



# PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012/13

## ENVIRONMENT

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# China

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## ENVIRONMENTAL REGULATORY FRAMEWORK

### 1. What are the key pieces of environmental legislation and the regulatory authorities in your jurisdiction?

#### Key legislation

The main environment-related statutes are the:

- Marine Environment Protection Law 1982, amended in 1999.
- Water Pollution Law 1984, amended in 1996 and 2008.
- Forestry Law 1984, amended in 1998.
- Land Administration Law 1986, amended in 1988, 1998 and 2004.
- Mineral Resources Law 1986, amended in 1996.
- Air Pollution Law 1987, amended in 1995 and 2000.
- Wildlife Protection Law 1988, amended in 2004.
- Environmental Protection Law 1989 (EPL).
- Solid Waste Law 1995, amended in 2004.
- Environmental Noise Prevention and Control Law 1996.
- Energy Conservation Law 1997, amended in 2007.
- Law on Environmental Impact Assessment 2002 (EIA Law).
- Water Law 2002.
- Law on Promotion of Clean Production 2002, amended in 2012.
- Radioactive Pollution Prevention and Control Law 2003.
- Renewable Energy Law 2005, amended in 2009.

On a political level, China's environmental planning and policies are primarily shaped and determined by the Five-Year Social and Economic Development Plans (FYSPs), which are elaborated by the Chinese Communist Party and the Chinese government and approved by the National People's Congress. Five-Year Plans are supplemented by more specific Five-Year Environment Plans (FYEPs), which are further broken down into five-year sectoral plans in areas such as water management of key rivers and lakes, hazardous waste management or the reduction of air pollution in designated zones (for example, acid rain control zones and sulphur dioxide control zones). China is currently under the 12th FYP/FYEP (for the period from 2011 to 2015).

#### Regulatory authorities

China's highest state body and only legislative house, the National People's Congress (NPC) and its Standing Committee, enact statutory environmental laws (*see above, Key legislation*), which governments at different levels are responsible for enforcing. The Ministry of Environmental Protection (MEP), often quoted as China's environmental watchdog, is responsible for overall supervision and administration of environmental protection work.

The actual implementation of environmental policies at the sub-national level is vested in the local Environmental Protection Bureaus (EPBs), which are in charge of, for example, monitoring industrial pollution discharge, site inspections, issuing discharge permits, imposing discharge fees/fines and prosecution.

## REGULATORY ENFORCEMENT

### 2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

The environmental requirements relating to pollution standards, permits and payment of charges are consistently enforced by the competent EPBs (those of the jurisdiction where the polluting facilities is located), through environmental inspections carried out by EPB inspectors. Many inspections are triggered by complaints arising from the public or the victim of damages resulting from the pollution.

When non-compliance is established, inspectors can issue warning letters, impose fines, withdraw the permit or shut down the facilities. Fines are the most frequently used measure. They are determined by the competent EPB through a decision process which will be open and fair and in compliance with the applicable regulations, taking into account the frequency of pollution events and the damages the polluting facilities have caused.

## ENVIRONMENTAL NGOS

### 3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

Environmental NGOs are playing a growing role in the development of China's green awareness. Their main activities consist of:

- Providing information to the public.
- Supervising enterprises and public administration activities.



- Advising the government and enterprises on important projects.
- Lobbying on environmental legislation.
- Helping environmental pollution victims in litigation and arbitration.
- Environmental science research.

The first Chinese environmental NGO, now called Friends of Nature, was created in 1994. Global Village of Beijing and Green Home are other well-known pioneering environmental NGOs in China.

In recent years, attention has focused mostly on the Institute of Public and Environmental Affairs (IPE). Founded in 2006 and led by a famous environmentalist (Mr. Ma Jun), the IPE regularly publicises information on environmental issues, including the names of enterprises that have exceeded discharge quotas or otherwise committed illegal pollution. It has also developed the China Water Pollution Map, the first public database of water pollution information in China.

Chinese NGOs depend on formal governmental approval. Under the applicable regulations (Administrative Regulations on Registration of Social Organisations), a nationwide NGO must:

- Have a registered capital of not less than CNY10,000.
- Have at least 50 members (or at least 30 if they are all legal persons).
- Be registered with the Ministry of Civil Affairs.

## ENVIRONMENTAL PERMITS

### 4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Chinese environmental pollution monitoring agencies (the MEP and EPBs) focus on emissions in separate media rather than taking an overall approach to the polluter's behaviour during its industrial operations. There is no equivalent to the EU integrated pollution prevention and control regime in Chinese law.

However, a major exception is at the time of an EIA. A general forecast of an industrial activity's likely impact on the environment is required (see Question 10) (Article 3, EIA Law). The EIA must be conducted during the project feasibility phase for all new, expansion or renovation projects, and be approved by the competent EPB. The competent EPB then gives an opinion in the EIA's approval, specifying the environmental regulations with which the concerned project must comply.

### 5. What is the framework for the integrated permitting regime?

#### Permits and regulator

All plants/facilities that directly or indirectly discharge hazardous or controlled substances (including waste water, waste gas and

solid waste) are subject to the Discharge Permit System (DPS). Under this permit system, all discharging entities must declare and register any emission of pollutants with the local EPB shortly after the facility's acceptance and any start of operations. The registration form includes quantity and regularity of emissions, as well as their concentration. The competent EPB then issues a permit with precise indications of discharge limits of pollutants (with reference to both volume and concentration) in an enterprise's wastewater/solid discharge and air emissions.

Two types of discharge permits exist in practice:

- Pollutant Discharge Permits are for enterprises whose pollutants discharge volume is compliant with the pollutant volume requirements set out by the competent EPBs.
- Temporary Pollutant Discharge Permits are issued to enterprises that are ordered to make corrections within a limited period for a volume exceeding the standard pollutant volume threshold.

#### Length of permit

Pollutant discharge permits are generally valid for two years with temporary permits usually only valid for one year.

#### Restrictions on transfer

As a general principle under Chinese law, discharge permits are location-specific and are not transferable (they are granted *intuitu personae*).

#### Penalties

Enterprises or institutions that do not have a valid Pollutant Discharge Permit are subject to administrative penalties, such as injunctions to make corrections and apply for the permit within a limited period of time. A fine can also be imposed, the maximum amount of which is not prescribed at national level but varies depending on the locally applicable regulations.

For environmental non-compliance penalties generally, Chinese regulators enforce regulations through administrative sanctions and their powers of prosecution. The MEP and local EPB can issue warnings, injunctions, fines (with escalation of fees in case of a persisting breach), and confiscate illegal gains. In serious cases, they can suspend or shut down plant operations and revoke the permit/licence. However, in practice, administrative penalties are not severe enough to ensure environmental compliance.

## WATER POLLUTION

### 6. What is the regulatory regime for water pollution (whether part of an integrated regime or separate)?

#### Permits and regulator

The water pollutant discharge permit system is governed by the revised Water Pollution Law, which came into effect on 1 June 2008. This law applies to the pollution of surface and ground water within China, excluding marine pollution. Different standards, including water pollutant discharge standards and water quality standards, are issued by the State Council and local governments at provincial level. Local governments can establish more stringent local standards for the items that are already specified in the national water pollutant discharge standard.

Enterprises or institutions must obtain a pollutant discharge permit before they can discharge any pollutant into bodies of water. This permit is given by the relevant local EPB after registration of the enterprise, on condition that the discharge complies with national and local standards.

#### Prohibited activities

Some activities are prohibited, including (*Articles 29, 30, 33, 34, Water Pollution Law*):

- Discharging oil, acid, alkaline, highly toxic liquid, urban refuse or industrial waste residue containing substances such as mercury, cadmium, arsenic, chromium, lead, cyanide or yellow phosphorus.
- Discharging radioactive solid waste or waste water containing any high or medium level radioactive substances.
- Piling or depositing solid waste on river banks at levels below the highest water level.

#### Clean-up/compensation

Enterprises and public institutions at risk of potential water pollution accidents must create an emergency plan for dealing with such accidents, make sufficient preparations for emergencies, and rehearse such plans on a regular basis (*Article 67, Water Pollution Law*). Where any accident occurs that causes or may cause water pollution, the enterprise or public institution must initiate its emergency plan immediately, enact emergency measures and report the accident to the environment protection authorities. It must also compensate the victims of the accident for losses incurred.

#### Penalties

Pollution fines are no longer subject to a cap and offenders are now liable to settle up to 30% of the direct economic loss caused by water contamination (*Article 83, Water Pollution Law*). While corporate executives were previously faced with only administrative sanctions in most water pollution cases, they can now incur fines up to half their personal income for the previous year. In addition, water pollution victims are expressly granted the right to file class actions, and environmental compliance in this area is now a criterion in the evaluation of local governments.

## AIR POLLUTION

### 7. What is the regulatory regime for air pollution (whether part of an integrated regime or separate)?

#### Permits and regulator

The air pollutant DPS is governed by the Air Pollution Law, which was promulgated in 1987 and last amended in 2000. All discharging entities must declare and register any emission of pollutants with the local EPB shortly after the facility acceptance and the start of any operation. The registration form includes quantity and regularity of emissions, as well as their concentration. The discharging entity is required to regularly update such information. Pollutants' emissions must meet the relevant national and local standards. The competent EPB then issues a permit with precise indications of discharge limits of pollutants (with reference to both volume and concentration) in an enterprise's air emissions.

#### Prohibited activities

Prohibited activities include:

- Mining coal that contains toxic or harmful substances.
- Discharging unpurified toxic waste gas and dust into the air.
- Burning asphalt, rubber, plastics, leather, household waste or other substances that produce toxic or harmful smoke or dust in densely inhabited areas.

#### Clean-up/compensation

Non-compliance with the Air Pollution Law can result in an order to remediate within a specified period of time, an order to stop such activities and a fine.

#### Penalties

Penalties and fines differ depending on the nature and severity of the pollution. Where an air pollution accident occurs, the polluting party can be charged a fine of up to 50% of the direct economic losses that have been caused (to a maximum fine of CNY500,000).

## CLIMATE CHANGE, RENEWABLE ENERGY AND ENERGY EFFICIENCY

### 8. Are there any national targets for reducing greenhouse gas emissions, increasing the use of renewable energy (such as wind power) and/or increasing energy efficiency (for example in buildings and appliances)?

The green targets include to (*12th FYP*):

- Increase the ratio of non-fossil energy in primary energy consumption to 11.4%.
- Reduce the energy consumption by 16%.
- Reduce the carbon dioxide emission by 17%.
- Significantly reduce the total quantity of major pollutants discharged.
- Reduce the chemical oxygen demand and sulphur dioxide emissions by 8%.
- Reduce the emissions of ammonia nitrogen and nitrogen oxides by 10%.

In addition, the 12th FYP on Energy Saving and Emissions Reduction, which was issued by the State Council in August 2012, sets out green targets to be reached by the end of 2015 including:

- A reduction in energy consumption by 16%, in comparison with the 2010 level.
- A reduction in carbon dioxide and sulphur dioxide emissions by 8%, in comparison with the 2010 levels.
- A reduction of the ammonia nitrogen and total nitric oxide emissions by 10%, in comparison with the 2010 levels.





**9. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?**

**Parties to UNFCCC/Kyoto Protocol**

China is a party to the United Nations Framework Convention on Climate Change (UNFCCC) and has ratified the Kyoto Protocol in 2001.

**Implementation**

The Measures for Operation and Management of Clean Development Mechanism Projects (2005) are the implementation legal framework for China. They set out the procedure for approval of a clean development mechanism (CDM) project at national level and allocation of revenues from the sale of certified emissions reductions (CERs) between the Chinese government and the project sponsor. If the CDM Executive Board confirms the final verification report on GHG emission reduction from the local Designated Operational Entity and issues CERs, between 2% (emissions reduction projects listed in the encouraged category) to 65% (HFC and PFC emissions reductions projects) of the proceeds of sale of such CERs are remitted by the project owner to the Chinese government.

**10. What, if any, emissions/carbon trading schemes operate in your jurisdiction?**

The National Development and Reform Commission (NDRC) issued the Interim Measures for the Administration of Voluntary Greenhouse Gas Emission Reduction Trading (Trading Measures) (13 June 2012). These Trading Measures are applicable to the trading of voluntary emission reductions of carbon dioxide, methane, nitrous oxide, hydro fluorocarbons, perfluorinated carbons and sulphur hexafluoride.

These Trading Measures establish an applicable scheme for the trading of certified voluntary emission reductions (CCER), largely using the NDRC's previously existing procedure for CDM projects.

The procedure consists of the following four steps, all of which are under the supervision of the NDRC:

- To record a project as a CCER project with the NDRC, based on a methodology filed with the NDRC.
- To obtain a certificate on the emission reductions once the entity has generated emission reductions.
- To record the CCER in a national registry under the NDRC.
- To trade the CCER in exchange centres that are recorded with the NDRC and subsequently deregister the CCER used for offsetting carbon emissions.

**ENVIRONMENTAL IMPACT ASSESSMENTS**

**11. Are there any requirements to carry out environmental impact assessments (EIAs) for certain types of projects?**

**Scope**

Any construction project, whether it is a new construction, a renovation or expansion project, is subject to EIAs.

**Permits and regulator**

The content of an EIA report depends on the degree of estimated future environmental impact (*Article 16, EIA Law*). It can therefore take the form of a full report, a statement or a registration form. It is generally prepared by a qualified agency, and must be submitted for approval to the competent environmental protection authority. This may be the provincial EPB or the MEP itself, depending on the amount of investment. Direct MEP approval is required for special construction projects (such as nuclear facilities and strictly confidential projects), inter-provincial projects and other projects that are examined or approved by the Central People's Government or by other authorities as delegated by the Central People's Government (*Article 5, Regulations on Classified Examination and Approval for Environmental Impact Assessment Documents of Construction Projects 2009*).

Construction works can start once the EIA is approved. Obtaining EIA approval is a necessary pre-requisite to securing building and operating permits. Applications for pollution during the operation phase are subject to discharge permits. Having obtained approval of an EIA report by the competent environmental protection bureau, a company must still apply for a licence to discharge pollutants.

**Penalties**

Any company that starts construction works without having first secured EIA approval can be ordered to cease works immediately and/or pay fines varying from CNY50,000 to CNY200,000. Administrative punishments may be imposed by the competent EPB on the person in charge and other persons that are directly responsible for such non-compliance. In some provinces (such as Heilongjiang), fines can be a percentage (between 1% and 3%) of the total investment amount of the project as a whole.

**WASTE**

**12. What is the regulatory regime for waste?**

**Permits and regulator**

Waste is a generic notion that is not defined in comprehensive terms under Chinese laws. However, waste is often referred to as a product or substance that falls in certain categories listed in sector-specific state standards, including:

- Solid waste is abandoned materials, in solid, semi-solid or gaseous state kept in containers, that comes from production, everyday life and other activities and causes environmental pollution (*Article 88, Solid Waste Law*). Solid wastes include industrial solid waste, household waste and hazardous waste.
- Hazardous waste is referred to in relation to the list of reactive, toxic, corrosive and other substances in the National Catalogue of Hazardous Waste 1998 (amended in 2008).
- Electronic waste is defined in the Measures for the Prevention and Control of Environmental Pollution by Electronic Waste 2007.
- Electrical waste and electronic products are regulated by the Administrative Regulations on the Recycle of Discarded Electrical and Electronic Products 2011.
- Radioactive waste is defined in the Security Administration Rules for Radioactive Waste 2012.



Specific permit requirements include:

- For hazardous waste, enterprises or institutions must obtain an operating permit from MEP or EBP at or above the county level before engaging in collection, storage and treatment activities in connection with hazardous waste (*Article 57, Solid Waste Law*).
- For solid waste, permits are required for importation of solid waste that can be used as raw material and that is listed in the limited importing catalogue and the automatically permitted importing catalogue (*Article 25, Solid Waste Law*).
- For radioactive waste, enterprises or institutions storing or treating radioactive waste are subject to storage/treatment permits (*Articles 12 and 23, Security Administration Rules for Radioactive Waste*).

#### Prohibited activities

Some activities in connection with solid waste are prohibited, including:

- Importing solid waste from outside of China for dumping, piling up or treating (*Article 24, Solid Waste Law*).
- Importing solid waste that cannot be used as raw materials or that are listed in the catalogue of import-forbidden items (*Article 25, Solid Waste Law*).
- Closing down, leaving idle or dismantling, without approval, facilities or sites for disposing industrial solid waste or household waste (*Articles 34 and 44, Solid Waste Law*).

Prohibited activities in relation to hazardous waste include:

- Collecting, storing, utilising or treating hazardous waste without an operating permit or against the provisions of the operating permit (*Article 57, Solid Waste Law*).
- Collecting, storing, transporting and treating hazardous wastes of incompatible nature without undergoing safety treatment (*Article 58, Solid Waste Law*).
- Mixing hazardous waste into non-hazardous waste for storage (*Article 58, Solid Waste Law*).

Prohibited activities in relation to radioactive wastes include:

- Importing radioactive wastes or any radioactively contaminated wastes from outside of China.
- Delivering radioactive wastes to any entity not having storage or treatment permit for storing or treating.
- Storing or treating radioactive wastes without proper storage or treatment permits, or against the requirements under the relevant permits.

#### Operator criteria

Entities discharging industrial solid waste must file a registration and declare to the EPB the information about the types, quantity, flow, storage and treatment of the industrial solid waste (*Article 32, Solid Waste Law*).

The design, construction and commissioning of facilities for solid waste discharge must be synchronised with that of the appropriate pollution storage and treatment facilities, failing which the main plant's start of operations will not be authorised. This

requirement, known as the three synchronisations system (3S), was first introduced in the EPL and is specifically reinstated in the Solid Waste Law (*Article 14, Solid Waste Law*).

#### Penalties

Penalties vary depending on the types of waste and the severity of the non-compliant activities, including (*Articles 67 to 87, Solid Water Law; Article 18 to 24, Measures for the Prevention and Control of Environmental Pollution by Electronic Waste and Articles 35 to 43, Security Administration Rules for Radioactive Waste*):

- Stopping illegal activities.
- Making corrections within a time limit.
- Suspending business.
- Paying fines.
- Revocation of licence.
- Imposing administrative penalties on the personnel in charge or other persons directly responsible for the pollution caused.

## ASBESTOS

### 13. What is the regulatory regime for asbestos in buildings?

#### Prohibited activities

No specific regulatory regime exists for asbestos in buildings in China. Asbestos is regulated by the general legal regime with respect to occupational health and safety, social security law, labour law and environmental law.

#### Main obligations

The Rules on Occupational Safety of Asbestos Work 2007 set out guidelines for prevention and protection against asbestos risk. Employers have a general obligation to prevent asbestos-related risks, as well as a duty to reduce the use of materials containing asbestos. In particular, they must:

- Fully disclose the risks linked to asbestos to employees.
- Place warning signs in a clear place.
- Install monitoring facilities.
- Prepare risk management systems.
- Develop a plan for prevention and protection, and review it periodically.
- Provide appropriate safety equipment to exposed employees.
- Organise occupational safety training and examination.
- Introduce a system of occupational health.
- Register the results of health examinations and keep records for at least 30 years.

A pre-assessment report of occupational diseases is required for all expansion or reconstruction of existing enterprises, and the improvement or introduction of new technologies. If an enterprise entrusts the disposal of asbestos waste to another qualified entity, it must inform this entity of the risks and consequences of occupational diseases.



Workers who suffer from asbestos-related illness are covered by work-related injury insurance, which is more protective than the standard medical insurance coverage (*Regulations on Work-Related Injury Insurances 2003, amended in 2010*).

#### Permits and regulator

There is no specific permit required in processing asbestos. However, as asbestos is listed in the *Catalogue of Highly Toxic Items* issued by the Ministry of Health in 2003, entities collecting, storing and treating asbestos are subject to operating permits for hazardous wastes under Article 57 of the Solid Waste Law.

MEP and Ministry of Health, as well as their local bureaus, are regulators and supervisors for the activities relating to asbestos.

#### Penalties

Non-compliance exposes an enterprise or institution to the risk of being ordered to rectify the situation within a limited time period and/or paying a fine for the pollution or the occupational diseases it caused.

Any enterprise that cannot meet the state standard of asbestos dust concentration at the end of 2011 will be ordered to shut down (*Circular on Strengthening Administration of Asbestos Mines and Asbestos Producing Enterprises, issued by the State Administration of Work Safety in 2010*).

## CONTAMINATED LAND

### 14. What is the regulatory regime for contaminated land?

#### Regulator and legislation

No specific regulatory regime exists for contaminated land and there is no mandatory legal requirement to investigate land for contamination. General principles and requirements relating to the prevention and control of land contamination are set out in other laws and regulations such as the EPL, the EIA Law and the Land Administration Law.

Where a site is left by a polluting entity after its relocation, particular requirements are set out in the MEP's *Opinion on Strengthening the Prevention and Treatment of Soil Pollution 2008*:

- The local EPB must ensure that the responsible party submits a soil risk assessment for the site left by a polluter.
- A remediation programme must be established by the EPB, which will determine the technical requirements and responsible party for the remediation programme.
- The responsible party to carry out the remediation programme will be the entity or individual that caused the soil pollution.
- In cases where the polluter enterprise merges or splits, the party responsible for remediation will be the entity that enjoys the rights and assumes the liabilities of the original polluter enterprise.

#### Investigation and clean-up

There are currently no specific administrative investigations or clean-up requirements in connection with land contamination

except for the provisions of the *Opinion on Strengthening the Prevention and Treatment of Soil Pollution 2008*. General investigation and clean-up requirements are set out in the EPL.

#### Penalties

No specific penalties relating to land contamination exist. General penalty provisions under the administrative, civil and criminal laws are applicable in the case of land contamination incidents (*Chapter VIII, Tort Liability Law and Section 6, Chapter VI, Criminal Law*).

Fines can be imposed if the polluter violates its liabilities under administrative or criminal law. However, the range of fines is not prescribed by law and depends on the discretion of the competent EPB or criminal judge.

### 15. Who is liable for the clean-up of contaminated land? Can this be excluded?

#### Liable party

According to the "polluter pays principle" in the EPL, a polluter is responsible for paying remediation costs. Following this principle, polluted soil or underground water must be restored and treated by the work unit or individual that caused the pollution (*Opinion on Strengthening the Prevention and Treatment of Soil Pollution*).

#### Owner/occupier liability

A current land occupier that has not caused the land pollution may be liable for investigation, remediation and/or clean-up of the land instead of the original polluter where the original polluter is liquidated, dissolved, or shut down, or cannot be identified by the relevant EPB.

#### Previous owner/occupier liability

It is a general principle under the EPL that the polluting party is liable for the pollution it caused. Therefore, the previous land occupier that has caused the contamination is liable for investigation, remediation and/or clean-up.

If otherwise contractually agreed between the parties, their agreement prevails between them. However, they may not be relieved of their duty to prevent and control pollution based on the agreement (*Opinion on Strengthening the Prevention and Treatment of Soil Pollution*).

#### Limitation of liability

As the burden of proof is often complex when polluted land has been transferred, allocation of responsibility for contamination is usually dealt with between the seller and the buyer on a purely contractual basis. This usually translates into a series of representations and warranties given by the seller, tied in with an indemnification mechanism in case of breach.

The seller often requires exclusion of its liability for any pollution whatsoever (whether land contamination or otherwise), and asks the buyer to rely on his own investigations. It is therefore recommended that a buyer of land or assignee of land-use rights conduct an environmental audit before concluding the transaction.



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**16. Can a lender incur liability for contaminated land and is it common for a lender to incur liability? What steps do lenders commonly take to minimise liability?**

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**Lender liability**

The general rule is that lenders are not liable for their borrowers' environmental offences, except where:

- They effectively control their borrower's business.
- They directly cause or participate in causing the damages.
- They enforce a mortgage on a polluted piece of land.

**Minimising liability**

A lender can reduce or minimise its liability for land contamination contractually. Besides the direct risk of liability, lenders can incur indirect risks in terms of rating or reputation due to the new green credit policy jointly adopted by SEPA (now MEP), the Bank of China and the China Banking Regulatory Commission (CBRC) in July 2007, and related regulations. These state that banking institutions cannot provide credit support for construction projects that do not comply with environmental standards, and take into account energy conservation and emission reduction in their credit policy.

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**17. Can an individual bring legal action against a polluter, owner or occupier?**

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The EPL provides for strict liability in environmental pollution cases, whereby a claimant is not required to show any fault, negligence or omission on the part of the defendant. Civil claims can be brought before the relevant administration body (most often the MEP or the local EPB) or a Chinese tribunal. The statutory limit for legal action is three years from the time when the victim became or should have become aware of the loss, which differs from the general two year limit for civil actions.

According to the EPL, the Criminal Law and the Supreme People's Court's Interpretation on Criminal Cases Involving Environmental Pollution 2006, criminal liability can arise when major pollution accidents cause injuries and/or significant losses of public or private property. Sanctions range from fines at the discretion of judges to imprisonment for up to 15 years.

In relation to possible defences, the EPL and a number of anti-pollution laws and regulations provide that no liability is incurred when the pollution results solely from irresistible natural disasters (that is, force-majeure). Generally, liability can be limited or excluded when the victim itself or a third party is at fault, which is in line with the General Principles of Civil Law 1986 and the Tort Liability Law 2009.

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**ENVIRONMENTAL LIABILITY AND ASSET/SHARE TRANSFERS**

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**18. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?**

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**Asset sale**

A buyer of an asset is less exposed to contingent or undisclosed liabilities than the buyer of shares. The buyer of a polluting asset is only liable for pollution arising after the date of purchase. The actual polluter remains liable for the pollution that they have caused (*Article 41, EPL*). However, it is usually quite difficult to prove that such liability occurred pre-acquisition. In addition, if the actual polluter has been dissolved, the current owner of the land use rights can be ordered to assume liabilities relating to compensation, remediation or clean-up.

Allocation of responsibility for land contamination is usually dealt with between the seller and the buyer on a purely contractual basis. This usually translates into a series of representations and warranties given by the seller, tied in with an indemnification mechanism in case of breach.

**Share sale**

In contrast, environmental liability remains with the company in a transfer of shares. Therefore, a company's existing environmental administrative or civil liability as against the competent EPB or a third party will be assumed by the share purchaser (the subsequent owner) after the share transaction.

However, allocation of responsibility can also be dealt with on a contractual basis, especially if the seller represents that he will indemnify the buyer from and against any pre-acquisition environmental liability. Sellers frequently seek to expressly exclude liability for any pollution whatsoever (whether land contamination or otherwise) and require the buyer to rely on his own investigations.

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**19. In what circumstances can a seller retain environmental liability after an asset sale/a share sale?**

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**Asset sale**

An entity or an individual that causes an environmental pollution is liable to eliminate damages and pay compensation to a third party that has suffered direct losses (*Article 41, EPL*). Similarly, if injury is caused due to pollution of the environment, the polluter bears tort liability (*Article 65, Tort Liability Law*). As a consequence, the seller that originally causes environmental damages or injury can retain environmental liabilities after an asset deal.

**Share sale**

If the polluter is a company, only the company has direct liability for the damages it caused, due to its limited liability status. The shareholders are only liable for the company to the extent of the shares subscribed for.






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**20. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?**

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**Asset sale**

There is no statutory requirement for a seller to expressly disclose environmental issues in an asset sale, a share sale or even a merger transaction. Instead, environmental issues are dealt with in contractual terms and representations, and warranties are usually required from the seller of the shares or the assets.

**Share sale**

This is the same as for an asset sale (*see above, Asset sale*).

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**21. Is environmental due diligence common in an asset sale/a share sale?**

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**Scope**

Environmental due diligence is increasingly common in both asset and share sales. It is usually undertaken through due diligence related to land and buildings.

The main areas covered are:

- Background information relating to target company's environmental issues.
- Environmental regulatory restrictions relating to the target company's activities.
- Administrative approvals and certificates (including, without EIAs, completion acceptance of the environmental protection facilities and pollution discharge permits).
- Past, current or potential claims and legal proceedings.
- Company's or assets seller's history relating to the environmental regulatory framework (covering non-compliance, violations and sanctions).

**Types of assessment**

Besides the legal environment due diligence, it is also common for buyers to hire environmental consultants for technical assessments (for example, land contamination on industrial sites).

**Environmental consultants**

If the company or the asset is exposed to major environmental risks, environmental due diligence is recommended. This due diligence is usually undertaken by environmental technical consultants and specialist environmental lawyers. Aside from obvious elements such as the scope of work and compensation, the engagement letter for an environmental consultant must also focus on the consultant's limit of liability, for the employer to know to what extent it can rely on the consultant's findings in making its business decisions.

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**22. Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?**

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**Asset sale**

Although sellers generally require buyers to rely solely on their own investigation of assets, they may agree on indemnification to a contractually stipulated extent, if environmental liability is incurred following the transfer of shares or ownership of assets to which environmental liabilities may be attached. These agreements on the allocation of environmental liabilities relating to, for instance, contaminated land, are valid and enforceable.

As environmental due diligence is increasingly frequent, so are environmental warranties and indemnities. Issues covered by environmental warranty and indemnity clauses vary depending on the transferred assets or company, and on the nature of risks disclosed during the due diligence process. The seller usually provides representations and warranties in relation to:

- Valid licences and authorisations.
- Compliance with environmental regulations.
- There being no environmental pollution or risk of environmental pollution.
- There being no existing or potential claims in relation to an environmental matter.

**Share sale**

This is the same as for an asset sale (*see above, Asset sale*).

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**23. Are there usually limits on environmental warranties and indemnities?**

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Breach of environmental laws or permits can give rise to civil and criminal liabilities, as well as to administrative fines. The EPL provides for strict liability in cases of environmental pollution, whereby a plaintiff is not required to show any fault, negligence or omission on the part of the defendant. Claims can be brought before the relevant administration body (most often the MEP or the local EPB) or a People's court. The statutory limit for legal action is three years from the time when the victim became or should have become aware of the loss, which differs from the general two year limit for civil actions.

However, there is usually no time limit on environmental warranties and indemnities in the purchase agreement. Financial caps may sometimes be granted to the seller.

**REPORTING AND AUDITING**

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**24. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?**

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**Public registers**

Regulators must keep a public register of environmental information (*Open Government Environmental Information Catalogue*)



and must establish a guide for environmental information opening (*Trial Measures on the Disclosure of Environmental-Related Information*).

### Third party procedures

In 2007, SEPA (now the MEP) adopted Trial Measures on the Disclosure of Environmental-Related Information, effective as of 1 May 2008. These give citizens and private companies the right to request environmental information from public authorities, who in turn must make the information available within a maximum of 30 working days on receipt of a written request. The scope of disclosure is broad and includes environmental planning, statistics, discharge levels of major pollutants, as well as the type, volume and disposal of solid waste produced in medium to large cities.

Public authorities must also adopt environmental emergency plans and disseminate information on administrative procedures (for instance, in levying fees and granting permits). They must also publish and update a list of companies whose emission of pollutants exceeds the national or local emission standards or which refuse to comply with injunctions or pay penalties for environmental offences.

The obligation to publicly disclose environmental information is also required from companies in relation to excess discharges and information on the construction and operation of pollution treatment facilities and equipment.

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### 25. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

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#### Environmental auditing

Companies in China must carry out environmental auditing (in the form of an EIA) before any new construction or expansion projects (*see Question 11*).

#### Reporting requirements

Polluting companies' reporting obligations to regulators are mandatory within the DPS system (*see Question 5*).

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### 26. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

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Entities that cause or may cause environmental incidents must (*Article 31, EPL*):

- Make the incident situation known to any third party that may suffer from that incident.
- Report information to regulators about the environmental incident.

In addition, reporting duties are also contained in discharge permits or licences, which usually require the operator to supply the EPB with data on emissions/discharges on a regular basis, and to inform the EPB of any accident without delay.

For instance, before a plant handling or generating hazardous waste is shut down, it must submit site soil and ground water contamination reports to the relevant local government authorities, and develop a remediation programme based on the findings in the reports (*Circular on Environmental Pollution Prevention Work in the Enterprise Relocation Process*).

In addition, an information reporting system has been established for environmental emergencies, under which environmental emergencies are classified into four levels. The local EPB must report the emergency information respectively to government at different levels, at a higher level within the EPB and/or the MEP within different time limits depending on the level of the incurred emergency (two hours for emergencies classified in levels I and II, and four hours for levels III and IV) (*Measures for the Reporting of Information on Environmental Emergencies 2011*).

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### 27. What access powers do environmental regulators have to access a company?

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The level of compliance by enterprises with pollution standards and permits is checked by EPB inspectors who carry out regular inspections, and sometimes surprise site visits, without requiring a warrant. Environmental regulators benefit from very broad information gathering powers, and can require production of documents (including technology and trade secret materials, to the extent necessary for compliance verification), demand samples and interview employees (*Article 14, EPL; Article 27, Water Pollution Law and Article 15, Solid Waste Law*).

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## ENVIRONMENTAL INSURANCE

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### 28. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?

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#### Types of insurance and risk

Some insurance companies based in China offer environmental liability insurance policies. The policies may cover:

- Liability for personal injury.
- The cost of cleaning up the polluted site.
- Unexpected and unintended loss caused by the pollution event.
- Defence costs in relation to proceedings following any accidental and sudden pollution.

Liabilities incurred in relation to expected or intended pollution, fines, penalties or exemplary damages, underground storage tanks, asbestos or lead are generally excluded.

#### Obtaining insurance

The extent of insurance cover must be negotiated with the insurance company on a case-by-case basis, on the basis of an expert opinion from the insurance company on existing and potential risks.



## ENVIRONMENTAL TAX

### 29. What are the main environmental taxes in your jurisdiction?

Currently, there is no specific legislation for environmental taxes in China. However, this topic is now on the agenda of the Chinese 12th Five-Year-Plan. Below are the existing Chinese taxes regarding environmental protection.

#### Enterprise income tax (EIT)

**Tax liability.** EIT is imposed on the actual profits (that is, taxable income less deductible costs and expenses) of a company.

**Tax rates.** The standard EIT rate is 25%. The following preferential treatments are available in relation to environmental protection:

- 10% of an investment can be offset against its EIT liability for acquiring and using equipment for the purpose of environmental protection, energy and water conservation.
- A three-year exemption, and three-year half deduction, for revenue derived from environmental protection, energy and water conservation projects, including:
  - public sewage treatment;
  - public refuse treatment;
  - development and utilisation of methane technologies;
  - development of technology for energy-saving and emission reduction;
  - seawater desalination.
- 10% deduction for income derived from products produced by comprehensive utilisation of major raw materials/resources by an enterprise.
- A three-year exemption and three-year half deduction for revenue derived from energy performance contracting projects by energy service companies.

#### Value-added tax (VAT)

**Tax liability.** VAT is levied on the following:

- The turnover derived from the sale of goods within China.
- The provision of processing, repair and replacement services in China.
- The import of goods in China.

**Tax rates.** The VAT standard rate for a general VAT taxpayer is 17%. The following preferential treatments are available in relation to environmental protection:

- VAT exemption for energy service companies transferring goods taxable for VAT from the project to an energy consuming enterprise.
- VAT exemption for qualifying sewage treatment projects.
- VAT exemption for sales of qualifying resurgent water.
- VAT "same time levy and rebate" treatment for sales of electricity or heat that is 80% or more generated by waste.
- 50% reduction of VAT for sales of electricity generated from wind power.

## THE REGULATORY AUTHORITIES

### National People's Congress (NPC)

**Main activities.** The NPC is responsible for enacting and amending all statutes including environmentally related statutes.

**W** [www.npc.gov.cn/englishnpc/news/](http://www.npc.gov.cn/englishnpc/news/)

### Ministry of Environmental Protection (MEP)

**Main activities.** The MEP is responsible for environmental management such as implementing environmental legislation, policies, and guidelines on environmental issues.

**W** <http://english.mep.gov.cn>

### National Development and Reform Commission (NDRC)

**Main activities.** The NDRC is the management agency under the State Council with broad administrative and planning control over the Chinese economy including sustainable development, climate change, and environmental matters. The NDRC is China's designated national authority under the United Nations Framework Convention on Climate Change.

**W** <http://en.ndrc.gov.cn>

- Reduced VAT rate and simplified collection method for sales of self-produced electricity by small-scale water power stations.

#### Business tax (BT)

**Tax liability.** BT is levied on turnover derived from:

- Services (except for VAT-able services) rendered in China.
- The assignment of intangible assets to a party located in China.
- Sales and rental of immovable properties located in China.

**Tax rates.** The BT standard rate for services is 5%. The following BT preferential treatment are available in relation to environmental protection:

- BT exemption for income derived from the implementation of energy performance contracting projects by energy service companies.
- BT exemption for income derived from sewage treatment services.

#### Surcharges

**Tax liability.** The City Maintenance and Construction Tax, Education Surcharge and Local Education Surcharge are surtaxes charged on the sum of BT/VAT actually paid by the taxpayer.

**Tax rates.** The City Maintenance and Construction Tax is levied at a rate that varies depending on the location of the taxpayer or the withholding agent:

- 7% of the tax base for taxpayers/withholding agents located in cities.



- 5% of the tax base for taxpayers/withholding agents located in counties or suburban areas.
- 1% of the tax base for taxpayers/withholding agents located in places other than cities, counties or suburban areas.

The National Education Surcharge is levied at a flat rate of 3%, while the Local Education Surcharge is levied at a flat rate of 2%.

#### Resource tax

**Tax liability.** All entities and individuals engaged in exploitation of mineral products or in production of salts within China are taxpayers for resources tax.

**Tax rates.** Resources tax is computed based on the *ad valorem* method for crude oil and natural gas (that is, the proportional tax rate multiplied by the sales amount, including deemed sales) or the specific duty method for other taxable products (that is, the quota tax rate multiplied by the sales volume, including deemed sales).

#### Vehicles and vessels tax

**Tax liability.** Owners and operators of motor vehicles and vessels within China must make annual tax payment.

**Tax rates.** Vehicles and vessels tax is applicable on vehicles and vessels. The annual tax liability ranges from:

- For passenger cars, CNY60 to CNY5,400, depending on the emissions volume.
- For cargo vehicles, CNY16 to CNY120, depending on the tonne load.

Motor vehicles and vessels that conserve energy or use new energy may be exempted from the vehicle and vessel tax, or subject to a 50% reduction on the standard tax rates.

#### Vehicle purchase tax

**Tax liability.** All entities and individuals that purchase the motor vehicles within the territory of China are liable for the vehicles purchase tax.

**Tax rates.** Vehicle purchase tax is calculated at the flat rate of 10% of the purchase price. The reduced rate (that is, 5% and 7.5%) for passenger cars with discharge volume at 1.6 litres or below are no longer applicable from 2011.

### ONLINE RESOURCES

#### Ministry of Environmental Protection (MEP)

W <http://english.mep.gov.cn>

**Description.** The MEP website contains China's policies, laws, regulations, rules and systems published in Chinese. The English translations are for reference only.

### REFORM

#### 30. What proposals are there for significant reform (changes) of environmental law in your jurisdiction?

According to an announcement published in the central government official website of 27 August 2012, the NCP Standing Committee is currently reviewing a draft amendment to the EPL. The draft amendment is based on proposals of a working group under the Environment and Resource Protection Committee of the NPC, and is reported to address the following major aspects:

- To protect farmland, prohibiting any discharge of solid waste that contains heavy metal or other hazardous substances.
- To strengthen administration on polluting enterprises, requiring the polluting enterprise to install and use pollution detection facilities to monitor the discharges generated by the company, and for the enterprise to have to conserve the original pollution detection records for a fixed period.
- To establish a control of the total amount of discharged pollutants (such a total amount control system having already been provided in the Air Pollution Law and Water Pollution Law).
- To establish a national environmental detection net and a national data information system to ensure the detection data and environmental assessment are coherent in different regions.
- To incorporate a specific chapter to further define EPB and MEP's powers and responsibilities.
- To further define responsibilities of a polluting enterprise with respect to the pollution prevention and the environmental emergencies.

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**Qualified.** Paris, 2005; England and Wales, 2010

**Areas of practice.** Nuclear power; water treatment; carbon trading.

**Areas of practice.** Environmental impact assessments; discharging permits; general environmental law.