also improved the ability of lawyers and judges to deal with the environmental cases. Many of his colleagues, who are lawyers in his organizations, have been paying visits to the United States.

Also the Center’s working to improve environmental legislation, for example, the solid waste law, the environment damage compensation law, and public participation in environmental protection. He will go quickly through the cases Professor Wang did. I will just give a very brief description of the case.

The first case is the ninety-seven households and villages of Donghai County in Jiangsu Province who sued two factories in Shandong Province for damages for polluting the Shilianghe Reservoir. The Shilianghe Reservoir is a big reservoir along the Huai River. It is located in Donghai County of Jiangsu Province, which borders Shandong Province. In order to promote the development of local economy and improve the living standards of farmers around the reservoir the government of Donghai County in compliance with the national fisher law encouraged local villagers to use net cages for fishing in the reservoir. There have been over two thousand cages of fish since the year 2000.

However the influence of polluted water from upstream in October 2000 and May 2001 caused the deaths of all the fish and shrimp in the reservoir. With the direct economy cost of over eleven million (yen) equivalent to about 1.4 million U.S. dollars. According to the investigation of the local environmental bureau protection bureau and fisher environment-monitoring center, the polluted water came from a paper mill and the chemical plant in Shandong Province. The villagers who suffered serious economic loss transported the dead fish to the neighboring county and asked the local government for compensation. The local government admitted there was pollution and promised to compensate.

However, when these villagers left the local government took no action at all, even though the villagers continuously went to the state environmental protection administration and provincial government of Jiangsu and Shandong Province to call for attention to this case, and the news media reported on this case. The problem remained unresolved.

These ninety-seven households sent a representative to visit
Professor Wang's center, and with the help of the center, these villagers brought an action for environmental damages. In the trial of first instance the court ordered the paper mill and the chemical plant to compensate these ninety-seven households 5.6 million yuen equivalent to seven hundred thousand (700,000) US dollars.

Defendants appealed to the Supreme Court of Jiangsu Province and the court decided to affirm the decision. In July 2004 these ninety-seven households received the full amount of damages and defendants are prohibited from discharging polluted water secretly. The quality of the water in the reservoir has improved and the villagers raise more and more fish in the reservoir.

Now also in other cases, in Beijing one hundred and eighty-two households and residents sued the Beijing Municipal Urban Planning Commission for illegal issuance of permits. In this case the Beijing Municipal Urban Planning Commission issued a construction permit to two research institutes for building an animal laboratory, and the distance between this lab and the residential buildings is only 19.06 meters, while according to a national law such distance needs to be at least twenty meters. So in order to let the Planning Commission vacate the permit residents first went through the administrative process but without any success. So they filed this case to court with the support of Professor Wang's center. And then finally they won the case and the court asked the Planning Commission to vacate the permits. This is the first case in Beijing where the residents sued the Planning Commission of a government and won. As a result of this case there are more and more residents in Beijing are now suing the Planning Commission.

And the final case is 1,722 people suing the biggest potassium chlorite plant in Asia in order to protect residents and trees in the whole county from pollution. And finally with the help of Professor Wang's center this case was won. And we also discuss the case a little bit more in the question and answer session.

And this case was rated as one of the top ten most influential litigations in 2005 in China. Ford Motor Car Company awarded this environmental protection award to Professor Wang and his center. Professor Wang was awarded a prize as the person of the year 2005 in green China. Professor Wang was also rated one of the top ten rights fighters by a Chinese human rights web site. Chicago Tribune also gave a special report on Professor Wang's work and listed him along with the Mexican president and the Palestinian Prime Minister as the eleven people who are going to have significant impact in the world in 2007.
Professor Wang Canfa
Thank you. Thank you everyone.

[Applause]
Honestly some of you may be wondering, Margret Kim, public adviser, California Energy Commission? What’s that got to do with China? I mean when I looked up my name and title and where I was coming from, I questioned that myself. And thought maybe the Journal was getting desperate to get someone to speak. That’s why I wanted to briefly explain to you what a public advisor is.

A public advisor is a statutorily created position at the California Energy Commission. And it is an independent council position appointed by the governor of California as an administrative watchdog, and makes decisions largely in power plant citing decisions. I’m no longer at the California Energy Commission as public advisor effective, which became effective two weeks ago.

I’ve been transferred to California Environmental Protection Agency as their China program director and special council to the California EPA Secretary to be posted in Beijing. So we’re moving to Beijing in two weeks.

I wanted to thank the Vermont Law School for this wonderful opportunity because it is important for me to share with you my experience and my continuing efforts in China. This is all the more meaningful at a personal level in light of what happened to me a few months ago, which in my opinion was rather shocking. I started receiving strange email, almost like hate emails, and my assistant rushed over to my office and said, “tell me what I’m to do. I keep getting phone calls.” “Phone calls from whom,” I asked. “About what?” And she said, “Phone calls from within the Energy Commission. Staff people are interested. It’s about you and what you’re doing in China. They don’t like it. They don’t think you should be sharing with the Chinese guest or that you should be going to China to talk about procedural rights, public participation, administrative law.” I said, “that is shocking. After all this is good for us, it’s good for China.” And much to my surprise my assistant said, “Margret I’m afraid I’ll have to agree with them. China is our enemy, don’t you know? They’re gonna learn the democratic ways and use that against us someday.” I was thinking, this is California, I know its Sacramento but it’s California. And I started feeling, oh, maybe the rest of the country may feel the same way. But because I’m here it reassures me that this is not the case.
So what is it that I have been doing for the past several years that’s so troubling? It’s in my own way to bridge the rule of law and the environmental law through sharing what we do in the government in terms of promoting public participation, public comments, public disclosure of information, conducting public hearing in the environmental review process.

But how I got started in this work is rather interesting because my background is that I come from the private sector. In a law firm as a litigation partner and later as a general consultant to a large Korean conglomerate. And I never really had a chance to deal with the public. And when I went from the service general council to the California Resources Agency I was tasked to draft environmental impact (NEPA) impact laws and regulations. And in that process you have to engage the public. But I never really thought it was very useful. I thought why can’t we just have expert lawyers get involved and that should be sufficient? In fact I even hired a special council to deal with the public. We had a 1-800 number assigned to get public comments and what not.

It was not until I moved to California Energy Commission as the public advisor responsible for procedural rights, and especially it was not until I actually got involved in China, that I really got to realize the true value and appreciate our open government system. I assume most of you are environmental law students but how many of you consciously think about public participation when studying environmental law? Oh, better than me. Without procedural rights, of course, substance of law has really no meaning.

This is what I’ve realized in China. I looked at their environmental laws and some were very good. But there was lack of compliance and enforcement. And in my opinion it’s largely due to the inability of the civil society groups and the public members to meaningfully participate. What I mean by as “meaningfully” is to have the opportunity to comment, to attend hearings, to testify, and to litigate. And so my experience in China for the past few years has been wearing one hat as the government official but the other hat through the non-profit that Robert and I formed, the Ecolinx Foundation.22

And I know that there are other NGOs, US and European NGOs, such as Earthjustice and the NRDC assisting the civil society groups, but I thought that we needed to have a balance. So our focus has been mostly on sharing government perspective, government information, and how do we do things within the government and to share that with

the State and Environmental Protection Administration, which is the equivalent of the US’s EPA.

And one reason was, if there are other foundations and non-profits helping the civil society groups, and if the government and local and central government officials feel that they’re not increasing their capacity, the easiest thing for the Chinese government to do is to just clamp-down on the NGOs. It hasn’t been easy, but we’ve trained throughout China as far north as Harbin and as west as Xingjiang and south as the Hainan Islands. And basically the training was on the administrative licensing process.

How do we have early outreach to let the communities know that we’re going to consider a power plant? By conducting workshops. The ABCs of how to conduct workshops. How to conduct public comment hearing as well as evidentially hearing. How to respond to the comments instead of ignoring them. Cause once you ignore them they will feel cynical about it and they will go back to maybe some more protests. How to communicate unpopular decisions. Very often the Chinese officials would say, we can’t satisfy everyone. So we might as well not go through this process but that is not the reason. And also on appealing administrative decisions. We’ve also assisted in developing guidelines for SEPA’s training arm on public participation.

I think that Professor Wang Canfa yesterday mentioned the law that they passed last year, which is the measure on public participation. And we’ve also provided guidelines, implemented guidelines for that. And I must admit that there has been a marked difference in attitudes toward public participation.

In the beginning I felt like they were sixty to a hundred people just sitting there kind of frozen and I felt like they were there because they were compelled to be there. And I wasn’t sure whether they were listening. And towards the end, as they warmed up, they admitted there is no need for this. Just like how I originally thought. They said we are engineers, we are experts, we are government people, we have all the answers. We are trying to protect the public; they don’t need to know.

So some people also thought that in the US we were crazy to allow anyone to participate in government decision making. Of course the Europeans have this tendency to approach it from a different perspective. They’re also there in China but they talk about selective and qualified participation. And, of course, that is not the case here. And some even suspect that, that maybe you in the west, the US would like to slow us down. That’s why you’re introducing this whole idea of public participation.
I know they are trying to slow down their economy and that may not be a bad way. But most recently, last November, we had a delegation for a whole six weeks. And this was partly from the passing of the measure of public participation law. They called and said we want to come and we want training. So I immediately thought it must be an environmental impact assessment technical training. They're always interested in technology. And they said, “no, no.” We only want to talk to people on public participation, which was surprising. They came. And they said, “also Margret we want to talk to people on the street. We want to know if what you’ve been saying is really true.” I said to them, “you can’t really stop people on the street but we will organize a group of civil society groups and reporters to talk about their role in public participation.”

And at the end, the leader from SEPA, there with fifteen people, said, “you know, this is not just about protecting our environment, this is going to bring democracy to our country.” I was shocked. I know the meaning of democracy is slightly different there than here. But I was thinking I hope he will not lose his job when he returns. I haven’t spoken to him since so I don’t know what happened to him.

So where is China on public participation? Progress is slow and incremental, but with Chinese characteristics. In fact there is a commentary that Robert and I wrote, if you’d like to learn a little more about our work.

I was talking to a professor at Beijing University recently and he was concerned. “Margret, I don’t think the public participation approach is working. We’ve had 86,000 protests in 2005 largely due to land use issues and pollution. And we’ve tried to hold one or two public hearings and that is after the decision is pretty much made and it didn’t work. More protests. Angry people.” I told them, “of course it won’t work because the public participation process is not occurring early enough and you’re picking and choosing, you know, it’s a cafeteria approach.” A little bit of European methods here a little bit of American methods there. It’s not inclusive enough to have a limited number of people who can actually testify. And they don’t disclose the information.

The report, the very hearing, is about commenting on the report, but the reports are withheld because most of the time its considered to be state secret. And they said we need to protect the public from information. So of course it didn’t work. They were more outraged.

And I say Chinese characteristics because I think of South Korea. And South Korea has democracy, but because of the political history
they are extremely suspicious and cynical about government. And so even today, while we have public participation law, when I talk to NGOs they still feel that political climate is still uncertain. The law, while they do have law, is still unclear. And they need to be cautious, and they feel that they still have to be invited to participate in government decision making. I believe that more training is needed throughout China at all levels. And I truly hope that Vermont Law School will also join in this effort to promote public participation in environmental review. Thank you.

[Applause]

PATTI GOLDMAN

Well, I too was a little concerned coming after lunch and realizing I was last and the cookie malaise would set in. So I put together some PowerPoint images last night to hopefully keep your attention.

Well, I am, first in the interest of transparency and disclosure, I’m not a China expert at all. I consider myself very much a student probably in the 101 series. And I first went in China just in 2005 and I went to one of Professor Wang’s training sessions. And was called the American expert, but to explain public interest environmental litigation in the United States. And there was tremendous interest among Chinese lawyers in trying to expand public interest environmental litigation. And I was just amazed at the thirst for information about our system. And the desires to push for law reform and expansion of what I do.

And so what I’ve been doing since I’ve had several other trips there and we’re now working with the Asia Law Institute which is the ABA’s rule of law program, and the All China Lawyers Environment and Resources Committee. And what we’re trying to do is look at well what could you do and the question I keep asking, I have no answers but I’ll ask you throughout my presentation, is if you could make some changes, what would have the greatest effect and is it feasible? And that’s the kind of questions we’ve been asking around this subject.

So today, what I want to talk about is citizen enforcement. And

24. Id.
that’s my bias, so another disclosure. I firmly believe that citizen enforcement is essential to environmental protection. You can have all the laws on the books. They can be the best laws on the books, but they’re not going to mean anything unless they’re enforced. I also think in any system the government is not up to the task. I think throughout the world there are insufficient resources for all the enforcement that needs to happen in any government. I can’t imagine, I mean I challenge you if there’s a situation where that’s not true, but also even if there were resources, there’s often not a lack of political will.

You’ve heard about “guanxi” (relationships) through the networks or the local government’s connection to the industry are dependent on the local polluter for tax base or for jobs and a sort of a social security system. Well in our system here, think of politicians dependent on political contributions from well-heeled industries. Whatever the reason, we often have a lack of political will to enforce the laws. So, that’s my premise. You can disagree with that, but that’s the premise on which I’m doing this presentation.

And I look at citizen enforcement has having three elements. First, access to information about what’s happening. It could either be government information about government actions or information about discharges, air discharges, water discharges, waste impacts on your health.

The second is an opportunity to participate in the decision making. You’ve heard a lot of talk about the environmental impact assessment law in China. And it has made inroads in both of these areas—in providing more information to the public and opportunities for public participation. And then the last, which is what I’m going to talk about, is access to legal redress. And there are a lot of issues you could approach with this, the lack of legal expertise, and the financial obstacles to bringing a case.

I’m going to talk about the legal obstacle of standing. And to do that, I’m going to go back first and talk about our situation in this country before we had liberalized standing. Which in many ways I think is analogous to the kinds of rights and remedies in China today. And then look at three questions about potential expansion that may or may not fit the Chinese system.

So for those of you who are law students, this is my attempt to reduce your semester of torts to one little icon. So, if you go back forty, fifty years, we had environmental litigation but it was basically common law, rights and remedies. And the rights were personal or
property and individual, uniquely individual. So an individual whose rights were infringed could go to court and seek compensation for the infringement of their rights. And the other kind of litigation we had would be more in the area of nuisance. And there again, it’s a right, it’s a property kind of right. Maybe a right to bottle the integrity, but it’s something that is held by the person and when it’s infringed, the individual could go to court and seek abatement of the nuisance. I pick the pigs as one of the best known nuisance kinds of cases.

And in China there is litigation that is analogous to both of these. I think Professor Wang was talking about a paper mill. There it seemed like one of the remedies was abatement, not just money damages. And many of the other cases that have been discussed are compensation for the people that are harmed. The purpose of the compensation is to make the victims whole. The only people that can really bring that case are the people whose rights are infringed, who are trying to be made whole.

Well we had an earth shattering event and change in our environmental law predicated on Earth Day, where there was a huge demand for more responsiveness of our laws. And in particular prevention and restoration. Two kinds of remedies that were not available under the common law system. And after Earth Day you had, I think it was more than two-dozen laws passed and signed by then President Nixon, a little bit Ford. And they looked at different kinds of rights and remedies. So you had the needs to have discharge permits that would restrict pollution and they would get at some issues that were not attainable with the kind of compensation scheme.

For example, incremental contributions to the environmental damage by multiple actors, or prevention before the harm occurs, or restoration. You know, if they get, I have another slide I didn’t put here of, you know, the headlines about Lake Erie is dead. Well, you know, it goes to stop the pollution but also clean-up, which is something that you wouldn’t necessarily get if you’re just trying to make victims whole.

So as these new laws moved into these new areas, there were new rights. And then the courts started recognizing new rights and new interests that could give rise to standing. The key case, and here I don’t know if any of you have seen it, the Mineral King case. This is Mineral King. From the law books you may know it better as Sierra Club versus Morton.\footnote{Sierra Club v. Morton, 405 U.S. 727 (1972).} It was actually the first case that was started by the
people that started my organization and it went to the Supreme Court and established our broadening of standing.

So here’s Mineral King, it’s in the Sierra Nevada National Forest, excuse me. And while Disney was going to build this huge mega project there of amusement park, hotels, huge amounts of traffic and it would fundamentally alter the character of this area. So Sierra Club challenged that decision on multiple different grounds. And it established two principles in the Supreme Court.

The first is injuries do not need to be personal or economic. And the court issues a very broad pronouncement that esthetic environmental and recreational interests can give rise to standing. The second was that organizations can sue. And it wasn’t a home run victory for Sierra Club in that case, because what Sierra Club wanted was the right to sue in its own right.

The right for an organization to speak for the trees, to be the representative of the environment. And what the Supreme Court said instead is Sierra Club could sue on behalf of its members. But it would have to prove some members were injured. That those members essentially could go to court on their own, but Sierra Club is going to go to court in a representational capacity. The lawsuit then also has to be germane to the organization’s interest and the individual members do not have to be necessary for the case or for the remedy. So for example you could never have a representational kind of case for compensation for damages because the individual members are essential.

So that brings me to my three questions that I want to pose. The first is that China, in looking at organizational standing, could deviate from the US model as some other countries have, and organizations could have standing to sue in their own right. So the first question is should environmental NGOs have standing to sue in their own right, to basically speak for the trees?

My first observation on that is that there would be advantages to an organization to be able to sue in their own right. My practice, or anyone who does what I do, we spend a tremendous amount of time and effort proving that individual members are harmed by the action that we’re trying to challenge. I once was interviewing a young lawyer who was fascinated with the issues and we were working on a standing case that was going to the Supreme Court. And he said, you know, I really don’t want to deal with those issues. I just want to get to the merits. And I said, maybe you should go somewhere else.

It is just a core piece of the work that you do of, you know, you’ve
documented the problem, you’ve got your experts lined up, you’ve figured out the law and then the organization has to figure out, OK which ones of our members go to this place or are exposed to this problem. And then they have to speak up. They have to provide evidence that they are injured. So if the concern is that individuals don’t want to step forward, because maybe there would be retaliation or it puts a burden on them, if an organization can sue in its own right then you insulate the individuals from having to basically bear the brunt of the burden or be exposed.

So in thinking about this issue, the reason we have membership standing is really grounded in Article III of the United States Constitution.

The Supreme Court has said Article III creates limited federal court jurisdiction to hear cases or controversies. And it has said that in order for there to be a real controversy you need to have a party that’s got a stake, that’s harmed, it’s adverse to bring it to the court and without that kind of individual harm there isn’t enough of a controversy.

Well obviously this doesn’t need to pertain to be exported to a country that has no similar constraints and doesn’t have that kind of case or controversy requirement. The second and I was actually was rereading the Christopher Stone piece “Should Trees have Standing?” that he wrote when the Mineral King case was being heard. And there actually is a lot of precedent for representative standing for people to represent others or objects. Like in guardianship cases for minors, in cases where there’s fiduciary. Even corporations are often in there as a trustee for the entity.

So there could be that kind of a model for NGOs to represent the environment. There could be all sorts of different questions. Which NGO, what are their duties, how do you make sure they are meeting those duties? And then I think the last caution that I put here is one that would be huge, which is if NGOs could sue on behalf of the environment that gives the government more power over who can sue. And the Chinese government already has a tremendous amount of power over registering NGOs, a potentially decertifying NGOs. So to raise the stakes around litigation would only enhance that power.

So my second question, if you look at the Mineral King case, the Supreme Court issued a broad pronouncement that all environmental, aesthetic, recreational injuries give rise to standing. And it was

answered in a broad brush way. But the answer could be more incremental or more particular. And so I would encourage in looking at the issue of standing, not to look at it across the board for all injuries and all claims but to break it down. So for example one of the options is that the pollution victims who are suing for compensation or abatement could be suing instead for prevention.

And I was interested to see the, what is it, the Beijing Municipal Urban Planning Commission case. Where it seemed like it was just that kind of case where people were participating in an administrative law proceeding to challenge an approval, it sounded like it was an approval of that animal laboratory. Which is instead of seeking compensation after the fact, trying to prevent the harm. So it puts people who are clearly injured, clearly have a stake and have standing to seek the after the fact remedy going to court to seek prevention.

Another option is to look at different kinds of economic injury. It’s seen in evolution of our system, there’s a lot more acceptance of economic types of injuries before there was these aesthetic kinds of injury. While it seems that a lot of the cases in China are based on personal harm or a property kind of right, there could be other economic interests that could give rise to standing.

And let me give an example. Some of the cases in China have been kind of fish farms, or people who have had a right to basically grow fish and have a fish farm and have invested in it and then the fish have been killed. And so it’s analogous to a property kind of right. Well in many of our cases out in the Pacific Northwest on salmon issues, we represent fishing interests. Commercial fishing, recreational, subsistence fishing. They don’t have a property right, unless it’s an Indian tribe. It’s not a property right. It’s an interest, it’s an economic dependency, its a right to get a license if licenses are given out. But if there are no fish, then there’s no right. And so they have been in court suing to prevent harm. Dams that would cause extinction of fish runs, pollution that would wipe out runs or degradation of their habitat that would diminish the runs as well. So again it’s prevention but it’s a different kind of interest—economic, but not property right—not our traditional kinds of rights.

We’ve also represented ecotourism kinds of businesses. In the fishing context the people who sell the fishing gear or do the fly fishing tours, or the boats. And they all have an economic interest in helping fisheries. They don’t have a property right in it, but they will suffer economic loss if there are no fish to catch. We also have in some of our cases asserted property value interests that are a little unusual. For
example, somebody who lives near a national forest and has valued the access to the forest and the beautiful vistas, then trying to challenge a logging project that would basically create a deforested landscape. And the argument was that the property values would diminish because of that action.

So my last question is that standing should not be looked at as a monolithic concept. But instead the question should be: standing to do what? And that the different interests that are required to have standing varied depending on the claim asserted and the remedy that is sought. And sometimes also vary depending on who the defendant is, particularly government or non-government.

So in the classic cases in China, the individuals are the only ones that can sue for compensation for harm to their person or their property. On the very other end of the spectrum, if the right is the right of access to information that is available to all people, all citizens, then everybody has that right. And that pretty much is the principle in this country for any, like discharge reports or freedom of information act kind of rights. That’s pretty much a right everybody would have. For environmental impact statements it’s closer to that kind of access to information right.

The way our courts have dealt with it is anyone who would be impacted by the project, if it causes the environment harm would have standing to sue to compel preparation of an environmental impact statement or to challenge its inadequacy. And if you’re challenging a zoning decision like the animal laboratory case, I think the general rule is the zoning is there for the benefit of the other people within that zone I guess, if you will. And anyone that would be injured or harmed or affected by a different incompatible use would have standing to try to challenge that deviation from the zoning scheme. I’m kind of trying to go in order where it’s harder and harder to get at the end here.

In terms of permits, there we have citizen suits, which liberalize standing directly. But again the principle is if you are affected by the resource and there’s going to be pollution into that resource that’s enough to have standing. And the litigant does not need to show that this discharge is going to cause the harm. The theory is, the government decided that in the standards and the permit and the citizens should be able to enforce those standards. If the polluter wants to pollute more the answer is to go to change the permit or the standards, not to just violate the permit. And now we get to the harder kinds of cases.

And the last three that I have up here are government actions. I
think some of our most restrictive standing doctrine has been developed in cases challenging government actions. The one, so the first is an inadequate government permit. In that situation your classic kind of administrative licensing kind of case, an individual could have standing on a particular license, on a particular matter if it affects them. And actually the law in China is similar on administrative licenses. It’s just that the interests that are recognized there are more your personal property interests.

In this country long ago it was recognized that that’s not very fair to let the people who want less regulation to be in court but not the people that want more regulation. And so we recognize both kinds of harm to get in court. Justice Scalia might not agree with that, but that’s down the law that we have. But the two situations that are the hardest are challenging government policies, particularly broad policies and broad programs. And here the theory is that’s the prerogative of the political branches. And if you don’t like it elect someone else. And when you get to that point of challenging policies you’ve got to have a clear violation of statute, a clear abuse of process in order to be able to have a right. And to be able to get into court there are a lot of limits on how much you can prove that you’re impacted, and often you can’t prove it enough because it’s a broad kind of policy.

And then the last situation, you might be impacted, there might be a kind of standing showing, but it would be if the government was not enforcing laws. That’s almost an impossible case to bring. And there the theory is the government has prosecutorial discretion to decide when to enforce and that citizens don’t have the right to go reorient the priorities or the use of resources. So with this kind of illustration of the various kinds of claims I want to give you a flavor of how to look at standing. I think it’s important to break it down, so that you know what are the interests so who has to show what kind of interest in order to go to court to get a remedy. That while standing and the cause of action are distinct things they often do merge as you start to figure out if you can get into court to assert them.

But my, I guess my threshold proposition at the beginning that citizen enforcement is essential is reinforced when I went through and started to think what is the hardest claim to bring. And it is suing the government for not enforcing. And that brings me back and reinforces the point that I think it is essential to have citizen enforcement, to have an effective environmental regime.

[Applause]
AUDIENCE QUESTIONS

Moderator
Thank you for four excellent presentations. I feel as though there’s so much to discuss. But we’ll try to take two or three questions at least. So let’s open the floor to questions and please address them to individual speakers or generally.

Audience
This question can be for everybody; Professor Wang Canfa might be able to best address it. I’m wondering first is there a distinction between law and equity in the Chinese system similar to the Anglo-American traditions? And secondly if in the realm of the equity and injunctions in the US there’s, you know, we would use something like an economic balancing analysis, cost benefit analysis often times. I’m wondering if under the government with Communist ideology whether those sorts of economic considerations have the same kind of weight or whether there’s a more heavily rights based sort of rule.

Professor Wang Canfa (translated)
You raise a very good question. In China, when we decide cases, we first go to the law. If there are no specific provisions in the law, we will also look into equality and justice this type of concept order to make the most reasonable decision. However something with Chinese characteristics that in China if there is no law we will probably go into policy. That’s what we called government policy or the policy of the Chinese Communist Party. So that policy would be a sort of main guideline in terms of deciding cases when there’s no related law in the legislation.

Also, in some cases, if there is no specific law, a judge may have some discretion in his deliberation of the cases, but that’s not common. In law there is no requirement to do a cost benefit analysis when you deliberate a decision, however in fact when judges make their decisions they will also take economic factors into account.

One example is the case Professor Wang just mentioned, the Beijing Residence sued Urban Planning Commission to vacate the permit it has already issues to build animal laboratory. The reason why the residents could win that case is exactly because the laboratory has not yet been built. So if it is, if it has been built it’s very difficult for the residents to win the case. If, you know, those economic factors take into account. Another case there are also residents suing Beijing Urban
Planning Commission, but these residents lost the case because the building has already been built. So, when the judges deliberate the decision, it is just not consistent with the economic considerations. So, they decided not to vacate the permit and let the building continue. Therefore when judges are considering the decision they would take economic factors into account.

**Patti Goldman**

There’s one thing I just want to share because I know when I was first in China and there was this discussion of substance and procedure and I completely misunderstood what it meant. Because as an environmental lawyer I think I want a substantive victory because to me a substantive victory means they did the wrong thing and they can’t turn around and do it again. The law says: you may not do X. And a procedural victory means you get a remand from a process but you don’t know what the outcome is. And so I had this bias that I always want substance, but there was a wonderful presentation that Professor Wang Canfa’s group did that was the dean of the Shanghai Law School. And he was explaining what procedural means is, there’s law and there’s process and there’s evidence and the judge will go through and write a decision that applies the law to the facts, logically come to a result and explain it in a way that you can see what it is and it’s accountable. And a substantive result would be you win because I say so. And when you start thinking of it that way, I mean a lot of what Wang Canfa was saying in answer to your question is, a lot of the same factors come in that we would think of as equity. But there isn’t that distinction between law and equity and it isn’t limited to a remedy after there’s a violation. It kind of gets jumbled together in deciding if there’s a violation.

**Moderator**

I’m reminded of Professor Cohen’s comment earlier this morning about the form not mattering so much as the substance and the result.

**Professor Cohen**

I wanted to follow up Alex Wang’s point. That last spring the All China Lawyer’s Association issued a so called. That said in all mass cases defined when cases have ten or more litigants the lawyer is suppose to immediately report to the law enforcement authorities including the police, become an agent of the police of the government is being retained. It also precludes lawyers not to take part in mediation
of controversies involving mass cases. Now what is happening in practice? Has this so called guiding opinion affected his organization’s work?

Professor Wang Canfa (translated)

Actually the ink pad of these guidelines will be significant on Professor Wang’s center’s work. The main consideration for issuing such guidelines is to try to constrain mass action in order to maintain social stability. According to the new guideline, Alex Wang has just mentioned, if lawyer wanted to take mass action cases which means the case involved more than ten people, he has to report not only to his partners of the firm but also to the All China Lawyers Association so that just puts a lot of obstacles in terms of the procedures and processes.

Both Department of Justice and Supreme Court of China jointly issue a document to let the Trial Court, which is the lawyer’s court in China, to make hearings on those mass actions. Actually, according to the original law in China in the past, mass action cases usually have big influence so the most appropriate court to hear these cases should be the intermediate court in China. And, if the parties are not satisfied with the judgment, they can either appeal to the Supreme Court of each province or even appeal the Supreme Court of China. But things, according to the new rule only the lowest court, that’s the trial court in China to hear that type of case. This case will never have a chance to appeal to the Supreme Court of China. And the Supreme Court of each provinces also makes there own rules according to the document from the Supreme Court of China. And put more constraints on the procedures and process in order to initiate mass action.

Last year the Dean of the University School of Law and the Dean of the Peking University School of Law and also the former presidents for China University of Political Science and Law had a discussion to, regarding this rule. They are considering to ask the National People’s Congress to vacate the rule issued by the Supreme Court of China, which is illegal. And then the former president of China University of Political Science and Law said we should probably not go to the Supreme Court of China first. Let’s just go to, for example the (Shando) Province Supreme Court to set it’s own rule regarding the rule just now I mentioned it’s illegal instead of saying directly that the Supreme Court of China’s rule is illegal because of the political considerations. So you can see it’s really difficult to have rule of law in China at this point because even the court itself doesn’t follow the law. Thank you.
**Moderator**
How much time do we have? So we’ll take one last question.

**Audience**
I have a quick question. In doing the math. So with about a hundred victims that comes out to about fifty six thousand yen which is about eight thousand (8,000) US dollars. How much of that have you been paid in lawyer’s fee or have you ever been paid a lawyer’s fee? I mean the question is relevant because there’s such a, there’s an insignificant environmental law baring China at this point. Fewer attorneys in all of China probably are equivalent to the number of attorneys in California alone. And so to the extent that, I think I know what the answer is, to the extent that, you know, they have difficulty paying lawyers, I mean how can you every have lawyers representing the clients?

**Professor Wang Canfa (translated)**
Professor Yang raises a very important question regarding attorney fee for environmental cases. Actually regarding the case Professor Yang just discussed there is a, there was an agreement between the lawyers and the plaintiff in this case saying that if the farmers won the case the lawyer would receive 5% of all the compensation as the attorney fee. However after those farmers received compensation they refused to pay the lawyers. But since Professor Wang’s center is a nonprofit organization, it’s not about money making. So he has already made effort to pre-warn those lawyers that there may be a chance the lawyers can’t receive any payment after litigating the cases.
Panelists: Dr. Irene Klaver\textsuperscript{27} & Marcia Mulkey\textsuperscript{28}

Friday, March 2, 2007

DR. IRENE KLAVER

Thank you for your generous introduction of our panel. Unfortunately, due to the weather, I will not be the last one to talk today. I had my spiel ready, invoking a traditional image of philosophy: Appropriately the philosopher gets the last word to bring sense and order to the events of the day, like the owl of Minerva who flies over Athens at dusk to reflect on what happened in the city of Athens. But the snow intervened and I have to depart earlier and leave it to the EPA, to Marcia, to close the day. I’m sure, it will make more sense.

What is a philosopher doing here you might wonder. I think it’s an excellent move of the Vermont Journal of Environmental Law to invite one to this Symposium. Especially one from the University of North Texas, because we are not just a philosophy program, but an environmental philosophy program–the only one in the world with this focus. Just like you are not just a law school but an environmental law school. And just like you, we house the first and premier journal in the field: Environmental Ethics. The Journal started in the 1970s and was one of the first to discuss Christopher Stone’s article, which discussed whether trees have standing, an idea that has been invoked a couple of times today.\textsuperscript{29}

\textsuperscript{27.} Associate Professor, University of North Texas, Department of Philosophy and Religion Studies, and Director of the Philosophy of Water Issues Program.

\textsuperscript{28.} Director of the National Enforcement Training Institute, United States Environmental Protection Agency.

\textsuperscript{29.} CHRISTOPHER STONE, SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT (1971).
Why philosophy? Well, the strength of philosophy is making connections, something we desperately need in a globalizing world, especially dealing with environmental issues. We need to see how things are connected. One of my favorite philosophers, Ludwig Wittgenstein explained how understanding “consists in the very fact that we ‘see connections.’”30 This is a transformative process—it changes our interpretative frameworks. I want to start with connecting back to the beginning, the title and openings speech of the Symposium: “China in Transition: Environmental Challenges in the Far East.” As Professor Wang Canfa stated yesterday in his keynote address, the central government in China has implemented a comprehensive environmental law. Its deficiency, however, lies in enforcement. One of the major problems is the enforcement of public policy on the local level. Too often local governments pursue economic benefits over environmental concerns. Professor Wang Canfa emphasized public participation as one of the crucial ingredients for environmental protection. At this last session I want to zoom in again on the importance of public participation. It lies at the heart of the encompassing theme, “China in Transition: Environmental Challenges in the Far East.” Public participation forms a major challenge and embodies the potential for a major transition.

I want to begin with sketching certain tools to facilitate public participation. In order to do that I first want to thank the Journal for this magnificent symposium. I brought a gift for you—for the office of the Journal. It is the “Don’t Mess with Texas” cup. The gift is part of my strategy. Yes. Very well thought out, eh. That’s what we philosophers do. We’re not just thinking about Kant and Hegel. We are thinking about these kind of issues, like public participation through a slogan like “Don’t Mess with Texas.” Who of you is familiar with it? You all know, of course, that you should not mess with Texas, but do you also know the slogan? Yes? Good for you! Amazing, it reached all the way to the East Coast.

Well, rightfully so, it’s an extremely, cleverly constructed slogan of the Texas Department of Transportation. It started in 1986 as a tough talking litter prevention campaign, meant to educate Texans about the litter problem in their Lone Star State. This is of course a hard thing to pull off in a state like Texas. The campaign was featured widely on

television, radio, billboards, and involved local celebrities like Willie Nelson. You know Willie Nelson? Excellent! The campaign basically told people to keep their trash in their truck and off the road—no more burrito wrappers and beer bottles hurdling out of your window, and became wildly popular! It turned into its own product line with cups and caps, t-shirts, and bumper stickers. Of course all made in China.

The campaign was a huge success. 96% of the Texans came to know the slogan—and apparently 100% of a 2007 audience of lawyers in Vermont, too! Most importantly, the campaign actually succeeded in reducing 52% of the litter in the 1990s and it still holds up today. The slogan managed to capture the spirit of Texans themselves. A tough, independent, don’t tell me what to do, kind of folk. Sometimes I regret not being a real Texan, don’t you?

The strength of the slogan, “Don’t Mess with Texas”—and this leads to the point how it is crucial for thinking about methods of public participation—is that it connects very different, in a way, mutually exclusive, worlds or frames of minds. It speaks to the mentality of the independent cowboy, as well as to the world of environmental concern—both appealing to a sense of belonging to Texas. And in Texas those were two worlds that did not mix too well, until the slogan. It forms, what I call, a perfect boundary object between worlds that have little in common, inhabited by people who often despise each other. The crux, the bridging element, is the double meaning/function of the word “mess.” It facilitates transition, the moment and place where the two worlds can meet and work together, and crystallize into a circumstance, a technique of connecting—a concrete connection in a particular activity. Don’t tell a Texan what to do; don’t mess with him; mind your own business. But, also don’t touch his Lone Star State; don’t mess with it; don’t make a mess of it; keep it clean, keep it beautiful. In both cases, there is a convincing appeal to Texas pride.

Don’t Mess with Texas functions as a boundary object, an intermediate between heterogeneous groups. Philosophers Star and Griesemeier developed the term “boundary object” in the context of scientific fieldwork where diverse groups try to achieve common understanding or collaboration across disciplinary divides through “translation of each other’s perspectives.”31 The same applies to many other situations where people from widely different backgrounds have to find common ground.

The question is how to find something that binds people together despite their adversities and that creates a common cause that both of them can endorse without necessarily having to give up their own principles. A cowboy does not have to become an environmentalist and environmentalist does not have to become a redneck. But still they both can stand behind “Don’t Mess with Texas”. That’s the art, to find that connection.

Searching for such a boundary object around water issues, I develop the notion of a water basin mentality. The boundaries of a river are not only formed by its banks or even floodplains, but as much by its watershed or basin—the whole area of land that drains into a river. Only when one can make these connections—from what I call a water basin-mentality—can one understand that good water management is intrinsically related to good land management. One needs to understand how practices in place have effects downstream. A water basin mentality can function as a boundary object to connect people with mutually exclusive water interests and hence facilitate public participation. Where environmental philosophy is often “reduced” to environmental ethics, my focus is on exploring the cultural aspects of environmental thinking. I work together with scientists, policy makers, social scientists, and artists, to see how we can bring environmental issues on people’s agenda, within people’s public imagination, or awareness. A water-basin mentality is a public awareness that water is not just something that comes out of a faucet, but starts somewhere else, in a watershed. I see this awareness as crucial for sound environmental decision making.

In this context I started an initiative, called “River Cultures and Ecological Futures,” in collaboration with Mr. Natarajan Ishwaran, Director of UNESCO’s Division of Ecological and Earth Sciences in Paris. He is also the Secretary of the Man and the Biosphere (MAB) Program. In the initiative UNESCO Biosphere Reserves and linked landscapes of trans-boundary river basins are priority areas for focused interdisciplinary research. Goal is to develop a cultural component in transnational ecosystem based water management and to implement this component in water policy practices. Where in academia the new buzzword is ‘interdisciplinary’, in water management it is ‘integrated water management.’ But what exactly is integrated boils usually down to hydrology, geology, and engineering. Lacking in the integration is a connection to the social, political, cultural aspects. That is what we focus on. It’s a wonderful project. I think this might be a really nice occasion to work together with the Vermont Law School. If there are
students who are interested in this project come and let me know. It will be good for your program, good for my program to have that exchange.

Back to China. Rivers are excellent vehicles for potential boundary objects, facilitating public participation, especially in contentious stakeholders meetings. Water in China is a huge issue of concern. Many regions of China, especially in the north where almost half of the population lives, are dealing with serious water shortages. Two thirds of China’s 600 cities are struggling with their water supply—aquifers are depleting rapidly, some cities are thinking about reuse—which we actually do in Denton, Texas—some are taking recourse to desalination plants, but turning seawater into drinking water is still an expensive because energy intensive business. Northern China has only 15% of the country’s water supply, but most of the people live there. You all know about the “South-to-North” transfer project one of the major mega-projects to transfer water from the Yangtze River to the Yellow River and other areas.

The Yangtze is one of the rivers we focus on in our “River Cultures and Ecological Futures” project. I want to mention another program related to this, a program at the University of Nijmegen in the Netherlands. I’m originally Dutch. It’s a Dutch twang you hear not a Texas twang, before you started wondering. I am starting a collaboration with Professor Toine Smits who’s the director of the Centre for Sustainable Management of Resources (CSMR). He has set up a fantastic Transboundary Water Management program, to create water managers who are capable of dealing with integrated water management in the broad sense. Also on an international level—it’s a European community funded project. There are students from the Netherlands, Germany, and Norway. And they are in the process of recruiting from China, Mexico, and the United States. Again I would love to include one of you if you are interested in this issue. It is a burgeoning field.

Professor Toine Smits’s is involved with the World Wildlife Fund in a fascinating project around the Yangtze River. It’s called the Yangtze Forum. It was inspired by international experience of the World Wildlife Fund and the Transboundary Water Management program involving problems of implementing integrated river basin management in China. Concepts as integrated river basin management are generally not well known in China. This is an ecosystem based approach of Chinese water management via bottom up analysis. For the Chinese society these kind of public participation processes are a
novel experiment. Provinces and ministries in China used to have a high degree of independence, and cooperation between the organizations is poor. Therefore, the China Counsel for International Cooperation and Development decided to launch a special task force around integrated river basin management. The objective of this task force was to deliver recommendations to premier Wen Jiabao for successful implementation of the integrated river basin management. One of the recommendations was to create a round table for all stakeholders in the Yangtze River basin, the so-called Yangtze Forum. In 2005 the provincial governance, key ministers from China’s water environment, forest, and agricultural sectors gathered for the first time to develop a common strategy and action plan for protection for this entire basin. The next Yangtze Forum is organized this April 2007.

What I’m hoping for is that there will be a water basin mentality created through these kind of projects, these kind of changes in interagency contexts together with public participation, together with an institutional changes on the level of education of engineering schools and water managers education, so that ultimately we can come towards a water basin mentality.

I conclude with a quote of Sandra Postel and Brian Richter from their book on river flows. According to them we need a “fundamental shift in how society uses, manages, and values fresh water—one that recognizes from the outset the importance of healthy ecosystems and humanity’s dependence on them.” And they continue by invoking Einstein that “you cannot solve a problem within the mindset that created it.” The mindset change they advocate sees human water economy as a subset of nature’s water economy and recognizes that human societies depend on healthy ecosystems.

To change a mindset we have to be very creative. One way to start is to initiate international exchange. That’s why this symposium is so timely. China and the United States need to know each other, to become more familiar with each other’s environmental issues, to try to understand each other. Understanding in a sense of connecting with each other a connection that leads to transitions and translations not just from Chinese to English and vice versa, but a translation that connects the local, global and regional through the mindset of public participation in a water basin mentality. Thank you.

Thank you. Well, I’m delighted to be here. I want to start by thanking Vermont Law School and VJEL. All the evidence is the future of environmental law is in good hands. I plan to start with a little mention of our mutual past, Karin Sheldon. We were environmental lawyers together when there really wasn’t such a thing. I don’t know if you know that country song, “I was country when country wasn’t cool?” That’s sort of us in environmental law. I’ve enjoyed getting to know Tseming Yang more recently and he’s helped me at my efforts to act like an academic. And Pat Parenteau of your faculty and I have a common resume entry. So I’ve got multiple degrees of connection to Vermont Law School and it occurred to me thinking about that, that most environmental lawyers in America probably are no more than a degree or two of separation from some kind of connection with this law school. And that’s something for you all to be very proud of. I also have to tell you that although EPA supports my attendance, and as far as I know I don’t have anything to say that they wouldn’t like me to say, these are my views and not theirs or the U.S. government’s.

And finally, I’ll try not to disappoint those of you who stuck with us and see if I have anything to add—I will say I was heartened and encouraged in most ways to learn that much of what I had to say, somebody has said at least a little snippet of by now. So, that means at least that I’ve figured out China a little better than I feared. And it also means that we are collectively beginning to put together what we all know in a way that helps us have a more meaningful understanding of what’s going on. You all know China’s amazing economic growth story—almost 10% a year or about 10% a year—you know that means their economy doubles every, you do the math, six or seven years. Think about that. I mean it’s just astounding, and add to that hurdling into international markets, hosting the 2008 Olympics.

This is an era of amazing developments in China. And with the time I have I couldn’t even give a basic look at Chinese environmental problems. Fortunately, everybody has a few good nuggets that they’ve shared with you. And each one of them is a gasper if you stop and think about it before it runs past you. Just to add a couple more, almost half of China’s 661 cities—and China has no small cities—do not have sewage treatment at all. Think about that. Raw sewage is going into streams in 40% or so of China’s cities. One-fourth or more of the population does not have drinkable water. And by that I don’t mean that it’s a good idea for you to drink bottled water. I mean it is not
drinkable. It causes defined immediate health problems even to people
who are used to it. Virtually every river is subject to massive dam
projects. Hydroelectric adoption is fast as it can be. Desertification is
moving fast. And since, although it’s relevant to water pollution, it
doesn’t scream relevance, we won’t even talk about coal developments.
But you heard a little bit about them.

The use of coal, especially high sulfur coal at the rate it’s occurring,
is astounding. Just one story is the Laza River where ten times the
permitted levels of lead and heavy metals are in the water. In that area
we have subsistence farming. The farmers are told, “you can’t eat your
food.” What are they going to eat? And of course they have therefore
continued to irrigate and eat. And sometimes the solutions are almost
comic. You’ve all heard the story about the mountain sprayed green?
In time for the Olympics. That takes care of strip mining impacts.

The Yellow River is losing about 40% of its fish population. What
is the cure? Dump six million fish a year in there. Think about it.
Here is a quote from Pan Yue, vice minister of SEPA, in a written
editorial, “In just thirty years China has made economic advances that
took western countries a century to accomplish.” Proud man, rightly
so. He went on to say, “it is equally true that environmental problems
suffered by western countries have been visited upon China within just
three decades.” Acknowledging the underbelly of this incredible
achievement—and that’s a high level official. That’s one of the reasons
for encouragement.

The environment seems to be one of those topics where there is at
least somewhat more openness to frankness by government officials, to
public criticism, to allowing NGOs to actually be meaningful players. I
like to think of it as the stalking horse for democratization across other
topics. There’s something about environment that’s either less
threatening or more daunting or whatever, that has made it a pretty
good example, not withstanding some disturbing things we heard here,
of the openness movement.

But the problems are so vast. It will take a massive amount of
money, a massive amount of institutional reform, a massive amount of
long-term commitment, and more than a little luck. So, Professor
Cohen, I don’t know that I’m an optimist. But I am heartened that
more and more people throughout the world and especially all those
incredibly capable people in China are beginning to think hard about it,
and us among them. We get a little credit for how we have spent our
time here.

And we’ve heard most of what I have to say. Of course you can’t
talk about government in China without talking about the Communist Party. But the main impression I wanted to leave you with, we heard first thing this morning, which is, in our conception, a centrally planned and operated and commanded government. I don’t think so. Yes, if the issue’s important enough. Environment as it relates to the Olympics, for example, is being very centrally commanded and controlled. But, you still have to understand the Communist Party and its impact. We’re not talking just about a central committee of the Communist Party, but rather a party that operates throughout the system. And in fact environmental protection in China is highly, dysfunctionally decentralized. And that’s a large part of what I want to leave you with today, is some feel for the particulars of that in the environmental context.

The National People’s Congress Committee on Natural Resources and Environmental Protection together with the State Council are sort of the on-going legislative and senior level executive branch, if you will, oversight of the national government’s role. And the national government does certainly more than the federal government had done here in the United States before 1970. They’re past that. There is some setting of meaningful national standards, directions, and so forth. But by and large the operational implementation is left to SEPA, the State Environmental Protection Administration, which is not unlike EPA. It’s sort of sub-cabinet and not beloved by too many, and doesn’t really have too much of its own constituency to take care of it, except that the people understand its importance. And that takes you a long way, my long government career would inform me.

But there are about 300 people working in SEPA. Now, the Vermont Department of the Environment may not have quite 300 people. I don’t know, but I guarantee you that there is no good size state that doesn’t have a whole lot more than that in the United States. EPA has about 18,000 just by comparison. China has what, four times as many people, six times as many people as we have? Having said that, it’s worth noting that there are about 60,000 professionals in the Environmental Protection Bureaus. So, I don’t want to leave you with the impression that there is nobody working on the government side in environment in China.

SEPA is largely a direction setting and policy articulating entity. That’s all they can be. They do some science. They do some public information campaigns. And they make an effort to oversee the environmental protection bureaus. But it’s a losing effort under their current infrastructure and capacities. The commissions of
environmental protection, you heard a little bit about, they’re the so-called planning commissions. I won’t say much about them. But it was cool to hear that they can be sued successfully. Another thing you learn in a long career in government is that sometimes it’s good to be able to be sued successfully. It enhances government—materially.

But mainly I wanted to talk about the environmental protection bureaus at some length. Understanding them is all about understanding the governmental infrastructure in China. Their relationship to the central government is indirect. There’s no direct reporting relationship to SEPA. There’s little or no money coming from SEPA to them. Their relationship to the local government, whatever it may be, provincial EPB or a city EPB, but whichever you are, you are part of the governmental entity where you’re involved. Your money comes from them, your direct reporting chain comes from them, and your fundamental sense of priorities comes from them. And among other things, the heads of all these governmental units are really fixated on results, economic results. And so you’re very much subject to that driver. And you internalize those values as part of that entity.

But the EPBs pretty much—this is that board chart, you can look at it, but we won’t spend any time on it—pretty much are charged with everything, almost everything that matters. EPBs are charged with applying national and provincial law, and that doesn’t just mean enforcing it. It usually means fleshing it out, putting the meat on the bones. It means putting any of the meaningful requirements that implement the larger more hortatory, more general national standards. Anything that is within their jurisdiction, they’re free to make law. And they often make law inconsistent with these national standards.

So, you have a lot of locally made law. EPBs do all the facility specific work, the permitting, and the environmental impact assessments; all the things that dictate the actual applicable terms for individual facilities or projects. They handle complaints. They’re intimately intertwined with the fee structure, including the building permit fees as well as fees to pollute. There is essentially a license to pollute as well as penalties of the more conventional type. And they have access to and often control all the compliance monitoring. So, they are where the rubber meets the road.

Now, there is some directional change underway. This slide is actually a list of recommendations that a task force put together and recommended to go into the eleventh five-year plan. But you will see that it almost all had to do with addressing this problem I’ve just described by giving SEPA more vision, visibility; by doing something
about the EPBs, about where they get their money, about how they’re controlled, about to whom they report, and thinking about the budget differently. It also involved whether their monies all come from the local level and the whole approach about how penalties are used. This has to do with whether they are just income for EPBs therefore maintained at a level so that polluters will keep paying them or whether they are more a tool to accomplish some other things.

Some of this will be adopted. SEPA is clearly moving to regional offices, where they have to have some enforcement, at least oversight capacity. So, some of these kind of reforms will be adopted, but the bolder reforms like linking success at the provincial level to a green GDP instead of mere GDP growth has not yet gotten attraction. In fact, it was expressly rejected.

All you law students are familiar I trust with that not yet over period in our history where there’s this huge debate about the role of the federal government versus the U.S. states—the great federalism debate. And depending on who you talk to and which side of the political spectrum they’re on or what kind of academic career they’ve built for themselves or whatever, you can hear very different takes on this whole question of what ought to be the roles of the central government, what ought to be the roles of the state governments.

You don’t hear a lot of argument for much environmental protection responsibility other than solid waste at more localized levels. But I want to remind us a little bit of that because it’s so salutary for our thinking about this Chinese challenge.

Do you want, a national floor? What are the drivers for having at least the minimum protection level be consistent and established at a national level? Well, one of the first rationales is the transboundary nature of pollution. Water, of course, is the perfect example of that although it’s not the only kind of pollution that moves across jurisdictional lines. Pollution doesn’t quite know how to stop at the border, as we all know. The whole issue of the race to the bottom is whether jurisdictions will compete to be pollution havens. There’s a general sense that they will. That’s debated. And I’m less convinced than I once was that it’s automatic that jurisdictions will compete to be pollution havens.

As a child of the south I had my doubts about states on anything when I was growing up. But these days sometimes I think the states are going to be the saviors of us all. In any event, the notion is that they might compete, and it doesn’t take more than one or two, to destabilize the whole confidence in the notion of a national floor.
event, a level playing field is generally a good thing.

One of the things that’s fascinated me in my career is the arc of industry point of view on this issue of national versus state standards. When I was young all of industry lined up with the devolution of power. These days they want federal preemption. And I don’t think it’s just because they think they have a hospitable federal government right now. I think it really is they’ve come to learn that if you’re gonna operate throughout the system, it’s just healthier to have a common set of standards.

There are issues of political will that are very different depending on at what level of government you operate. Not exclusive of corruption, small corruption is easier to pull off and sustain and keep hidden at lower levels, but far more significant to political will are issues relating to priorities, interests. It’s very, very difficult for even a United States state government to have the strength to take on a truly major economic player in the state and certainly hard for smaller units of government where the stakes are so much greater. There are issues of sources of influences as I’ve said. They’re just different at different levels of government. Not in any improper way, just in a realistic way.

And finally environmental problems are fraught with complexity. They are scientifically difficult. They require, look, I mean we didn’t get it perfect. But can you imagine tackling air pollution without all the kinds of tools we have in the Clean Air Act? And can you imagine simplifying it in any useful way? These are complicated legal problems. They’re complicated technically. They’re complicated from a science point of view, and it just is harder to do the less capacity you have.

So, all of that sort of taken together is the notion of why you want some kind of national floor. Economies of scale are pretty obvious. Generally, although not always, it’s more efficient if you do things at the larger scale. It relates heavily to this notion of capacity. How do you maintain the kind of scientific expertise you have to have in fifty U.S. states? And there’s comparable kinds of questions that relate to China of course. It has led to our sort of favorite solution, cooperative federalism. I want to talk about that just a little bit in my solutions discussion. Which is basically a way of having your cake and eating it too, of having what is offered by centralization, together with some of the real and material advantages that come from governing at a level closer to the people.

Here’s a quick side story. I was fortunate enough to do some work in central Europe shortly after the end of the Soviet Regime, and I was
interested in what my colleagues from government had to say about things. They didn’t trust the press at all. That was fascinating. You would have thought of the free press as liberators, but almost equally fascinating was that there was a trust only in local government in those areas because their experience was all of excessive centralized control, incompetent centralized control, and authoritarian. I don’t think you’ll run into that issue in the same way in China because it isn’t the same dynamic. But it’s sort of indicative that what you trust and what you believe in is a function of what you’ve experienced and what has worked where you have been.

Finally, one of the big arguments for why you want variability is that states and others can be laboratories of creativity. And this is very real. You need only look at climate change regulatory initiatives to see that but for the U.S. states we would have no regulatory action.

Another favorite story of mine is that I understand the State Department when it attends the Climate Change Convention, to which we are a party as opposed to Kyoto. We’re required to say what progress we’re making on greenhouse gas change. And so our State Department talks about all the things the U.S. states are doing, very proudly in that forum.

So, it is great to have the kind of initiative that comes from variability. And China has such differences across it that the opportunity for some local areas to take the lead is very welcome. The Beijing Olympics is an opportunity to set a model and it’s being used that way. And ABA and NRDC, the World Bank, the World Wildlife Fund, you’ve heard a lot about their projects. A lot of those peel off one EPB or one community and start an experiment of public participation and so forth. So, you want to preserve that.

So, I guess it’s no surprise for an EPA person that my recommendations do include expanding the central government role. I definitely think that China needs to empower the national level of government in the area of environment considerably, but you want to preserve all those 60,000 professionals that are in EPBs now. You want to engage them. You want to take advantage of what they bring to the table. You need energy and you need leadership at these lower levels of government. You need to find some way to enhance that to get them on a better page. Maybe we need a philosopher or several to get us there. You want to embrace and design a system that will be science based, so you don’t want public participation literally run amuck. You have got to have some, you know, some hard science in there.
You also want one that will be a rule of law, not individuals. I didn’t fully understand all that term meant until I began understanding China. And it’s literally the case that a mayor or whatever can defacto decide what the law is. And we heard stories about that in the judiciary—it’s just hard for us to conceive of. I mean we know that there are things at the margins that feel a little bit like that to us and we’re outraged by them, but in general we so comfortably expect the rule of law over the rule of any man or woman. And you want therefore the advantage of dual, shared, and joint responsibility for the environment. You want a mix of national and local standards but the local shouldn’t be able to undermine the national.

Is this sounding a little bit like the U.S. system? Maybe too much. You want to make some centralized funding sources. We do that too. The federal share has declined, but it’s still enough to make a difference and impact in the behavior of states. You want both general oversight—oversight of the quality of like an EPB program or a provincial program and you want for some, facility specific oversight—oversight of some individual permits. And my experience tells you that at least when it comes to enforcement, it’s healthiest if both levels of government have the capacity to act. You don’t want to limit your enforcement capacity to the national government. Only the biggest cases will ever get brought. But you do want some relatively easy way to fill the gaps left. And it’s not easy to just say we’re gonna have to declare you incompetent systemically in order to do that. Those of you who know our statutes very well recognize that they all have some version of a mix of this with little twists that are different depending on the statute, but they basically involved this kind of partnered multi-level, in some ways arguably duplicative approach.

And so I think that if China can find ways, and I think it’s beginning to buy into at least this enhanced central government role. And it almost can’t avoid preserving the local government role. It’s just too endemic to its system. So it will probably wind up okay. So I will wind up, because of my current job, by touting the role of capacity building, training, information exchange, expertise exchanges. And there’s a place for all of us in that.

**Moderator**

Thank you very much.

**Marcia Mulkey**

Thank you. It was great fun to be here.
AUDIENCE QUESTIONS

Moderator
Oh, thank you Marcia, very much. Any questions for her? Oh, my. Professor Cohen.

Professor Cohen
You reinforced the point I tried to make this morning, of the irony of talking about a Communist totalitarian government that for reform purposes needs to strengthen the central government.

Marcia Mulkey
I thought it was so cool when you said that because I had that insight. And I thought, wow, I had this insight with dabbling in China and here’s somebody who really knows and sees that.

Professor Cohen
If you look at the Supreme Court’s recent five-year plan it’s very similar to this. They’re trying to reduce local authority, enhance the central authority, promote the budget decision making, promote the appointment personnel decision making to get away from this local control. China needs to have a stronger central government. It runs contrary to our initial political view of what China really needs is more experimentation, more federalism type of grandiose laboratories and experimentation. You mentioned we should be weakening the Communist Party, but actually experience suggests in the circumstances in which they find themselves, China would be better off with a stronger more responsible central government.

Marcia Mulkey
Well, I’ve come to that conclusion without anywhere near the depth of experience you’ve had with it. But it seems to me, and I may be wrong about this, that it’s partly because the Communist Party itself in China is not as highly centralized, I mean that the party infrastructure is sort of decentralized too in its own way. But anyway, I must say that my ego was soaring as soon as you said that this morning ‘cause that’s my big insight.

Audience
And it’s a question for both our speaker and for Jerry Cohen. To what extent does the Communist Party have to struggle with it’s loss of
authority? That is its own sense of credibility among Chinese people. As we’re looking at bolstering authority they’re really saddled with the perception that they’re corrupt and that they’re just not going to be taken seriously. How do you deal with that issue as well?

**Professor Cohen**

The party has seventy-one million members. The party is losing the scope of its powers, shrinking gradually. The party’s moral is sagging. Its sense of popular legitimacy is declining. One fascinating area where they’re trying to improve this is the party is importing into its own processes for disciplining its own members relative sanctions. They’re importing initial ideals. Before you kick me out of the party I have a right to know what I did wrong. You must produce evidence. I have a right to know. I have a right to have another party member help me defend myself. I have to have a hearing. If I lose the hearing I have a right. All these ideas that are western due process. Judicial ideals that have not yet been implemented well in the judiciary of China itself are already being prescribed and to some extent are beginning to be practiced by the Communist Party in order to stand more legitimacy in the eyes of their own members. I’ve written about this briefly in the talk I gave to the Congressional Executive Commission on China. It was published in *NYU Journal of International Law and Politics* last year.33 It’s one of the most interesting developments in law in China involving areas of the party that isn’t formally involved. Good question.

**Audience**

Actually I have a two-part question. I’m going to direct mine to Jerry.

**Marcia Mulkey**

Maybe we should just bring Jerry [Professor Cohen] up.

**Audience**

It’s all about centralization and centralized power. I guess the first

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33. See Jerome A. Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead for China*, 37 N.Y.U. J. INT’L L & Pol. 423, 435–36 (2005) (explaining that the Communist Party Charter recognizes Western notions of due process, including notice and the right to be heard, but such provisions have not been well enforced. In recent years, however, local Party Discipline and Inspection Commissions have taken steps to begin resolving this lack of implementation.).
part of the question; I’ve actually been dying to ask these questions. Somebody think about this stupid question. But maybe, I’m just wondering about your comment. One of the issues in the central government is that it’s made up of individuals who at the same time are occupying positions with the state or the central government also occupy positions out in the provinces, right? I mean they have separate interfaces of power. And I’m curious about those influences, I mean the level of centralization that you can possibly expect from China.

Marcia Mulkey
Well, before Jerry answers with some knowledge of China, let me observe that that’s also true of the U.S. system, and that almost everybody who’s engaged in the national government has some sort of prior life. It’s not unusual that it be with a U.S. state or a city government. It might be industry or regulated community. And there is, in my experience, a pretty rapid sort of changing of hats that where you sit is what you see and so forth. On the other hand, there’s a lot of value added from having that experience. So at least in the U.S. system I don’t think that’s fatal. In fact, it might be an asset. But maybe that’s not relevant to the—

Professor Tseming Yang
Right. The governor of Fujian Province is a member of the state council.

Marcia Mulkey
But that’s different. I mean that’s sort of the appointment of people. That sort of goes to the rule of people not of law question.

Professor Cohen
But everybody is. [Some people having already been Wong Dong whatever or Mayor of Shanghai becomes central full-time apparagics defending standing under the Polit Bureau. But others as you say different areas in China. They all come together. And they all have to be bargained with. A consensus has to be forged.

Marcia Mulkey
Absolutely.

Professor Cohen
They offer a lot of resistance.
Marcia Mulkey

Plus these people moved, you know, they move with the party which sort of decides where they get to go. I thought this, the fellow who had been head of SEPA who I met, so I’m embarrassed that I can’t remember his name. Actually, I was pretty impressed by him. He’d been there for a long time. But he was pretty outspoken. I think he’d shown some real leadership. I thought it was somewhat ironic that he sort of took the fall for that mistake. And it is fascinating to hear that he so quickly was rehabilitated by the party, which may mean that he was regarded as not having been the source of that.

Professor Cohen

Efficient holding between those who represent the promises as it were, and those who represent the center. Bargaining is also among those who represent the center. The former, the present Minister of Public Security, a very powerful person, who at the next meeting of the full party, the elevated, the head of the national political party group used to be the governor of Central. Now, although he’s the center person now, loyal to the center, he would like to build up the control of the Ministry of Public Security over all the provincial police organizations. But he also is in opposition to the Ministry of Justice and the Supreme Court. And they’re not represented in the. He’s more powerful; he’s more resourceful, but there are other people in the Polit Bureau who take account of even though they all have central government hats as well as party hats. So it’s really quite.