China's Environmental Legislation and Enforcement

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Introduction

After 30 years of fast economic growth, China is facing unprecedented challenges brought by environmental pollution and ecology deterioration. In recent years, China's environmental legislation and enforcement have become core content of the major considerations during the establishment and operation of businesses in China. To help readers to gain a better understanding of China's environmental law system, this article briefly reviews China's environmental legislation history since 1979 and discusses major current environmental laws and the basic legal mechanisms created by these laws that might impact an industrial facility from its initial establishment to daily operation. The environmental enforcement system, mainly focusing on the Ministry of Environmental Protection and its local counterparts, will also be discussed to help the reader understand how the laws-on-the-paper are implemented across China.

Full Article

China promulgated its first environmental law, the Environmental Protection Law (Trial Implementation), in 1979, one year after its decision to reform and open up to the world. Thirty years has passed since then and no one could have anticipated the changes occurred in China, including the environmental challenges brought by unprecedented industrialization and urbanization. That’s why we continually see new environmental legislations or amendments to existing laws and regulations being discussed at legislatures at central and local levels. One key characteristic of China is that every five year, the State Council of China (China’s cabinet) will draft a “5 year plan for national economic and social development” to establish long-term goals and objectives of development. The Plan, once approved by China’s top legislature, the National People’s Congress (NPC), becomes legally binding for all levels of government nationwide. In 2006, the 11th “5 year plan” required a cut of 10% major pollutants (including sulphur dioxide in air emission and chemical oxygen demand in wastewater discharge) by 2010 from a 2005 baseline. Chief officials of local governments across the country will be demoted or punished if they fail to achieve their specific goals of pollutant reduction. This is a major drive behind most new environmental legislations recently.

1. Hierarchy of China’s environmental laws

China’s Constitution, as amended in 2004, provides in Article 26 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 reforestation and the protection of forests”.
As a legal matter, however, the Constitution cannot be applied to companies or individuals in a direct manner. The regulatory regime that directly impacts a company or facility operating in China consists of Laws, Regulations, Ministerial rules, Local regulations and rules, National and local standards, etc. The chart below shows the hierarchy of China’s environmental laws at the central government level.

[Diagram]

- National People’s Congress (NPC)
- Constitution
- National People’s Congress and its Standing Committee
- Laws, e.g. Water Pollution prevention and Treatment Law; International Conventions and Treaties
- State Council, i.e. China’s cabinet
- Regulations, e.g. Construction Project Environmental Protection Regulation
- Ministries, Commissions and Administrations under the State Council, e.g. the Ministry of Environmental Protection
- Ministerial rules, e.g. Environmental Information Disclosure Measures (Trial Implementation)
- State Standardization Administration Commission
- National mandatory standards (GB standards), e.g. Emission standard for industrial enterprises noise at boundary (GB 12348-2008)
Environmental Law 1113

It is worth mentioning that China has ratified more than a dozen international environmental conventions and treaties, including:

- Convention for the Protection of the World Cultural and Natural Heritage (1985, year of approval or signage);
- Convention on the Prevention of Marine Pollution By Dumping of Wastes and other Matters (1985);
- Vienna Convention for the Protection of the Ozone Layer (1989);
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1991);
- Montreal Protocol on Substances That Deplete the Ozone Layer (Adjusted and Amended) (1991);
- United Nations Framework Convention on Climate Change (1993);
- Convention on Biological Diversity (1993);
- International Covenant on Economic, Social and Cultural Rights (1997);
- Stockholm Convention on Persistent Organic Pollutants (2001);
- Kyoto Protocol to the Convention on Climate Change (2002), etc.

These conventions and treaties have been or are to be converted to Chinese laws or regulations and enforced by government agencies. Similar to the central government, governments at local provincial and large municipal levels may also have their local environmental regulations and mandatory standards applicable within their respective jurisdictions. Local environmental regulations might have additional requirements on companies and local environmental standards shall apply more stringent limits on pollutant emission. This is commonly seen in coastal cities and provinces that have achieved continuous high economic growth accompanied by serious environmental issues.

2. Introduction of major environmental laws and regulation

2.1 Environmental Protection Law

As mentioned above, the Environmental Protection Law first came into place in 1979 and was amended in 1989. It became the “mother law” of all the other environmental laws and regulations. The Law, as amended in 1989, stipulates that the purpose of the Law is “protecting and improving people's environment and the ecological environment, preventing and controlling pollution and other public hazards, safeguarding human health and facilitating the development of socialist modernization”, which means China’s environmental law and policy is seeking the balance between economic growth and environmental protection. This is the basic tone of each and every environmental legislation since that time. As old as 30 years, the Law is hardly enforceable today if without being substantiated by other major environmental laws covering water, air, waste, etc. The Standing Commission of National People’s Congress (SCNPC), China’s top legislature, is studying how to modernize the Law. Some legal scholars are arguing that the Law should be made a Chinese counterpart of US NEPA (National Environmental Policy Act) to impose stricter liability against governments across China, whose effort on environmental protection could easily be overwhelmed by its desire to develop local economy.
2.2 Water Pollution Prevention and Treatment Law

The Water Pollution Prevention and Treatment Law was adopted in 1984 and amended twice, in 1996 and 2008 respectively. The 2008 revision to the Law was seen as a response to China’s serious water crisis exemplified by the 2007 blue algae outbreak in Taihu lake, which caused shutdown of drinking water supply to millions of people and, the 2005 chemical spill to the Songhua River, which led to dispute between China and Russia and resignation of the environmental minister. Highlights of the 2008 amendment include:

- A cap and trade system on major water pollutants (COD, ammonia-nitrogen, phosphorates, etc) will be established and enforced. Provinces around the Taihu Lake including Jiangsu, Zhejiang have already initiated pilot projects on cap and trade of water pollutants among manufacturing sites in certain cities.
- Discharge permits must be obtained for each site with wastewater discharge either to surface water or a wastewater treatment plant. The Ministry of Environmental Protection is working on the draft Regulation of Pollutant Discharge Permit, which is to be adopted by the State Council in a year or two. Once adopted, a comprehensive discharge permit system will be established and enforced nationwide on a unanimous basis.
- Companies are required to make sure their pollutant discharges are in compliance with both limits set forth in the discharge standards and the cap of total pollutant amount.
- Each year facilities that discharge pollutants directly or indirectly into water body shall report to and register with local Environmental Protection Bureau (EPB) on the categories, quantities and concentrations of pollutants discharged, and also provide the technical information concerning prevention and control of water pollution.
- Protection on drinking water is enhanced by enforcement of more stringent discharge standards for wastewater discharged to major rivers and lakes and limit or even ban of new projects that might cause pollution to drinking water source.
- If a company, in violation of the law, pollutes the water environment seriously, EPB or MEP shall make public the company name. An entity and individual damaged by water pollution is entitled to claim the elimination of the hazard and compensation for the damage against the polluter. Polluter in violation of the law shall be responsible for taking treatment measures to eliminate pollutants or pay for such treatment or remediation.
- The previous penalty cap (1 million RMB (approx. 150,000USD)) against the entity that causes a serious water pollution accident is removed.

2.3 Air Pollution Prevention and Treatment Law

The Air Pollution Prevention and Treatment Law was first adopted in 1984 and amended in 1995 and 2000. The 2000 amendment brought changes to the Law of 1995:

- More focus on the solution of air pollution in major cities;
- Introducing total amount control for air pollutants and emission permits;
- Control on air pollution by vehicles;
- Setting air pollutant emission fees to replace exceedance fees; exceedance of air emission standards has been forbidden;
- More strict legal liability on non-compliance.
Coal accounts for more than 60% of China’s total energy consumption and 70%-80% of SO2 emissions as well as smoke & dust. Before renewable energy and nuclear power become more available, China is planning to use more coal to generate electric power without deteriorate air quality. As mentioned above, in 2006 the NPC approved central government’s plan of reducing SO2 emission by 10% by 2010. Key measures include requiring mandatory installation of desulphurization equipments in coal-firing power plants and phase out coal firing boilers in major cities. A “cap and trade” system is also expected to be established for SO2 emission quota trade among thermo power plants. The SCNPC has already planned to revise this Law for the third time within 2-3 years. The intent is to tighten car emission in major cities and enhance cross-provincial control of air pollution.

2.4 Law on the Prevention and Control of Environmental Pollution by Solid Wastes

The Law on the Prevention and Control of Environmental Pollution by Solid Wastes, or the Solid Waste Law, came into force 1996 and was amended in 2004. The revised Law established the “extended producer’s responsibility” (EPR) and tightened the import of solid waste for recycling. The Law also requires that if a site generates hazardous waste, which is listed in the Hazardous Waste Catalogue, the site shall use licensed vendors to transport and dispose such waste. The amended law makes it clearer that polluters shall be responsible for pollution they cause. Further, the law provides that an enterprise must dispose of its solid wastes before the enterprise is dissolved or terminated. Significantly, once an enterprise is acquired or merged, the acquirer is responsible for disposal of untreated solid waste unless a previous agreement states otherwise.

2.5 Environmental Impact Assessment Law

The Environmental Impact Assessment Law was adopted in 2002 and came into force from 2003. The Law was an escalation of the Regulation on the Environmental Protection of Construction Projects adopted in 1998. The owner of any new, expansion or modification project that might have negative impact on the environment must, before commencement of any construction work, retain a qualified third party to formulate an environmental impact assessment (EIA) report and submit the report to local or central government environmental authority for examination and approval. The project owner must follow the requirements raised in the EIA report and have the agency approval for final environmental monitoring and approval after the construction is done and before operation formally starts. EIA has become a “must-do” for almost every project in China except for those came into existence before 1998. An approved EIA report is essentially a comprehensive environmental permit for the construction and operation of a site or facility. The EIA process is complex and requires detailed review by a business to ensure compliance for any planned project, including modifications to an existing facility, production line or treatment system.

2.6 Radioactive Pollution Prevention and Treatment Law and the Regulation on the Safety and Protection from Radioactive Isotopes and Radiation Devices

The Law came into force in 2003 and the Regulation was enacted in 2005. The Law regulates the establishment and operation of nuclear facilities and disposal of radioactive wastes. The Regulation requires permits to be obtained by manufacturer, seller and user of radioactive isotopes and radiation devices.
2.7 Land contamination

To date there is no Law on Contaminated Land or Law on Soil Pollution and there has been little, if any, enforcement action by authorities to drive contaminated land remediation. General principles relating to prevention and control of land contamination are prescribed in various laws, regulations and standards, but current language has not yet been extensively tested except for a few pilot projects of land remediation as part of a research program in limited cities. China’s top environmental watchdog Ministry of Environmental Protection, or MEP, together with the Environmental & Resource Committee of the National People’s Congress have initiated a drafting process for China’s Soil Contamination Law, with a draft expected in the next few years.

In June 2004, SEPA (State Environmental Protection Administration, the predecessor of MEP) published a notice to address the issue of land contaminated by industrial companies. According to the Notice, polluters will be held liable for the restoration of contaminated land. More particularly, sites that generate hazardous wastes shall have their land tested and analyzed before they terminate operations and change the land use purpose. Polluters are to be responsible for the treatment of land pollution and restoration of land function. Please note that there is no detailed definition or guidance regarding how to identify original responsible parties, or what to do in the event responsible persons cannot be identified or cannot pay for cleanup. It would be difficult to enforce the restoration in lack of baseline or pre-occupancy assessment.

The Chinese government has not established a set of standards specifically for soil and groundwater cleanup. However, the government has promulgated a number of national standards to assist with the evaluation (including risk assessment) and monitoring of soil and groundwater contamination. It is worth noting that these standards do not expressly reference contaminated land cleanup or related compensation.

2.8 China WEEE and ROHS

In response to the EU’s Directives on WEEE (Waste Electrical and Electronic Equipments) and ROHS (restriction of the use of certain hazardous substances in electrical and electronic equipment), China promulgated its equivalent WEEE regulation, i.e. Regulation on Recycling and Disposal of Waste Electrical and Electronic Products early Feb 2009, which will become effective Jan 1, 2011. Back in 2006, the Ministry of Information Industry (now merged into the Ministry of Industry and Information Technology) issued the Management Methods for Controlling Pollution by Electronic Information Products, which is known as China RoHS and took effect March 1, 2007.

China WEEE regulation is more of a framework legislation, which is to be supplemented by multiple implementing rules and standards between now and Jan 2011. Generally speaking, China WEEE regulation requires manufacturers and importers of electrical and electronic products to be responsible of taking back and recycling of waste electrical and electronic products, either done by themselves or by paying to the China WEEE Fund. They are also required to provide necessary information of disposal to disposers. The scope of “electrical and electronic products” is not yet defined and the rate of funding is to be worked out by ministries of finance, resource utilization and environmental protection.

China ROHS rule basically requires manufacturer or importer of “electronic information products” to label their products to inform the customers whether certain “hazardous substances” are contained and if so, what level are these substances and in which parts are they contained. Furthermore, a “key catalogue” of China ROHS is being
drafted. The “key catalogue” will require some “electronic information products”, primarily consumer electronics with large volume, to eliminate use of the hazardous substances in these products and go through a China Compulsory Certification before they are marketed in China.

2.9 Climate change

China announced its ratification of the Kyoto Protocol in 2002. To date, China has not committed to any binding cap or absolute reduction of GHG emissions.

Meanwhile, China is taking climate change as an opportunity to promote energy efficiency, energy conservation and renewable energy as well as relevant R&D. The government has also been working actively on facilitating projects under the Protocol's clean development mechanism (CDM).

The NDRC issued the National Climate Change Programme in June 2007, which is the most comprehensive statement of China’s policy and objectives on climate change. The Programme announced China’s goals and objectives of climate change by 2010, including:

- 20% improvement of energy efficiency on the baseline of 2005
- Raising the proportion of renewable energy (including large-scale hydropower) supply up to 10% and the extraction of coal mine methane up to 10 billion cubic meters
- Realize the increase of carbon sink by 50 million tons on the top of 2005.

Implementation of the Programme remains uncertain. For example, the Programme mentioned China’s ambition to develop many environmental protection technologies, e.g. carbon capture and storage, without setting up specific timeline and the government did not allocate any significant money in the 4 trillion RMB stimulus package to work on this.

Major legislation include:

- China enacted the Renewable Energy Law on Jan 1, 2006. The Law requires grid companies to buy all electricity generated from renewable energy by licensed company at price set by the central government. In March 2008, NDRC released the Renewable Energy Development Plan in “the eleventh-five” Period, aiming at increasing the portion of renewable energy in total energy consumption to more than 10% by 2010.
- The revised Energy Conservation Law, which took effect since 1 April 2008, emphasized more on the key areas (construction, transportation, public institution) and other key energy consuming entities by both restrictive and incentive mechanism.
- China’s central government released Comprehensive Working Plan on Energy Conservation and Pollution Reduction in June 2007. One highlight of the Plan is to add the progress of energy conservation and pollutants reduction as one of the key elements of the appraisal programs for government official and SOE management.
- Circular Economy Law, which took effect as of Jan 1, 2009, is a law aiming at promoting efficient use of resources and energies.
- Ministry of Environmental Protection (MEP) released air emission standards to limit methane emission from coalmines (GB 21522-2008, effective July 1, 2008) and nitrogen oxides emission (GB 13223-2003, effective January 1, 2004) from thermal power plants.
3. Environmental liabilities

Another trend of environmental legislation of China is the increase of environmental liabilities on both types and severity. There are three types of environmental liabilities under Chinese environmental laws: administrative, civil and criminal. Administrative environmental liability is most commonly imposed by MEP or local EPB against corporate violators of environmental laws and regulations. By severity from low to high, administrative environmental liability consists of warning, fine, confiscation of illegal gains, order to stop operation or use, revoke of license or permit, order to shut down and termination. MEP or EPB must follow administrative procedures when making any kind of administrative punishment against companies and all of the administrative punishments mentioned here are suable in court.

Civil environmental liability is handled differently than common civil liabilities, as the polluter will be held liable for civil damage caused by pollution no matter whether the polluter is at fault or not and unless the polluter can prove that the damage is not caused by the pollution. However, the environmental and civil procedure law limits the scope of plaintiff damages to pollution victims suffering direct loss caused by pollution.

Environmental criminal liability is set forth in China’s Criminal Code as amended in 1997. Nine articles in the Code criminalize activities that severely damage the environment such as dumping hazardous waste and illegal logging. Based on the consequence of the crime, one could be jailed up to 15 years and fined. If a company is found guilty of causing serious pollution accidents or damages, the company shall be fined and persons who are directly responsible for the offence, e.g. general manager, safety manager, board directors, etc., shall be punished in accordance with relevant provisions.

4. Enforcement of environmental laws and regulations in China

The Ministry of Environmental Protection (MEP) is China’s top environmental watchdog. MEP, formerly known as the State Environmental Protection Administration, or SEPA was elevated to ministry status in 2008. Its responsibilities include pollution control and prevention, rule and policy making and interpretation, approval of EIA of major projects, standards making, environmental monitoring and supervision and ensuring nuclear safety. Environmental protection bureaus (EPB) at or above county level governments are MEP’s local counterparts responsible for environmental enforcement at local level. MEP also has six regional environmental supervision and inspection centers.

Environmental lawsuits are on the rise because more and more pollution victims are suing polluters in courts nationwide, with the support of environmental NGOs and lawyers on a pro bono basis. The laws are also becoming more convenient for such plaintiffs in these lawsuits by shifting the burden of proof to the polluters, who has to prove that the health or property damage is not caused by its emission or discharge.

The enforcement of environmental laws and regulations remains a pressing challenge for MEP and its local divisions. Inconsistency or even lack of enforcement could impact business operations in China, especially in the middle and western parts of China where local governments still prioritize economic growth to environmental protection.