

ENVIRONMENTAL LAW

CORPORATE RESPONSIBILITY

Amendments to China's Environmental Protection Law, which took effect Jan. 1, could mean significant changes for how foreign companies do business in the country.

What China's New Environmental Protection Law Means for Your Organization

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I. Introduction

During my recent meetings in Beijing to discuss environmental compliance and enforcement issues, I was struck by the deep convictions and intensive efforts from all sectors in China—including government, industry and citizen groups—to address environmental challenges to life and economic development. China has pinned its hope on the release and implemen-

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Ferris recently met in Beijing with some of China's leading government authorities to discuss the implementation of the framework Environmental Protection Law amendments.

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tation of the amendments to the Environmental Protection Law (EPL),¹ which went into effect Jan. 1.

Many of the concepts enshrined in these amendments are not "new." The amendments, under development for years, increase the potential for meaningful and positive changes. These include government support for moving beyond traditional legal controls; expanding citizen group participation, environmental justice programs and institution building; and applying informational and technological tools to address environmental law implementation and shortfalls.

This article discusses the long-term implications of the Environmental Protection Law as an enabling statute and reviews key adjustments or new measures in the amendments compared with the 1989 version of the EPL.² This article also reviews how key provisions of the EPL have been taken one step further. The article concludes with some key EPL-related questions that companies, particularly manufacturers, operating in China should be asking their compliance and risk management teams at this stage.

II. Long-Term Implications and Issues

The amendments to China's Environmental Protection Law should not be thought of as something that

¹ Environmental Protection Law of the People's Republic of China, Eighth Meeting of the Standing Committee of the Twelfth National People's Congress April 24, 2014, effective as of Jan. 1, 2015.

² Enacted Dec. 26, 1989, effective on same date (superse- ded).

will be applied directly to members of the regulated community. These amendments are better considered as part of an “enabling law” in the sense that the provisions in the EPL will “enable” government authorities at various levels to draw from the law to adjust their own policies and to issue subsidiary rules to implement its provisions. Since the amendments to the EPL were enacted April 24, 2014, China’s Ministry of Environmental Protection and other agencies have been working on implementing these provisions, which are discussed in Section III.

The following bulleted items present an overview of the key measures in the amendments that reflect adjustments, important retained provisions or new measures compared with the 1989 version of the EPL. The article references below apply to the amended EPL. The amendments:

- Establish new principles for environmental protection, i.e., “protection first,” “prevention as the focus,” “comprehensive treatment,” “public participation” and “accountability for damages” (EPL Article 5);
- Clarify legal accountability where environmental protection law is concerned on the part of entities and individuals (EPL Article 6);
- Add a requirement for local governments to increase their financial investment in the protection and improvement of the environment, prevention and control of pollution, and other public hazards and improve governments’ efficiency of their use of financial resources for these ends (EPL Article 8);
- Require government, other stakeholders and new media to play their proper roles in advocacy, outreach, education, supervision and other relevant activities in the area of environmental protection (EPL Article 9);
- Establish June 5 of each year as Environmental Day (EPL Article 12);
- Specify the main contents of environmental protection plans (EPL Article 13);
- Establish requirements for government agencies to take into account environmental impacts when drafting economic and technological policies (EPL Article 14);
- Grant autonomy to local governments to draft certain environmental quality standards that are more stringent than national environmental quality standards (EPL Article 15);
- Add basic requirements for establishing environmental quality monitoring stations (points) and accountability for related data authenticity and accuracy (EPL Article 17);
- Set up an early warning mechanism for the carrying capacity of environmental resources (EPL Article 18);
- Initiate a joint prevention and control coordination mechanism across specified administrative regions (EPL Article 20);
- Adopt financial, tax, pricing, and government procurement policies and measures to encourage and support the development of environmental protection service and other industries (EPL Article 21);
- Adopt financial, tax, pricing and government procurement policies, and measures to encourage enterprises to reduce the pollutant discharges below the national/legal limits (EPL Article 22);
- Require the government support the conversion, relocation and shutdown of enterprises, public institutions and other operations where such actions are consistent with law and aimed at the improvement of the environment (EPL Article 23);
- Grant to certain local environmental protection agencies the authority to shut down and seize facilities and equipment that cause enterprise pollutant discharges, including with respect to public institutions and other operations that are the source of pollution discharges in violation of law and that cause or are likely to cause severe pollution (EPL Article 25);
- Implement a system of environmental protection target accountability and performance evaluation (EPL Article 26);
- Establish a reporting system for environmental conditions and reporting of environmental protection target completion status (EPL Article 27);
- Institute a compensation system to support ecological protection (EPL Article 31);
- Commit improved and enhanced protection of relevant investigation, monitoring, assessment and recovery systems for air, water and soil (EPL Article 32);
- Promote the use of “environmental protection” (i.e., “green”) products and recycled products and prioritize procurement of such products, as well as equipment and facilities, that conserve energy, water and materials and are beneficial to environmental protection (EPL Article 36);
- Implement domestic local government waste sorting, disposal and recycling (EPL Articles 37 and 38);
- Establish and improve monitoring, investigation and risk assessment systems for the environment and public health (EPL Article 39);
- Implement clean energy production and use (EPL Article 40);
- Clarify the use of pollution prevention and control facilities in construction projects in compliance with environmental law (EPL Article 41);
- Add an environmental protection accountability system for discharge entities and an obligation for use

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of monitoring equipment on the part of key pollution discharge entities (EPL Article 42);

- Establish a total pollutant-load control system for major pollutants (EPL Article 44);

- Adopt a pollutant discharge-permit administration system (EPL Article 45);

- Add new environmental protection requirements for the agricultural industries/sector (EPL Articles 49 and 50);

- Promote environmental pollution liability insurance (EPL Article 52);

- Add a new chapter covering enterprise information disclosure obligations, public participation in environmental protection and stakeholder (including government) environmental protection supervision rights (EPL Chapter V);

- Establish a continuous daily fine penalty system (EPL Article 59).

Some of these provisions may appear familiar to readers who have followed this closely. Language adjustments aside, however, key provisions governing transparency, public participation and enhanced liability and penalties are indeed new in the context of a national framework law such as the EPL. These key provisions will be important to monitor.

III. Current Implementation and Enforcement Update

When looking at recent developments in implementation of the amended EPL, readers should keep in mind that, as of this writing, it has been less than a year since its April 24, 2014, enactment and only a few months have passed since its Jan. 1 effective date. In addition, the intervening Lunar New Year holidays in February created a lull in rulemaking activity in China.

Nevertheless, national- and local-level administrative activities aimed at implementing the amendments are robust. Examples of national-level measures that have been issued to implement various aspects of the amendments include the following (*note that all links go to information in Chinese*):

- Opinion of the Supreme People's Court on Comprehensive Enhancement of Environmental Resource Trial Work to Provide Vigorous Judicial Safeguards to Promote Construction of an Ecological Civilization, issued and effective June 23, 2014 (EPL Articles 53, 57, 58). <http://www.chinacourt.org/law/detail/2014/06/id/147914.shtml>

- Measures of the Environmental Protection Administrative Department on Implementing Daily Consecutive Penalties, issued by the Ministry of Environmental Protection, Dec. 19, 2014, effective Jan. 1, 2015 (EPL Article 59). http://www.zhb.gov.cn/gkml/hbb/bl/201412/t20141223_293365.htm

- Measures of Environmental Protection Administrative Departments on [Property] Seizure and Detention, issued by the Ministry of Environmental Protection, Dec. 19, 2014, effective Jan. 1, 2015 (EPL Article 25). http://www.zhb.gov.cn/gkml/hbb/bl/201412/t20141223_293366.htm

- Measures of the Environmental Protection Administrative Department on Production Restrictions and Suspensions for Rectification, issued by the Ministry of Environmental Protection, Dec. 19, 2014, effective Jan. 1, 2015 (EPL Article 25). http://www.zhb.gov.cn/gkml/hbb/bl/201412/t20141224_293385.htm

- Interim Measures on Environmental Violation Cases, Transferred From Administrative Supervision Departments, [Involving] Administrative Detention, jointly issued by the Ministry of Public Security, Ministry of Industry and Information Technology, Ministry of Environmental Protection, Ministry of Agriculture and General Administration of Quality Supervision, Inspection and Quarantine, Dec. 24, 2014, effective Jan. 1, 2015 (EPL Article 63). http://www.mep.gov.cn/gkml/hbb/gwy/201501/t20150105_293789.htm

- Measures on Environmental Information Disclosure for Enterprises and [Other] Entities, issued by the Ministry of Environmental Protection Dec. 19, 2014, effective Jan. 1, 2015 (EPL Articles 53 and 55). http://www.zhb.gov.cn/gkml/hbb/bl/201412/t20141224_293393.htm

- Interpretation of the Supreme People's Court on Some Questions Related to the Application of Law When Hearing Public Interest Environmental Civil Litigation Cases, issued by the Supreme People's Court Jan. 6, 2015, effective Jan. 7, 2015 (EPL Article 58). <http://www.chinacourt.org/law/detail/2015/01/id/148058.shtml>

In these implementing measures it is clear that issues at the forefront of national government Environmental Protection Law implementation include judicial capacity-building for environmental litigation, enterprise and institution environmental information disclosure and access, and environmental law enforcement tool and process clarification and strengthening.

It also is clear that Ministry of Environmental Protection line agencies (i.e., the environmental protection bureaus) and local governments are sensitized to the national government environmental protection goals and enforcement priorities reflected in the amended EPL and national-level implementation measures.

In early March, for example, the Ministry of Environmental Protection announced 12 examples of enforcement cases. These cases took place in Linxi, Chongqing, Guangzhou, Zhangjiagang, Xiangtan, Hangzhou, Shenzhen, Dongying, Shaoxing, Tianjin, Nantong and Sichuan.

The ministry report noted that two cases involved consecutive daily fines (in accordance with EPL Article 59) as the two entities in question did not rectify their illegal pollutant discharge activities even after receipt of rectification orders from the local environmental authorities. Two other cases involved production equipment seizures (in accordance with EPL Article 25).

The ministry report also indicated that the "responsible persons" at four companies (the targets of four other cases) were subjected to administrative detentions arising from enterprise continuation of violating activities after receiving the rectification orders from local environmental authorities (in accordance with EPL Article 63). In the remaining four cases in the report, criminal charges were imposed on individuals who in-

tentionally engaged in environmental pollution activities (in accordance with EPL Article 69).³

V. Aligning Your Organization With EPL Amendments Implementation

It is clear that the Chinese government is actively working on “spreading the word and practice” of the EPL amendments. It also is clear, however, that meaningful and full implementation of the EPL amendments, and any related measure, is a long-term goal that involves factors far beyond the scope of this article. That said, early consideration of the implications of these amendments to China’s framework law governing environmental protection is important now, particularly if your responsibilities involve your organization’s mid- and long-term compliance and risk management.

Accordingly, below is a list of some questions that you should ask yourself, your team, suppliers and other relevant stakeholders that have responsibility for compliance and risk management. These questions reflect issues that are best proactively understood and addressed to the extent possible as liability and related regulatory programs evolve, rather than reactively as problems emerge.

1. *Public and community outreach.* Does the organization have a community outreach function and has that function engaged community leaders and civic groups to provide a channel of communications and early warning system for environmental concerns and disputes?

2. *Environmental information awareness and preparation.* What environmental information does the orga-

nization currently disclose? Does that information represent everything that must be disclosed per law? What is not required to be disclosed but voluntarily disclosed? Is the organization currently included in mobile media disclosures, including apps such as Pollution Map available in China via the Institute for Public & Environmental Affairs and its partners?⁴

3. *Operations siting.* Is the organization sited in a community or development zone abutting residential or other (for example) retail installations (through urban sprawl or other phenomena)?

4. *Legal team awareness and preparation.* Is the organization’s legal team aware of key aspects of China’s emerging citizen suit and related litigation mechanics, including recovery of “reasonable” attorney’s fees and qualification requirements for citizen groups aiming to sue enterprises or other organizations for environmental harms? Is the organization communications team in touch with the legal team to map out channels for discussion with the public or government representatives should citizen suit issues arise?

By answering these questions and acting to institute risk management and strategic planning mechanisms now, at an early point in the development of the EPL amendments’ regulatory, liability and judicial-redress mechanisms, you can ensure that you and your organization are in a better position to deal with China’s evolving community relations, information disclosure, civic group campaign, manufacturing site, supply chain and litigation issues involving environmental protection.

³ A detailed case list can be found at: http://www.cenews.com.cn/xwzx2013/hjyw/201503/t20150303_788325.html.

⁴ The functionality of this app includes mapping of certain local facilities, the facilities’ discharge permit obligations and compliance (enforcement order) status.