

# Annual Review of Chinese Environmental Law Developments: 2010

by Mingqing You

Mingqing You is an Associate Professor at the Environmental and Resources Law Institute, Zhongnan University of Economics and Law, Wuhan, China. He is also a lawyer with Hubei Zhong & Xin Law Firm, Wuhan, China.

---

## *Editors' Summary*

---

In 2010, 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, water and soil conservation, and other law and policy developments in environmental protection in China in the past year.

---

## I. Implementation of International Environmental Law

### A. Ozone-Depleting Substances

The State Council promulgated the Regulation on the Management of Ozone-Depleting Substances on April 8, 2010,<sup>1</sup> fulfilling China's obligations under the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol. Ozone-depleting substances in this Regulation refer to chemicals having detrimental effects on the ozone layer and listed on the Checklist of Ozone-Depleting Substances Under National Control, which is written, adjusted, and published by the Ministry of Environmental Protection in consultation with other competent departments under the State Council.<sup>2</sup> This Regulation is applicable to the production, sales, consumption, import, and export of ozone-depleting substances. The term "consumption" refers to the use of ozone-depleting substances for production and business operations, excluding the use of products containing ozone-depleting substances.<sup>3</sup>

The Ministry of Environmental Protection is responsible for law enforcement, in cooperation with the Ministry of Commerce, the General Administration of Customs, and their local branches.<sup>4</sup> The main law enforcement tools are the total quantity control and permits. The basic law enforcement process is as follows: The first step is for the Ministry of Environmental Protection to draft the National Plan for Gradually Eliminating Ozone-Depleting Substances (the National Plan) in cooperation with other governmental departments to be submitted to the State Council for approval.<sup>5</sup> The second step is for the Ministry of Environmental Protection, in consultation with other relevant departments under the State Council, to determine and publish a list of prohibited or restricted construction projects and a list of prohibited or restricted ozone-depleting substances, based on the National Plan and the elimination progress of ozone-depleting substances.<sup>6</sup> The third step is for the Ministry of Environmental Protection to determine and publish the annual total quantity.<sup>7</sup> Entities producing or consuming ozone-depleting

---

*Author's Note: This Article is supported by the National University Special Research Fund administered by Zhongnan University of Economics and Law.*

1. Regulation on the Management of Ozone-Depleting Materials (promulgated by the State Council, Mar. 24, 2010, effective June 1, 2010), ST. COUNCIL GAZETTE, Issue 12, Serial No. 1335, available at [http://www.gov.cn/gongbao/content/2010/content\\_1593322.htm](http://www.gov.cn/gongbao/content/2010/content_1593322.htm).
2. *Id.* art. 2.
3. *Id.* art. 3.
4. *Id.* art. 4.
5. *Id.* art. 5.
6. *Id.* art. 6.
7. *Id.* art. 7.

substances may submit written applications to the Ministry of Environmental Protection before October 31 of each year for the production or consumption quota of the next year. The Ministry of Environmental Protection will evaluate and make decisions on such applications based on the total annual quota.<sup>8</sup> It is prohibited for any entity to produce or consume ozone-depleting substances beyond its annual quota, unless it meets the conditions of exemption. According to this Regulation, if a consumer has any of the following circumstances, it is not required to get a consumption quota permit: (1) a maintenance entity that needs to use ozone-depleting substances to maintain cooling devices, cooling systems, or extinguishing systems; (2) a laboratory that needs to use a small quantity of ozone-depleting substances for experimental analysis; (3) an entry/exit inspection and quarantine agency that needs to use ozone-depleting substances for quarantine purposes to prevent the entry or exit of harmful organisms; or (4) any other circumstances under which the party concerned is not required to get a consumption quota permit as specified by the Ministry of Environmental Protection.<sup>9</sup>

## B. Clean Development Mechanisms

The Management Rule on the Chinese Clean Development Mechanism Fund was issued on September 14, 2010, and came into effect on the same day.<sup>10</sup> The purpose of this Fund is to support the mitigation of and adaptation to climate change and to promote sustainable development.<sup>11</sup>

The management structure of this Fund consists of a Governing Board and a Management Center. The Governing Board is in charge of making policies, strategic plans, and other major decisions and is composed of representatives of the Ministry of Finance, the National Development and Reform Commission, the Ministry of Foreign Affairs, the Ministry of Science and Technology, the Ministry of Environmental Protection, the Ministry of Agriculture, and the State Bureau of Meteorology. The Management Center is responsible for the day-to-day management of the Fund.<sup>12</sup>

The sources of this Fund include: (1) income garnered from transferring the certified emission reduction to be paid to the State; (2) income from the operation of this

Fund; (3) donations; and (4) other sources.<sup>13</sup> Sellers of certified emission reductions shall file with the Management Center their sales contract within 15 days of signing the contract and pay a certain percentage of the income to the Fund.<sup>14</sup> Part of the Fund will be used as grants for capacity-building, public awareness, and other qualified activities,<sup>15</sup> and part of the Fund will be used as loans to or investments in business projects related to the mitigation of and adaptation to climate change.<sup>16</sup>

## II. Water and Soil Conservation

Because of excessive industrial and agricultural development, China has serious soil erosion problems. There are many soil erosion disasters during rainy periods each year. The mud-rock flow of August 8, 2010, at Zhouqu, Gansu Province, was particularly disastrous and led to 1,478 deaths. Although the State Council issued a circular to require local governments to be more vigilant and take effective preventative measures,<sup>17</sup> the disaster still happened, and the national flag again flew at half-mast for the deaths of ordinary citizens.

As part of the effort to curb soil erosion and to avoid geological disasters, the Standing Committee of the National People's Congress revised the Law of the People's Republic of China on Water and Soil Conservation on December 25, 2010.<sup>18</sup> The original Water and Soil Conservation Law was promulgated on June 29, 1991, and played a key role for almost a decade in preventing and harnessing water and soil losses, protecting water and land resources, reducing natural disasters and sediment hazards, and promoting sustainable development of the national economy and society. The purpose of the revision is to help this law better protect the environment and meet new needs imposed by the gradual formation of the market economy in China and rapid economic and social development. The revised law consists of 60 articles in seven chapters.

The first chapter, entitled "General Provisions," has six articles, and all of them are revised. The revised law takes a preventive approach to conserve water and soil, adds sustainable development to the purposes of this law,<sup>19</sup> and prioritizes the prevention of soil erosion over remedial

8. *Id.* art. 12.

9. *Id.* art. 10.

10. Management Rule on Chinese Clean Development Mechanism Fund (promulgated by the Ministry of Finance, the National Development and Reform Commission, the Ministry of Foreign Affairs, the Ministry of Science and Technology, the Ministry of Environmental Protection, the Ministry of Agriculture, and the State Bureau of Meteorology, Sept. 14, 2010, effective Sept. 14, 2010), ST. COUNCIL GAZETTE, Issue 3, Serial No. 1362, available at [http://www.gov.cn/gongbao/content/2011/content\\_1792049.htm](http://www.gov.cn/gongbao/content/2011/content_1792049.htm).

11. *Id.* art. 2.

12. *Id.* arts. 5-8.

13. *Id.* art. 9.

14. *Id.* arts. 10-13.

15. *Id.* arts. 19-27.

16. *Id.* arts. 28-33.

17. The Circular on Further Strengthening the Work on Prevention and Control of Geological Disasters (issued by the General Office of the State Council, July 16, 2010), ST. COUNCIL GAZETTE, Issue 21, Serial No. 1344, available at [http://www.gov.cn/gongbao/content/2010/content\\_1661319.htm](http://www.gov.cn/gongbao/content/2010/content_1661319.htm).

18. Law of the People's Republic of China on Water and Soil Conservation (revised by the Standing Committee of the National People's Congress, Dec. 25, 2010, effective Mar. 1, 2011), available at [http://www.gov.cn/flfg/2010-12/25/content\\_1773571.htm](http://www.gov.cn/flfg/2010-12/25/content_1773571.htm).

19. *Id.* art. 1.

measures.<sup>20</sup> The revised law greatly changes the power and responsibility of the national government and local governments and puts more duty on heads of local governments, i.e., governors at the provincial level and mayors at the city and county levels. Although the national Ministry of Water Resources and bureaus of water resources of local governments continue to take the main responsibility for water and soil conservation, the revised law greatly increases the responsibility of the local governments. The revised law provides that local governments at the county level or above shall exercise general leadership in conservation work and incorporate water and soil conservation into their economic and social development plans.<sup>21</sup> The responsibility of local governments is even heavier for key areas subject to preventative or remedial measures, for which local governments are required to meet certain targets and shall be punished or rewarded according to their performance.<sup>22</sup> The revised law also specifically requires other branches of local governments, including those in charge of forestry, agriculture, and land and mineral resources, to perform their relevant responsibilities.<sup>23</sup> This is because a key cause of erosion is economic development, for which the head of the water resources bureau does not have much control. The fact that the revised law puts the responsibility of local governments before the responsibility of the Ministry of Water Resources and their local branches is also an indication of the position of local governments in water and soil conservation. As many rivers and lakes stretch over different provinces, the revised law provides that the Ministry of Water Resources may establish catchment-wide subsidiaries for important rivers or lakes (catchment management agencies).<sup>24</sup> These catchment management agencies are directly under the Ministry of Water Resources, independent of local governments. The revised law also specifically encourages and supports private citizens and companies to participate in water and soil conservation work.<sup>25</sup>

A new second chapter, entitled "Planning," was also added. The original law only provides in Article 7 that the water resources bureau at the county level or above shall draft water and soil conservation plans to be submitted to the government for approval. Many places failed to give sufficient attention to and carry out these plans. The revised law retained the governmental authorities in drafting and approving water and resource conservation plans but strengthens the force of such plans by providing that the approved water and soil conservation plans shall be strictly enforced, and any revision shall be first submitted to the original regulating authority for approval.<sup>26</sup> When other governmental agencies draft infrastructural development plans, mineral resources development plans, urban development plans, public utilities development plans,

and other plans, they shall provide for preventative and remedial measures for possible soil erosion and shall seek the opinions of water resources bureaus before submitting such plans for approval.<sup>27</sup> Other articles of this chapter provide for the principles, contents, and factual basis of drafting water and soil conservation plans. To provide a sound factual basis, the revised law requires the Ministry of Water Resources and provincial water resources authorities to periodically make soil erosion surveys and publish the results of such surveys.<sup>28</sup> Governments at the county level and above shall demarcate key areas subject to preventative or remedial measures based on such surveys.<sup>29</sup> This is expected to improve the objectivity of water and soil conservation plans.

In the third chapter, entitled "Prevention," the revised law also makes some important changes. Besides enlarging protected areas and adding more forbidden activities, such as the collection of *Nostoc flagelliforme*, a fungus with superstitious value in southern China, the revised law noticeably changes the legal requirements on water and soil conservation plans for construction projects. According to the original law, the environmental impact assessment (EIA) report for railways, highways, water projects, mineral resources enterprises, electricity enterprises, and other large and medium sized industrial enterprises in mountainous or hilly areas and windy deserts shall have a water and soil conservation plan approved by the water resources bureau. The revised law makes the water and soil conservation plan a separate document independent of the EIA report and establishes a permit procedure similar to the EIA procedure administered by the Ministry of Environmental Protection and local environmental protection bureaus. For all construction projects in mountainous or hilly areas, windy deserts, and other vulnerable areas that may possibly lead to soil erosion, a water and soil conservation plan shall be submitted to and approved by a water resources bureau at the county level or above or the Ministry of Water Resources. When carrying out such projects, preventative and remedial measures shall be taken according to the approved plan. Should there be a major change of the project or a need to make a major change of the preventative or remedial measures, the water and soil conservation plan shall be submitted to the original approving authority for reapproval.<sup>30</sup> The companies concerned shall take preventative and remedial measures according to the approved plans, and the governmental agencies shall see that such companies carry out the approved plans.<sup>31</sup> As this revision has certain implications for the EIA procedure, clarification by the government is needed for the future coordination of the EIA procedure and the approval procedure for water and soil conservation plans.

In the fourth chapter, entitled "Remedial Measures," the revised law introduces ecological benefit compensa-

20. *Id.* art. 3.

21. *Id.* art. 4.

22. *Id.* art. 4.

23. *Id.* art. 5.

24. *Id.* art. 5.

25. *Id.* art. 9.

26. *Id.* art. 14.

27. *Id.* art. 15.

28. *Id.* art. 11.

29. *Id.* art. 12.

30. *Id.* art. 25.

31. *Id.* art. 26.

tion and conservation fees. It provides that the State shall improve the preventative and remedial work for sources of rivers, protection areas of drinking water sources and head-water conservation areas, and shall incorporate water and soil conservation into the ecological benefit compensation system.<sup>32</sup> The law also provides that companies shall pay a conservation fee if they fail to restore water and soil conservation for their projects in mountainous or hilly areas, windy deserts, and other vulnerable areas.<sup>33</sup>

The revised law also changes the monitoring of soil erosion, supervision, and legal liabilities.<sup>34</sup>

### III. Economic Policies Related to Environmental Protection

#### A. Phasing Out Outdated Production Capacity

The State Council issued the Circular of the State Council on Further Strengthening the Work of Phasing Out Outdated Production Capacity on February 6, 2010.<sup>35</sup> Existing outdated production capacity is a major source of environmental pollution and waste; the phasing out of such production capacity is conducive to environmental protection and the transformation of economic structure. According to the Circular, targets will be set first at the national level, then at the provincial level, and ultimately at the county level. Each county shall meet its target to ensure that provincial and national targets are met. National annual targets and implementation plans for each industry will be proposed by the Ministry of Industry and Information Technology and the State Energy Bureau, according to the economic development conditions and the target set by the State Council on the phasing out of outdated production capacity and in consultation with related governmental agencies. Currently, the phasing out work is focused on electricity generation, coal, coke, ferroalloy, calcium carbide, steel, nonferrous metals, building materials, textiles, and some light industries.

To curb the development of and gradually phase out the targeted production capacity, the State will tighten market accession, strengthen economic and legal measures, and increase the severity of law enforcement and punishment. As to market accession, the State will impose more requirements on new production capacity to control market accession. For those industries with surplus production capacity, the State will only allow new production capacity if an equal or greater amount of outdated production capacity is phased out. This linkage between new and outdated production capacity will give local governments more incentive to phase out outdated capacity and may also lead to

more mergers and acquisitions. As to economic measures, the State will increase the costs of operating outdated production capacity with differentiated electricity prices, the prices of resources, resources taxes, environmental taxes, and other measures.

The State will also use some policy incentives to encourage the phasing out of outdated production capacity. The national government and local governments will give financial rewards for the phased out production capacity, the upgrading of industries, and the reemployment of workers. The taxation authorities and banks will also give support to the phasing out work with preferential measures.

Since the issuance of this Circular, various governmental authorities have taken measures. The Bank of China and the China Banking Regulatory Commission jointly issued the Circular on Improving Banking Services to Support Energy Conservation, Pollution Reduction, and the Phasing out of Outdated Production Capacity on May 28, 2010.<sup>36</sup> The Ministry of Industry and Information Technology and other national governmental authorities jointly issued rules on how to examine the performance of local governments on phasing out outdated production capacity on January 26, 2011.<sup>37</sup> This plan provides a detailed schedule for reporting and implementation by local governments and examination by national authorities.

#### B. Promotion of Strategic New Industries

Closely related to the phasing out of outdated production capacity is the development of new environmentally friendly industries. The State Council issued the Decision on Accelerating the Nurturing and Development of Strategic New Industries on October 10, 2010.<sup>38</sup>

The term “strategic new industry” is defined as an industry based on major technological breakthroughs and major development demands, with the major leading function for overall long-term economic and social development, consuming less material resources, and having strong development potentials and overall benefits. This Decision lists the following as strategic new industries: energy conservation and environmental protection; new-generation information technology; biological industries; high-caliber equipment; new energy; new materials; and new-energy automobiles. The development of strategic new industry is part of China’s effort to transform the current unsustainable economic structure and ease the burden on the environment and resources.

32. *Id.* art. 31.

33. *Id.* art. 32.

34. *Id.* arts. 40-58.

35. Circular of the State Council on Further Strengthening the Work of Phasing Out Outdated Production Capacity (issued by the General Office of the State Council, Feb. 6, 2010), *ST. COUNCIL GAZETTE*, Issue 11, Serial No. 1334, available at [http://www.gov.cn/gongbao/content/2010/content\\_1585425.htm](http://www.gov.cn/gongbao/content/2010/content_1585425.htm).

36. Circular on Improving Banking Services to Support Energy Conservation, Pollution Reduction (issued by The Bank of China and the China Banking Regulatory Commission, Oct., 2010), available at [http://www.gov.cn/zwggk/2010-05/31/content\\_1617354.htm](http://www.gov.cn/zwggk/2010-05/31/content_1617354.htm).

37. Circular on the Issuance of the Implementation Plan on the Examination of the Work on Phasing Out Outdated Production Capacity (issued by the Ministry of Industry and Information Technology, Jan. 26, 2011), available at [http://www.gov.cn/zwggk/2011-01/31/content\\_1796695.htm](http://www.gov.cn/zwggk/2011-01/31/content_1796695.htm).

38. Decision on Speeding Up the Nurturing and Development of Strategic New Industries (issued by the State Council, Oct. 10, 2010), *ST. COUNCIL GAZETTE*, Issue 30, Serial No. 1353, available at [http://www.gov.cn/gongbao/content/2010/content\\_1730695.htm](http://www.gov.cn/gongbao/content/2010/content_1730695.htm).

### C. Energy Conservation

China's attention to energy problems was highlighted by the establishment of the State Energy Committee on January 22, 2010, which is headed by Premier Wen Jiabao and consists of representatives of more than 10 key governmental agencies at the ministerial level. The office of the State Energy Committee is established in the State Energy Bureau and is headed by the head of the National Development and Reform Commission and the head of the State Energy Bureau.<sup>39</sup> This is believed to overcome the low status of the State Energy Bureau within the governmental hierarchy.

In recent years, China took several market-based mechanisms to reduce energy consumption; one of them is energy performance contracting. In this mechanism, a service company signs an energy management contract with an energy user. This mechanism creates a win-win situation, where the service company will get paid from the saved energy, and the energy user will save energy without making much investment from its own pocket. Service companies were generally successful and profitable in the past years. To promote the further development of the energy-saving service industry, the General Office of the State Council issued on April 2, 2010, the opinions of the National Development and Reform Commission and

other governmental authorities on promoting energy performance contracting and boosting the energy-saving service industry.<sup>40</sup> As a response, the Ministry of Finance and the State Administration of Taxation issued preferential treatment policies for value added tax, turn-over tax, and income tax of energy-saving service companies on December 30, 2010.<sup>41</sup>

### IV. Concluding Remarks

The year 2010 is the last year of China's Eleventh Five-Year Plan. During the past five years, China made great efforts to transform its unsustainable economy under the notion of building an environmentally friendly and resource-conservative society (the so-called two-type society) and made much progress, both in terms of the development of environmental law and in terms of the reduction of key pollutants, i.e., sulfur dioxide (SO<sub>2</sub>) and carbon dioxide (CO<sub>2</sub>). For both SO<sub>2</sub> and CO<sub>2</sub>, the goals of a 10% reduction set in the Eleventh Five-Year Plan were met. As 2011 is the first year of the Twelfth Five-Year Plan, the National People's Congress will adopt a new plan that is expected to include more requirements on environmental issues, and we expect that China will make more environmental rules and improve its environment in the future.

39. Circular on the Establishment of the State Energy Committee (issued by the General Office of the State Council, Jan. 22, 2010), ST. COUNCIL GAZETTE, Issue 4, Serial No. 1327, available at [http://www.gov.cn/gongbao/content/2010/content\\_1528905.htm](http://www.gov.cn/gongbao/content/2010/content_1528905.htm).

40. Circular on Issuing the Opinions of the National Development and Reform Commission on Promoting Energy Performance Contracting and Boosting Energy-Saving Service Industry (issued by the General Office of the State Council), ST. COUNCIL GAZETTE, Issue 11, Serial No. 1334, available at [http://www.gov.cn/gongbao/content/2010/content\\_1585428.htm](http://www.gov.cn/gongbao/content/2010/content_1585428.htm).

41. Circular on Issues of Value Added Tax, Turn-Over Tax, and Income Tax for Promoting Energy-Saving Industry (issued by the Ministry of Finance and State Administration of Taxation, Dec. 30, 2010), available at [http://www.gov.cn/zwqk/2011-02/17/content\\_1804866.htm](http://www.gov.cn/zwqk/2011-02/17/content_1804866.htm).