

# Clearing the Air on China's New Environmental Protection Law

## **Contents**

---

Background	1
Key Developments in the EPL	1
Impact of the EPL on Enterprises in China	2
Looking forward	3

**MAY**

**2014**



On 24 April 2014, the 8<sup>th</sup> meeting of the Standing Committee of the 12<sup>th</sup> National People's Congress of the People's Republic of China ("**PRC**" or "**China**") adopted the *People's Republic of China Environmental Protection Law* (the "**EPL**").<sup>1</sup> The EPL takes effect on 1 January 2015.

## 1. Background

It has taken 25 years for the revised EPL to become law, which even by Chinese standards is an incredibly long gestation period; the most likely explanation for this is that this was due to the time taken for the political factions within the Chinese government to align themselves on the basic principles of environmental protection for modern-day China, recognising the huge changes in the nature of the issues faced due to China's phenomenal growth and development and the changes to the political and social environment in China since the previous version of the law was promulgated at the end of 1989. Given that progress getting to this point has been so long and laboured, it suggests that there was some difficulty in achieving broad consensus on whether China should prioritise economic growth and/or social stability over heavier penalties and strict enforcement of environmental protection laws and regulations.

In general, the EPL seems to be a move in the right direction and a positive development in terms of enhancing environmental protection in China. However the question remains as to whether there is the will to empower the Ministry of Environmental Protection ("**MEP**") and its local organs to enforce the EPL against a background where strict enforcement could lead to undesired consequences, such as mass-layoffs (e.g., by closing down the most polluting State-owned Enterprises). This would impact on achievement of other key political goals, such as "social harmony".

Given the large income and wealth disparities as between places and people in China, and China's broad and varied environmental problems, it will require a concerted, multi-faceted approach to address them adequately. In order for the EPL to make a real difference, it will need to be backed by clear and effective national and local measures on implementation and enforcement, not to mention the determination to ensure that enforcement risk becomes a real deterrent for would-be violators.

## 2. Key Developments in the EPL

In this note, we have not attempted to cover all the changes in the EPL since 1989. We have focused here on what we consider to be the most significant developments in environmental protection law to have emerged from the EPL. On a very rudimentary level, the EPL contains over 20 more provisions than its predecessor, suggesting a more thoughtful and fuller treatment of the subject matter. Overall the feeling is that it sets out a much more forceful position on environmental protection, backed with more 'teeth', particularly in the following areas:

### (a) Increased transparency:

Enterprises and local government authorities will be required to make public environmental information and information on environmental quality, environmental monitoring, environmental incidents, administrative licensing and penalties relating to the environment, and the collection and use of pollutant discharge fees. (Articles 53 and 54 of the EPL). For enterprises that are heavy polluters, there is a requirement to publicly disclose the names of the principal pollutants discharged, the method of discharge, the discharge concentration and total amount, information on discharge which exceed standards, and information on the construction and operation of pollution control facilities (Article 55 of the EPL). This could, if adequately

<sup>1</sup> First promulgated with effect from 26 December 1989.

enforced, expose those enterprises to much more acute levels of public scrutiny, as well as exposing the polluters to more lawsuits.

Most significantly, any enterprise preparing environmental impact assessment ("EIA") documents required for all construction projects must publicly disclose such documents and solicit public opinion to a greater extent than required under existing laws, and the government-approved EIA documents must be publicly disclosed (except for information containing State or commercial secrets) (Article 56 of the EPL). This is not far short of putting every construction project with environmental implications on trial in 'the court of public opinion', not to mention exposing the officials who approved the EIA documents to scrutiny over whether they have done their jobs properly. It could be argued that it will make it much more difficult for local MEP officials to approve EIA reports for projects that are potentially damaging to the environment without being able to justify their decisions.

(b) **Increased liabilities for polluters:**

Enterprises that violate environmental protection laws and regulations are now subject to fines that may accumulate on a daily basis (Article 59 of the EPL) and any violations may be made public (Articles 53 and 62 of the EPL).

One of the features of the new EPL is that it has more 'teeth'. This can be seen in the following provision where the responsible persons of a non-compliant enterprise may also face detention for up to 15 days where the enterprise commits certain violations, such as failing to obtain EIA approval or a pollutant discharge permit or refusing to suspend the violating act, illegally discharging pollutants, or refusing to cease production, or use, of a banned pesticide (Article 63 of the EPL).

(c) **Increase liabilities for government officials:**

Local government departments and officials will have their performance

evaluations take into account attainment of environmental protection targets, and the evaluation results will be made public (Article 26 of the EPL).

In addition, government officials will be subject to heavier penalties (i.e., demerits, demotions, dismissal, and criminal prosecution) for committing unlawful acts such as granting permits where criteria are not met, covering up violations, failing to issue an order to suspend or cease operations in accordance with the law, or failing to disclose environmental information that are subject to public disclosure (Article 68 of the EPL).

(d) **Whistleblower protections:**

Any citizen, legal person or other organization will have the right to report (i) environmental pollution or ecological damage caused by any institution or individual; and (ii) failure of any environmental regulatory body to perform its legal duties, and such report must keep the relevant information on the informant confidential (Article 57 of the EPL). Again there appears to be an attempt to shine a spotlight on MEP officials carrying out their duties properly and lawfully.

(e) **Standing to file environmental pollution claims:**

A significant development in the EPL has been broadening the scope of parties with standing to file environmental pollution claims. A social public interest organization ("**NGO**") will now have standing to file claims in the People's Court for environmental pollution and ecological damage if it meets these (quite stringent) requirements (Article 58 of the EPL):

- (i) is registered with the civil affairs department of the People's Government at the municipality divided into districts level or higher; and
- (ii) has specialized in environmental protection public benefit activities for five consecutive years or more, and

has no record of violating the law.

Currently, there are around 300 registered NGOs in China which may meet these requirements. Given the complexity of the legal system in China and the perceived political sensitivities around NGOs in China, it remains to be seen how receptive local governments will be to this type of accountability to third parties.

### 3. Impact of the EPL on Enterprises in China

#### 3.1 Practical implications

The primary impact of the EPL will be in delivering the message to enterprises in China that the business cost of causing environmental pollution will significantly increase. The actual impact on an enterprise will depend on the nature and extent of its operations, although operational costs associated with compliance with the new environmental regime can be expected to increase. More specifically, the EPL requires enterprises to:

- (a) reduce the generation of pollutants by giving priority to clean energy resources, adopting processes and equipment to increase resource utilization and minimize emission of pollutants, and adopting technologies to handle waste and treat pollutants (Article 40 of the EPL);
- (b) adopt an environmental protection accountability system (Article 42 of the EPL);
- (c) pay environmental discharge fees (or be subject to an environmental protection tax) for pollutant discharge (Article 43 of the EPL); and
- (d) solicit public opinion for construction projects (Article 56 of the EPL).

#### 3.2 Cost of non-compliance

For enterprises that do not comply with the new environmental protection regime, the impact of the new regime is potentially quite far-reaching and may start to hit their bottom lines (assuming adequate enforcement follows). Under the existing environmental protection regime, enterprises that did not comply with environmental protection regulations were subject to fines or penalties, but often these were kept at bay by using 'relationships' or simply

paid as a cost of doing business, as the cost of complying may have been much higher. As a result, the incentive to comply was low. By increasing the range of fines and penalties (e.g., daily additional penalty fines to run consecutively with the original fines), this situation may change.

#### 3.3 Potential economic benefits of compliance

For enterprises that do comply with the new environmental protection regime or who operate in this space, the impact may be both positive and negative. Under the EPL, the Chinese government must introduce fiscal, tax, price and government procurement policies and measures to encourage and support enterprises, public institutions and other business operators to further reduce emission of pollutants (Articles 21 and 22 of the EPL). This may translate into more work for environmental protection industry participants and specialist environmental consultants to advise on how to achieve this.

It remains to be seen, however, whether for those who are not in the environmental protection business these government incentives will fully offset any additional operational costs that arise from complying with the new environmental protection regime. There may be additional hidden costs to some business operators such as owners of future construction projects, who will henceforth be required to submit to greater public scrutiny under the EPL; they may suffer delays and costs (e.g., hiring public relations firms or legal advisors) associated with dealing with "the court of public opinion" and NIMBY (Not in My Backyard) type protests as a result of greater exposure to public scrutiny.

### 4. Looking forward

The EPL does articulate a change of mind-set from the "development at any price" model that has prevailed in China in recent years. The real issue, however, with the EPL and all environmental legislation in China has historically not been the lack of legislation, but consistent and even-handed enforcement.

Above all, environmental protection in China (and elsewhere) is essentially an issue that has to be addressed locally with the means and resources available in the locality where the environmental issue or incident arises – and one that is very difficult to manage and police effectively from the central government level. Local governments and politicians are more likely to be swayed by local issues and considerations which may be at odds with vigorously and effectively enforcing environmental legislation.

At the very least, the EPL may indicate a change in the policy direction in China, as it signals a recognition (at least on paper) of the continued growing importance of environmental protection in the midst of economic development.

## **Contacts**

### **Shanghai**

Philip Cheng  
philip.cheng@hoganlovells.com  
+86 21 6122 3816

Andrew McGinty  
Andrew.McGinty@hoganlovells.com  
+86 21 6122 3866

Daniel Fogarty  
daniel.fogarty@hoganlovells.com  
+86 21 6122 3809

### **Beijing**

Roy Zou  
roy.zou@hoganlovells.com

+86 10 6582 2596

Jun Wei  
jun.wei@hoganlovells.com  
+86 10 6582 2501

**www.hoganlovells.com**

---

Hogan Lovells has offices in:

Alicante	Dusseldorf	London	Paris	Singapore
Amsterdam	Frankfurt	Los Angeles	Philadelphia	Tokyo
Baltimore	Hamburg	Luxembourg	Prague	Ulaanbaatar
Beijing	Hanoi	Madrid	Rio de Janeiro	Warsaw
Brussels	Ho Chi Minh City	Miami	Riyadh*	Washington DC
Budapest*	Hong Kong	Milan	Rome	Zagreb*
Caracas	Houston	Moscow	San Francisco	
Colorado Springs	Jakarta*	Munich	São Paulo	
Denver	Jeddah*	New York	Shanghai	
Dubai	Johannesburg	Northern Virginia	Silicon Valley	

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com).

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney Advertising.

©Hogan Lovells 2014. All rights reserved. [SHALIB01/1092505]

\*Associated offices