

Annual Review of Chinese Environmental Law Developments: 2008

by Mingqing You

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Editors' Summary

In 2008, China continued its environmental development goals outlined in the Eleventh Five-Year Plan passed in 2006. This annual review surveys the major developments in Chinese environmental law and policy in the past year. The Article covers developments in international environmental law, energy conservation, enforcement mechanisms, and the environmental impacts of major events and incidents in China in the past year.

I. International Environmental Law

A. Climate Change

Climate change is still on the top of China's agenda. As a follow-up action to the China National Climate Change Program,¹ on October 29, 2008, the Information Office of China's State Council, the Central Government, issued another white paper entitled *China's Policies and Actions for Addressing Climate Change*.²

First, this white paper generally describes China's role in climate change and the expected impact of climate change on China. Second, it states China's strategies and objectives for addressing climate change. Finally, it gives a detailed description of China's policies and actions to mitigate climate change, adapt to climate change, enhance public awareness, enhance international cooperation, and improve institutions and mechanisms for addressing climate change. This white paper reflects the latest policy developments, though it also, to a large extent, reiterates the China National Climate Change Program. This white paper demonstrates that China has taken substantial measures to mitigate and adapt to climate change.

This white paper still emphasizes the principle of common but differentiated responsibility and stresses international transfer of funds and technology. According to the principle of common but differentiated responsibility, developed and developing countries should bear different proportions of the cost of mitigating and adapting to climate change. This principle is expressly enshrined in the United Nations Framework Convention on Climate Change,³ and it is regarded as the guiding principle for distributing rights and obligations concerning climate change among nation states. Guided by this principle, this white paper indicates that China will stick to the Kyoto Protocol and is reluctant to take up quantified and verifiable targets of reducing greenhouse gas (GHG) emissions. That is to say, it is one thing for China to take

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1. See China's National Climate Change Program (issued by the State Council, June 3, 2007), ST. COUNCIL GAZETTE, Issue 20, Serial No. 1235, available at http://www.gov.cn/gongbao/content/2007/content_678918.htm (Chinese version) and <http://en.ndrc.gov.cn/newsrelease/P020070604561191006823.pdf> (English version).
2. See INFO. OFF., ST. COUNCIL OF THE P.R.C., CHINA'S POLICIES AND ACTIONS FOR ADDRESSING CLIMATE CHANGE (2008), available at http://www.gov.cn/zwqk/2008-10/29/content_1134378.htm (Chinese version) and http://www.gov.cn/english/2008-10/29/content_1134544.htm (English version).
3. United Nations Framework Convention on Climate Change (UNFCCC) pmbl. & art. 3, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994).

voluntary measures, but it is quite another thing to accept binding international obligations. So far, China is willing to take voluntary measures but refuses to take legally binding international obligations on the reduction of GHG emissions. China also stresses the importance of the transfer of funds and technology from developed countries to developing countries.

B. Biodiversity

On August 28, 2008, the State Council promulgated the Measures for Examination and Approval of the Entry and Exit of Genetic Resources of Livestock and Poultry and the Research in Their Utilization in Cooperation With Foreign Entities, which came into effect on October 1, 2008.⁴

This new rule is made under the Livestock Industry Law of 2005.⁵ It controls the governmental approval procedure for the entry into and exit from Chinese territories of genetic resources on the list of protected genetic resources. According to this new rule, the national governmental agency in charge of livestock industry is the competent authority to issue relevant permits and approvals. The purposes of the rule include the protection of bio-safety and biodiversity as well as the protection of genetic resources. Benefit-sharing arrangements are a requisite part of the application for governmental approval on the exit of genetic resources or international collaborative research and use.

II. Conserving Energy and Reducing Pollutant Discharge

The Standing Committee of the National People's Congress revised the Law on Prevention and Control of Water Pollution on February 28, 2008. The revision came into effect on June 1, 2008.⁶ Major revisions include the following.

First, the revised law makes local governments more accountable. The law for the first time specifies the position of water pollution control in the national economic and social development plans and provides that governments at

county or higher levels shall incorporate water environmental protection into the national economic and social development plans and be responsible for the water environment within its jurisdiction.⁷ This provision greatly enhances the position of water pollution control as well as the responsibility of local governments. Whether the target of water protection is achieved will be an important part of the appraisal of the work of local governments and their key officials.⁸ To bring more pressure on local governments and make them more accountable, the revised law also requires the Ministry of Environmental Protection to publicly announce the list of provinces that fail to meet the control targets of the total quantity of key pollutants. Similarly, provincial environmental protection agencies are also required to publicly announce the list of counties that fail to meet the control targets of the total quantity of key pollutants.⁹

Second, the revision improves the administrative management regime on water pollution, especially the provisions on ecological compensation,¹⁰ regional moratoriums on the approval of environmental impact assessments (EIAs),¹¹ pollutant discharge permits,¹² innovation of the enforcement of civil liabilities,¹³ and legal aid in lawsuits concerning damages caused by water pollution.¹⁴ These new regulatory tools will make the governmental regulatory work more effective.

Third, the revised law subjects more behaviors to more severe administrative penalties, which makes this law more powerful. For instance, the ceiling of administrative fines for many violations increased to Renminbi 500 thousand Yuan (currently about \$70,000 U.S.).¹⁵ For some violations, there is no ceiling of the administrative fines.¹⁶

Fourth, the revision also gives the environmental protection agencies more enforcement authority. For example, the law authorizes the environmental protection agencies to request polluters to reduce or suspend their production and discharge of pollutants.¹⁷

Generally speaking, the revision of the Law on Prevention and Control of Water Pollution is the beginning of a new round of legislative effort on the adoption and revision of pollution control laws and, to a large extent, reflects the trend of future development. Many regulatory tools, such as the moratorium of the approval of EIAs, will also be adopted by other sectoral pollution control laws.

4. See Measures of the People's Republic of China for Examination and Approval of the Entry and Exit of Genetic Resources of Livestock and Poultry and the Research in Their Utilization in Cooperation With Foreign Entities (promulgated by the State Council, Aug. 28, 2008, effective Oct. 1, 2008), ST. COUNCIL GAZETTE, Issue 26, Serial No. 1277, available at http://www.gov.cn/gongbao/content/2008/content_1092959.htm.

5. See The Law of the People's Republic of China on Livestock Industry (adopted by the Standing Committee of the National People's Congress, Dec. 29, 2005, effective July 1, 2006), ST. COUNCIL GAZETTE, Issue 6, Serial No. 1185, available at http://www.gov.cn/gongbao/content/2006/content_211988.htm.

6. See The Law of the People's Republic of China on Prevention and Control of Water Pollution (revised by the Standing Committee of the National People's Congress, Feb. 28, 2008, effective June 1, 2008), available at http://www.gov.cn/flfg/2008-02/28/content_905050.htm (Chinese version) and <http://www.chinaenvironmentallaw.com/wp-content/uploads/2008/03/water-pollution-prevention-and-control-law.pdf> (English translation).

7. *Id.* art. 4.

8. *Id.* art. 5.

9. *Id.* art. 19.

10. *Id.* art. 7.

11. *Id.* art. 18.

12. *Id.* art. 20.

13. *Id.* art. 83.

14. *Id.* art. 88.

15. *Id.* arts. 71, 75, 76 & 81.

16. *Id.* arts. 73, 74 & 83.

17. *Id.* art. 74.

III. Economic Incentives

A. Circular Economy

On August 29, 2008, the Standing Committee of the National People's Congress promulgated the Circular Economy Promotion Law, which became effective on January 1, 2009.¹⁸ The term "circular economy" collectively refers to the reduction, reuse, and recycling of waste in the process of production, circulation, and consumption.¹⁹ Among reduction, reuse, and recycling, reduction of waste is preferred, followed by reuse and recycling. This law provides that the development of a circular economy shall follow the principle of giving priority to reduction under the precondition of being technically feasible, economically rational, and effective at saving resources and protecting the environment.²⁰

This law imposes the duty to develop a circular economy on all citizens and organizations, and adopts the developing of a circular economy as an important strategy for economic and social development. It provides that the development of a circular economy shall be propelled by the government, led by the market, effected by enterprises, and participated in by the public. It requires making overall plans, making reasonable layouts, adjusting measures to local conditions, and focusing on actual effect.²¹ This law includes compulsory legal duties as well as economic incentives, which may be summarized as follows.

This law imposes on the government a compulsory duty to make circular economic plans. The circular economy shall be a required part of the national economic development plans drafted by governments at or above county level, and shall also be a necessary part of specialized plans, such as environmental plans, drafted by competent government agencies. The plans concerning circular economy shall specify the rate of resources output, rate of waste reuse, and the rate of recycling, and shall specify the key tasks and safeguard measures of law enforcement. The government shall enforce the law to achieve these targets, and the achievement of these targets will in turn be an important factor in the evaluation of government work.

The total quantity control targets of the discharge of main pollutants, land use for construction purposes, and water use are an important component of these circular economy plans, which not only make the plans specific and measureable, but also connect the plans to each other. This is because the total quantity control targets at the national level are split among provinces and become provincial control targets, which are then further split among counties. These total control targets also require local governments to readjust the economic

structure and only approve construction projects meeting the requirements of corresponding control targets.

This law provides an important enforcement tool for the government to achieve the total control targets: the extended responsibility of producers. This law provides that producers of products or package materials under the Compulsory Recycling List shall be responsible to recycle such products or package materials. If such products can be reused, such producers shall be responsible to reuse them. If they cannot be reused for technical or economic reasons, such producers shall dispose of such products or package materials appropriately. The producers may also entrust distributors or others to carry out such reuse, recycling, or disposal work.²² These requirements extend the traditional responsibility of producers to the distribution and consumption of their products and make producers more responsible and accountable to society.

Besides compulsory requirements, this law also provides some economic incentive measures. Considering the importance and broad influence of industrial policies, this law provides that the industrial policies made by the State shall meet the requirements of circular economy.²³ Under this general requirement, this law also provides that the government shall periodically issue and revise lists of technologies, processes, equipment, materials, and products to be encouraged, restricted, or eliminated. It is prohibited to produce, import, or sell equipment, materials, or products listed for elimination; it is also prohibited to use technology, processes, equipment, or materials listed for elimination.²⁴ This law provides more economic incentive measures in its Chapter 5, including special funds for the development of circular economy,²⁵ financial support for relevant scientific research,²⁶ preferential tax treatment of circular economic activities and of restrictions on the exportation of products whose production consumes much energy and generates much pollution,²⁷ investment policies (including requirements on lending activities of commercial banks),²⁸ price policies,²⁹ government procurement,³⁰ and government awards,³¹ among others.

The primary law enforcement authority will be vested into a comprehensive administrative branch for circular economy under the State Council.³² The National Development and Reform Commission (NDRC) and its local subsidiaries are most likely to be designated as such a branch to enforce the law, considering the law enforcement resources of NDRC. NDRC is the key governmental department to formulate and enforce economic policies and has much power over big enterprises. The conduct of large consumers of resources decides whether the target of circular economy will be achieved, so if they can be brought under control, China will

18. See The Circular Economy Promotion Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress, Aug. 29, 2008, effective Jan. 1, 2009), available at http://www.gov.cn/jfjg/2008-08/29/content_1084355.htm (Chinese version) and http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020080919377641716849.pdf (English version).

19. *Id.* art. 2.

20. *Id.* art. 4.

21. *Id.* art. 3.

22. *Id.* art. 15.

23. *Id.* art. 6.

24. *Id.* art. 18.

25. *Id.* art. 42.

26. *Id.* art. 43.

27. *Id.* art. 44.

28. *Id.* art. 45.

29. *Id.* art. 46.

30. *Id.* art. 47.

31. *Id.* art. 48.

32. *Id.* art. 4.

have achieved a big success. As the NDRC has much leverage and power over them, it is natural to designate the NDRC to enforce the circular economy law.

As China's economy is developing at a high speed, the promotion of a circular economy will help to ease the tension between economic development and environmental protection. In a large sense, the notion of circular economy is a change of the economic development mode. The enforcement of this law also needs more detailed rules and the support of other laws and regulations. China is expected to make more rules and revise other relevant laws and regulations accordingly. This law is part of the effort to legalize and implement the scientific outlook on development proposed by the Communist Party of China.

B. Plastic Shopping Bags

Even before the promulgation of the Circular Economy Promotion Law, the Chinese government took measures to limit the use of shopping bags in line with the theory of circular economy. On December 31, 2007, the General Office issued the Circular on Restricting the Manufacture, Sale, and Use of Plastic Shopping Bags.³³ According to this Circular, as of June 1, 2008, the production, sale, and use of plastic shopping bags thinner than 0.025 millimeter shall be prohibited and no shops and markets shall provide shopping bags free of charge.

To enforce this Circular, on May 15, 2008, the Ministry of Commerce, the NDRC, and the State Administration for Industry and Commerce jointly promulgated the Measures for Administration of the Paid Use of Plastic Shopping Bags at Commodity Retail Places, which came into effect on June 1, 2008.³⁴ Besides repeating the prohibition of free shopping bags after June 1, 2008, these Measures provide the legal liabilities for infringements. According to these Measures, a retail facility may determine by itself the price of plastic shopping bags. However, the following conduct is prohibited: (1) selling shopping bags below costs; (2) failing to specify (or properly specify) the price of shopping bags; (3) selling shopping bags at a discount or otherwise failing to sell shopping bags according to the specified price; and (4) providing consumers with shopping bags free of charge or otherwise actually free of charge.³⁵ Except in limited situations, a retail facility shall specify separately the quantity and price of shopping bags.³⁶ A retail facility shall only buy shopping bags from legally established producers, distributors, and importers of plastic shopping bags and shall keep appropriate

records.³⁷ The government may impose certain fines for such violations, ranging from Renminbi 5,000 Yuan (about \$700 U.S. at the current rate of exchange) to Renminbi 20,000 Yuan (about \$3,000 U.S. at the current rate of exchange).³⁸

IV. Law Enforcement Mechanisms

A. The Establishment of the Ministry of Environmental Protection

The former State Environmental Protection Administration (SEPA) was upgraded into a ministry, i.e., the Ministry of Environmental Protection (MEP), through a resolution adopted by the National People's Congress on March 15, 2008.³⁹ Compared with the former SEPA, the new MEP has a higher status in the government. This is an indication of China's attention to environmental protection. The State Council later further specified the MEP's duties and internal offices.⁴⁰ A noticeable change is that the new MEP takes over the supervision of nuclear safety and the control of water pollution.

B. The Measures on Environmental Administrative Reconsideration

The MEP promulgated the Measures on Environmental Administrative Reconsideration on December 30, 2008, which became effective on the same day.⁴¹ These Measures replace an old rule of the former SEPA.⁴² These Measures are to implement the Administrative Reconsideration Law⁴³ and the Regulations for the Implementation of Administrative Reconsideration Law⁴⁴ and make special detailed provisions in light of the special features of environmental cases. These Measures will govern the administrative reconsideration work of the MEP and its local subsidiaries.

33. The Circular of the General Office on Restricting the Manufacture, Sale, and Use of Plastic Shopping Bags (issued by the General Office of the St. Council, Dec. 31, 2007), ST. COUNCIL GAZETTE, Issue 4, Serial No. 1255, available at http://www.gov.cn/gongbao/content/2008/content_881186.htm.

34. The Measures for Administration of the Paid Use of Plastic Shopping Bags at Commodity Retail Places (promulgated by the Ministry of Commerce of the P.R.C., the National Development & Reform Commission of the P.R.C., and the State Administration for Industry & Commerce, May 15, 2008, effective June 1, 2008), ST. COUNCIL GAZETTE, Issue 33, Serial No. 1284, available at http://www.gov.cn/gongbao/content/2008/content_1157917.htm.

35. *Id.* art. 6.

36. *Id.* art. 7.

37. *Id.* art. 8.

38. *Id.* arts. 14, 15 & 16.

39. Decision of the First Meeting of the Eleventh National People's Congress on the Adjustment of the Organization of the State Council (adopted by the National People's Congress, Mar. 15, 2008), GAZETTE OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS, Issue 3, at 401.

40. Rules on the Main Duties, Internal Offices, and Staff of the Ministry of Environmental Protection (issued by the State Council, July 10, 2008), available at http://www.mep.gov.cn/law/fg/gwyw/200808/t20080801_126885.htm.

41. The Measures on Environmental Administrative Reconsideration (promulgated by the Ministry of Environmental Protection, Dec. 30, 2008, effective Dec. 30, 2008), available at http://www.gov.cn/fbg/2009-01/12/content_1202621.htm.

42. Measures for Environmental Administrative Reconsideration and Response to Administrative Lawsuits (promulgated by the State Environmental Protection Administration, Dec. 27, 2006, effective Feb. 1, 2007), ST. COUNCIL GAZETTE, Issue 31, Serial No. 1246, available at http://www.gov.cn/gongbao/content/2007/content_786219.htm.

43. Law of the People's Republic of China on Administrative Reconsideration (adopted by the Standing Committee of the National People's Congress, Apr. 29, 1999, effective Dec. 1, 1999), GAZETTE OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS, Issue 3, at 225-34.

44. Regulations for the Implementation of the Law of the People's Republic of China on Administrative Reconsideration (promulgated by the State Council, May 29, 2007, effective Aug. 1, 2007) ST. COUNCIL GAZETTE, Issue 20, Serial No. 1235, available at http://www.gov.cn/gongbao/content/2007/content_678914.htm.

V. Environmental Aspects of Major Events and Incidents

A. Olympic Games

Beijing made several major environmental protection commitments in its candidature dossier and went to great effort to achieve them. In fact, environment protection was a key issue in the 2008 Olympic Games, as embodied in the concept of “Green Olympics.” The Organizing Committee started to design an Environmental Management System (EMS) as early as 2002, passed the ISO 14001 (ed. 1996) certification audit in September 2005, and one year later was also certified according to the new 2004 release of the standard.⁴⁵

What was the actual achievement? Greenpeace issued a report on the eve of the 2008 Olympic Games.⁴⁶ According to this report, key achievements include the introduction of state-of-the-art energy-saving technology in Olympic venues, the increase of the new vehicle emissions standards to EURO IV ahead of schedule, the addition of four new rail lines for the city as well as a direct line within the Olympic Green, a high percentage of electricity supply from wind power stations, dramatically improved sewage, wastewater treatment plants and water reuse systems, a fleet of more than 3,000 buses running on compressed natural gas, the upgrade of small boilers, the conversion of household heating systems from household coal heating to electricity, the increased collaboration between government and civil society in environmental protection, and environmental commitments made by sponsors.⁴⁷ These achievements helped to reduce energy consumption and pollutant discharge and helped to improve the air quality.

However, according to this report, Beijing also missed some targets. For example, although the Organizing Committee had introduced environmental guidelines for Olympic timber purchasing, they missed a chance to introduce an internationally recognizable timber procurement policy, such as Forest Stewardship Council (FSC) standards for construction material used during the Games. The need to use temporary measures to improve the air quality represents another big failure, although Beijing adopted a lot of long-term measures to improve the air quality of the city.⁴⁸ According to this report, however, the biggest target missed lies in the limited transparency and a lack of independently verified data and certification of Olympic venues.⁴⁹

In conclusion, the Beijing Olympic Games leave a generally positive environmental protection legacy and represents China's efforts to protect the environment, but it also indicates that there is still a long way to go.

45. For a detailed review of China's preparation for Green Olympic Games, see UNITED NATIONS ENVIRONMENT PROGRAMME, BEIJING 2008 OLYMPIC GAMES: AN ENVIRONMENTAL REVIEW (2007), available at <http://www.unep.org/downloads/BeijingReport.pdf>.

46. See AMY ZHANG ET AL., GREENPEACE, CHINA AFTER THE OLYMPICS: LESSONS FROM BEIJING (2008), available at <http://www.greenpeace.org/raw/content/china/en/press/reports/green.pdf>.

47. *Id.* at 4.

48. *Id.*

49. *Id.*

B. Wenchuan Earthquake

A major earthquake struck Wenchuan of Sichuan Province, a mountainous area in the southwestern part of China, on May 12, 2008. This earthquake caused severe damage, including environmental damage. After the earthquake, the Chinese government took quick action to protect the people and manage the post-earthquake environment.

The State Council made quick legislation in response to the earthquake and adopted the Regulations on Post-Wenchuan Earthquake Reconstruction within one month of the earthquake.⁵⁰ This is the most important legislation for the post-earthquake reconstruction. It provides that the reconstruction should be carried out according to the principle of integrating economic development and environmental protection.⁵¹ It makes provisions for a reconstruction plan and its implementation. These provisions are important to upgrade the living conditions and protect the environment. The Ministry of Environmental Protection also issued some guidelines:

- Technical Guidelines on Protection of Centralized Drinking Water Sources in Earthquake-Hit Areas (For Interim Implementation)⁵²
- Technical Programs for Emergency Response to Protect the Safety of Drinking Water in Earthquake-Hit Areas (For Interim Implementation)⁵³
- Technical Guidelines on Monitoring Surface Water Environment Quality and Centralized Drinking Water Sources in Earthquake-Hit Areas (For Interim Implementation)⁵⁴
- Technical Guidelines on Safe Disposal of Medical Wastes in Earthquake-Hit Areas (For Interim Implementation)⁵⁵

50. The Regulations on Post-Wenchuan Earthquake Reconstruction (promulgated by the State Council, June 8, 2008, effective June 8, 2008), ST. COUNCIL GAZETTE, Issue 17, Serial No. 1268, available at http://www.gov.cn/gongbao/content/2008/content_1018937.htm.

51. *Id.* art. 3.

52. Technical Guidelines on Protection of Centralized Drinking Water Sources in Earthquake-Hit Areas (For Interim Implementation) (promulgated by the St. Council, May 20, 2008), ST. COUNCIL GAZETTE, Issue 32, Serial No. 1283, available at http://www.gov.cn/gongbao/content/2008/content_1149244.htm.

53. Technical Programs for Emergency Response to Protect the Safety of Drinking Water in Earthquake-Hit Areas (For Interim Implementation) (promulgated by the St. Council, May 20, 2008), ST. COUNCIL GAZETTE, Issue 32, Serial No. 1283, available at http://www.gov.cn/gongbao/content/2008/content_1149244.htm.

54. Technical Guidelines on Monitoring Surface Water Environment Quality and Centralized Drinking Water Sources in Earthquake-Hit Areas (For Interim Implementation) (promulgated by the State Council, May 20, 2008), ST. COUNCIL GAZETTE, Issue 32, Serial No. 1283, available at http://www.gov.cn/gongbao/content/2008/content_1149244.htm.

55. Technical Guidelines on Safe Disposal of Medical Wastes in Earthquake-Hit Areas (For Interim Implementation) (promulgated by the State Council, May 30, 2008), ST. COUNCIL GAZETTE, Issue 32, Serial No. 1283, available at http://www.gov.cn/gongbao/content/2008/content_1149247.htm.

- Technical Guidelines on Environmental Protection in Transitional Resettlement Zones of Earthquake-Hit Areas (For Interim Implementation)⁵⁶

Legislations and guidelines, together with other efforts, achieved much success. Although the area affected by the earthquake contained chemical plants, radioactive materials, and other dangerous materials, there was no major report of environmental disaster after the earthquake.

VI. Future Development

The most important environmental legislation currently under consideration is the Energy Law. Currently, China does have some sectoral energy laws, such as the Coal Law and the Electricity Law. As these sectoral energy laws were made at different times and may have some hidden conflicts, there is a need to have an overarching legislation as well as the need to revise the old laws in light of the new overarching legislation. It is expected that the new law will take environmental protection as an important component.

56. Technical Guidelines on Environmental Protection in Transitional Resettlement Zones of Earthquake-Hit Areas (For Interim Implementation) (promulgated by the State Council, May 30, 2008), ST. COUNCIL GAZETTE, Issue 32, Serial No. 1283, available at http://www.gov.cn/gongbao/content/2008/content_1149249.htm.