

THE ROLE OF CIVIL SOCIETY IN ENVIRONMENTAL GOVERNANCE IN THE UNITED STATES AND CHINA

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In 1972 leaders of most of the nations of the world gathered in Stockholm for an historic first global summit on the environment, the United Nations Conference on the Human Environment.¹ By a vote of 112-0, representatives of the nations assembled at that conference adopted a declaration emphasizing the importance of protecting the planet's environment and outlining foundational principles of environmental law.² Now, more than four decades later, nearly all countries have adopted substantial environmental laws.³ But despite considerable progress, pollution problems still pose fundamental threats to public health in some parts of the world.

China sent a large delegation to the 1972 Stockholm Conference, which helped prompt the development of Chinese domestic environmental law and policy.⁴ Today China has an impressive body of national environmental laws, but they often are poorly implemented and enforced.⁵

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1. See GÜNTHER HANDL, DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (STOCKHOLM DECLARATION), 1972 AND THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, 1992 1 (2012), available at http://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf.

2. *Id.* at 2.

3. See Dr. Rajendra Ramlogan, *The Environment and International Law: Rethinking the Traditional Approach*, 3 VT. J. ENVTL. L. 1, 4 (2001) (showing that, after 1970, there were 305 multilateral environmental agreements, while between 1800 and 1970, there were only 182); *About*, ECOLEX.ORG, http://www.ecolex.org/ecolex/ledge/view/About_en_US;DIDPFDSIjsessionid=AD572EC08D01F18C0BEC45BE5BED28D5 (last visited Nov. 16, 2013) (“Environmental law has, over the past thirty years, . . . [seen] a significant growth in multilateral and bilateral agreements, national legislation, international ‘soft law’ documents, and law and policy literature, as well as related jurisprudence and court decisions.”).

4. CHARLES R. MCELWEE, ENVIRONMENTAL LAW IN CHINA: MITIGATING RISK AND ENSURING COMPLIANCE 22–23 (2011).

5. See RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 525 (2002) (“[A]lthough there are environmental laws on the books, they frequently go unenforced, in part because of lack of political will to enforce them if that means slowing down economic growth.”); Arwen Joyce

Coupled with rapid industrial development, poor enforcement has resulted in massive environmental problems.⁶ As a public, enraged by deteriorating environmental conditions, demands action from the country's new leaders, many believe that China should embrace the U.S. model of environmental law.⁷ A prominent feature of the U.S. model is its emphasis on encouraging civil society to participate in the development, implementation, and enforcement of environmental policy.⁸ Politically powerful regulated industries and environmental NGOs wage fierce lobbying campaigns in Congress and before the agencies.⁹ Agencies must solicit and consider public input before issuing regulations.¹⁰ Everyone affected by agency actions has the right to seek judicial review of those actions and ordinary citizens and NGOs may file lawsuits to enforce U.S. environmental laws.¹¹

& Tracye Winfrey, *Taming the Red Dragon: A Realistic Assessment of the ABA's Legal Reform Efforts in China*, 17 GEO. J. LEGAL ETHICS 887, 891–92 (2004) (discussing enforcement challenges faced by environmental regulators in China).

6. For example, in January 2013, air pollution in Beijing reached levels described online by locals as “postapocalyptic,” “terrifying,” and “beyond belief” and by the U.S. Embassy’s @BeijingAir Twitter feed as “Beyond Index.” Edward Wong, *On Scale of 0 to 500, Beijing’s Air Quality Tops ‘Crazy Bad’ at 755*, N.Y. TIMES, Jan. 13, 2013, at A16. Epidemiologists working with the World Health Organization estimate that air pollution in China causes 1.2 million premature deaths annually. Edward Wong, *Early Deaths Linked to China’s Air Pollution Totaled 1.2 Million in 2010, Data Shows*, N.Y. TIMES, Apr. 2, 2013, at A9. The Chinese Academy of Environmental Planning estimated in 2010 that environmental damage robbed the Chinese economy of approximately \$230 billion, or 3.5% of the country’s gross domestic product. Edward Wong, *Cost of Environmental Damage in China Growing Rapidly Amid Industrialization*, N.Y. TIMES, Mar. 30, 2013, at A4.

7. Cf. Joyce & Winfrey, *supra* note 5, at 891–92 (Because China’s original model of leaving environmental enforcement up to local governments led to unpredictable enforcement efforts, critics are urging China to increase the public’s ability to participate and for the central government to regulate on the regional scale).

8. A plaintiff suing under environmental citizen lawsuit provisions has been referred to as a “private attorney general.” *Sierra Club v. Morton*, 405 U.S. 727, 737–38 (1972). Most major environmental laws in the United States have citizen suit provisions. See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2619 (2006); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2006); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (2006); Clean Water Act, 33 U.S.C. § 1365 (2006); Clean Air Act, 42 U.S.C. § 7604 (2006); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9659 (2006); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046(a)(1) (2006); Noise Control Act of 1972, 42 U.S.C. § 4911 (2006); Resources Conservation and Recovery Act, 42 U.S.C. § 6972 (2006); Safe Drinking Water Act, 42 U.S.C. § 300j- 8 (2006). Some environmental statutes do not contain citizen suit provisions, notably the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1988 & Supp. V 1993).

9. See PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 4 (1981).

10. See, e.g., Administrative Procedure Act, 5 U.S.C. § 553 (requiring for all rulemaking conducted by federal agencies, that “[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation”).

11. 5 U.S.C. §§ 701–06 (generally permitting judicial review of all final actions taken by federal agencies). See, e.g., *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 545–46 (D.D.C. 2005) (recounting a history of suits against EPA to compel them to comply with statutory deadlines in the Clean Air Act).

Could the key to China controlling its environmental problems be to empower Chinese civil society along the lines of the U.S. model? Although air and water pollution have become so severe that the Chinese public is demanding more effective government action to combat them, China has a very different legal and political culture than the United States. This article questions the notion that transplanting the U.S. model of civil society's role necessarily would make Chinese environmental law yield dramatically improved results.

INTRODUCTION

This article compares the roles of civil society in the various stages of U.S. and Chinese environmental governance. Part II compares the historical evolution of environmental NGOs in the U.S. and China. Part III examines the process of adopting environmental legislation in the two countries. Part IV discusses the influence of civil society on the process of issuing regulations to implement the environmental laws in the U.S. and China. Part V examines judicial review of environmental regulations. Part VI discusses the role of civil society in the enforcement of environmental regulations in the U.S. and China.

The strategies employed by NGOs to promote environmental protection have broadened in recent years to include transparency initiatives that encourage companies to voluntarily improve their environmental practices. Part VII of the paper discusses such initiatives in the U.S. and China. Part VIII of the paper concludes by discussing what the U.S. can learn from China and what China can learn from the U.S. with respect to improving environmental governance through empowerment of civil society. It cautions that one should not assume that aspects of one's legal system can be transplanted effectively to the other. China's experience illustrates that avoiding a "race to the bottom" is an important reason for maintaining powerful environment agencies at the federal level. While China has the luxury of being able to enact tough environmental laws with little effective opposition from the regulated community, the lack of hard-fought legislative battles that produce compromises with industry also may be a contributing factor to China's greater problem of enforcing its environmental laws.

II. THE DEVELOPMENT OF ENVIRONMENTAL NGOS

Although environmental NGOs have a longer history in the United States than in China, there has been a recent surge in the growth of

environmental NGOs in China.¹² This section compares their evolution in the U.S. with China's recent experience.

A. *Environmental NGOs in the United States*

The rise of the modern environmental movement in the U.S. is often traced to 1962 when Rachel Carson's *Silent Spring* was published.¹³ *Silent Spring* alerted the public to the possibility that pesticides could be accumulating in the food chain in a way that could cause severe, long-term environmental damage.¹⁴ In 1967, the Environmental Defense Fund was formed by a group of scientists who sought to have DDT banned because it was precisely that kind of pesticide.¹⁵ Another group, the Natural Resources Defense Council ("NRDC"), was created in an effort to force the Federal Power Commission to consider environmental concerns when licensing an electric power project that would have destroyed a particularly scenic and historic stretch of the Hudson River at Storm King Mountain.¹⁶ At the time, no federal agencies shouldered primary responsibility for responding to concerns about environmental protection. The new environmental groups went to court to try to require government agencies to be more responsive to environmental concerns.

To be sure, conservation groups had been in existence in the United States for more than seven decades when *Silent Spring* was published. The Sierra Club, founded in 1892, played a major role in early twentieth century battles concerning management of public lands.¹⁷ But the environmental groups formed in the 1960s and 70s fundamentally differed from the older conservation groups in their level of activism.¹⁸ They were

12. See TIMOTHY HILDEBRANDT, SOCIAL ORGANIZATIONS AND THE AUTHORITARIAN STATE IN CHINA 1–2 (2013) ("In the past decade, social organizations [including environmental ones] have quickly sprouted in China.").

13. See, e.g., Sally J. Kelley, *An Annotated Bibliography of Selected Environmental Law Resources of Interest to Practicing Attorneys*, 1995 ARK. L. NOTES 111, 111 (1995) ("In 1962 the publication of Rachel Carson's *Silent Spring* led to widespread public awareness, concern, and discussion [and activism, which] served as catalysts to the enactment of significant environmental protection legislation and to the establishment of the Environmental Protection Agency.").

14. *Id.*

15. *Our Mission and History*, ENVTL. DEF. FUND, <http://www.edf.org/about/our-mission-and-history> (last visited Nov. 16, 2013). See generally THOMAS R. DUNLAP, DDT: SCIENTISTS, CITIZENS AND PUBLIC POLICY (1981) (chronicling the efforts of the Environmental Defense Fund against DDT).

16. See ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 136–43 (1993); *E-Law: What Started it All?*, NATURAL RES. DEF. COUNCIL (May 5, 2000), <http://www.nrdc.org/legislation/helaw.asp>.

17. SIERRA CLUB, HISTORY OF ACCOMPLISHMENTS 1, available at <http://www.sierraclub.org/history/downloads/SCtimeline.pdf>.

18. See SAMUEL P. HAYES, BEAUTY, HEALTH, AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955–1985 13–14 (1989) (discussing how the conservation in the early twentieth

committed to influencing environmental policy at every stage of legislative and regulatory processes.¹⁹ The membership of these new environmental NGOs grew dramatically in the next few decades. It is estimated that in 1960 approximately 150,000 people had contributed to environmental NGOs in the U.S. and that their combined annual budgets totaled less than \$20 million.²⁰ By the end of the 1980s, eight million people in the U.S. had contributed to 100 national environmental NGOs that had a combined budget of more than \$500 million.²¹

The growth of U.S. environmental NGOs was fueled in part by funding from foundations. The Ford Foundation, which expressly sought to promote the development of public interest law in the early 1970s, provided important seed money for some of the new environmental groups.²² Early victories of the modern U.S. environment movement attracted additional membership contributions and spurred political entrepreneurs to expand their range of actions.

B. *Environmental NGOs in China*

Civil society organizations have had a long and sometimes turbulent history in China from ancient times to the present.²³ Following the Communist Revolution of 1946 “civil society virtually disappeared as a bottom-up movement” in China.²⁴ Fearing the development of competitors to its power, the Communist Party repressed civil society organizations, which reemerged only slowly after Deng Xiaoping’s reforms.²⁵

In recent years China’s civil society has played an increasingly important role in environmental protection. First, since the 1990s the

century differed from the much more popular environmental movement that emerged after World War II and grew over the following decades). *See also id.* at 53 (discussing rapid growth of the Sierra Club and National Wildlife Federation during the 1960s); *id.* at 60 (discussing the formation of groups such as the Environmental Defense Fund and the Natural Resources Defense Council, during the late 1960s and the 1970s).

19. *See id.* at 60–61 (discussing how environmental groups in the 1970s were able to advocate with “considerable effectiveness in judicial and administrative as well as legislative decision making”).

20. Robert V. Percival, *Environmental Legislation and the Problem of Collective Action*, 9 DUKE ENVTL. L. & POL’Y F. 9, 13 (1998).

21. *Id.*

22. *See* FORD FOUNDATION, THE PUBLIC INTEREST LAW FIRM: NEW VOICES FOR NEW CONSTITUENCIES 5, 20, 23 (1973) (noting that the Foundation donated over \$4 million to public interest firms between 1970 and 1973, including the Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club Legal Defense Fund, now Earthjustice).

23. *See generally* KARLA W. SIMON, CIVIL SOCIETY IN CHINA: THE LEGAL FRAMEWORK FROM ANCIENT TIMES TO THE “NEW REFORM ERA” 369–71 (2013) (detailing the history of civil society organizations beginning in the Qin dynasty).

24. *Id.* at 370.

25. *Id.*

number of environmental NGOs in China has increased significantly.²⁶ Second, mass citizen activism, often focusing on “not in my backyard” (NIMBY) issues, has been on the rise in China.²⁷ Third, the use of legal processes by individual citizens and lawyers through petitions, lawsuits, and other forms of activism has increased.²⁸ Civil society is playing an increasingly important role in efforts to awaken environmental awareness, strengthen environmental protection legislation, expose illegal business activity and governmental failures, and to promote environmental dispute resolution.

China’s first significant environmental NGO was “Friends of Nature”, a grassroots NGO similar to modern NGOs.²⁹ Environmental NGOs were pioneers in the Chinese NGO movement, and today they play a vital role in the growth and development of Chinese NGOs.³⁰ Among the current NGOs in China, environmental NGOs are believed to be the most active and the groups with the greatest social impact.

The history of environmental NGOs in China is not a long one, but it has had many twists and turns. Chinese NGOs, especially those at the grassroots level, have faced many institutional obstacles in the course of their development. These include the difficulty of registering as NGOs, financing difficulties and, other constraints on carrying out their activities. Many environmental groups that function essentially as NGOs do not meet the Chinese government’s formal qualifications for registration.³¹ In this article we treat these groups as environmental NGOs, even if they are not formally registered as such by the Chinese government.

26. All China Env’t Fed’n, Summary Report on the Development of China’s Environmental Civil Society Organizations in 2008 1 (Oct. 30–31, 2008) (unpublished manuscript), available at www.acef.com.cn/uploads/soft/131220/down_1.doc.

27. See e.g., Paul Mooney, *Citizen Activism*, HUMAN RIGHTS IN CHINA (Nov. 30, 2012), <http://www.hrichina.org/en/crf/article/6416>; Wanxin Li, Jieyan Liu & Duoduo Li, *Getting Their Voices Heard: Three Cases of Public Participation in Environmental Protection in China*, 98 J. ENVTL. MGMT. 65, 71 (discussing citizen activism and NIMBY attitude in reaction to the Liu Li Tun garbage incineration project in China).

28. Randall Peerenboom, *China’s Legal System: A Bum Rap?*, UCLA ASIA INST., <http://www.international.ucla.edu/asia/news/article.asp?parentid=2878> (last visited Nov. 16, 2013) (“Increasingly, citizens are willing to take on the government through administrative reconsideration and litigation.”).

29. See Michael M. Gunter, Jr. & Ariane C. Rosen, *Two-Level Games of International Environmental NGOs in China*, 3 WM. & MARY POL’Y REV. 270, 273 (2012) (“Beginning with the first domestic NGO, Friends of Nature in 1994 . . .”).

30. Guosheng Deng (邓国胜), *Research on Development Index of China Environmental NGO*, 6 CHINA NON-PROFIT REV. 200, 201 (2010); Chen Jie, *The NGO Community in China*, 68 CHINA PERSPECTIVES 29, ¶ 4 (2006).

31. Gunter & Rosen, *supra* note 29, at 273 (“NGO registration remains one of the most imposing obstacles for NGOs in China.”).

1. Characteristics of Chinese Environmental NGOs

a. Development Is Rapid but Legal Recognition Remains Difficult

The number of China's environmental NGOs is increasing rapidly. A survey conducted by the All China Environment Federation in 2008 found that the number of environmental NGOs in China exceeded 3,500, an approximately 28% increase over the number in 2005.³² These included more than 1,300 government-supported environmental NGOs, more than 1,380 student groups, more than 500 grass roots organizations, and 90 branches of international environmental NGOs.³³ The number of grass roots NGOs had more than doubled from 2005, increasing by more than 300.³⁴

Chinese law requires environmental NGOs to obtain the identity of a corporation and their activities must be in accordance with "Regulations for Registration and Management of Social Organizations", (issued 1998)" and "Provisional Regulations for the Registration Administration of People-Run non-Enterprise Units."³⁵ NGOs accept double-layered management., wherein registration is managed by the civil affairs department³⁶ while day-to-day business is managed by the competent business unit.³⁷ The latter has been given great power to review and monitor the activities of the environmental NGOs, and to investigate and punish their misdeeds.³⁸ To avoid those kinds of responsibilities, the competent business unit often refuses to affiliate with environmental NGOs, which severely restricts the establishment of environmental NGOs.³⁹ In addition, the above regulations still establish many substantive restrictions, which have become major institutional obstacles for the development of environmental NGOs.⁴⁰

32. All China Env't Fed'n, *supra* note 26, at 1.

33. *Id.*

34. *Id.*

35. See Gunter & Rosen, *supra* note 29, at 278–79 (summarizing major registration laws, including the Regulations on the Registration and Management of Social Organizations (revised) and Provisional Regulations on the Registration and Management of Popular Non-enterprise Work Units).

36. *Regulations for Registration and Management of Social Organisations*, CHINA DEV. BRIEF (Nov. 11, 1999, 10:14 AM), <http://www.chinadevelopmentbrief.com/node/298>. Article 6 provides that "[t]he Ministry of Civil Affairs and local Civil Affairs departments . . . are the peoples government agencies for registration and management of social organisations. *Id.*

37. *Id.*

38. *Id.*

39. See Gunter & Rosen, *supra* note 29, at 280 ("[M]any government organizations are reluctant to take on the responsibilities and potential liabilities of becoming a sponsor organization.").

40. See *generally id.* at 279–80. For example, Article 13 provides a non-exhaustive list of

China's environmental NGOs face many difficulties. The first one is an identity problem; the requirements for official registration are so harsh that many NGOs are not formally registered as Non-Profit Organizations (NPOs).⁴¹ The rest operate under other identities, registering as industry and commerce entities, or dependent and unincorporated bodies, or even operating as illegal organizations. But even unregistered environmental groups still act essentially as NGOs, so the standard of what defines an environmental NGO should be based on an organization's aims concerning environmental protection, instead of on their apparent registration identities.

Today Chinese NGOs promote the progress of civil society by playing important roles in meeting community needs, helping supervise government actions, and promoting democracy-building. In recent years, China's executive and legislative leadership have been trying to promote legislation to require NGOs to improve their management systems. Former Chinese Civil Affairs Bureau Director Chen Jin Luo led preparation of the "experts' recommended draft on non-profit organization of the PRC."⁴² This draft proposes to lower the threshold for registration of NGOs and to relax substantive access restrictions.⁴³ In addition, the Chinese NGO experts' draft also calls for promoting a tax relief system, governmental procurement of NGO public services, and other reforms.⁴⁴ These reforms eventually may help remove some of the current confusion over the identity of many environmental NGOs.

restrictions, stating that "[t]he registration and management agency will not approve the registration preparation" if "it can be shown that the objectives and area of work of a social organisation applying for the first stage of registration do not comply with Article 4 of these regulations," if "there is already a social organisation active in the same or similar area of work" in the same administrative area, if "the persons applying or the intended persons in charge have ever received criminal sanction of being deprived of their political rights, or do not possess complete civil liability," or if "deception is employed in the preliminary application." CHINA DEV. BRIEF, *supra* note 36.

41. Koon-Kwai Wong, *Greening of the Chinese Mind: Environmentalism with Chinese Characteristics*, 12 ASIA-PACIFIC REV. 39, 53 (2006).

42. Chen Jin Luo (陈金罗), *A Review of 30 Year's NGO Legislation*, PHILANTHROPY TIMES (Oct. 26, 2010, 9:45AM), http://gongyi.ifeng.com/news/detail_2010_10/26/2899037_0.shtml.

43. *Id.* The revised administrative regulations likely to be adopted by the end of 2013 are expected to assist in the registration of hundreds of thousands of NGOs according to Wang Jianjun, director of the Bureau of Administration of NGOs under the Ministry of Civil Affairs. *New Rules for NGOs on Cards*, CHINA DAILY (Apr. 19, 2013, 8:45 AM), http://usa.chinadaily.com.cn/weekly/2013-04/19/content_16421841.htm.

44. *Id.*

b. China's Environmental NGOs' Various Backgrounds and Functions

Environmental NGOs in China can be divided into three general categories: (1) officially endorsed NGOs, (2) international NGOs, and (3) grassroots NGOs. The NGOs in each of these categories perform different functions and face different limitations.

One successful example of an officially endorsed environmental NGO is the All-China Environment Federation (ACEF).⁴⁵ ACEF is recognized by China's Ministry of Environmental Protection.⁴⁶ Official backing gives this type of NGO incomparable advantages for registration, operation, and fundraising.⁴⁷ The group has very rich resources in official contacts and background, influential channels for discovering environmental illegal actions, and direct contact with powerful official media.⁴⁸ ACEF has professional expertise in technology and legal services, information disclosure, and even litigation.⁴⁹ However, because of the group's close relationship with the administrative agencies, it generally cannot freely criticize nonfeasance by administrative agencies, like many famous foreign environmental NGOs. This is significant because in China nonfeasance is a prevalent phenomenon among environmental authorities at all levels.⁵⁰

International environmental NGOs, like the NRDC and the Environmental Defense Fund (EDF), both of which have offices in Beijing, benefit from their access to substantial financial support from foreign sources.⁵¹ According to various sources, people and groups in the United States and Canada annually contribute to Chinese NGOs up to U.S. \$650 million, an amount that has been increasing yearly.⁵² More importantly, international NGOs contribute ideas concerning how to advance civil

45. See generally *Introduction*, ALL CHINA ENV'T FED'N (Aug. 30, 2012), <http://www.acef.com.cn/en/aboutacef/2013/1216/1004.html>.

46. See *Our Advantages*, ALL CHINA ENV'T FED'N (Aug. 30, 2012), <http://www.acef.com.cn/en/aboutacef/2013/1216/1007.html> (highlighting that an advantage of ACEF is support from the Ministry of Environmental Protection).

47. See ALL CHINA ENV'T FED'N, *supra* note 45.

48. See *Organizational Structure*, ALL CHINA ENV'T FED'N (Aug. 30, 2012), <http://www.acef.com.cn/en/aboutacef/2013/1216/1005.html>; ALL CHINA ENV'T FED'N, *supra* note 46.

49. Xiaoxing Feng, *Playing the Role of ENGOs, Improving the Level of Public Participation, and Promoting Sustainable Development*, ACEF (July 2, 2012), <http://www.acef.com.cn/news/lhhd/43973.shtml>.

50. MCELWEE, *supra* note 4, at 6; Qie Jianrong (郝建荣), *Governments' Nonfeasance is Major Source of Environmental Chronic Disease*, LEGAL DAILY (Nov. 14, 2011, 7:22 PM), http://www.legaldaily.com.cn/index_article/content/2011-11/14/content_3091860.htm?node=5955.

51. Cf. Gunter & Rosen, *supra* note 29, at 286 (listing budgets of six well-known international NGOs in China, including EDF and NRDC).

52. *Environmental NGOs: Further Money Pressure Highlighted*, CE NEWS (Oct. 14, 2011), http://www.cenews.com.cn/xwzx/hjyw/201110/t20111014_706797.html.

society and they can enlighten China's NGOs concerning practices that originated in the West.⁵³ However, international NGOs in China face one major quandary: because of their international character, they face stricter supervision and greater restrictions on their activities than they do when operating outside of China.⁵⁴

China's grassroots NGOs face challenges because of their small size and their difficulties obtaining financing. According to a survey on the scale of environmental public interest organizations, Chinese grassroots environmental NGOs generally are small with 73% having less than ten staff persons, and 41% with less than five staff.⁵⁵ Chronic funding shortages face even some well-known grassroots NGOs.⁵⁶ This can be traced in part to the lack of tax incentives for contributing to nonprofits because contributions to charitable organizations are not tax deductible as they are in the United States.⁵⁷ Third, there is a need for capacity-building among grassroots NGOs. The professional level of their staff is much lower than that of the average international NGO.⁵⁸ In addition, the distant relationship between government and grassroots NGOs often results in a lack of institutionalized channels for participating in governmental decision-making. However, grassroots NGOs still enjoy public support because they are perceived to be more objective as neutral third parties monitoring governmental and corporate behavior.⁵⁹

2. Reasons for the Relative Success of Environmental NGOs in China

Compared with U.S. NGOs, China's environmental NGOs are still in a formative stage and perform more limited functions. But among NGOs in

53. Ta Kung Pao, *China's Overseas NGOs have Reached more than 4000, Facing Legal Embarrassment* (June 29, 2012), <http://www.dongnanyanet.com/cms/a/kyn/2012/0710/2515.html>.

54. See Gunter & Rosen, *supra* note 51, at 279; Carl Minzner, *New Chinese Regulations on Foundations*, 2 INT'L J. CIV. SOC. L. 110, 113–15 (2004).

55. Guosheng Deng, *supra* note 30, at 205.

56. See Cai Shouqiu & Wen Lizhao, *The Latest Development of Environmental NGOs in China*, 4 INT'L UNION FOR CONSERVATION OF NATURE ACAD. ENVTL. L.J. 39, 42 (2013).

57. Tax benefits are only available to legally-registered NGOs, so many grassroots NGOs that are registered as businesses do not benefit. Shawn Shieh, *Can Bill Gates and Warren Buffet Start a Philanthropic Revolution in China, NGOs In China* (Oct. 1, 2010), <http://ngochina.blogspot.com/2010/10/can-bill-gates-and-warren-buffet-start.html>; see also Lian Mo, *Beijing Looks at Laws on Philanthropy*, CHINA DAILY (Nov. 3, 2010, 6:05 PM), http://www.chinadaily.com.cn/china/2010-11/03/content_11498980.htm.

58. Guosheng Deng, *supra* note 30, at 205.

59. See Luna Lin, *Government-Backed NGO Under Pressure to Act Against China's Largest Coal Miner*, CHINA DIALOGUE (July 23, 2013), <https://www.chinadialogue.net/blog/6227-Government-backed-NGO-under-pressure-to-act-against-China-s-largest-coal-miner/en>.

China the functions of environmental NGOs are remarkable and notably greater than those enjoyed by other kinds of NGOs. There are three main reasons for this difference.

Theoretically, environmental NGOs create less political sensitivity than other NGOs in the view of Chinese government officials. NGOs that focus on human rights, labor, and other issues are viewed as potentially more threatening by Chinese officials.⁶⁰ Despite the lack of a “grassroots culture” for NGOs, it is widely understood that the Chinese government is more tolerant of the existence and development of environmental NGOs than NGOs who focus on other issues.

Environmental NGOs enjoy a warmer relationship with executive authorities than other NGOs in China. In recent years, because of a one-sided emphasis on economic development, China’s Ministry of Environmental Protection (MEP) has faced incredible difficulties in fulfilling its increasing administrative functions.⁶¹ Despite the importance of MEP’s mission, the agency has faced many barriers to enforcement from other central authorities and local governments.⁶² This has increased the need for China’s environmental protection departments to rely more heavily on environmental NGOs for support and services. In January 11, 2011, the Ministry of Environmental Protection issued “guidance on cultivation and guide the orderly development of Chinese environmental NGOs,” to improve their quality.⁶³ Among the organizations surveyed, 71% of organizations have received the help and support of the government, and these institutions have great expectations for the role of government in environmental protection.⁶⁴

As noted above, international NGOs have made important contributions that have assisted in the development of Chinese environmental NGOs.⁶⁵ These include contributions of funds, human resources and assistance with capacity-building for China’s NGOs.

60. See Wang Fei, *Operation and Development Trend of the NGOs of Environmental Protection in China*, 247 XUE HUI 14 (2009); Chen, *supra* note 30, at ¶ 6.

61. Guosheng Deng, *supra* note 30, at 204; MCELWEE, *supra* note 4, at 83.

62. *Id.*; see also MCELWEE, *supra* note 4, at 104 (describing how administrative rules have “co-equal status” with local decrees and local rules).

63. See *Guidance on Cultivation and Guide the Orderly Development of Environmental Guidance*, MINISTRY OF ENVTL. PROT. (Dec. 10, 2010), http://www.zhb.gov.cn/gkml/hbb/bwj/201101/t20110128_200347.htm.

64. Guosheng Deng, *supra* note 30, at 203.

65. See *infra* notes 51–54 and accompanying text.

3. The Principal Functions of Chinese Environmental NGOs

Chinese environmental NGOs have functioned at a much lower level than some international NGOs, focusing on tree planting, calling for the protection of wild animals, and helping the government to raise public awareness of environmental problems.⁶⁶ Chinese environmental NGOs have been less active than international NGOs in promoting environmental legislation, enforcement, and participating in the process of regulatory development. Even the MEP's active promotion of environmental NGOs would not seem to be enough. Institutional or political reform may be needed before Chinese NGOs participate in the legislative and judicial processes that shape environmental policy as closely as NGOs do in the United States.

A survey of Chinese environmental NGOs found that such organizations typically focus on projects like the following: exchanging information, building public awareness, education, sustainable development demonstration projects, capacity building, and policy research and other means for promoting environmental protection.⁶⁷ The number of environmental organizations that provide legal assistance and that engage in policy advocacy is very limited with only 11 organizations engaging in these activities.⁶⁸ This reflects both the limited operational capacity of Chinese environmental NGOs, as well as China's legal and institutional environment. China's legal system is imperfect, especially with respect to environmental public interest litigation. The litigation system is not perfect and the judiciary is not independent.⁶⁹ Legal proceedings to protect the environment and to vindicate private rights cost too much and achieve too little success.⁷⁰ In addition, due to the lack of institutionalized participation in decision-making and ineffective government communication channels, grassroots NGOs rarely are involved in government decision-making and development planning that may have a significant impact on the environment.⁷¹

66. Guosheng Deng, *supra* note 30, at 206.

67. Guosheng Deng, *supra* note 30, at 206.

68. *Id.*

69. See e.g., Zhang Chun, *Cadmium Pollution in Yunnan Reopens Debate over Public Interest Litigation*, CHINA DIALOGUE (July 15, 2013), <https://www.chinadialogue.net/article/how/single/en/6206-Cadmium-pollution-in-Yunnan-reopens-debate-over-public-interest-litigation> (commenting on the inability of environmental NGOs to successfully prosecute alleged violators of environmental statutes due to high appraisal costs and ambiguous statutes).

70. *Id.*

71. Guosheng Deng, *supra* note 30, at 206–07.

III. CIVIL SOCIETY AND THE ENACTMENT OF ENVIRONMENTAL LEGISLATION

During the 1970s and 1980s, a broad bipartisan consensus in favor of environmental protection led the U.S. Congress to adopt comprehensive laws responding to most of the prominent environmental problems of the time.⁷² However, there is now a sharp partisan split in Congress that makes it virtually impossible to enact new environmental legislation, shifting environmental battles to the agencies and the courts.⁷³ Although the general public and regulated industries have little input on the legislative process in China, the National People's Congress (NPC) regularly reaches out to prominent academics and gives them the responsibility for drafting new legislation with substantial input from affected government agencies. Legislative proposals that win the support of the Chinese Communist Party routinely are ratified by overwhelming majorities of the NPC when it meets each March.

A. *United States*

In a remarkable burst of legislative activity between 1970 and 1976 the U.S. Congress enacted a series of laws requiring the establishment of comprehensive regulatory programs to protect the environment. These laws include the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act. These acts establish a comprehensive regulatory infrastructure that seeks to protect the public from environmental harm. While various theories have been proposed to explain why Congress was able to enact these remarkable laws,⁷⁴ the early legislation was passed even before the new, national environmental groups had developed a significant lobbying presence.⁷⁵ Some observers have even argued that the initial laws were particularly stringent because of the absence of unified, national groups representing environmental interests that were capable of making compromises with business interests in the lobbying process.⁷⁶

These laws routinely were expanded and strengthened when

72. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 92–97 (7th ed. 2013) (chronicling the history of environmental law in the United States during the 1970s).

73. *Id.* at 100.

74. Many of these theories are reviewed in Percival, *supra* note 20, at 13–15.

75. E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313, 338 (1985).

76. *Id.*

reauthorized by Congress in the decade that followed. By then both industry groups and environmental organizations had developed sophisticated lobbying operations to influence Congress.⁷⁷ Laws to address new concerns raised by highly publicized incidents of visible environmental harm also were enacted. These included the “Superfund” legislation adopted in 1980 after contamination of homes in Love Canal from long-buried hazardous wastes, the Emergency Planning and Community Right to Know Act adopted in response to the Bhopal tragedy, and the Oil Pollution Act of 1990 adopted in response to the Exxon Valdez oil spill.⁷⁸

Beginning with the 1994 Republican takeover of Congress, the bipartisan consensus in favor of more stringent environmental legislation disappeared. As both industry and public interest groups became more sophisticated in their efforts to influence legislation it has proven to be much easier for either set of interests to block legislation than to win enactment of new statutes. Today the U.S. Congress is sharply split on issues of environmental regulation.⁷⁹ The Republican takeover of the U.S. House of Representatives in the 2010 elections produced the most anti-environmental house of Congress in U.S. history. In the 112th Congress that met from 2011 through 2012, the Republican-controlled U.S. House of Representatives approved more than 300 bills to roll back environmental regulations.⁸⁰ These measures generally did not become law because they could not win passage in the U.S. Senate, which is controlled by Democrats more sympathetic to environmental regulation. Due to the partisan split in the two houses of Congress it has become virtually impossible for Congress to enact any new environmental legislation.

B. Public Participation in Legislative Initiatives in China

Because China has a one-party political system, it has avoided the legislative gridlock that has stymied the enactment of new environmental legislation in the United States. Under normal circumstances, almost all the laws that the Communist Party wants to enact meet little resistance. But when new legislation or important development projects are being

77. Today these lobbying operations are even more sophisticated. *See, e.g.*, Andrew Kreighbaum, *Oil Spill Bills Stall in Senate as Industry, Environmental Lobbyists Battle*, OPEN SECRETS BLOG (Aug. 23, 2010, 4:35 PM), <http://www.opensecrets.org/news/2010/08/post-2.html>.

78. PERCIVAL, *supra* note 72, at 144, 339, 351–52.

79. *Id.* at 100.

80. MINORITY STAFF OF THE H. COMM. ON ENERGY AND COMMERCE, 112TH CONG., THE ANTI-ENVIRONMENT RECORD OF THE U.S. HOUSE OF REPRESENTATIVES: FINAL SUMMARY OF THE 2011-2012, *available at* <http://democrats.energycommerce.house.gov/sites/default/files/documents/Anti-Environment-Voting-Record-of-112th-Congress-Summary-Final.pdf>.

considered, environmental NGOs can find many avenues for influencing government decisions.

1. The Relevant Legal Provisions for Initiating Legislation

In accordance with the relevant provisions of the Chinese Constitution and the “Legislation Law of the PRC,” the National People’s Congress Standing Committee, the State Council and the Central Military Commission, the Supreme People’s Court, Supreme People’s Procuratorate, the National People’s Congress (NPC), and a number of its representatives have the legal power in China to initiate legislation.⁸¹ China’s administrative legislation and rules are only drafted by the State Council. Those ministries and commissions in the State Council that need to develop administrative regulations must seek preliminary approval from the State Council.⁸² Thus in China because of the strict legal project procedures, theoretically it is impossible for civil society to have a direct role in initiating legislative proposals.

2. The Efforts of Chinese Environmental NGOs to Initiate Environmental Legislation

China’s environmental NGOs still have some influence on efforts to initiate environmental legislation. They can do so in the following ways. First, they can appeal for the adoption of necessary environmental legislation through their own NGO publications,⁸³ by network platform,⁸⁴

81. XIANFA [CONSTITUTION] art. 64, § 1 (2004) (China). See also Lifa Fa (立法法) [Law on Legislation] art. 12, 13, 24, 25 (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 112 (China), translated in LEGISLATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA, ORDER OF THE PRESIDENT NO. 31, CHINESE GOVERNMENT’S OFFICIAL WEB PORTAL (Mar. 15, 2013), http://english.gov.cn/laws/2005-08/20/content_29724.htm.

82. See also Lifa Fa (立法法) [Law on Legislation] art. 57 (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 112 (China), translated in LEGISLATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA, ORDER OF THE PRESIDENT NO. 31, CHINESE GOVERNMENT’S OFFICIAL WEB PORTAL (Mar. 15, 2013), http://english.gov.cn/laws/2005-08/20/content_29724.htm.

83. For example, the earliest Chinese environmental NGO “Friends of Nature,” in its annual environmental green book, *China Environmental Development Report*, noted that some important national nature reserves in China are facing a crisis and called for the nature reserve law to be enacted as soon as possible. *Chinese Environmental NGOs are Calling for Legislation to Protect Nature Reserves*, CHINA NEWS NETWORK (Apr. 19, 2012, 7:57 PM), <http://www.chinanews.com/gn/2012/04-19/3832928.shtml>.

84. See e.g. Lou Hua et al., *E administration Square*, WWW.NEWS.CN (May 9, 2009) (in order to hear more voices of the masses, people.com.cn in 2009 opened “E square” for Internet users, in order to

and by the use of influential media. Second, academics working with the environmental NGOs often are asked to help draft legislative proposals or specific legislation, which are then submitted to the NPC through its members and the CPPCC.⁸⁵ If these legislative proposals are approved by the Party leadership, they will be adopted much more easily by the National People's Congress than is the case in the U.S. Congress where fierce lobbying battles between interest groups are waged.

IV. CIVIL SOCIETY AND THE REGULATORY PROCESS

A. *United States*

In the U.S. the federal environmental laws and the Administrative Procedure Act require agencies to solicit public input before adopting regulations.⁸⁶ Agencies generally must provide the public with notice and an opportunity to submit comments prior to adopting any new regulations.⁸⁷ Regulatory targets are intensely interested in forestalling the issuance of regulations and reducing the cost of complying with them. Thus, during the rulemaking process regulated industries in the U.S. fiercely lobby not only the agency conducting the rulemaking, but also the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), which is tasked by the President with reviewing and approving particularly significant proposed and final regulations.⁸⁸ While public interest groups also participate in this process, their influence more often than not is dwarfed by industry lobbying efforts.⁸⁹

enable the public, Congress representatives, and government officials to exchange views via the Internet). Over the past few years "E square" has been the vehicle for the submission of more than 14,000 recommendations. Another example is that many environmental NGOs called for tobacco control legislation in Beijing in 2008 in their own annual symposium. *400 Environmental Organizations Calling for Tobacco Control Legislation*, BEIJING TIMES (Nov. 1, 2008, 9:51 AM), <http://news.qq.com/a/20081101/000879.htm>.

85. Hong Liu, *China ENGOs' Participation in Policy Making*, 6 FUDAN PUB. ADMIN. REV. 5 (2010) (discussing some examples of how the members of environmental NGOs used their own status as members of the NPC and the CPPCC to put forward the proposals to NPC & CPPCC).

86. PERCIVAL, *supra* note 72, at 170–71.

87. *Id.*

88. *Id.* at 172–74.

89. See, e.g., John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES, Nov. 17, 2011, at A1 (arguing political strategy was behind the White House's rejection of EPA's proposed smog standard); Haley Sweetland Edwards, *He Who Makes the Rules*, WASH. MONTHLY, Mar./Apr. 2013, at 27, (describing how industry lobbying has neutered agencies trying to issue regulations to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act). But see Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1860–63 (2013) (former OIRA administrator arguing that although OIRA meets far more frequently with business groups than environmental NGOs its actions vetoing national

For NGOs one of the most challenging aspects of the regulatory process is the need to convince agencies to focus regulatory attention on a particular problem. If environmental legislation requires an agency to regulate a particular problem, the federal environmental laws generally authorize private parties to bring citizen suits to compel government officials to perform duties required by law.⁹⁰ These provisions were used by environmental NGOs to force EPA to issue regulations implementing many of the federal laws that required comprehensive regulatory programs to protect the environment. As frustration mounted over EPA delays in issuing regulations, Congress repeatedly amended the environmental laws to establish statutory deadlines for EPA's issuance of regulations.⁹¹ Because these deadlines are enforceable through citizen suits, they have given environmental NGOs new tools for forcing regulatory action.

In a few instances environmental NGOs in the U.S. also have been able to use lawsuits to compel EPA to regulate certain substances or practices that were not explicitly subject to regulation in the underlying environmental statutes. For example, a Sierra Club lawsuit forced EPA to establish a program to prevent significant deterioration of air quality in areas currently in attainment for the national ambient air quality standards.⁹² A lawsuit by the NRDC forced EPA to promulgate a national ambient air quality standard for lead.⁹³

But usually it is very difficult to convince an already overburdened agency to focus regulatory attention on a particular issue. This is well illustrated by the history of NGO efforts to persuade EPA to ban gasoline lead additives.⁹⁴ Tetraethyl lead was invented by chemist Thomas Midgely

environmental regulations had nothing to do with politics).

90. RICHARD G. STOLL, *EFFECTIVE EPA ADVOCACY: ADVANCING AND PROTECTING YOUR CLIENT'S INTERESTS IN THE DECISION-MAKING PROCESS* 15 (2010).

91. PERCIVAL, *supra* note 72, at 98.

92. The Sierra Club successfully argued that the Clean Air Act's statutory purpose to "protect and enhance" air quality created an obligation not only to attain the NAAQS, but also to prevent the deterioration of air quality that was presently better than the NAAQS. After the district court decision was affirmed in an unpublished per curiam opinion by the D.C. Circuit, it was then sustained when the Supreme Court split 4-4 on the merits. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 256 (D.D.C. 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided court mem. sub nom.*, *Fri v. Sierra Club*, 412 U.S. 541, 541 (1973).

93. The court ruled that because EPA had already made a determination that lead endangered public health in order to regulate lead additives in fuel, and because it was indisputable that lead satisfied the criteria pollutant standard of being emitted from "numerous or diverse mobile or stationary sources," EPA also had a nondiscretionary duty to declare lead a criteria pollutant and regulate it under the provisions of the Act governing those pollutants. *Natural Res. Def. Council v. Train*, 545 F.2d 320, 322 (2d Cir. 1976).

94. The history of NGO efforts to persuade EPA to ban lead additives is reviewed in detail in Ellen K. Silbergeld & Robert V. Percival, *The Organometals: Impact of Accidental Exposure and*

in the 1920s as an inexpensive means for boosting gasoline's octane content.⁹⁵ By the late 1960s Cal Tech scientist Clair Patterson was warning that increased use of leaded gasoline was generating dangerously high levels of lead in the ambient air and in soil near major highways.⁹⁶ As enacted by Congress in 1970, the Clean Air Act expressly authorized EPA to regulate fuel additives that the agency found to endanger public health.⁹⁷ Pressed by environmental NGOs to respond to this problem, EPA adopted regulations to set an upper limit on the amount of lead additives that refiners could use in the total pool of gasoline (leaded and unleaded) that they produced.⁹⁸

Having made a finding that lead in the ambient air endangered public health, EPA was sued by NRDC, which successfully argued that the Clean Air Act also required EPA and NRDC to set a national ambient air quality standard for lead.⁹⁹ After EPA's initial limits on the amount of lead in gasoline were struck down by a three-judge panel as based on evidence that was "speculative and inconclusive at best," the U.S. Court of Appeals, by a 5-4 vote, reversed this decision and upheld EPA's regulation in a decision that represents the U.S. judiciary's strongest endorsement of precautionary regulation.¹⁰⁰

In 1982 the lead in gasoline issue resurfaced when Vice President Bush, as head of President Reagan's Vice Presidential Task Force on Regulatory Relief, forced EPA to propose abolishing the very limits on the lead content of gasoline that the D.C. Circuit had upheld. NGOs played a major role in defeating this initiative.¹⁰¹ The NGOs received surprising support from conservative columnist George Will who wrote a column entitled "The Poison That Poor Children Breathe," attacking the proposal.¹⁰² In a decision upholding EPA's decision to abandon the

Experimental Data on Regulatory Policies, in NEUROTOXICANTS AND NEUROBIOLOGICAL FUNCTION: EFFECTS OF ORGANOHEAVY METALS 328 (Hugh A. Tilson & Sheldon B. Sparber eds., 1987); and Lisa Heinzerling, Frank Ackerman & Rachel Massey, *Applying Cost-Benefit to Past Decisions: Was Environmental Protection Ever a Good Idea?*, 57 ADMIN. L. REV. 155, 160-72 (2005).

95. Jamie Lincoln Kitman, *The Secret History of Lead*, THE NATION (Mar. 20, 2000), <http://www.thenation.com/article/secret-history-lead?page=0,2>.

96. Clair Patterson, *Contamination and Natural Environments of Man*, 11 ARCH. ENVTL. HEALTH 344 (1965).

97. Heinzerling, Ackerman & Massey, *supra* note 94, at 164.

98. Silbergeld & Percival, *supra* note 94, at 342.

99. *Natural Res. Def. Council v. Train*, 545 F.2d 320, 328 (2d Cir. 1976).

100. *See Ethyl Corp. v. U.S. Env'tl. Prot. Agency*, 541 F.2d 1, 54 (D.C. Cir. 1976) (en banc).

101. Silbergeld & Percival, *supra* note 94, at 344-45.

102. George Will, *The Poison Poor Children Breathe*, WASH. POST, Sept. 16, 1982, at A23, reprinted in *LAW AND THE ENVIRONMENT: A MULTIDISCIPLINARY READER 101* (Percival & Alevizatos eds., 1997).

proposal, but giving small refineries more time to comply with it, the U.S. Court of Appeals stated, “the demonstrated connection between gasoline lead and blood lead,” and “the demonstrated health effects of blood lead levels . . . would justify EPA in banning lead from gasoline entirely.”¹⁰³

With the D.C. Circuit having confirmed that a ban on lead in gasoline would not encounter legal problems, NGOs then thought strategically concerning how to persuade EPA to act. At the time the agency was facing deep political problems because cars that were supposed to run on leaded gasoline often were being misfueled with the slightly cheaper leaded gasoline, destroying their catalytic converters and contributing to an unexpected rise in air pollution.¹⁰⁴ EPA responded to this problem by requiring states to undertake politically unpopular vehicle inspection programs. At the same time the Reagan administration’s newly empowered Office of Management and Budget was pushing all regulatory agencies to base their decisions on cost-benefit analyses.¹⁰⁵ One environmental NGO pushed EPA to solve the misfueling problem by phasing out gasoline lead additives, arguing that a cost-benefit analysis would demonstrate enormous net benefits from such action.¹⁰⁶ EPA ultimately proposed to phase out leaded gasoline toward the end of the Reagan administration, despite the President’s ideological opposition to environmental regulation. When implemented, this single regulatory action caused massive reductions in children’s exposure to lead. It now has been adopted by nearly every country in the world.¹⁰⁷

This history demonstrates the power of NGOs thinking strategically and seeking alliances even with groups that normally are not proponents of environmental protection measures. Lead phasedown is now widely viewed as EPA’s most notable environmental achievement.¹⁰⁸ Yet then-EPA Deputy Administrator Al Alm noted that it was an initiative that came about almost by accident “through a ‘chance’ encounter” with someone who suggested that EPA do a cost-benefit analysis of a lead phaseout.¹⁰⁹

103. *Small Refiners Lead Phase-Down Task Force v. U.S. Evtl. Prot. Agency*, 705 F.2d 506, 531 (D.C. Cir. 1983).

104. Silbergeld & Percival, *supra* note 94, at 346.

105. *Id.* at 345.

106. *Id.* at 345–46.

107. See *Phasing Out Leaded Gasoline*, WORSTPOLLUTED.ORG, <http://www.worstpolluted.org/projectsreports/display/66> (last visited Nov. 16, 2013).

108. PERCIVAL, *supra* note 72, at 33 (citing the financial and health benefits that resulted from the EPA’s phasedown of lead additives in gasoline).

109. Al Alm, *The Multimedia Approach to Pollution Control: An Impossible Dream?*, in MULTIMEDIA APPROACHES TO POLLUTION CONTROL: A SYMPOSIUM PROCEEDINGS 114, 115 (1987).

B. *Public Participation in the Regulatory Process in China*

In China regulations are issued with little public input by the State Council, a body that is considered a separate branch of government under the Chinese Constitution. Because Chinese environmental regulations are not the product of fierce lobbying and compromise between affected interests and regulatory authorities, it seems hardly surprising that they are not taken as seriously by the regulated community as in the U.S.

1. Public Participation in Accordance with China's Administrative Regulations

Public participation in the area of administrative regulations means systems and mechanisms through which relevant governmental entities allow and encourage interested parties and ordinary citizens to share their opinions in the process of administrative legislation and decision. These opinions are sought to further enhance justice and the rationality of administrative actions. In China this is a significant element in efforts to promote the rule of law and adherence to law by administrative agencies.¹¹⁰ To ordinary citizens, public participation is a mechanism of interest expression.

Article 58 of the registration law of PRC provides that “In drafting administrative regulations, opinions from relevant organs, organizations and citizens shall be widely listened to, and forums, seminars, hearings, etc. may be held for the purpose.”¹¹¹ Thus, gathering of opinions may be in various forms such as panel discussions, feasibility study meetings, hearings, or other forms.¹¹²

Public participation is increasingly welcomed by the government and more frequently mentioned in the documents of the State Council. The article of “Guidelines of Comprehensively Promoting Administration by Law,” issued by the State Council in 2004, requires improvement in the way the public participates in the development of government legislation and broader public participation.¹¹³ The article of “Opinions on

110. The Law on Legislation of the People's Republic of China (promulgated by Order No. 31 of the President of the People's Republic of China, Mar. 15, 2000, effective July 1, 2000), Article 1, 58, *translated in* LEGISLATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA, ORDER OF THE PRESIDENT NO. 31, CHINESE GOVERNMENT'S OFFICIAL WEB PORTAL (Mar. 15, 2013), *available at* http://english.gov.cn/laws/2005-08/20/content_29724.htm.

111. *Id.*

112. *Id.*

113. *Guidelines of Comprehensively Promoting Administration by Law*, STATE COUNCIL (Aug. 31, 2006), http://www.gov.cn/ztl/yfxz/content_374160.htm (announcing that part 5 and other articles require improvement in the way the public participates in the development of government legislation

Strengthening the Establishment of Government by Law issued by the State Council” in 2010, emphasizes that government legislation should strictly comply with legal jurisdiction and procedures.¹¹⁴ It also requires improvements in the systems and mechanisms of public participation to guarantee that public opinions can be fully expressed and that legitimate rights can be fully realized.¹¹⁵

2. Practices by the Public, Especially Environmental NGOs

Compared with the development of legislative initiatives, environmental NGOs have more opportunities to participate in the implementation of legislation because of legal guarantees. But to make the public voice heard in the NPC, contacting representatives is not the only way. Environmental NGOs can seek to influence legislation by promoting their ideas concerning specific legislation,¹¹⁶ by encouraging public response to the call from the MEP or other legislative and administrative entities,¹¹⁷ and by using both platforms of official bureaus and civic society themselves.¹¹⁸

3. Strong Public Dissatisfaction with Environmental Conditions and Efforts to Improve Current Regulations

During the meeting of the NPC and CPPCC in Beijing in early 2013, rare dissent surfaced when the NPC elected the members of the NPC’s

and broader public participation).

114. *Opinions on Strengthening the Establishment of Government by Law*, STATE COUNCIL (2010) http://www.gov.cn/gongbao/content/2010/content_1745842.htm (announcing that part 4 and other articles emphasize that government legislation should strictly comply with legal jurisdiction and procedures).

115. The Law on Legislation of the People's Republic of China (promulgated by Order No. 31 of the President of the People's Republic of China, Mar. 15, 2000, effective July 1, 2000), Article 5, translated in LEGISLATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA, ORDER OF THE PRESIDENT NO. 31, CHINESE GOVERNMENT'S OFFICIAL WEB PORTAL (Mar. 15, 2013), available at http://english.gov.cn/laws/2005-08/20/content_29724.htm.

116. For example, many NGOs proposed regulatory initiatives and some directly put forward detailed drafts of laws. During the modification of the civil procedure law of PRC, “numerous environmental organizations and individual citizens . . . submitted their views.” *The Top Ten Events of Public Participation in Environmental Protection in 2012*, CPPCC (Apr. 18, 2013), <http://cppcc.people.com.cn/n/2013/0418/c34948-21177179.html>. See also Christine Xu, *Didn't Think China had Bottom-Up Activism? Think Again*, NATURAL RES. DEF. COUNCIL (July 8, 2013), http://switchboard.nrdc.org/blogs/cxu/didnt_think_china_had_bottom-u.html.

117. CPPCC, *supra* note 116.

118. *Id.*

Environmental and Resources Protection Committee.¹¹⁹ Up to 850 representatives voted “no”, which means that one-third of the total representatives refused to vote for them, considering the 125 who refused to vote.¹²⁰ The voting results astonished the representatives in the Great Hall and also drew accolades from some media. This unusual level of dissent reflected dissatisfaction of people from all walks of life in China. It can be predicted that in the future the public, especially organized NGOs, will play a larger role in initiating environmental legislation.

Although no relevant regulations can be found on public participation in legislative initiatives at the national legislative level, there have been some breakthroughs in recent years at the local level. For example, in 2006 the Guangzhou Municipal Government enacted the “Measure of the Public Participation in Legislation of Regulations in Guangzhou” (“the Measure”) that became effective from January 1, 2007.¹²¹ Few particular local governmental regulations address public participation in administrative legislation.¹²² In 2012 the Guangzhou Municipal Government amended the Measure to improve the procedures for public participation.¹²³ The Measure has 37 articles in five chapters, mainly addressing public participation in regulation drafting, examination, and execution.¹²⁴

Though few local governmental regulations in China regulate public participation in administrative legislation, many other local governments also have relevant procedures for public participation in drafting local regulations. For example, the “Regulations of Hunan Administration Procedures (2008)” fully reflect that government’s arrangement regarding public participation in regulatory decisions.¹²⁵ Currently, 29 provincial-level governments will collect opinions openly before drafting local

119. Li Jing & Verna Yu, *New Environmental Team Booed Amid Pollution Woes*, S. CHINA MORNING POST (Mar. 17, 2013, 5:59 AM), <http://www.scmp.com/news/china/article/1192581/new-environmental-team-booed-amid-pollution-woes>.

120. *Id.*

121. *The Measures of the Public Participation in Legislation of Regulations in Guangzhou*, LEGAL EDUC. NETWORK (Oct. 26, 2010), <http://www.chinalawedu.com/falvfagui/1200a21752aaaa2010/20101223wangyo14144.shtml>. See also *Guangzhou Municipal Measures on Public Participation in Formulating Rules* (promulgated by the Guangzhou Municipal Government Standing Committee, June 27, 2006, effective Jan. 1, 2007) (China).

122. During the writing of this paper, another provincial level regulation named “Public participation in formulating local regulations” was issued by Gansu province on July 26, 2013, effective October 1, 2013. See *Gansu Provincial People’s Congress Standing Committee Notice*, CPC NEWS (Oct. 4, 2013, 4:53 PM), <http://cpc.people.com.cn/n/2013/1004/c64387-23104941.html>.

123. *Id.*

124. *Id.*

125. *Hunan Provincial Procedure Provisions* (promulgated by the Hunan Provincial People’s Government, Apr. 9, 2008, effective Oct. 1, 2008) (China).

regulations and rules.¹²⁶ A total of 18 provinces, cities, and autonomous regions, including Beijing and Tianjin, have regulations on collecting opinions openly and holding hearings relating to provincial-level regulations when drafting local regulations and rules.¹²⁷ At the same time the other 11 provinces, cities, and autonomous regions have relevant regulations in the form of regulative documents, working rules of legal offices or systems approved by provincial governments.¹²⁸ Systems supporting public participation in local administrative legislation are gradually taking form.¹²⁹

Conceptually, issues regarding NGO organization and public participation in the regulatory process are no longer obstacles. However, much still must be done to improve public participation including: (1) broadening participation in national-level and local rulemaking to establish more specific regulations, (2) reducing excessive formalism, which is a serious problem in many kinds of public decisions and which reduces the effectiveness of public participation, requiring a more reasonable design of the system, (3) more professional training of NGO representatives to improve their organization's ability to influence regulatory decisions, and (4) greater sincerity in implementing the relevant systems by administrators and legislators at all levels.¹³⁰

V. JUDICIAL REVIEW OF ENVIRONMENTAL REGULATIONS

Virtually every significant environmental regulation promulgated in the U.S. is challenged in court by the regulated industry and/or environmental interests. With gridlock in Congress precluding the enactment of new environmental legislation, the judiciary has become a more important battleground between regulatory targets and the beneficiaries of regulation. Although the U.S. Supreme Court has instructed lower courts to defer to decisions by executive agencies interpreting ambiguous statutory provisions,¹³¹ some agencies and some

126. Hong Zhang (张红), *Public Participation in Administrative Legislation: Institutional Innovation and Prospects*, ADMIN. REFORM (July 20, 2011, 9:08 AM), <http://www.cntheory.com/news/Dshclsfb/2011/720/117209812K244BBI183BC1C5HE6G6.html>.

127. *Id.*

128. *Id.*

129. *Id.*

130. Feilong Tian, *Public Participation: From The System Principle to the System Details* (Mar. 25, 2013), <http://www.publiclaw.cn/article/Details.asp?NewsId=4224&classid=22&classname=公民参与立法>.

131. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

types of regulation seem to receive more deference than others.¹³² The judiciary also has used doctrines of standing to make it more difficult for NGOs to challenge certain types of agency actions.¹³³ By contrast, the Chinese judiciary plays virtually no role in influencing agency decisions because regulations issued by the State Council generally are not subject to judicial review.¹³⁴

A. *United States*

The judicial system has played an important role in developing U.S. environmental policy through judicial review of agency regulatory decisions. The U.S. Administrative Procedure Act (APA) and the federal environmental statutes generally authorize judicial review of agency action at the behest of anyone adversely affected by it.¹³⁵ As adopted in 1946, the APA was a compromise that sought to balance the interests of the public in effective regulation with those of the regulated community by making it easier for agencies to issue regulations while providing greater access to judicial review as a check on agency action.¹³⁶

Although the U.S. Supreme Court has instructed lower courts to defer to agency interpretations of ambiguous regulatory statutes,¹³⁷ significant regulatory initiatives have been derailed by the courts. Despite overwhelming proof of harm to health caused by tobacco products, when the U.S. Food and Drug Administration (FDA) sought to regulate them stringently, the U.S. Supreme Court, by a 5-4 vote, rejected the agency's finding that cigarettes were "drug delivery devices" for nicotine that could be regulated by the agency.¹³⁸

In 1989, after a decade-long investigation, EPA issued a regulation phasing out nearly all remaining uses of asbestos.¹³⁹ The agency concluded

132. See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 796–97 (2008); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 183–84 (2010).

133. See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

134. RACHEL E. STERN, *ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE* 212 (Chris Arup et al. eds., 2013).

135. Administrative Procedure Act, 5 U.S.C. § 702 (2006) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.')

136. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999).

137. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

138. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131, 160–61 (2000) ("Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.')

139. *Asbestos: Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29, 460 (July 12, 1989) (codified at 40 C.F.R. pt. 763).

that only a phaseout “will adequately control” the life cycle of asbestos exposure risks that occur whenever the substance is mined, used in manufacturing, released into the environment through deteriorating asbestos-containing products, or is disposed.¹⁴⁰ Despite the well-documented dangers of asbestos, this regulation was struck down by a reviewing court which concluded that the agency had failed to perform sufficiently detailed cost-benefit analyses of banning not only each particular use of asbestos, but also of all intermediate alternatives short of a ban.¹⁴¹ The court required such highly detailed proof, on a product-by-product basis, that benefits outweighed costs, as to render the Toxic Substances Control Act virtually impotent as a regulatory tool.¹⁴²

Despite some judicial reversals of important regulatory initiatives, the regulatory infrastructure of U.S. environmental law generally has survived persistent legal attacks. In 2001 the U.S. Supreme Court unanimously rejected an industry argument that unless the Clean Air Act was interpreted to require that regulations be based on cost-benefit analyses it would be an unconstitutional delegation of legislative authority to the executive.¹⁴³ In 2007 the Court, by a 5-4 vote in *Massachusetts v. EPA*, ordered EPA to reconsider its refusal to regulate greenhouse gas (GHG) emissions as arbitrary and capricious.¹⁴⁴ As a result of this decision, the EPA was able to promulgate regulations controlling GHG emissions under the existing Clean Air Act, even though efforts to enact new legislation establishing a comprehensive cap-and-trade program had failed. In June 2012 a panel of the U.S. Court of Appeals for the D.C. Circuit unanimously rejected all industry challenges to these regulations in a decision deferring to EPA’s findings concerning the contribution of GHG emissions to global warming and climate change.¹⁴⁵

B. *China*

Chinese law does not authorize private parties to seek judicial review

140. *Id.* at 29,468.

141. *See Corrosion Proof Fittings v. U.S. Env’tl. Prot. Agency*, 947 F.2d 1201, 1229 (5th Cir. 1991) (“[EPA’s] explicit failure to consider the alternatives required of it by Congress deprived its final rule of the reasonable basis it needed to survive judicial scrutiny.”).

142. *See id.* While the *Corrosion Proof Fittings* decision effectively precluded EPA from banning existing uses of asbestos, most other developed countries have done so, and the World Trade Organization (WTO) has upheld such bans in light of the demonstrated dangers of asbestos. *E.g.*, Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 192(b), WT/DS135/AB/R (Mar. 12, 2001).

143. *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 458, 475–76 (2001).

144. *Massachusetts v. U.S. Env’tl. Prot. Agency*, 549 U.S. 497, 534 (2007).

145. *Coal. for Responsible Regulation, Inc. v. U.S. Env’tl. Prot. Agency*, 684 F.3d 102, 113 (D.C. Cir. 2012) (per curiam).

of regulatory decisions by the State Council. In 2003 two judges in Henan province were fired as a result of a decision that struck down a provincial regulation as inconsistent with national law.¹⁴⁶ This received national attention in China, providing a strong signal to other judges that aggressive judicial review was unwelcome in China.

VI. ENVIRONMENTAL ENFORCEMENT AND CITIZEN SUITS

In the U.S., environmental enforcement relies heavily on self-monitoring by regulated industries, supplemented by government inspections. But nearly all the federal environmental laws provide for citizen suits that can be brought either against government agencies who fail to perform non-discretionary duties, such as meeting statutory deadlines for issuing regulations, or against polluters who violate their permits.¹⁴⁷ As noted above, citizen suits against government officials initially played a key role in forcing U.S. agencies to issue regulations to implement the environmental laws. However, except in Clean Water Act cases they have not been used frequently to enforce the environmental laws against polluters because of the difficulty of proving violations.

Despite determination at the national level to upgrade environmental performance, Chinese officials have had a difficult time enforcing their environmental laws because their legal system is so decentralized with local environmental protection boards having most of the enforcement power.¹⁴⁸ China's Ministry of Environmental Protection has only 300 employees (compared to 17,000 employees at the U.S. EPA) and it regularly loses bureaucratic battles to the powerful National Development and Reform Commission.¹⁴⁹ Chinese environmental laws do not expressly provide for citizen suits, though determined public interest lawyers still are bringing lawsuits asking courts to stop pollution and to compensate victims. The creation of environmental courts in some Chinese provinces and legal reforms to facilitate class actions ultimately may make such lawsuits easier to win. But Chinese courts remain beholden to the wishes of the Communist Party and routinely refuse to hear cases that the Party does not want to be heard. This is illustrated by the refusal of Chinese

146. STERN, *supra* note 134, at 212.

147. See PERCIVAL, *supra* note 72, at 1122–23.

148. MCELWEE, *supra* note 4, at 5.

149. *Id.* at 84; *How Many People Work for the EPA?*, ENVTL. PROT. AGENCY, <http://publicaccess.supportportal.com/link/portal/23002/23012/Article/17588/How-many-people-work-for-the-EPA> (last modified May 7, 2013).

courts to hear lawsuits by fishermen harmed by the Bohai Bay oil spill.¹⁵⁰

A. *United States*

In the U.S., government enforcement authorities rely heavily on self-monitoring and self-reporting requirements to detect violations of the environmental laws. The pollution control statutes generally authorize EPA to impose monitoring, recordkeeping, and reporting requirements on dischargers.¹⁵¹ Under the Clean Water Act, dischargers of water pollutants are required to monitor their discharges on a regular basis and to file discharge monitoring reports (DMRs) that are available to the public. When self-reported violations are included in DMRs, it is relatively easy for regulatory authorities or citizen groups to bring successful enforcement actions. Recognizing the danger that sources will not report adverse monitoring data truthfully, regulatory authorities prosecute reporting violations with vigor. When false reporting or tampering with monitoring data has been discovered, criminal prosecutions often follow. To make it possible to uncover false reports, the environmental laws generally give enforcement officials the right to conduct inspections.¹⁵²

Recognizing that federal agencies had a long history of unresponsiveness to environmental concerns, Congress sought to enlist citizens in the tasks of ensuring that the laws were implemented and enforced properly. It did so by authorizing citizen suits, a major innovation first incorporated in the Clean Air Act Amendments of 1970¹⁵³ and included in virtually all the major environmental laws Congress subsequently adopted.¹⁵⁴ These provisions generally allow citizens to act as “private attorney generals” to supplement government enforcement against those who violate environmental regulations.¹⁵⁵ They “generally authorize ‘any person’ to commence an action against ‘any person’ alleged to be in violation of the laws.”¹⁵⁶ These citizen suit provisions require citizens to

150. *500 Fishermen of Shandong Claimed Against Conoco Phillips, a U.S. Court Hearing*, CHINA NETWORK (Apr. 3, 2013), http://news.china.com.cn/live/2013-04/03/content_19360353.htm; Gong Jing & Cui Zheng, *The Dark Patch on Bohai Bay*, CHINA-WIRE (Dec. 26, 2011), <http://china-wire.org/?p=17854>.

151. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1318–19 (2006).

152. ENVTL. LAW INST., A CITIZEN’S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE 22–23 (2002), *available at* http://www.epa.gov/compliance/ej/resources/reports/annual-project-reports/citizen_guide_ej.pdf.

153. Clean Air Act, 42 U.S.C. § 7604 (2006).

154. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365 (2006), Water Act and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9659 (2006).

155. PERCIVAL, *supra* note 72, at 1123.

156. *Id.*

notify the alleged violator and federal and state authorities prior to filing suit. Sixty days' notice usually is required, although the amount of notice can vary for certain violations.¹⁵⁷ The citizen suit provisions usually specify that if federal or state authorities are diligently prosecuting an action to require compliance, filing of a citizen suit is barred, though citizens are authorized to intervene in federal enforcement actions as of right.¹⁵⁸

Citizen enforcement actions against private parties who violated environmental regulations were rarely filed during the 1970s. This changed in 1982 due to concern over a dramatic decline in governmental enforcement efforts during the early years of the Reagan administration. The NRDC "initiated a national project to use citizen suits to fill the enforcement void."¹⁵⁹ NRDC's project focused on enforcement of the Clean Water Act because it was easy to prove violations of this Act through discharge monitoring reports (DMRs) filed by polluters.¹⁶⁰ These reports are "available to the public and can serve as prima facie evidence of NPDES permit violations."¹⁶¹ Joined by local environmental groups, NRDC systematically scrutinized DMRs, sent 60-day notice letters to dischargers who reported violations of permit limits, and then filed citizen suits. As a result of this project, the total number of citizen suits brought under the Clean Water Act increased from six in 1981 to 62 in 1983, surpassing the 56 Clean Water Act cases referred by EPA to the Justice Department for prosecution that year.¹⁶²

Citizen suits became relatively easy to win because of the self-reported violations contained in the DMRs. Several courts rejected efforts to create new defenses to such suits (including claims that discharge monitoring reports prepared by defendants were too unreliable to serve as the basis for violations or that they violated the Fifth Amendment privilege against self-incrimination).¹⁶³ Dischargers protested vehemently (the general counsel of the Chemical Manufacturers Association complained that his members never would have agreed to more aggressive permit

157. For example, section 505(b) of the Clean Water Act (officially codified as 33 U.S.C. § 1365(b)(2) (2006)) authorizes suits alleging violations of NSPS requirements or toxic effluent standards to be brought immediately after notice, as does section 7002(b)(1)(A) of the Resource Conservation and Recovery Act (RCRA) (officially codified as 42 U.S.C. § 6972(c) (2006)) for violations of RCRA subtitle C.

158. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b)(1)(B).

159. PERCIVAL, *supra* note 72, at 1130.

160. *Id.*

161. *Id.*

162. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 ENVTL. L. REP. 10,407, 10,424 (1984).

163. PERCIVAL, *supra* note 72, at 1131.

provisions if they had known that their permits were going to be enforced), In 1984 EPA commissioned a comprehensive study of citizen suits.¹⁶⁴ The study found that citizen suits had been operating in a manner generally consistent with the goals of the environmental statutes by both stimulating and supplementing government enforcement.¹⁶⁵ The study rejected the notion that citizen suits had interfered with government enforcement efforts or that they had focused on trivial violations.¹⁶⁶

B. China

1. NGOs' Non-Litigation Roles in Environmental Enforcement

NGOs can play a role in the implementation and enforcement of Chinese environmental law. The implementation of law by Chinese NGOs can be divided into two parts: litigating on behalf of the public after an environmental incident and efforts to enforce the environmental laws during administrative processes. The latter mainly includes supervision of the implementation of the government's environmental policies and promoting corporate responsibility.

As social organizations, environmental NGOs can develop their own proposals and views to some extent, and express their opinions during the administrative process. Efforts to influence public opinion are the most common strategy employed by Chinese environmental NGOs. For example, in 2003 Chinese NGOs effectively organized public opposition to a proposal by a state-owned corporation to build 13 dams on the Nu River. As a result of widespread protests, the project was suspended by then-Premier Wen Jiabao in 2004. In 2012 Chinese NGOs succeeded in bringing several construction projects to a halt for failure to comply with environmental impact assessment requirements.”¹⁶⁷

164. *Id.*

165. ENVTL. LAW INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES, at v, ix (1984).

166. Other studies of the impact of citizen suit provisions in the environmental laws were presented in April 2003 at a symposium at Widener University School of Law. The symposium on “Environmental Citizen Suits at Thirty something: A Celebration & Summit” featured leading figures in the citizen suit movement who discussed its history and current status. See e.g. Karl S. Coplan, *Is Citizen Suit Notice Jurisdictional and Why Does it Matter?*, 10 WIDENER L. REV. 49 (2003); James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1 (2003); Jeffrey G. Miller, *Overlooked Issues in the “Diligent Prosecution” Citizen Suit Preclusion*, 10 WIDENER L. REV. 63 (2003).

167. *The Top Ten Events of Public Participation in Environmental Protection in 2012*, *supra* note 116. For a description of the environmental impact assessment process for construction, see MCELWEE, *supra* note 4, at 130.

In 2012, pervasive environmental pollution and food safety problems drew more and more attention to heavy metal in the soil, PM2.5 in the air, unsafe drinking water, and invisible nuclear radiation. Gathering and publishing environmental data through mobile devices has become a new way for the public to participate in environmental protection.¹⁶⁸ Monitoring activities by private parties have been inspired by greater public concern over the quality of the living environment. These activities also can be seen as a way to spur professional institutions and government officials to disclose information and to take positive measures to protect the environment. These activities enhance the public's enthusiasm for participation in environmental protection. Environmental monitoring activities are listed among the top ten elements of the public's participation in environmental protection.¹⁶⁹

Another clear trend in China is that environmental NGOs are starting to take on some governance roles that originally belonged to the government by helping to monitor compliance with environmental regulations.¹⁷⁰ This could mean that the government may relinquish some environmental management functions that could be performed by NGOs. As the government begins to cede some of its role to the NGOs, the government can focus more on macroeconomic regulation and general control, eventually enlisting NGOs to be a *de facto* constraint on executive power.

The All China Environmental Federation (ACEF), a government-endorsed NGO, is a social organization that can play an important role in monitoring official action to ensure that the government performs its responsibility to protect the environment. After ACEF receives environmental complaints, it can conduct an on-the-spot investigation and use media exposure to publicize environmental problems.¹⁷¹ ACEF then can send a proposal letter to the relevant administrative department responsible for protecting the environment. Using these methods, ACEF has responded effectively to 16 cases of pollution problems, promoting local government administration according to law, and supervising polluting enterprises to eliminate the pollution problem and maintain public environmental rights and interests.¹⁷²

ACEF has played a very useful role in promoting compliance with environmental regulations. Cases it has handled often are publicized in

168. *Id.*

169. *Id.*

170. *Id.*

171. *See Introduction, ALL CHINA ENV'T FED'N, supra* note 45.

172. *Id.*

media reports by the Xinhua News Agency or CCTV. ACEF's lawyers wrote to China's top leaders to get attention from all levels of the government.¹⁷³ ACEF is particularly valuable because its members know China's national conditions deeply, and they can find the most workable methods for resolving pollution disputes through monitoring and site investigation that then are reported by media and to officials.¹⁷⁴

2. NGOs' Roles in Bringing Citizen Suits—ACEF's Recent Attempt

a. In China Only ACEF is Active in Bringing Public Interests Suits

ACEF's achievements on citizen suits are remarkable. As a civil society organization, ACEF brought and won a lawsuit against Xiuwen County Environmental Protection Bureau for malfeasance in failing to provide environmental information to the public.¹⁷⁵ ACEF completed the nation's first public environmental interest litigation with a social organization as plaintiff.¹⁷⁶ It brought a lawsuit against Dingpa Paper Mill of Wudang district of Huiyang and eventually won the case.¹⁷⁷ In these proceedings, ACEF's strategy employed some legal innovations, including bringing the litigation in the special court of environmental protection, preserving evidence, using professional people's jurors, and having litigation costs borne by the defendant for the first time in an environmental case.¹⁷⁸

b. Legislation to Facilitate Environmental Public Interest Litigation

For many reasons, it is very difficult to bring public interest litigation in China. An important source of this difficulty is standing requirements for plaintiffs. The standing requirements of traditional civil law were too strict, requiring that only the direct victim can bring a lawsuit.¹⁷⁹ At the end of 2012 the Civil Procedure Law was amended to provide for a system of public interest litigation by modifying the provisions of Article 55.¹⁸⁰

173. *Id.*

174. *Id.*

175. *Id.*

176. *Briefing on Environmental Rights Services for the Public in 2011*, ACEF (Feb. 13, 2012, 11:22 AM), <http://gongyi.163.com/12/0213/11/7Q504CLB00933KC8.html>.

177. *Id.*

178. *Id.*

179. STERN, *supra* note 134, at 47.

180. Sheng Zhang, *Legislative Development in China in 2012*, CHINESE J. COMP. L., Dec. 2010, at

Relevant bodies and organizations prescribed by the law may now bring a suit to the People's Court against such acts as environmental pollution, harm to the consumer's legitimate interests and rights, and other acts that undermine the social and public interest. The environmental NGOs' standing to bring environmental public interest litigation has been confirmed. Yet unfortunately individuals are not expressly authorized to bring public interest litigation under these amendments, even though much of China's environmental public interest litigation has been brought on behalf of private citizens.¹⁸¹

Because ACEF has the endorsement of the Chinese government¹⁸² and employs lawyers with a fairly strong technical and legal background, it has had greater success in bringing environmental public interest litigation than any other NGO in China.¹⁸³ However, the recent draft revisions of China's environmental protection law have placed ACEF in an awkward position. On June 26th, 2013, draft amendments to the Environmental Protection Law were submitted to the NPC Standing Committee meeting for secondary consideration.¹⁸⁴ Among these amendments, one draft article caused heated debate: "For the actions of environmental pollution, or ecological damage, which harm public interests, All-China Environment Federation and this organization established in the provinces, autonomous regions and municipalities, can bring a suit to a people's court."¹⁸⁵ Many professionals questioned this amendment because it would effectively give ACEF a monopoly over environmental public interest litigation. They argued that this was contrary to the intent of the amendment of Civil Procedural Law in 2012. After that amendment, § 55 provides that "Legally designated institutions and relevant organizations may initiate proceedings at the competent people's court"¹⁸⁶

While puzzling to most observers, the draft amendment to narrow standing to bring public interest environmental litigation may have been

13.

181. *Announcement of China Top Ten Public Interest Litigation in 2012* (Jan. 30, 2013, 12:01 AM), <http://www.legalweekly.cn/index.php/Index/article/id/2000>.

182. The majority of the ACEF leadership are retired senior government officials. *See The Chinese ACEF is Hard on Behalf of the Public Interest*, NANDU (June 27, 2013), <http://nandu.oeeee.com/nis/201306/27/71505.html>.

183. *Briefing on Environmental Rights Services for the Public in 2011*, *supra* note 176.

184. *Environmental Protection Amendment Act Provisions*, NPC (July 17, 2013), http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2013-07/17/content_1801189.htm.

185. *Id.*

186. XX (XX) [Laws of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013) P.R.C. LAWS (China). CHINA AMENDS CIVIL PROCEDURE LAW FOLLOWING THIRD READING, GOV.CN (AUG. 12, 2012), http://english.gov.cn/2012-08/31/content_2214483.htm.

caused by the following. First, because public interest litigation is difficult, the drafters of the amendment may have thought that many other organizations' "capacities are too shabby."¹⁸⁷ Secondly, some officials are concerned about the potential for abuse of public interest litigation.¹⁸⁸ Thus, they are very cautious about expanding the parties that could bring such cases for fear that it might substantially increase the amount of such litigation.

It is possible that the drafters of the amendment confounded distinctions between the right to litigate and the capacity to handle litigation. Those bringing China's rare environmental public interest cases face the depressing reality that courts frequently reject environmental complaints. This could be a much more serious barrier than their organization's capacity to handle litigation. Indeed, three public interest lawsuits brought by ACEF in 2013 were all rejected by courts instead of being decided on the merits.¹⁸⁹ Officials also may be overanxious because public interest litigation may encourage tougher enforcement action than they believe is desirable. The complexities of environmental litigation, limited judicial expertise, scant resources to pay public interest lawyers, and other problems make any surge in environmental public litigations almost impossible in the short term.

It was anticipated that the amendments to the Civil Procedure Law would expand organizational standing to bring public interest litigation beyond what is allowed in the U.S. However, the draft amendments to the Environmental Law that would allow only ACEF to bring such lawsuits would greatly limit such lawsuits. Thus, they ignited a storm of controversy and it was widely expected that the draft would be changed.¹⁹⁰ China's environmental movement is increasing in importance throughout the country and broadening standing and the right to bring actions to other NGOs is widely viewed as a vital step towards increasing public participation.¹⁹¹

187. Song Yangbiao, *Not Single Running, Not Let Go Boldly*, TIME WEEKLY, http://www.dooland.com/magazine/article_287053.html (last visited Nov. 16, 2013).

188. *Environmental Public Interest Litigation Should be Filed by ACEF*, THE BEIJING NEWS, June 27, 2013, at A8, available at http://epaper.bjnews.com.cn/html/2013-06/27/content_443459.htm?div=-1.

189. Qie Jianrong (郗建荣), *Lack of Judicial Interpretation, The New Civil Procedure Facing Embarrassments*, LEGAL DAILY, June 20, 2013, at 6.

190. During a meeting with Professor Percival in Beijing in August 2013, top officials of ACEF expressed embarrassment at the draft amendment and emphasized that they had not sought it and did not believe that they should be given a monopoly over public interest environmental litigation.

191. Wang Dianxue, *Environmental Public Interest Litigation Brought by the All-China Environment Federation "Exclusively"?*, S. METRO. DAILY, June 27, 2013, at A5.

On October 21, 2013, a reporter learned that a third, revised draft of amendments to the Environmental Protection Law had been submitted to the National People's Congress committee. The revised draft contains three conditions for bringing public interest environmental litigation. First, the qualified organization must be registered with the civil affairs department under the State Council. Second, it must have specialized in environmental protection public activities for more than five consecutive years. Third, it must have a good reputation.¹⁹² One insider who worked on the revisions stated that, with these conditions, the number of qualified organizations in China that could bring public interest litigation would be less than ten. Because it is very difficult for civil society organizations to be registered with the civil affairs department, these conditions still will be very harsh for grass-root environmental NGOs.¹⁹³

3. China's Environmental Protests and the "NIMBY Movement"

In July 2012, in Shifang, Sichuan Province, the public's fear of pollution from a molybdenum-copper project gradually evolved into protests.¹⁹⁴ During the same month, in Qidong, in Jiangsu Province people were worried that Japan's oji paper group project would affect the sea ecosystem and inshore aquaculture.¹⁹⁵ Tens of thousands of citizens rallied to demonstrate against the project. In October 2012, in Ningbo, Zhejiang Province, there were large-scale protests against expansion of a PX (paraxylene) chemical plant. In these cases, public opposition has led to the projects being suspended or relocated.¹⁹⁶

In May 2011, in Guizhou, Qingzhen Province, a director of a roofing waterproof glue factory, named Long Xingguang, poured eight tons of toxic chemical waste in liquid form into sewage.¹⁹⁷ After prosecution, Long Xingguang was sentenced to prison for two and a half years.¹⁹⁸ Cai Changhai, leader of the public environmental education center in Guiyang, then brought a civil action in his own name to require Long to provide 1.073 million yuan as compensation for the pollution.¹⁹⁹ He claimed the

192. *Litigation Subject on Environmental Public Interest Falling into "Seesaw Battle"*, BEIJING YOUTH DAILY, Oct. 28, 2013, at A4.

193. *Id.*

194. *Announcement of China Top Ten Public Interest Litigation in 2012*, *supra* note 181.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

right to seek compensation for harm caused by the pollution to the East Gate River within the jurisdiction of the Qingzhen municipality.²⁰⁰ The court accepted this lawsuit, indicating the power of public controversy to increase the willingness of courts to accept cases.²⁰¹

VII. NGOS AND TRANSPARENCY INITIATIVES

In the U.S., the Emergency Planning and Community Right to Know Act (EPCRA) requires annual disclosures of toxic releases by most large companies that must be made available to the public in a Toxics Release Inventory (TRI).²⁰² U.S. NGOs have used this information to pressure companies to reduce such releases. Chinese NGOs, led by Goldman Environmental Prize winner Ma Jun's Institute for Public and Environmental Affairs (IPE), have conducted labor and environmental compliance audits of the Chinese supply chains of multinational electronics companies.²⁰³ By publicizing the results of these audits, these NGOs have persuaded Apple and Hewlett Packard to agree to regular audits by independent entities.²⁰⁴ In partnership with the NRDC, these NGOs also have released annual ratings of how well Chinese municipalities are implementing the provisions of the 2008 Open Information Law, which mimics the U.S. Freedom of Information Act.²⁰⁵ This creative strategy has helped provide incentives for local officials to take the law more seriously. Increasing protests over environmental conditions by the Chinese public have improved prospects for China adopting some form of a pollution release and transfer registry like the U.S. TRI.²⁰⁶

A. *United States*

In December 1984 an accidental release of methyl isocyanate at a

200. *Id.*

201. *Id.*

202. Emergency Planning and Community Right-to-Know Act § 313, 42 U.S.C. § 11023 (2012) (all companies with ten or more full-time employees are subject to this provision).

203. See e.g., FRIENDS OF NATURE, IPE, GREEN BEAGLE, THE OTHER SIDE OF APPLE (2011), available at <http://www.ipe.org.cn/Upload/Report-IT-V-Apple-I-EN.pdf>.

204. Katie Marsal, *Apple to Allow Independent Audits of Its Supply Chain*, APPLE INSIDER (Feb. 21, 2012, 7:09 AM), http://appleinsider.com/articles/12/02/21/apple_to_allow_independent_environmental_audits_of_its_supply_chain.

205. ALEX WANG, NATURAL RES. DEF. COUNCIL, CUTTING THROUGH THE FOG WITH CHINA'S FIRST POLLUTION INFORMATION TRANSPARENCY INDEX (PITI) 1 (2009), available at <http://www.nrdc.org/international/piti/files/chinapiti.pdf>.

206. Barbara Finamore, *A Step Forward for Environmental Transparency in China*, SWITCHBOARD (Mar. 29, 2013), http://switchboard.nrdc.org/blogs/bfinamore/a_step_forward_for_environment.html.

chemical plant owned by the Union Carbide Corporation in Bhopal, India killed more than 3,000 people and severely injured of thousands of others.²⁰⁷ Congress ultimately responded not by enacting new controls on toxic emissions, but rather by adopting legislation requiring comprehensive emergency planning and the reporting of chemical releases.²⁰⁸ This legislation is known as the Emergency Planning and Community Right to Know Act of 1986 (EPCRA).²⁰⁹ It requires companies to file annual reports disclosing their releases of hundreds of toxic chemicals.²¹⁰ This data must be made available to the public in what has come to be known as the Toxics Release Inventory.

When the first TRI was released, EPA officials were shocked by the large volume of reported releases.²¹¹ Community organizations and environmental groups used the data to support calls for stronger regulation. During the first week after the TRI became available through the National Library of Medicine, the Library received 225 requests for subscriptions, most from community groups and ordinary citizens.²¹² On August 1, 1989, *USA Today* published a two-page list of “The Toxic 500,” the U.S. counties with the most pollution from industrial chemicals as reported in the TRI.²¹³ The National Wildlife Federation published a book identifying the 500 largest dischargers, who released more than 7.5 billion pounds of toxics, including 39 known or probable carcinogens.²¹⁴ NRDC used the data to prepare “A Who’s Who of American Toxic Air Polluters,” identifying more than 1,500 major sources of toxic air emissions.²¹⁵ Subsequent updates of the TRI have continued to receive wide publicity and many community groups have used the TRI to issue reports publicizing local polluters. The EDF created an interactive pollution locator that used TRI data to permit individuals to obtain information on the Internet about sources of pollution in their communities.²¹⁶ By entering their zip code, individuals could find out what chemicals were released by which sources

207. PERCIVAL, *supra* note 72, at 339.

208. *Id.*

209. Emergency Planning and Community Right-to-Know Act of 1986, Pub. L. No. 99-499, § 300, 100 Stat. 1613 (1986); 42 U.S.C. §§ 11001–50.

210. PERCIVAL, *supra* note 72, at 341.

211. *Id.*

212. Roberto Suro, *Grass-Roots Groups Show Power Battling Pollution Close to Home*, N.Y. TIMES, July 2, 1989, at A1.

213. USA Today, *The Top 500 Counties: The Most Common Chemicals*, USA TODAY, Aug. 1, 1989, at A6.

214. See G. POJE, THE TOXIC 500 T.1 (1988).

215. PERCIVAL, *supra* note 72, at 341.

216. See *Pollution in Your Community*, SCORECARD, <http://scorecard.goodguide.com> (last visited Nov. 16, 2013).

in their neighborhoods, information about what is known concerning the potential health effects of the chemicals, and how the emissions rank relative to facilities in other parts of the country. By clicking on a link on the website, citizens could send free faxes complaining about the emissions to facilities whose releases were among the highest 20% in the nation.

The TRI has proven invaluable in providing information to inform public policy and public debate over those policies. For instance, Congress relied heavily on TRI data in specifying the 189 toxic chemicals required to be regulated as hazardous air pollutants in the 1990 Clean Air Act Amendments.²¹⁷ EPA has used the TRI as the cornerstone of its pollution prevention strategy and as a means for improving the effectiveness of existing regulatory programs.²¹⁸ TRI data has also figured prominently in debates over environmental justice, helping researchers employ an array of tools to identify the extent to which environmental exposures may be visited in a disproportionate fashion on certain segments of the population.²¹⁹

TRI backers believed that providing information about toxics releases from facilities to the communities nearby those facilities would prompt firms to change their behavior in ways that reduced the amount of those releases. The evidence to date bears out this expectation. Following the September 11, 2001 terrorist attacks, the Blue Plains Wastewater Treatment Plant that serves Washington, D.C. discontinued its use of liquid chlorine that had been stored in 90-ton tanker cars at its plant located only four miles from the U.S. Capitol. This action was taken after the TRI revealed the storage of this highly dangerous chemical in tanker cars that, if ruptured, could quickly spread a toxic cloud killing thousands of people within a 10-mile radius.²²⁰ Some environmental groups are citing terrorism concerns as further justification to push industry to shift production processes to use inherently safer chemicals.

B. *China's Outstanding Breakthrough on Transparency of Information*

1. Information Disclosure Strategies by Chinese NGOs

217. PERCIVAL, *supra* note 72, at 341.

218. *Id.* at 341–42.

219. *Id.* at 342.

220. Carol D. Leonnig & Spencer S. Hsu, *Fearing Attack, Blue Plains Ceases Toxic Chemical Use*, WASH. POST, Nov. 10, 2001, at A1.

Two innovative strategies employed by Chinese NGOs focus on information disclosure. First, working with NRDC's Beijing office, IPE in Beijing has released annual rankings of how well officials in 113 Chinese cities are implementing China's Open Information Law.²²¹ The rankings, which have been released over the last four years, are called the Pollution Information and Transparency Index (PITI). Data from the fourth PITI report, which covers 2012, showed improvement in the average performance of officials in these cities, particularly in top performing cities.²²² However, the report also found that some cities regressed and others still provided almost no environmental information.²²³ The principal problem areas seem to be disclosure of environmental impact assessments, information concerning environmental violations, and emissions data. The report calls for public disclosure on online monitoring data from key polluters, comprehensive disclosure of government supervisory and enforcement data, and periodic publication of emissions data for pollutants covered by environmental impact assessments.²²⁴

Ma Jun's IPE also worked with more than 20 other NGOs to audit companies in the Chinese supply chains of multinational electronics companies. Reports prepared by this NGO coalition harshly criticized companies like Apple for using suppliers that regularly violated Chinese labor and environmental laws.²²⁵ As a result of these reports, Apple joined the Fair Labor Association and hired independent auditors to perform regular audits of its supply chain.²²⁶ These audits already are having an impact as Apple has taken actions to discipline suppliers who fail to comply with these laws, as documented in the company's annual Apple Supplier Responsibility report that discloses the results of these audits.²²⁷

As environmental conditions have continued to deteriorate in China, the public is becoming increasingly militant in demanding greater transparency. Barbara Finamore, NRDC's Asia Director, expresses optimism that China may move toward regular publication of emissions

221. Ma Jun (马军), 2011 PITI Results and Analysis Released (Jan. 17, 2012, 11:19 AM), <http://news.qq.com/a/20120117/000957.htm>.

222. See INST. OF PUB. & ENVTL. AFF., <http://www.ipe.org.cn>.

223. See Ma Jun, *supra* note 221.

224. See INST. OF PUB. & ENVTL. AFF., *supra* note 222.

225. Ma Jun, *supra* note 221.

226. Don Resinger, *Apple Planning Environmental Audits of Chinese Supply Chain*, CNET (Feb. 21, 2012, 7:04 AM), http://news.cnet.com/8301-13506_3-57381645-17/apple-planning-environmental-audits-of-chinese-supply-chain.

227. APPLE, INC., APPLE SUPPLIER RESPONSIBILITY: 2013 PROGRESS REPORT (2013), *available at* <http://www.apple.com/supplierresponsibility/reports.html>.

data by adopting some form of Pollution Release and Transfer Register, as more than 50 other countries have done.²²⁸

2. The Government's Information Disclosure and NGOs

China's former State Environmental Protection Administration (SEPA) issued the "environmental impact assessment of public participation in the Interim Measures" which came into force on March 18, 2006.²²⁹ Pursuant to Article 11 of these regulations construction units or their authorized environmental impact assessment agency can take measures to facilitate public understanding of the environmental impact assessment report.²³⁰

China has adopted freedom of information regulations very similar to those in effect in the United States. The State Council's regulations on the Disclosure of Government Information and Disclosure of Environmental Information (Trial) both took effect on May 1, 2008.²³¹ The Regulation of Disclosure of Government Information is known as the third revolution of Chinese government reform. Its significance is to provide a legal guarantee for the public's right to know.²³² Compared to China's corporate information disclosure, environmental information disclosure by the government represents a very significant step forward. Many environmental NGOs and even research scholars and students now can obtain information.

Of course due to the restriction of disseminating information to the people in the history of Chinese culture, government information disclosure in China has still a long way to go. After China's implementation of the information disclosure law through government information disclosure regulations some environmental NGOs who sought information often were frustrated. Less than half of local governments responded positively to such information requests.²³³

228. See Finamore, *supra* note 206.

229. CHINA'S STATE ENVTL. PROT. ADMIN. (SEPA), INTERIM MEASURES ON PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSESSMENT (2006), available at http://www.gov.cn/jrzq/2006-02/22/content_207093_2.htm.

230. *Id.*

231. CHINA'S STATE ENVTL. PROT. ADMIN., DISCLOSURE OF ENVIRONMENTAL INFORMATION (TRIAL), ORDER NO. 35, available at http://www.zhb.gov.cn/info/gw/juling/200704/t20070420_102967.htm; CHINA'S STATE COUNCIL, THE PEOPLE'S REPUBLIC OF CHINA ON OPEN GOVERNMENT INFORMATION, available at <http://www.gov.cn/xxgk/pub/govpublic/tiaoli.html>.

232. CHINA'S STATE ENVTL. PROT. ADMIN., *supra* note 231.

233. *Why is Environmental Information Disclosure so Difficult?* SO. WEEKEND (June 24, 2010, 11:42 AM), <http://www.infzm.com/content/46698>.

Some environmental information is still closely guarded by the Chinese government. It is widely believed that China has serious problems of soil contamination. In 2006, the State Environmental Protection Agency (now MEP) and the Ministry of Land launched an extensive survey of soil contamination problems in China. The study took four years, but when it was completed the data it collected were not released to the public. Beijing lawyer, Dong Zhengwei submitted a request for government disclosure of the results of the study.²³⁴ However, China's MEP refused to disclose it, citing the need to protect "national secrets."²³⁵

CONCLUSIONS

Concern about environmental problems has spawned the growth of environmental NGOs in both the U.S. and China. Environmental NGOs in China can be divided into three categories – official NGOs, international NGOs, and grassroots NGOs. Because of heavy state control of NGOs, each of these groups operates in a much more confined legal and political environment than their counterparts in the United States. However, environmental NGOs in China seem to have greater freedom than NGOs that focus on other issues. While international NGOs generally have greater resources than the other environmental NGOs, it is not easy for them to get the registration permit from the Chinese government, and their range of activities is limited. Grassroots NGOs generally lack sufficient financial and professional support, thereby restricting the role that they can play. Official NGOs in China are in the best position to operate because of their relatively richer social resources, and their comparatively wider network of contacts in the government.

China is now moving to make it easier for NGOs to operate. In the long run, the development of grassroots NGOs may prove to be the best indicator of social progress. Experience in the U.S. has demonstrated that environmental NGOs can help improve environmental policy as EPA and other federal agencies have become much more responsive to citizens' concerns due to interactions with NGOs. Yet comparison of the role of civil society in environmental policy in the U.S. and China demonstrates the naiveté of simple assumptions that the U.S. legal system should be

234. *China Focus: Soil pollution data remains secret, stirs public concern*, China Society For Human Rights Studies (May 9, 2013), http://qr.showchina.org/Harmonioussociety/Environment/t20130510_1036598.htm.

235. Zhang Chun, *Why Should Soil Pollution Data be Kept a "State Secret"?*, CHINA DIALOGUE (Mar. 4, 2013), <https://www.chinadialogue.net/article/show/single/en/5758-Why-should-soil-pollution-data-be-kept-a-state-secret>.

transplanted to China.

China clearly has more serious problems than the U.S. with enforcement of its environmental laws. China's experience reflects in part the greater decentralization of its system of environmental law with local environmental protection boards having considerable power. To be sure "the idea that local officials subvert the central leadership's good intentions" on environmental issues has become a "familiar narrative in Chinese politics" but one that is important to approach with a good degree of nuance.²³⁶ A survey of Chinese NGOs reports that NGO leaders have a more positive opinion of local leaders than the general public in China.²³⁷ Local efforts to protect economically important industries in China are real, but it is too simplistic "to call the central government pro-environment and the local government pro-growth."²³⁸ In several provinces efforts are being made to adopt innovative measures to protect the environment, including the creation of environmental courts. In similar fashion, some U.S. states have adopted innovative measures to control environmental problems that go far beyond what the federal government has required. California, for example, has been pursuing a statewide cap-and-trade program to control greenhouse gas emissions within the state. But overall China's experience demonstrates the reality of the "race to the bottom" hypothesis that was a major justification for the high degree of centralization embodied in the U.S. environmental laws.

It is much easier to enact environmental legislation in China, because of its one party system, than it is in the U.S. Environmentalists in China need not worry about legislative gridlock, but this also may be a factor in China's greater difficulty with enforcement of its environmental laws. U.S. environmental laws are the product of hard fought compromises between environmentalists and the regulated community, which may lend greater legitimacy to the laws leading industry to take them more seriously.

Experience with citizen suits in the U.S. indicates that they have played a vital role in forcing agencies to issue regulations to implement the environmental laws. However, they have not been as significant a factor in enforcement of regulations except in cases where violations are easy for citizens to prove. There is no current prospect that China will permit citizen suits against central government agencies, but this type of litigation is less necessary in China because industry lobbyists do not block the State Council from issuing regulations. Chinese law is moving toward express recognition of citizen suits against polluters, at least when brought by

236. STERN, *supra* note 134, at 232.

237. HILDEBRANDT, *supra* note 12, at 160–61.

238. *Id.*

official NGOs. The U.S. experience suggests that such lawsuits can be useful, but they are no panacea for chronic enforcement problems in light of the difficulty of proving violations in many cases.

The emphasis some Chinese environmental NGOs are placing on transparency and disclosure initiatives appears to be a creative strategy that enables them to effect change without threatening the established legal order. The development of environmental NGOs in China is a relatively recent phenomenon, but barring an unexpected backlash from the central government, it is likely that their growth will continue. It is likely that these NGOs will continue to promote information disclosure and become more involved in monitoring administrative actions through litigation, and even playing a greater role in influencing the development of legislation and regulations. Potentially this could have a significant effect on development of the whole administrative legal system in China. Even at this stage, it is undeniable that Chinese environmental NGOs have contributed greatly to democratic consolidation in the environmental regime through public interest litigation and disclosure of environmental information.

Despite substantial differences between the Chinese legal system and that of the U.S., environmental concerns have become so urgent in China and much of the world that they are inspiring efforts by NGOs to reverse the laxity of administrative supervision. Chinese NGOs are trying every means to expose existing environmental problems in China and to demand better environmental protection policies. Environmental protection is a common concern of mankind supported by universal values throughout the world. China's difficulties with environmental enforcement should provide a cautionary lesson for those in the U.S. who advocate relaxing federal regulation and devolving greater environmental authority to lower levels of government. The road that U.S. environmental NGOs have traveled provides valuable experience to inform China's efforts to build a stronger civil society.