

One Billion Enforcers

China has enormous environmental problems but also a wide range of environmental statutes to address them. However, the country first has to establish rule of law and effective governance. Citizen litigation could play a key role

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In a rural village, set on the edges of a narrow mountain valley, a group of farmers goes to court seeking relief from industrial pollution that has threatened their health and destroyed the crops that are the basis of their livelihoods. The defendants are two local factories that use a primitive industrial process to reduce copper ore. The process generates massive amounts of smoke, and an awful stench, devastating much of the surrounding forests and crops and causing local residents to suffer from chronic headaches and coughing. The farmers ask for compensation and a court order halting the pollution. The court refuses to order a stop to the polluting activities because such an order would “blot out two great mining and manufacturing enterprises, destroy half of the taxable values of a county . . . and deprive thousands of working people of their homes and livelihood.”

This is a story that is all too familiar in China, reflecting the persistent distance between environmental degradation and a legal system struggling to keep up with a rapidly changing economy. This particular story, however, does not come from China. Rather, it is the 1904 case of *Madison v. Ducktown Sulphur*, in the state of Tennessee. As in China today, the industrial revolution in the United States brought with it increasing harm to the public from pollution and greater environmental conflict.

In the early part of the 20th century, the American legal system was not up to the task, and the country muddled through decades of inadequate environmental regulation and often unsatisfactory court decisions. It was not until the 1970s that the United States passed a series of robust environmental laws and opened the door to a generation of environmental advocates who would use law and the courts to improve the environment.

With its burgeoning environmental problems, China arguably faces a challenge more formidable than any the United States or other developed countries ever confronted. China’s breakneck economic growth since Deng Xiaoping’s “reform and opening” commenced in the late 1970s has brought with it environmental degradation of a scope and speed not before seen. But, while the United States had a relatively mature and stable judiciary and legal profession at the time it began to create its modern environmental law framework, China has been forced to rebuild a legal system that had been largely dismantled in the first decades of Communist rule, while at the same time struggling to find a solution to the rapid deterioration of its environment.

The environmental challenges China faces after nearly three decades of rapid economic growth are, by now, well known. Sixteen of the 20 most polluted cities in the world can be found there. Over 300 million people, a population larger than that of the entire United States, do not have access to safe drinking water. An estimated 300,000 people die prematurely each year because of air pollution in excess of legal standards. China’s carbon dioxide emissions may surpass U.S. levels as early as 2009. The government’s own estimate puts the initial cost of environmental cleanup at a minimum of \$135



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billion. The State Council, China's highest executive body, gave this sobering assessment in 2005:

The environmental situation remains extremely grim. Although environmental protection in China has made positive progress, the grim environmental situation has not changed. . . . Developed countries experienced environmental problems in stages along their 100-year industrialization process. China has seen all of these problems appear in a concentrated 20-year period.

Chinese officials blame the worsening environment — a century's worth of environmental problems crammed into 20 years — for increased unrest. In 2005, there were some 51,000 disputes over environmental pollution, according to Zhou Shengxian, the minister of the China's State Environmental Protection Administration, known as SEPA. From 2001 to 2005, Chinese environmental authorities received more than 2.53 million letters

and 430,000 visits by 597,000 petitioners seeking environmental redress. Officials have expressed concern that China's environmental problems are a leading threat to social stability.

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Creating a Legal Culture that Supports Environmental Protection

China's central government officially supports a role for lawyers and the judicial system in environmental protection. The State Council has called for the "perfection of the legal assistance system for pollution victims, and research and establishment of an environmental civil and administrative public interest litigation system." The barriers to creating an effective, reliable framework for dealing with China's environmental problems, however, are daunting.

Unlike the United States, with its long history and culture of using law and the courts, China essentially started to build a legal system less than three decades ago. What arose from the ashes of Communist rule was a civil law structure derived from the civil code principles of the Soviet Union and Europe. As in the past, the new judicial setup

was not established to give jurists the independence taken for granted in the United States and elsewhere. There was no separation of powers, no concept of the courts serving as a check on executive or legislative power. Given the enormous task of creating a system anew, not surprisingly persistent problems remain. The courts remain weak, with poorly trained judges (as recent as 1995 only 7 percent of judges had a college degree, though that percentage rose to over 50 percent by 2005), and regular intervention in cases by local governments that often have a financial interest in polluting enterprises.

If China takes decades to mobilize its legal system, as the United States did, it will likely be too little, too late.

China is just beginning to experiment with many of the legal tools that have worked so well to improve the environment in the United States. The modern era of environmental protection and law in the United States began with such seminal cases as *Scenic Hudson Preservation Conference v. Federal Power Commission* (1965) and *Sierra Club v. Morton* (1972), which broadened the ability of the public to use the courts to protect environmental interests and clarified the ability of environmental groups to sue on behalf of their members to protect the environment, and the series of environmental laws enacted in little more than 10 years starting with the National Environmental Policy Act of 1969. Citizen suit provisions allowed the public (including environmental groups like the Natural Resources Defense Council, Sierra Club, and Environmental Defense) to sue as private attorneys general to enforce against violations of the law by polluters and failure by government agencies to carry out required duties. Citizens could now use lawsuits to seek injunctions and fines against polluters and force governments to act. These new legal tools were indispensable in improving environmental protection in the United States.

There is some comfort in knowing that developed countries like the United States, Japan, and the United Kingdom were able to reverse decades of environmental degradation by the use of law. However, China's environmental problems are moving faster and on a larger scale than anything the world has ever seen. At the same time, the growth of rule of law and public environmental



awareness are showing promising initial signs of success. However, if China follows the example of the United States in taking decades to mobilize its legal system against its environmental challenges, it will likely be too little, too late.

An Abundance of Statutes, But Little Support for Enforcement

The amount of work China has put into developing an environmental protection structure has been impressive. Beijing's early recognition of the need for environmental legislation can be seen in the passage of a draft Environmental Protection Law in 1979, right at the outset of China's reforms. Since then, China's framework has grown to include more than 20 major statutes and countless State Council regulations, standards, and other legal-norm-creating documents. The major measures include the Atmospheric Pollution Prevention and Control Law, the Water Pollution Prevention and Control Law, and the Environmental Impact Assessment Law. In addition, enactments now cover forestry, fisheries, wildlife protection, marine regions, desertification prevention, clean production, solid waste, and numerous other areas.

It is received wisdom that the country's environmental laws are relatively complete and that enforcement is now the real problem. This is true in part. Like the United States's first environmental laws, however, China's, though broad in coverage, still suffer from weaknesses that limit their effectiveness. Provisions are often vague and more akin to policy statements. They frequently "encourage" rather than "require." Perhaps most importantly, the provisions for enforcement are often extremely weak.

Like the first efforts in the U.S., China's laws are broad but suffer from weaknesses that limit effectiveness.

The Environmental Impact Assessment Law offers a good example of this. The EIA Law requires an environmental impact assessment to be completed prior to project construction. However, if planners completely ignore this requirement and build a project without submitting an environmental impact statement, the only penalty is that the local environmental protection bureau may require them to do a make-up envi-

ronmental assessment. If the developer does not complete this make-up within the designated time, only then is the bureau authorized to fine the enterprise. Even so, the fine is capped at a maximum of about \$25,000, a fraction of the overall cost of most major projects. As might be expected, the lack of more stringent enforcement mechanisms has resulted in a significant percentage of projects not completing legally required assessments prior to construction.

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The allowance for make-ups carves a loophole around the fundamental *raison d'être* of impact assessment — to build environmental considerations into the projects at the planning stage. Chinese officials and legal scholars are well aware of these weaknesses and openly acknowledge that they are the result of compromises in the legislative process and concerns about limiting economic growth, a challenge environmental officials have certainly faced elsewhere.

Expectations Grow for Chinese Environmental Legal Advocacy

Despite these problems, there are signs that law and public advocacy will begin to play a larger role. As Chinese law expert Randall Peerenboom has noted, "There is considerable direct and indirect evidence that China is in the midst of a transition toward some version of rule of law." China's leaders increasingly speak of "ruling the country according to law," helping to realize the principle enshrined in its constitution adopted in 1999.

Moreover, as environmental consciousness increases, citizens are beginning to turn to the courts and the law in general to advocate for their rights. Cases handled or supported by non-governmental organizations, GONGOs (government-organized NGOs), and public interest lawyers are an influential, though still limited, aspect of this phenomenon. The Center for Legal Assistance to Pollution Victims, a Beijing-based environmental NGO, is perhaps the best-known of a new generation of environmental legal advocates. The center recently helped a group of nearly 2,000 farmers in Fujian



Province win a judgment against Asia's largest potassium chlorate plant, which had caused massive damage to local crops and timber stands, as well as to residents' health. Since its inception in 1999, CLAPV has handled over 70 cases and obtained favorable results in nearly half of them.

The All-China Environment Federation, a government-sponsored umbrella group for environmental civil society, created a legal assistance office that has taken on 23 environmental matters covering over 3,000 people since its founding in 2005, according to media reports. In Yunnan Province, an environmentalist named Li Bo has established a center for rights-based environmental conservation advocacy in the wake of a successful campaign to protect indigenous land rights against illegal tourism development in the Tibetan village of Jisha.

Professor Wang Jin and several other scholars and students at Peking University Law School brought a novel suit on behalf of the Songhua River, a species of fish, and an island in an ultimately unsuccessful attempt to press for relief with respect to the Songhua River benzene spill two years ago.

Public interest litigation requires expertise and money, but NGOs' operations are hamstrung.

Some of these disparate efforts have shown promising initial success. However, public interest litigation of this sort requires the expertise and financial backing that only come from the creation of stable, more established organizations dedicated to the work. To make public interest litigation more effective, laws and policies will need to be instituted to encourage the development of environmental public interest law organizations such as CLAPV. Burdensome registration rules currently make it difficult for NGOs to obtain official registration, and so most must operate in an unofficial status that prevents them from setting up bank accounts and makes it impossible for them to partner with certain foundations, multilateral organizations, and government funders. For example, to register, NGOs must obtain the support of a government sponsor (a so-called "mother-in-law" organization), which most have been unable to do. Tax exemptions for donations and the creation of regulations to encourage domestic foundations and other funding sources would enhance the growth and expansion of stable, effective public interest organizations.

While Litigation Often Fails, It Drives the Law's Development

Another promising trend is the advent of informal local community coalitions turning to legal advocacy to protect their interests. The White Swan Residential Development in Guangzhou opposed the construction of high-voltage transmission towers only a short distance from residents' homes and discovered clear violation of the EIA Law's fundamental requirement to conduct an environmental impact assessment prior to construction. The residents, who feared the health and property value impacts of the transmission towers, filed suit and used the attention garnered by the legal action to lobby various levels of government and ultimately obtain an agreement by the power company to bury the offending transmission lines. Though the systems and cultural contexts in China and the United States are quite dissimilar, the strategy of utilizing the pressure and publicity that attends litigation to focus attention on an issue and drive a solution as seen in this example are not so different from those used in the Storm King lawsuits and cases like it. Similar cases have arisen in Beijing, Hangzhou, and elsewhere and the communities have informally provided each other with strategic advice.

A fight against transmission towers was lost but led to the first hearing on impact assessment under one law.

In many other cases, unsuccessful litigation has produced positive results in citizen involvement and use of the law. The Bai Wang Jia Yuan Residential Development case in Beijing involved transmission towers built in anticipation of the 2008 Beijing Olympics and, while it ultimately failed, the suit led to the first public hearing on environmental impact assessment pursuant to the new Administrative Licensing Law. In another case, a residential community in Shenzhen opposed the construction of an underground traffic tunnel between Hong Kong and Shenzhen because the exhaust outlets were located too near to their homes. Several residents examined the environmental impact statement for the project and, suspecting errors, conducted their own. The new assessment found grave inaccuracies in the original report and dangerous levels of pollution in violation of rele-



vant environmental standards. Although residents did not succeed in preventing the project in this case, their actions reflect a new awareness of (and willingness to use) legal procedures as tools for advocacy.

As in other countries, unsuccessful litigation has often served as a catalyst to negotiated solutions or government enforcement. An example of this was an administrative lawsuit against an environmental protection bureau in Hebei Province for approval of a highly polluting plant that refined silver from film sludge. The case ultimately resulted in two court rejections on lack of standing grounds. Nonetheless, the plaintiffs' advocates used the court case to highlight gross errors in the approved environmental impact statement and caused SEPA to suspend the firm that authored the EIS and render it invalid. Without a valid EIS, the factory was ordered to cease operation and remains shuttered.

Recognizing Officially the Public Interest in Environmental Litigation

The Chinese government now recognizes the value of environmental litigation, and sectors of the government are exploring the possibility of establishing some form of public interest litigation. The State Council last year issued a decision on environmental protection that specified "public interest litigation" as a favored tool for environmental protection. It is unclear what form such litigation will take. One

SEPA is considering a framework that expands individual and NGO standing to bring suit in the public interest.

proposal is to make the procuratorate (roughly equivalent to a prosecutor in the United States) a permissible plaintiff in a public interest lawsuit. Some officials in SEPA have considered a public framework that expands individual and NGO standing to bring suit in the public interest, particularly in cases for which there might be no other plaintiffs (such as harm to endangered species or damage to national forests). A structure that allows both government and public litigation would, however, be optimal. The sheer magnitude of China's environmental challenges requires a broad system that includes government litigation and wider support for public citizen enforcement.

The United States long ago recognized that

citizen litigation could provide an indispensable supplement to scarce government enforcement resources and serve to supervise recalcitrant government agencies as well. SEPA, with some 300 employees at the national level, could benefit even more from enforcement assistance from the public.

Examples from the United States in which environmental NGOs have litigated alongside federal government lawyers to enforce against local polluter violations and deal with weak local level enforcement may be of particular interest to China, given the serious and persistent problems with local protectionism. The *Friends of the Earth v. Laidlaw* case in the United States, which resulted in a key 2000 Supreme Court ruling on standing, is also a good example of local NGOs and federal lawyers litigating side-by-side against polluters where local enforcement has been inadequate. Indeed, national-level environmental enforcement officials in China are seeking to use government and citizen-led public interest litigation as a way to circumvent local pressures against environmental enforcement. At the same time, the possibility of government involvement may serve to assuage the fears of opponents who are wary of opening the door too quickly to public participation. So long as China does not place undue burdens on citizens and citizen groups suing (such as limiting public involvement to cases where the government is also bringing suit), elements of a U.S.-style citizen suit system could help China to improve its overall environmental enforcement.

The central government sees citizen involvement as a way to circumvent local pressures.

Environmental law and public involvement in enforcement have played a constructive, and indispensable, role in environmental protection in dozens of countries around the world. The challenges in China today are immense, but so are the opportunities for improvement if the legal tools so effective elsewhere can be harnessed in the name of environmental protection. •

Portions of this essay were previously published in China Dialogue (chinadialogue.net) and will also appear in a forthcoming article in the Vermont Journal of Environmental Law's 2007 Symposium book entitled China in Transition: Environmental Challenges in the Far East.