

# Annual Review of Chinese Environmental Law Developments: 2016

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The year 2016 witnessed the adoption or revision of several of China's environmental laws by the Standing Committee of the National People's Congress (NPC), as well as some major judicial initiatives by the Supreme People's Court (SPC). This Comment summarizes these developments in turn.

## I. Major Legislation

### A. Law on the Exploration and Development of Resources of Deep Seabed Areas

The NPC Standing Committee adopted the Law of the People's Republic of China on the Exploration and Development of Resources in Deep Seabed Areas on February 26, 2016, effective as of May 1, 2016.<sup>1</sup> The "deep seabed areas" refer to the seabed and ocean floor and the subsoil thereof beyond the limits of the People's Republic of China and other States.<sup>2</sup> This description is taken from the definition of "Area" in the United Nations Convention on the Law of the Sea (UNCLOS),<sup>3</sup> because this law was adopted to implement the UNCLOS.

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1. The Law of the People's Republic of China on the Exploration and Development of Resources in Deep Seabed Areas (adopted by the NPC Standing Comm. Feb. 26, 2016, effective May 1, 2016), available at [http://www.npc.gov.cn/wxzl/gongbao/2016-06/03/content\\_1993626.htm](http://www.npc.gov.cn/wxzl/gongbao/2016-06/03/content_1993626.htm) [hereinafter Deep Seabed Law].
2. *Id.* art. 2.
3. United Nations Convention on the Law of the Sea, art. 1, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm).

The UNCLOS provides that the Area and its resources are the common heritage of mankind, and establishes the principles governing the Area and legal rules on the development of its resources.<sup>4</sup> In short, State enterprises or natural or juridical persons may apply for and carry out exploration and development of resources; such applicants shall be under the sponsorship of a State Party or State Parties; such applicants shall meet certain qualifications and sign a contract with the International Seabed Authority if its application is accepted; the sponsoring State(s) shall ensure that the sponsored contractor follow the rules and the contract; and the sponsoring State is not liable for damages caused by any failure of a sponsored contractor to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures that are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

China is a State Party to the UNCLOS, and the purpose of this new law is to ensure that China meets its responsibilities as a State Party. This law establishes an administrative licensing regime.<sup>5</sup> That is to say, a Chinese natural or juridical person or other organization shall first get the approval of the Chinese government before applying to the International Seabed Authority. China will only provide sponsorship after the competent administrative agencies are satisfied that the application is in conformity with state interests and the applicant has financial and technical capabilities. This law also provides for reporting and other requirements to be instituted after the applicant signs a contract with the authority to ensure the contractor complies with the UNCLOS and the contract.<sup>6</sup>

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4. *Id.* pt. XI, in particular art. 153 and annex III.

5. Deep Seabed Law, *supra* note 1, arts. 7-8.

6. *Id.* arts. 9-14.

## B. Revision of the Environmental Impact Assessment Law

The NPC Standing Committee adopted a resolution to revise the Environmental Impact Assessment Law of the People's Republic of China (the EIA Law) on July 2, 2016.<sup>7</sup> The revisions are mainly in the following aspects:

First, the revision eliminates conflicts between the EIA Law and the 2014 revised Environmental Protection Law.<sup>8</sup> Article 61 of the 2014 revised Environmental Protection Law provides that the governmental agencies with relevant supervision authorities on environmental protection shall issue an order to stop construction work and impose fines, and may also request the restoration to previous conditions.<sup>9</sup> This provision is different from the requirements of the 2002 EIA Law,<sup>10</sup> which provides a grace period for remedying the failure to follow the EIA procedure prior to the start of construction. Under the 2002 EIA Law, when an environmental protection bureau finds that a construction project started without going through the EIA procedure, it shall halt the construction project and request that a makeup EIA procedure be made within a given time period. Only when the EIA procedure is not satisfied within this specified period can an environmental protection bureau impose fines.<sup>11</sup>

According to the rule of interpretation stating that the newer law shall prevail over and supersede the older law, the 2014 revised Environmental Protection Law, after coming into effect on January 1, 2015, shall prevail and environmental protection agencies no longer need to specify an EIA procedure makeup period before imposing a fine. However, some environmental protection authorities remained doubtful. The revision of the EIA Law is to clarify that the relevant environmental protection agencies do have the power, and in fact the responsibility, to impose a fine as soon as it is discovered that a construction project started without first going through the EIA procedure. The wording of the revised provision indicates that the agen-

cies have no option but to impose a fine.<sup>12</sup> The question is whether the environmental protection agencies may decide not to impose such a fine based on the Administrative Penalties Law, which allows the administrative agencies not to impose administrative penalties if the violation is minimal.<sup>13</sup> This point is important, particularly considering that the administrative fine may be quite large, as discussed below.

Second, the revision also changes the rule on the amount of the administrative fine for failure to follow the EIA procedure before starting a construction project. Under the 2002 EIA Law, the fine can range from 50,000 to 200,000 yuan (approximately 625 to 30,000 USD).<sup>14</sup> Under the revised EIA Law, the fine is between 1% and 5% of the total project investment.<sup>15</sup> For a project requiring a large investment, the administrative fine can be quite substantial.

Third, the revision meets the requirements on streamlining administrative licensing. The government has called for the streamlining of administrative licensing to reduce transaction costs for investments. This revision eliminates administrative licensing for EIA registration forms.<sup>16</sup> The revision also eliminates the sequential requirements on the approval of an EIA report or EIA statement by the environmental protection bureaus or the Ministry of Environmental Protection and the applicable approvals by other governmental agencies.<sup>17</sup> That is to say, the applicant may apply for the approvals of different governmental agencies simultaneously. The EIA approval is neither a prerequisite for other governmental approvals nor conditioned on other governmental approvals.

Fourth, the revisions requests that the agency drafting development plans be more responsive to the opinions and comments of the review panel. Per the revised EIA Law, if the review panel suggests that the development plan be revised, the drafting agency shall improve the draft plan in light of the EIA report and the suggestions of the review panel, or explain its decision not to follow the sugges-

7. Decision of the NPC Standing Committee on the Revision of Six Laws Including the Energy Saving Law of the People's Republic of China (adopted July 2, 2016, effective Sept. 1, 2016), *available at* [http://www.npc.gov.cn/npc/xinwen/2016-07/04/content\\_1993244.htm](http://www.npc.gov.cn/npc/xinwen/2016-07/04/content_1993244.htm).

8. Environmental Protection Law of the People's Republic of China (adopted by the NPC Standing Comm. Dec. 26, 1989, revised by the NPC Standing Comm. Apr. 24, 2014, effective Jan. 1, 2015) [hereinafter Revised EPL]. See also Mingqing You & Yan Wang, *Annual Review of Chinese Environmental Law Developments: 2014*, 45 ELR 10419 (May 2015); Mingqing You, *Changes and Challenges of the 2014 Revised Environmental Protection Law in the Context of China's Five Fundamental Transitions*, 45 H.K. L.J. 621 (2015).

9. Revised EPL, *supra* note 8, art. 61.

10. The Environmental Impact Assessment Law of the People's Republic of China (adopted by the NPC Standing Comm. Oct. 28, 2002, effective Sept. 1, 2003), *available at* [http://www.gov.cn/gongbao/content/2002/content\\_61822.htm](http://www.gov.cn/gongbao/content/2002/content_61822.htm) [hereinafter 2002 EIA Law].

11. *Id.* art. 31.

12. The Environmental Impact Assessment Law of the People's Republic of China (adopted by the NPC Standing Comm. Oct. 28, 2002, revised by the NPC Standing Comm. July 2, 2016, effective Sept. 1, 2016), art. 31, *available at* [http://www.npc.gov.cn/wxzl/gongbao/2016-08/22/content\\_1995717.htm](http://www.npc.gov.cn/wxzl/gongbao/2016-08/22/content_1995717.htm) [hereinafter Revised EIA Law].

13. The Administrative Penalties Law of the People's Republic of China (adopted by the NPC Mar. 17, 1996, effective Oct. 1, 1996, revised by the NPC Standing Comm. Aug. 27, 2009, effective Aug. 27, 2009), *available at* <http://law.npc.gov.cn/FLFG/flfgByID.action?flfgID=214&zlsxid=01&shwDetailType=QW>.

14. 2002 EIA Law, *supra* note 10, art. 31.

15. Revised EIA Law, *supra* note 12, art. 31.

16. *Id.* art. 22. The EIA Law provides for three types of EIA documents: EIA reports, EIA statements, and EIA registration forms. An EIA report is the most comprehensive, an EIA statement less comprehensive, and the EIA registration form quite simple.

17. The Revised EIA Law deleted Article 17(2) of the 2002 EIA Law, which required the prior approval of other governmental agencies for certain types of projects.

tions of the review panel.<sup>18</sup> However, one issue not explicitly addressed is whether a new or revised EIA report is required for the revised development plan. After the review panel reviews the draft plan and makes suggestions, the drafting agency may or may not follow such suggestions when revising the draft plan. The wording of the revised law does not prohibit the drafting agency from submitting the revised plan to the approving agency for approval even if the drafting agency revised the draft plan not in accordance with the suggestions.

The aforementioned revisions may be conducive to environmental protection. However, the revisions may increase the workload and difficulties of environmental protection agencies, which will require more capacity-building in the future. In particular, the revisions make it mandatory for the environmental protection agencies to impose administrative fines and set a potentially large minimum amount for such fines. Local environmental protection agencies may find it quite difficult to enforce.

### C. Revision of the Wildlife Protection Law

The Wildlife Protection Law was revised by the NPC Standing Committee on July 2, 2016, effective as of January 1, 2017.<sup>19</sup> The “wildlife” protected by this law refers to valuable and endangered species of terrestrial and aquatic animals and terrestrial animals with ecological, scientific, and social value.<sup>20</sup> The revisions improve the protection, use, and regulation of wildlife, and also provide for better protection for those harmed by wildlife. The main revisions of the law are as follows:

The first aspect is the upgrading of the legislative purposes, which were revised to protect wildlife, save precious or endangered species, maintain biodiversity and ecological balance, and promote ecological civilization.<sup>21</sup> Compared with the same article in the previous legislation, the phrase “development and reasonable utilization of wildlife resources” was deleted. For the same reason, the new Article 4 provides that the state shall prioritize the protection of wildlife, regulate the utilization of wildlife resources, and tighten supervision and law enforcement.

The second aspect is specific rules on the protection of wildlife. The revised law requires the protection of wildlife habitats.<sup>22</sup> It also limits access to wildlife genetic sources for artificial propagation and breeding; except when necessary to preserve wildlife species, artificial propagation and breeding shall not use wildlife directly taken from nature, but rather use the offspring from artificial propagation and

breeding.<sup>23</sup> In addition, the relevant administrative agencies may enlarge the population of wildlife by organizing the release of offspring from artificial propagation and breeding into the wild.<sup>24</sup>

The third aspect is specific rules on the utilization of wildlife. The revised law provides that the utilization of wildlife or wildlife products shall meet the requirements of ecological civilization; respect social moral standards; and abide by laws, regulations, and governmental rules even if the utilization is for scientific research, public interests, scientific education, preservation of wildlife species, and other legitimate purposes. Utilization of wildlife and wildlife products for these purposes shall mainly use offspring of artificial propagation and breeding and shall benefit the conservation of the wildlife population.<sup>25</sup>

The fourth aspect is the tightening of supervision. These rules mainly relate to the use of wildlife and wildlife products as medicine or pharmaceutical raw materials, the catching and killing of wildlife not listed as key national protected wildlife but subject to catch quotas, and the use of wildlife in advertisement.

The fifth aspect is the introduction of rules on releasing wildlife into nature. For cultural, religious, and other reasons, some people in China release wildlife such as turtles, snakes, and fish. Such release may cause ecological problems as well as damage to the person or property of others. This revision provides that a person shall bear legal liability if he or she imprudently releases wildlife and causes damage to the person or property of others or endangers an ecological system.<sup>26</sup>

The sixth aspect is the compensation of those whose person or property is harmed by certain wildlife. Before the revision, only damages caused by key national or local protected wildlife were compensable. This revision broadens the scope and provides that losses caused by wildlife with ecological, scientific, and social values are also compensable.<sup>27</sup>

### D. Revision of the Marine Environmental Protection Law

The NPC Standing Committee adopted a decision to revise the Law of the People’s Republic of China on the Prevention and Control of Marine Pollution on November 7, 2016.<sup>28</sup> This revision is mainly concerned with the following aspects:

First is the planning of the differentiated use and protection of oceans. At the top is the national master plan specifying the main functions of each ocean. At the second

18. Revised EIA Law, *supra* note 12, art. 14(1).

19. The Wildlife Protection Law of the People’s Republic of China (adopted by the NPC Standing Comm. Nov. 8, 1988, first revision by the NPC Standing Comm. Aug. 28, 2004, second revision by the NPC Standing Comm. Aug. 27, 2009, third revision by the NPC Standing Comm. July 20, 2016, effective Jan. 1, 2017), available at [http://www.npc.gov.cn/npc/xinwen/2016-07/04/content\\_1993249.htm](http://www.npc.gov.cn/npc/xinwen/2016-07/04/content_1993249.htm).

20. *Id.* art. 2.

21. *Id.* art. 1.

22. *Id.* arts. 11-13.

23. *Id.* art. 25.

24. *Id.* art. 26(2).

25. *Id.* art. 29.

26. *Id.* art. 38.

27. *Id.* art. 19.

28. Decision of the NPC Standing Committee on Amending the Law of the People’s Republic of China on the Protection of the Marine Environment (adopted Nov. 7, 2016, effective Nov. 7, 2016), available at [http://www.npc.gov.cn/npc/xinwen/2016-11/07/content\\_2001574.htm](http://www.npc.gov.cn/npc/xinwen/2016-11/07/content_2001574.htm).

level is national oceanic function zoning, which shall be drafted by the State Oceanic Administration in cooperation with other relevant agencies under the State Council and with local governments at the provincial level, and which shall be approved by the State Council.<sup>29</sup> The function zoning sets the function and environmental protection level for different parts of the ocean and forms the basis of administrative licensing and use of the ocean. This revision also provides for “ecological protection red lines” for key marine ecological function zones, ecologically sensitive zones, ecologically fragile zones, and other parts of the ocean.<sup>30</sup> Ecological protection red lines reserve special areas for environmental protection and impose stringent requirements on such areas or exclude them from development and other use. The idea of ecological protection red lines was first introduced into national legislation with the 2014 revision of the Environmental Protection Law.<sup>31</sup>

The second aspect is related to EIAs. Before the revision, this law allowed only one form of EIA document (i.e., the full EIA report) for marine projects and coastal projects. This revision allows both full EIA reports and EIA statements.<sup>32</sup> Thus, some marine and coastal projects with minor environmental impacts can be covered by EIA statements, which means cost savings in the preparation of EIA documents. The government has a public list specifying which types of construction projects require an EIA report or a statement, which is expected to be modified to reflect these updates in the revised Marine Environmental Protection Law.

However, the approval procedure of the EIA reports or statements differs from that provided in the revised EIA Law. For marine and coastal projects, the approving governmental agency must still seek the opinion of other governmental agencies in charge of marine affairs and fisheries, as well as the environmental protection agencies of the armed forces.<sup>33</sup> For key sea areas that exceed the total allowable discharge of a key pollutant or fail to meet environmental protection goals, the environmental protection agency or oceanic administrative agency at or above the provincial level shall impose a moratorium on the approval of all EIA documents covering construction projects that increase the total discharge of the respective pollutants.<sup>34</sup>

Finally, this revision also requires the disclosure of governmental information,<sup>35</sup> environmental protection tax and pollutant discharge fees,<sup>36</sup> ecological compensation,<sup>37</sup> and increased legal liabilities.<sup>38</sup> It uses more general terms to require vessels and related activities to take effective

measures to prevent marine pollution, and specifically requires prior approval for transshipping bulk liquids with environmental risks.<sup>39</sup>

### E. Environmental Protection Tax Law

The Environmental Protection Tax Law was adopted on December 25, 2016.<sup>40</sup> The 2014 Environmental Protection Law provides that the collection of pollution discharge fees shall cease when an environmental protection tax system is implemented.<sup>41</sup> Under the current regime of pollutant discharge fees, those discharging pollutants directly to the environment are required to pay a certain sum of money. Pollutants include air pollutants, water pollutants, noise, and solid wastes, including hazardous wastes. For pollutants discharged to the air and ocean and for solid wastes, the fee is determined by the type and quantity; for water pollutants, type, quantity, and concentration; for noise, the level of noise.<sup>42</sup> However, polluters need not pay pollutant discharge fees for wastewater discharged to municipal sewage disposal facilities. Instead, they must pay the sewage disposal facilities. Polluters also need not pay pollutant discharge fees for industrial solid wastes if they have qualified facilities for the storage and disposal of such wastes.<sup>43</sup>

Laws adopted by the NPC or its Standing Committee rank higher than regulations adopted by the State Council. Therefore, replacing the pollutant discharge fee regulations with an environmental tax law is an enhancement of the fees' status. However, there is not a significant change to the rules. Under this new law, taxable pollutants are still air pollutants, water pollutants, noise, and solid wastes, including hazardous wastes. The calculation of the environmental protection tax is not significantly different from that of the pollution discharge fee; thus, this law could be adopted without much debate at its second reading, a contrast from the usual practice of adoption of a law at its third reading.

Nevertheless, there are some changes. As to pollutants, noises other than industrial noises, such as the noise from construction sites, are excluded from taxable pollutants, though noise from construction sites is a pollutant under the pollutant discharge fee regime. The new law has two tiers of tax reduction for the discharge of air or water pollutants below the applicable pollutant discharge standards, while the pollutant discharge fee regime has only one tier.<sup>44</sup>

29. The Law of the People's Republic of China on the Protection of Marine Environment (adopted by the NPC Standing Comm. Aug. 23, 1982, first revision Dec. 25, 1999, second revision Dec. 28, 2013, third revision Nov. 7, 2016, effective Nov. 7, 2016), art. 7 [hereinafter Revised Marine EPL].

30. *Id.* art. 3(1).

31. Revised EPL, *supra* note 8. See also You & Wang, *supra* note 8; You, *supra* note 8.

32. Revised Marine EPL, *supra* note 29, arts. 43 and 47.

33. *Id.*

34. *Id.* art. 11(3).

35. *Id.* art. 6.

36. *Id.* art. 12.

37. *Id.* art. 24.

38. *Id.* arts. 73(1), 82, and 90.

39. *Id.* art. 70.

40. Environmental Protection Tax Law of the People's Republic of China (adopted by the NPC Standing Comm. Dec. 25, 2016, effective Jan. 1, 2018), available at [http://www.npc.gov.cn/npc/xinwen/2016-12/25/content\\_2004993.htm](http://www.npc.gov.cn/npc/xinwen/2016-12/25/content_2004993.htm) [hereinafter Environmental Protection Tax Law].

41. Revised EIA Law, *supra* note 12, art. 43(2).

42. Regulations on the Collection, Use, and Administration of Pollutant Discharge Fees (promulgated by the State Council Jan. 2, 2003, effective July 1, 2003), art. 12, available at [http://www.gov.cn/zhengce/content/2008-03/28/content\\_5152.htm](http://www.gov.cn/zhengce/content/2008-03/28/content_5152.htm).

43. *Id.* art. 2.

44. Environmental Protection Tax Law, *supra* note 40, art. 13.



## II. Judicial Initiatives

### A. Judicial Interpretation on Environmental Crimes

The SPC and the Supreme People's Procuratorate jointly issued a judicial interpretation on environmental crimes at the end of 2016,<sup>45</sup> which replaced the judicial interpretation of the same name issued in 2013.<sup>46</sup>

The 2016 judicial interpretation is mainly related to the seriousness or severity requirements for the crimes of polluting the environment, illegally disposing of imported solid wastes, and importing solid wastes without permission. In addition, this judicial interpretation provides that EIA staff and agencies may be committing the crime of providing fraudulent certifying documents or providing significantly untruthful certifying documents if they willfully provide fraudulent EIA documents or their EIA documents contain substantial untruthful information.<sup>47</sup> Illegally interfering with the normal operation of automatic environmental monitoring devices may also constitute the crime of interfering with computer information systems.<sup>48</sup>

### B. Judicial Policies on Environmental Litigation

The SPC continues to promote the hearing of environmental cases and, in May 2016, issued a guideline on the hearing of environmental cases.<sup>49</sup> This guideline classifies environmental cases into four categories: cases related to environmental pollution and ecological protection, cases related to the development of natural resources, cases related to climate change, and cases related to ecological

or environmental damages. This guideline outlines the key points, principles, and judicial policies of each category.

The document requires courts to adequately perform their functions of enforcing environmental rights and interests, constraining governmental power, solving disputes, formulating public policies, and other functions. Considering public policy formulation as a judicial function indicates that the SPC endorses judicial activism in environmental cases. In another guideline on the judicial safeguard for the development of the Yangtze River economic belt, issued in February 2016, the SPC also stressed the hearing of environmental cases.<sup>50</sup>

### C. Hearing of Environmental Cases

The court indeed heard many more environmental cases than in previous years. The procuratorates alone initiated 483 public interest cases, mostly environmental, a sharp increase from the 12 cases in 2015.<sup>51</sup> Nongovernmental organizations also initiated a number of environmental public interest cases.

## III. Outlook

After years of introducing environmental legislation, China still lacks a law specifically addressing soil pollution. The NPC Legislature has already undertaken much preparation in recent years for the planned adoption of a law on the prevention and control of soil pollution. Such a law is the biggest expectation for 2017.

45. Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Related to the Application of Law in the Handling of Environmental Pollution Criminal Cases (issued Dec. 23, 2016, effective Jan. 1, 2017), *available at* <http://www.court.gov.cn/fabu-xiangqing-33781.html> [hereinafter 2016 Judicial Interpretation on Environmental Crimes].

46. Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Related to the Application of Law in the Handling of Environmental Pollution Criminal Cases (issued June 17, 2013, effective June 19, 2013), *available at* <http://www.court.gov.cn/fabu-xiangqing-5450.html>.

47. 2016 Judicial Interpretation on Environmental Crimes, *supra* note 45, art. 9.

48. *Id.* art. 10.

49. Opinions of the Supreme People's Court on Adequately Performing Adjudication Functions in Providing Judicial Services and Safeguards for the Promotion of Ecological Civilization and Green Development (issued May 26, 2016), *available at* <http://www.court.gov.cn/fabu-xiangqing-21651.html>.

50. Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Development of the Yangtze River Economic Belt (issued Feb. 24, 2016), *available at* <http://www.court.gov.cn/fabu-xiangqing-17402.html>.

51. Wang Di, *Background of the Blowout of Public Interest Cases Initiated by the Procuratorates*, JIANCHA DAILY, Jan. 26, 2017, at 1.