

## COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA

### China's New Environmental Protection Law

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#### Introduction

China is currently the world's second largest economy and is facing serious environmental challenges. Since China adopted its "open door" policy and market economy reform in 1978, the astronomical growth in the Chinese economy has coincided with a corresponding decline in environmental quality. The ubiquitous smog that blankets the skies of most Chinese cities is a constant reminder of the extent of Chinese environmental problems. Clean air, water and soils have become luxuries beyond the reach of most inhabitants of mainland China.

Chinese law does intend to protect the environment. *The Environmental Protection Law* was first adopted in 1979 and revised in 1989.<sup>1</sup> This revision has however proved grossly inadequate to address the severity of Chinese environmental problems. Neither the 1989 Environmental Protection Law, nor the copious instruments formulated with the purpose of environmental protection, such as *the Atmospheric Pollution Prevention and Control Law*,<sup>2</sup> *the Circular Economy Promotion Law*,<sup>3</sup> *the Energy Conservation Law*,<sup>4</sup> *the Renewable*

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The author thanks Dr. Michelle Lim for her comments on the earlier draft.

<sup>1</sup> 中华人民共和国主席令第 22 号[Decree of the President of P. R. China (No. 22)], 中华人民共和国环境保护法 [Environmental Protection Law of P. R. China], 26 December 1989.

<sup>2</sup> 中华人民共和国主席令第 32 号[Decree of the President of P. R. China (No. 32)], 中华人民共和国大气污染防治法 [Atmospheric Pollution Prevention and Control Law of P. R. China], 29 April 2000.

<sup>3</sup> 中华人民共和国主席令第 4 号[Decree of the President of P. R. China (No.4)], 中华人民共和国循环经济促进法 [Circular Economy Promotion Law of P. R. China], 29 August 2008.

<sup>4</sup> 中华人民共和国主席令第 77 号[Decree of the President of P. R. China (No.77)], 中华人民共和国节约能源法 [Energy Conservation Law of P. R. China], 28 October 2007.

*Energy Law*,<sup>5</sup> *the Cleaner Production Promotion Law*,<sup>6</sup> *the Forest Law*,<sup>7</sup> or *the Grassland Law*,<sup>8</sup> have succeeded in stopping the deterioration of China's environment.

On 24 April 2014, *China's New Environmental Protection Law (2014 EPL)*<sup>9</sup> was adopted, entering into force on 1 January 2015. The 2014 EPL replaces the 1989 EPL, with the hope to combat China's environmental problems. The question therefore is whether the 2014 EPL will bring clean air, water and soil back to Chinese people in the foreseeable future? This country report first discusses the content of 2014 EPL. It then sheds some light on the weaknesses of the 2014 EPL and concludes with recommendations for the effective implementation of this law.

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<sup>5</sup> 中华人民共和国主席令第 33 号 [Decree of the President of P. R. China (No.33)], 中华人民共和国可再生能源法 [Renewable Energy Law of P. R. China], 28 February 2005; 中华人民共和国主席令第 23 号 [Decree of the President of P. R. China (No.23)], 全国人民代表大会常务委员会关于修改中华人民共和国可再生能源法的决定 [Decisions on the Amendments to the Renewable Energy Law of P. R. China by Standing Committee of National People's Congress], 26 December 2009.

<sup>6</sup> 中华人民共和国主席令第 72 号 [Decree of the President of P. R. China (No.72)], 中华人民共和国清洁生产促进法 [Cleaner Production Promotion Law of P. R. China], 29 June 2002; 中华人民共和国主席令第 54 号 [Decree of the President of P. R. China (No.54)], 全国人民代表大会常务委员会关于修改《中华人民共和国清洁生产促进法》的决定 [Decisions on the Amendments to Cleaner Production Promotion Law of P. R. China by Standing Committee of National People's Congress], 29 February 2012.

<sup>7</sup> 中华人民共和国森林法 [Forest Law of P. R. China], 1984 年 9 月 20 日第六届全国人民代表大会常务委员会第七次会议通过, 根据 1998 年 4 月 29 日第九届全国人民代表大会常务委员会第二次会议《关于修改〈中华人民共和国森林法〉的决定》第一次修正, 根据 2009 年 8 月 27 日第十一届全国人民代表大会常务委员会第十次会议《关于修改部分法律的决定》第二次修正 [adopted in 1984 by the 7<sup>th</sup> Meeting of Standing Committee of National People's Congress, as amended in 1998 by Decisions on the Amendments to Forest Law of P.R. China, 2<sup>nd</sup> Meeting of Standing Committee of National People's Congress and in 2009 by Decisions on the Amendments to Several Laws, 10<sup>th</sup> Meeting of Standing Committee of National People's Congress ].

<sup>8</sup> 中华人民共和国主席令第 26 号 [Decree of the President of P. R. China (No. 26)], 中华人民共和国草原法 [Grassland Law of P. R. China], 18 June 1985, as amended by 中华人民共和国主席令第 82 号 [Decree of the President of P. R. China (No. 82)], 28 December 2002.

<sup>9</sup> 中华人民共和国主席令第 9 号 [Decree of the President of P. R. China (No. 9)], 中华人民共和国环境保护法 [Environmental Protection Law of P. R. China], 24 April 2014.

## The 2014 EPL

A proposal for amending the 1989 EPL was first submitted to the National People's Congress (NPC) in 1995. The NPC Standing Committee commenced the legislative procedure of amending the EPL in 2011. The NPC was initially conservative in its approach and intended to revise only some parts of the 1989 EPL. It then recognized the fact that the 1989 EPL was completely obsolete and that fundamental change was unavoidable if there was to be any hope of reversing past and current trends of environmental degradation. The 2014 EPL should therefore be seen as a new law rather than a revised version of the 1989 EPL. It contains 7 Chapters and 70 Articles. This is far more detailed than the 1989 EPL (6 Chapters, 47 Articles).

Chapter 1 defines general principles of the 2014 EPL. It is stated by the 2014 EPL that protection of the environment is the priority, while economic development should take a back seat.<sup>10</sup> For the first time, principles such as the precautionary principle, public participation and integrated management are enshrined in the EPL.<sup>11</sup> Moreover, the 2014 EPL provides that local government is responsible for environmental quality within its jurisdiction.<sup>12</sup> World Environment Day (5 June each year) is recognized in the 2014 EPL as China's National Environment Day.<sup>13</sup>

Chapter 2 sets out governmental responsibilities for the management and supervision of environmental protection. According to the 2014 EPL, the environment must play a very important part in the government's social and economic development plans.<sup>14</sup> The Law requires the State Council to enact national standards for environmental quality and pollution discharge. It is noted that local governments are encouraged to adopt more stringent

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<sup>10</sup> Art.1, 2014 EPL: "The purposes for the adoption of this law are to protect the environment, prevent and control pollution and other disasters, ensure public health, advance the society towards eco-friendly and promote sustainable development of the economy and society".

<sup>11</sup> Art. 5, 2014 EPL.

<sup>12</sup> Art. 6, 2014 EPL.

<sup>13</sup> Art. 12, 2014 EPL.

<sup>14</sup> Art. 13, 2014 EPL: "local government (above county level) shall include environmental protection in its social and economic development plan"; Art. 14: "The State Council and Provincial government shall fully consider environmental impact and consult with experts before any policy making on economy and technology".

standards than national standards.<sup>15</sup> The Ministry of Environmental Protection shall establish a national network for monitoring environmental data.<sup>16</sup> The 2014 EPL also emphasizes the role of environmental impact assessment (EIA). Any development plan and construction project without an EIA shall not be pursued.<sup>17</sup> A further interesting provision which warrants highlighting is Art. 20. This Article addresses pollution across administrative regions. It requires the central government to identify key areas and establish an integrated approach with uniform planning, standards, monitoring and pollution prevention and control measures so as to combat pollution in river basins and ecological loss across different administrative areas.

Chapter 3 concerns measures for the protection and improvement of the environment. Protected areas shall be established for areas that are ecologically important, sensitive and vulnerable (so called “red line”).<sup>18</sup> The 2014 EPL pays attention to the protection of biodiversity. It provides that preventive measures shall be taken to control the spread of alien species. Through the 2014 EPL, China has established an ecological compensation mechanism. Under this scheme, funding shall be transferred to protected areas. At the same time, local governments are enabled to negotiate details of ecological compensation based on market rules.<sup>19</sup> The 2014 EPL addresses the protection of air, water, soil and oceans.<sup>20</sup> It however relies on specific legislation such as *the Atmospheric Pollution Prevention and Control Law* for the execution of these provisions. Finally, the government encourages the public (citizens, companies and other organizations) to use more environmental friendly commodities. In government procurement preference shall also be given to environmental friendly products, equipment and facilities.

Chapter 4 addresses pollution and other public nuisance. Several measures in the 1989 EPL are retained in the 2014 EPL. These measures include provisions related to pollution prevention. Pollution control facilities must be designed, built and used at the same time as the project.<sup>21</sup> Companies that cause pollution must pay a pollutant discharge fee or

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<sup>15</sup> Art. 15 and 16, 2014 EPL.

<sup>16</sup> Art. 17, 2014 EPL.

<sup>17</sup> Art. 19, 2014 EPL.

<sup>18</sup> Art. 29, 2014 EPL.

<sup>19</sup> The negotiation is between local governments of regions that benefit from protected areas and local government of regions where protected areas are established. Art. 31, 2014 EPL.

<sup>20</sup> Art. 32 and 34, 2014 EPL.

<sup>21</sup> Art. 41, 2014 EPL.

environmental tax.<sup>22</sup> The Central government shall establish total allowance for discharging pollutants in the whole country.<sup>23</sup> Therefore, even if companies have paid a pollutant discharge fee or environmental tax, they must not exceed the pollution allowance in their region. Companies shall also apply for the pollutant discharge permit before conducting any activities that may result in pollution.<sup>24</sup> Some new elements are also introduced in Chapter 4. For example, the use of clean energy is promoted.<sup>25</sup> The use of environmental pollution liability insurance is encouraged.<sup>26</sup> Where companies have paid environmental protection tax, the pollution discharge fee shall be waived.<sup>27</sup> As a response to the many environmental disasters of recent years, the 2014 EPL refers to the Emergency Response Law<sup>28</sup> for risk control, contingency planning, emergency response and restoration pursuant to any environmental disasters.<sup>29</sup> The 2014 EPL requires local governments to disclose information when environmental pollution may affect public health and environmental security.<sup>30</sup>

Chapter 5 concerns information disclosure and public participation. It is clear from the 2014 EPL that citizens, corporations and other organizations are entitled to access environmental data, and to participate in and supervise environmental protection.<sup>31</sup> The Ministry of Environmental Protection is required to publish information regarding the quality of the environment and pollution. Similarly provincial governments are required to prepare and regularly update reports on the environment.<sup>32</sup> Local governments can make use of a “black listing” system to name and shame companies that are in violation of environmental legislation.<sup>33</sup> The most important development in Chapter 5 is the public interest litigation provisions. This issue has been discussed for years in China. According to Art. 58, NGOs that have registered on a local government list (above city level) and have been continuously

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<sup>22</sup> Art. 43, 2014 EPL.

<sup>23</sup> Art. 44, 2014 EPL.

<sup>24</sup> Art. 45, 2014 EPL.

<sup>25</sup> Art. 40, 2014 EPL.

<sup>26</sup> Art. 52, 2014 EPL.

<sup>27</sup> Art. 43, 2014 EPL.

<sup>28</sup> 中华人民共和国主席令第 69 号 [Decree of the President of P. R. China (No. 69)], 中华人民共和国突发事件应对法 [Emergency Response Law of P. R. China], 1 November 2007.

<sup>29</sup> Art. 47, 2014 EPL.

<sup>30</sup> Art. 47, 2014 EPL.

<sup>31</sup> Art. 53, 2014 EPL.

<sup>32</sup> Art. 54, 2014 EPL.

<sup>33</sup> *Ibid.*

active in environmental protection and public interests for at least 5 years are qualified to bring litigation to local courts.

Chapter 6 focuses on liability. Several penalties can be applied where the 2014 EPL has been breached. These include fines, restoration, suspension of the project and imprisonment of responsible persons. It is noted that penalties imposed on companies that are in violation of pollutant discharge standards can be charged on a daily basis.<sup>34</sup> In contrast to the 1989 EPL, the 2014 EPL provides for government liability in addition to liability of corporations and citizens. Staff of the Environmental Protection Agency and other relevant institutions can be punished or dismissed according to Art. 68.

### **Weaknesses**

The 2014 EPL is a clear improvement on previous legislation. There are however weaknesses within the 2014 EPL. Firstly, the 2014 EPL relies on legislation such as the Marine Environmental Protection Law, the Emergency Response Law and the Atmospheric Pollution Prevention and Control Law. Although it can be said that the 2014 EPL has the potential to guide the implementation and enforcement of other Chinese environmental legislation, the relationship between the EPL and other legislation is not clarified in the 2014 EPL. Secondly, the national ecological compensation scheme established under the 2014 EPL needs further legislation to provide details regarding the definition of beneficial regions and clarification of specific market rules for the negotiation between beneficial regions and protected areas. A further limitation of this scheme is that it maintains the traditional view of protected areas as excluding human activities. Thirdly, there is a whole new chapter on public participation in the 2014 EPL. Nevertheless, several constraints limit public involvement. Individuals are not allowed to initiate public interests litigation at all. Moreover, the barriers to qualifying as an NGO that can pursue public interest litigation in a Chinese court remain great. In practice, it is very difficult for NGOs to register. Therefore, only NGOs that have government backing or are trusted by the government, such as the All-China Environment Federation, can make use of the 2014 EPL to sue polluters in court. Finally, the 2014 EPL provides for government liability in the field of environmental protection. For example, the Chief of Environmental Protection Agency shall resign in case a serious damage to the environment occurs. However, it is not clear under what circumstances the government can be sued for not actively protecting the environment.

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<sup>34</sup> Art. 59, 2014 EPL.

**Conclusions**

The 2014 EPL brings hope to Chinese people that in the future they can once again live in a good environment with clean air and water. In the author's opinion, it is too early to applaud the formulation of new legislation as a success in itself. Though the 2014 EPL provides more detailed tools for combating environmental problems in China, weaknesses remain. The 2014 EPL is in itself insufficient for overcoming the Chinese environmental crisis. The government definitely plays a very important role in this battle. The question that remains for all Chinese citizens is this: "Is there another way to have a decent life while avoiding environmental destruction?" If people of this rising economy on the one hand blame their government for failing to curb pollution while on the other hand talk about buying their first car as demonstration of wealth, then the future for this battle is bleak.