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# Green law in China

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# Introduction

*Isabel Hilton, chinadialogue editor*

Why did *chinadialogue* decide to produce this special issue on environmental law in China? There were a number of reasons: China, as Alex Wang points out in his essay, has made great strides in the last two decades in drawing up new laws and regulations to address the environmental crisis that China's model of rapid economic development has brought about. Elsewhere, as Alex Levinson and Kristen McDonald explain, landmark legal cases, often brought by NGO plaintiffs on behalf of the public, have been important weapons in the fight against pollution, in forcing remediation, assigning responsibility to polluters and in preventing future pollution.

But much remains to be done. If China is to achieve the ambitions of the 12th Five-Year Plan and turn towards a more sustainable and fairer model of development, the law, robustly applied, will be an important part of that success. In China, where powerful industries often ignore government regulation and are frequently protected by local political interests, the availability of effective legal remedy would also help to build the social harmony that the government stresses as an important policy goal.

And finally, it is clear that legal innovation is increasingly discussed by environmentalists internationally as a way of addressing issues of environmental justice, conservation and climate change, and some new approaches have made headlines in recent years.

Ecuador in 2008, for example, became the first country in the world to declare the legal rights of nature. The new statute declared that "nature has the right to exist, persist, maintain and regenerate its vital cycle, structure, functions and its processes in evolution." Under this new provision nature became not an object to be exploited but a rights-bearing entity under the law. This means that a citizen or group of citizens can bring a case to court against a polluter on behalf of nature, even if the citizen him or herself has suffered no direct injury from the pollution.

In Europe, a coalition of lawyers, the ICE Coalition, has begun to discuss the use of the law to address the complex challenges of climate change and other global environmental issues through their proposal for an International Court for the Environment. Such a court would set up a transnational jurisdiction, analogous to the International Court of Justice. If such a court came into being, it could address the problems caused when decisions in one country impact, sometimes fatally, on the people of another.

We were curious, therefore, to explore how China, the world's factory for the last 30 years and one of the most severely polluted countries, had conceived and implemented its environmental laws.

The condition of a country's laws – how strong they are, how robustly applied, how effective they are in redressing harm – is one measure of political will. It is important to examine this last decade, a decade in which Chinese citizens and lawyers have increasingly been turning to the law for remedy, to try to gauge how well it is working.

The results, we have discovered, are mixed, despite the many splendid statutes and the progress that has been made, including the establishment of up to 40 special environmental courts and tribunals. There remain many impediments to the full use of the law to address past, present and future pollution, as Zhang Jingjing explains. Cases are difficult to bring, many are not accepted, the outcome is uncertain and the enforcement of judgements patchy. This, of course, is true of many countries, but China, as always, has some special characteristics.

It is not all bad news. The eight landmark cases we have highlighted are a testament to the determination of many lawyers and citizens to turn paper laws into living instruments. Their courage and resolution is evidence that many in China are working hard to ensure their country emerges from its current transition with a legal system that provides recourse for those injured, accountability for those who cause the injury and some connection between the two. We hope that this special ***chinadialogue*** series will help to illuminate their efforts.

SPECIAL SERIES

# China's green laws

# Environmental litigation in China today

*Despite ambitious top-down green policies, there are still many obstacles to public supervision through the courts, writes* ***Alex Wang****.*

Environmental litigation is difficult business in China. Even as the country enters into its 12th Five-Year Plan period, with perhaps the most extensive set of top-down environmental and energy policies and targets it has ever announced, the space for bottom-up public supervision, particularly through the use of law and the courts, has in recent years been constrained.

There has been some progress in the development of tools that create greater transparency and accountability in environmental laws and policies. There have been modest, but important, improvements in government and corporate disclosure of environmental information in recent years. A small cadre of dedicated and increasingly sophisticated Chinese and international environmental groups and journalists continue to highlight China's environmental problems and search for possible solutions.

But high hopes that lawyers and legal experts could harness the law to bring about positive environmental change have been tempered. As one leading environmental lawyer told me, "we must lower our expectations."

This is unfortunate, because a public educated in the law, willing to vigorously press for enforcement of environmental law at the ground-level, can offer a powerful supplement to government environmental-enforcement efforts. It can force polluters to internalise the costs of environmental violations and drive greater compliance with the law. In China, local resistance to central dictates is well recognised: it is hard to avoid the sense that the government is leaving value on the table by not placing a greater emphasis on the role of the judiciary and public supervision in its quest to achieve its environmental and energy goals.

Image from Webfee

> *"The lack of a reliable formal channel for addressing environmental disputes and holding agencies and polluters accountable can breed public resentment and prevent the resolution of injustices."*

Aside from the potential benefits for the attainment of central government objectives, litigation is about resolving disputes. Many environmental disputes involve regular citizens facing the negative impacts of development and environmental degradation: farmers who have lost crops and livelihoods; villagers facing health problems from pollution; homeowners facing property damage; children poisoned by heavy metals. Fair and predictable judicial proceedings can help to remedy these injustices that have been, and continue to be, the by-products of rapid development.

Last year, the Center for Legal Assistance to Pollution Victims (CLAPV) – China's first environmental legal aid center – celebrated its tenth anniversary. The All-China Environment Federation (ACEF) – a government-organised NGO under the environmental ministry – established an environmental legal aid centre in 2005. My organisation, the Natural Resources Defense Council (NRDC), has worked with these groups and others to develop an environmental bar in China (a group of lawyers specialising in environmental law) and build the capacity of lawyers, judges and the citizenry. Much has happened in the area of environmental law and litigation over the last decade and it is worth

taking stock of where we stand today. I wrote an article for *chinadialogue* in 2007, expressing hope that environmental litigation could play a greater role in China's environmental protection. In 2011 that hope, it must be said, has yet to be realised.

**Benefits and challenges**

Where it has worked, environmental litigation has served a number of important functions, such as providing some level of compensation to those who have been harmed by pollution. But in other critical respects, such as stopping ongoing pollution or forcing the remediation of past environmental harm, environmental litigation has fallen short.

An informal survey of environmental lawyers found that compensation for harms was typically the best that plaintiffs could hope for. One example of a successful "compensation for harm" case is a recent lawsuit brought by a group of mussel farmers in the Tianjin Maritime Court for harm caused by a coastal oil pipeline spill. The plaintiffs received 12 million yuan (US$1.9 million). This outcome is by no means typical though. Difficulties in causation and evidentiary burdens have made even compensatory relief difficult to obtain, particularly where harm to human health is a claim. In some cases where compensation is ordered, payment is nonetheless very difficult to obtain. This was the case in the Fujian Pingnan case against a chemical factory, which I described in detail in a 2007 article in the *Vermont Journal of Environmental Law*.

Lawsuits can sometimes also put the spotlight on gaps in legislation and drive legal reform. The Tianjin mussel farmers' case, which involved multiple defendants, was discussed in the course of amending China's *Tort Law*. Some lawyers feel the case played a role in the establishment of the new Article 68 of that law, which provides for joint and several liability to third parties (expanding the potential parties from which plaintiffs may collect).

Litigation has in some cases also served as a channel for forcing an administrative response, by pressuring local governments to take action, or by alerting higher-level government officials to problems at the local level. A case supported by ACEF in Chengde, in Hebei province northern China, concerning an iron-steel plant affecting more than 1,000 people, did not lead to a favorable court decision, but, after mediation, caused the local government to offer payment to harmed locals in an effort to offer some level of relief. Unfortunately, the company did not admit to any wrongdoing.

Generally speaking, though, public confidence in the courts is low. According to one experienced environmental lawyer, many plaintiffs actually have very little hope of winning, but use environmental lawsuits simply as a way to lodge a complaint and have their dissatisfaction formally recorded. All environmental lawyers I spoke with said that it is more difficult than in the past even to get cases accepted by the courts. They also said that it is virtually impossible to stop ongoing pollution or force remediation of historical pollution through the courts. A Chinese judge once told me (speaking of a housing dispute), "you cannot count on the courts to resolve the problem. Lawsuits can only serve as a tool to get the attention of the appropriate government officials."

The lack of a reliable formal channel for addressing environmental disputes and holding agencies and polluters accountable can breed public resentment and prevent the resolution of injustices. Often it is the fear of social instability that has made courts reluctant or unwilling to handle sensitive issues or cases with large numbers of plaintiffs. However, the inability to obtain judicial relief has the tendency to push the public to take matters into its own hands as has happened in numerous incidents across China in recent years. The result in such cases is that neither plaintiffs, nor the government achieve their goals.

**A direction forward**

Environmental courts are a potentially positive development for environmental litigation. In recent years, various cities and provinces in China have

established at least 39 specialised environmental courts, tribunals, panels, or circuit courts. Many of these courts have promulgated local rules allowing additional stakeholders, including local prosecutors, environmental agencies, NGOs and citizens, to bring "public interest" environmental suits (ones in which the parties might not traditionally have standing).

A greater diversity of channels for relief is in principle a good thing, but the verdict on these courts is still out. The most successful environmental court to date (in the city of Guiyang, south-west China) has shown a greater willingness to accept difficult cases and a greater degree of innovation in crafting solutions to environmental problems. ACEF has brought a number of demonstration cases in the environmental courts that provide a glimpse at the positive potential of environmental public interest litigation. These "public interest" cases are focused on stopping environmental problems, rather than individual compensation, and deserve much greater recognition and use. Critics have said that the environmental courts still do not fundamentally resolve problems of local protectionism and lack of independence that have made environmental enforcement so problematic in China.

Lawyers have also cited the Maritime Courts as a potential bright spot in environmental litigation. The Supreme People's Court has been considering granting these cross-jurisdictional courts jurisdiction over regional water pollution cases. The higher quality of the judges, greater financial resources and relative independence from local influence make these courts an attractive venue for specialisation in environmental cases. China's Intellectual Property Courts are a model for how such specialised courts can make improvements on current weaknesses in China's court system.

Apart from these specialised courts, many experts in Chinese government, academia and civil society have been pressing for national legislation to establish environmental public interest litigation in China on the basic idea that additional channels of supervision and enforcement are needed to supplement resource-constrained government enforcement efforts. There has been robust discussion on this topic in relation to the upcoming amendments to *China's Civil Procedure Law* and *Environmental Protection Law*, and these legislative amendments provide a once-in-a-decade (or two) opportunity to incorporate public interest litigation into the law.

China has a long history of taking successful local experiments to scale at the national level. The environmental courts have already served as an important forum for testing out environmental public interest litigation on a smaller scale, and have played a substantial role in forwarding the national discussion around public interest litigation. They have also provided empirical evidence that prior concerns about frivolous lawsuits and problems of coordination among the various stakeholders were overblown. China's new environmental courts should continue to be given wide latitude to demonstrate the value of environmental litigation in furthering China's environmental protection objectives and providing justice to Chinese citizens around the country. Legislators will hopefully take the opportunity to build public interest litigation into Chinese law in the coming year or two, so that the successful experiences in the environmental courts can be expanded nationwide.

Perhaps most importantly, China has a small, but dedicated, cadre of lawyers, citizens, and environmental groups willing to use legal tools for environmental protection and to promote the development of rule of law in China (one example can be seen in the documentary, *The Warriors of Qiugang*). In our work over the years in China, a remarkable number of lawyers have expressed a desire and willingness to use their skills to help the environment and prevent injustice. Much work can be done to help these lawyers play a bigger role in China's environmental protection.

In China, there is often discussion of "Chinese characteristics". In the environmental realm, China has forged its own unique path to addressing some of

the most urgent environmental and energy problems our world has ever seen. As China has shown with its current and recent Five-Year Plans, its approach is characterised by the ability to move quickly when necessary; a strong sense of pragmatism; comfort with drawing experience from a wide range of domestic and international stakeholders; and most importantly a willingness to experiment and make decisive adjustments when problems are discovered. We have seen this in China's adjustments to address inefficient allocations of environmental and energy targets, and in efforts to prevent the power outages that many local officials resorted to in 2010 to meet their energy intensity targets.

China's current approach, for better or worse, also reflects a much greater comfort with top-down administrative measures. The government has already announced that this was an error of the 11th Five-Year Plan and that market measures will assume a greater role in the future. However, legal channels and greater public involvement and supervision are equally important and deserve much greater focus as well. China will only hamper itself if it takes these critical tools off the table.

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# The plight of the public

*How easy is it for Chinese citizens to challenge government decisions that affect the environment? Public interest lawyer* ***Zhang Jingjing*** *reviews some key cases and offers an insider's view.*

Image from Danion

Five or six years ago, "public participation" became a buzzword in environmental circles: the attempt to allow citizens and green groups a role in public decision-making was symbolised by the first ever state-level public environmental hearing on the laying of an impermeable membrane in the Old Summer Palace lake, organised by the State Environmental Protection Agency (SEPA).

Half a decade later, however, the buzz has faded. Now, "public interest litigation" is the hot topic – not just in the environmental field, but in defending the rights of consumers, women and migrant workers. These lawsuits reflect a China in an era of transformation, with social conflicts presenting a challenge for the traditional litigation system.

These buzzwords represent an emerging awareness of public participation in social management and government policy-making. And the two are intimately linked. Without public participation and representation of social groups, public-interest litigation will struggle to correct government errors or address illegal administrative actions and thus meet its objective of protecting the public interest. And, without public-interest litigation, public participation lacks any means of legal redress – and risks becoming mere window-dressing.

However, when we examine actual environmental incidents and lawsuits, we often find that "the public" has only a token role, while the "public interest" may not really mean the interests of the public at all. Prosecutors, the government and government departments all rush to represent the "public interest", but citizens and environmental groups are not allowed to bring litigation on behalf of the public or the environment.

Looking back at cases of public participation in the environmental field over the last few years will help us reach a clearer understanding of how the public participates in the Chinese environmental movement. Here are four important examples:

> *"Without public-interest litigation, public participation lacks any means of legal redress – and risks becoming mere window-dressing."*

**1. Hearing on electromagnetic pollution from Beijing Electric Power Company's Xishangliu high-voltage transmission line, 2004**

This hearing, held by the Beijing Environmental Protection Bureau (EPB), may not have had as big an impact on the public consciousness as the Old Summer Palace case, but it was the first hearing on environmental impact assessments (EIAs) after the "Administrative License Law and Temporary Method for Environmental Protection Administrative Licensing Hearings" came into effect on July 1, 2004. The approval of EIA reports for construction projects is a type of administrative licensing, and falls under the scope of this law.

After the hearing, members of the public in attendance

brought a lawsuit contesting Beijing EPB's approval of the project. In terms of breakthroughs in public participation, and breadth of methods of participation, this case is of no less significance than the Old Summer Palace hearing.

Construction of the high-voltage power line in question was started illegally by Beijing Electric Power Company before an EIA had been carried out. Not only did the line interfere with views of the nearby Summer Palace – a World Heritage site – but more than 10 residential communities and educational institutions along its route were in range of electromagnetic radiation.

On August 13, 2004, the Beijing EPB held a hearing on an environmental impact assessment, completed retrospectively by the power company, on the question of whether or not the power line would create electromagnetic pollution. The bureau approved the report – carried out by an environmental assessment agency chosen and paid for by Beijing Electric Power Company – which expressed complete confidence that the line would not create electromagnetic pollution: "The effect on the surrounding public is small, and public safety is assured. The project is viable," it said.

Six home-owners from the neighbourhood of Baiwang filed a formal request with the State Environmental Protection Agency that the decision on this rushed and obviously flawed report be reconsidered. That request was denied. In April 2005, they brought a lawsuit in Haidian district court, demanding that Beijing EPB's approval of the report be rescinded. The case lasted four years, until a second appeal was rejected by Beijing First Intermediate Peoples' Court on December 15, 2009. By that time, the illegally-built Xishangliu high-voltage power line had been up and running for four years.

**2. Hearing on the Old Summer Palace lake, 2005.**

On March 22, 2005, academic Zhang Zhengchun found while visiting the Old Summer Palace that workers were laying an impermeable plastic lining in the lake. He published an article on *People.com.cn* describing this as a "devastating ecological disaster", prompting a media flurry and widespread public concern. On April 1, the State Environmental Protection Agency (now the Ministry of Environmental Protection) ordered the Old Summer Palace management office to halt work and commission an environmental impact assessment – and specifically said that a hearing would be held on the report. In fact, the hearing was held shortly after this announcement, on April 13, before the EIA had been completed.

Like the Xishanglu high-voltage line, this project was started illegally, before any environmental impact assessment had been carried out. But in neither case were the project owners – the Old Summer Palace Management Office and Beijing Electric Power Company – punished or held legally responsible in any way. Article 31 of the law on environmental impact assessments states only that, in such cases, an assessment must be carried out when the problem is identified. That kind of "soft" regulation allows these cases to multiply and destroys the value of an EIA system – which lies in prevention. This article must be revised, or there is no point in having the assessment system at all.

This was the first hearing called by the State Environmental Protection Agency, and the most influential. In the six years since, no public hearing has had as big an impact. Deputy director of SEPA at the time, Pan Yue, said: "Environmental affairs are closely tied to the interests of all social groups, and so a public consensus is easy to reach. Widespread public participation in environmental policy decision-making is the social foundation of environmental protection, and an important symbol of the progress of the socialist democratic legal system."

What happened next? The public presented their opinions at the hearing, and the government "heard" them. And the story appeared to have a reasonably happy ending: Tsinghua University was commissioned to produce an environmental impact assessment and, on July 5 that year, SEPA accepted the report and ordered the Old Summer Palace management to make changes accordingly.
This case was a primer for Chinese public participation

in environmental protection. Although the way in which the hearing was convened and held, and the subsequent handling of the case by SEPA, were not perfect, the outcome was better than could have been expected: the highest environmental protection authority in the land had held a public hearing.

In February 2006, the year after that hearing, SEPA released its "Temporary Measures for Public Participation in Environmental Impact Assessments".

**3. Protest against Xiamen PX petrochemical project, 2007**

Xiamen Haicang PX (paraxylene) plant, planned by the Xiamen government and Taiwanese investors, was meant to be Xiamen's biggest ever industrial project. But during the Liang Hui – China's annual parliamentary session – in March 2007, Chinese People's Political Consultative Conference (CPPCC) member and Xiamen University professor Zhao Yufang put forward a motion, signed by 105 other CPPCC members, that the project was too close to residential areas and that a leak or explosion at the site would put one million local lives in danger.

Far from taking any notice of this, the Xiamen government actually accelerated construction work. The case became a central issue at the Liang Hui and attracted intense media and public attention, peaking in late May. On June 1, tens of thousands of angry Xiamen citizens attended a "walking" protest – organised online and via text messages – to show their discontent. On June 7, Xiamen government announced that the fate of the project would be decided in line with a regional environmental planning assessment. The same day, SEPA announced it would carry out that assessment itself and that heavy chemical projects such as the PX plant would be reconsidered in its light.

In December 2007, Xiamen completed its environmental impact assessment, and confirmed that the area was not suitable for a large chemical plant. The Xiamen government then organised a hearing on the EIA. On December 17, the provincial and city governments jointly announced that the project would be relocated. This was described as a "victory for public opinion" in the media, but it is almost impossible that we will see that type of "walking" protest again in environmental cases, particularly today when the Party places social stability above all else. [Editor's update: this article was first published on chinadialogue.net on July 19, 2011. It is interesting to note that, one month later, authorities in Dalian, north-east China, ordered a PX plant to close following a similar public protest.] The Xiamen government was forced to accept public participation under unique circumstances – and did so by a unique method. This type of participation was not included in SEPA's regulations on public participation, and the processes and methods that are provided for in the document have met challenges on the ground.

**4. Opposition to the Liulitun waste-incineration project, 2007**

Another incident worth noting is the 2007 request by residents of Liulitun that SEPA re-examine and revoke Beijing Environmental Protection Bureau's approval of the environmental impact assessment for a waste-incineration plant near their homes, on the basis that the location was unsuitable and the amount and scope of public participation inadequate.

SEPA reached a decision in June 2007: "The project should be delayed for further discussion, and that process should be entirely open and opinions sought from a wider population. The findings of that process should be submitted to Beijing Environmental Protection Agency for approval and made public, then submitted to SEPA. Construction must not start before this has been completed.

> *"If members of the public ask to participate in environmental policy decisions and their request is refused, current legislation does not allow that decision to be contested in court."*

Of the four cases described in the first part of this article, three ended with the hoped-for resolution: projects that may have gone on to pollute the environment were delayed, ordered to carry out environmental impact assessments and make changes or forced to move.

But it is more common in China for the public wish to participate in environmental impact assessments to be thwarted. In the case of Sinopec's 2008 ethylene project in Pengzhou, Sichuan, for example, the desire of many Chengdu residents to take part in the process was ignored. Even cases where the public have succeeded in having a say still demonstrate the challenges to participative democracy in China's environmental affairs.

First of all, the successful cases always occur after the questionable activity has taken place. The public has no means by which to acquire full and complete information on the approval and construction process – they just happen to find out that the project is in some way illegal or problematic, by which point the scheme has either gone ahead illegally without an environmental impact assessment or the assessment has been concluded without full public participation. Without media exposure, the public wouldn't even know about such activities, let alone participate in addressing them.

Second, the government does not actively provide for participation. In the four cases we looked at here, it was after "walking" protests or widespread exposure online or coverage in the mainstream media that state environmental authorities and local governments were forced to hold hearings. The government does not actively invite the public to participate in the writing and approval of the assessments.

Third, the regulations on the processes of public participation are inadequate and do not allow the public fully to express their opinions. One reason for local scepticism about the environmental impact assessments for the high-voltage power line at Xishangliu and the waste-incineration plant at Liulitun was that too few people had participated in the process, and those who were chosen to participate were not representative of the people affected.

The 2006 "Temporary Method for Public Participation in Environmental Impact Assessments" includes certain regulations on the ways in which the public can participate in the evaluation of construction projects. But in practice the results have been poor. In particular, until three years ago, there was no legislation on the publication of government


Image from Webfee

information, which is both a pre-condition and mainstay of public participation. This changed in 2008, but the results of that legislation have hardly been something to boast about: frequently, members of the public are unable to acquire full and accurate data, making it impossible for them to participate in the government policy making process in a prepared and rational manner.

We have seen some progress. The Ministry of Environmental Protection is working on national standards for environmental protection, and its "Environmental Impact Assessment Technical Guidelines: Public Participation" was made available for public comment in January 2011. This document sets out regulations on the process of public participation – the definition of the public, the timings and methods for publication of the information required for public participation and the conditions for holding discussion sessions and hearings.

But there is a fourth obstacle: this type of participation lacks teeth in the law courts. The administrative licensing and environmental impact assessment laws give the public the right to participate, but no means of redress if that right is infringed upon, meaning that right exists in name only: as lawyers often say, without redress, there are no rights.

The environmental impact assessment law has just one simple and abstract article on public participation: "The state encourages relevant work units, experts and members of the public to participate in environmental impact assessments via an appropriate method." It does not specify the legal responsibilities to be borne if public opinions are not sought. This is why public participation

in these assessments is often lacking, or fails to reach the degree intended when the system was designed.
If members of the public or environmental groups ask to participate in environmental policy decisions and their request is refused by the government, current legislation does not allow that decision to be contested in court. The existing law on administrative licensing only permits those with a direct interest to sue. If, for example, Zhang Zhengchun – the first person to identify the problems at the Old Summer Palace – or environmental campaign group Friends of Nature were dissatisfied with the administrative decisions taken by the State Environmental Protection Agency in that case, neither party would be able to take the matter to court, as they have no direct relationship of interests with the responsible party, the Old Summer Palace Management Office. The lack of the guarantee of that right is a major obstacle to participation of citizens or organisations in government environmental decisions.

On May 1, 2008, the State Council's "Regulations on Publication of Government Information" and the Ministry of Environmental Protection's "Trial Methods for Publication of Environmental Information" came into effect – stirring great hopes among both environmental groups and the public, who believed they marked a new dawn for participative democracy in the environmental field. But three years later, the situation can only be described as passable. Open environmental information is a pre-requisite for public participation – if that essential ingredient is only in a passable state, it's easy to imagine the condition of participation on the ground. Nationally influential cases of public participation, such as the one concerning the Old Summer Palace, have not been repeated.

These obstacles seem to have dampened public enthusiasm for taking part in environmental policymaking. But the nature of modern society means the authorities actually need public participation to ensure that the decisions they make are correct. Increasingly, technological development is bringing new risks to society, and the aim of public policy should be to prevent and manage those risks. Public participation can help the nation to avoid social conflict arising out of government policy errors, and will assist in maintaining social harmony and stability.

What changes, then, would we like to see? We hope to see the words "temporary" or "trial" removed from the regulations that aim to boost public participation – such as the "Temporary Method for Environmental Protection Administrative Licensing Hearings", the "Temporary Method for Public Participation in Environmental Impact Assessments" and the "Trial Methods for Publication of Environmental Information". We hope to see information under government control shared with the public. And we hope that court doors will open to citizens and environmental groups. Only then can China limit the dangers its environmental problems pose to society.

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# Legal lessons from America

*Does US case-law have anything to offer China's emerging green legislation?* ***Alex Levinson*** *and* ***Kristen McDonald*** *run through key lawsuits that have shaped the way citizens and campaign groups can use their courts.*

America's environmental laws have influenced the development of green legislation abroad: China's Environmental Impact Assessment Law, for example, reflects study of the United States' National Environmental Policy Act, while Beijing's recent laws and regulations on public disclosure of information show an understanding of the US Freedom of Information Act. Mongolia developed its national environmental laws with the help of American lawyers. There are dozens of other such examples.

But what about environmental case law in the United States? Are there lessons to be drawn from the wins and the losses for counterparts in the environmental law profession and their colleagues abroad?

At a recent roundtable with Chinese environmental law professionals in San Francisco, a lively discussion developed on the issue of lawyers' fees and court fees. On first blush, this might seem a minor issue compared to the larger environmental challenges at hand both in China and the United States, but in China, public-interest environmental law is so new that working out who pays for lawsuits is still a critical problem to solve.

In the United States, the rule of thumb (often called the "American rule") is that each side pays its own attorney fees, regardless of whether they win or lose. That's a critical reason some famous cases – such as the suit organised by Erin Brockovich against California's Pacific Gas and Electric Company over contamination of drinking water in the southern

Image from USFWS Pacific

Californian town of Hinkley – were able to go ahead. (In contrast in England, the risk to the injured citizen of having to pay defendants attorney fees is simply too great and can deter people from pursuing such claims.) *Christiansburg Garment Company v. Equal Employment Opportunity Commission*, though not an environmental case, further ensured that when citizen groups lose a case against big corporations in the United States, they don't have to pay their opponent's legal fees.

> *"Without public support for a lawsuit, or at least public awareness and concern over the issue it addresses, litigation efforts can backfire."*

Another key issue for emerging environmental law in China and elsewhere is "standing" – the legal term for the right to sue. In the United States, *Sierra Club v. Morton* in 1972 was the fundamental Supreme Court case that established standing based on environmental-resource interests. The Sierra Club ultimately lost the case (in which they attempted to fight development in an area near Sequoia National Park, California) but won the war because the Supreme Court decision laid out a clear roadmap for how to successfully establish legal standing-to-sue in future cases.

The case established that an environmental organisation could sue not on behalf of the organisation itself, but on the basis of evidence of injury to members whose

aesthetic or recreational interests had been damaged. In 2000, standing issues were further clarified to the advantage of environmental organisations, in particular for pollution cases, as a result of *Friends of the Earth v. Laidlaw Environmental Services*.

The case was brought against a company that had formerly been polluting a section of the North Tyger River in South Carolina. The case held that the plaintiffs had the right to sue based on the damage to members who would have used the resources recreationally had it not been repeatedly and illegally polluted by Laidlaw. In other words, the case helped clarify that plaintiffs did not need to produce prohibitively expensive evidence that specific particles of pollution produced by the defendant had specific health impacts on its members.

New laws and regulations on the public right to access environmental information, and efforts to ensure there are legal avenues for making challenges on transparency grounds are at a critical proving point in China, and elsewhere. In the United States, legislation such as the Clean Water Act (CWA) and Freedom of Information Act, has provided clear guidelines on how information must be disclosed, and there have been few modifications by the courts.

Prior to the CWA, for example, the United States' rivers and harbours protection laws required plaintiffs to prove injury to the environment directly from the defendant's actions. The CWA put the burden on the defendants by requiring them to file regular "discharge monitoring reports", detailing whether or not they were meeting their pollution-permit requirements, and creating the right for any citizen or NGO to sue for violations. A company's own reports must show violations of permits, and the CWA citizen suit provisions have allowed citizen groups to hold companies accountable for these violations.

In other areas of natural resource decision-making, however, access to information on US government decisions has been less clear cut. In 2004, the Sierra Club and Judicial Watch sued vice-president Dick Cheney under the Federal Advisory Committee Act (FACA) for holding a series of secret meetings with industry representatives, under the auspices of the "National Energy Policy Development Group". The plaintiffs were concerned that Cheney was attempting illegally to steer the United States towards a backward, carbon-intensive energy policy and felt that broader consensus on energy issues would be better for the country. Ultimately, Cheney was favoured by the Supreme Court on grounds of protecting state secrets. But the plaintiff's efforts were heralded as an important tactic for exposing Cheney's back-door manipulations of national energy policy.

Some US environmental lawsuits are useful to reflect upon not necessarily for their outcomes, but for the tactical issues they raised. Since the late 1980s, a long list of lawsuits brought by various environmental interests targeted protection of the Northern Spotted Owl under the Endangered Species Act and National Environmental Policy Act. These suits first appeared at a time when logging was rampant across the north-western United States, and the cases created a train wreck for the regional timber industry. The environmental side won some of the cases, and lost others. But more importantly, the cases did what the plaintiffs wanted them to do: they greatly raised the profile of the destruction of the nation's last remaining ancient forests.

The most successful environmental suits in courts, however, are those that are brought as part of a much broader strategy involving public outreach, research, lobbying and other tactics. Environmental lawyers in the United States almost always work in collaboration with environmental non-profit organisations or other citizen groups. One crucial reason for this is that, as president Abraham Lincoln said in 1858, "Public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently, he who moulds opinion is greater than he who enacts laws." Without public support for a lawsuit, or at least public awareness and concern over the issue it addresses, litigation efforts can backfire. But more importantly, public support is necessary for ensuring

that, after a win in court, environmental gains can be sustained over time.

This is perhaps the most important lesson from US environmental case-law for new practitioners of green legislation in China and elsewhere, as well as communities and organisations that may seek to bring lawsuits as a means of addressing environmental concerns.

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# Eight cases that mattered

*From a successful challenge to Beijing's planning authorities to compensation for mass tadpole deaths, the 2000s were full of turning points for environmental law. Here,* chinadialogue *details its picks of the decade.*

Chinese people are coming to an ever-graver understanding of the dual changes of economic development and environmental degradation. In some heavily polluted towns and villages, citizens who had only just started to enjoy an improved standard of living have found themselves fighting a lonely battle against death and disease.

With both government action and moral indignation proving ineffective, judicial redress has become the last option for dealing with environmental disputes. But the path to enshrining environmental rights in law is proving thorny and the judicial system is experiencing bumps along the way.

According to the Chinese saying, it takes 10 years to forge a sword. So, what progress has the past decade seen when it comes to using the judicial process to resolve environmental problems? And what challenges remain? Here, with the help of senior academics and lawyers, we have chosen eight representative and influential cases of the period. We hope this retrospective will help improve understanding of the current state of Chinese environmental law.

We would like to express our gratitude for their contributions and advice to: Zhang Jingjing of the Global Network for Public Interest Law; Liu Xiang of the Center for Legal Assistance to Pollution Victims; Alex Wang, formerly of the US Natural Resources Defense Council and now based at the University of California, Berkeley School of Law; Wang Jin, professor at Peking University School of Law; Zhu Xiao, professor at Renmin University School of Law; and Qin Tianbao of Wuhan University School of Law.


> *The Rongping factory grew to account for one third of county government income, but along with economic development came environmental degradation and rising cancer rates.*

- **The Pinghu Tadpoles**

**Yu Mingda of Pinghu in Zhejiang versus five factories, including Buyun Dyes and Buyun Chemicals.**

*This case took 14 years to play out and involved: four levels of courts, appeals from three levels of procurators, and four occasions on which of representatives from the National People's Congress exercised supervisory duties over the Supreme Court – lawyers say it "exhausted all means of judicial redress" and reflects China's struggle between environmental protection and local business interests.*

Starting in 1989, Yu Mingda of Pinghu in Zhejiang province, east China, leased land from Pinghu Normal College, where he farmed American river frogs. But over a period from late 1993 to early 1994, his stock of 2.7 million tadpoles all died.

Yu contacted Pinghu Environmental Bureau, which confirmed that the water near the farm had been polluted and told him the pollution had come from five factories, including Buyun Dyes Factory and

Buyun Chemicals, located further upstream. These were village enterprises run by Buyun village, which neighboured Yu's farm. The environmental authorities found that the five plants were dumping untreated effluents directly into the river. But the factories denied any link with the dead tadpoles. In December 1995, Yu sued them, demanding 483,000 yuan (US$75,000) in compensation.

In response to a request by the Pinghu Court, the Ministry of Justice's Institute of Forensic Science carried out an assessment and found that the death of the tadpoles was directly and undeniably linked to water pollution from Buyun Dyes. But the court did not accept the finding. On July 27, 1997, one and a half years after accepting the case, Pinghu Court dismissed Yu's claim.

When asked about the decision during an interview with a Zhejiang reporter, the deputy head of Pinghu Intermediate Court said: "Maybe the pollution was caused by the factories, but that year virtually all the fish and frogs around here died. If we had found in favour of the plaintiff, then many others would have asked for compensation too. Who's going to pay for all those losses?"

In 1998, Shaoxing Intermediate Court upheld the original decision and, in 2001, Zhejiang Higher People's Court did the same. In 2006, the Supreme People's Court accepted the case for review and eventually overturned these decisions in 2009, ordering the five plants to pay Yu 483,000 yuan (US$75,000) in compensation – plus 100,000 yuan (US$15,500) in interest.

- **Shandong reservoir pollution**

**Ninety-seven farmers from Lianyungang versus Jinyimeng Paper and Linshu Chemical Plant.**

*This case resulted in a huge compensation payout for losses caused by water pollution. It was a cross-region case: the court that handled it was not in the plaintiff's hometown, and thus did not consider the financial conditions of the companies in question when setting the compensation level. As a result, the amount received by the plaintiffs was equivalent to their estimated losses.*

*In this case, the government paid compensation in advance and then asked for reimbursement from the companies, not only demonstrating its obligation to protect the environment, but also giving backing to the lawsuit. However, whether or not this practice will be followed by other local governments depends on their willingness.*

In the year between June 1999 and June 2000, fish in the Shiliang River Reservoir – at the intersection of the counties of Donghai and Ganyu in Jiangsu province and Linshu county in Shandong province, eastern China – were killed off by major pollution incidents, resulting in severe losses for 97 fish-farming families. The reservoir is the biggest artificial reservoir in Jiangsu and a reserve source of water for the city of Lianyungang.

After each case, the farmers complained to the Shandong provincial government and the State Environmental Protection Agency (now the Ministry of Environmental Protection) as well as visiting Linshu county government to demand compensation – but no solution was offered. In 2007, the 97 affected families brought a lawsuit against the two defendants, requesting that they be ordered to pay 5.6 million yuan (US$866,000) in compensation for loss of fish, and 480,000 yuan (US$74,000) in other costs, including those for investigations, and to prevent further occurrences.

The defendants denied any pollution or causal link, but evidence found during the court's investigation showed that the first defendant was releasing 10,000 tonnes or more of polluted water daily, while the second was releasing about 1,000 tonnes – and that water was flowing into the Shiliang River Reservoir. Lianyungang Intermediate People's Court found that the defendants had been releasing pollution and that this was the cause of the plaintiff's losses, and ordered compensation to be paid. An appeal by the defendants

to Jiangsu Higher People's Court was rejected. At the end of 2003, the farmers received 5.6 million yuan in compensation.

• **The Tasman Sea spill**

**Tianjin Oceanic Bureau versus Infinity Shipping and the London Protection and Indemnity Club.**

*This was China's first international marine ecology civil compensation case. Although the damages ultimately awarded were less than hoped for, it was still a landmark case: it made the maritime authorities aware of the possibilities of claiming damages through the courts, laid a foundation for judicial and administrative bodies to better handle these cases, and provided essential experience for public interest environmental compensation lawsuits.*

At 4am on November 23, 2002, the Maltese-registered tanker Tasman Sea collided with the Chinese Shunkai No. 1, 23 nautical miles east of the Tianjin Dagu Anchorage, triggering an oil spill. Investigations by the North China Sea Monitoring Centre found that 359.6 square kilometres of ocean were affected, with oil content in sediment, reaching 8.1 times normal values. The spill badly damaged the ecology of the Bohai Gulf, an important spawning and feeding ground for ocean fisheries.

After the incident, various parties brought claims in the Tianjin Marine Court against Infinity Shipping, the tanker's owner, and the London Protection and Indemnity Club (a mutual insurer in the shipping industry). The State Oceanic Administration authorised its Tianjin branch to sue for marine ecological damages of over 98.3 million yuan (US$15 million) on behalf of the state; Tianjin Fisheries and Harbours Office sued for losses to the fishing industry of 18.3 million yuan (US$2.8 million); while Tianjin Tanggu District Dagu Fishing Association, Hebei Luannan County Fishing Association, Tianjin Tanggu District Beitang Fishing Association and Dagu Fishing Association sued for 62.28 million yuan (US$9.6 million) in fishing and fish-farming losses to thousands of fishermen and fish farmers.

On December 24, 2004, decisions were made on the eight separate cases brought against the two defendants in Tianjin Marine Court. Damages of more than 17 million yuan (US$2.6 million) were awarded to 1,490 fishermen and fish farmers in Luannan, Hangu, Beitang and Dagu for to the impact on catches and equipment. On December 30, the court awarded more than 10 million yuan (US$1.5 million) in compensation to Tianjin Oceanic Bureau for losses to marine environmental capacity and costs incurred in investigation and assessment; and 15 million yuan (US$2.3 million) to Tianjin Fisheries and Harbours Office for loss of fishery resources and investigation costs.

This case involved 10 different legal parties, affected more than 1,500 people, and included requests for compensation of 170 million yuan (US$26.3 million). This was also the first time China had sued an overseas shipping insurer for losses under the terms of the 1992 International Convention on Civil Liability for Oil Pollution Damage since becoming party to the convention.

• **The Panjiayuan animal-testing laboratory**

**Residents of Buildings 4 and 6 at Panjianyuan Nanli, Beijing versus the Beijing Planning Commission.**

*In this case – one of very few successful challenges to the Beijing Planning Commission – one reason given by the court for cancelling the project's planning permission was that an environmental impact assessment should have been carried out but was not, rendering the decision unsound.*

*Lawsuits over impacts of urban planning on people's lives are actually not uncommon; this particular case is significant because the court accepted it, and the challenge was ultimately successful. Attempts to take planning commissions to court in China frequently collapse because residents fail to secure recognition as valid plaintiffs. In this case, having considered the public interest, the court decided to accept the Panjiayuan residents as plaintiffs. Their success was mainly because*

*the project design violated certain rules set by the state, while media attention was also a contributing factor.*

Residents of Panjiayuan Nanli in Beijing say that, in 1984, an animal-testing laboratory was built across the road from their homes and, although measures were taken to reduce the odours from the facility, bad smells have affected their quality of life since. In May 2002, the residents learned that another, even bigger animal laboratory in the same location had received planning permission.

The residents believed the approval process for the facility was illegal and requested that Beijing Planning Commission re-examine its decision – but the commission maintained that its actions were above board. Finally, 182 residents took the commission to court, requesting that the planning permission certificate awarded to the new project be withdrawn. Wang Canfa, director of the Center for Legal Assistance to Pollution Victims and professor at China University of Political Science and Law, represented the residents. He found that the design of the project fell short of national standards: the laboratories were only 19.6 metres away from residential buildings – well below the required distance of 50 metres – and there was no 20 metre isolation zone, as required by health regulations. Wang also believed the laboratories would affect the local environment – and that, therefore, an environmental impact assessment was needed.

In June 2003, Beijing Xicheng District People's Court issued the first judgement on the case, ordering the Beijing Planning Commission to cancel approval of the new laboratory. The commission did so, but also appealed against the judgement. Finally, the initial judgement was upheld and the Planning Commission dropped the appeal. This case was included in the 2003 Bulletin of the Supreme People's Court.

- **The Xiping chemical plant**

**More than 1,700 villagers from Pingnan in Fujian versus Fujian Rongping Chemicals.**
*This case involved more plaintiffs than any other reported in the Chinese media to date and is representative of group lawsuits in China. While the main factor determining the outcome of a case is not the number of plaintiffs but the evidence, when a lawsuit involves so many claimants, the judge may be more careful in making the final decision, on the basis that an unfair judgment could bring adverse impacts to society.*

In 1992, the south-east coastal province of Fujian implemented a "Mountain-Coast Cooperation" policy, with the aim that richer coastal regions would help boost the development of poor mountainous areas. In March that year, Asia's biggest chlorate producer, Rongping United Chemicals – now Fujian (Pingnan) Rongping Chemicals – started construction of a plant in the village of Xiping.

The Rongping factory grew to account for one third of county government income, but along with economic development came environmental degradation and rising cancer rates. In the nine years from 1995 (the second year the plant was in operation) to 2004, not a single Xiping youth who signed up for military service passed the medical inspection.

In 1995, the factory owners made a one-off payment for loss of crops. But no further compensation was awarded. Then, in 1998, the second phase of the facility went into operation, further damaging local vegetation.

On November 7, 2002, a civil suit was brought against the factory at Ningde Intermediate People's Court, by the residents of Xiping, Houlong and Xiadi villages, led by Zhang Changjian. They asked that the company be ordered to close its facility, clean up the site and nearby mountainside, and pay compensation of 13.5 million yuan (US$2.1 million) for damages to crops and emotional health. The number of villagers participating in the suit reached a new record – 1,721.

The court found that the company had caused losses through environmental pollution and ordered it immediately to stop infringing the plaintiffs' rights, to pay compensation of 250,000 yuan (US$39,000)

for damage to timber, fruit trees, bamboo and fields and to clean up industrial waste on site and nearby. Both parties appealed against this judgement. In 2005, the Higher Court's final judgement rejected the defendant's appeal, and ordered the factory to pay compensation of about 680,000 yuan (US$105,000). The plaintiffs' lawyer described this decision as the court's "balancing trick": "more than ten million yuan would have been considered a heavy fine, while tens of thousands would have been light. The court didn't verify the actual losses sustained, and just gave the villagers a token amount."

- **Pollution of the Shiliugang River**

**Guangzhou Haizhu District Procuratorate versus Xinzhongxing textile treatment plant.**

*This was the first example of a procuratorate bringing an environmental public interest case in China and established a significant model for the rest of the province: in its wake, further instances have occurred in Guangdong, though a similar case is yet to be seen elsewhere in the country.*

The Shiliugang River in Guangdong province, south China, once ran clear, but after September 2007, its clean waters turned dark and foul – to the distress of local residents. As a result of complaints, Haizhu Environmental Bureau inspected local companies and found that the Xinzhongxing textile-treatment plant was in severe breach of pollution regulations. Washing powder, enzymes and oxalic acid, mixed up with dyes from clothes, were being dumped untreated into the river. In the eight months after the facility opened, it discharged an average of 40 tonnes of waste each day – a total of 9,600 tonnes over the period.

In July 2008, Haizhu Procuratorate sued factory boss Chen Zhongming at Guangzhou Marine Court for causing water pollution and demanded compensation for losses and costs. In November, the court formed a panel of judges to hear the case and, in December, ruled that Chen was liable for the environmental losses caused by the pollution. Chen was ordered to pay 117,289.20 yuan (US$18,200) in compensation. This was the first environmental public interest case brought by a Chinese procuratorate. Haizhu People's Court found that, in accordance with Article 3 of the Water Law, and the Article 73 of the General Principles of Civil Law, Shiliugang River is a national resource, and as the state's organ of legal supervision, the procuratorate had the right to sue over losses caused within its jurisdiction.

- **Public interests in Jiangyin**

**The All-China Environment Federation versus Jiangyin Port Container Company.**

*This was China's first environmental public interest case brought by a mass organisation and came to determine the conditions that need to be met to bring a claim of this sort. The All-China Environment Federation has gone on to file several public-interest lawsuits in local environmental courts in Yunnan, Guizhou and other regions. However, it has not resulted in any visible impact on other community organisations. Regional environmental groups are not eligible to bring lawsuits in other parts of the country.*

In May 2009, the All-China Environment Federation received a complaint from residents of Jiangyin in Jiangsu, on China's east coast, that Jiangyin Port Container Company was creating air, water and noise pollution during the process of unloading, washing and transporting iron ore, severely impacting their quality of life. After on-site investigations and evidence-gathering, the federation brought an environmental public interest case in Wuxi Intermediate People's Court, requesting that the company be ordered to stop encroaching on public environmental interests, and remove the risks to sources of drinking water for Jiangyin and Wuxi cities.

The court accepted the case.
On September 22, 2009, the case was resolved through mediation and the defendant was required to correct its environmental violations.

- **The Dingpa paper mill**

**The All-China Environment Federation and Guiyang Public Environmental Education Centre versus Dingpa paper mill.**

*This was the first public interest case where a non-profit foundation helped to cover litigation costs. This financial support had a remarkable effect, as it allows us to rethink the role of foundations in environmental protection.*

*But there are two problems: first, as mentioned above, there are regional restrictions when it comes to green NGOs acting as plaintiffs. Second, it is up to the foundation in question to decide whether or not to support lawsuits financially.*

The All-China Environment Federation and the Guiyang Public Environmental Education Centre sued the Dingpa paper mill in Wudang district, Guiyang, over the discharge of effluent into the Nanming River and Wu River, an important Yangtze tributary. In 2010, Qingzhen Environmental Court held a public hearing in Wudang district and ordered the Dingpa facility to stop the release of effluent, remove any risks to the Nanming River, and pay reasonable costs to the plaintiffs to cover evidence-gathering, analysis and litigation.

The case was heard by Guiyang Qingzhen People's Environmental Court – the court's fourth public interest case since it was established. The defendant was ordered to halt pollution immediately and take prompt measures to reduce environmental risks.

With the permission of the court, the plaintiffs applied to the "Two Lakes and A Reservoir" protection fund – an organisation that campaigns for the conservation of water resources in Guiyang, funded by the Guiyang government – to pay the costs of preparing the case.

The case also used expert testimony. The experts stated that the defendant's factory included effluent storage and settling ponds and, without comprehensive water treatment, it would be unable to avoid pollution. The only way to enforce the court's order that the defendant immediately halt pollution would be to close the plant, they said. This expert testimony became court evidence, and will be an important basis for enforcement of the judgement.

# Losses at sea

*Marine pollution is back in the public eye thanks to the latest oil spill in the Bohai Gulf.* **Xia Jun** *looks at three maritime lawsuits, and what they tell us about environmental litigation in China.*

*Editor's note: this summer's oil spill in the Bohai Sea has once again brought the issue of marine pollution to public attention. Calls for litigation over these incidents are increasing. At a reporters' salon held by Chinese NGO Green Earth Volunteers on July 13, Xia Jun, a lawyer who has long worked on maritime pollution cases, used three case studies to explain the troubled journey of this area of law in China. This is an edited transcript of his presentation.*

### Tasman Sea

This case is famous for being the first in China in which the maritime authorities used the courts to claim compensation for environmental damage at sea. (This case is also included in *chinadialogue*'s list of the most influential environmental lawsuits of the decade, "Eight cases that mattered".)

On November 23, 2002, the Maltese-registered Tasman Sea, laden with crude oil, collided with Shunkai No. 1, a Chinese vessel, 23 nautical miles east of the Tianjin Dagu Anchorage, north China, triggering an oil spill. That spill polluted the sea off the port of Tianjin and part of the bay near the city of Tangshan.

With authorisation from the State Oceanic Administration, Tianjin Oceanic Bureau brought a lawsuit in the Tianjin Maritime Court against the owners of the Tasman Sea, Infinity Shipping, and its insurers, the London Protection and Indemnity Club, seeking compensation for damage to the marine environment caused by the spill.

On December 30, 2004, Tianjin Marine Court ordered the two defendants jointly to pay almost 10 million yuan (US$1.5 million) in compensation to Tianjin Oceanic Bureau (7.5 million yuan for loss of marine environmental capacity and 2.5 million yuan for the costs of investigation, monitoring, evaluation and research into biological restoration); over 15 million yuan (US$2.3 million) to Tianjin Fisheries and Harbours Office for losses to fishery resources; and over 17 million yuan (US$2.6 million) to 1,490 fishermen impacted by the spill. In total, compensation ordered to be paid out reached 42.9 million yuan (US$6.7 million).

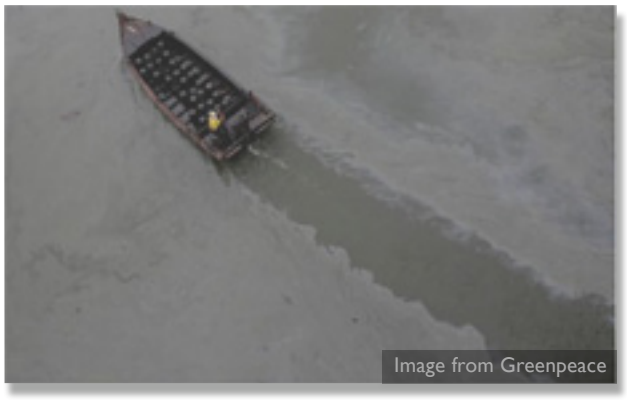
Image from Greenpeace

> *China should be able to deal with the impact of oil slicks more effectively than it did during the 2006 Bohai spill, or the 2010 Dalian leak.*

However, the defendants immediately appealed to Tianjin Higher People's Court. And seven years later, following an appeal and a hearing at the Supreme People's Court, Tianjin Oceanic Bureau received a settlement of just 3 million yuan (US$466,000). What the compensation was for was not specified, and even costs incurred were not recovered. Other plaintiffs also saw their compensation levels greatly reduced, and the defendants ultimately paid out about 21.2 million yuan (US$3.3 million), less than half the original sum.

In the end, the damages awarded for the Tasman Sea incident were less than hoped for. There were several reasons for this: China lacked the means to evaluate and establish losses to the marine environment; its basic environmental monitoring ability was primitive; and there were no experimental environmental restoration projects to use as a basis for establishing benchmark costs. As a result, the evidence presented was inadequate. Compensation orders were made for losses to environmental capacity, but not for other losses to marine ecology.

Although, in financial terms, the Tasman Sea case was no victory, it was nonetheless a landmark lawsuit which cleared a path for improvements to the system. It made the maritime authorities aware of the possibilities of claiming damages through the courts, laid a foundation for judicial and administrative bodies to better handles such cases and provided essential experience for public interest environmental compensation lawsuits.

The case prompted the publication, in 2007, of the "Guidelines for Evaluation of Environmental Losses Due to Maritime Oil Spills". It also set a precedent for finding within the scope of damages owed by a responsible party: losses to environmental capacity, losses to maritime ecological functions, cost of restoration of maritime sediment, cost of restoration of tidal shoals, cost of restoration of phytoplankton, cost of restoration of nekton, biological management research costs and monitoring and environmental costs.

### The Jinsheng collision

On May 12, 2007, two more vessels – the Jinsheng, registered in Saint Vincent & the Grenadines, and the Korean Golden Rose – collided, again resulting in an oil spill. Shandong Oceanic and Fisheries Office sued the owners of the Jinsheng, Jinsheng Shipping, for losses sustained as a result of damage to fishery resources and maritime ecology, and for investigation and monitoring costs.

Qingdao Maritime Court accepted the findings presented by the State Oceanic Administration's North China Sea Monitoring Centre and the Ministry of Agriculture's Yellow Sea and Bohai Sea Fisheries Environmental Monitoring Centre, which put maritime environmental losses at almost 9 million yuan (US$1.4 million) and losses to natural fisheries at 7.2 million yuan (US$1.1 million). On this basis, the court found Jinsheng Shipping liable to pay compensation.

With the necessary resources, technical evidence and support of authoritative bodies, and in particular the experience gained in the Tasman Sea case, this lawsuit proceeded relatively smoothly and counts as a victory for maritime environmental compensation in China.

### 2006 Bohai spill

On February 22, 2006, China's maritime authorities found a large area of floating oil during a patrol of the Bohai Sea. Shandong province promptly took steps to ascertain losses to the fishing industry caused by the pollution, with local government inviting authoritative technical departments to carry out monitoring and evaluation and also providing active support for seeking damages through litigation. Therefore, compensation was won with relative ease. The neighbouring province of Hebei was less aware of the possibilities of litigation and, as a result, lost out.

From March, the crude oil gradually spread from the mouth of the Luan River to Caofeidian, an economic development zone built on reclaimed land in Bohai Bai, creating havoc. Farmed shellfish died off, resulting in widespread losses. After repeated requests from shellfish farmers, Bohai Sea Fisheries Environmental Monitoring Centre eventually carried out tests and produced a report. The report found that six farms in Yueting county alone suffered losses of 30.7 million yuan (US$4.8 milion), while the impact on farms not to request tests was never quantified. The area of ocean polluted by the spill was later calculated to be 300 square kilometres.

In early 2007, the State Oceanic Administration and the State Environmental Protection Agency (the predecessor of the Ministry of Environmental Protection) each made statements blaming the crude oil pollution on "oil tanker accidents and theft of oil from offshore oil fields". In July 2007, Dongying Intermediate People's Court handed down heavy sentences – including the death penalty – to those convicted of stealing oil. However, only limited and vague confirmation of the scope of the oil spill and the losses it caused was given.

After the verdicts in the oil theft case were announced, the six shellfish farmers from Hebei province sued China Shipping Development Company and its tanker subsidiary; oil company Sinopec and its Shengli Oil Field subsidiary; and the Tianjin branch of another oil giant, China National Offshore Oil Corporation (CNOOC), in Tianjin Maritime Court. The court made huge efforts in the process of hearing the case, including obtaining confidential materials

such as oil fingerprinting reports from the state oceanic and maritime authorities' investigations into the pollution incident. In the end, it was established that the oil had come from the Shengli Oil Field.

The court's final report also stated that the Shengli Oil Field Company had failed to take effective measures to prevent the leak and to make reports in accordance with regulations when the leak was discovered – and should therefore be subject to administrative punishment. Taking a range of complex factors into account, the State Oceanic Administration ultimately decided not to fine the firm.

Due to unclear and difficult application of the law, inadequacies with the evidence presented by the plaintiffs and the imbalance of power between the shellfish farmers and the oil firms, the case was resolved through mediation. On November 18, 2010, an agreement was reached, finally bringing the long process of litigation to an end. The four defendants representing the oil field and the oil tanker, while not admitting liability for the oil pollution, made payments of 40% of the assessed losses to the plaintiffs. At the same time, the plaintiffs cancelled their lawsuit against CNOOC's Tianjin branch.

In Shandong, the Qingdao Maritime Court had, slightly earlier in 2010, issued its judgement in a case brought by Dongying fishermen against the Shengli Oil Field. It ruled that the oil field was not liable for the damages but, in accordance with principles of "harmonious judicature", ordered it to pay compensation equivalent to 70% of the fishermen's losses, a total of over 20 million yuan (US$3.1 million). A case brought by the Dongying Oceans and Fisheries Bureau over damages to fishery resources was given only symbolic support. Nobody sued for damages to marine ecology caused by the oil spill. The oil field company appealed, and Shandong Higher People's Court resolved the case through mediation.

All claims in a case brought by Shandong Yantai Fisheries Association on behalf of local fishermen were rejected by Qingdao Maritime Court in the summer of 2009.

**What next?**

The rule of environmental law in China is making progress – and the situation is already better this year than it was last year. Even so, both government and civil resources for seeking damages are inadequate, law enforcement is weak and success is only seen in straightforward cases. These issues still need to be resolved.

China should be able to deal with the impact of oil slicks more effectively than it did during the 2006 Bohai spill, or the 2010 Dalian leak. Administrative and judicial procedures should be combined. But the government still habitually uses administrative measures to deal with pollution incidents, sacrificing the interests of the weak and the environment. There is still work to be done, by both the authorities and the Chinese people.

*Xia Jun is a Beijing-based environmental lawyer.*

# Shaping China's green laws

*Beijing may have drawn on global knowledge to write its pollution legislation, but the product is uniquely Chinese, writes* ***Charles McElwee*** *in a summary of the story so far.*

American, European and Japanese environmental experts will find familiar elements in China's environmental laws. China has borrowed heavily from a number of international sources and experts in drafting its laws, but the end product is, in almost every case, uniquely Chinese.

The foundational environmental law in China is, logically enough, the Environmental Protection Law. It was first enacted on a trial basis in 1979 and amended and reenacted, without the "trial" designation, in 1989. This law contains the seeds of most of the environmental laws introduced since 1979. Indeed, the law contains little more than seeds, consisting of only 47 provisions averaging two to three sentences in length.

Following closely on the heels of the Environmental Protection Law were a set of laws that established an environmental regulatory structure for China that is media-specific, end-of-pipe (it controls the discharge of pollutants rather than their creation) – and command-and-control, meaning it relies on administrative enforcement of environmental-performance standards. Water, air, solid and hazardous wastes and noise pollution were each addressed by separate laws (two in the case of water). In their first incarnation, these laws called for the establishment of ambient air, water and noise standards and concentration-based discharge limits for air and water pollution, and decibel limits for noise pollution.

Pollutant discharges by an operating facility above applicable limits could subject the facility owner to administrative sanctions, but generally resulted (where such actions were addressed at all) in orders to reduce the level of discharges within a given period of time. Regulation of solid and hazardous waste imposed fewer obligations, primarily because of the lack of effective options for the off-site disposal of such wastes during the early phase of environmental lawmaking.


Image from maxful

> *Viewed as a piece of legislative craftsmanship, China's environmental-law system covers most of the necessary topics. As applied, however, it hangs like an ill-fitting suit.*

Obligations set out in the Environmental Protection Law and echoed in the media-specific laws were further refined by specific rules, and became *de facto* cross-media, stand-alone regulatory programmes. For instance, a set of regulations providing for Environmental Impact Assessments (EIAs) eventually spawned a new law, and EIAs have since become the main point of entry into China's environmental-law regime for most entities.

End-of-pipe regulatory models are relatively effective at reducing pollutant loads if the number of "pipes" is constant or growing at a slow pace, but given China's rapid development, it became apparent that even if existing entities were in compliance with the original concentration-based discharge limitations (clearly an inapplicable assumption in China), the number of new polluting facilities being built would result in ever-increasing pollutant loads. As a result, China began to introduce "total load" limits into its regulatory model

to cap the total discharge of certain "major" pollutants.

It also began to draw on international experience with regulatory models that promote sustainability. The Clean Production Law and Circular Economy Law were products of this focus on stopping the creation – not just the discharge – of pollutants. Broadly speaking, these laws impose obligations to make products in a cleaner, more efficient way, by using less hazardous raw materials, energy and water, and producing fewer toxic wastes.

Some of China's more recent regulatory schemes (none of which has taken the form of a national law) have sprung up in reaction to regulations enacted elsewhere, particularly in the European Union. And so there is a China REACH to regulate new chemical substances, a China RoHS to restrict hazardous substances in IT equipment and a China WEEE to address the recycling and disposal of electrical and electronic waste. However, these names, while convenient short hands, suggest closer parallels between the European and Chinese regulatory approaches than in fact exists.

Pilot projects have been initiated to test market-based variations on the traditional command-and-control models. Experimental sulphur-dioxide trading programmes have been set up in some places, primarily involving power plants that are required to install emissions-monitoring devices sophisticated enough to support the creation of a trading scheme. Environmental exchanges have been established in Beijing, Shanghai, Tianjin and elsewhere in anticipation of the day when large regional or national markets are created by a cap-and-trade system on conventional pollutants or carbon emissions.

While China's environmental law regime comprises a set of national laws and regulations similar to many western models, it is important to understand that the Chinese tend to define the fundamental aspects of their environmental legislation in terms of a set of systems or principles, not individual national laws.

As Dr Yin Fucai of the Anhui Province Environmental Protection Bureau has put it, "[i]n China, every environmental man knows eight environmental regulations and policies." Or seven or ten depending on which "environmental man" you are talking to, but the perspective revealed by this statement is the same. Most observers seem to ascribe to the notion that there are "three principles" (such as "polluter pays") and at least seven generally accepted "management rules" (for instance the "Three Simultaneous" system – which requires that a facility and its mandated pollution control measures are designed, constructed, and placed into operation at the same) at the core of China's environmental regulatory scheme.

These principles and regimes were formulated primarily during the three national environmental-protection conferences in 1973, 1983 and 1989 and set forth in the statements summarising the conference discussions. All of them were incorporated into the 1989 version of the Environmental Protection Law, and other laws and regulations adopted subsequently.

Viewed as a piece of legislative craftsmanship, China's environmental-law system covers most of the necessary topics. As applied, however, it hangs on China like an ill-fitting suit: too tight here, too roomy there; succeeding only in making everyone uncomfortable and requiring a set of temporary fixes. Some of the problems can be resolved easily. Others will demand changes to the structure of governance in China, involving fundamental shifts in the distribution of power and requiring significant political will to implement.

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# Seeking damages

*With no law governing pollution compensation in China, victims can become double losers. Former eco-official Zhang Kunmin tells **Meng Si** why legislation is needed – but will still take 10 years to emerge.*


Image from Webfee

*Compensation paid to victims of major environmental incidents in China has failed to meet public expectations. The Ministry of Environmental Protection (MEP) has published a document outlining its views on the issue – which it hopes will start a process that leads ultimately to legislation and a fairer compensation system. Here Zhang Kunmin, former deputy director of the State Environmental Protection Agency (now the MEP) tells Meng Si why change is needed.*

**Meng Si: Why did environmental compensation concern you initially? Why do you think it's important?**

Zhang Kunmin: In 1985, I was transferred from Tsinghua University into the state environmental protection system and, for 10 years, held the post of deputy director of the State Environmental Protection Agency, where I had responsibility for regulations and policy. Conditions were tough then. The state had made it clear that environmental protection was a fundamental policy, but our actual powers and funding were out of sync with the seriousness of the task. Even so, we were committed and really hoped our efforts would see China avoid the "pollute first, clean up later" path that developed nations had taken. Looking now at how environmental protection has evolved in China, it seems we still failed to avoid that route. It's worth thinking hard about why.

After retiring, I taught in Japan for three years, and I visited Minamata city, where Minamata disease occurred, and talked this over with a number of Japanese academics. There are three main lessons to take from Japan. First, an economy that doesn't care about the environment is uneconomic. For example, prior to the UN Conference on Environment and Development in 1992, Japan reviewed the economic costs of three major public incidents, including the problems at Minamata, and calculated that compensation and restoration costs in this case were 103 times higher than what it would have cost to prevent it in the first place.

Second, once an environmental problem arises, it takes a huge amount of time to deal with it fully. Minamata disease was first identified in 1956, but it took 48 years for the process of local court judgements and appeals to lead to a Supreme Court decision in 2004.

> *"With limited fines and low compensation, breaking the law is often cheaper than following it, and that further emboldens some irresponsible firms."*

And then it wasn't until 2009 – 53 years after the problem emerged – that a law on assisting the victims was passed.

Third, Japanese scholars repeatedly emphasise that the environment cannot truly be protected until people's legal rights are guaranteed.

China is undergoing accelerated industrialisation and explosive urbanisation, and facing grave environmental challenges. We need to examine Japan's experience and learn from it.

**MS: What is the state of environmental compensation in China today? What problems are there?**

ZK: In some of China's pollution cases, those hit first are the factory workers and their relatives and other nearby residents. Workers generally won't complain about pollution from their own factory, and some types of pollution are initially hard to detect. The problem isn't exposed until it gets really bad or the company takes too many liberties. But even then, confirming and quantifying the damage caused is a real challenge. The damage caused by environmental pollution is hidden, it's accumulative and it's delayed. Also, due to China's stage of development and financial and technological considerations, national standards can't be fixed too high. This makes identifying and compensating for environmental losses extremely difficult.

China already has a fairly complete set of environmental laws and regulations. On paper, the means are there to resolve just about any issue. But in actual practice, that doesn't happen – we lack the necessary personnel, standards and mechanisms, and so in many cases justice doesn't get done. The environmental authorities are administrative bodies and can only investigate and then impose fines as provided for in legislation. [An obligation to pay compensation for environmental damage is recognised in, for example, China's Environmental Protection Law, but no law explicitly sets forth how environmental damages are to be calculated.] Often those fines are very limited, while compensation relies on negotiation between the polluter and the victim – there's still no law to rely on for that. With limited fines and low compensation, breaking the law is often cheaper than following it, and that further emboldens some irresponsible firms.

The level of fines that can be imposed are set out in the applicable laws or regulations, but the amounts are very low – and even lower when you take inflation into account. We felt they were low when the legislation was being formulated, but the industry bodies have their own considerations. So the outcome was that the fines were, in our opinion, set at a low level. There are no state laws or regulations on compensation. In the Zijin Mining pollution case last year, neither the public nor the media were happy with the level of compensation set.

When environmental protection officials inspect factories, it's akin to guerrilla warfare. To save electricity and money the companies only run equipment meant to reduce pollution in the day time, or only when someone is coming to check up on them – when they leave, it gets switched off again. It's a game of cat and mouse. That's what happens when polluters don't pay an appropriate price for the damage they cause and neither criminal or civil punishments follow. The costs of breaking the law are too low.

Although the criminal law recognises certain environmental breaches as crimes and sets out penalties accordingly, the courts still need sufficient evidence to proceed with arrests. But it's often very hard to evaluate the evidence of environmental damage, and there are no dedicated personnel or standards for doing so. Even if the laws are in place, it's rare that they get applied effectively.

**MS: Academics have long called for legislation on environmental compensation. Why are we only now seeing movement on this from the environmental authorities?**

ZK: As a developing nation, we are still building our legal system and there are a huge number of laws that need to be written – so there's a queue. And, according to state procedures, they must be considered one by one, so getting a law onto the statute books is often very difficult. The law on prevention of solid-waste pollution took a whole decade.

In fact, some legal experts have been discussing an environmental compensation law for years. It's true that China has plenty of laws directly relevant to management of the environment (nine, not including the Natural Resources Law). Some other government departments want to know why we've got so many laws. But look at Japan: in 1970 they made 14

environmental laws in just one year. We need to do as much as possible to make sure leaders and other departments understand the special nature of the environment, and the urgency of legislation.

The Ministry of Environmental Protection has recently published its "Opinions on Assessment of Losses to Environmental Pollution". Being ministerial opinions, these will be submitted to the State Council, but do not then need to be considered by every ministry, so that avoids difficulties at the first stage. I think it is an appropriate thing to do. We've already recognised the importance and urgency of this, so let's first have a go ourselves, then push that forward step by step, and ultimately there's bound to be legislation. My estimate would be that it'll take 10 years before we see a law on environmental compensation. That's quite fast by current standards.

**MS: What are the challenges of turning an environmental-compensation system into a judicial process?**

ZK: One challenge is working out what level to set compensation at: it can't be too high, or too low. So this requires analysis of the system and its participants, and fair treatment of both the polluter and the victim. Also, the legislation can't rely just on the environmental authorities – they also need to get the full support of the judicial authorities.

The "Opinions on Assessment of Losses to Environmental Pollution" say that that assessment should gradually be brought into the judicial appraisal system. Bringing in judicial and financial methods will greatly increase the force of environmental-compensation decisions. In the past, those have been lacking and we've relied just on administrative measures.

But I'm confident that the public want to see this law – it reflects international experience and fits with the overall trend. It will succeed.

**MS: What about public participation in formulating environmental compensation law? How do you ensure that the public has as much of a say in the process as the often powerful polluters?**

ZK: To do anything well, you need active participation from all parties. That requires consultation mechanisms so that the system constrains interested parties, but can also be revised – through certain legal processes – in accordance with the will of those concerned, as circumstances change.

The system-participant analysis I mentioned just now requires that, when you establish a system, you consider the opinions and needs of all concerned parties – including businesses and the authorities that supervise them.

Currently we describe polluters and victims as the strong and weak parties, as the victims have almost no backing, while the polluters enjoy fairly clear-cut support. But once there's a law and a system, then all government departments and the media can support the victims. I'm not worried about that. Public opinion is gradually strengthening. You could say that the environmental authorities are, of all government bodies, the most enthusiastic about environmental NGOs and public participation.

*Zhang Kunmin is former deputy director of the State Environmental Protection Agency (SEPA) – now the Ministry of Environmental Protection – and deputy chair of the China Society for Sustainable Development.*

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