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Reaching Out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime

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REACHING OUT TO THE RULE OF LAW: CHINA'S CONTINUING EFFORTS TO DEVELOP AN EFFECTIVE ENVIRONMENTAL LAW REGIME

Richard J. Ferris Jr.* & Hongjun Zhang, Ph.D.**

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INTRODUCTION

The rapid development and related environmental burdens of the People's Republic of China received widespread attention from a variety of domestic and international observers over the past two decades.¹ Much of this attention has

When conducting research in preparation for writing this article, the authors interviewed high-level officials at China's NPC, State Environmental Protection Administration (SEPA), and other government organizations. A promise of confidentiality was made to the interviewed officials. As a result, the names and titles of the interviewees are not disclosed in this article. The interviewees are indicated by the letters "A, B, C, etc.," along with the date(s) of the interviews. Chinese-language notes covering these interviews are on file with the authors.

Additionally, in order to provide a more fulsome discussion of China's environmental legal system in this article, the authors did not cover the equally important and related occupational health and safety laws. One such law is China's Safe Production Law [An Quan Sheng Chan Fa], adopted on June 29, 2002 and effective on November 1, 2002. Among the measures in the Law with relevance to environmental protection is the first paragraph of Article 32, which reads "[t]hose who manufacture, deal in, transport, store, or use dangerous substances, or dispose of waste dangerous goods shall be subject to examination, approval, and supervision of the [regulatory] departments concerned in accordance with the relevant laws and regulations, as well as national or trade standards." That being said, it is worth noting that many of the challenges associated with the implementation of China's environmental regulatory regime, noted in Part III, are relevant to an analysis of China's occupational health and safety regime.

¹ See, e.g., CHINA COUNCIL FOR INT'L COOPERATION ON ENV'T & DEV., PROCEEDINGS OF THE FOURTH MEETING (1996); QU GEPING & LI JINCHANG, POPULATION AND THE ENVIRONMENT IN CHINA (Jiang Baozhong & Gu Ran trans., Robert B. Boardman ed., 1994); HONG JIANG, THE ORDOS PLATEAU OF CHINA: AN ENDANGERED ENVIRONMENT, U.N. Sales No. 99.III.A.25 (1999); MANAGING THE ENVIRONMENT IN CHINA (Qu Geping & Wo-yen Lee eds., 1984); HE PO-CH'UAN, CHINA ON THE EDGE: THE CRISIS OF ECOLOGY AND

centered on the extent and nature of these burdens and has painted a very bleak picture of China's environmental challenges. This outlook has perhaps been reinforced by similarly somber accounts of recent efforts to build a legal culture and system in China to address these challenges.²

However, the reality of work in China to address environmental protection issues is sometimes obscured by a legal culture that does not readily divulge information on administrative laws or the harsh results of compliance failures.³

DEVELOPMENT (1991); VIKRAM NEHRU ET AL., WORLD BANK, *Protecting the Environment, in CHINA 2020: DEVELOPMENT CHALLENGES IN THE NEW CENTURY* 71 (1997); DEE MACK WILLIAMS, *BEYOND GREAT WALLS: ENVIRONMENT, IDENTITY, AND DEVELOPMENT ON THE CHINESE GRASSLANDS OF INNER MONGOLIA* (2002); Cindy Sui, *China's Land, Water and Air Blighted by Contamination*, AGENCE FR.-PRESSE, Sept. 1, 2002, 2002 WL 23590743; Bayard Webster, *China's Progress Hurting Land*, N.Y. TIMES, Oct. 3, 1982, § 1, at 1.

This attention has encompassed other dynamic Asian countries and territories that, like China, have undergone rapid economic transformation resulting in significant environmental degradation. See, e.g., ASIA'S ENVIRONMENTAL CRISIS (Michael C. Howard ed., 1993); ROBIN BROAD & JOHN CAVANAGH, *PLUNDERING PARADISE: THE STRUGGLE FOR THE ENVIRONMENT IN THE PHILIPPINES* (1993); IAN COXHEAD & S.K. JAYASURIYA, *THE OPEN ECONOMY AND THE ENVIRONMENT: TRADE, POLICY AND RESOURCE DEGRADATION IN ASIA* (2003); NORMAN R. EDER, *POISONED PROSPERITY: DEVELOPMENT, MODERNIZATION, AND THE ENVIRONMENT IN SOUTH KOREA* (1996); MADHAV GADGIL & RAMACHANDRA GUHA, *THIS FISSURED LAND: AN ECOLOGICAL HISTORY OF INDIA* (Univ. of Cal. Press 1993); THE STATE OF THE ENVIRONMENT IN ASIA 1999/2000 (Japan Env'tl. Council ed., 2000); Rachel Morarjee, *Spectre of Environmental Disaster Looms Over Asia as Cities Swell*, AGENCE FR.-PRESSE, May 8, 2002, 2002 WL 2402514.

² See, e.g., William P. Alford & Yuanyuan Shen, *The Limits of the Law in Addressing China's Environmental Dilemma*, in *ENERGIZING CHINA: RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH* 405 (Michael B. McElroy et al. eds., 1998); Bryan Bachner, *No Law, No Sky: Economic Development and Environment in the Fifth Dragon*, in *DEVELOPMENT IN SOUTHERN CHINA: A REPORT ON THE PEARL RIVER DELTA REGION INCLUDING THE SPECIAL ECONOMIC ZONES* 186 (Yushuo Zheng & Stewart MacPherson eds., 1995); Richard J. Ferris Jr. & Hongjun Zhang, *The Challenges of Reforming an Environmental Legal Culture: Assessing the Status Quo and Looking at Post-WTO Admission Challenges for the People's Republic of China*, 14 GEO. INT'L ENVTL. L. REV. 429 (2002) [hereinafter Ferris & Zhang, *WTO*]; Ling Zhong, Note, *Nuclear Energy: China's Approach Towards Addressing Global Warming*, 12 GEO. INT'L ENVTL. L. REV. 493 (2000).

³ Aspects of China's regulatory culture that have reinforced non-transparent or information access-adverse practices in the environmental sector are discussed in Ferris & Zhang, *WTO*, *supra* note 2, at 439-41. This practice is by no means solely a characteristic of China's legal culture. For an early overview of issues associated with access to environmental data in Asia, see Jamie Allen, *Oranges in the Apple Cart: Gathering Environmental Data in Asia*, 1 ASIAN J. ENVTL. MGMT. 7 (1993). Further, information access challenges in China are not unique to the environmental sector. Paradoxically, China's rapid growth and increasing "openness" to the outside world have spurred the development of government web sites and other information resources, but have also increased government sensitivities to the potential administrative burdens and government secrecy implications of

With this in mind, the authors have prepared this article in the belief that a fresh baseline of information concerning these efforts is needed.⁴ Such a baseline would serve to: (1) underscore the significant amount of positive work underway toward a more robust environmental protection regime in China; (2) describe the current status of China's environmental regulatory system; (3) assess key factors in the current environmental regulatory system that influence the effective implementation of China's environmental laws; and (4) provide others interested in the legal aspects of China's environmental protection efforts with a new backdrop of information with which to undertake their own inquiries. To this end, the authors included in this article information from their recent environmental work with Chinese policy and lawmakers, as well as international institutions, foreign investment community members, and citizen group representatives operating in China.

In particular, Part I of this article provides readers with a sense of the scope and characteristics of China's increasingly multifaceted and acute environmental problems. Part II provides background information on China's current environmental law framework, including descriptions of key national and local legal norms, lawmaking institutions, and other influential participants in China's environmental regulatory regime. Part III includes a discussion of key government environmental law implementation resources and capacities, as well as an assessment of selected factors contributing to environmental law implementation challenges.⁵ To conclude, Part IV sets forth the authors' observations on

such efforts. See, e.g., Wendy Lei, Note, *Economic Boon or Regulatory Bane? The Emergence of the Internet in Modern China*, 22 RUTGERS L. REC. 6 (1997), at <http://pegasus.rutgers.edu/~record/articles/22r1r6/frames.html>; Chris Yeung & Linda Choy, *China Steps Up 'Openness' Attack*, S. CHINA MORNING POST, June 18, 1994, at 12, available at 1994 WL 8781322; see also Ferris & Zhang, *WTO*, *supra* note 2, at 443-47.

⁴ To this end, this article draws upon and updates some of the authors' early research efforts on environmental law in China, most notably their general survey of China's environmental regulatory regime first published in 1997. See Zhang Hongjun & Richard J. Ferris Jr., *The Environmental Regulatory Regime of the People's Republic of China: A Primer Addressing Practical Concerns of Foreign Investors*, 27 ENVTL. L. REP. 10228 (1997) [hereinafter Zhang & Ferris, *Primer*]; Hongjun Zhang & Richard J. Ferris Jr., *Shaping an Environmental Protection Regime for the New Century: Environmental Law and Policy in the People's Republic of China*, 6 ASIAN J. ENVTL. MGMT. 35 (1998) [hereinafter Zhang & Ferris, *Environmental Regime*].

⁵ The authors purposely chose to use the word "implementation" over the word "enforcement" in their discussion of issues surrounding the performance of obligations set forth in China's environmental laws. The authors believe that the term "implementation" encompasses many prerequisites for meaningful accomplishment of the objectives of environmental laws. These include sufficient personnel resources, training, infrastructure, environmental and legal awareness, public participation, and political will. Further, government officials in China sometimes associate the term "enforcement" with an act that necessarily involves an adversarial proceeding. During a recent conversation with the authors, one SEPA official stated: "Many government inspections of violations of Chinese

fundamental changes in China's legal culture as these relate to the effective implementation of, and compliance with, environmental laws.

I. CHINA'S ENVIRONMENTAL SITUATION

The intensity and variety of foreign direct investment (FDI) and domestic industrial activities in China has increased significantly over the past decade.⁶ Correspondingly, China's environmental challenges have grown to include not only basic media-specific challenges (e.g., air, water, noise), but also more complex issues associated with the use of advanced technologies.

Recent examples of environmental pollution and natural resource degradation issues typically faced by regulators, investors, and members of the public in China highlight the broad spectrum of China's environmental challenges. These issues include toxic substance contamination,⁷ blood-lead level increases in children,⁸ wetland and agricultural land losses,⁹ drinking water pollution,¹⁰ genetically

environmental law involve, at the beginning, consensus-building at the national and local-government levels and discussions with the violators regarding the most efficient means of achieving compliance. The most efficient means are rarely adversarial." Interview with Government Official A, SEPA (Aug. 5, 2002).

⁶ See, e.g., *Airlines Swoop to Conquer China*, NIKKEI WKLY., Sept. 24, 2002 (commenting that the "surge in foreign direct investment in China has led to a massive influx of business travelers to the country"), available at 2002 WL 25814631; Frances Williams, *Worldwide Slowdown Hits Foreign Investment*, FIN. TIMES (London), Sept. 18, 2002, at 10 (noting that, contrary to the worldwide trend, "China saw inward investment rise to nearly [47 billion dollars] in 2001 from [41 billion dollars] the previous year"), available at 2002 WL 100563482. For general data on FDI and the export industry in China and specific jurisdictions such as the Hong Kong Special Administrative Region, see DIV. ON INV., TECH. & ENTER. DEV., U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2001: PROVIDING LINKAGES, U.N. Doc. UNCTAD/WIR/2001, U.N. Sales No. E.01.II.D.12 (2001), available at <http://www.unctad.org/en/docs/wir01full.en.pdf>.

⁷ See *China — Yangtze River Under Severe Threat from More than 100 Wastewater Dischargers*, CHINA ONLINE, Oct. 6, 2000, 2000 WL 4757355 (noting, among other things, that "the water quality of China's rivers is increasingly under threat, with dangers ranging from accidental discharges of toxic substances to companies' continual discharge of polluted wastewater").

⁸ See *High Blood Lead Levels Found in Beijing Children*, BBC MONITORING, Sept. 18, 2001, 2001 WL 27944104; Sue Mulley, *Blood Lead Levels High in Chinese Children*, MED. POST, May 1, 2001, at 45, available at <http://www.medicalpost.com/content/EXTRACT/RAWART/3717/45A.html>.

⁹ See *China — World Bank Advises China to Clean Up Its Environmental Growth*, CHINA ONLINE, Apr. 10, 2002 (commenting that "[i]n recent years, the desert has increased in size faster than the net decline of cultivated land across" China), 2002 WL 10273613; *Great Efforts Planned to Protect Natural Wetland Resources*, XINHUA ENG. NEWSWIRE, Sept. 26, 2001, 2001 WL 28465444.

¹⁰ See *China Says 38.6 Per Cent of Rural Drinking Water Harmful to Health*, BBC

modified organism (GMO) safety,¹¹ alien species incursions,¹² environmental impact assessment for project planning decisions,¹³ battery and other waste minimization,¹⁴ and clean production technology promotion.¹⁵

Additionally, it is apparent that international environmental issues are inexorably tied to China's domestic environmental burdens. For instance, environmental monitoring stations located at the peak of Hawaii's Mount Loa reportedly recently identified the presence of five to ten day-old arsenic, copper, and zinc in emissions from smelting operations in China.¹⁶ Further, increasingly severe dust storms resulting, in large part, from desertification occurring throughout China, have played havoc with air quality and transportation in China and neighboring countries such as the Republic of Korea and Japan.¹⁷ Plumes of dust from these storms have even been identified in the mainland United States, reportedly transported via the jet stream.¹⁸

One positive aspect of these environmental developments is that they have served to motivate, in large part, meetings between high-level government officials

MONITORING, Nov. 9, 2001, 2001 WL 29912382.

¹¹ See *China Appeases U.S. Soybean Traders with Relaxed Rules*, CHINA ONLINE, Mar. 11, 2002 (discussing China's newly issued rules addressing safety certification procedures for imports of GMOs and related Chinese concerns over the management of GMOs in China), 2002 WL 10273382.

¹² See *China: State Vows to Protect Biodiversity*, CHINA DAILY (Eng. ed.), June 7, 2001 (indicating, among other things, that "[a]nnual economic losses caused by invasive species, including ragweed, mikania micrantha and hyacinth, reached 57.4 billion yuan (US\$6.9 billion)"), available at LEXIS, News Library, Chidly File.

¹³ See *China to Draft New Law on Environmental Protection*, XINHUA NEWS AGENCY, Aug. 26, 2002 (discussing China's efforts to develop a draft statute on environmental impact assessments, including provisions requiring that administrative bodies subject their development plans to the environmental impact assessment process), 2002 WL 26131196.

¹⁴ See *Association to Combat Battery Pollution*, XINHUA ENG. NEWSWIRE, May 1, 2001, 2001 WL 19761042; Christopher Bodeen, *Computer Waste a Threat to China's Environment: Official*, ASSOCIATED PRESS NEWSWIRE, May 31, 2002, WL Apwiresplus Database; *Chinese Students Find Low Recycling Rate of Used Battery*, XINHUA NEWS AGENCY, Nov. 19, 2001, 2001 WL 30261206.

¹⁵ See *Chinese President Signs Decree Promulgating Law on Promoting Clean Production*, BBC MONITORING, July 2, 2002, 2002 WL 23485889 (reporting the enactment into law of China's draft Clean Production Promotion Law on June 29, 2002); *World's First Clean Production Law to Be Publicized in China*, ASIAINFO DAILY CHINA NEWS, Sept. 10, 2001, LEXIS, News Library, Asinfo File.

¹⁶ See Andrew Bridges, *Dirty Air Has Gone Global*, TORONTO STAR, June 1, 2002, at J5, available at 2002 WL 21222267.

¹⁷ See Howard W. French, *China's Growing Deserts are Suffocating Korea*, N.Y. TIMES, Apr. 14, 2002, § 1, at 3 (depicting, among other things, how dust from China's deserts is increasingly making life difficult in South Korea and Japan and how this dust is reportedly binding with the toxic by-products of certain industrial operations in China).

¹⁸ See *id.*

in the affected countries to discuss possible solutions to China's progressive environmental problems. For example, the environmental ministers of China, South Korea, and Japan met in Seoul for the Fourth Tripartite Environment Ministers Meeting (TEMM) from April 20–21, 2002.¹⁹ The ministers' discussions were largely focused on the problem of "yellow dust" emanating from China.²⁰ South Korea initiated the TEMM in 1999 as a means to address transboundary pollution originating in China.²¹ Since that time, the meetings have evolved to address other environmental issues of mutual concern, including research on endocrine disrupting substances.²² The primary focus of the meetings, however, is still finding ways to minimize transboundary air pollution caused by dust storms arising in China.²³

Despite the welcome infusion of political will from ministers and other high-level governmental officials, meaningful advancements in China's environmental law regime are often founded on the good efforts of individuals undertaking the actual law-drafting, implementation, and compliance-assurance work on a day-to-day basis. These individuals include officials at China's regulatory agencies such as the State Environmental Protection Administration (SEPA). In the words of one SEPA official, the cumulative nature of many of China's environmental problems is alternatively "both motivating and intimidating."²⁴ Whether motivation will prove the stronger force, in the words of this same official, "depends on the outcome of

¹⁹ See *Korea, Japan and China to Hold Environmental Discussions*, ASIA PULSE, Apr. 18, 2002, 2002 WL 19014361 [hereinafter *Environmental Discussions*]. TEMM maintains a web site at <http://www.temm.org> (last visited May 5, 2003).

²⁰ See *Environmental Discussions*, *supra* note 19.

²¹ See *id.*

²² Largely as a result of discussions on endocrine disruptors and related cooperative research initiatives held at the TEMM in Tokyo from April 7–8, 2001, China commenced planning work for a research project on endocrine disrupting substances. Interview with Government Official A, *supra* note 5.

²³ For example, at the 2001 TEMM, the environmental minister from China proposed a "Research Project on Sandstorm Control and Joint Survey on the Ecosystem in Northwest China" to address the sandstorm phenomenon through the collective resources of China, South Korea, and Japan. In the *Joint Communiqué* from the Fourth TEMM, the environmental ministers commended the initial efforts to develop a program to address sandstorms and proceeded to discuss the plan for project implementation. NAT'L INST. OF ENVTL. RESEARCH, JOINT COMMUNIQUÉ: FOURTH TRIPARTITE ENVIRONMENT MINISTERS MEETING AMONG CHINA, JAPAN AND KOREA (2002), available at <http://nier.go.kr/MENU/050104/050104.doc>. Interestingly, China's efforts to promote sandstorm research and minimization projects may be fostered by a desire to largely eradicate this problem before the 2008 Olympiad. See *China to Spend 6.8 Billion Dollars Curbing Sandstorms*, AGENCE FR.-PRESSE, Oct. 23, 2001, 2001 WL 25044834 (describing the implementation of a sandstorm control project as a "key measure to quicken environmental improvement of Beijing and the surrounding regions and . . . a part of the 'green Olympics movement'").

²⁴ Interview with Government Official B, SEPA (Aug. 9, 2002).

numerous efforts currently underway to change the system for the better.”²⁵

II. CHINA’S CURRENT ENVIRONMENTAL LAW FRAMEWORK

A. Key Aspects of China’s Environmental Lawmaking System

1. The National People’s Congress

The principal institutions responsible for the enactment or promulgation of laws or legal norm-creating documents are identified in China’s Constitution.²⁶ The Constitution provides that the National People’s Congress (NPC) is the highest-level legislative body in China. The NPC is empowered by the Constitution to enact and amend “fundamental” national statutes,²⁷ including statutes related to the establishment and organization of certain government institutions (*i.e.*, “organic statutes”).²⁸

The Standing Committee within the NPC is authorized to enact and amend all national laws (including statutes and other legal norm-setting instruments in the areas of environmental protection and natural resource conservation) with the exception of fundamental national statutes. Nonetheless, during times when the NPC is not in session,²⁹ the Standing Committee may supplement and amend laws enacted by the NPC but only insofar as these supplements and amendments do not contravene the laws’ “fundamental principles.” Significantly, the NPC may revise or annul inappropriate decisions made by its Standing Committee. In turn, the Standing Committee may revise or annul inappropriate national administrative regulations or local regulations that are promulgated by lower-level national and local administrative bodies. The General Office of the NPC gathers input from specialized NPC Committees and the State Council to put together a Five-Year Legislative Plan that will guide the legislative work of the NPC in five-year

²⁵ *Id.* For examples of efforts to change or otherwise positively influence China’s current environmental law regime, see *infra* notes 113–24 and accompanying text.

²⁶ See XIANFA arts. 58, 62, 64, 67, 89, 100, 116 (1982) (amended 1999).

²⁷ For example, “fundamental” national statutes generally address issues such as the establishment, organization, and responsibilities of the NPC, people’s governments, people’s courts, civil and criminal liabilities, government prosecutory functions, and issues related to special administrative and autonomous regions. See Zhong Hua Ren Min Gong He Guo Li Fa Fa [Law of the People’s Republic of China on Legislation] art. 8 (2000). Thus far, no environmental protection and natural resource conservation statutes have been designated “fundamental” national statutes.

²⁸ “Organic statutes” refer to the laws establishing the NPC, the State Council, the People’s Courts, and the People’s Procuratorate. See, e.g., Quan Guo Ren Min Dai Biao Da Hui Zu Zhi Fa [The Organizational Law of the National People’s Congress] (1982).

²⁹ The NPC is generally in session only two weeks per year, normally in March.

periods.³⁰

2. NPC Legislative Committees

The NPC has established a number of advisory “committees” with responsibility for the drafting of national laws and overseeing implementation of these laws. These committees, which currently number nine, are specialized and comprised of congressional representatives with expertise and background in their respective subject matters.³¹ The committee with primary responsibility for environmental protection matters, including issues related to the management of natural resources, is called the “Environmental Protection and Natural Resources Conservation Committee.”³² While many of these committees were established as part of the Chinese government’s attempt to streamline and reinforce the law-making process, they do not have the authority to override the power of the State Council and its administrative departments to propose draft legislation.³³

3. The State Council and State Council Administrative Departments

Below the NPC is the State Council. The State Council is China’s highest

³⁰ The current NPC Five-Year Legislative Plan covers the term 2003–2008. The initial draft of this Plan includes a number of environmental protection and natural resource conservation-related statutes, including a soil and groundwater remediation act, a product lifecycle management act, and a renewable energy act.

³¹ The committees currently consist of the following:

- Agriculture and Rural Area Committee, established 1998;
- Education, Science, Culture and Health Committee, established 1983;
- Environmental Protection and Natural Resource Conservation Committee, established 1993;
- Finance and Economy Committee, established 1983;
- Foreign Affairs Committee, established 1983;
- Internal Affairs and Justice Committee, established 1988;
- Law Committee, established 1954;
- Nationality Committee, established 1959; and
- Overseas Chinese Committee, established 1983.

³² “This Committee is comprised of congresspersons with varied government backgrounds and/or expertise in environmental protection issues.” Ferris & Zhang, *WTO*, *supra* note 2, at 436.

³³ For a more detailed discussion of the environmental lawmaking process, and the roles of the NPC Committees in this system, see generally Richard J. Ferris Jr. & Hongjun Zhang, *The Development of the Rule of Law in China: Observations on the Environmental Lawmaking Process*, METROPOLITAN CORP. COUNS. (Mid-Atlantic ed.), Oct. 2000, at 4 [hereinafter Ferris & Zhang, *Environmental Lawmaking*]. See also *infra* notes 34–39 and accompanying text (discussing State Council Administrative Department legislative proposals).

administrative organ and the executive authority of the NPC. Its functions and powers include the authority to: (1) approve and promulgate national administrative regulations; (2) issue decisions in orders in accordance with the Constitution and other laws; (3) review legislative proposals for referral to the NPC or its Standing Committee; and (4) oversee the work of its underlying ministries and commissions.³⁴ In the area of oversight, it is generally true that the State Council may alter or annul inappropriate regulations of its underlying ministries and commissions.³⁵ The State Council includes a special office in charge of legal issues: the Office of Legislative Affairs. This Office prepares the State Council's annual and five-year legislative drafting plans. These plans are an important indicator of which legal initiatives will likely be the focus of Chinese government and international resources in the near term.³⁶

Under the State Council are the various State Council ministries and other administrative departments.³⁷ In addition to SEPA, these include numerous other government authorities with responsibilities that include or affect environmental protection.³⁸ The administrative departments, akin to executive agencies in the

³⁴ See XIANFA art. 89.

³⁵ The State Council is required to refer inconsistencies between local and State Council regulations to the NPC Standing Committee for review and decision.

³⁶ The term of the State Council's current Five-Year Legislative Drafting Plan is 2003–2008. At the State Council, the Annual Legislative Drafting Plan is generally treated as more authoritative, given the detailed nature of the work undertaken at the State Council level.

³⁷ These organizations were largely restructured during government administrative reforms undertaken in March 1998. See Zhang & Ferris, *Environmental Regime*, *supra* note 4, at 36. Further government reorganization was initiated during the administrative restructuring that took place after the NPC meeting in March 2003.

³⁸ An exhaustive listing of State Council Administrative Departments with responsibilities involving environmental protection issues would be beyond the scope of this article. That being said, it is worth noting, if only for the purposes of underscoring the complexity of navigating multiple and sometimes overlapping or inconsistent administrative agency requirements, key State Council Administrative Departments with environmental responsibilities. These include:

- General Customs Administration;
- Ministry of Agriculture;
- Ministry of Commerce;
- Ministry of Communications;
- Ministry of Construction;
- Ministry of Education;
- Ministry of Finance;
- Ministry of Foreign Affairs;
- Ministry of Information Industry;
- Ministry of Justice;
- Ministry of Land and Resources;
- Ministry of Public Health;

United States, are authorized to make “ministerial regulations” within their areas of competence (i.e., pollution control for SEPA and agricultural management for the Ministry of Agriculture). Administrative departments under the State Council may also prepare proposals for national legislation (i.e., “statutes”) within their areas of competence.³⁹ These legislative proposals, when completed, are typically forwarded to the State Council for review and approval, and then referred to the NPC for review and possible adoption. Drafts of regulations that are promulgated by the State Council constitute administrative regulations of the State Council. However, drafts of regulations prepared by ministries and administrative departments alone (i.e., ministerial regulations) do not typically need to pass State Council review before the drafting ministries/administrative departments promulgate the regulation.

4. Provincial and Municipal Governments⁴⁰

At the provincial level, provincial people’s *congresses* (and their standing committees) may issue local regulations provided they do not contravene the Constitution and applicable national laws and administrative and ministerial regulations. Provincial people’s *governments* may also issue local regulations provided these do not contravene regulations issued by the provincial people’s congresses.

Four of China’s municipalities, commonly referred to as “municipalities directly under the Central Government,” have law-making powers corresponding to those of provincial governments. These municipalities are Beijing, Chongqing, Shanghai, and Tianjin.⁴¹ China’s autonomous regions, including Inner Mongolia, Guangxi, Ningxia, Xizang (Tibet), and Xinjiang, also possess law-making powers similar to those of the provinces.⁴²

At the local government level, municipal people’s congresses may promulgate local regulations to supplement or implement national and provincial laws and

-
- Ministry of Public Security;
 - Ministry of Railways;
 - Ministry of Science and Technology;
 - Ministry of Water Resources;
 - State Administration of Quality Supervision, Inspection, and Quarantine;
 - State Development Reform Commission;
 - State Environmental Protection Administration; and
 - State Industry and Commerce Administration.

³⁹ See generally Ferris & Zhang, *Environmental Lawmaking*, *supra* note 33.

⁴⁰ The lawmaking powers described in this section are generally provided under Section 5 of XIANFA.

⁴¹ ALAN HUNTER & JOHN SEXTON, *CONTEMPORARY CHINA* 105 (1999).

⁴² *Id.*

administrative regulations.⁴³ These laws serve the same functions as provincial laws and are subject to restrictions similar to those at the provincial level, except that these regulations also must not contravene regulations issued by the people's congress of the province in which the municipal government is situated.⁴⁴ Municipal people's congresses must receive approval from their provincial people's congress for draft municipal regulations before promulgating those regulations.⁴⁵ As indicated in further detail later in this article, local governments are increasingly the "trend setters" in China with respect to the development of influential legal measures, particularly in the area of environmental protection.

5. Special Economic Zones

Special Economic Zones (SEZs) serve a unique function in China. SEZs have proliferated throughout the country over the past ten years.⁴⁶ Predominately located in the eastern and southern coastal regions of China, SEZs are granted authority to offer special tax and other incentives to attract foreign investment.⁴⁷ Generally, the laws of the municipality in which the SEZ is located apply to activities within the SEZ. For example, the NPC in 1992 authorized the Shenzhen Municipal People's Congress (with jurisdiction over the Shenzhen SEZ at the border with Hong Kong) to promulgate local regulations that are specifically applicable to the Shenzhen SEZ.⁴⁸ While a municipality would typically not be permitted to differentially regulate separate areas of the municipality, it can regulate an SEZ differently so long as it receives NPC authorization and the regulations applying to the SEZ do not contravene the Constitution, national and provincial laws, and administrative and ministerial regulations.

⁴³ Herbert S. Yee & Wang Jinhong, *Grassroots Political Participation in Rural China*, in CHINA IN TRANSITION: ISSUES AND POLICIES 25, 27 (David C.B. Teather & Herbert S. Yee eds., 1999).

⁴⁴ Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China art. 7 (1979) (amended 1995).

⁴⁵ *Id.*

⁴⁶ 1 COUNTRIES OF THE WORLD AND THEIR LEADERS YEARBOOK 2003, at 410 (Daiva Marija Zedonis ed., 2002) (noting the introduction of more than two thousand SEZs since 1993); 1 WORLDMARK YEARBOOK 2000, at 586 (Mary Rose Bonk ed., 2000) (detailing the economic success of SEZs in recent years).

⁴⁷ See HUNTER & SEXTON, *supra* note 41, at 73.

⁴⁸ See Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Shou Quan Shen Zhen Shi Ren Min Dai Biao Da Hui Ji Qi Chang Wu Wei Yuan Hui He Shen Zhen Shi Ren Min Zheng Fu Fen Bie Zhi Ding Fa Gui He Gui Zhang De Yi An De Jue Ding [Decision of the Standing Committee of the NPC on Authorizing the People's Congress of Shenzhen Municipality and Its Standing Committee and the People's Government of Shenzhen Municipality to Formulate Regulations and Rules Respectively for Implementation in the Shenzhen SEZ] (July 1, 1992).

B. Key National and Local Environmental Laws

I. Overview

Against a backdrop of environmental challenges, China's law and policymakers are developing one of the region's most dynamic environmental law frameworks. At present, this framework includes roughly twenty statutes, more than forty regulations, approximately five hundred standards, and more than six hundred other legal norm-creating documents primarily addressing pollution control, natural resource conservation, and management of the environmental stewardship aspects of consumer products ("product stewardship").⁴⁹ At the local-government level, one senior environmental official recently indicated that environmental measures at the provincial and municipal levels alone likely total more than one thousand.⁵⁰

Adding to this regime are China's obligations under more than eighty bilateral and multilateral environmental treaties.⁵¹ Premier Zhu Rongji reinforced China's commitment to assume responsibilities related to the reduction of greenhouse gases when, on September 3, 2002, at the World Summit on Sustainable Development, he announced that China was moving forward with ratification of the Kyoto Protocol to the Framework Convention on Climate Change.⁵² These accords often provide

⁴⁹ In recent years, the number of compilations and databases of Chinese law has increased significantly. This is due, in part, to the fact that many Chinese administrative agencies do not yet have a publicly available "official gazette" or other central publication for their administrative laws. See, e.g., Ferris & Zhang, *WTO*, *supra* note 2, at 444. Thus, members of the regulatory and regulated communities are largely relying on internal or outside company-supported efforts to develop Chinese law compilations and databases. One distinct problem with this is that it is often very difficult to be sure that a particular compilation or database is comprehensive and accurate. One database that government officials and private-sector companies use is the Law Information System, developed by the Information Center of the National People's Congress and indexed in "Dublin Core" format (DC.Format) by KYInfo Technology Co., Ltd. Note that the phrase "other legal norm-creating documents" refers to the wide variety of documents, of various nomenclature, that reinforce, augment, or interpret the measures set forth in national environmental statutes, regulations, and standards.

⁵⁰ Interview with Government Official B, *supra* note 24.

⁵¹ For a fairly comprehensive, if not up-to-date, compilation of environmental treaties that China has concluded or signed, see ZHONG GUO DI JIE HE QIAN SHU DE GUO JI HUAN JING TIAO YUE JI [COMPILATION OF INTERNATIONAL ENVIRONMENTAL TREATIES CONCLUDED OR SIGNED BY CHINA] (SEPA ed., 1999).

⁵² See Chen Ming, *World Hails China's Approval of Kyoto Protocol at Earth Summit*, XINHUA NEWS AGENCY, Sept. 3, 2002, 2002 WL 26134202. China provided its instrument of ratification to the United Nations Secretary General on August 30, 2002. *Id.* See generally Kyoto Protocol on the United Nations Framework Convention on Climate Change, adopted Dec. 10, 1997, U.N. Doc. No. FCCC/CP/1997/L.7/Add.1, reprinted in 37 I.L.M. 22, available at <http://unfccc.int/resource/convkp/kpeng.pdf>.

needed financial and other support for the development and implementation of domestic environmental laws by the institutions indicated above.⁵³

2. National Environmental Laws

In 1979, the NPC Standing Committee enacted China's first major environmental statute, the Environmental Protection Law (EPL).⁵⁴ Essentially, the EPL establishes fundamental concepts for environmental protection often reflected in subsequently adopted laws. These concepts include, but are not limited to, the following:

- Individuals may report or file charges against those who cause pollution or otherwise damage the environment;⁵⁵
- People's governments of provinces, autonomous regions, and municipalities directly under the Central Government may establish local pollutant discharge standards for activities not specified in national standards; for those items that are already indicated in national standards, these people's governments may establish local standards that are more stringent than those at the national government level and report these standards to SEPA;⁵⁶
- Those who construct facilities that cause pollution must observe laws addressing environmental protection for such projects;⁵⁷
- Measures must be undertaken to protect the ecological environment during the development or use of natural resources;⁵⁸
- Technologies for the prevention and control of pollution at a facility/construction project must be (1) designed, (2) built, and (3) engaged

⁵³ An example of a multilateral environmental treaty that addresses financial and other treaty implementation support for developing countries such as China is the Stockholm Convention on Persistent Organic Pollutants, *opened for signature* May 23, 2001, UN Doc. UNEP/POPS/CONF/2, *reprinted in* 40 I.L.M. 532, *available at* http://www.pops.int/documents/convtext/convtext_en.pdf. China signed the Convention on May 23, 2001. U.N. Env't Programme, List of Signatories and Parties to the Stockholm Convention, *at* <http://www.pops.int/documents/signature/signstatus.htm> (last visited Sept. 15, 2002).

⁵⁴ Huan Jing Bao Hu Fa (1979). The law was originally enacted for trial implementation on September 13, 1979, and later abrogated by implementation of the Environmental Protection Law of the People's Republic of China, adopted December 26, 1989. "For trial implementation' is a phrase that [Chinese legislators use to refer to] legislation that [they] view as 'experimental' at the time of passage and . . . subject to revision [at an undetermined point in the future]." Zhang & Ferris, *Environmental Regime*, *supra* note 4, at 52 n.6.

⁵⁵ Environmental Protection Law of the People's Republic of China art. 6, *available at* http://www.zhb.gov.cn/english/law_detail.php3.

⁵⁶ *Id.* art. 10.

⁵⁷ *Id.* art. 13.

⁵⁸ *Id.* art. 19.

- concurrently with the principal part of the facility or construction project;⁵⁹
- Enterprises or institutions that cause severe environmental pollution will be required to eliminate and control such pollution within a specified time period;⁶⁰
- Technologies or facilities that fail to meet the requirements set forth in environmental protection laws shall be banned;⁶¹ and
- Entities shall not transfer facilities that cause severe pollution to entities that are unable to prevent and control such pollution.⁶²

The EPL was crafted as a framework environmental law focusing on pollution control. Thus, the law is potentially applicable to all pollutive activities. Natural resource issues are addressed in the law only as these relate to pollution control management.⁶³

Since the enactment of the EPL, the NPC has adopted roughly twenty statutes primarily addressing pollution control, natural resource conservation, and product stewardship.⁶⁴ These statutes include the following:

- The Air Pollution Prevention and Control Law;⁶⁵
- The Clean Production Promotion Law;⁶⁶
- The Law on Desertification Prevention;⁶⁷
- The Environmental Impact Assessment Law⁶⁸

⁵⁹ *Id.* art. 26. This concept is often referred to as the “three synchronizations” or “three simultaneities” principle. Put another way, the principle requires that pollution-control installation design, construction, and operation are undertaken at the same time as design, construction, and operation of the associated facility or construction project. See Guan Yu Ru He Ren Ding Jian She Xiang Mu Wei Fan “San Tong Shi” Zhi Du Wen Ti De Fu Han [Interpretive Letter on the Question of How to Identify Whether a Construction Project Has Violated the “Three Simultaneities” System] (Nat’l Env’tl. Prot. Agency Mar. 17, 1994). The National Environmental Protection Agency is the precursor to SEPA.

⁶⁰ Environmental Protection Law art. 29.

⁶¹ *Id.* art. 30.

⁶² *Id.* art. 34.

⁶³ One of the authors of this article, Dr. Hongjun Zhang, was involved in recent NPC discussions regarding the pollution-control focus of the EPL in his previous capacity as Legislative Director with the NPC Environmental Protection and Natural Resource Conservation Committee. A draft Natural Resource Conservation Law was also discussed. At this time, however, this draft has been tabled for possible discussion at a later, undetermined date.

⁶⁴ Because an increasing number of statutes include provisions related to the environment, it is difficult to determine with accuracy the exact number of so-called “pollution control, natural resource conservation, and product stewardship” statutes. The list in this section is provided to give readers an idea of key statutes in these areas.

⁶⁵ Da Qi Wu Ran Fang Zhi Fa (1987) (amended 1995, 2000).

⁶⁶ Qing Jie Sheng Chan Cu Jin Fa (2002).

⁶⁷ Fang Sha Zhi Sha Fa (2001).

⁶⁸ Huan Jing Ying Xiang Ping Jia Fa (2002).

- The Energy Conservation Law;⁶⁹
- The Environmental Noise Pollution Control Law;⁷⁰
- The Fisheries Law;⁷¹
- The Flood Prevention Law;⁷²
- The Forestry Law;⁷³
- The Grasslands Law;⁷⁴
- The Land Administration Law;⁷⁵
- The Law on the Prevention of Environmental Pollution Caused by Solid Waste;⁷⁶
- The Marine Environmental Protection Law;⁷⁷
- The Mineral Resource Law;⁷⁸
- The Water and Soil Conservation Law;⁷⁹
- The Water Law;⁸⁰
- The Water Pollution Prevention and Control Law;⁸¹ and
- The Wildlife Protection Law.⁸²

At lower levels of authority, beneath the statutes, are the State Council regulations and other legal norm-creating documents issued by the State Council and State Council Administrative Departments. As mentioned earlier, there may be roughly forty regulations specifically addressing pollution control, natural resource conservation, and product stewardship that are issued by the State Council. However, if you add standards and other legal norm-creating documents (e.g., documents bearing English translations such as "interpretive letters," "circulars," "decisions," and "measures"), the count may approach several thousand. That being said, while there may be areas of environmental law that are not yet addressed by national statutes,⁸³ most subjects or activities generally considered to be within the purview of environmental law have been covered to some extent in China by one or

⁶⁹ Jie Yue Neng Yuan Fa (1997).

⁷⁰ Huan Jing Zao Sheng Wu Ran Kong Zhi Fa (1996).

⁷¹ Yu Ye Fa (1986).

⁷² Fang Hong Fa (1997).

⁷³ Sen Lin Fa (1984) (amended 1998).

⁷⁴ Cao Yuan Fa (1985).

⁷⁵ Tu Di Guan Li Fa (1986) (amended 1998).

⁷⁶ Gu Ti Fei Wu Wu Ran Huan Jing Fang Zhi Fa (1995).

⁷⁷ Hai Yang Huan Jing Bao Hu Fa (1982) (amended 1999).

⁷⁸ Kuang Zhan Zi Yuan Fa (1986) (amended 1996).

⁷⁹ Shui Tu Bao Chi Fa (1991).

⁸⁰ Shui Fa (1988) (amended 2002).

⁸¹ Shui Wu Ran Fang Zhi Fa (1984) (amended 1996).

⁸² Ye Sheng Dong Wu Bao Hu Fa (1988).

⁸³ As of this writing, the NPC has not enacted statutes, for instance, to primarily address biosafety, natural resource conservation, toxic substance control, radioactive pollution control, and soil and groundwater contamination.

more legal norm-creating documents. This in itself attests to the growing complexity of this area of law in China. What remains is to consider whether and how these statutes are being implemented. This subject is addressed further in Part III of this Article.

Given the breadth of topical coverage at this level, members of the regulated community are well-advised to look beyond statutory provisions when these provisions: (1) do not address a particular activity or product; or (2) simply address a particular product or activity in ambiguous terms. Notwithstanding the caveats concerning transparency, information access, and a legal culture that still favors reliance on the instructions of authority figures over the texts of laws,⁸⁴ it is likely that the same legal measures have been issued to cover the particular situation at issue.

To elucidate this point, we have provided below a sampling of measures (mandatory and voluntary) covering subjects that are not yet addressed via a specialized statute.

- *Biosafety*: The Management Regulation on Transgenic Agricultural Organism Safety.⁸⁵
- *Contaminated Soil and Groundwater Remediation*: The Environmental Quality Risk Assessment Criteria for Soil [and Groundwater] at Manufacturing Facilities.⁸⁶
- *Environmental Labeling*: Measures on the Certification Management of Products Bearing Environmental Labels.⁸⁷
- *Natural Resource Conservation*: The Regulations on Nature Reserves.⁸⁸
- *Organic/Green Food Product Certification*: The Measures for the Management of Organic Foods Certification.⁸⁹
- *Radioactive Pollution Control*: The Measures on the Management of Electromagnetic Radiation Environmental Protection.⁹⁰
- *Toxic Substances Control*: The Circular on Strengthening the Management of Hazardous Chemicals.⁹¹

⁸⁴ See *supra* note 3; *infra* notes 126, 129–37 and accompanying text.

⁸⁵ Nong Ye Zhuan Ji Yin Sheng Wu An Quan Guan Li Tiao Li (State Council May 23, 2001).

⁸⁶ Gong Ye Qi Ye Tu Rang Huan Jing Zhi Liang Feng Xian Ping Jia Ji Jun (SEPA June 9, 1999).

⁸⁷ Huan Jing Biao Zhi Chan Pin Ren Zheng Guan Li Ban Fa (Nat'l Env'tl. Prot. Agency July 28, 1994).

⁸⁸ Zi Ran Bao Hu Qu Tiao Li (State Council Oct. 9, 1994).

⁸⁹ You Ji Shi Pin Ren Zheng Guan Li Ban Fa (SEPA June 19, 2001).

⁹⁰ Dian Ci Fu She Huan Jing Bao Hu Guan Li Ban Fa (Nat'l Env'tl. Prot. Agency Mar. 25, 1997).

⁹¹ Guan Yu Jia Qiang Hua Xue Wei Xian Wu Pin Guan Li De Tong Zhi (SEPA, State Econ. & Trade Comm'n, Ministry of Pub. Sec., Ministry of Communications, and State Bureau of Quality & Technical Supervision Dec. 29, 1999). Note that the responsibilities

3. Local Environmental Laws

As noted earlier in this section, local (i.e., provincial and lower-level government) environmental laws may exceed one thousand pieces of legislation. Understanding information access challenges in China that are daunting even at the national government level, as is discussed further in this article, it is not hard to imagine that a clear understanding of the scope and nature of local environmental laws is a difficult task.

Local governments and people's congresses are required by virtue of Chinese law to submit newly adopted legal measures to the national government for record. For instance, China's Constitution provides in Article 100 that "[t]he people's congresses of provinces and municipalities directly under the Central Government and their standing committees . . . shall report . . . local regulations to the Standing Committee of the National People's Congress."⁹² However, information on the level of compliance with this requirement is inadequate to clearly determine the likely percentage of local laws recorded at the national government level. One government official recently provided the following comment on this subject: "It is unlikely that the local governments report all legal measures to the national level. [The local governments] often do not have resources that they can devote to such tasks; efforts to report new or amended laws to the national government stretch meager local administrative resources."⁹³ Having described these limitations, the official also indicated that more accurate review by national government authorities of local government laws is "essential to understanding whether the local government authorities are complying with the [baselines] set forth in national norms."⁹⁴

Against this backdrop, the authors note that local environmental laws typically address subjects covered in the majority of national environmental laws.⁹⁵ However, local lawmaking activities increasingly move beyond the topical parameters set by national law and serve as helpful indicators of trends.⁹⁶ SEPA and the NPC

of the State Economic and Trade Commission have been largely assumed by the new State Development Reform Commission, and the responsibilities of the State Bureau of Quality and Technical Supervision are currently undertaken by the recently reorganized State Council administrative department referred to as the State Administration of Quality Supervision, Inspection, and Quarantine.

⁹² XIANFA art. 100 (1982) (amended 1999).

⁹³ Interview with Government Official C, SEPA (Sept. 15, 2002).

⁹⁴ *Id.*

⁹⁵ Examples include, for the water and air environments, the Tianjin Shi Fang Zhi Shui Wu Ran Guan Li Ban Fa [Tianjin Management Measures on the Prevention of Water Pollution] (1994) and the Hunan Sheng Da Qi Wu Ran Fang Zhi Shi Shi Ban Fa [Hunan Province Air Pollution Prevention Implementing Measures] (1991).

⁹⁶ For a helpful, but hardly comprehensive, compilation of key local-government environmental laws, see DI FANG HUAN JING BAO HU FA GUI XUAN BIAN [COLLECTION OF

Environmental Protection and Natural Resource Conservation Committee monitor such activities to identify consensus or divergent approaches to environmental protection issues that may signal appropriate subjects for national legislation. Recent examples of growing lawmaking trends at the local level include measures addressing the control of single-use or “throw-away” food containers.⁹⁷

4. Draft Laws: The Future

“Laws are being drafted at all times, on all subjects.”⁹⁸ This statement by a SEPA official and veteran of numerous law-drafting projects is testament to the dynamic quality of the Chinese legal system. While the drafting of a law by no means ensures that the law will be adopted and enter into force, we have indicated below a number of law-drafting efforts underway at the national level. This is by no means an exhaustive listing, but it should prove helpful as a further indicator of recent trends in Chinese environmental lawmaking.

- *Proposal to Include a Product Lifecycle Management Act in the Five-Year Legislative Plan for 2003–2008 (National People’s Congress).* Lawmakers at the NPC believe that this proposal has a roughly fifty percent chance of being included in the final 2003–2008 Legislative Plan.⁹⁹ That being said, the fact that such a statute has been suggested for the draft Plan is indicative of the growing concern Chinese lawmakers are expressing over “product and process” related environmental pressures, as opposed to the traditional “end-of-pipe” concerns addressed with traditional environmental controls.
- *Proposal to Include a Soil and Groundwater Contamination Act in the Five-Year Legislative Plan for 2003–2008 (National People’s Congress).* If the lawmakers decide to formally include such a statute on the 2003–2008 Legislative Plan, it is highly likely that work on drafting a Soil and Groundwater Contamination Act would begin within the next year or two. The statute reportedly would be proposed with the goal of strengthening the legal tools available to regulatory authorities to combat China’s growing historical contamination problems.¹⁰⁰

LOCAL ENVIRONMENTAL PROTECTION LAWS] (SEPA ed., 1999).

⁹⁷ See, e.g., Beijing Shi Xian Zhi Xiao Shou, Shi Yong Su Liao Dai He Yi Ci Zing Su Liao Can Ju Guan Li Ban Fa [Beijing Management Measures Limiting the Sale and Use of Plastic Bags and Single-Use Plastic Food Utensils] (1999); Guangzhou Shi Jin Zhi Sheng Chan Jing Xiao Shi Yong Yi Ci Xing Bu Ke Jiang Jie Su Liao Can Ju Gui Ding [Guangdong Rules Prohibiting the Manufacture, Distribution, and Sale of Single-Use, Non-Biodegradable Plastic Food Utensils] (1997).

⁹⁸ Interview with Government Official D, SEPA (Sept. 10, 2002).

⁹⁹ Interview with Government Official F, National People’s Congress (Apr. 20, 2003). This proposal reflects the earliest stage of legislative planning at the NPC.

¹⁰⁰ *Id.*

- *Draft Measures on the Recycling and Take-Back of Household Electronic Products (State Development Reform Commission)*. These draft measures were reportedly largely drafted at the request of NPC representatives concerned with alarming media accounts concerning the rise of illegal electronic waste disposal in China.¹⁰¹ The draft measures would possibly be finalized as several separate laws, including one addressing household electronic product take-back, reuse, and recycling, and the second governing “secondary pollution” from these activities.¹⁰² The definition of “household electronic products” is apparently still subject to further discussions.¹⁰³ That said, SDRC officials, taking the lead from the now-defunct State Economic and Trade Commission, have indicated that they favor a broad definition, potentially capturing within the law a wide variety of consumer electronic products.¹⁰⁴ The drafting process has been delayed somewhat by government reorganization efforts commenced in March 2003 and the recent Severe Acute Respiratory Syndrome (SARS) epidemic, but the drafters hope to make significant progress on this effort in 2003.¹⁰⁵
- *Draft Measures on the Recycling and Reuse of Used Tires (State Development Reform Commission)*. This initiative would reportedly address, among other things, mandatory requirements for used tire recycling, including economic incentives for promoting such recycling and tire reuse.¹⁰⁶ There is currently no set schedule for completion of the draft measures.¹⁰⁷
- *Draft Rules on Dry Battery Recycling (State Development Reform Commission)*. These draft rules would apparently cover “all dry battery chemistries” and would include provisions addressing heavy-metal contents, battery waste treatment, and recycling.¹⁰⁸ There is reportedly no specific date set for

¹⁰¹ *Id.*; see, e.g., JIM PUCKETT ET AL., THE BASEL ACTION NETWORK & SILICON VALLEY TOXICS COALITION, EXPORTING HARM: THE HIGH-TECH TRASHING OF ASIA (Jim Puckett & Ted Smith eds., 2002), available at <http://www.ban.org/e-waste/technotrashfinalcomp.pdf>; see also *China to Tighten Import Controls on Electronic Waste*, ASIA PULSE, May 31, 2002, 2002 WL 21181247.

¹⁰² Interview with Government Official D, *supra* note 98; see also Xiao Zhang, *New Rules for Appliance Disposal*, CHINA DAILY, June 3, 2002, available at 2002 WL 7168821.

¹⁰³ Interview with Government Official G, State Economic and Trade Commission (July 28, 2002). The State Economic and Trade Commission initiated the drafting of this proposed rule. After the NPC disbanded the State Economic and Trade Commission during the government reforms in March 2003, the State Development Reform Commission reportedly took over the lead in this drafting initiative.

¹⁰⁴ Interview with Government Official D, *supra* note 98.

¹⁰⁵ *Id.*

¹⁰⁶ Interview with Government Official G, *supra* note 103. The SDRC assumed the lead role on these measures from the now-defunct State Economic and Trade Commission.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

promulgation of these draft rules.¹⁰⁹

- *Draft Standards on Mercury Content in Button Cells (State Development Reform Commission)*. These draft standards would reportedly supplement existing mercury content limitation measures applicable to primary zinc-manganese and alkaline zinc-manganese batteries.¹¹⁰ The draft standards would reportedly address individual button cells (i.e., "button-shape batteries"), button cells in multi-packs, and button cells embedded in electronic products.¹¹¹ The SDRC, taking over from the former State Economic and Trade Commission and Light Industry Bureau, hopes to proceed with the development of these proposed measures as soon as possible in 2003.¹¹²

III. CHINA'S ENVIRONMENTAL LAW IMPLEMENTATION

As noted above, China is developing a large array of environmental laws. Implementation of these laws, however, has met with limited success.¹¹³ Reinforcing this observation, a SEPA official recently commented that China has "a wealth of laws with shallow roots."¹¹⁴ In light of these comments, the authors believe it would be most helpful, in the limited space of this Article, to highlight a number of encouraging developments concerning the implementation of environmental law in China. First, the authors address key recent developments in China with respect to law implementation and institutional capacity-building.

¹⁰⁹ *Id.* The SDRC assumed the lead role on these measures from the former State Economic and Trade Commission.

¹¹⁰ Interview with Government Official H, State Economic and Trade Commission (June 15, 2002); *see, e.g.*, Guan Yu Xian Zhi Dian Chi Chan Pin Gong Han Liang De Gui Ding [Regulation on Mercury Content Limitation for Batteries] (Nat'l Light Indus. Bureau, State Econ. & Trade Comm'n, Ministry of Internal Trade, Ministry of Foreign Trade & Econ. Cooperation, State Admin. for Indus. & Commerce, Nat'l Env'tl. Prot. Agency, Gen. Customs Admin., State Technical Supervision Bureau, and State Imp. & Exp. Prod. Inspection Bureau Dec. 31, 1997) [hereinafter *Mercury Content Limitation*]. The SDRC assumed the lead role on these measures from the disbanded State Economic and Trade Commission.

¹¹¹ Interview with Government Official H, *supra* note 110.

¹¹² *Id.*

¹¹³ *See, e.g.*, STATE ENVTL. PROT. ADMIN., HUAN JING XING ZHENG ZHI FA SHOU CE [HANDBOOK ON THE ADMINISTRATIVE ENFORCEMENT OF ENVIRONMENTAL LAW] (2001); JOHN ZERBY & JOHN YUHONG WANG, AUSTL.-CHINA CHAMBER OF COMMERCE & INDUS. OF N.S.W., SUGGESTIONS FOR IMPROVEMENTS IN THE SUPERVISION OF LAW ENFORCEMENT IN CHINA (2000), available at <http://www.accci.com.au/trade/lawsem.htm>; Bryan Bachner, *Regulating Pollution in the People's Republic of China: An Analysis of the Enforcement of Environmental Law*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 373 (1996); Zhang & Ferris, *Primer*, *supra* note 4, at 10, 235-36; Ferris & Zhang, *WTO*, *supra* note 2, at 457; David Hsieh, *Old Habits Blamed for China's Poor Ecology*, STRAITS TIMES (Singapore), June 6, 2001, at A5, available at 2001 WL 22287590.

¹¹⁴ Interview with Government Official D, *supra* note 98.

Second, the authors set forth their views on selected factors contributing to environmental law implementation challenges in China.

A. Key Law Implementation and Institutional Capacity-Building Developments

SEPA officials recently developed a number of internal administrative measures to guide and support the effective implementation of environmental law. Among these measures, the Administrative Penalty Procedures are worthy of particular review.¹¹⁵ SEPA formulated the Procedures largely in response to the call, from SEPA officials charged with investigating violations of environmental laws, for what is essentially a form of enforcement guidelines.¹¹⁶

The Procedures contain a flow-chart indicating appropriate steps in pursuing administrative penalties (i.e., undertaking enforcement actions) against alleged violators of China's environmental laws. The steps in the flow chart are set forth below in an unofficial English translation.

Establishing a Case

1. The competent [SEPA] departments such as the Departments of Supervision, Pollution Control, and Nature Conservation fill out the "Approval Form for Establishing a Case";
2. The competent departments submit the "Approval Form for Establishing a Case" to the Department of Law and Policy for signature [by the Department of Law and Policy and the competent SEPA department(s)] and approval of the case;
3. The competent SEPA departments should complete establishment of the case within 7 days of receiving the case.

Investigating and Obtaining Evidence

1. The competent departments send investigation staff to the site in question, including representation by the

¹¹⁵ Xing Zheng Chu Fa Gong Zou Cheng Xu (SEPA Feb. 2, 2001).

¹¹⁶ Administrative penalty statistics contained in a recently commissioned SEPA report indicate that approximately 180,000 administrative penalties were enforced during the period 1999–2001. See STATE ENVTL. PROT. ADMIN., REVIEW OF THE ENVIRONMENTAL PROTECTION ADMINISTRATION (Aug. 2002) (draft internal report, on file with authors) [hereinafter SEPA, REVIEW]. The internal report does not provide any details on the individual cases making up the roughly 180,000 penalties. However, one SEPA official involved in the drafting of the report indicated that the number of enforcement actions is growing each year and that the Administrative Penalty Procedures "will soon be an invaluable reference guide for SEPA enforcement officers." Interview with Government Official D, *supra* note 98.

Department of Law and Policy. The investigation should be conducted by at least 2 officials. [Such officials] should . . . show their ID [upon arrival at the site];

2. Investigation observations should be recorded in writing. Questioning [of individuals at the site] should be conducted [one person at a time];
3. If [environmental] monitoring is needed, the monitoring report should be prepared and signed by the monitoring staff and stamped by the monitoring unit.

Penalty Review

1. After investigation, if the decision is made to not impose an administrative penalty, the "Approval Form for Withdrawing a Case" should be completed [by the competent department]. Signatures of [minister-level officials] at the State Environmental Protection Administration shall be obtained in order [to secure] withdrawal of a significant case;
2. The competent departments shall provide their preliminary opinions on [the nature of] the penalty. The Department of Law and Policy shall review the applicable facts and law, provide suggestions for penalties, and submit [these suggestions] to [minister-level officials] at the State Environmental Protection Administration for a final decision.

Notice and Hearing

1. Three days prior to the delivery of the "Decision on Administrative Penalties," investigation staff of the competent departments shall provide the party involved of the [decision to impose administrative penalties] for violations [of environmental laws], the basis of penalty, the [nature of the] proposed penalty, and the party's right to submit a statement and pleading;
2. For [administrative penalties involving] large fines, suspension or shut down orders, or permit withdrawal, the party involved should be provided with notice of the fact that it has the right to a hearing [on the penalties]. The [party should make a] request for a hearing within 3 days of receiving such notice;
3. The hearing should be conducted according to the provisions set forth in the "*Administrative Penalty Law*" and "*Administrative Penalty Methods for Environmental*

Protection”;

4. The hearing should be presided over by the Department of Law and Policy and include participation by the investigation staff from the competent departments.

Issuance of the Administrative Penalty

1. The Department of Law and Policy shall issue a “Decision on Administrative Penalties” based on the result of [the aforementioned] review, and submit [the Decision] for approval according [to SEPA] procedures;
2. The “Decision on Administrative Penalties” shall be [formally] issued within 3 months of the establishment of the case.

Delivery of the Administrative Penalty

1. The “Decision on Administrative Penalties” should be delivered to the party or its agent within 7 days of the issuance of the Decision by Department of Law and Policy;
2. If the party refuses to accept or refuses to sign [the Decision], the delivery person shall invite related individuals to the site, make notes on the reason [that the Decision was not accepted or signed] and the time on the receipt for the Decision, and leave the Decision [at the location of the party or related individuals].¹¹⁷

Implementation of the Administrative Penalty

1. The administrative penalty is effective from the date of delivery of the “Decision on Administrative Penalties”;
2. If the party does not apply for review and initiate litigation within the allotted time period, [SEPA] may submit a request to the people’s court to institute compulsory execution of the penalty or penalties;
3. If the party does not pay a stipulated fine within the allotted time period, [SEPA] may impose on the party a [continuous daily fine constituting] an additional 3% of the total penalty for each day the fine is due.

Recording the Administrative Penalty

1. After completion of a case, the Department of Law and Policy shall prepare a “Completion Report for Administrative Penalty Cases”;
2. After completion of a case, the staff and units that handle

¹¹⁷ This provision is particularly vague. It is possible that “related individuals” refers to the party’s agents.

the case shall submit case materials to the [SEPA] Records Office;

3. After case materials are recorded [with the Records Office], no units or individuals may privately add or remove materials from these records.¹¹⁸

Another key development involves the establishment within SEPA of the “Environmental Emergency and Incident Investigation Center.”

As part of the Chinese government’s long-term efforts to improve implementation of environmental laws, SEPA announced in April 2002 plans to open the Investigation Center. According to the *Circular on the Establishment of the SEPA Environmental Emergency and Incident Investigation Center*¹¹⁹ and our conversations with SEPA officials,¹²⁰ the major responsibilities of the Investigation Center include:

- Investigating and supervising the violations of Chinese law involving environmental pollution and ecological degradation;
- Coordinating resolution of “transboundary” (i.e., one provincial jurisdiction to another provincial jurisdiction) environmental disputes;
- Inspecting of sites involving environmental pollution for possible evidence concerning violations of environmental laws; and
- Assisting SEPA with formulation of policies and standards applicable to the implementation of environmental laws.¹²¹

Under the limits imposed by the *Circular*, the Investigation Center has the authority to hire a maximum of forty-five enforcement officers. SEPA indicated that the near-term goal was to hire thirty such officers. By the end of 2002, the hiring process was completed. While the addition of this many officers dedicated to investigation and enforcement issues is a boon to SEPA’s environmental law implementation capacity, it will by no means suffice over the long term. SEPA’s present personnel hiring authority, not including the individuals retained pursuant to the aforementioned *Circular*, is limited to two hundred by State Council Regulation.¹²²

¹¹⁸ Xing Zheng Chu Fa Gong Zou Cheng Xu [Administrative Penalty Procedures] (SEPA Feb. 2, 2001).

¹¹⁹ STATE ENVTL. PROT. ADMIN., GUAN YU ZU JIAN GUO JIA HUAN JING BAO HU ZONG JU HUAN JING YING JI YU SHI GU DIAO CHA ZHONG XIN DE TONG ZHI (2002) [hereinafter SEPA, CIRCULAR].

¹²⁰ Interview with Government Official C, *supra* note 93; interview with Government Official D, *supra* note 98.

¹²¹ SEPA, CIRCULAR, *supra* note 119.

¹²² See Guo Jia Huan Jing Bao Hu Zong Ju Zhi Neng She Zhi, Nei She Ji Gou He Ren Yuan Bian Zhi Gui Ding [Regulation on Responsibility Allocation, Organizational Structure and Personnel Limitations of the State Environmental Protection Administration] (State

The establishment of the Investigation Center represents an institutional response on SEPA's part to repeated calls from the regulated and regulating communities alike for improved implementation of environmental laws in China. Senior SEPA officials commented that they hope this new institution will be the first in a series of capacity-building initiatives aimed at reinforcing the links between China's environmental laws and on-the-ground compliance with those laws.¹²³

Another initiative that reaches beyond but may reinforce the implementation of environmental laws in China is the State Economic and Trade Commission's establishment in 2002 of "general counsel" positions within "key state-owned enterprises."¹²⁴ Pursuant to this initiative, "key state-owned enterprises" designated by the State Economics and Trade Commission (or its successor) are required to establish the position of general counsel with overall responsibility for assuring the organization's compliance with China's laws.

It is still too early to predict whether the initiatives discussed above will be successful. They serve, however, as heartening evidence of China's acknowledgment of the need to bolster the existing environmental law implementation regime. They also represent a belief on the part of the Chinese government, however transient at this point, in mechanisms that give force to China's multitude of legal texts. This manifestation of the government's confidence in the legal system may serve as sufficient incentive to China's young generation of regulatory officials to advocate further such initiatives.

B. Factors Contributing to Implementation Challenges

There are numerous reasons that environmental laws face significant implementation challenges in China. The authors have set forth below examples from their work with government officials, multilateral development institutions, foreign investors, citizen groups, and academics in China that we believe represent key factors contributing to these challenges. In addition to these factors, where possible and appropriate, the authors have identified developments evidencing progress toward creating a legal culture and regime conducive to the effective implementation of Chinese environmental laws.

Council June 23, 1998).

¹²³ Interview with Government Official A, *supra* note 5; Interview with Government Official D, *supra* note 98.

¹²⁴ See Guiding Opinions on Pilot Work to Establish an Enterprise General Counsel System Within Key State-Owned Enterprises [Guan Yu Zai Guo Jia Zhong Dian Qi Ye Kai Zhuan Qi Ye Zong Fa Lu Gu Wen Zhi Du Shi Dian Gong Zuo De Zhi Dao Yi Jian], (State Econ. & Trade Comm'n, Party Org. Dep't, Party Enter. Comm., Party Fin. Comm., Ministry of Pers., Ministry of Justice, and State Council Office of Legal Aff. July 18, 2002). The responsibility for overseeing this initiative has been passed to the State Development Reform Commission after the March 2003 disbanding of the State Economic and Trade Commission.

1. Local Government Protectionism

This factor involves SEPA's lack of direct control over local government environmental protection authorities. Local government officials are often extremely sensitive to potential interventions by national government authorities that could potentially contravene their decisions, for example, regarding project environmental approvals. There are two reasons in particular for this sensitivity.

First, provincial governors and municipal mayors appoint the directors of their local environmental protection bureaus (EPBs). Further, the provincial and municipal treasuries are primary financial resources supporting the activities of the EPBs. Thus, if a governor or mayor, for example, has supported a particular project or activity and that activity is later hindered or halted by SEPA intervention, it is quite possible that EPB officials will suffer as a result.

Second, national government intervention by authorities such as SEPA in a local environmental matter is sometimes characterized as a "failure" on the part of the EPB officials involved in the matter. At the very least, such interventions are often viewed as, in the words of one local environmental official, "a bitter root to swallow."¹²⁵

SEPA influence at the local government level is likely further complicated by difficulties associated with accessing information on local government environmental lawmaking activities. As noted earlier, local government authorities are required by law to submit copies of new or amended laws to SEPA for the record, but it is likely that this requirement is often overlooked.¹²⁶

Largely in response to these challenges, SEPA has engaged in a number of efforts in recent years aimed at building consensus within the Chinese government for changes that would allow SEPA to exercise some level of direct control over

¹²⁵ Interview with Government Official I, Xiamen EPB (July 15, 2001).

¹²⁶ See text accompanying *supra* notes 92–93. It is interesting to compare the situation in China with that in the U.S. concerning the method and extent to which national environmental authorities are informed of local government environmental lawmaking developments. At the U.S. Environmental Protection Agency (EPA), the general approach to obtaining such information ranges from mandatory to *ad hoc* methods:

1. Each EPA programmatic office (air, water, etc.) monitors State activity for that area. It varies from statute to statute whether the state has to report changes.
2. EPA has a partnership with the Environmental Council of the States (ECOS). EPA obtains information on state activity from ECOS, if and as available.
3. EPA obtains information from the Office of Congressional and Intergovernmental Relations. This Office supports an entire group that monitors state activities.
4. EPA obtains information from the EPA Office of the General Counsel. This Office monitors state activities involving cross-cutting issues.

Interview with M. Moore, EPA Office of Administration and Resource Management (Sept. 24, 2002).

EPB activities. Since late 2001, prior to the appointment of provincial EPB directors, provincial governors are required to consult with SEPA on the planned appointment of such officials. Another effort is the commissioning of a report that highlights the fact that SEPA's inability to intervene more directly at the local government level to ensure effective implementation of national environmental laws.¹²⁷ SEPA circulated this report prior to March 2003 with the goal of building sufficient consensus among national government officials to support legislative changes that are necessary to secure SEPA authority to undertake such interventions.¹²⁸ The influence of the report was apparently not sufficient to prompt significant changes in SEPA's administrative authority, but the fact that the report highlighted the need for such changes and was reviewed by China's seniormost officials will perhaps facilitate helpful reforms in the not-so-far future.

2. Public Participation and Information Access

Participation in environmental law development and implementation by members of civil society face a number of barriers. The most significant of these barriers involves the Chinese government's sensitivity to activities that government authorities might perceive as provoking collective resistance or criticism of government initiatives.¹²⁹

Paradoxically, although such activities may provoke a negative government response, a growing number of government authorities are undertaking efforts to promote the solicitation of public comments on draft laws,¹³⁰ or are including public comment provisions in legislation.¹³¹ Representatives of citizen organizations,¹³² the

¹²⁷ SEPA, REVIEW, *supra* note 116.

¹²⁸ Interview with Government Official J, SEPA (July 3, 2002).

¹²⁹ See, e.g., Ferris & Zhang, *WTO, supra* note 2, at 451 n.115 (describing circumstances in which the development of citizen support, including legal services focusing on citizen labor rights' counseling, would attract strict government scrutiny).

¹³⁰ See *id.* at 443-47 (describing examples of the publication by various Chinese government authorities of draft laws for public comment).

¹³¹ See, e.g., *Zhong Hua Ren Min Gong He Guo Li Fa Fa* [Law of the People's Republic of China on Legislation] art. 35 (2000) (stating that the Standing Committee shall distribute draft statutes to concerned organizations and individuals to "solicit opinions"); *Jian She Xiang Mu Huan Jing Bao Hu Guan Li Tiao Li* [Regulations on the Environmental Management of Construction Projects] art. 15 (State Council Nov. 29, 1998) ("Construction units should, in preparing the environmental impact statement, solicit the views of the units and residents in the locality wherein the construction project is located.").

¹³² Environmental citizen groups of various types are playing an increasingly important role in China, albeit largely via educational endeavors rather than advocacy aimed at government activities. See Ferris & Zhang, *WTO, supra* note 2, at 450-51. The number of such groups is increasing. This perhaps belies assumptions that such groups are rare in present-day China. See CHINA DEV. BRIEF, 250 CHINESE NGOS: CIVIL SOCIETY IN THE

media,¹³³ corporations¹³⁴ and other members of civil society are engaging government environmental authorities at all levels to lodge complaints via official environmental "hotlines,"¹³⁵ engage officials on compliance matters, and provide input on government environmental initiatives, among other aims.

Perhaps two of the most promising developments in the area of public participation and information access are SEPA's new *Circular on Issuing the "Management Methods on Administrative Transparency in Environmental Protection Authorities"* (SEPA Transparency Circular)¹³⁶ and the recently proposed draft Measures of Shenyang Municipality for Public Participation in Environmental Protection (Draft Measures).¹³⁷

The SEPA Transparency Circular represents a significant milestone for those monitoring China's efforts toward freer access to government information in this post-WTO membership era. Among other things, SEPA Transparency Circular lists numerous types of information that environmental authorities should make available to the public, including:

- environmental quality status information;
- regulations, standards, and other guidance documents issued by the environmental authorities;
- long and short-term planning information; and

MAKING (2001).

¹³³ Members of the media have been involved in an environmental "inspection" campaign initiated by the NPC in 1993. In this campaign, entitled the "China Environmental Protection Campaign for the Century," the NPC encouraged members of the print, audio, and visual media to commend organizations for their good environmental protection efforts and to expose and criticize organizations responsible for weak environmental protection efforts or the destruction of the environment. The aim of this campaign is to develop grassroots opinions supporting more vigorous environmental protection efforts. During the past nine years, the campaign has attracted the participation of over six thousand reporters who have published nearly fifty thousand articles and reports, spurring strong social responses from citizens and government officials in favor of environmental protection efforts. For example, newspaper reports on the serious pollution of China's Huai River drew the immediate attention of central government authorities, which promptly implemented a program to address the River's contamination. See *Beijing Orders River Clean Up*, FIN. TIMES (London), Aug. 25, 1995, at 6; *China Seeking Overseas Cooperation in Combatting Water Pollution*, XINHUA ENG. NEWswire, May 7, 1996, 1996 WL 10244868; *Clean-Up Call for China's Rivers*, XINHUA ENG. NEWswire, May 8, 1996, 1996 WL 10245400.

¹³⁴ See Catherine Gelb & Virginia A. Hulme, *Ensuring Health and Safety in China Operations*, CHINA BUS. REV., Jan.-Feb. 2002, at 42 (indicating that "GE sites in China interact regularly with local environmental protection bureaus (EPBs) and labor bureaus").

¹³⁵ See *Environmental Protection Hotline Debuts in China*, XINHUA ENG. NEWswire, Jan. 9, 2001, 2001 WL 4513669.

¹³⁶ Guan Yu Fa Bu "Huan Jing Bao Hu Xing Zheng Zhu Guan Bu Men Zheng Wu Gong Kai Guan Li Ban Fa" De Tong Zhi (SEPA Jan. 20, 2003).

¹³⁷ Shen Yang Shi Huan Jing Bao Hu Gong Zhong Can Yu Ban Fa (Cao An undated).

information regarding approvals and inspections associated with the environmental impact assessment of construction projects.

While the SEPA Transparency Circular is indeed a welcome development, it is worth pointing out that the likely effects and implementation of the Circular remain unclear. For example, the Circular carves out some potentially broad exemptions from the list of information that should be made available to the public. Exempted information includes information involving state secrets or information that, in SEPA's opinion, is not of "practical value" to the public.

At the local level, the Shenyang government developed the Draft Measures with the assistance of training workshops and expert commentary provided via the American Bar Association's Asia Law Initiative. This Initiative presently focuses on training sessions involving the participation of government officials, citizen group representatives, academics, and private attorneys interested in or focusing on environmental law matters. These sessions promote the adoption of various practices that are typically associated with rule-of-law systems and have been favorably received by Chinese participants.

Among other features, the Draft Measures specify in detail the public's rights and interests as these related to environmental protection efforts.¹³⁸ Similar to the approach taken with the SEPA Transparency Circular, the Draft Measures also provide details on the kinds of environmental information that may be accessed by members of the public. For instance, the Draft Measures indicate that such information includes discharge and treatment information from polluting industrial facilities and information on the use of fees that the government levies for the discharge of pollutants.¹³⁹

All of the information-access rights included in the Draft Measures may not survive the legislative process, where more conservative elements of the government often advocate a more restrained approach; however, the Draft Measures and the associated training experiences may draw inspiration from the SEPA Transparency Circular and may serve as models for similar initiatives in other local jurisdictions. The more accustomed local and national officials are to these provisions, the more likely that greater information access provisions will pass their scrutiny in the future.

3. Current State of the Private Practice of Environmental Law

Environmental lawyers in China are in short supply. Often, individuals with expertise in this area of law are predominantly associated with academic institutions or government organizations. Further, individuals with formal law school training still represent a minority in the legal departments of government environmental

¹³⁸ See *id.* art. 4.

¹³⁹ See *id.* art. 9.

institutions.¹⁴⁰ For example, as of this writing, the SEPA Law and Policy Department is staffed with fourteen officials, only five of whom have law degrees.

The private bar in China is not ignoring this area of law, increasingly looked upon as a critical component of corporate operations and investment risk management efforts in China. In October 2001, a subcommittee on environmental protection and resource conservation law was established within the All-China Lawyers Association. At present, there are roughly fifty lawyers who are members of this subcommittee. Doubtless, the presence of a growing environmental bar within China that is committed to understanding China's complex environmental legal regime and engaging environmental officials on their client's legal matters will greatly reinforce the role of laws and legal viewpoints within the environmental administration, to the benefit of the environmental regulatory system as a whole.

4. Law Drafting and Technical Infrastructure for Implementation of Environmental Laws

In a number of situations, compliance with Chinese environmental laws requires access to sophisticated infrastructure that does not exist, or does not exist in sufficient quantity and quality. For instance, the Law on Prevention of Environmental Pollution Caused by Solid Waste essentially requires "cradle to grave" (i.e., generation to disposal) management of hazardous wastes.¹⁴¹ Hazardous waste facilities in China that can accept such wastes and treat them in an environmentally sound fashion are in short supply, however.¹⁴² This particular situation is indicative of what may be a slightly "aspirational" approach to the drafting of environmental laws. This approach disregards the immediate practicability of the law in question in favor of targets that are environmentally attractive, but largely unattainable using existing infrastructure or technology.

A further example of this approach to law drafting exists in the Regulation on Mercury Content Limitation for Batteries.¹⁴³ The Mercury Content Regulation specifies, among other things, a mercury content limitation for certain batteries of 1 part-per-million (ppm) by January 1, 2005.¹⁴⁴ While the very low target of 1 ppm mercury content may be appealing to regulatory authorities as a uniquely lofty

¹⁴⁰ This situation also holds true for the legal departments of other governmental agencies involved in environmental protection-related efforts, such as the legal department of the Ministry of Public Health.

¹⁴¹ See Gu Ti Fei Wu Wu Ran Huan Jing Fang Zhi Fa art. 42-58 (1995).

¹⁴² See, e.g., *Government to Spend 2.4bn Dollars on Hazardous Waste Treatment Removal*, BBC MONITORING, Feb. 15, 2002 ("China is spending billions of dollars to quell the flow of the millions of tons of hazardous waste which are discharged into the environment every year"), 2002 WL 14248848.

¹⁴³ See Mercury Content Limitation, *supra* note 110.

¹⁴⁴ *Id.* art. 6.

requirement, an approach that would facilitate compliance across a broad range of technical abilities (by mandating omission rather than abatement) would be to prohibit the intentional addition of mercury to battery products.

Regardless of whether legislative or regulatory officials employ what appears to be an aspirational approach in their lawmaking activities, the gap between legal text and implementability that is sometimes evident in Chinese environmental laws will remain unless significant achievements are made toward minimizing the numerous other challenges to the implementation of Chinese laws.

While legislative or regulatory officials may be aware of the weaknesses of this law drafting approach, they are often driven to promulgate new laws rather than improve the effectiveness of existing laws. In the current government promotion regime, the development of new laws represents a more readily identifiable sign of achievement (at least for the law drafters' superiors) than improvements in the implementation of existing laws.

That being said, it appears that regulatory officials are responding to calls to bridge the gap between the requirements of Chinese laws and the ability to implement these laws. For instance, Chinese officials recently issued a number of statements that outline goals to facilitate the management of hazardous wastes. These goals, as articulated by SEPA, (the now-defunct) State Economic and Trade Commission, and Ministry of Science and Technology representatives, include the proper storage and safe treatment or disposal of all wastes generated in "key" cities by the year 2005.¹⁴⁵ The goals also include the treatment and disposal of hazardous wastes in a benign manner in all cities in China by the year 2015.¹⁴⁶ To help realize these goals, China reportedly plans to spend more than \$2.5 billion on hazardous waste management.¹⁴⁷

5. Personnel Resources of Key Regulatory Authorities

Much has been said regarding the limitations of regulatory authorities, such as SEPA, with primary responsibility for advancing China's environmental protection goals.¹⁴⁸ These limitations may create situations, for instance, in which SEPA is unable to prioritize the allocation of meager personnel and other resources to address critical issues. It is a common practice for regulatory authorities that determine they have insufficient personnel to address a particular responsibility to "borrow" staff from advisory or supporting technical organizations. The agencies are rarely asked to pay the salaries of such "borrowed" staff. However, in the reality of the Chinese

¹⁴⁵ See Technical Policy for the Prevention and Control of Hazardous Waste Pollution (SEPA, State Econ. & Trade Comm'n, and Ministry of Sci. & Tech. Dec. 17, 2001).

¹⁴⁶ *Id.* § 1.3.

¹⁴⁷ *Id.*

¹⁴⁸ See, e.g., *supra* note 122 and accompanying text.

administrative and business environment, the agency would be obliged to respond in kind with some sort of assistance to the organization that helped the agency out when it was in need. In SEPA's case, these situations can result in an allocation of resources (project-related or otherwise) to fulfill these obligations that might, if SEPA did not need to rely on borrowed staff, be otherwise directed to accomplish what the regulated community and Chinese leaders may believe are more critical regulatory tasks.

IV. CONCLUSION: MOVING TOWARD MORE EFFECTIVE IMPLEMENTATION

China's environmental problems have prompted significant strides toward the development of a robust system of environmental protection laws. To the concern of China's lawmakers and regulatory authorities, as well as members of the regulated community, widespread, meaningful, and effective implementation of these laws is largely still an aspirational goal. There are, however, numerous signs that China's lawmakers and regulatory authorities are reaching out to a "rule of law" approach that would help achieve more effective implementation of environmental protection laws.¹⁴⁹

During the early and mid-1990s, senior lawmakers and drafters in the Chinese government were very hesitant to receive training, advice, and support from the international community.¹⁵⁰ Many such officials viewed such overtures from members of the international community as attacks or otherwise negative influences on China's sovereignty.¹⁵¹

Only a few years later, in the late 1990s, the change in the tone of discussions at the NPC was evident.¹⁵² Law drafters and their superiors were becoming increasingly comfortable with the idea of inviting foreign experts to testify, comment, or otherwise conduct research to facilitate NPC law drafters' efforts.¹⁵³ Gradually, many NPC law drafters viewed this practice as a way to make life easier and improve the quality of the draft legislation.¹⁵⁴ This was quite evident during the early efforts of the NPC Environmental Protection and Natural Resource

¹⁴⁹ The goal of making environmental law more effective in Asia, including China, has been discussed by government, citizen, and other stakeholders for many years. *See generally* MAKING ENVIRONMENTAL LAW IN ASIA MORE EFFECTIVE (William Barron & Jill Cottrell eds., 1996).

¹⁵⁰ Reflections of Dr. Hongjun Zhang, former Legislative Director at the NPC Environmental Protection and Natural Resource Conservation Committee (Sept. 24, 2002).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* Examples of early initiatives involving foreign experts include the drafting of China's Environmental Noise Pollution Control Law and the development of amendments to the Land Administration Law.

¹⁵⁴ *Id.*

Conservation Committee to exchange views with foreign experts on significant environmental legislative proposals.¹⁵⁵

Now, in the twenty-first century, the practice of engaging outside resources to assist with background research, training and other matters conducive to better lawmaking does not even raise eyebrows within the NPC legislative body, the NPC Committees, the State Council, and many agencies under the State Council.¹⁵⁶ Indeed, for many senior environmental lawmakers, the ability to indicate that a law drafting effort benefited from the consideration of international models or experience is now seen to add "weight" to a legislative proposal that may help persuade other legislators to support the law.¹⁵⁷

New opportunities for the regulated community, citizens and organizations alike, to engage the government with respect to best practices environmental protection law concerns will likely reinforce many government officials' perceptions of the benefit of these interactions.¹⁵⁸

Major shifts in perception such as these, as well as new opportunities for China to critically assess suitability of the current state of its legal regime, such as acceding to the World Trade Organization¹⁵⁹ and hosting the 2008 Olympics,¹⁶⁰ will encourage "deeper roots" for China's wealth of environmental laws.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ These interactions have included discussions between citizens' groups and the Chinese government regarding recycling initiatives and discussions between multinational corporations and the Chinese government on the advantages of and approaches for undertaking environmental, health, and safety audits of the corporations' supplier companies. See *Clearing the Air: The Human Rights and Legal Dimensions of China's Environmental Dilemma: Roundtable Before the Cong.-Exec. Comm'n on China*, 108th Cong. 2-16 (Comm'n Print 2003) (statements of Elizabeth Economy, Richard Ferris, Brian Rohan, and Jennifer Turner), available at <http://www.cecc.gov/pages/roundtables/012703/index.php>.

¹⁵⁹ See Accession of the People's Republic of China, WTO Doc. No. WT/L/432 (Nov. 23, 2001), available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc>; Press Release, World Trade Org., WTO Ministerial Conference Approves China's Accession (Nov. 10, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr252_e.htm.

¹⁶⁰ On July 13, 2001, the International Olympics Committee (IOC) voted to award Beijing the honor of hosting the XXIX Olympics in 2008. *Beijing Wins Bid to Host 2008 Olympics; Landmark IOC Vote Brings Games to China for the First Time*, PR NEWswire (July 13, 2001), available at WL Prwire Database.