Seeing Through the Smog?
Pushing for Pollution Information Transparency and Environmental Public Interest Law in China

Prepared statement by
Jennifer L. Turner
Director, China Environment Forum
Woodrow Wilson Center

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Introduction

In the 36years since opening up to the world, China's economy is still booming and it is easy to talk in superlatives about the country—fastest growing economy, largest and most populated cities, tallest dams, biggest consumer of coal, and the list goes on. China's rapid economic growth has lifted millions out of poverty and promoted wealth in the country, but at a major cost to the environment. China is now burdened with some of the dirtiest air and water in the world. There remain huge unknown threats in terms of soil quality, biodiversity losses, and long-term impacts of pollution on the public's health. The Chinese government has long acknowledged the growing litany of environmental woes and passed countless laws and regulations, but enforcement remains a key obstacle.

Since the mid-1980s, Chinese government and research institutes have actively engaged with bilateral and multilateral aid agencies as well as U.S. environmental NGOs, universities, foundations, and research institutes to address China's pollution and other environmental challenges. This international engagement has assisted Chinese policymakers in drafting and passing environmental and clean energy laws, regulations and standards, and led to joint researches between Chinese and international institutes. International organizations also have helped train and empower Chinese environmental policymakers, lawyers, judges, journalists, researchers, and NGOs to work on public participation, open information, and other environmental governance issues. For example, Vermont Law School, Natural Resources Defense Council, and the American Bar Association have all worked with the Chinese NGO Center for Legal Assistance for Pollution Victims to train Chinese judges, lawyers and local officials on public hearings for environmental impact assessments and public interest law cases. Over the last three decades, U.S. environmental NGOs have played a pivotal role in creating new kinds of cooperation and dialogues around environmental problems, forging long-lasting partnerships among Chinese and U.S. researchers, NGOs, and government agencies.

As the Chinese government has passed new laws and measures on environmental information transparency and public participation, the growing cohort of Chinese environmental journalists, lawyers, researchers and activists have gained more political space in which to operate and are placing greater bottom-up pressure on the government to improve China's weak enforcement of environmental laws and regulations. The expansion of "green" laws and the increasing accessibility to information on environmental issues in China has paved the

path for a growing national consciousness rallying around the right to a clean environment, and Chinese citizens are increasingly willing to petition, complain, and protest the worsening environmental quality.

Below is a brief overview of some emerging trends of transparency, public participation, and public interest lawsuits around environmental issues in China. While there are many encouraging developments, ultimately these new policy tools are but one part of what needs to be larger environmental governance reforms in China.

Demands for Pollution Information

In recent years, Northern China has witnessed major air pollution incidents. But the smog that blanketed Beijing and much of northern China in December 2012 and the early months of 2013 was particularly severe and worrying for government and citizens alike. During this time, pollution levels for fine particulate matter ($PM_{2.5}$) rose two, three or sometimes four times beyond the emergency level of 250 micrograms per cubic meter. Chinese citizens broadcasted their frustration with the smog through social media and some Chinese NGOs rented out personal air quality monitors to have citizens then post the registered "hazardous" readings online alongside official government air quality reports that listed the air pollution as "fair" or "moderate." Through these public awareness campaigns, Chinese online citizens (netizens) successfully advocated for the central government to adopt $PM_{2.5}$ standards that match those being tweeted by the U.S. Embassy in Beijing. Greenpeace China and Beijing University School of Health issued a timely study that reported 8,600 early deaths from $PM_{2.5}$ in Beijing, Xi'an, Guangdong and Shanghai in 2012. The Chinese news media was highly critical of the government's failure to lessen the, literally, choking pollution. The public's extensive criticism online and harsh news media reporting were effective in prompting the government to make some of the following policy changes:

- China's State Council mandated rapid deployment of $PM_{2.5}$ monitoring and issued real-time data to the public. As of January 2013 a total of 496 monitoring sites have been set up in the 74 Chinese cities and the central government aims that all prefecture-level cities establish urban air quality monitoring program by 2016.[1]
- The 12th Five-Year Plan for Energy Development, which came out in January 2013 introduced a noteworthy and unprecedented pollution control policy target. Specifically, energy producers are required to cut small particulate emissions ($PM_{2.5}$) by 30% over the next five years. Coal-fired power plants and oil companies will now be targeted for stricter regulation.
- To improve the city's dismal air quality, the Beijing Development and Reform Commission announced a new round of targets to cut coal use, capping coal use at 15 million tons a year by 2015, the end of the 12th Five-Year Plan period, which represents a 60% drop from the city's 2010 use.
- The central government announced plans to upgrade vehicle fuels quality and tighten auto emission standards.
- The smog incident catalyzed a new dialogue in China about how to evaluate local officials for actual environmental improvements, whereas in the past, they were recognized for installing pollution control equipment, even though the equipment may not be operating.

While Chinese government agencies have long issued ambitious statements addressing pollution, the difference in the latest air pollution case is that the general public, NGOs and the news media were more vigilant and willing to demand environmental information and accountability from officials, widely expressing and sharing their discontent online. A recent Shanghai Jiao Tong University survey of 3,400 Chinese citizens across 34 cities revealed that more than three-quarters of the respondents would be willing to protest against polluting industries.[2] Nearly 80 percent believed environmental protection should be a higher priority than economic development. [3]

Successes and Failures in Using Open Information Tools

An NGO's Success….

A growing number of Chinese NGOs are using open information measures and Internet "naming and shaming" as tools to pressure polluting industries and inattentive government agencies to halt pollution. Ma Jun, China's leading water pollution activist and founder of the NGO Institute for Public and Environmental Affairs (IPE), is perhaps the leader in using open information measures to motivate better environmental performance from governments and companies. In 2006, drawing on publically available information of polluters, IPE created online water and air pollution databases and publicized a list of polluters now numbered more than 125,000. A broad range of stakeholders—particularly international and Chinese companies—use these databases as a tool to monitor the environmental quality and suppliers' performance in China. International and Chinese companies who request audits to clear their names off of his well-publicized website often work with IPE's Green Choice Alliance—a group of 30 grassroots Chinese green NGOs who help oversee audits of the companies. The Alliance has motivated hundreds of factories with poor pollution records to publicly disclose their work plans to clean up their pollution.

Taking his transparency work a step further, in 2009, Ma Jun's NGO began working with a U.S. NGO, the Natural Resources Defense Council, to create a pollution information transparency index (PITI), which examines and ranks government performance in disclosing environmental information and respond to public appeals in 113 cities. The index is not intended to be solely a finger pointing exercise, but rather to help educate and motivate city officials to view information transparency as a valuable tool in promoting better environmental enforcement.

…and a Lawyer's Failed Attempt

Lawyers too are working to uncover poor environmental performance and test China's 2008 Open Environmental Information Measures, which gave citizens the right to request pollution information from government and industry. Soil pollution is a quieter environmental crisis facing China that only recently made headlines after Beijing lawyer Dong Zhengwei unsuccessfully applied to access data on the 2006 national soil pollution survey, conducted by the Ministries of Environment and Land Resources. Ministry of Environmental Protection (MEP) declined Dong's request citing the survey results as a "state secret." At least three state-run newspapers (People's Daily, China Daily, and Xinhua) criticized China's environmental authorities for arguing that soil pollution data is a "state secret" and thus not fit for public consumption.

Dong subsequently pressed for an administrative review from MEP; but on May 8, 2013, the lawyer received MEP's administrative review decision that he still could not receive the information. The MEP justified the denial stating that the survey's information on soil pollution was only a general overview of the situation with more studies underway, and once the MEP completed its investigation it would release the results to the public.

China currently lacks the laws, regulations and standards that could guide MEP in requiring clean up and assigning liability, a gap that also could explain some of MEP's hesitancy in releasing what could be very

unsettling information on soil quality. Thus, without legislation of action, the open information measures end up being simply an institution in waiting.

Although the ministries of environment and land and resources have not fully released the national soil survey results, researchers around China began publishing sobering articles on the scope of the problem. A Nanjing Agricultural University study hypothesized that up to 10% of China's rice may be contaminated with cadmium, identifying rice from Hunan, Guizhou, and Guangxi Zhuang Autonomous Region as being potentially the most heavily contaminated. China's oldest environmental NGO, Friends of Nature, released its *Annual Report on Environment Development of China* on April 11, 2013 which highlighted the growing challenge of soil pollution. This report cited Chinese studies that found 12.1% of China's farmland is polluted to some degree with heavy metals. The report also indicates that China is already suffering direct economic losses caused by pollution in agricultural lands, which leads to reduced grain production and raises public questions of food safety. Few NGOs have focused on soil quality and food safety; so shining a light on this area could help raise this issue's profile on the policy agenda. Thanks to the latest round of discussion on and off line about China's soil pollution, the country is now expecting a new oil pollution prevention and control law in three years.[4]

Taking it to the Streets—Protest as Participation of Last Resort

The Chinese Public Security Bureau no longer publishes the exact numbers on environmental pollution protests, but in a recent lecture on the social impact of pollution problems organized by the Standing Committee of the National People's Congress, Yang Chaofei, the vice-chairman of the Chinese Society for Environmental Sciences, stated that the number of environmental mass incidents has grown an average of 29% annually from 1996 to 2011.[5] Yang noted particularly that pollution incidents involving dangerous chemicals and heavy metal pollution have risen since 2010. Chinese news media frequently report on protests, particularly urbanites whose protests against polluting factories have led to closures and sometimes halted planned projects. For example, earlier this year when an environmental activist in Kunming learned about plans for constructing a refinery and petrochemicals base near Kunming to process oil from Myanmar, he started disseminating leaflets condemning the planned project. His efforts ultimately sparked a major protest in the city on May 17, 2013, which prompted Kunming's mayor to meet with the protestors and promise the local government would take their opinions into account in the city's ruling on the project.

While the growing number of pollution protests indicates a citizenry keen on demanding their right to a clean environment, many protests are ultimately more a symptom of China's environmental governance problem and will not, at least in the near term, solve the nation's pollutions. If, for example, the Chinese public was actively involved in environmental impact assessment hearings (as is required by law) many protests could have been avoided. Without a formal channel to learn of large infrastructure projects such as construction of incineration plants and oil refineries, the public is left with little choice but to protest when they learn about the project. Another weakness of protests is that the often "Not In My Backyard (NIMBY)" protests do not stop polluting behavior, but simply move it. There are numerous examples of dirty factories which face campaigns online and on the streets in east coast urbanities simply move the set-up to a poorer inland community where the cycle of pollution and protest may begin again. This, most notably, occurred after the 2007 PX protests in the city of Xiamen where city authorities moved a planned PX facility 30 miles inland.[6]

Potential of Public Interest Law Cases

November 13, 2005 witnessed one of the biggest environmental disasters in China's modern history. An explosion occurred at a PetroChina chemical plant in China's northwestern Jilin Province, spilling one hundred tons of benzene into the Songhua River and creating a toxic slick stretching over 80 kilometers into the Amur River in Russia. On behalf of the endangered species and the polluted river, a group of Chinese lawyers filed a

lawsuit against the subsidiary of PetroChina responsible for the spill, inaugurating a new era in Chinese environmental activism: seeking legal recourse for environmental harm through a public interest case. Though the court eventually dismissed the Songhua River Case, because it did not recognize animals and ecosystems having legal standing as plaintiffs, the case sparked a legal and policy discussion about how such cases could become a valuable tool to strengthen China's poor enforcement of pollution control laws and regulations. In August 2012, Article 55 of China's Civil Procedure Law was amended to create effective space for environmental public interest litigation that might have even allowed for the Songhua River case to receive standing.

The amendments to Article 55 of China's Civil Procedure Law grant the right to statutorily approved authorities and relevant organizations to initiate lawsuits against polluters on behalf of the public interest. In other words, the plaintiff does not need to show personal injury or loss from the pollution. This is the first time a Chinese national law recognizes public interest litigation. Another notable amendment, to China's Civil Procedure Law, allows non-judicial experts to challenge the opinion of judicial appraisers and aid Chinese court in fact finding, a move that opens up the court to new stakeholders. Because there are a limited number of judicial appraisers (judicial experts) in China, allowing non-judicial experts for testimony will effectively widen the pool to environmental experts and potentially increase the speed of the cases.

In 2011 two independent Chinese NGOs—Friends of Nature and Chongqing Green Volunteer Association—tested the public interest law by bringing a public interest law case against a mining company that illegally dumped 5,000 tons of chromium tailings next to a reservoir in western Yunnan. The toxic runoff severely contaminated the water and killed livestock and crops in nearby villages.[7]

Chinese courts often shun large pollution cases, yet the Yunnan court accepted the NGO plaintiffs in this case because of a provincial law that granted the NGOs' legal standing. The local environmental protection bureau also joined as a plaintiff, which greatly facilitated the compiling of evidence. Moreover, the NGOs successfully catalyzed considerable news media reporting on the case. Wang Canfa, founder of the Center for Legal Assistance for Pollution Victims, was quoted saying that this case was a good start for the public interest lawsuits in China. He considered this case as helpful in shaping the Civil Procedure Law Amendments.[8]

Robert Percival, a professor at University of Maryland Carey School of Law, explained at a November 29, 2012 meeting at the Woodrow Wilson Center that while China amended Article 55 of its Civil Procedure Law to allow for public interest suits, many questions still remain, particularly regarding precisely who can serve as a public interest plaintiff. Ultimately, the major challenge faced by those wishing to raise public interest suits is the courts' unwillingness to accept such cases, especially if the company in question serves as a major source of local tax revenue.

These new rules under Article 55 are encouraging developments that indicate a growing space for public interest law and greater involvement of NGOs in environmental advocacy. However, the Article 55 rules have yet to be tested in a large high profile case and will likely need more guidance from either the legislators or the courts to be fully applied. There are currently six to ten public interest environmental law cases that NGOs and lawyers are working on in China, which indicates an appetite to experiment with this new tool.

Conclusion

The smoggy air devouring Beijing is one prominent example of how 40 years of double-digit economic growth has exacted a huge environmental cost on China. The Chinese government's own data highlight the growing

costs: the Chinese Academy of Environmental Planning (a research institute under the Ministry of Environmental Protection) reported in March 2013 that environmental degradation cost the country about $230 billion in 2010, or 3.5 percent of China's GDP. This is three times higher than MEP's estimate of pollution costs in 2004.[9] The growing costs of environmental degradation and the government's own inability to enforce existing laws will be one of the greatest challenges for China moving forward.

It is important for China to keep opening political space that allows grassroots groups, lawyers, and the general public to push for transparency, open information and public interest law cases, for these tools can create effective pressure for better environmental performance by the government and industry. However, in the long run there are many vital political reforms that China must make to truly strengthen environmental enforcement—such as creating a completely independent judiciary and empowering the Ministry of Environmental Protection. Alex Wang, a UC Berkeley researcher, argues that to substantially improve environmental performance by local governments China needs to establish hard targets for environmental quality outcomes against which officials at the province and sub-provincial levels are held strictly accountable.[10]

Pressing pollution problems that threaten China's economy have motivated Chinese policymakers to explore creative reforms in pollution control, clean energy laws, and regulations. Such experimentation has made environmental protection one of the most progressive policy and legal advocacy areas in China, particularly in terms of prioritizing open information, encouraging public participation, creating and setting up special courts, and granting political space for NGOs. Many international groups have conducted research and pilot projects that have helped build the capacity of Chinese regulators, NGOs, and researchers to develop these bottom-up regulatory tools. Of relevance for today's testimony, the U.S. EPA, Vermont Law School, Natural Resources Defense Council, American Bar Association, and other NGOs have been active in creating exchanges and conducting trainings in environmental information transparency, public participation, and public interest law. Such work strengthens China's environmental governance, which could help reduce pollution, better protect the health of Chinese citizens, and the products they consume. Cleaner skies over China also could lower the growing problem of air pollution from China impacting neighboring countries and the western coast of the United States.

Additionally, as the Chinese government improves environmental governance regulations and encourages stronger public and government watchdogs, Chinese companies will come under greater pressure to obey pollution control laws. Forcing Chinese companies to internalize the costs of pollution could raise the cost of products produced in China and potentially help level the playing field with international companies that have already been doing a better job in pollution prevention.

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