

# The Paper Panda

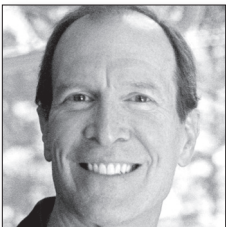
*China as an emerging superpower makes for an engaging story line, but already-legendary pollution and rampant natural resource consumption highlight the central government's weakness as it struggles to catch up to the West. A world class environmental protection system is unlikely without improvements in the country's legal and administrative systems*

**Samuel A. Bleicher**

**V**isitors to China quickly learn that its cities are choking on air pollution and that the water in most places is unsafe to drink. Other environmental problems, though not as obvious, are equally severe. Deforestation and desertification are rampant. Resources are extracted without mitigation or restoration. Agricultural practices are reducing productivity while rendering prime farmland unfit for cultivation. Knowledgeable analysts, including the country's top officials, recognize that current practices are highly undesirable, frequently uneconomical, and almost certainly unsustainable.

Outsiders tend to think that the problem is the leadership's lack of commitment to environmental protection; that is, that the words and plans and laws are not intended to be taken seriously. The reality is more complex, but it does not lead one to optimistic conclusions.

China is and probably always will be a poor country



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on a per capita basis, with a weak central government facing enormous challenges in every sphere, and with an orientation toward hierarchical, straight-jacket plans with poorly defined objectives, rather than regulation administered by independent bureaucrats, prosecutors, and judges. Changing these fundamental conditions to improve environmental protection will be difficult at best. The most promising near-term development is the dramatic growth in citizen activism among the newly sophisticated populace, which is making public participation and honest government decisionmaking increasingly essential.

China's system of environmental regulation must be understood in the context of the overall development of its economy and society, and in the context of its traditions and history. China is in every sense a world under construction, with its physical, social, economic, legal, and institutional blueprints being drawn and revised daily as the construction proceeds. The scale of the transformations taking place in every dimension of social, economic, and political life is difficult even for the most knowledgeable observers to comprehend fully. China's urban transformation is creating an enormous need for new government programs and institutions to replace the traditional agrarian social networks that are rapidly declining in the newly mobile society. Environmental degradation is only one of many problems that threaten the functioning of the new China: the disparity in income distribution exceeds even that of the United States; the government provides virtually nothing in the way of a social safety net; and most people have minimal access to health care.

The American media are filled with impressive-sounding statistics about China's economic, social, and military progress that bolster the image of "emerging



superpower.” It makes a compelling story line, reinforced by the propaganda image that the current Chinese leadership would like us to accept — much more dramatic than to say that China is slowly emerging out of feudalism and desperately hopes to use the fruits of western technology to pull its people away from the edge of starvation. The statistics cited in our media are typically correct, but the implication of great strength largely depends on the readers’ ignorance of comparable U.S. and global figures:

- *China is the world’s third-largest economy and has been growing consistently at a 10 percent annual rate for more than a decade.* Though China’s gross domestic product is already almost one third the size of the U.S. economy, on a per capita basis it is only one-fifteenth as large. When energy consumption and other indicators are factored in, China’s longer-term growth rate is probably more like 6 percent. If environmental degradation is included in the calculations, China has had essentially no net growth in recent years. The economic limitations imposed by environmental and natural resource deficiencies are difficult to quantify and are therefore rarely included as real constraints in calculations of China’s future development. Even assuming that China’s claimed 10 percent rate could continue uninterrupted indefinitely, China would just catch up with the United States GDP in about 20 years — but not nearly approach the United States in GDP per capita. The gap between the average western citizen and the average Chinese citizen will not close for the indefinite future.

- *China’s defense budget has increased by about 18*

*percent in each of the last several years.* The Pentagon estimates 2006 Chinese military spending at almost \$90 billion, but most other estimates are lower. The U.S. military appropriation for fiscal year 2007 was \$440 billion plus \$50 billion for Iraq and Afghanistan. Against the U.S., Japanese, and Taiwanese forces, a war would be a catastrophe for China. And a long-term military engagement could create just the kind of domestic economic dislocations and shortages that (after the initial burst of patriotic enthusiasm) would feed the dissatisfaction that the regime rightly fears most.

- *Beijing has three million vehicles and is adding 1,000 cars a day to its already gridlocked streets.* The capital’s metro area of 16,000 square kilometers, with a permanent population of almost 13 million (plus another 4 million “transient” residents), has about three million vehicles. But the Los Angeles metro area, with a similar population but one-quarter the area, has over seven million vehicles. Nationally, China has about 22 vehicles per 1,000 people, while the United States has 764 vehicles per 1,000. The urban gridlock reflects the serious lack of transportation infrastructure, not a large number of vehicles per capita.

- *China is responsible for about one-third of the increase in worldwide demand for oil in recent years.* But its total consumption is only one-third as much as the United States’, and on a per capita basis, it consumes only one-tenth as much as the United States. Unquestionably the demand for oil and other natural resources by China, along with India and other developing countries, has contributed to the outstripping of supply on a worldwide basis. This growing demand may

well exceed what the planet can deliver for long even with dramatic price increases. But the world's growing resource consumption would hardly be sustainable even without China.

## Weakness at the Center

**W**hen judged by its ability to organize a complex modern, predominantly urban society, China's central government and its economic, social, political, and legal institutions are not strong. Beijing has built an export-dependent economy ill-suited to meeting domestic needs, and it is coming up against insurmountable environmental and natural resource obstacles. It will always be struggling to produce sufficient food to stay beyond subsistence. The supposedly all-powerful Communist government is struggling to end its substantial subsidies of gasoline, electricity, and water consumption — as does the United States, it fears strong popular opposition. With world oil and food prices rising, these issues will become even more difficult.

The central government has succeeded over the last 30 years in unleashing a largely unregulated, entrepreneurial economic engine. It claims it is now working to remedy the most corrosive economic, social, and environmental consequences. But so far it appears unable to tame the runaway horse — that is, to address effectively the adverse effects of the single-minded focus on production and profit targets. It may be able to lock up or kill off several thousand dissidents, but controlling dissidents is a much easier task than designing and implementing modern economic, regulatory, and social welfare institutions in a society that has almost none. So far it has not demonstrated progress that matches the magnitude of its needs.

In the environmental sphere, the national government is acting to mitigate the most highly visible problems. It expended vast sums, directly and through destruction of existing capital investment, to rebuild or dismantle environmentally unredeemable manufacturing facilities in time for the Olympics. Huge amounts are also being invested to divert water from current agricultural uses in central China to supply the growing cities of dry northern China. This summer the State Environmental Protection Administration, its national environment ministry, denied permits to build new coal-fired power plants to a publicly traded utility because its existing plants are not meeting environmental standards. Especially where energy-related issues are involved, environmental and economic improvements can often go hand in hand.

But these steps hardly begin to resolve the country's vast and continuing environmental decline. A sig-

nificant degree of skepticism about the commitment to environmental protection seems justified when one sees that the SEPA has less than 500 employees, compared with the U.S. Environmental Protection Agency's 12,000. An instructive example of the central government's limited capability has been the response to foreign complaints about food and drug contamination and mislabeling. It executed its food and drug commissioner for taking bribes, though such corruption is by no means uncommon and may not have been "newly discovered." Later, the government quietly agreed to allow the U.S. Food and Drug Administration to place American inspectors in its plants in 12 industrial sectors to provide "technical assistance" on inspection methods.

In other words, it asked foreigners to help ensure compliance with its own legal standards. Why? Because its own oversight system is incapable of overcoming the effects of confusion and connections. The dramatic increase in wealth has created more opportunities and incentives for corruption. The high visibility of some of this malfeasance — poorly compensated expropriations of private property to help developers, for example — frequently creates a public backlash.

## The Role of Law

**A**mericans instinctively turn to legislative, regulatory, administrative, and law enforcement machinery when an environmental or public health problem emerges. We may be slowed (but sometimes dramatically benefited) by our dual federal and state legal systems, and by due process of law. But typically reforms are adopted, loopholes are closed, and miscreants are punished.

The situation in China is quite different. The national government actually has adopted satisfactory, sometimes very stringent, laws addressing environmental quality, as well as wages and working conditions, child labor, food and drug safety, and intellectual property protection. A cultural tradition of following directives from the authority in Beijing, combined with the political ambitions of rising party leaders, encourages conformity, or at least lip service. But the real impact of these laws is far less than an American observer would assume.

Many provisions of these laws lack the necessary precision, resorting instead to hortatory guidance and seemingly self-evident requirements. The 2003 Administrative License Law, for example, attempts to cover the whole gamut of permit administration — it prohibits officials from taking bribes or conditioning the issuance of permits on the use of certain suppliers; charges supervisory agencies to correct front-line administrators' mistaken decisions; and calls for hear-

## Different Operating Systems

In Washington and Beijing, conference-goers speak the global vernacular of governance — English terms such as “rule of law,” “non-governmental organization,” “public participation” — but meanings often differ from person to person. Those who would transplant American law to China must know how to translate between the “operating systems” which give common words local meaning. American lawyers talk about the need to “make law work,” but the translation in China today might be “making the plans work.”

China and American operating systems share dual principles — pragmatism and stability. Americans understand pragmatism; Charles Sanders Peirce and William James coined the term. China (where the saying goes, “Black cat, white cat it makes no difference as long as it catches mice”) has been a champion practitioner of the pragmatic. But concepts of stability differ.

In China, stability means strong central authority, with no separation of powers; China’s law tradition, from ancient legalism to civil and socialist, fits the top-down mold. America’s Founding Fathers, per Federalist Ten, premised stability in free multiplication of factions. The common law tradition, with bottom-up citizen-court lawmaking and enforcement, fits within this premise.

In China, there are now many environmental laws, but government plans provide requirements (targets or *mu biao*) which are given teeth through performance incentives to responsible officials. For example, the key de facto climate change requirement is a plan target, not a law. The energy saving (*jie*

*neng*) target in the Five Year Plan is imposed through agreements (*zeren zhuang*) with provinces and then with the top emitters. The Five Year Plan also targets sulfur dioxide and chemical oxygen demand but myriad local plans target a host of further items, including local nuisances such as restaurant noise.

Plans are legal (i.e., provided for by Constitution) but not law (i.e., as defined in the law on legislation). In comparative function, perhaps, the plan is analogous to American laws enforceable only by the government on itself, as for instance where there is no practical citizen standing. Indeed, since China’s heavy industrial pollution is still often from state enterprises, enforcement may be largely by government and against government — with attendant tensions where stability is pegged to growth of gross domestic product.

The law-plan distinction goes to the heart of environmental agency authority. In the United States, once Congress makes a law, the Environmental Protection Agency (per *Chevron*) is deferred to for meaning. In China, plan targets are set by the key authority at each level of government; environmental agencies, which must abide by the targets, advise but do not set them. (In the United States, government lawyers are omnipresent; in China today, environmental agencies have few lawyers to compare plans with law).

But similarities between operating systems exist. In both countries, key requirements are set at the

center, with enforcement through agreements with local governments. In both countries civil service workforces are supplemented by large non civil service staff (*shi ye danwei* in China, contractors in the United States.) In both countries interlocal competition drives environmental protection. In the United States, however, and consistent with the common-law, bottom-up operating system, the government paid workforce is supplemented by citizen oversight, with citizen suit and information laws to give bite.

In sum, the translation between law and plan is a key to making China’s environmental law work — and at least two approaches present themselves.

First, from the top, plans and laws may be systematically reviewed and linked — as the new water law does. Second, from the bottom, and drawing on the rootedness of the plan in the government’s own targets and the force of intergovernmental competition, citizens might, drawing on the tools of information-based environmental regulation in America, shine comprehensive light on targets and their implementation. Drawing on the logic of information-based regulation, and China’s new open information law, plan targets might be given further basis and bite and perhaps even promote a race to the top.

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ings on “matters of vital importance involving public interests for the granting of administrative permission which the administrative department believes need hearing.” Fully implemented, this law would clearly be an improvement over much existing practice, but it still allows vast uncontrolled administrative discretion. The 2002 Law on Promotion of Cleaner Production has an even more aspirational character.

More fundamentally, independent institutional mechanisms to add specificity and ensure compliance are largely absent. Resort to the legal system is culturally disfavored, and the central government has not effectively empowered judges and prosecutors to enforce national laws. The government is led by engineers, not lawyers, and their approach to problems reflects their training. Chinese legal scholars, unlike their government, understand that the legal code is not just another highway to be built, but an evolving, organic tool to accomplish society’s goals. The government’s current plan for reform of the legal system calls for the National People’s Congress to “complete” the civil code by 2010.

The Chinese constitution and civil law system do not countenance judicial review, which is reserved to the national State Council and Supreme People’s Court, and judicial decisions cannot provide authoritative, binding interpretations or clarifications. The provincial governments control the budgets of regional criminal and civil justice institutions, and their influence on specific decisions is widely acknowledged. Lower court judges and prosecutors are evaluated for retention and promotion by the provincial procurator’s office (analogous to a state attorney general’s office but with much broader authority). They may be retained or dismissed based on their cooperativeness in individual cases as much as on their legal competence. They have no assured tenure or anything akin to judicial independence.

The provincial governments are in turn strongly influenced by the local party, which “represents the whole people,” in the official party rhetoric. Local officials and party leaders too often benefit professionally (and sometimes personally) from the success of local profit-making enterprises. Given the emphasis on economic growth, they often have little incentive to support law enforcement if it will slow or undermine the operations of a significant local enterprise.

## Laws vs. Plans

**A**nother fundamental structural weakness in Chinese environmental regulation is the uncertain legal significance of the government’s five-year plans and their relationship to the overlapping legal re-

quirements. As in other Communist states, Chinese economic activity was, and to a significant extent still is, dominated by a comprehensive social and economic planning process. The national plans are adapted and applied by provincial and industrial managers. They control investment and provide targets for production, infrastructure development, and related economic activities, including capital investment in environmental protection. Unlike the Clean Air Act’s state implementation plans or state coastal zone management plans, these regional plans are not evaluated against specific regulations or subjected to litigation to determine their correspondence to national plans.

Current national plans call for dramatically stronger environmental protection measures along with continued economic growth, but the legal enforceability of these documents is doubtful. Moreover, planning documents, even more than legislation, are often written in vague, qualitative, “balanced” language that would make “violation” an elusive concept. Local governors and business managers, who are often mostly interested in advancing immediate economic growth, are able to downplay environmental protection or worker and product health and safety guidelines. Without any separate legal enforcement mechanism, failure to meet the plan’s environmental directives is unlikely to occasion adverse consequences for local leaders and managers if economic targets are met and no scandal emerges.

While the Chinese constitution and civil code say that the courts are open to everyone, anecdotal reports indicate that even ostensibly ministerial processes are sometimes influenced by political perspectives. Filing a complaint with the court clerk can meet recalcitrance if the claim might create public controversy. Outspoken challengers sometimes face trumped-up criminal charges, arrest, or confinement — even when paralleled by government action to resolve the problem and thus keep the broader public happy. Other responses can include severing communications lines used to express opinions or organize public actions.

The picture is not uniformly bleak, however. In recent years nongovernmental organizations devoted to environmental protection have emerged. They are pressing the government and the judicial system to take action against the most egregious pollution and resource degradation. While there have been successes, the small scale of these organizations and the ever-present threat (and too-frequent reality) of reprisals place serious constraints on their activities.

Direct citizen action by an increasingly sophisticated middle class has had significant impacts in

some highly publicized cases through demonstrations, marches, and similar public events, even where litigation would likely be impossible or unproductive. In the absence of mechanisms to ensure lawful public participation in the formal decision process that absorb the energy of dissatisfied citizens, public unhappiness with local decisions can easily lead to uncontrollable spontaneous opposition.

Recent events show the government's difficulty in controlling protests. The widespread availability of internet and cell phone communication has made protests more difficult to prevent. For example, unauthorized rallies in Shanghai opposed a new rail line through a middle class residential neighborhood. Cell phone text messages encouraged recipients to "go shopping" at a certain time and place; crowds appeared, made news, and dispersed before official "crowd control" or arrests were possible. In Xiamen, a citizen march successfully demanded public hearings about pollution threats from a proposed chemical plant. A recent riot in Weng'an County in Guizhou in response to the alleged cover-up of a rape-murder ended in the destruction of local government offices. Regional officials reportedly acknowledged that the riot also reflected public unhappiness with the local government as a result of its self-interested handling of mining and economic development decisions. Aside from the actual damage in such demonstrations and riots, local leaders are sensitive to the loss of face occasioned by the visible and often widely publicized disruption of social harmony. From the perspective of the more senior officials, such public outcry suggests poor local leadership.

The protests and lawsuits growing out of parents' fury over the collapse of poorly constructed school buildings in the earthquake last May, as well as the spontaneously organized citizen relief efforts, are educating government institutions at all levels about the dangers of inadequate mechanisms for public participation, according to the Director of the Sichuan Social Development Research Institute:

From this disaster, the government has come to realize the power of the grass roots. This power will be helpful in establishing and managing a real civil society. But the problem is how to allow the grass-roots groups to take part in an orderly way. Taxi drivers used to be considered the least-educated and least-civilized group, but they were the first to respond to the disaster, organizing themselves to drive the injured to hospitals.

The Chinese government faces an enormous challenge in seeking to provide institutional structures

to channel citizen energy into established, manageable forums before it becomes destructive, without losing control of the country's direction. A new regional plan designed to introduce more democracy and a more independent judiciary in Shenzhen may point the way to a more hopeful future. When the government itself, not an earthquake, is perceived as the primary culprit in some future economic or environmental disaster, the survival of the regime may ultimately depend on the success of such institution-building efforts.

## What the Outside World Can Do

Significant and systematic improvements in environmental protection are unlikely to be accomplished without addressing the larger need for improving the legal and administrative machinery of the Chinese government. Persuading the central government to take the necessary steps is a sensitive task. Arguments that China should make judges and prosecutors more independent and expand individual human rights as a self-evident moral objective are unlikely to motivate the Beijing government, both because of its own political needs and broader cultural attitudes about the relative importance of community harmony versus individual rights.

The 2007 Party Congress was filled with rhetoric about increasing democracy. But effective democracy — the broad diffusion of power beyond the party and its attendant government bureaucracies to independent legal institutions, media, NGOs, and individual citizens — will only be implemented if it is seen as a means of promoting social harmony and strengthening the impact of national laws over local corruption and opportunism. The central government will only strengthen its judicial and administrative law systems, diffuse power outside the bureaucracy guided by the party, and create a more diverse civil society if it is persuaded that doing so will create the social resilience, adaptability, and sense of participation that will strengthen the current government's survival prospects.

The outside world should promote progressive, incremental improvement of the legal system and related civil institutions, which is vital to progress on the environment and other pressing issues, and to avoiding recurrent cycles of rebellion and repression. The United States and other developed countries need to act vigorously to help strengthen Chinese civil institutions, while recognizing the continuing imperative of the Chinese government to show continuous improvement in domestic economic and social conditions. •