

COMMENTARY



China Begins Enforcing Newly Amended Environmental Protection Law

In Brief

The Environmental Protection Law (the “EPL”) of the People’s Republic of China (“PRC”) was promulgated more than 25 years ago. But only recently have substantive amendments to the EPL, combined with public awareness and government leadership, provided reason to hope that the EPL can serve its mission to protect China’s environment.

On April 24, 2014, China’s legislature, the Standing Committee of the National People’s Congress, adopted major amendments to the EPL that became effective on January 1, 2015. The revised EPL contains substantive and procedural changes that significantly update China’s environmental legal regime. More importantly, recent enforcement actions demonstrate that the government is determined to do more than change the law on paper. This *Commentary* examines some of the more important amendments of the ECL and highlights a few enforcement actions that demonstrate China’s effort to redress the environmental legacy of its rapid industrialization.

Expanded Scope of Environmental Public Interest Litigation

In other developed countries, environmental litigation by public interest groups has played an important role in the enforcement of environmental law. In China, however, there was no legal basis for public interest litigation until recently. The Civil Procedure Law (2008) provided that in order for a party to be eligible to file a lawsuit, it must have a direct interest

in the case to be filed. On January 1, 2013, the revised Civil Procedure Law came into effect, including its Article 55, which prescribes that “Authorities and relevant organizations designated by laws may bring a suit to the people’s court against environmental pollution actions.” Under the revised law, government-designated authorities and organizations may now file a public interest lawsuit even if they have no direct interest in the suit.

In furtherance of the revised Civil Procedure Law, the revised EPL expands the scope of eligible parties to environmental public interest litigation. Article 58 of the EPL now allows social organizations to initiate legal proceedings against polluters on behalf of the public, provided they are registered with the Civil Affairs Agencies at the municipal level or above, and have engaged in public service activities in environmental protection for five consecutive years without any record of violation of laws.

Shortly after the revised EPL came into effect, on January 6, 2015, the Supreme People's Court promulgated the Interpretation on Several Issues Regarding the Application of Law in Public Interest Environmental Civil Litigation (the "SPC Interpretation"). The SPC Interpretation expands the definition of "social organizations" by providing that "social groups, private non-enterprise units, and foundations" may all be considered "social organizations." According to officials at the Ministry of Civil Affairs, more than 700¹ social organizations qualify to file public interest environmental litigation, including organizations such as the All-China Environment Federation ("ACEF") and Friends of Nature ("FON").

The SPC Interpretation also provides guidelines on the burden of proof in public interest litigation. Where the plaintiff requests, and the defendant refuses to produce, environmental information to which the defendant is entitled or that the evidence shows the defendant does, in fact, possess, the court can presume that the plaintiff has established that the information is unfavorable to the defendant. The SPC Interpretation indicates that the court is encouraged to actively investigate, gather, and appraise the evidence necessary for trial of civil public interest environmental litigation.

In the three months after the EPL amendments took effect, several environmental protection social organizations filed public interest litigation. Two such organizations, the FON and Fujian Green Home, jointly filed a lawsuit against four mine operators, claiming their unauthorized stone-quarry activities were responsible for ecological damage in Nanping city, Fujian province. The Nanping Intermediate People's Court accepted the case on January 1, 2015, the day the revised EPL took effect, making it the first environmental public interest litigation in China.² Nine months later, in October 2015, the court issued its judgment in the case, ordering the

defendants to pay both the clean-up costs at the site and the legal costs of the two social organizations.³

On March 19, 2015, the ACEF, another social organization, filed an environmental lawsuit against Dezhou Jinghua, a Shandong chemical company, alleging the company had illegally discharged harmful substances. The lawsuit seeks RMB 30 million (US\$4.8 million) in compensation. The Intermediate People's Court in Dezhou city of Shandong province agreed to hear the lawsuit.⁴

More and larger environmental public interest organization lawsuits are expected to follow. The FON has established an environmental public interest fund to support public interest litigation. The fund has received the sponsorship of "Alibaba Public Interest Fund."⁵

Harsher Penalties against Polluters and Greater Power for Environmental Protection Authorities

Consecutive Daily Penalties. Before the amendments, the cost of compliance with the previous EPL was much higher than the cost of noncompliance. According to statistics,⁶ the average cost of noncompliance under the ECL was less than 10 percent of the cost of environment rectification. Thus, polluters strategically chose payment of penalties over compliance for the obvious economic benefits.

In order to address this problem, the revised EPL establishes a new penalty process that calculates penalties on a daily basis until rectification is completed. Article 59 of the revised EPL stipulates that where an entity or business operator is fined for the illegal discharge of pollutants and is ordered, but refuses, to make rectification, the administrative department may impose a fine on a daily basis based on the original fine amount, starting on the second day after service of the rectification order.

On December 19, 2014, the Chinese EPA published the Measures for Continuous Penalty on a Daily Basis ("Daily Penalty Measures"), which came into effect on the same day as the revised EPL. The Daily Penalty Measures specify four situations subject to continuous daily fines if the polluter does not stop the discharge of pollutants: (i) discharge of pollutants exceeding national/ local pollutant discharge standard,

or the key total pollutant discharging amount; (ii) discharge of pollutants in ways intended to escape supervision, such as through underground pipelines, a seepage well, or seepage pit, falsifying monitoring data, and improper operation of a pollution prevention facility; (iii) discharge of prohibited pollutants; and (iv) illegal dumping of hazardous waste.

The Daily Penalty Measures also provide guidelines on how the fines are to be calculated and the procedure for imposing the daily penalty. When the government initially identifies illegal discharging, it should issue a rectification order ("First Order") and deliver it to the polluter. Within 30 days of the service of the First Order, the government should conduct a reinspection of the polluter's premises. If the government determines that the polluter failed to stop the illegal discharging, the government can at that point impose a continuous penalty on a daily basis calculated from the day after service of the First Order until the date of the reinspection. It will also issue another rectification order ("Second Order") that specifies the reason for imposing the continuous penalty and how the penalty is calculated. The government can conduct multiple reinspections. If the government determines that the polluter has still failed to make rectification, it can again issue a fine up to the date of the reinspection. The consecutive daily fines will continue to be calculated on a rolling basis, without limit, until rectification is finally completed. The continuous fines may also be applied simultaneously with other enforcement measures such as suspension of production, seizure, or detention.

There are already several reports of local authorities imposing daily fines to force rectification of environmental violations. On March 27, 2015, the local EPA in Suzhou city issued its first bill for continuous penalty payments calculated on daily basis pursuant to the revised EPL. Fuxing Zipper, a company based in Suzhou, was fined RMB 18,000 per day, RMB 216,000 in total, for its excessive discharge and refusal to make timely rectification.⁷

Suspension of Business. The revised EPL provides that if a polluter discharges excessive pollutants, the authorities may order the polluter to suspend or shut down its production.

In this way, the revised EPL substantially raises the cost of illegal discharging.

A well-known pharmaceutical company in Zhejiang Province, Nexchem Pharmaceutical Co., Ltd, was recently ordered to suspend production due to unauthorized discharge of polluted water. On March 28 and May 21, 2013, Nexchem was fined RMB 100,000 and RMB 444,000 respectively by the environmental protection authority for its unauthorized discharging of polluted water exceeding limits, production without approval from the environmental protection authority, and excessive discharging of waste water from production. On May 22, 2014, the Environmental Protection Administration of Jinhua City discovered that Nexchem again discharged waste water exceeding pollutant limits without authorization. Accordingly, Nexchem's operations have been shut down since May 22, 2014.⁸

Seizure of Facilities and Equipment. The revised EPL also grants greater power to environmental protection authorities. Article 25 grants competent environmental protection authorities the power to seize facilities and equipment where a polluter's illegal discharge causes or may cause serious pollution. In furtherance of this new power, the EPA published the Measures for Seizure and Detention which came into effect on January 1, 2015. The Measures define the situations subject to seizure and detention, and they establish the required procedure for implementing these sanctions.

On January 27, 2015, the local EPA of Shenzhen City, Guangdong Province seized and detained the facilities and equipment of Hengjin Metal Product that were discharging polluted water, fined the company RMB 200,000, and imposed a 15-day administrative detention on both the directly responsible individual and company management.⁹

Administrative Detention. Under the prior ECL, individuals responsible for environmental pollution were subject to legal liability only in the event that violation constituted a crime. Now, under Article 63 of the revised EPL, individuals that commit noncriminal environmental offenses can also be punished with up to 15 days of administrative detention.

Increased Transparency and Whistleblower Protection

The revised EPL also includes provisions that require companies to provide increased transparency about pollution and protect whistleblowers who report violations. Thus, Article 55 of the revised EPL provides that key pollutant-discharging enterprises are required to disclose certain information regarding discharged pollutants. The EPA also published the Measures for the Disclosure of Environmental Information by Enterprises and Public Institutions ("Disclosure Measures"), which came into effect on January 1, 2015. The Disclosure Measures clearly define the scope of disclosure, disclosure methods, legal liability, and awards for reporting environmental information.

Article 9 of the Disclosure Measures specifies that a key pollutant-discharging entity shall disclose to the public the following information: (i) basic information; (ii) information on pollutant discharge; (iii) construction and operation status of pollution prevention and control facilities; (iv) information on the environmental impact assessment of construction projects and other environmental protection administrative licensing; (v) emergency response plans for environmental emergencies; and (vi) other environmental information. A key pollutant-discharging entity included in the list of enterprises subject to national priority monitoring shall also disclose its environmental self-monitoring program.

Under Article 57 of the revised EPL, informants who report to authorities about polluters' illegal action or authorities' failure to perform their duty shall be kept confidential.

Effective December 15, 2014, the local EPA in Beijing published the Regulations on the Award to Whistleblower for Reporting Environmental Illegal Actions ("Whistleblower Award Regulations.") According to the Whistleblower Award Regulations, a whistleblower may report environmental pollution by phone, mail, or email, and the whistleblower may receive a reporting reward of RMB 600 to RMB 5,000.

Enhanced Accountability

A key factor to the success of the environmental law is to persuade provincial and local officials to seriously enforce its provisions. Under Article 26 of the revised EPL, accomplishment

of environmental protection targets will be considered as a factor for government officials' performance evaluations, and the evaluation results will be made public. In addition, Article 68 of the revised EPL provides that government officials will be subject to heavy penalties if they fail to properly perform their duty of environmental protection and supervision.

There is reason to believe that government officials are already taking their duties under the ECL seriously. For example, on October 1, 2014, the city of Shanghai adopted the Amendment to Regulations of Shanghai City on the Prevention and Control of Atmospheric Pollution. This amendment increased the initial fine cap for atmospheric pollution from RMB 10,000 to RMB 50,000.

Likewise, on January 13, 2015, Guangdong province adopted amendments to the Regulation of Guangdong Province on Environmental Protection. These amendments, which took effect on July 1, 2015, address the problem of local protection of polluting enterprises by establishing a new jurisdiction system for environmental protection cases. Previously, environmental litigation was handled by the local courts, and thus was subject to local government interference. To address this issue, the Guangdong provincial court will set up a special division of the court to handle environmental litigation at the provincial level, where it is less likely to be subject to local influence.

Enforcement of the Revised EPL

The legal changes and enforcement actions discussed above represent only a small sample of the recent efforts to enforce the revised EPL. As of March this year, two months after the revised EPL came into effect, there were 107 cases involving administrative detention and 15 cases subject to continuous daily penalties, with the highest penalty being RMB 1.9 million in a single case, and RMB 7.23 million in total penalties.¹⁰ More enforcement actions are likely to follow, along with substantially larger penalties.

Lawyer Contacts

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Endnotes

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