

A CHINA ENVIRONMENTAL HEALTH PROJECT RESEARCH BRIEF

This research brief was produced as part of the China Environment Forum's partnership with Western Kentucky University on the USAID-supported China Environmental Health Project

Trial by Fire: A Chinese NGO's Work on Environmental Health Litigation in China

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China passed the first version of its *Environmental Protection Law* in 1979. As of 2007, the Chinese government has enacted another 26 laws related to environmental protection, which are supported by more than 2,000 regulations and decrees.¹ These laws have established a legal framework supporting China's efforts to achieve environmental reform and sustainable development. However, the key pollution control legislation has been generally ineffective in mitigating serious violations of environmental law due in part to weak provisions for the effective punishment of violators within the laws and overly powerful local governments that prioritize economic growth over environmental protection.² Local government protectionism has meant factories caught polluting are under-fined, which means polluters lack incentives to spend time and money on pollution control measures or equipment. Many of China's foundational environmental laws do criminalize pollution that harms the health or livelihood of individuals, but even the current version—amended in 1989—of the *Environmental Protection Law* appears to prioritize economic growth over environmental security.

Because the enforcement of pollution control regulations remains weak, Chinese legislators have attempted to increase public participation in environmental decision-making (e.g., public hearings for environmental impact assessments) and empower citizens by giving them greater access to pollution information (e.g., new environmental information dissemination regulations and government transparency laws).³ The *Environmental Protection Law* includes provisions that allow pollution victims to bring lawsuits against the responsible parties. More broadly, the *Environmental Protection Law* and *Law on Evaluation of Environmental Effects* enshrine the environmental interests of Chinese citizens, asserting that people have the right to be informed of and to supervise public policy related to their environment, and that anyone who interferes with this involvement is violating the law.⁴ Although encouraging steps towards empowering the public, these laws do not clearly stipulate the conditions and procedures for public participation. Thus, many citizens do not know how to assert their rights, even if they are aware they possess them. In short, public participation in the environmental sphere remains limited and is insufficient in protecting many Chinese citizens from the harmful consequences of pollution.

Perhaps the current most effective channel for public participation in China's environmental sector is litigation—which is the specialty of China's only environmental litigation nongovernmental organization (NGO)—the Center for Legal Assistance to Pollution Victims (CLAPV). Established in October 1998, CLAPV provides free legal assistance and volunteer attorneys to people whose lives and livelihoods have been damaged by pollution. Although CLAPV has won numerous cases, the difficulty in winning cases for pollution victims demonstrates some of the weaknesses in China's nascent legal infrastructure, as well as other political obstacles in this form of public participation.

Pollution victims in China usually lack knowledge on how to navigate the court system, and many such plaintiffs are too poor to afford a lawyer. Even if a group of pollution victims does succeed in having their case heard, they rarely win due to local government control of the courts, or judges and lawyers with insufficient training in environmental law. CLAPV's efforts to overcome obstacles facing citizens bringing cases to court highlights possibilities for reforms in China's legal system and the promising role an active civil society could have in empowering citizens.

CLAPV: AN OVERVIEW

CLAPV is managed by professors, associate professors, and teachers affiliated with China University of Political Science and Law, Peking University, Qinghua University, Renmin University, and other prominent research institutions. It is heavily dependant on volunteers, most of whom are graduate students and lawyers. As for funding, CLAPV receives grants and awards from predominantly foreign sources.⁵ CLAPV's work has not gone unnoticed: Wang Canfa—the founder and director of CLAPV who is also a professor at the China University of Political Science and Law—has received numerous honors from both Chinese and international groups; *Time Magazine* named him one of its Heroes of the Environment in 2007, and the Chinese government conferred on him its “Green Person of the Year Award” in 2005. The Center itself has also received numerous honors: it was, for instance, awarded the first-place environmental protection education prize by the U.S. Ford Motor Company in October 2001. Various Chinese news media outlets have reported on the Center's activities, including CCTV and *China Daily*, among other newspapers and television stations.

CLAPV's mission is multifold. According to Wang Canfa, CLAPV aims to raise public consciousness of environmental legislation and improve the capacity of administrative agencies and judicial bodies to enforce this legislation. These aims are supported by CLAPV's current projects, including a telephone hotline that provides free legal advice to pollution victims, and a “Lawyer's Mailbox” (in conjunction with *China Environmental News*) that publicly answers readers' letters online, regarding questions of environmental law. CLAPV also facilitates new environmental regulation, having commented on or assisted in drafting the *Environmental Impact Assessment Law*, the *Clean Production Law*, the *Nature Reserve Law*, and other pieces of legislation.

CLAPV organizes and sponsors symposiums on the implementation of environmental law and promotes academic exchange. In cooperation with the Japan Environment Conference, CLAPV organized three sessions of the Sino-Japan International Symposium on Environmental Dispute Settlement, which were held in Beijing, China and Kumamoto, Japan in 2001, 2004 and 2005. In 2002, the Center sponsored the “Seminar on Handling Difficult Cases in Western China” in Xi'an; and in August 2004, it organized the “International Symposium on Legislation on Environmental Damage Compensation” in Beijing in cooperation with the Legal Bill Office of the Environment and Natural Resources Protection Committee of the National People's Congress. All these activities have spurred the development of Chinese environmental legislation and improved legal capacity to aid pollution victims.

A Voice for Pollution Victims

Legal services to pollution victims and training of legal professionals are at the heart of CLAPV's operations. CLAPV offers free professional training to lawyers and judges on environmental law and has set up a national network of environmental protection lawyers. Between 2001 and 2007, CLAPV trained 262 lawyers, 189 judges and 21 environmental enforcement officials from all over the country in environmental law. CLAPV cooperates with law firms to undertake complicated environmental cases and pays partial litigation fees for impoverished clients. Through its telephone hotline, which started in November 1999, about 9,487 callers have received free legal advice. With the Center's help, some of these environmental complaints have been resolved through administrative channels and others through the courts.

To date, CLAPV has assisted pollution victims with 98 cases, of which 35 involved damages to human health. In most of these cases CLAPV helped plaintiffs find pro bono lawyers, helped gather information on behalf of the plaintiffs, and worked to promote news coverage of the case. Of these 35, CLAPV won 12 and lost 6.⁶ CLAPV tends to win cases in which the environmental and health impacts are minimal and the plaintiffs are few. Successful cases also usually receive considerable news media coverage, which helps decrease the likelihood of local government corruption surrounding the case. In contrast, difficult cases involve many plaintiffs who have suffered or are suffering from

severe environmental and health impacts. The damages to the environment and human health in these cases often are not conclusively affirmed by science—and this complexity often means that such cases are not widely reported by the news media. The defendants in these cases tend to be large companies that pay considerable revenue or taxes to local governments and who often interfere unlawfully in the legal process.

CHALLENGES TO PUBLIC ENVIRONMENTAL LAW CASES

The successes and failures of CLAPV's cases highlight trends in China's still evolving legal system. First, while powerful government-owned industries can manipulate the outcome of the trial, the news media can play an integral role in ensuring the cases are given a fair trial. Second, because law is a relatively new field in China, attorneys often deal with an inconsistent judicial system and poorly trained judges. It is worth mentioning, however, that unfamiliarity with environmental law occasionally works to the plaintiff's advantage. For example, in one case, the plaintiff's lawyer used the *Law of Water Pollution Prevention and Control* to argue his case. However, the defendant's lawyer knew nothing about this amended law and still referred to the outdated version. Thus, a plaintiff's chances of success greatly depend on the education of his lawyer.

Other key obstacles to pollution court cases that are discussed below include: a shortage of legal precedence and scientific evidence to establish causation of pollution and health problems; local protectionism; and a lack of environmental information.

Proving Causation

A case is very difficult to win if the plaintiffs cannot demonstrate a scientific connection between the harm incurred and environmental contamination. Because the environment purifies itself of pollution over an extended period of time, it is imperative that evidence of pollution is collected immediately upon detection. The difficulty in proving this connection depends on whether a single, identifiable source—such as a discharge pipe from a factory—can be conclusively identified as the cause of contamination.⁷ If this point source is on the property of the defendant, then the plaintiff's lawyer can make a strong case that the defense is responsible for the damage suffered by his/her client.

One example of a successful suit with clear point source pollution is illustrated in the case of 231 families in Pengnan Village in Nanhui County, which suffered a significant decrease in the output of their rice fields between 1994 and 1995. The families blamed their loss of profit on sharing the source of their irrigation water with a pharmaceutical company. Subsequently, a team of specialists commissioned by CLAPV investigated the property and concluded that the damage to Pengnan Village rice was due to poisonous substances in the river and soil. The specialists claimed that these substances were discharged in wastewater from the factory and entered the rice fields through the irrigation water.⁸ When the case was heard, the court ruled in favor of the plaintiffs because the findings of the specialist team supported their claims.

However, it is much more difficult for plaintiffs to prove culpability of one polluter in cases of non-point pollution runoff or when there are multiple polluters.⁹ For example, in one case CLAPV helped bring to court, farmers from Jiangsu Province blamed the mass deaths of their fish and waterfowl on the pollution discharged from three local factories. These factories were not willing to bear sole responsibility for the pollution as there were more than 100 factories discharging sewage along the Fang Ting River.¹⁰ Similarly, a case between frog farmers in Zhejiang Province and five local industries remains unresolved after eight years of appeals because the plaintiff could not satisfactorily demonstrate that the defendants were the sole source of the damage to the frog ponds.

Conflicts of Interest

Local environmental protection bureaus in China have long lacked the power to be strong enforcers of pollution laws due to interference by local governments. Environmental laws are further weakened

when local governments and officials protect the interests of industries that contaminate the environment but contribute greatly to local revenue and generate jobs. One notable example of government interests clashing with those of citizens was reported in *The Nanfang Daily* early in 2007. Villagers from Duigou Village, in Jiangsu Province's Guannan County, tested their water and found that it was undrinkable for both people and animals. The villagers blamed the contamination on the chemical plants in a local industrial park and demanded compensation of 40,000 Yuan (\$5,000). The local administrative committee then countersued on charges of blackmail, imprisoning several villagers for six months and suppressing any further challenges to local businesses and the government.¹¹ Notably, in over 90 cases that CLAPV has helped bring to court, plaintiffs have also attempted to sue the local environmental protection bureau for not enforcing the law.

The tight relationships between business and the government, compounded by a lack of law enforcement, have left environmental authorities in an awkward situation: despite all the efforts they have made at the national level towards creating stricter environmental laws, violations at the local level remain rampant.¹² As an example, electronic-waste (e-waste) recycling has become a major source of revenue for many localities, and despite central government bans on importing e-waste, highly polluting recycling workshops can remain active for years because local governments are reluctant to enforce the law and risk losing revenue.¹³ In general, factories that contribute largely to the local economy are permitted to pollute without any limitations.¹⁴ Moreover, many plants cut corners on waste treatment to save money, such as by diluting wastewater with fresh water rather than treating with high-tech equipment.¹⁵

The lack of coordination and poor delineation of public duties between pollution and protection of natural resources results in conflicts of interest between government bodies, especially at the local level. Zhou Ke, a professor of law at Renmin University of China, postulates that the weakness of the nation's environmental legislation stems from being based on preventing pollution rather than on protecting natural resources.¹⁶ The administrative power of the environmental authorities is limited to pollution prevention, but it often shares this responsibility with other administrative departments that manage specific economic sectors that profit from exploiting natural resources. For example, the Ministry of Water Resources is responsible for both protecting China's rivers and managing hydropower and water transfer projects.

The weakness of the Ministry of Environmental Protection (formerly SEPA) was particularly evident in the summer of 2007 when a toxic algae bloom choked China's third-largest freshwater lake, Taihu. The algae bloom stemmed from nutrient-rich discharge from factories, crab farms along the shore, as well as agricultural. MEP officials claimed they could do little to protect the lake because the crab farms were under the jurisdiction of the Ministry of Agriculture, the wastewater treatment plants under local governments, and the lake itself under the Ministry of Water Resources.¹⁷ The poor inter-agency coordination in protecting the lake combined with local government protectionism help explain the failure of a ten-year campaign to keep Taihu clean.

Limited Information Disclosure

Besides possessing a limited understanding of their rights to sue for damages from pollution, Chinese citizens also usually lack sufficient access to information on pollution. Better access to information could help victims mount lawsuits against polluters and enable more citizens to become involved in environmental policymaking.¹⁸ Over the past decade, the Chinese news media has become much more open in its reporting of environmental problems, and the government has made strides in publishing more reports on air and water quality—both in print and online. Nevertheless, some environmental statistics are classified and access to them is limited.¹⁹ A prime example of this occurred in March 2007, when Chinese government officials pressured the World Bank to remove estimates of the number of premature deaths caused by pollution in China from a formal draft of *The Cost of Pollution in China* before the report was released at a conference in Beijing.²⁰ The original report

included statistical models estimating that approximately 750,000 people a year die prematurely in China from respiratory illnesses linked to air pollution, which Chinese authorities questioned under the premise that the World Bank used faulty methods to estimate the death rates. Ironically, a few months later the Chinese government signed off on the OECD's 2007 report *Environmental Performance Review for China*, which contained similar estimates of air pollution fatalities.

The controversy surrounding the World Bank article underscores how pollution is an increasingly sensitive issue, for it has the potential to trigger health concerns and social turmoil in China. In 2005, China's State Environmental Protection Administration (SEPA) reported 50,000 protests around pollution incidents, and complaints to SEPA are also on the rise. The increase in environmental protest is often linked to local governments and industries that are unresponsive to formal complaints about pollution.

MEP (formerly SEPA) has been one of the more progressive central government agencies in taking advantage of new central government calls for greater transparency. Over the past few years, the Chinese government began implementing information disclosure laws, but some of these laws and rules are either too narrow in scope or have yet to be properly implemented. Without effective disclosure laws, public participation in court cases or public hearings for environmental impact assessments (EIAs) cannot be meaningful. Moreover, policymakers will lack needed information to make better decisions on proposed projects or policies.²¹

Besides often being hesitant to disseminate information, many Chinese policymakers have not completely embraced public participation as a basic right, viewing it as a formality rather than as an invaluable tool that could help avoid costly policy mistakes and/or public protest.²² For example, in the EIA process local officials will hold hearings too late to impact decisions, or invite only a select group of people to the hearing. Regulations on EIA hearings and other public participation and information dissemination rules are still new and many local governments not only lack the willingness, but also the training to run such democratic processes. It is in this area that NGOs, such as CLAPV, have and can continue to play a major role in training officials and educating the public on hearings and other mechanisms for public participation.

THE ROLE OF ENVIRONMENTAL NGOS IN IMPROVING RULE OF LAW

While CLAPV currently is the only pollution litigation NGO in China, there have been some international groups—such as the Natural Resources Defense Council (NRDC) and the American Bar Association (ABA)—that have been undertaking projects to educate Chinese citizens and legal professionals about China's environmental laws and public participation outlets. For example, NRDC set up a public participation website—GreenLaw (<http://www.greenlaw.org.cn/ch/>) and ABA has helped municipal governments design information disclosure laws and better public hearing mechanisms. Since international green NGOs began operating in China in the mid-1980s, many of them have played integral roles in shaping environmental and clean energy legislation and conducting trainings of local environmental and natural resource agencies, as well as involving communities in on-the-ground projects.

Many of China's grassroots groups have been actively promoting environmental education and public involvement in environmental protection, most often in relatively "safe" forms (e.g., encouraging consumers to conserve, recycle, and reduce their own household's waste and pollution), but there have been examples in which groups besides CLAPV are pushing to involve the public in improving environmental laws—such as the 2005 national campaign against dam-building on the Nu River, in which Chinese NGOs criticized the Yunnan government for not carrying out any EIAs and then later demanding public disclosure of the EIAs that were conducted. Perhaps one of the most significant examples of a Chinese NGO promoting better information disclosure has been the water and air pollution databases that the Chinese NGO Institute for Public and Environmental Affairs has

posted online, which not only present government published air and water quality trends, but also gather (sometimes real time) data on emissions from specific factories. Since the 1990s, quite a number of smaller green groups have used online petitions to halt ill-conceived golf courses and other development projects.

Despite being the largest sector of China's civil society, environmental NGOs are still small in number, due to both registration and funding challenges.²³ However, another growing part of China's "green" civil society is individual citizens, who protest pollution violations—increasingly using Internet and cell phone technology. Guobin Yang argues more advanced communication technologies, such as the Internet and text messaging, offer a powerful arena for citizen participation outside of state control.²⁴ The utility of cell phones in spurring public participation is illustrated by a protest in June 2007 over the planned construction of a giant chemical factory in Xiamen. Xiamen University students sent text messages to Xiamen residents claiming that the factory would spoil the city's aesthetic beauty and threaten human health.²⁵ The students used text messages to organize a protest in which between 7,000 to 20,000 people gathered peacefully in the city center. The protestors also complained the city had not conducted the required public hearing of the EIA. Video and reports of the protest appeared on the Internet, attracting national reporters and attention of Beijing. Central authorities supported the position of the protestors and advised Xiamen authorities to reconsider the plant while reprimanding them for failing to observe standards for environmental protection.²⁶

At more than 220 million users as of February 2008, China has already surpassed the United States as the country with the most Internet users.²⁷ Although Internet access is not yet ubiquitous in China, other communications technologies are extremely pervasive. According to statistics provided by the Chinese embassy, the number of cell phone users in China is greater than 430 million, which means that the country could potentially account for almost half of all cell phone purchases around the world.²⁸ As China's Internet population continues to increase, it could become more difficult for the Chinese government to control information and maintain its censorship mechanisms.²⁹

No other Chinese NGO has stepped forward to address the fact that pollution victims in China usually do not know how or are too poor to navigate the court system. However, CLAPV's most critical contribution to China's environmental law is educating judges and lawyers, often with no previous experience with these types of cases, in environmental law and legal practice, and in establishing precedents that will lead to greater equity in environmental use and access. Moreover, CLAPV has established a network of concerned lawyers to fill in for class action case. There is still room for more development in the sector, for now a sustainable system must be established in order for China's citizens to access their legal rights and for major changes to occur across the country in terms of preventing (out of fear of litigation) future environmental injustices.

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