

Washington International Law Journal

Volume 17 | Number 3

6-1-2008

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Recommended Citation

Christine J. Lee, Comment, *"Pollute First, Control Later" No More: Combating Environmental Degradation in China Through an Approach Based in Public Interest Litigation and Public Participation*, 17 Pac. Rim L & Pol'y J. 795 (2008).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol17/iss3/9>

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“POLLUTE FIRST, CONTROL LATER” NO MORE: COMBATING ENVIRONMENTAL DEGRADATION IN CHINA THROUGH AN APPROACH BASED IN PUBLIC INTEREST LITIGATION AND PUBLIC PARTICIPATION

Christine J. Lee[†]

Abstract: As China continues to face severe environmental degradation as a side effect of torrid economic growth and rise in population, the Chinese government has promulgated numerous environmental laws over the past few decades to address this critical issue. The efficacy of these laws, however, has been highly questionable. Although the laws themselves—modeled substantially on United States and European environmental laws—are relatively complete and comprehensive, difficulties in implementation and particularly enforcement have led to the continued deterioration of China’s environment. These failures in implementation and enforcement of environmental laws emerge from numerous factors, most notably from the decentralized structure of China’s environmental protection agency, from China’s underdeveloped legal system, and from the country’s insistent prioritization of continued economic growth over environmental protection.

These factors constitute significant obstacles to effective environmental protection, but approaches based in public interest litigation and public participation currently provide the most viable methods for increasing the efficacy of Chinese environmental laws. Accordingly, an approach that incorporates both public participation and public interest litigation, similar to the *qui tam* system used in the United States, may prove especially effective in bolstering Chinese environmental protection. In essence, *qui tam* actions combine both citizen assistance and government-led litigation to prosecute wrongdoings. Under such a system that combines elements of public participation with government-led public interest litigation, China’s central government will have the authority to prosecute civil environmental lawsuits filed by private citizens on behalf of the government, thereby creating a potentially powerful tool for Chinese environmental protection.

I. INTRODUCTION

Throughout history, no nation has emerged as a major industrial and economic power without inflicting substantial environmental damage.¹ In recent years China has also followed this trend, but on an entirely unparalleled scale.² Over the past two decades China has experienced

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¹ Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, N.Y. TIMES, Aug. 26, 2007, at A1.

² *Id.*

unprecedented economic growth;³ unfortunately, this torrid growth has also been accompanied by unprecedented environmental degradation.⁴ Unlike previous nations that caused environmental damage at a more modest rate on their marches toward economic strength, China has incurred severe environmental costs well before the maturation of its economic development. As such, China is essentially “a teenage smoker with emphysema.”⁵

The deterioration of China’s environment has been severe, pervasive, and unrelenting. China is commonly considered to have the worst urban air pollution in the world,⁶ and a 2005 World Bank study found that sixteen of the world’s most polluted cities are in China.⁷ Only one percent of China’s 560 million urban residents breathe air considered safe by the European Union,⁸ and the Chinese Ministry of Health says that pollution has made cancer the leading cause of death in the country.⁹ Additionally, 300 million Chinese citizens, approximately the population of the United States, lack access to safe drinking water.¹⁰

Catastrophic environmental accidents are also relatively common. One of the most serious accidents occurred in late 2005 when a chemical plant explosion dumped more than 100 tons of the toxic chemical benzene into the Songhua River¹¹ and left millions of people without running water for several days.¹² Over 100 chemical plants situated on the banks of China’s rivers still pose a serious threat to drinking water and may potentially lead to widespread chemical contamination.¹³

China’s severe environmental problems also extend to other parts of the world. Chinese air pollution manifests as acid rain over South Korea and

³ Cynthia W. Cann, Michael C. Cann & Gao Shangquan, *China’s Road to Sustainable Development: An Overview*, in CHINA’S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 3, 3 (Kristen A. Day ed., 2005).

⁴ Kahn & Yardley, *supra* note 1.

⁵ *Id.*

⁶ Tseming Yang, *Introduction: Snapshots of the State of China’s Environmental Regulatory System*, 8 VT. J. ENVTL. L. 145, 145 (2007).

⁷ BENJAMIN VAN ROOIJ, REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE, AND ENFORCEMENT; THEORY AND CASES 2 (2006).

⁸ Kahn & Yardley, *supra* note 1.

⁹ *Id.*

¹⁰ Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 200 (2007).

¹¹ Wang Xiangwei, *Mainland’s Environmental Chief Sacked Over Toxic Chemical Spill*, S. CHINA MORNING POST, Dec. 3, 2005, at 1 [hereinafter *Mainland’s Environmental Chief Sacked*].

¹² David Lague, *Water Crisis Shows China’s Pollution Risks*, N.Y. TIMES, Nov. 24, 2005, at A6.

¹³ Ching-Ching Ni, *China Finds Chemical Plants Pose Widespread Risk to Rivers*, L.A. TIMES, Jan. 25, 2006, at A3.

Japan.¹⁴ Desertification in China has been severe¹⁵ and has led to increased sand and dust storms that travel to South Korea and Japan.¹⁶ Additionally, a significant amount of pollution in the United States can be attributed to China,¹⁷ including more than a quarter of the atmospheric pollution over Los Angeles, California.¹⁸ In fact, environmental experts predict that China will eventually account for one-third of the air pollution in the entire state of California.¹⁹ Environmental accidents have also directly impacted other countries. In the Songhua River case, because the Songhua flows into the Heilong River that eventually becomes Russia's Amur River, the toxic chemicals ultimately contaminated Russian waters.²⁰

Much of China's explosive economic growth over the past few decades emerged from the country's adoption of the *xian wuran, hou zhili*, or "pollute first, control later," model of economic development.²¹ This model of development has been followed in the past by other countries such as the United States ("U.S."), Japan, and the United Kingdom ("UK"),²² but each of these countries was able to effectively address the consequent environmental degradation after their respective economies matured.²³ As mentioned above, however, China's situation is unique in that the nation faces the consequences of severe environmental degradation well before economic maturation and as it continues to strive for maximum economic growth. Furthermore, China also faces a unique predicament in that it first established a working legal system after the demise of Mao Zedong's Cultural Revolution in the late 1970s;²⁴ consequently, the country's legal system is still relatively young and underdeveloped. Additionally, the decentralized structure of China's environmental regulatory system serves to impede the country's environmental protection efforts.²⁵ Thus, China faces

¹⁴ Kahn & Yardley, *supra* note 1.

¹⁵ VAN ROOIJ, *supra* note 7, at 2.

¹⁶ Ian Hannam & Du Qun, *Environmental Law Reform to Control Land Degradation in the People's Republic of China: A View of the Legal Framework of the PRC-GEF Partnership Program*, in LAND USE LAW FOR SUSTAINABLE DEVELOPMENT 315, 316 (Nathalie J. Chalifour et al. eds., 2007).

¹⁷ See generally Traci Watson, *Air Pollution from Other Countries Drifts into USA*, USA TODAY, Mar. 14, 2005, at 1A.

¹⁸ Jim Yardley, *Dirty Cloud Forms Over Rising China; Pollution Threatens Economic Triumphs*, INT'L HERALD TRIBUNE, Oct. 31, 2005, at 4.

¹⁹ *Id.*

²⁰ *Mainland's Environmental Chief Sacked*, *supra* note 11.

²¹ Wang, *supra* note 10, at 198.

²² *Id.*

²³ Kahn & Yardley, *supra* note 1.

²⁴ See Srinivasan, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 291-92 (2007).

²⁵ See *id.* at 310.

serious economic, legal, and administrative barriers to effective environmental protection.

In light of these formidable barriers, approaches based in public interest litigation and public participation in environmental protection efforts may provide the most viable methods for enhancing Chinese environmental protection overall. In particular, an approach that incorporates both public participation and public interest litigation, inspired by *qui tam* actions used in the United States, may prove effective in strengthening Chinese environmental protection. *Qui tam* actions in the United States are most commonly brought under the False Claims Act and are statutorily-authorized actions that allow the government to prosecute civil claims filed “in the name of the Government” by private parties.²⁶ Thus, the United States’ *qui tam* system, which combines citizen assistance and government-led litigation, provides a framework for the establishment of a similar system in China in the environmental context. Under the *qui tam* system, China’s central government will have the authority to prosecute civil environmental lawsuits filed by private citizens. Such a system will constitute a small but important step towards achieving effective environmental protection in China.

This Comment will identify deficiencies in China’s environmental legal framework and recommend a solution based on public participation and public interest litigation to help combat China’s environmental degradation. Part II of this Comment discusses China’s current environmental legal framework and how weak implementation and enforcement of laws have led to inadequate environmental protection. Part III presents the reasons behind the inefficacies of the environmental legal framework. Part IV suggests that enhanced public participation in environmental protection and public interest litigation are currently the most viable methods to overcome the inefficacies of China’s environmental laws. Part V proposes the adoption of a law to establish such a system, inspired by the *qui tam* system in the United States, that combines both government-led litigation with elements of public participation and expressly allows China’s central government to prosecute civil environmental lawsuits filed by private citizens.

²⁶ *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 769 (2000).

II. CHINA'S ENVIRONMENTAL LEGAL SYSTEM FAILS TO ADEQUATELY PROTECT THE ENVIRONMENT

China has created a comprehensive and complete body of environmental laws over the past three decades. Although shortcomings in some legislation have hindered environmental protection to an extent, these shortcomings are relatively minor compared to the major weakness in Chinese environmental law: lax implementation and enforcement of environmental laws.

A. *China's Environmental Laws Are, for the Most Part, Complete and Comprehensive*

China's environmental legal framework consists primarily of four levels: 1) China's Constitution; 2) laws enacted by the National People's Congress ("NPC") and the Standing Committee; 3) binding regulations, orders, decisions, and other documents promulgated by the State Council (here, through the State Environmental Protection Administration); and 4) regulations, decisions, and orders promulgated by provinces, autonomous regions, and municipalities directly under the central government.²⁷

China's body of environmental laws began with limited provisions involving the environment in the 1978 Constitution.²⁸ These provisions were subsequently revised and strengthened through the 1982 amendments to the Constitution.²⁹ Currently, Article 9 of the Constitution provides that "[t]he state ensures the rational use of natural resources and protects rare animals and plants" and that "[t]he appropriation or damage of natural resources by any organization or individual by whatever means is prohibited."³⁰ Furthermore, Article 26 of the Constitution provides that "[t]he state protects and improves the living environment and the ecological environment, and prevents and controls pollution and other public hazards" and that "[t]he state organizes and encourages afforestation and the protection of forests."³¹

In 1979, the National People's Congress Standing Committee enacted the Environmental Protection Law ("EPL"), the nation's first targeted

²⁷ Hannam & Qun, *supra* note 16, at 319.

²⁸ Sitaraman, *supra* note 24, at 293.

²⁹ *Id.*

³⁰ Constitution of the People's Republic of China, Ch. II General Principles, art. 9 (1982), available at <http://english.people.com.cn/constitution/constitution.html>.

³¹ *Id.* art. 26.

environmental statute.³² The EPL was first introduced for trial implementation in 1979, then significantly revised before its adoption in 1989.³³ The statute “was prepared as a general environmental law focusing on pollution control . . . [and] the law is potentially applicable to all pollution-generating activities.”³⁴ Thus, the EPL essentially acts as a general “catch-all” for environmental protection.³⁵ In practice, however, the provisions of the EPL are aspirational in nature, as it “establishes fundamental concepts for environmental protection that often are reflected in subsequently adopted laws.”³⁶ Among other things, it grants individual citizens the right to “report on or file charges against units or individuals that cause pollution or damage to the environment,”³⁷ grants “awards to units and individuals that have made outstanding achievements in protecting and improving the environment,”³⁸ establishes environmental monitoring systems under the State Environmental Protection Administration (“SEPA”) and local Environmental Protection Bureaus (“EPBs”),³⁹ requires the use of environmental impact statements on new construction projects,⁴⁰ stipulates that enterprises or institutions that cause severe environmental pollution shall be required to eliminate and control the pollution within a certain period of time,⁴¹ and describes the legal liabilities of violators.⁴² Perhaps most significantly, the EPL retroactively provided a solid legislative base for many of the environmental regulatory programs first developed during the 1970s and 1980s, and also extended responsibility for environmental protection to governing bodies at the national, provincial, county, and city levels.⁴³ Although the practical value of the EPL has been rather minimal (to pollution victims, for example), the statute acted as a catalyst for a wide range of subsequent environmental statutes—most of which emerged from

³² Richard J. Ferris Jr. & Hongjun Zhang, *Environmental Law in the People's Republic of China*, in CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 66, 76 (Kristen A. Day ed., 2005).

³³ Sitaraman, *supra* note 24, at 294.

³⁴ Ferris & Zhang, *supra* note 32, at 76.

³⁵ See generally Environmental Protection Law (promulgated by the Standing Comm. People's Cong. Dec. 26, 1989, effective Dec. 26, 1989), available at <http://www.china.org.cn/english/environment/34356.htm> (P.R.C.) [hereinafter Environmental Protection Law].

³⁶ Ferris & Zhang, *supra* note 32, at 76.

³⁷ Environmental Protection Law, *supra* note 35, art. 6.

³⁸ *Id.* art. 8.

³⁹ See *id.* art. 11.

⁴⁰ *Id.* art. 13.

⁴¹ *Id.* art. 29.

⁴² See *id.* arts. 35-45.

⁴³ XIAOYING MA & LEONARD ORTOLANO, ENVIRONMENTAL REGULATION IN CHINA: INSTITUTIONS, ENFORCEMENT, AND COMPLIANCE 16 (2000).

the general provisions of the EPL but were more specific and narrowly-focused in content.⁴⁴

These more narrowly-tailored environmental laws include statutes concerning water pollution, marine environment, fisheries, solid waste, atmospheric pollution, wildlife, radioactive pollution, and environmental impact assessments (“EIA”) for new construction projects.⁴⁵ Of particular importance is the EIA statute. Although the EPL discusses EIAs generally, the Law of the People’s Republic of China on Appraising of Environmental Impacts (2003) delved into great detail on the EIA process and, notably, included public participation as an element of project approvals.⁴⁶ As such, the enactment of the EIA statute “marked a watershed moment for public participation in China, as public involvement became a required component of the environmental decision-making process.”⁴⁷

In addition to the creation of environmental statutes, China amended the Criminal Law of the People’s Republic of China in 1997 to attach criminal liability to certain environmental violations.⁴⁸ One section, “Crimes of Impairing the Protection of the Environment and Resources,” details major violations subject to criminal liability including serious pollution accidents,⁴⁹ illegally importing or treating imported solid waste,⁵⁰ illegally catching or killing protected wildlife,⁵¹ and illegal mining.⁵² The law also assigns specific ranges of prison terms for each violation.⁵³

China also participates in various international conventions and treaties on environmental protection,⁵⁴ including the Kyoto Protocol and the Framework Convention on Climate Change.⁵⁵ Such accords “often provide

⁴⁴ See Adam Briggs, Note, *China’s Pollution Victims: Still Seeking a Dependable Remedy*, 18 GEO. INT’L ENVTL. L. REV. 305, 309 (2006); see Ferris & Zhang, *supra* note 32, at 79.

⁴⁵ Sitaraman, *supra* note 24, at 296.

⁴⁶ Law on Appraising of Environmental Impacts (promulgated by the Standing Comm. People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=2496&keyword=environment> (P.R.C.) [hereinafter Environmental Impacts Law].

⁴⁷ Jesse L. Moorman & Zhang Ge, *Promoting and Strengthening Public Participation in China’s Environmental Impact Assessment Process: Comparing China’s EIA Law and U.S. NEPA*, 8 VT. J. ENVTL. L. 281, 282 (2007); see also *infra* Part IV.A (giving examples of public participation).

⁴⁸ CRIMINAL LAW, Ch. VI, Section VI (adopted by the Nat’l People’s Cong., Jul. 1, 1979, revised Mar. 14, 1997), available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php> (P.R.C.).

⁴⁹ *Id.* art. 338.

⁵⁰ *Id.* art. 339.

⁵¹ *Id.* art. 341.

⁵² *Id.* art. 343.

⁵³ *Id.* art. 338-46.

⁵⁴ Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 163 (2007).

⁵⁵ Ferris & Zhang, *supra* note 32, at 76.

needed financial and other support to develop and implement domestic environmental laws.”⁵⁶

The final major component of China’s environmental legal framework is SEPA, China’s centralized environmental agency comparable to the United States Environmental Protection Agency (“EPA”).⁵⁷ In 1998 the Chinese Premier elevated SEPA to the ministerial level within the State Council in an attempt to demonstrate and solidify the agency’s authority over environmental protection to the general public.⁵⁸ Similarly, in March 2008 China announced plans to reorganize the central government by, among other things, transforming SEPA into one of five so-called “superministries.” Created to improve bureaucratic efficiency, this move will presumably enhance SEPA’s clout within the central government.⁵⁹ SEPA’s formal duties include promulgating environmental laws, creating environmental policy, and formulating specific regulations concerning environmental protection.⁶⁰ SEPA also monitors environmental compliance through provincial, municipal, and local EPBs and Environmental Monitoring Centers throughout China.⁶¹ Local EPBs are tasked with implementing and enforcing SEPA’s environmental laws and regulations.⁶² Additionally, local EPBs are responsible for overseeing EIAs for new projects (although some EIAs require SEPA approval), monitoring local emissions, assessing fines for pollution discharges that exceed state standards, and pursuing legal action against those who consistently fail to meet pollution standards.⁶³

Thus, China’s environmental legal framework is relatively complete, broad in coverage, and comprehensive.⁶⁴ Some of the environmental laws, however, may suffer from certain weaknesses. For example, certain laws contain vague language and are often more similar to policy statements than authoritative mandates. These provisions “encourage” rather than require compliance, and frequently contain very weak enforcement provisions.⁶⁵ Still, such statutory weaknesses are relatively minor when compared to

⁵⁶ *Id.*

⁵⁷ Sitaraman, *supra* note 24, at 305.

⁵⁸ Briggs, *supra* note 44, at 310.

⁵⁹ Jim Yardly, *China Retools Its Government in a Push for Efficiency*, N.Y. TIMES, Mar. 12, 2008, at A12.

⁶⁰ Sitaraman, *supra* note 24, at 305.

⁶¹ *Id.* at 306.

⁶² *Id.*

⁶³ Elizabeth Economy, *Environmental Enforcement in China*, in CHINA’S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 102, 103 (Kristen A. Day ed., 2005).

⁶⁴ See Sitaraman, *supra* note 24, at 295-98.

⁶⁵ Wang, *supra* note 10, at 203.

China's serious problems with implementation and enforcement of environmental laws and present a far less formidable barrier to effective environmental protection.

B. Chinese Environmental Protection Suffers from a Lack of Effective Implementation and Enforcement of Environmental Laws

China's primary challenge in environmental protection lies in the implementation and enforcement of its environmental laws. One of the weakest areas of implementation and enforcement involves SEPA and the EPBs. SEPA and its local EPBs frequently fail to enforce environmental laws against local enterprises. Such failures are exemplified by the numerous small chemical factories along the banks of China's Tonglang River. These factories had continually discharged acid wastewater into the river for many years before the EPB finally ordered the factories to stop production in 2004.⁶⁶ Although local EPBs were aware of the factories' activities long before 2004, they declined to take action against the factories because a stop in production would seriously harm the local economy and most of the livelihoods in the area.⁶⁷ Similarly, in 1997 a number of residents in Tangshan who lived near a polluting factory began developing skin conditions and even leukemia; the local government officially acknowledged that the plant released toxic pollutants such as benzene into the area, but only issued a fine against the plant and allowed it to continue polluting.⁶⁸

Another example of SEPA's and the EPBs' failure to implement and enforce environmental statutes is illustrated by the EIA statute. Environmental officials often decline to fully implement or enforce the EIA law. There are numerous instances of EIA officials approving projects that do not comply with EIA requirements, as well as cases of officials reporting false information on EIA statements in order to allow construction.⁶⁹ For instance, one such report stated that the distance between a proposed plant and residential area was 400 meters, while the actual distance was twenty meters.⁷⁰ SEPA approved the construction, and the project subsequently inflicted severe pollution.⁷¹

⁶⁶ VAN ROOIJ, *supra* note 7, at 192-95.

⁶⁷ *Id.* at 193.

⁶⁸ Briggs, *supra* note 44, at 315.

⁶⁹ Wang Canfa, *supra* note 54, at 166.

⁷⁰ *Id.*

⁷¹ *Id.* at 166-67.

Another area of ineffective enforcement involves criminal liability for environmental violations. As discussed above, China amended its criminal code in 1997 to include environmental crimes and to punish environmental polluters.⁷² These criminal provisions, however, have not been properly enforced. For example, between 1997 and 2002, there were 387 serious environmental pollution cases that should have fallen under criminal liability; yet less than twenty of these cases were prosecuted.⁷³ Instead, EPBs dispensed administrative fines against the polluters rather than any criminal penalties.⁷⁴

The foregoing illustrations of weak implementation and enforcement of environmental laws are a few of the numerous such environmental protection failures throughout China. Such weak implementation and enforcement are common and difficult to combat because of the decentralized administrative structure of SEPA, weaknesses in the relatively new Chinese legal system, and China's drive to maintain explosive economic growth.

III. STRUCTURAL, LEGAL, AND ECONOMIC BARRIERS PREVENT EFFECTIVE ENFORCEMENT OF CHINA'S ENVIRONMENTAL LAWS

There exist numerous reasons behind China's weak enforcement of environmental laws. The most significant factors include 1) the decentralized structure of China's environmental protection agency, 2) the underdeveloped Chinese legal system, and 3) the country's prioritization of economic growth and livelihood over environmental protection.

A. *The Decentralized Structure of China's Environmental Protection Agency Presents Serious Challenges to Effective Environmental Enforcement*

As discussed above, SEPA generally promulgates environmental laws at the national level, while the local EPBs are given the task of enforcing the laws.⁷⁵ This lack of centralized enforcement power on the part of SEPA is to be expected, given the sheer size and population of China, and parallels some of the structural issues inherent in China's government as a whole. In theory China's government operates as a unitary state with power centralized

⁷² See *supra* Part II.A.

⁷³ Symposium, *China in Transition: Environmental Challenges in the Far East*, 8 VT. J. ENVTL. L. 379, 385 (2007) [hereinafter *China in Transition*].

⁷⁴ *Id.*

⁷⁵ See *supra* Part II.A.

in Beijing.⁷⁶ In reality, the national government issues broad guidelines, and subnational and local governments possess considerable discretion in interpreting, implementing, and enforcing national mandates.⁷⁷ As such, SEPA's similar structure reinforces the sentiment of many citizens regarding the efficacy of the central government as a whole that "[t]he mountains are high, and the emperor is far away."⁷⁸

The extensive devolution of enforcement authority to local administrative levels has led to the inability of the national agency to enforce environmental laws effectively. SEPA's structure gives local agencies implementation and enforcement authority over most day-to-day environmental issues, which leaves the central agency with little authority over implementing and enforcing specific laws at the local level.⁷⁹ Thus, local EPBs have significant leeway and independence in interpreting and enforcing SEPA mandates.⁸⁰ The local environmental agencies, however, are often unwilling to vigorously enforce environmental mandates from the central government,⁸¹ generally because of local protectionism—local governments protecting local economic, political, and social interests⁸²—and sometimes because of corruption.⁸³ This problem emerges in large part from the fact that local EPBs receive most or all of their funding from local governments. Neither SEPA nor the central government provides much, if any, funding for the EPBs' environmental enforcement operations.⁸⁴ Thus, a local government is able to exercise influence over the EPB through its budgetary control and prioritize local economic considerations over environmental protection. Additionally, corrupt and ambitious EPB officials may engage in lax environmental enforcement at the behest of local governments, as the decisions involving promotions and career advancement are made by these local governments.⁸⁵ As a result, local governments exert significant influence over the bureaus,⁸⁶ EPB officials are often susceptible to pressures from local governments to enforce environmental laws less

⁷⁶ See William P. Alford & Yuanyuan Shen, in *ENERGIZING CHINA: RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH* 415, 415 (Michael B. McElroy et al. eds., 1998).

⁷⁷ *Id.*

⁷⁸ Briggs, *supra* note 44, at 311.

⁷⁹ Pamela Howlett, *Striking the Right Balance: The Contrasting Ways in Which the United States and China Implement National Projects Affecting the Environment*, 12 *MO. ENVTL. L. & POL'Y REV.* 17, 34 (2004).

⁸⁰ Sitaraman, *supra* note 24, at 306.

⁸¹ *Id.* at 314.

⁸² VAN ROOIJ, *supra* note 7, at 264.

⁸³ Sitaraman, *supra* note 24, at 309.

⁸⁴ *Id.* at 310.

⁸⁵ *Id.* at 309-10.

⁸⁶ VAN ROOIJ, *supra* note 7, at 273.

stringently,⁸⁷ and the EPBs' loyalties more often lie with the local governments rather than the national government.⁸⁸

Additionally, SEPA (the centralized agency) is often unable to fully enforce environmental laws at the local level because it is "deficient in size, authority, and institutional capacity to successfully assert control over local environmental agencies."⁸⁹ Although SEPA has attempted to support the enforcement activities of the EPBs, its aforementioned deficiencies have rendered many of these attempts unsuccessful.⁹⁰

B. China's Relatively New Legal System Is a Major Reason for the Weak Enforcement of Environmental Laws

Historically, China was governed primarily through personal relationships or *guanxi* (social connections).⁹¹ The legal history of China suggests that law was always viewed as an instrument for social control, rather than a tool to empower the individual against the state: "[L]aw was . . . viewed as a mechanism to prevent China's citizens from rebelling or challenging the supremacy of the state."⁹² As such, the country has no tradition or legal culture of using lawyers, courts, or the law to redress injustices or resolve disputes.⁹³ Although China had once established an underdeveloped and sporadically-utilized legal regime during the Republican and Nationalist era (1911-1948), the advent of Mao Zedong's rule brought forth the complete obliteration of this fledgling legal system.⁹⁴ China did not begin reestablishing a genuine legal regime until the demise of Mao and the Cultural Revolution in the late 1970s.⁹⁵ Post-Mao, China faced the immense legislative challenge of reestablishing, or truly establishing for the first time, the largest legal system in the world.⁹⁶

In part because of its relatively nascent nature, China's legal system suffers from significant weaknesses. Genuine power and authority lie primarily within the Communist Party, despite the introduction of a body of

⁸⁷ Economy, *supra* note 63, at 108.

⁸⁸ See Sitaraman, *supra* note 24, at 310.

⁸⁹ Sitaraman, *supra* note 24, at 314.

⁹⁰ Economy, *supra* note 63, at 104.

⁹¹ Ruth Greenspan Bell, *The Law and Economics of Development and Environment: Culture and History Count: Choosing Environmental Tools to Fit Available Institutions and Experience*, 38 IND. L. REV. 637, 644 (2005); MA & ORTOLANO, *supra* note 43, at 82.

⁹² Sitaraman, *supra* note 24, at 290-91.

⁹³ Wang, *supra* note 10, at 202.

⁹⁴ Sitaraman, *supra* note 24, at 291.

⁹⁵ *Id.*

⁹⁶ VAN ROOIJ, *supra* 7, at 45.

law.⁹⁷ As such, China possesses a weak judiciary system.⁹⁸ Chinese citizens often cannot look to the judiciary to force the government to implement or enforce laws, as the judiciary is not independent of other governing bodies. Judges are both funded⁹⁹ and appointed by local governments.¹⁰⁰ Consequently, judges must answer to their respective local governments that may regularly intervene in cases involving financially beneficial polluting enterprises.¹⁰¹ Furthermore, judges must also undergo annual political training, “which further undercuts their independence and the likelihood that they will make a decision that is contrary to official doctrine,”¹⁰² and judges are often poorly trained.¹⁰³ In the Chinese legal system, “the legislator is the almighty entity within the State, without a system of checks and balances.”¹⁰⁴ This political structure often “makes [it] impossible for a Chinese court to declare a statute or even a local set of regulations invalid or unconstitutional”¹⁰⁵ and often renders the judiciary ineffective. In other words, the legislative body—rather than the courts—have the authority to create, modify, and interpret legal rules.¹⁰⁶ Furthermore, although governing bodies at the national level (such as SEPA) are responsible for interpreting national laws and local laws that implement national laws,¹⁰⁷ the national government is generally reluctant to issue written interpretations of laws.¹⁰⁸ This reluctance only adds to the ambiguity and uncertainty of the legal system.¹⁰⁹

There are signs, however, that China is committed to strengthening its legal system. In the past few years the government elite has been guiding the transition from China’s political-legal system towards a system that emphasizes the rule of law and reduced interference of administrative and judicial processes by the Communist Party.¹¹⁰ For instance, the practice of procuring outside resources (such as the international community) to assist with research, training, and other such matters related to strengthening the

⁹⁷ Greenspan Bell, *supra* note 91, at 644.

⁹⁸ *See id.* at 645.

⁹⁹ Alford & Shen, *supra* note 76, at 416.

¹⁰⁰ Greenspan Bell, *supra* note 91, at 645.

¹⁰¹ Wang, *supra* note 10, at 202.

¹⁰² Greenspan Bell, *supra* note 91, at 645.

¹⁰³ Wang, *supra* note 10, at 202.

¹⁰⁴ Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT’L & COMP. L. 35, 45 (2007).

¹⁰⁵ *Id.* at 44.

¹⁰⁶ *Id.* at 45.

¹⁰⁷ Ferris & Zhang, *supra* note 32, at 88.

¹⁰⁸ *Id.* at 89.

¹⁰⁹ *Id.*

¹¹⁰ Castellucci, *supra* note 104, at 61.

“rules-of-law” is becoming quite commonplace and accepted by the top governmental bodies.¹¹¹ Also, China’s leaders increasingly advocate “ruling the country according to law” and even amended the Constitution in 1999 to include this rule of law principle.¹¹² Furthermore, the Chinese government’s reluctance concerning written interpretations of laws has diminished somewhat: “Requests for written interpretations, reliance on existing written interpretations, and exchanges of letters confirming that a compliance approach described by the company or other stakeholder is acceptable to authorities are increasing at certain agencies in China.”¹¹³ China appears to be gradually strengthening its legal system by reducing ambiguity and vagueness of broadly drafted laws¹¹⁴ (through issuing interpretations, for example) and demonstrating its commitment to a genuine legal regime.

C. *The Prioritization of Economic Growth and Livelihood over Environmental Protection Acts as a Formidable Barrier Against Effective Implementation and Enforcement of Environmental Laws*

China’s intense focus on economic development over the past twenty to thirty years has resulted in remarkable economic growth. In 1978 China was the forty-eighth largest economy in the world; in 2005 China was the fourth largest economy in the world behind only the United States, Japan, and Germany.¹¹⁵ Impressively, during this twenty-seven year period, China’s gross domestic product increased by an average of 9.4% every year.¹¹⁶ During this period of torrid economic growth, China also vastly reduced the number of people living in poverty,¹¹⁷ thereby enhancing economic livelihood.

Because of China’s runaway economic success, the country tends to prioritize economic growth and livelihood over environmental protection, both at the central level and especially at the local level.¹¹⁸ Pan Yue, the deputy minister of SEPA, stated in an interview: “[t]he main reason behind the continued deterioration of the environment is a mistaken view of what

¹¹¹ See Richard J. Farris, *Reaching Out to the Rule of Law: China’s Continuing Efforts to Develop an Effective Environmental Law Regime*, 11 WM. & MARY BILL OF RTS. J. 569, 602 (2003).

¹¹² Alex Wang, *Environmental Protection in China: The Role of Law*, <http://www.chinadialogue.net/article/show/single/en/745-Environmental-protection-in-China-the-role-of-law> (last visited Apr. 26, 2008) [hereinafter *China Dialogue*].

¹¹³ Ferris & Zhang, *supra* note 32, at 89.

¹¹⁴ *Id.*

¹¹⁵ Wang, *supra* note 10, at 199.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *China in Transition*, *supra* note 73, at 387.

counts as political achievement The crazy expansion of high-polluting, high-energy industries has spawned special interests. Protected by local governments, some businesses treat the natural resources that belong to all the people as their own private property.”¹¹⁹ Local protectionism rears its head once again. Because local governments often pursue economic growth and livelihood over environmental protection,¹²⁰ these local governments apply heavy pressure on EPBs to regulate economically valuable polluting enterprises less stringently. Thus, many local governments, with EPB cooperation, often ignore environmental laws and edicts by reopening mines or factories that were closed for pollution violations by the central government¹²¹ and by allowing severely polluting enterprises to continue operations.¹²²

The local governments’ emphasis on economic growth and livelihood is further demonstrated by the fact that a municipality’s worst polluter is often also its principal employer and largest source of revenue.¹²³ Consequently, local governments tend to prioritize such revenues over environmental protection and pressure local EPBs to limit their enforcement of environmental laws against polluting enterprises.¹²⁴ There are also instances where local governments appear to enforce penalties against polluters without imposing any actual penalties: “[i]t is no rarity . . . to find a bureau imposing a fine on a dirty local enterprise (thus fulfilling its duty), but then passing the money on to the local administration, which refunds it to the company via a tax break.”¹²⁵

China’s tendency to prioritize economic growth and livelihood over environmental protection acts as a significant obstacle to effective enforcement of environmental laws.

IV. PUBLIC PARTICIPATION AND PUBLIC INTEREST LITIGATION WILL LEAD TO MORE EFFECTIVE ENVIRONMENTAL PROTECTION

As discussed above, structural, legal, and economic barriers currently hinder the efficacy of China’s environmental laws. Because these barriers are formidable, public participation and public interest litigation may currently constitute two of the most viable options for enhancing Chinese

¹¹⁹ Kahn & Yardley, *supra* note 1.

¹²⁰ Wang Canfa, *supra* note 54, at 171; VAN ROOIJ, *supra* note 7, at 193.

¹²¹ See Kahn & Yardley, *supra* note 1.

¹²² See, e.g., VAN ROOIJ, *supra* note 7, at 191-209.

¹²³ Briggs, *supra* 44, at 316.

¹²⁴ *Id.* at 316-17.

¹²⁵ *Id.* at 317.

environmental protection. In particular, a system that incorporates both public participation and public interest litigation may prove especially effective.

A. *Increasing Public Participation in Environmental Protection Efforts Will Enhance Environmental Protection in China*

The enhancement of public participation in environmental protection efforts has great value for improving the efficacy of Chinese environmental laws and is one of the most promising ways to overcome the foregoing legal, governmental, and economic barriers to achieve effective environmental protection. Such public participation allows citizens to contribute to the efforts of the government in producing higher quality decisions on the environment.¹²⁶ There are also other benefits of public participation including enhanced public education and governmental transparency and accountability.¹²⁷ As such, enhanced public participation will lead to “a system capable of producing knowledgeable and inclusive environmental decisions.”¹²⁸ Additionally, public participation can serve to ameliorate SEPA’s deficiencies in regulatory and supervisory oversight that emerge from its limited resources of money and manpower.¹²⁹ For example, citizens possess intimate knowledge of local environmental violations and can notify government officials while simultaneously heightening awareness of local environmental issues.¹³⁰ In this manner, public participation can also act to maximize limited government resources by assisting SEPA with its monitoring and enforcement efforts, thereby saving SEPA time and money.¹³¹

In recent years, “there has been a dramatic upsurge in both the level of interest and the level of involvement among the Chinese public in improving the environment.”¹³² Some examples of recent public participation activities have included formal involvement by the public in environmental non-governmental organizations (“NGOs”) and “mass-based” environmental programs such as battery recycling or tree planting.¹³³ Another example of public participation, as mentioned earlier, emerges from the environmental impact assessment statute that generally requires public participation

¹²⁶ Moorman & Ge, *supra* 47, at 286.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 287.

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² Economy, *supra* note 63, at 116.

¹³³ *Id.*

through “demonstration meetings, hearings, or by any other means.”¹³⁴ A recent example of such EIA-based public participation transpired in December 2007 in the city of Xiamen, where the government proposed construction of a power plant that could pose serious dangers to the environment and public health.¹³⁵ The proposal sparked passionate protests by Xiamen citizens, many of whom voiced their opposition to the project at rare public hearings held by the city government¹³⁶—hearings that are required, with few exceptions, by the EIA statute.¹³⁷ The public’s participation in the EIA process ultimately forced the city to suspend its construction of the toxic chemical plant.¹³⁸

Additionally, the lodging of citizen complaints to environmental officials, through which the public “acts as a watchdog,” is one of the most common forms of public participation in environmental protection.¹³⁹ In 1996, for example, environmental officials received over 67,000 letters of complaint regarding environmental pollution; in 1998, this number increased to 241,321.¹⁴⁰ In fact, “local environmental officials state that many of their best tips for polluting enterprises come from such letters and phone calls.”¹⁴¹ The individual local environmental agencies, of course, cannot (or will not) address all complaints, in which case complainants may take legal action to enjoin or seek compensation from violators of environmental laws.¹⁴² Such legal recourse, however, can be difficult to pursue and attain because, as the

¹³⁴ Environmental Impacts Law, *supra* note 46, arts. 11, 21. Chapter II, Article 11 provides the following: In case a program may cause unfavorable environmental impacts or directly involve the environmental interests of the general public, the organ that works out the special programs shall, prior to submitting the draft of the programs for examination and approval, seek the opinions of the relevant entities, experts and the general public about the draft of the report about the environmental impacts by holding demonstration meetings or hearings or by any other means, except it is provided by the state that it shall be kept confidential.

Chapter III, Article 21 provides the following: Unless it is provided by the state that it is necessary to keep confidential, for the construction projects which may impose significant environmental impacts and for which it is necessary to work out a report of environmental impacts, the construction entity shall, before submitting the construction project for examination and approval, seek the opinions of relevant entities, experts and the general public by holding demonstration meetings, hearings or by any other means.

¹³⁵ Maureen Fan, *Chinese City Asks Public's Input on Proposed Factory; Unusual Request, Accompanying Report on Environmental Impact of Chemical Plant, Follows Large Protests*, WASH. POST, Dec. 7, 2007, at A33.

¹³⁶ Joey Liu, *Xiamen Residents Say No to Toxic Plant; Hostility Towards Works in Rare Public Meetings*, S. CHINA MORNING POST, Dec. 15, 2007, at 5.

¹³⁷ Environmental Impacts Law, *supra* note 46, arts. 11, 21.

¹³⁸ Howard W. French, *Seeking a Place at the Decision-Making Table; Chinese Fight Plans to Extend Train Line*, INT'L HERALD TRIB., Jan. 28, 2008, at 3.

¹³⁹ Economy, *supra* note 63, at 116.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

next section discusses, potential plaintiffs face various obstacles within China's traditional system of environmental litigation.

B. Public Interest Litigation Will Buttress Traditional Environmental Litigation Resulting in Enhanced Environmental Protection

Environmental litigation in China consists mainly of pollution compensation litigation, in which plaintiffs seek compensation for harm caused by pollution.¹⁴³ Pollution compensation lawsuits are authorized by two statutes: the General Principles of Civil Law and the EPL.¹⁴⁴ Article 124 of the General Principles of Civil Law provides that “[a]ny person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.”¹⁴⁵ Article 41 of the EPL provides that “[a] unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses.”¹⁴⁶

Traditional environmental litigation, however, presents formidable obstacles to potential plaintiffs. One such obstacle is the high (often prohibitively high) cost of litigation for plaintiffs. Chinese law requires plaintiffs to pay a case acceptance fee—a percentage of the requested relief.¹⁴⁷ Also, courts often levy “other litigation costs” against plaintiffs; because these costs are imposed at the court’s discretion, such “other litigation costs” can often be “a source of abuse.”¹⁴⁸ Furthermore, in cases where the losing defendant fails to pay the court-ordered amount, the plaintiff is required to pay fees to initiate “execution proceedings” to compel the defendant’s payment.¹⁴⁹ Additionally, plaintiffs must pay for appraisals, executed by court-appointed certified experts, which provide material evidence of violations, causation, and appropriate damages.¹⁵⁰ Such appraisal fees can be extremely costly, sometimes even equivalent to “many years of salary for an average individual in China.”¹⁵¹ Thus, the high costs imposed on

¹⁴³ Patti Goldman, *Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience*, 8 VT. J. ENVTL. L. 251, 255 (2007).

¹⁴⁴ Wang, *supra* note 10, at 207.

¹⁴⁵ General Principles of the Civil Law (promulgated by the Standing Comm. People’s Cong, Apr. 12, 1986, effective Jan. 1, 1987), art. 124, available at <http://en.chinacourt.org/public/detail.php?id=2696> (P.R.C.).

¹⁴⁶ Environmental Protection Law, *supra* note 35, art. 41.

¹⁴⁷ Wang, *supra* note 10, at 211-12.

¹⁴⁸ *Id.* at 212.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

plaintiffs in traditional environmental litigation has the effect of discouraging potential plaintiffs from filing lawsuits, particularly those potential plaintiffs from more rural areas.

Traditional environmental litigation also suffers from barriers presented by a familiar theme in Chinese environmental law: local protectionism. Local protectionism can discourage potential plaintiffs from filing environmental lawsuits because of 1) local pressures and threats imposed on plaintiffs themselves and 2) the local government's influence over its courts.¹⁵² Local governments, as well as many local citizens, often seek to protect polluting enterprises from closure or heavy fines because such enterprises may be of great economic value to both local governments and individual citizens.¹⁵³ As such, there have been instances of threats and harassment towards plaintiffs bringing suit against local polluting enterprises. In one such case, locals assaulted the plaintiff when he was collecting water samples for evidence and also assaulted his wife at their home; the local government also closed the plaintiff's health clinic.¹⁵⁴

Protectionism also often extends to local courts, as local governments have control over both personnel and budgetary decisions of the courts.¹⁵⁵ As Wang Canfa, a prominent Chinese environmental law activist, has stated, "[i]f people in the provinces try to sue these companies, they come up against courts which are not very independent because they are influenced by local governments. Even if the [plaintiffs] are right, they often lose the case."¹⁵⁶ Thus, plaintiffs can face powerful community and governmental pressures and judicial barriers in pursuing traditional environmental litigation, and these obstacles often serve to deter potential plaintiffs from filing lawsuits against local violators. Accordingly, an additional layer of environmental litigation via public interest litigation may constitute an effective alternative for seeking relief by bypassing the obstacles in traditional environmental litigation.

In December 2005, the State Council declared that "public interest litigation" was a favored tool for environmental protection¹⁵⁷—although the government has yet to establish a legal framework for public interest litigation.¹⁵⁸ Public interest litigation, broadly defined as litigation brought

¹⁵² Wang, *supra* note 10, at 202, 215.

¹⁵³ Briggs, *supra* note 44, at 317; Wang, *supra* note 10, at 215.

¹⁵⁴ Wang, *supra* note 10, at 215.

¹⁵⁵ Economy, *supra* note 63, at 109.

¹⁵⁶ *Id.*

¹⁵⁷ Wang, *supra* note 10, at 220.

¹⁵⁸ *See id.* at 220-23.

to protect “the general welfare of the public”¹⁵⁹ (i.e., on behalf of the “public interest”), would “address many of the barriers found in traditional pollution compensation litigation,”¹⁶⁰ such as the high cost of litigation and reluctance of individual citizens to bring suit against local enterprises,¹⁶¹ and Chinese environmental law in general. Although weaknesses in the Chinese court system may continue to affect public interest litigation cases and even where these cases are unsuccessful, litigation can often serve “as a catalyst to negotiated solutions or government enforcement.”¹⁶² In one such case, plaintiffs filed a lawsuit against an EPB in Hebei Province that had approved the polluting operations of a local factory; the case was ultimately dismissed by two local courts for lack of standing.¹⁶³ The plaintiffs, however, used the case to bring attention to gross misstatements in the factory’s environmental impact statement (“EIS”).¹⁶⁴ SEPA ultimately invalidated the factory’s EIS and shut down its operations.¹⁶⁵ Similarly, public interest litigation may assist governmental enforcement of Chinese environmental laws by supplementing enforcement measures and supervising disinclined government agencies (e.g., certain EPBs) and officials and by providing an additional resource for environmental protection to SEPA, a regulatory entity with already scarce resources.

Accordingly, both public participation and public interest litigation stand out as two of the currently most viable methods for enhancing Chinese environmental protection. Thus, a solution consisting of both public interest litigation and elements of public participation may prove especially effective for strengthening China’s environmental protection and ultimately combating the country’s severe environmental degradation.

V. QUI TAM ACTIONS WILL ALLOW THE CENTRAL GOVERNMENT TO PROSECUTE ENVIRONMENTAL LAWSUITS FILED BY PRIVATE CITIZENS

Chinese environmental legal scholars have proposed several solutions pertaining to public interest litigation, including the express statutory establishment of the procuratorate (roughly equivalent to prosecutors in the United States) as a permissible plaintiff in civil and administrative environmental lawsuits.¹⁶⁶ Such a provision is not expressly stated in law,

¹⁵⁹ BLACK’S LAW DICTIONARY 580 (3d pocket ed. 2006).

¹⁶⁰ Wang, *supra* note 10, at 220.

¹⁶¹ *Id.* at 220-23.

¹⁶² China Dialogue, *supra* note 112.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Wang, *supra* note 10, at 222.

but the procuratorates in China have initiated or prosecuted a small handful of civil lawsuits against polluting enterprises with some success.¹⁶⁷ For example, in 2004 the Yan Jiang Procuratorate in Sichuan Province gave official warning to a seriously polluting enterprise—after the local EPB failed to stop the factory’s pollution and after local citizens declined to sue due to litigation costs—to either cease its polluting activities or face a civil lawsuit brought by the procuratorate.¹⁶⁸ Procuratorates from several other provinces have also brought civil environmental lawsuits against polluting enterprises in the past decade or so, although “such cases to date have always been ‘bootstrapped’ onto criminal suits that are clearly within the current legal authority of the procuratorate.”¹⁶⁹ Although the instances are few, government-led public interest litigation appears to be a promising avenue for enhanced environmental protection. Procuratorate-led public interest litigation, however, may still be subject to local protectionism; thus, a better solution may be found in public interest litigation led by an entity of the central government, namely SEPA. Such a system would help limit the effects of local protectionism by essentially eliminating possible loyalties to a local government.

China should not, however, limit itself solely to government-led public interest litigation. Rather, “a system that allows both government and public litigation to protect the environment would . . . be optimal.”¹⁷⁰ One way of establishing government-led public interest litigation with a measure of public participatory elements is through a statutory provision of *qui tam* actions, modeled on the *qui tam* system in the United States, for civil environmental lawsuits. Thus, as detailed in the following section, China should adopt a new law or amend an existing law to establish a similar *qui tam* system that allows the central government to prosecute civil environmental lawsuits filed by private citizens.

A. *The Qui Tam Process in the United States Provides a Viable Framework for Increased Citizen Involvement and Government-Led Public Interest Litigation in China*

In the United States, *qui tam* actions are statutorily authorized actions most commonly brought under the False Claims Act (“FCA”).¹⁷¹ The FCA

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 222-23.

¹⁷⁰ China Dialogue, *supra* note 112.

¹⁷¹ See *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 768 (2000); see generally 31 U.S.C.A. §§ 3729-33 (2007).

“imposes civil liability upon any person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.”¹⁷² Originating from British legal tradition,¹⁷³ *qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*—“who pursues this action on our Lord the King’s behalf as well as his own”—and under the FCA, *qui tam* actions allow the government itself to bring a civil suit against the alleged false claimant¹⁷⁴ or, alternatively, a private person to bring suit, “in the name of the Government,”¹⁷⁵ on behalf of him or herself and the United States.¹⁷⁶ Specifically regarding actions brought by private persons, a *qui tam* action is an action “brought on behalf of the government by a private party who receives some part of the recovery awarded as compensation for his efforts.”¹⁷⁷ The private person is also called a “relator.”¹⁷⁸ In very general terms, the *qui tam* action is a statutory method for the government to seek citizen assistance to fight injustice or crime.¹⁷⁹

Under the FCA, a relator who initiates an action submits “[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses” to the government, specifically the Department of Justice (“DOJ”).¹⁸⁰ The complaint is filed *in camera* and remains under seal for at least sixty days.¹⁸¹ The government may then “elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.”¹⁸² If the government chooses to intervene, it assumes primary responsibility for prosecuting the action.¹⁸³ The relator, however, “may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement.”¹⁸⁴ If the government declines to pursue the action within sixty days of receiving the

¹⁷² *Vermont*, 529 U.S. at 769 [internal quotations omitted].

¹⁷³ *See id.* at 774.

¹⁷⁴ *Id.* at 769.

¹⁷⁵ 31 U.S.C.A. § 3730(b)(1).

¹⁷⁶ *Vermont*, 529 U.S. at 769.

¹⁷⁷ Tammy Hinshaw, Annotation, *Construction and Application of “Public Disclosure” and “Original Source” Jurisdictional Bars Under 31 U.S.C.A. § 3730(e)(4) (Civil Actions for False Claims)*, 117 A.L.R. FED. 263, § 2(a) (1994).

¹⁷⁸ *Vermont*, 529 U.S. at 769.

¹⁷⁹ Hinshaw, *supra* note 177, § 2(a).

¹⁸⁰ 31 U.S.C.A. § 3730(b)(2).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ 31 U.S.C.A. § 3730(c)(1).

¹⁸⁴ *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 769 (2000).

complaint and material evidence and information, “the relator has the exclusive right to conduct the action . . . and the Government may subsequently intervene only on a showing of good cause.”¹⁸⁵ If the government pursues and successfully prosecutes the claim, the relator generally receives “at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.”¹⁸⁶ If the government declines to pursue the relator’s claim, the relator “shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds,” plus attorney’s fees and costs.¹⁸⁷

Although establishment of a *qui tam* process identical to that of the United States would likely be unworkable and ill-advised, a modified version of the government-led *qui tam* action, with its citizen assistance element, should prove effective in buttressing Chinese environmental public interest litigation and enhancing environmental protection overall.

B. Adopting a Modified Version of the Qui Tam Process Will Enhance Environmental Litigation and Help Address Inefficiencies in China’s Environmental Legal Framework

China may enhance environmental protection by supplementing its current system of environmental litigation with public interest litigation. One way China can achieve this goal is by adopting a new law or amending an existing law¹⁸⁸ to establish a *qui tam* process similar to that of the United States¹⁸⁹ that employs both the intimate knowledge provided through citizen assistance and the resources and efficacy of government-led litigation.

¹⁸⁵ *Id.* [internal quotations omitted].

¹⁸⁶ 31 U.S.C.A. § 3730(d)(1).

¹⁸⁷ *Id.* § 3730(d)(2).

¹⁸⁸ Several existing laws may possibly be amended to include such a provision. For example, Chapter 1, Article 6 of the Environmental Protection Law of the People’s Republic of China provides that “[a]ll units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment.”

¹⁸⁹ *See supra* Part V.A.

1. *China Should Incorporate Both Public Participation and Government-Led Litigation Through a System Based on the Qui Tam Process of the United States*

As discussed above, qui tam actions in the United States are authorized under several statutes, most commonly the FCA.¹⁹⁰ The “critical factor allowing plaintiffs to sue under the theory of qui tam is the existence of a statute specifically authorizing such suit.”¹⁹¹ Thus, in order to implement such a framework, it is necessary for China to adopt a new law or amend an existing law to specifically authorize qui tam type actions.

In the creation of such a law, the qui tam system of the United States provides a viable framework. China, however, must take into consideration the substantial differences between the two countries when creating its own version of qui tam actions. Some examples of such differences include available monetary and personnel resources, overall governmental structure, types of administrative agencies, and the legal system. Accordingly, China should create a law that contains similar provisions as the United States’ qui tam law,¹⁹² but with significant modifications appropriate to the country’s unique circumstances.

First, qui tam actions in China should be filed with SEPA. SEPA is the appropriate body to file such a claim because 1) it is the central agency in charge of environmental regulatory oversight and already has the requisite knowledge and administrative capability to handle environmental claims; and 2) it has recently demonstrated its commitment to stricter environmental enforcement, mirroring the “increase in the political will of the central government to seriously address environmental problems through legal reform.”¹⁹³ For example, in 2007, SEPA rejected permits for 187 construction and investment projects worth \$91 billion for failing to meet environmental impact criteria; in the previous year, SEPA had rejected 110 projects, and during the period from 1995 to 2005, it had only rejected two projects.¹⁹⁴ Another such example of SEPA’s stronger commitment to environmental enforcement in 2007 was demonstrated by its environmental checks on over 220,000 firms, out of which over 8,000 companies were

¹⁹⁰ *Id.*

¹⁹¹ 70 C.J.S. *Penalties* § 10 (2007).

¹⁹² *See supra* Part V.A.

¹⁹³ Briggs, *supra* 44, at 309 (citing Eric Orts, *Environmental Law with Chinese Characteristics*, 11 WM. & MARY BILL RTS. J. 545, 562 (2003)).

¹⁹⁴ CHINA: *Government Enviro Standards Getting Stricter, Official Says*, GREENWIRE, Dec. 18, 2007, at International Vol. 10, No. 9.

punished for environmental violations.¹⁹⁵ Thus, SEPA appears to be asserting its authority through its escalating enforcement measures, and this assertion may also transfer to the realm of environmental litigation. There are also other specific benefits for filing qui tam actions with SEPA.¹⁹⁶

Additionally, China's qui tam statute should extend the period of time the government has to intervene and pursue an action. In the United States, the DOJ has sixty days to consider and proceed with a qui tam claim.¹⁹⁷ In China's case, this statutorily-mandated period must be extended in light of SEPA's comparatively scarce resources and capabilities (including money and manpower)¹⁹⁸ in order for SEPA to effectively consider and investigate the claims.

China would likely need to decrease the relator's percentage of the award or settlement as compared to the qui tam system in the United States. The qui tam process under the FCA "imposes damages essentially punitive in nature,"¹⁹⁹ and the United States government awards fifteen to thirty percent of the final award or settlement to the relator.²⁰⁰ China should lower this percentage in light of circumstances unique to its legal system and governmental needs. For instance, punitive damages are generally not awarded in traditional environmental litigation cases in China;²⁰¹ the ultimate award in such cases is generally limited to a lower total amount for actual and emotional damages,²⁰² along with elimination or control of the harmful pollution.²⁰³ Because SEPA is in great need of resources, particularly money, in order to carry out its current regulatory functions and environmental programs²⁰⁴ and will also need resources for such a system of government-led public interest litigation, providing relators a decreased percentage of the award or settlement (while still maintaining a sufficient percentage to motivate relators to file qui tam actions) will allow SEPA to retain more funding for its functions.

On the other hand, China's qui tam system will need to conform to the United States' version in two important respects. First, United States qui

¹⁹⁵ *China's Environment Watchdog Urges Suspension of Companies, Industrial Parks*, BBC Monitoring Asia Pacific–Political, July 15, 2007.

¹⁹⁶ See *infra* Part V.B.2.

¹⁹⁷ 31 U.S.C.A. § 3730(b)(2).

¹⁹⁸ See *Economy*, *supra* note 63, at 106.

¹⁹⁹ *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 784 (2000).

²⁰⁰ 31 U.S.C.A. § 3730(d)(1)–(2).

²⁰¹ Wang, *supra* note 10, at 210.

²⁰² *Id.* art. 39.

²⁰³ Environmental Protection Law, *supra* note 35, art. 29.

²⁰⁴ See *Economy*, *supra* note 63, at 106.

tam suits are filed in federal court.²⁰⁵ China should adopt a similar requirement for its qui tam system and allow the claims to be brought beyond the local level, such as in intermediate courts or higher, in order to mitigate the effects of local protectionism. As discussed, protectionism occurs in numerous forms, including intense community and governmental pressures on plaintiffs and the local governments' influence over its local courts, and often prevents plaintiffs from prevailing in environmental suits brought in local courts.²⁰⁶ Such local protectionism is likely to extend even to qui tam suits brought by SEPA in local courts; accordingly, China's qui tam statute should allow claims to be brought beyond the local level. Such a requirement is especially recommended in light of evidence that certain pollution compensation claims heard in intermediate courts escaped the effects of protectionism and resulted in favorable outcomes for the plaintiffs.²⁰⁷

Second, China's qui tam system should mirror the U.S. system with respect to standing for qui tam actions. The United States confers standing on a relator in a qui tam suit even if he or she has not suffered any personal injury in fact; such standing is based on the concept that the relator acts as an agent of the government that has suffered an injury in fact.²⁰⁸ China will need to allow the same standing requirements for relators to maximize the efficacy of qui tam actions and to maintain the spirit and purpose of public interest litigation.

2. *China Should Establish a Modified Qui Tam Process to Improve Deficiencies in Its Environmental Legal Framework in Order to Enhance Environmental Protection*

It is important to note that the qui tam process is not a substitute for traditional environmental litigation where plaintiffs have suffered personal injury in fact and seek full compensation for their injuries. The qui tam action is simply an additional layer of environmental litigation in the form of government-led public interest litigation that citizens can pursue to correct environmental violations. One purpose of the qui tam process is to induce citizens who have viable legal claims but decline to seek traditional legal action to pursue some kind of legal redress. Thus, although a qui tam system in China is an important step towards achieving effective

²⁰⁵ *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 787 (2000).

²⁰⁶ *See supra* Part I.B.

²⁰⁷ Wang, *supra* note 10, at 215; Wang Canfa, *supra* note 54, at 179.

²⁰⁸ *See Vermont*, 529 U.S. at 773-74.

environmental protection, it is not a panacea for China's environmental ills. If China seeks to substantially improve environmental protection, changes must occur on a more systemic level beyond the context of environmental litigation. Examples of such changes include—but are not limited to—substantive reorganization of SEPA's administrative structure; increased funding and personnel for SEPA so as to detach local funding of EPBs and increased manpower to carry out SEPA's duties; increased involvement by NGOs and expansion of NGO autonomy in China; increased education and citizen awareness of environmental issues; enhancement of judiciary independence from local governments; and expansion of standing in traditional environmental litigation. Establishment of a modified *qui tam* statute in China, however, will still serve to combat a number of deficiencies in China's environmental legal system.

As discussed above, many prospective plaintiffs elect not to bring claims through traditional environmental litigation for numerous reasons.²⁰⁹ For instance, many citizens decline to pursue legal action against polluters because of the often prohibitively high litigation costs. Under a *qui tam* action, however, the high costs of litigation will no longer deter complainants, as the government will bear these costs. This, of course, logically raises questions regarding SEPA's ability to bear such costs, as "SEPA is already stretched to the limits of its capacity."²¹⁰ This monetary consideration, however, may be addressed in two ways.

First, because a successful *qui tam* claim will only provide a percentage of the final award or settlement to the relator, the remainder of the award can go to SEPA to buttress funding for its environmental protection functions (including *qui tam* actions). Second, frequent employment of *qui tam* actions will demonstrate the willingness of the central government to enforce environmental protection measures and may have the effect of heightened compliance by polluting enterprises. If this is the case, SEPA may be able to decrease its inspections—that some experts argue are ineffective²¹¹—of local EPBs, thereby reducing costs. Although the Chinese government should still provide additional funding to SEPA for the agency to operate more effectively, monetary considerations are unlikely to act as a considerable barrier to the viability of a *qui tam* system.

Additionally, the *qui tam* process will, in a sense, expand standing for such claims, as relators need not have suffered personal injury in fact to bring a *qui tam* action. Such an expansion of standing will induce citizens—

²⁰⁹ See *supra* Part IV.B.

²¹⁰ Economy, *supra* note 63, at 106.

²¹¹ See *id.*

including non-local citizens—who possess material information or evidence of serious environmental violations but have not suffered direct personal harm to bring legal action,²¹² especially with the percentage award acting as an additional incentive.

The provision of *qui tam* actions in Chinese environmental law will also help mitigate problems presented by local protectionism with respect to environmental lawsuits. By allowing claims to be filed with courts beyond the local level, *qui tam* actions will remove some of the disadvantages—emerging from the influence that local governments hold over local courts—that plaintiffs face in traditional environmental litigation. This knowledge, coupled with evidence that claims have a higher chance of success in courts beyond the local level,²¹³ will also have the effect of encouraging more citizens to pursue legitimate claims.

Finally, the various governing bodies of China will likely consider the establishment of a modified *qui tam* system as a more acceptable solution, as compared to some other proposals, for enhancing environmental protection. Although a number of governing bodies, such as certain divisions of the central government, are committed to strong environmental protection measures,²¹⁴ other governing components of China are “principally concerned with job growth . . . [and] in maintaining China’s comparative advantage as the world’s number one low-cost producer.”²¹⁵ Thus, the government-controlled *qui tam* system may have a higher chance of adoption than more expansive proposals such as the systemic expansion of standing for traditional environmental lawsuits, increased NGO involvement, or the complete restructuring of SEPA.

VI. CONCLUSION

China’s explosive economic growth over the past three decades has not come without consequence. The country now faces one of the most serious cases of environmental deterioration in history. China has attempted to combat, or at least slow, this degradation through its environmental laws. Problems with implementation and enforcement, however, have weakened the efficacy of the laws, and China’s environmental regulatory structure, relatively new and underdeveloped legal system, and emphasis on economic growth have presented serious barriers to effective environmental protection.

²¹² See Hinshaw, *supra* note 177, § 2(a).

²¹³ Wang, *supra* note 10, at 215; Wang Canfa, *supra* note 54, at 179.

²¹⁴ See Briggs, *supra* note 44, at 309.

²¹⁵ Sitaraman, *supra* note 24, at 303.

Currently, in light of the difficulty of overcoming such barriers, enhancing public participation in environmental protection efforts and establishing public interest litigation may be the most viable methods for strengthening China's environmental protection, thereby alleviating the country's severe environmental degradation. Specifically, an approach that incorporates both public participation and government-led public interest litigation may prove especially effective in enhancing Chinese environmental litigation and, as a result, protection. The qui tam system in the United States combines both public participation and government-led litigation and thus provides a framework for the establishment of a similar system in Chinese environmental litigation. Qui tam actions will allow China's central government to prosecute civil environmental lawsuits filed by private citizens and create an effective instrument to enhance environmental protection. The establishment of such a system in China will constitute a small but promising step towards effectively regulating the "belching dragon."²¹⁶

²¹⁶ *Id.* at 267.