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## Clean Air, Clean Processes? The Struggle over Air Pollution Law in the People's Republic of China

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## Article

# Clean Air, Clear Processes? The Struggle over Air Pollution Law in the People's Republic of China

by

WILLIAM P. ALFORD\* AND BENJAMIN L. LIEBMAN\*\*

As the People's Republic of China (PRC or China) seeks to use law to address environmental problems, it faces daunting challenges, in terms both of the magnitude of environmental degradation it is experiencing and the capacity of its legal institutions. Pollution levels in the major cities in the PRC are among the highest on earth. Epidemiological studies indicate that the concentration of airborne particulates is two to five times the maximum level deemed

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The research for this Article includes interviews that the co-authors conducted with Chinese officials and scholars between 1996 and 2001. A promise of confidentiality was made to interviewees who are, therefore, identified by line of endeavor (i.e., government official or scholar) and the year in which the interview was conducted. The authors' notes of these interviews, with names and precise positions redacted, are on file with the *Hastings Law Journal*.

acceptable by the World Health Organization.<sup>1</sup> A noted World Bank study based on conservative assumptions estimates that as of the mid-1990s urban air and water pollution alone costs the Chinese economy US\$32.3 billion annually in premature deaths, morbidity, restricted activity, chronic bronchitis, and other health effects.<sup>2</sup> And new scholarly work suggests that the "health impacts fall disproportionately on women and children."<sup>3</sup>

China's lawmakers have not ignored these problems. The PRC has in recent years sought to enlist the law to address its environmental ills. In 1995<sup>4</sup> and then again in 2000,<sup>5</sup> China undertook significant revisions of its principal air pollution law, while throughout the decade of the 1990s it promulgated discrete measures concerning coal production, acid rain, and associated matters. To date, these legal changes have at best had a minor impact on the Chinese environment, but as we know from Bruce Ackerman and William Hassler's classic study of the making of air pollution law in the United States, *Clean Coal/Dirty Air*, even in highly-developed legal systems, efforts through law to address such issues pose massive challenges.<sup>6</sup>

This Article examines the 1995 revision of the Air Pollution Prevention and Control Law (the 1995 APPCL). The struggles attending that revision warrant our attention not only because of the gravity of China's air pollution, but for the revealing window they provide onto Chinese legislative development more generally. Through it, we can better understand the inner workings of what is, under the Chinese constitution, the supreme organ of the state, the

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1. Chris P. Nielsen & Michael B. McElroy, *Introduction and Overview to ENERGIZING CHINA: RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH* 11 (Michael B. McElroy et al. eds., 1998).

2. THE WORLD BANK, *CLEAR WATER, BLUE SKIES: CHINA'S ENVIRONMENT IN THE NEW CENTURY* 23 (1997).

3. *ENERGIZING CHINA*, *supra* note 1, at 12.

4. Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [The Air Pollution Prevention and Control Law of the People's Republic of China] (adopted Sept. 5, 1987, effective June 1, 1988, amended Aug. 29, 1995) [hereinafter 1995 APPCL], *reprinted in* ZHONGGUO HUANJING BAOHU FAGUI QUANSHU (1982-1997) [THE COMPLETE BOOK OF ENVIRONMENTAL PROTECTION LAWS AND REGULATIONS OF CHINA 1982-1997] (Guojia Huanjing Baohu Ju Zhengce FAGui Si [The Policy Law and Regulation Division of the National Environmental Protection Agency] ed., 1997) [hereinafter FAGUI QUANSHU].

5. Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [The Air Pollution Prevention and Control Law of the People's Republic of China] (enacted Apr. 29, 2000, effective Sept. 1, 2000) [hereinafter 2000 APPCL].

6. BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULPHUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT* 3, 117 (1981).

National People's Congress (NPC); the interface of the NPC with other organs of state, national, and sub-national; and ultimately, the relationship of the Chinese state to its people. This has much to tell us about the particular limitations that prevented the 1995 APPCL from achieving more, the difficulties confronting overall efforts to deploy law to improve the Chinese environment, the growing politicization of environmental matters, and the challenges that the Chinese state faces as it attempts both to represent popular interest in more transparent governmental institutions and also to deepen its engagement in the international community as it prepares to accede to the World Trade Organization.

Since the principal research for this Article was completed, China has yet again amended its air pollution law. The Air Pollution Prevention and Control Law of the People's Republic of China, as amended in April 2000 (the 2000 APPCL) makes major changes in the 1995 law, reflecting perhaps the weaknesses in that law, the worsening environmental situation in China, and a growing governmental awareness of the need to combat such problems. A full consideration of the 2000 revisions is beyond the scope of this Article, but a brief examination of those revisions illuminates the interplay between institutional growth and enduring constraints that mark the contemporary Chinese legal and political scene.

This Article commences in Part I by introducing law-making in China before reconstructing the drafting process and attendant political battles leading up to the revision of China's principal air pollution law in 1995—which, as Ackerman and Hassler observed with reference to the United States, can be every bit as messy as the soiled air such efforts are intended to address. Part II then examines the institutional factors that ultimately are critical to an understanding of why the 1995 APPCL, as promulgated, fell well short of its original authors' objectives but set in motion a process that over time has led to the realization of at least some of these legislative goals through the 2000 APPCL. The Article concludes by suggesting the implications of these institutional considerations for environmental law and legislative development more generally in the PRC.

## I.

Beijing of the 1990s was hardly Washington of the late 1960s and early 1970s, even if each was marked by earnest political and philosophical battles over the best ways in which to address problems

of air pollution through law. This Part commences with a short introduction to the formal structure for law-making in China and a brief overview of China's first air pollution law, the Air Pollution Prevention and Control Law of 1987 (the 1987 APPCL),<sup>7</sup> by way of providing background for a consideration of the struggle over air pollution law of the mid-1990s. That struggle, in turn, provides a foundation for the treatment in Part II of the ways in which institutional design has influenced and is likely further to shape the law's role in the battle over air quality in China.

## A. The Organs of State

### (1) *In General*

The 1982 Constitution of the PRC provides that the NPC is China's highest organ of state power.<sup>8</sup> The NPC's powers include the authority to enact all "basic laws" (*jiben fa*), to supervise the implementation of such laws, and to make amendments to the Constitution.<sup>9</sup> The full NPC meets only once a year, however,<sup>10</sup> for approximately three weeks, and most law-making activity is instead conducted by its Standing Committee. The roughly 155-member Standing Committee meets bi-monthly,<sup>11</sup> and is authorized to

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7. Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [The Air Pollution Prevention and Control Law of the People's Republic of China] (adopted Sept. 5, 1987, effective June 1, 1988) [hereinafter 1987 APPCL], reprinted in FAGUI QUANSHU, *supra* note 4, at 21.

8. Zhonghua Renmin Gongheguo Xianfa [Constitution of the People's Republic of China] art. 57 (1982) [hereinafter Constitution], reprinted in ZHONGHUA RENMIN GONGHEGUO XINGZHENG FAGUI XUANBIAN [A SELECTION OF THE ADMINISTRATION REGULATIONS AND LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] 1 (Zhonghua Renmin Gongheguo Sifa Bu & Guowuyuan Fazhi Ju [The Ministry of Justice of the People's Republic of China & The State Council Bureau of Legislative Affairs] eds., (1990) [hereinafter FAGUI XUANBIAN]. The NPC includes approximately 3,000 deputies, representing China's provinces, autonomous regions, and centrally administered municipalities. See *id.* art. 59; Murray Scot Tanner, *Organizations and Politics in China's Post-Mao Law-Making System*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 90 n.5 (Pitman B. Potter ed., 1994).

9. Constitution, *supra* note 8, art. 62. The term "basic law" is not defined. See Tanner, *supra* note 8, at 59; cf. Perry Keller, *Legislation in the People's Republic of China*, 23 U. BRIT. COLUM. L. REV. 653, 661 (1989) (stating that although "basic law" is not defined in China's constitution, the term "does not often present a practical problem," as "[i]t is generally accepted as referring to statutes . . . which have a fundamental effect on the whole of society"). The full NPC also has a range of other powers, notably the appointment and removal of government leaders. Constitution, *supra* note 8, art. 62.

10. Constitution, *supra* note 8, art. 61.

11. Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Zuzhi Fa [Organic Law of the National People's Congress of the People's Republic of China] art. 29 (promulgated

interpret the Constitution, pass laws (*fa*) other than basic laws which are the domain of the full NPC, interpret laws, and supervise the work of the other principal organs of government: the State Council, the Central Military Commission, the Supreme People's Procurate, and the Supreme People's Court.<sup>12</sup> Despite the NPC's formal powers, however, the Chinese Communist Party (Communist Party, Party or CCP) has served as the ultimate arbiter of power in China. The Party's influence over the NPC is expressed through a variety of mechanisms, including most notably the Party Central Committee's role in defining the overall legislative agenda, and vetting key pieces of legislation, and the fact that virtually all NPC leaders—and most delegates—are Party members or selected from a list approved by the Party.<sup>13</sup>

The Constitution also provides for the establishment of specialized committees to facilitate the NPC's work.<sup>14</sup> Nine such committees are currently in existence.<sup>15</sup> Day-to-day work of the Standing Committee is managed by the Standing Committee's

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Dec. 10, 1982) [hereinafter 1982 Organic Law], reprinted in FAGUI XUANBIAN, *supra* note 8, at 58.

12. Constitution, *supra* note 8, art. 67. The Standing Committee also has the power, *inter alia*, to review local laws and regulations that contravene the Constitution or national laws, to appoint a range of officials, and to enact treaties. *Id.*

13. Tanner, *supra* note 8, at 60-65.

14. Constitution, *supra* note 8, art. 70.

15. The Constitution provides for the establishment of specialized committees in eight areas, but also states that the NPC may establish additional committees as necessary. *Id.* The eight subject areas the Constitution lists are nationalities, law, finance and economy, education, science, culture and public health, foreign affairs, and overseas Chinese affairs. *Id.* Pursuant to the Constitution, the NPC established six committees, grouping Education, Science, Culture and Public Health into a single committee. Tanner, *supra* note 8, at 84. The Internal and Judicial Affairs Committee was established in 1988, the Environmental Protection Committee was established in 1993, and the Committee on Agricultural and Rural Affairs was established in 1998. *Id.* at 81. The Committee on Environmental Protection was renamed the Environment and Natural Resources Protection Committee (ENRPC) in 1994.

The committees are designed to draft and discuss legislation for consideration by the NPC and the NPC Standing Committee. *Id.* The powers of the committees, which generally have some two dozen members (many drawn from the Standing Committee) and one to two dozen staffers, include submitting legislation to the Standing Committee, considering proposals referred to the committees by the Standing Committee, and reviewing the legality of regulations issued by government ministries and commissions. 1982 Organic Law, *supra* note 11, art. 37.

In addition to the nine specialized committees, a tenth—the Committee on Legislative Affairs (*Fazhi Gongzuo Weiyuanhui*) (CLA)—works directly for the Standing Committee, reviewing all laws submitted to the NPC or the Standing Committee. The CLA, which has a staff of over 200, is not to be confused with the specialized Committee on Law (*Falu Weiyuanhui*), whose area of responsibility is the legal system.

Chairman's Group, which includes the chairman and vice-chairmen of the Standing Committee as well as the chairs of the special committees.<sup>16</sup>

Although the NPC and its Standing Committee are responsible for the passage of all national laws, other government authorities also enjoy a wide range of law-making power,<sup>17</sup> as will be considered at greater length in Part III below. The State Council, China's chief administrative and executive body,<sup>18</sup> is authorized both to enact administrative measures, rules, regulations, and decisions pursuant to national laws and the Constitution, and to submit legislative proposals to the NPC.<sup>19</sup> The various ministries and commissions under the State Council also are authorized to issue orders, rules, and directives—which in China's complex hierarchy of legal norms occupy a less prominent place than enactments of the State Council itself.<sup>20</sup> People's congresses at various levels of provincial and local government also may enact a wide range of local regulations and decisions, provided such regulations do not violate the Constitution, national laws, or national administrative regulations and rules. In addition, local governments and government departments are also authorized to issue rules and regulations, provided they are not in violation of the Constitution and the aforementioned national measures.<sup>21</sup> Finally, China has a national judiciary, headed by a

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16. Constitution, *supra* note 8, art. 68. The Chairman's Group drafts the agenda for each Standing committee meeting, and decides whether proposals and laws submitted to the Standing Committee should be referred to a specialized committee or considered by the full Standing Committee. See 1982 Organic Law, *supra* note 11, art. 25. On the evolution of the Standing Committee's power, see Tanner, *supra* note 8, at 79-80.

17. William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125, 127-28 (1997) (noting that law in China "emanates officially from no fewer than eleven sources").

18. Constitution, *supra* note 8, art. 86. "State Council" refers both to China's cabinet—consisting of China's premier and most important ministers—and the variety of ministries, bureaus, and commissions that constitute the central government. Tanner, *supra* note 8, at 89 n.4.

19. Constitution, *supra* note 8, art. 89; see also Tanner, *supra* note 8, at 65 ("The State Council . . . promulgates the majority of all national laws and regulations, without submitting them to the NPC for consideration, and [has been] . . . the key drafter of most of the NPC-promulgated laws.").

20. Keller, *supra* note 9, at 671-72.

21. Constitution, *supra* note 8, art. 100. The quantity of local regulations is significant. In the environmental area, for example, see DIFANG HUANJING BAOHU FAGUI XUANBIAN [A SELECTION OF SUB-NATIONAL ENVIRONMENTAL LAWS AND REGULATIONS] (Guojia Huanjing Baohu Zongju Zhengce FAGui Si [The Central Policy, Law, and Regulation Division of the National Environmental Protection Agency] ed., 1999) [hereinafter DIFANG FAGUI XUANBIAN].

Supreme People's Court which itself is vested with extensive interpretive powers.<sup>22</sup>

(2) *Concerning the Environment*

Although the NPC is China's supreme state organ, the State Council took the lead in establishing and upgrading official entities concerned with the environment. The Environmental Protection Bureau was the first such entity, formed in 1975 as a part of the National Basic Construction Commission (*Guojia jiben jianshe weiyuanhui*). Its role was supplanted in 1988 by the National Environmental Protection Commission, the principal mission of which was to "aid the [Bureau] in directly communicating with the politically more powerful industrial ministries."<sup>23</sup> Four years later the Bureau was renamed the National Environmental Policy Agency (NEPA) and elevated to sub-ministry status with the right directly to report to the State Council. And in 1998, NEPA was, in turn, given full ministry rank and renamed the State Environmental Protection Administration (SEPA) at a time when many ministries were being closed or consolidated.<sup>24</sup> It has a staff of approximately 200 at the national level.

The NPC did not form a separate committee under its Standing Committee to address issues of the environment until 1993, at which time the role of the NPC's committees more generally was expanding.<sup>25</sup> A year later the committee so formed was renamed the Environment and Natural Resources Protection Committee (ENRPC), reflecting its broadened authority.<sup>26</sup> As of the time of the debates discussed in this Article, it included approximately twenty members, eleven of whom were Standing Committee members, and a staff of approximately twenty-five.

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22. Nanping Liu, *OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA* 49-51 (1997).

23. This history is traced in Abigail R. Jahiel, *The Organization of the Environmental Protection in China*, 156 *CHINA Q.* 757, 769 (1998). See also *ZHONGHUA RENMIN GONGHEGUO ZHENGFU JIGOU WUSHI NIAN* [FIFTY YEARS OF STATE ORGANS OF THE PEOPLE'S REPUBLIC OF CHINA] 140-41 (Guojia Xingzheng Xueyuan [The National School of Administration] ed., 1991).

24. *Guojia Huanjing Baohu Zongju Guapai* [State Environmental Protection Administration Puts Out Its Sign], *RENMIN RIBAO* [PEOPLE'S DAILY], Apr. 1, 1998, at 5.

25. Zhang Hongjun & Richard J. Ferris Jr., *Shaping an Environmental Protection Regime for the New Century: Environmental Law and Policy in the People's Republic of China*, 6 *ASIAN J. ENVTL. MGMT.* 35, 41 (1998); BARBARA J. SINKULE & LEONARD ORTOLANO, *IMPLEMENTING ENVIRONMENTAL POLICY IN CHINA* 8 (1995).

26. SINKULE & ORTOLANO, *supra* note 25, at 6, 24 n.2.

This structure is replicated below the national level. All provinces and many localities have environmental protection bureaus. These bureaus, which together employ some 80,000 individuals, are typically not funded by SEPA, but instead secure funding from the local governments of which they are a part, that portion of discharge fees assessed on polluters that they are allowed to retain (twenty percent with the rest to be remitted for pollution abatement purposes), and various consulting and other businesses they may run.<sup>27</sup> And most provincial people's congresses have established environmental affairs committees.<sup>28</sup>

## B. Air Pollution

### (1) *In General*

China has engaged in a broad range of environmental law-making since it emerged from the Cultural Revolution and began to transform its economy in 1978.<sup>29</sup> The first generation of such laws included the Environmental Protection Law (for Trial Implementation) in 1979,<sup>30</sup> the Marine Environmental Protection Law in 1982,<sup>31</sup> the Water Pollution Prevention and Control Law and the Forestry Law in 1984,<sup>32</sup> the Grasslands Law in 1985,<sup>33</sup> and the

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27. Xiaoying Ma & Leonard Ortolano, ENVIRONMENTAL REGULATION IN CHINA: INSTITUTIONS, ENFORCEMENT, AND COMPLIANCE 22, 63-64, 84-85 (2000).

28. On provincial people's congresses, see Roderick MacFarquhar, *Reports From The Field: Provincial People's Congresses*, 155 CHINA Q. 656 (1998).

29. Cf. Alford & Shen, *supra* note 17, at 126 ("China has promulgated an extensive body of environmental law that is impressive in comparison to that of many other developing nations."). China took some steps aimed at protecting the environment even before 1978. China's 1954 Constitution provided that the environment belongs to the public, and China enacted a scattering of measures in the 1950s and 1960s relating to certain pollutants. Alford & Shen, *supra* note 17, at 129; Ma Xiangcong, *Preliminary Discussion on the Law of Environmental Protection*, in ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA 65-66 (Lester Ross & Mitchell A. Silk eds., 1987).

30. Zhonghua Renmin Gongheguo Huanjing Baohu Fa [The Environmental Law in the People's Republic of China] (promulgated for trial implementation on Sept. 13, 1979, abrogated by implementation of the Environmental Protection Law of 1989, effective Dec. 26, 1989).

31. Zhonghua Renmin Gongheguo Haiyang Huanjing Baohu Fa [The Marine Environmental Protection Law of the People's Republic of China] (promulgated Aug. 23, 1982, effective Mar. 1, 1983), *reprinted in* FAGUI QUANSHU, *supra* note 4, at 6.

32. Zhonghua Renmin Gongheguo Shui Wuran Fangzhi Fa [The Water Pollution Prevention and Control Law of the People's Republic of China] (promulgated May 11, 1984, effective Nov. 1, 1984), *reprinted in* FAGUI QUANSHU, *supra* note 4, at 12.

1987 APPCL. Throughout the 1980s China also enacted numerous regulations and decisions relating to environmental matters, including air pollution.<sup>34</sup>

Commencing at the very end of the 1980s and into the 1990s, China undertook a new effort to strengthen its environmental laws,<sup>35</sup> revising this first generation of environmental statutes<sup>36</sup> as well as crafting new laws on solid waste,<sup>37</sup> noise,<sup>38</sup> and other environmental issues and developing a range of national and local environmental regulations.<sup>39</sup> These measures were undertaken in part due to a recognition that many of the earlier laws "were cast in terms of a more planned economy and a more ordered society than existed by the end of the first decade of post-Cultural Revolution reform."<sup>40</sup>

(2) *The 1987 Air Pollution Prevention and Control Law*

The 1987 APPCL established a broad, but vague, framework for the regulation of air pollution. The law consisted of just forty-one articles, filling less than eight pages of text in Chinese, separated into six chapters: General Provisions; Supervision and Management of the Prevention and Control of Air Pollution; Prevention and Control of Pollution from Soot; Prevention and Control of Pollution from Waste Gas, Dust, and Odorous Substances; Legal Liability; and Supplementary Provisions.<sup>41</sup>

The General Provisions set forth the basic policies behind the law and the responsibilities of various government actors. Thus, for example, Article 1 stated that, in addition to preventing air pollution,

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33. Zhonghua Renmin Gongheguo Caoyuan Fa [The Grasslands Law of the People's Republic of China] (promulgated on June 18, 1985, effective Dec. 1, 1985), *reprinted in* FAGUI QUANSHU, *supra* note 4, at 322.

34. Alford & Shen, *supra* note 17, at 129-30.

35. Lester Ross, "The East is Green"—Recent Developments in Environmental Law in China, CHINA L. & PRAC., Sept. 1997, at 56.

36. See, e.g., Zhonghua Renmin Gongheguo Shui Wuran Fangzhi Fa [Water Pollution Prevention and Control Law of the People's Republic of China] (promulgated May 15, 1996) [hereinafter Water Pollution Law], *reprinted in* FAGUI QUANSHU, *supra* note 4, at 14.

37. See Zhonghua Renmin Gongheguo Gutu Feiwu Wuran Huanjing Fangzhi Fa [Solid Waste Pollution Prevention and Control Law of the People's Republic of China], (promulgated Oct. 30, 1995), *reprinted in* FAGUI QUANSHU, *supra* note 4, at 27.

38. See Zhonghua Renmin Gongheguo Huanjing Zaosheng Wuran Fangzhi Fa [Noise Pollution Prevention and Control Law of the People's Republic of China Law] (promulgated Oct. 29, 1996), *reprinted in* FAGUI QUANSHU, *supra* note 4, at 32.

39. See Ross, *supra* note 35, at 58 (listing recent legislative efforts to strengthen environmental protection).

40. Alford & Shen, *supra* note 17, at 132.

41. See 1987 APPCL, *supra* note 7.

the law was designed to protect the human and ecological environment and human health and to promote "socialist modernization."<sup>42</sup> Article 2 stated that both the State Council and local governments were responsible for taking steps to protect against air pollution,<sup>43</sup> while Article 3 stated that environmental departments were to coordinate air pollution prevention work.<sup>44</sup> Articles 6 and 7 provided that NEPA would establish national environmental standards for environmental quality and for pollutants, but also indicated that sub-national units of government could enact standards more stringent than those existing at the national level.<sup>45</sup>

Other provisions provided broad outlines as to how local environmental bureaus should enforce air quality standards. The law required new construction projects to include projected impacts on air quality in their environmental impact statements,<sup>46</sup> provided for fees to be assessed against enterprises or institutions exceeding air pollution standards,<sup>47</sup> and gave environmental bureaus the power to conduct on-site inspections of polluters.<sup>48</sup> It also called for standards to be issued governing soot discharge and waste gas emissions, and barred the burning of certain materials in densely inhabited areas, absent approval by the local environmental protection department.<sup>49</sup>

The law's provisions on legal liability provided for warnings or fines against violators.<sup>50</sup> In cases in which an environmental authority had imposed administrative sanctions on a polluter, the law permitted the affected party to challenge the sanctions in court.<sup>51</sup> The law allowed environmental protection departments to settle disputes regarding liability resulting from harm caused by air pollution, while also permitting affected parties to file suit.<sup>52</sup> Finally, it also provided for criminal sanctions to be imposed in cases of serious harm caused by air pollution.<sup>53</sup>

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42. *Id.* art. 1.

43. *Id.* art. 2.

44. *Id.* art. 3.

45. *Id.* arts. 6, 7.

46. *Id.* art. 19.

47. *Id.* art. 11.

48. *Id.* art. 15.

49. *Id.* arts. 17, 22-25, 28. Such materials included asphalt, rubber, plastics, and the like.

50. *Id.* art. 39.

51. *Id.* art. 35.

52. *Id.* art. 36.

53. *Id.* art. 38.

### C. Revising the APPCL

#### (1) *Advocates of Revision*

For observers inclined to see the NPC as little more than a “rubber stamp,” the controversy surrounding efforts during the mid-1990s to revise China’s principal air pollution law would seem to suggest, at a minimum, a stamp of rather considerable complexity—with divisions not only between advocates and opponents of revision, but also within each of these camps, at least as to tactics.

The principal governmental advocates for the mid-1990s revision of the 1987 APPCL were the ENRPC of the NPC and NEPA.<sup>54</sup> Both were convinced that China’s existing air quality law was inadequate to the task. By the mid-1990s, total suspended particulates and sulphur dioxide in Beijing, Shanghai and other principal Chinese cities exceeded World Health Organization standards and even the norm in such other notoriously polluted Asian cities as Bangkok by as much as six-fold, resulting, according to one World Bank study based on 1995 data, in 178,000 premature deaths, 346,000 pollution-related respiratory hospital admissions, and millions of days of work lost per annum in urban China.<sup>55</sup> Nor were such problems limited to city dwellers, with acid rain damaging an estimated quarter of vegetable production in parts of Sichuan in 1993 and said to cause more than 13 billion dollars a year in damage across China.<sup>56</sup> Moreover, although national data seemed to indicate that particulate discharges were stabilizing by the middle of the decade, the same sources suggested that aggregate sulphur dioxide emissions were increasing more rapidly than coal use, raising concerns about the effectiveness of abatement procedures that the 1987 APPCL was, at least in theory, intended to support.<sup>57</sup> And the prospects for these problems continuing were great, with energy demand increasing, coal remaining constant at roughly three-quarters of primary energy consumption, and the national motor vehicle fleet growing more than three-fold during the decade ending in 1995.<sup>58</sup>

Advocates of substantially overhauling the 1987 APPCL contended that it was not only vague and unclear, but also was the

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54. Interview with Official A (1996); Interview with Official D (1996); Interview with Academic U (1996).

55. CLEAR WATER, BLUE SKIES, *supra* note 2, at 6, 19. See also VACLAV SMIL, CHINA’S ENVIRONMENTAL CRISIS (1993).

56. CLEAR WATER, BLUE SKIES, *supra* note 2, at 22.

57. *Id.* at 8.

58. *Id.* at 45, 50, 74.

product of a different era, marked by appreciably greater state control—with the result that it was premised on a set of societal circumstances that no longer necessarily obtained, at least to the same degree.<sup>59</sup> This was evident economically in the 1987 APPCL's assumption that the state would continue to be heavily involved in industrial planning and its concomitant focus on two types of actors—enterprises with some measure of state ownership and individuals—leaving uncertain its application to the rapidly proliferating (and, in some instances, heavily polluting) categories of non-state enterprises and private businesses.<sup>60</sup> Socially, the law took for granted the continued viability of the *danwei* system, pursuant to which each citizen belonged to a unit that, at least in theory, tightly monitored his or her behavior, even though by the 1990s, China (by official estimates) had a “floating population” living beyond *danwei* control of perhaps more than 100 million.<sup>61</sup> And, in terms of administration, the law presumed both a continued shared sense of national interest, as defined by the state, and a continued capacity of the central government to exert control over sub-national governmental actors that did not necessarily take full account of the growing pluralization of interests in society and the devolution of power from the center.

Beyond any such deficiencies, at least some in the ENRPC and NEPA argued that China's growing engagement with the international community in the years following the original air pollution law's development provided further rationale for its revision. Accession to the Montreal Protocol on Ozone Layer Depleting Substances carried with it international legal obligations (even if deferred for a decade) that would require revision of the 1987 APPCL, while accession in the Vienna Convention for Protection of the Ozone Layer and The Framework Convention on Climate Change (which China was the first major state to ratify) together with Beijing's role in the United Nations Conference on Environment and Development and other international environmental fora suggested that there would be costs in terms of reputational capital to pay for a

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59. See Guanyu “Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa” (Xiuding Zhengqiu Yijian Gao) de Shuoming [Explanation Regarding the “People's Republic of China Air Pollution Prevention and Control Law” (Revision Draft for Comment)], at 20-21 [hereinafter ENRPC Explanation].

60. See Alford & Shen, *supra* note 17, at 132.

61. DOROTHY J. SOLINGER, *CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE AND THE LOGIC OF THE MARKET* 17-23 (1999).

laggard air quality regime.<sup>62</sup> Foreign engagement had also, it was suggested, provided China with unprecedented exposure to the legal, technological, and other knowledge said to underlie successful environmental policy in developed market economy nations, while increasing the likelihood that China could obtain sophisticated air monitoring equipment abroad (or at least the technology therefor) that might facilitate enforcement of more stringent discharge requirements.<sup>63</sup>

Central government entities with an explicit environmental mandate were not the only proponents of substantially revising the 1987 APPCL. Elsewhere in national governmental circles, support came, in varying degrees, from offices and officials with responsibility for public health, foreign affairs, and technological development.<sup>64</sup> Beyond the "Ring Roads" (the Chinese capital's counterpart to the Beltway), a number of important provincial level governments, including most notably those of Beijing, Shanghai, and Tianjin, were supportive of more stringent environmental regulations. These jurisdictions were experiencing both the salutary and baleful effects that wealth might have on the environment (i.e., a growing middle class with keener concern for environmental affairs juxtaposed with soaring increases in automobile use) while also chafing at the dilemma posed by the relatively lax standards and even laxer enforcement of China's national body of environmental legislation.<sup>65</sup> The 1987 APPCL, to be sure, authorized sub-national units of government to promulgate tougher local requirements (which, in some instances included innovative measures that laid the groundwork for subsequent efforts to improve the legal framework for air quality at the national level), but that seeming discretion was, to some extent, undermined by the problem of air pollution generated by distant sources, and the possibility that some industries might take advantage of growing autonomy from the state to migrate from more to less environmentally restrictive locales.

The ENRPC, NEPA, and other proponents of revising the air quality law also sought to enlist support beyond officialdom as such, the line between state and society being rather less distinct in the

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62. ENRPC Explanation, *supra* note 59, at 15. See also Lester Ross, *China: Environmental Protection, Domestic Policy Trends, Patterns of Participation in Regimes and Compliance with International Norms*, 156 CHINA Q. 809, 809-10, 813-15 (1998).

63. Interview with Official A (1997).

64. Interview with Official A (2001).

65. Interview with Academic A (1999).

PRC than in liberal democracies.<sup>66</sup> In-house media such as the *Zhongguo Huanjing Bao* (China Environmental Newspaper) and others linked to the pertinent agencies stepped up their coverage of the problems engendered by air pollution—with some, but by no means all, of the more important stories reaching more general publications. “Non-governmental” organizations and relevant academics were encouraged to give voice to their general concerns about the environment. And referencing a growing volume of citizen complaints, the ENRPC endeavored to make the case that the “voice of the masses” indicated support for tighter pollution controls through law.<sup>67</sup>

## (2) *Drafting Revisions*

Advocates of revising the air pollution law recognized that they were likely to encounter stern opposition from an array of politically powerful actors, including the State Planning Commission, the State Economic Commission, some industrial ministries, provincial governments in Sichuan, Guizhou, Gansu and elsewhere associated with “dirty,” (i.e., high-sulphur coal), and others.<sup>68</sup> Accordingly, the ENRPC and allies endeavored from the outset to move swiftly and discreetly, taking advantage in particular of the NPC’s attempts in 1993 (at the start of its eighth session) to assert itself relative to the State Council by developing its own formal legislative plan and preparing more of its own laws, rather than principally reacting to initiatives and drafts from the State Council’s Bureau of Legislative Affairs (BLA).<sup>69</sup> Acting before opponents could effectively mobilize,<sup>70</sup> the ENRPC succeeded in persuading the NPC’s institutional leadership to include a revised air pollution law among the 100 proposals selected from more than 500 put forward for inclusion in the plan’s so-called “first tier” (i.e., laws that the Standing Committee plans to consider during the NPC’s term, as distinct from a second tier that it might address, time permitting, and those not deemed worthy of inclusion in the plan).<sup>71</sup>

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66. Tony Saich, *Negotiating the State: The Development of Social Organizations in China*, 161 CHINA Q. 124 (2000).

67. ENRPC Explanation, *supra* note 59, at 21.

68. Interview with Academic K (1996); Interview with Official F (1996).

69. This change in the NPC’s role is described in Michael W. Dowdle, *The Constitutional Development and Operations of the National People’s Congress*, 11 COLUM. J. ASIAN L. 1 (1997).

70. See Interview with Official F, *supra* note 68. These objections were, however, slight when compared to later objections to the substance of the proposed law. *Id.*

71. Dowdle, *supra* note 69, at 60.

In deciding in March 1994 to revise the law, the NPC's Standing Committee delegated responsibility for its drafting to the ENRPC. Recognizing the importance of demonstrating an ability to work with sympathetic forces in the State Council hierarchy, the ENRPC looked for initial legislative drafting to NEPA which, in turn, formed a drafting group comprised chiefly of NEPA officials and academic specialists in environmental law drawn from Wuhan University and leading schools in Beijing.<sup>72</sup> With some solicitation of views from environmental officialdom both at the national and sub-national levels, this drafting group soon produced a proposed revised air pollution law.<sup>73</sup>

Although responsible for the decision to have NEPA undertake the initial drafting work, the ENRPC was less than fully satisfied with its results, viewing the draft as too accommodating to industrial interests substantively and too imprecise technically.<sup>74</sup> Believing that a stronger draft law would put it in a better position to bargain with opponents, the ENRPC rewrote important parts of the NEPA draft, strengthening provisions designed to control acid rain, adding articles regarding the control of nitrogen oxide emissions, toughening sanctions, and sharpening legislative language.<sup>75</sup> With the second draft in hand, the ENRPC then began the arduous process of soliciting the views of the BLA, affected ministries and commissions and the standing committees of the people's congresses of each province and centrally administered municipality.<sup>76</sup> Not surprisingly, many of the solicited agencies, including, in particular, the electricity

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72. Interview with Official F, *supra* note 68; Interview with Academic K, *supra* note 68.

73. At least some provincial environmental bureaus sent the draft law to county and municipal environmental bureaus under their jurisdiction for comments; the provincial bureaus then passed such comments on to NEPA. Interview with Official R (1996).

74. See Interview with Official A (1997), *supra* note 63.

75. See Interview with Official F, *supra* note 68. Objections to the NEPA draft came in particular from ENRPC members with significant experience in environmental protection who wanted much more stringent provisions. *Id.* However, NEPA officials also apparently left some provisions out of the original draft because they felt inclusion of such provisions would be futile. See Interview with Official I (1996). The substance of other changes suggested by ENRPC and NEPA is discussed *infra* text accompanying notes 118-158.

76. Interview with Official F, *supra* note 68. In addition, an informal meeting was held in Beidaihe (the summer resort at which senior officialdom vacations) with representatives of the ENRPC, the Legislative Affairs Bureau of the State Council, and representatives of the NPC's Commission on Legal Affairs. Persons attending the meeting did so in their individual capacities, not as representatives of their respective departments. Interview with Official W (1996).

and coal ministries, voiced strong objections.<sup>77</sup> In addition, the NPC's powerful Commission on Legislative Affairs (CLA), a body directly under the Standing Committee responsible both for drafting laws for the Standing Committee and for reviewing laws proposed by other actors (including the NPC specialized committees), expressed its serious concerns.<sup>78</sup>

(3) *Debate and Retreat: The Controversy over Proposed Revisions*

Notwithstanding the resistance its soundings evoked, the ENRPC decided in October of 1994 to submit its initial draft to the NPC Standing Committee with little change, fearing that incorporating points raised by opponents would unduly weaken the law.<sup>79</sup> The draft immediately ran into fierce opposition, principally taking the form of objections mirroring those made that had been articulated earlier in the process.<sup>80</sup> In the face of this controversy, the Standing Committee called on the CLA to collect the views of central government departments and ministries, sub-national government, industry, and scholars.<sup>81</sup> The CLA, in turn, primarily solicited the views of the law's opponents, on the grounds that the ENRPC chiefly represented the perspective of its supporters.<sup>82</sup> The ENRPC, to be sure, had sought the views of some of the law's opponents, but it had done so only after developing its own draft and with less than a fully open mind, suggested the CLA. Indeed, in carrying out this inquiry, the CLA was mindful of the fact that the ENRPC had not gone out of its way to elicit and heed the CLA's advice prior to developing the aforementioned draft. Concurrently with the CLA's inquiry, the BLA, which was no less concerned with maintaining its bureaucratic prerogatives, undertook to solicit views from pertinent State Council ministries for eventual transmission to the CLA.<sup>83</sup>

(4) *Issues of Contention*

Although the ENRPC's draft contained revisions to a majority of articles in the 1987 APPCL, five proposed changes emerged as the most contentious. Two centered chiefly around traditional sectoral interests—coal and automobiles—also having strong regional

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77. Interview with Official F, *supra* note 68.

78. *Id.*; Interview with Official A (1997), *supra* note 63.

79. Interview with Official A (1996), *supra* note 54.

80. *Id.*

81. Interview with Official W, *supra* note 76.

82. *Id.*

83. *Id.*

implications, while the remaining three—concerning the system of emission fees, total loading, and the division of urban areas into three distinct zones—additionally raised what might be described as broader philosophical issues.

A considerable portion of the coal China produces presents serious environmental problems.<sup>84</sup> Much of it mined in the politically important province of Sichuan (with a population roughly the size of Germany's) and other parts of southwestern China has a sulphur content of some five percent<sup>85</sup> (as compared with one percent or less for internationally traded steam coal or four percent for the "dirty coal" that seized Ackerman and Hassler's attention)<sup>86</sup> while coal extracted from throughout the nation has an average ash content said to be double that of its internationally traded steam counterpart.<sup>87</sup> China's continuing reliance on "inefficient coking plants and industrial boilers, . . . small boilers that fuel local industries, service establishments and housing estates . . . [and] even less efficient household stores," in turn, exacerbates the problems of acid rain and respiratory disease that these high-sulphur and high-ash coals, respectively, present.<sup>88</sup>

Coal washing has the potential to reduce both sulphur and ash emissions. Given that less than ten percent of China's steam coal was being washed as of 1995,<sup>89</sup> the ENRPC draft called on Chinese mines producing high-sulphur coal to install washing mechanisms by a specified date or close down.<sup>90</sup> Not surprisingly, the ENRPC's mandatory washing proposal met with strenuous opposition from the Ministry of Coal at the national level,<sup>91</sup> as well as from representatives of Sichuan and other areas likely to be affected.<sup>92</sup> Mandatory washing, argued the Ministry, would be enormously expensive, particularly in view of the fact that the government required that coal sold to power plants (typically from larger state-controlled mines) be

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84. Vaclav Smil, *China's Energy and Resources Uses: Continuity and Change*, 156 CHINA Q. 935, 937-42 (1998).

85. *Id.* at 941.

86. Ackerman, *supra* note 6, at 19.

87. *Id.*

88. Smil, *supra* note 84, at 940-41.

89. Elspeth Thompson, *Reforming China's Coal Industry*, 147 CHINA Q. 726, 730 (1996).

90. See ENRPC Explanation, *supra* note 59, art. 30. Although the 1995 APPCL significantly tightened regulations on high-sulphur coal, it did not explicitly state that mines failing to comply would be shut. 1995 APPCL *supra* note 4, art. 24.

91. Interview with Official F, *supra* note 68.

92. *Id.*; see also Interview with Official W, *supra* note 76.

priced some 20 *yuan* (approximately US\$2.40 at the time) per ton below market rates in order to keep electricity prices low.<sup>93</sup> Such a mandate, regional authorities contended, might ultimately force closures, particularly among the 80,000 smaller mines that tended to deal even more frequently in raw (i.e., unwashed) coal than larger state mines.<sup>94</sup> This, it was further suggested, would result in massive unemployment in what were already hardscrabble areas, carrying with it the possibility of social unrest.<sup>95</sup> There were, to be sure, those within the Ministry who thought that mandatory washing might justify higher coal prices (as well as cleaner air), with support also coming from representatives of regions producing low-sulphur coal (such as Shanxi) or suffering from acid rain, but, in the end, they were unable to carry the day.<sup>96</sup> The final version of the law required that mines extracting coal with a high-sulphur or high-ash content include washing and drying facilities, but left it to the State Council to set a deadline for their establishment, even as the law called for limiting the mining of dirty coal and the popularizing of coal washing.<sup>97</sup>

The ENRPC's draft also aroused the ire of the automobile industry, as well as some major industrial users of automobiles, in its attempts to address the emissions problem engendered by China's burgeoning reliance on cars.<sup>98</sup> Specifically, the draft: (1) called for stringent inspections for all new autos to ensure compliance with national standards; (2) authorized a prohibition on the importation or sale of cars not meeting such standards; (3) strengthened the position of the local environmental bureaus charged with enforcing such standards by requiring other governmental agencies to work more closely with them; and (4) provided that relevant governmental departments develop plans to encourage the substitution of unleaded gasoline for leaded.<sup>99</sup> With the exception of the last provision, which won the backing of major state refiners who thought they could use a mandated switch-over to push smaller competitors out of business<sup>100</sup> and also enjoyed a measure of support in advanced urban centers

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93. Interview with Official F, *supra* note 68.

94. *Id.*; Interview with Official A (1999).

95. *Id.*

96. Interview with Official F, *supra* note 68. . Such views were rejected due to uncertainty regarding the funding needed for clean technology, as well as concern by Coal Ministry officials that if they did accede to this, small producers of coal might be able to evade such requirements and undersell their product with untreated coal.

97. 1995 APPCL, *supra* note 4, art. 4.

98. Interview with Official D (1996), *supra* note 54.

99. ENRPC Explanation, *supra* note 59.

100. Interview with Academic AA (1996).

such as Beijing, Shanghai, and Tianjin, all these proposals were defeated. The principal rationale offered was that the costs of implementation far outweighed any environmental benefits to be derived, at least in the minds of those who believed they would bear such expenses.<sup>101</sup>

Opponents of the other three major proposals of the ENRPC draft that engendered serious controversy cited cost, but, additionally, framed their opposition along broader lines. The ENRPC draft, for instance, sought to strengthen the emissions permit and fee systems by mandating that those who would emit pollution secure a permit prior to commencing such activity, by requiring polluters to pay emission fees on their entire volume of emissions (as opposed to only that portion in excess of permitted levels, as was the case under the 1987 APPCL), and by explicitly declaring emissions in excess of levels authorized by said permits to be illegal. With modest experiments underway in some locales and with the example of many foreign jurisdictions in mind, the ENRPC and NEPA were convinced that movement toward a vibrant permitting system was critical.<sup>102</sup> Fees were warranted even for pollution within permitted levels, contended the ENRPC, to mirror the fact that such emissions placed a strain on national resources (and, as well, to reflect what was understood to be international best practice).<sup>103</sup> And, it was vital, advocates of the draft argued, that excessive emissions be deemed illegal in order to lend gravity to calls for a cleaner environment and to strengthen the hand of local environmental officialdom.<sup>104</sup>

Each of the foregoing measures evoked strong opposition, but the sharpest condemnation was directed at the attempt to label excessive emissions illegal. Fee levels for excessive emissions had been established in the early 1980s, at a time when much of the Chinese economy was still under relatively strong state control, and had not been changed since,<sup>105</sup> both because of opposition from heavily polluting industries and on-going disagreement between environmental authorities (for whom such fees were a prime source of operating revenues at the local level) and other governmental

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101. Interview with Official D (1996), *supra* note 54.

102. Interview with Official A (1996), *supra* note 54; Interview with Official I, *supra* note 75; Interview with Academic K, *supra* note 68.

103. ENRPC Explanation, *supra* note 59, at 26.

104. Interview with Official A (1999), *supra* note 94.

105. Zhengshou Paiwu Fei Zhanxing Banfa [Temporary Provisions for the Collection of Emissions Fees] (promulgated Feb. 5, 1982), *reprinted in* FAGUI QUANSHU, *supra* note 4, at 11.

agencies over the choice of the state agency that would derive any new revenues. By the mid-1990s, these fees were typically artificially low (running at a fifth of the cost of abatement), with the result that many enterprises found it cheaper to pay them rather than stem pollution, while in other instances environmental bureaus failed even to collect fees for fear of alienating powerful industrial interests and their local governmental patrons.<sup>106</sup> The changes proposed by the ENRPC, argued the CLA based on a report that some critics believed was scientifically unfounded, would, in effect, result in the majority of enterprises nationally being labeled as violators of the law.<sup>107</sup> This, the CLA suggested somewhat sharply, not only posed serious implementation problems, but also ran the risk of insulting otherwise law-abiding citizens and, so, impairing, rather than enhancing, respect for the law.<sup>108</sup> In consequence, the final version of the law retained the 1987 APPCL formulation with little change.

The ENRPC draft's proposal that emissions be measured by total load, rather than concentration, experienced much the same treatment. At the time of the 1987 APPCL's revision, most pollution control in China relied on measurements of the concentration of pollutants in emissions, rather than the total load, even though such measurements often did not produce an accurate reading of the impact of pollution, given that pollutants might be diluted or released slowly over time.<sup>109</sup> Building on experimentation in Jiangsu and elsewhere at the sub-national level (principally concerning water pollution), advocates in the ENRPC, buttressed by sympathetic scholars, argued that total loading was essential if pollution was accurately to be measured and, therefore, was an indispensable element of any effective air quality law.<sup>110</sup>

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106. Interview with Official A (1996), *supra* note 54; Interview with Academic T (1996). One reason fee standards were not changed is apparently that other government departments were willing to accede to it only if they, not NEPA, collected the fees. NEPA feared losing an important revenue stream for environmental protection, and thus, changes of consequence were not made. See Interview with Academic T, *supra*. See also SINKULE & ORTOLANO, *supra* note 25.

107. Interview with Academic U, *supra* note 54; Interview with Academic AA, *supra* note 100.

108. Interview with Academic AA, *supra* note 100. The report stated, for example, that seventy percent of all electrical plants in the regions surveyed would fail to meet emissions standards. *Id.* Although some supporters of the provision agreed that the provision would be problematic if such a high percentage of enterprises were actually deemed to be operating illegally, they doubted the CLA's estimates. *Id.* Interview with Academic U, *supra* note 54.

109. SINKULE & ORTOLANO, *supra* note 25, at 35-36.

110. Interview with Official U (1996); Interview with Academic Y (1996).

Opponents of total loading, including the Ministry of Electricity and the Ministry of Chemical Industry (speaking at times directly and at times through the State Planning Commission and the State Economic Commission) contended that it represented far too massive and expensive a change, given both the cost of technology needed to monitor emissions and, presumably, the cost of compliance with tighter pollution controls that would result from the more accurate measurements total loading would provide.<sup>111</sup> Where, it was asked, would the funds needed come from and what would be the likely impact of the proposed changes on economic development? Some local officials, including persons in and beyond the environmental protection bureaucracies, objected on the grounds that they neither had nor foresaw obtaining the technology needed to meet the law's requirements.<sup>112</sup> Others contended that even if technologically feasible, the high costs of total loading were simply unwarranted for a nation at China's stage of economic development.<sup>113</sup> In the end, however, differences in opinion regarding total loading centered not only around cost, but also on whether it was appropriate to include in the law provisions that many felt were unattainable, at least in the short- to mid-term.<sup>114</sup> As with the proposal to label excessive emissions illegal, concern was voiced about the implications of setting a standard that might result in a significant number of actors being treated as violators of the law. And, so, the proposed change was shelved.

The final major focal point of opposition to the ENRPC draft emerged with respect to its proposal to divide China's municipalities (which, in some instances, included considerable agricultural land) into three categories for air pollution prevention and control purposes.<sup>115</sup> Category 1 cities would be required to comply with the most stringent standards for sulphur dioxide and particulates by the end of 1998, cities in category 2 would in general be subject to less stringent standards, and those in the third group would have been permitted to meet yet lower standards through 1998, after which they would be expected to comply with the standards provided for category 2 cities.<sup>116</sup> Objections paralleled those voiced with respect to

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111. Interview with Official F, *supra* note 68; Interview with Academic E (1996).

112. Interview with Academic AA, *supra* note 100.

113. Interview with Academic E, *supra* note 111.

114. Interview with Official W, *supra* note 76.

115. See ENRPC Explanation (regarding art. 19), *supra* note 59.

116. *Id.* Category I would have included centrally administered cities, provincial capitals, important historical and tourist locales, and urban areas in special economic

terming excessive emissions illegal and instituting total loading. The costs of establishing such special zones, it was suggested, would be too great. Implementation would be too difficult,<sup>117</sup> notwithstanding the success of Beijing, Shanghai, and other localities in taking advantage of autonomy provided in the 1987 APPCL to put in place requirements exceeding national minimums. And there was, once again, a concern voiced about the damage to legal development of promulgating requirements that, it was alleged, would not consistently be observed.

Beyond the foregoing points of particular contention, the ENRPC draft also included a number of other provisions that, had they survived the Standing Committee's review, would have significantly enhanced pollution controls and the role of local environmental bureaus. One would have strengthened environmental impact assessments by expanding the areas for which such reports are required, requiring assessments to take account of the views of the affected public, fining those who submit false or seriously inaccurate environmental impact assessments, and imposing criminal liability in cases in which inaccurate environmental impact assessments resulted in serious harm.<sup>118</sup> Another would have explicitly made local governments responsible for air pollution and would have included specific provisions stating that each level of government should dedicate funds to preventing air pollution (without necessarily indicating where such funds were to be found).<sup>119</sup> And yet another would have strengthened the position of local environmental bureaus, by shifting authority to establish emissions standards from local governments (which even in the revised law have the authority to accept or reject recommendations from environmental authorities to suspend or terminate operators of polluting plants) to local environmental bureaus while also expanding the range of conduct subject to fines.<sup>120</sup> As with so much else proposed by the ENRPC, these also met with strenuous opposition.

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zones. *Id.* Nationally designated scenic areas would also have been classified in the first category. *Id.*

117. *Id.*; Interview with Academic U, *supra* note 54.

118. See ENRPC Explanation (regarding arts. 10 and 52), *supra* note 59. The PRC is now preparing a law specifically reporting environmental impact assessments.

119. See *id.* art. 2.

120. See *id.* arts. 6-7, 48-56.

(5) *The Standing Committee's Decision*

Despite the numerous objections its draft encountered, the ENRPC initially was unwilling to compromise.<sup>121</sup> The CLA similarly refused to budge, and a protracted stalemate ensued.<sup>122</sup> In the end, however, the ENRPC apparently realized that it had little choice; either it could negotiate concessions, or abandon plans for any revisions. ENRPC officials accordingly negotiated a compromise dealing principally with members of the CLA and the NPC's Law Committee,<sup>123</sup> enabling the Standing Committee to promulgate the revised law.

As suggested above, the compromise eliminated the vast majority of the ENRPC's key suggested revisions, leaving noteworthy change in only four areas—clean production technology, the sulphur content of coal, the establishment of acid rain control areas, and the use of unleaded gasoline.

The revised law appeared to strengthen the regulation of production technology. In addition to encouraging the use of clean production technology, one of only nine new articles provided for the phase-out of production processes and facilities that cause serious air pollution.<sup>124</sup> The law stated that the State Council and "relevant departments" shall issue a list of processes and facilities to be banned within a specified period of time. It also stated that enterprises or institutions using banned processes and facilities may be closed. Although the impact of the definition of such processes and facilities would obviously be crucial (and was to have been addressed in a separate clean production law), the provision seems to have been an effort to move toward tighter standards.

The law also suggested an attempt to strengthen regulation of sulphur emissions. A new article called for coal washing and dressing to be popularized and for limitations on the mining of high-sulphur coal. The revised APPCL also included new provisions aimed toward the reduction of pollution caused by the burning of coal in urban areas.<sup>125</sup> Additionally, the law stated that acid rain and sulphur dioxide control areas could be established, in which industry would be required to use low-sulphur coal or install technology designed to

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121. Interview with Official A (1999), *supra* note 94.

122. Interview with Official F, *supra* note 68.

123. The Law Committee is one of the more specialized committees under the Standing Committee of the NPC. See Dowdle, *supra* note 69, at 51-52 (discussing the work of the Law Committee).

124. 1995 APPCL, *supra* note 4, art. 15.

125. *Id.* arts. 25, 26, 36.

reduce emissions.<sup>126</sup> Finally, the law took a small step toward reducing auto emissions by calling on the state to foster use of unleaded gasoline and by providing for the development of plans to eliminate the use of lead.<sup>127</sup>

Despite the apparent success of opponents of tightened environmental standards, however, supporters of the ENRPC draft on the Standing Committee did not submit quietly, but instead were vocal in arguing that the final version of the law was too lenient toward polluters.<sup>128</sup> For example, during Standing Committee discussions of the compromise draft, one member argued that although the Standing Committee had asked for views on the law from industry and polluters, the CLA had not solicited the views of people concerned with the environment. Additionally, supporters of the ENRPC draft argued that pursuant to national environmental policy, and in particular Agenda 21, the state should be striving more affirmatively to use law to protect the environment.<sup>129</sup> Others argued that the law as revised would serve little use without setting specific target dates for the elimination of the use of leaded gas and other proposed changes. Critics also complained that provisions regarding violators of its ban on certain processes and technologies delegated the authority to impose penalties to governmental departments "responsible for polluting industries," ignoring the fact that many joint ventures and private industries do not have such supervisory departments. And critics of the watered-down draft also argued that the public health costs of the truncated legislation would be large.<sup>130</sup> Nonetheless, in the end, only a single member of the Standing Committee voted against adoption of the revised law.<sup>131</sup>

#### D. The Aftermath

There was, to be sure, widespread disappointment in the ENRPC, NEPA, the environmental bureaucracy below the national level, and among environmental scholars with the 1995 revisions.<sup>132</sup> The debate over the APPCL revisions, however, might better be

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126. *Id.* art. 24.

127. *Id.* art. 38.

128. Interview with Academic T, *supra* note 106.

129. State Science and Technology Commission and State Planning Commission, CHINA'S AGENDA 21—WHITE PAPER ON CHINA'S POPULATION, ENVIRONMENT AND DEVELOPMENT IN THE 21ST CENTURY (1994).

130. *Id.*

131. Interview with Official F, *supra* note 68.

132. See, e.g., Interview with Official R, *supra* note 73.

thought of as representing one stage in an ongoing debate. Although the law itself may not have met even limited expectations, the discussions about it paved the way for subsequent consideration of stricter environmental law and regulation. As is shown below, some provisions explicitly rejected in the debate surrounding the 1995 APPCL nonetheless found their way into national and local legal measures during the second half of the 1990s, culminating in the revision of the APPCL itself in 2000.

### *(1) Implementing Regulations*

One could think of the 1995 APPCL as one round in an ongoing debate over air pollution standards. Both the general implementing regulations, which were drafted but not issued,<sup>133</sup> and more specific regulations on acid rain provisions,<sup>134</sup> which were promulgated two and a half years after the 1995 APPCL, created opportunities to revisit struggles waged during the law's drafting. Notably, changes rejected by the NPC's Standing Committee concerning pollution permits, total loading, and controls on sulphur dioxide emissions resurfaced during the preparation of the aforementioned sets of regulations.<sup>135</sup>

As the lead agency overseeing environmental regulation under the State Council, NEPA assumed responsibility for overseeing drafting of overall implementing regulations, which it, in turn, assigned to environmental officials in the Hebei provincial government.<sup>136</sup> In addition, groups of scholars were also formed to help develop particular provisions: responsibility for drafting regulations on acid rain, for example, was delegated to a group including environmental scientists at Beijing's Qinghua University. Concurrently, NEPA consulted with the Coal Ministry regarding standards on the washing of high-sulphur coal. Additionally, although the State Council's Economic and Trade Committee undertook responsibility for drafting a list of those products to be

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133. See Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Shishi Xize Xiuzheng An (Song Shen Gao) [People's Republic of China Air Pollution Prevention and Control Law Implementing Regulations Draft Showing Revisions (Draft Submitted for Consideration)] [hereinafter APPCL Draft Implementing Regulations]. Pending the completion of these regulations, those promulgated in 1988 to implement the 1987 APPCL remained legally effective.

134. Interview with Academic Z (1996); see also Geoffrey Murray, *China Announces Plan to Tackle Acid Rain Problem*, KYODO NEWS SERV., Mar. 14, 1998, available at LEXIS, World Library, ALLWLD File.

135. Interview with Official A (1999), *supra* note 94.

136. Interview with Official I, *supra* note 75.

banned pursuant to the new law, it did so in consultation with NEPA, while NEPA itself began to draft regulations on automobile emissions.<sup>137</sup>

Notwithstanding the suggestion of some officials that the vague provisions of the 1995 APPCL itself made rapid revision of the implementing regulations essential, the process of revising the implementing regulations proceeded slowly, ultimately, at the national level, yielding only a set of "detailed rules," the acid rain provisions, and provisions restricting nitrogen oxide emissions.<sup>138</sup> Although this pace may be due in part to changes in China's leadership and to the restructuring of the State Council's ministries, the delays also suggest that the effort encountered significant opposition within high government circles. For example, NEPA completed its draft of the regulations on acid rain in August 1996,<sup>139</sup> but the State Council did not approve them until 1998.<sup>140</sup> The failure to pass implementing regulations may also have reflected a misguided strategy by environmental advocates, for in some cases they were seeking to include provisions explicitly rejected by the NPC Standing Committee—and they were doing so at a time when there was increased attention to the question of whether State Council rules and regulations were in line with national laws.

The acid rain provisions are revealing. Having failed to secure approval from the Standing Committee in 1995 for total loading, NEPA made its inclusive acid rain regulations a prime goal.<sup>141</sup> These provisions create two control zones, covering areas that account for sixty percent of China's sulphur dioxide emissions, and establish a target date of 2000, by which time all industrial polluters within these zones will be required to comply with national standards for sulphur

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137. *Id.*

138. Ross, *supra* note 35, at 56. China has strengthened its ambient air quality standards, setting standards for the emission of particles smaller than 10 microns, and tightening standards on the emission of suspended particulates and nitrogen oxide. *Id.* at 56-57.

139. NEPA actually completed two drafts of the regulations, one with large areas included as acid rain control areas and one with fewer areas so included. Drafters anticipated that industry representatives would push for the smaller plan; however, some opposed it because it would have divided certain provinces in half, with certain portions of some provinces subject to stricter standards than other areas within the same province. Interview with Academic Z, *supra* note 134.

140. See Guowuyuan Guanyu Suanyu Kongzhiqu He Erliang Hualiu Wuran Kongzhiqu Yougan Wenti De Pifa [The Reply of the State Council with Regard to Acid Rain Control Districts and Sulphur Control Districts], Jan. 12, 1998 [hereinafter Reply of the State Council].

141. Interview with Official D (1996), *supra* note 54.

dioxide emissions.<sup>142</sup> Existing mines are to be restricted in their production of high-sulphur coal, and new mines that might extract high-sulphur coal will be prohibited, while new coal-fired power plants will not be permitted near major urban areas and existing power plants will be required to install desulphurization technology. In addition, a pollution permit system will operate to regulate emissions and provide a basis for the collection of fees from sulphur dioxide emitters in the two zones.<sup>143</sup>

The acid rain regulations thus contain many provisions originally included in the ENRPC's draft 1995 APPCL concerning permits, specific target dates, and bans on new mines. Although the limited geographic area in which the regulations are being implemented may reduce their effectiveness, the ability of NEPA to convince the State Council to enact these provisions demonstrates that the NPC Standing Committee's explicit rejection of certain provisions in national laws does not necessarily bar their inclusion in regulations. Additionally, the very presence of such provisions in the acid rain provisions may make their acceptance in future revisions of the APPCL easier. In effect, in the acid rain provisions, environmentalists appear to have won back some of what they lost in the 1995 APPCL itself.<sup>144</sup>

NEPA's success with the acid rain regulations came despite opposition resembling that in the debate over the 1995 APPCL. Affected industrial groups, which had often attempted to influence NEPA, sought to do so with regard to these regulations. In addition, representatives of local governments lobbied the group drafting the acid rain provisions. Many feared that their jurisdictions might be included in acid rain control areas, although some local environmental bureaus lobbied for inclusion so as to strengthen their own positions locally.<sup>145</sup>

The general implementing regulations initially appeared to be following a similar path, with slow movement through the State

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142. See Murray, *supra* note 134. The areas included in the control zone account for just 11.4% of China's territory. *Id.* At the time of the completion of this Article, SEPA was examining the degree to which compliance has been attained. Although many local areas are reporting high compliance rates, the reliability of such reporting is unclear.

143. *Id.*

144. The procedure of assigning responsibility to drafters who then diverge somewhat from the language of the original law is not uncommon. Tanner, *supra* note 8, at 70 (noting that "officials who draft [implementing] regulations can and often do use them to alter or subvert the intentions of the original law's drafters"). It does not appear that the ENRPC was involved in a consequential way in the drafting of the acid rain regulations.

145. Interview with Academic I (1996).

Council apparatus but the belief in NEPA that the regulations would eventually be approved. The draft of the regulations that NEPA submitted to the State Council included a number of provisions explicitly rejected in the NPC Standing Committee's debate over the 1995 APPCL. In particular, the draft regulations stated that all provinces and directly administered cities shall formulate "total loading plans" for air pollution.<sup>146</sup> The draft regulations also provided for the use of pollution permits, tightened restrictions on the mining of high-sulphur coal, required the phasing-out of the use of leaded gasoline, increased penalties for violations of the APPCL and the implementing regulations, and expanded the jurisdiction of national and local environmental authorities.<sup>147</sup> In the end, however, SEPA was unable to win approval of these regulations. Although the inclusion of such provisions in the draft regulations demonstrated that national environmental authorities did not consider themselves overly constrained by the text of the 1995 APPCL, the failure to win approval of the regulations suggests that this may have been a mistake.<sup>148</sup> Although persons involved in the drafting process commented that they believed themselves bound by the law, they also indicated their belief that they should draft the regulations in light of laws passed and policy statements issued subsequent to the APPCL, most notably in the former case the Water Pollution Law that has provisions regarding permits, fines, and total loading that went well beyond the 1995 APPCL, and in the latter, President Jiang Zemin's July 1996 speech at China's National Conference on Environmental Protection endorsing total loading.<sup>149</sup> As will be demonstrated below, the inclusion of such concepts may have ensured that even if the State

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146. See APPCL Draft Implementing Regulations, *supra* note 133, art. 2; see also *id.* art. 7 (stating that districts that are unable to meet national emissions targets for air pollution shall not create new polluting facilities or expand existing facilities, unless such emissions are compensated for by reductions from other pollution sources, so as to ensure that the total load of pollution in that district does not increase); *id.* art. 25 (providing for the use of total loading measurements in acid rain control areas).

147. *Id.* arts. 5, 11, 19, 23, 31, 34-35.

148. To be sure, some persons involved in the drafting of the regulations questioned how far the regulations could stray from the APPCL. For example, the drafters debated whether provisions could be included regarding fines for excessive emissions, which would effectively treat such excesses as illegal. Interview with Academic T, *supra* note 106. The NPC Standing Committee had apparently specifically rejected the use of fines in this context, deleting such provisions from the draft ENRPC submitted to the Standing Committee. Some involved in the drafting of the implementing regulations believed that they lacked the authority to include such provisions in the regulations. Others, however, felt that such provisions should be included.

149. Interview with Official K (1996); Interview with Academic T, *supra* note 106.

Council would not pass these regulations, the groundwork would be laid for the 2000 revision of the APPCL.

(2) *National Laws and Policies*

In addition to laying the groundwork for later versions of the APPCL itself, the ENRPC and NEPA also succeeded in incorporating certain key principles represented by provisions deleted from the 1995 APPCL into other laws, most notably the 1996 revision of the Water Pollution Law, which explicitly provides for pollution to be measured via total loading, and also provides for the use of emissions permits.<sup>150</sup> Additionally, the Water Pollution Law is the first PRC law to mandate that environmental impact assessments must take account of the views of affected members of the public (although it does not guarantee public access to information, or public participation at other stages of the approval process).<sup>151</sup>

To be sure, experiments in the use of permits and total loading for water pollution were underway well before comparable local efforts regarding air pollution. Also, technology to address water pollution was both more readily available and appreciably cheaper than for counterparts for air pollution.<sup>152</sup> Nevertheless, the inclusion of provisions calling for total loading and permits suggests at least the possibility that the debates over such issues in the context of revising the APPCL may have made it easier to include such provisions in the Water Pollution Law and vice versa.

Other policy statements and national regulations further illustrate that principles suggested in ENRPC's draft of the 1995 APPCL have been winning more widespread acceptance.<sup>153</sup> Total loading received a boost in July 1996 from Jiang Zemin's speech on that topic.<sup>154</sup> The government's much-publicized effort to clean up the enormously polluted Huai River included the promulgation of

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150. See Water Pollution Law, *supra* note 36, art. 16.

151. See *id.*, art. 13; Ross, *supra* note 35, at 57.

152. The inclusion of fines for exceeding pollution limits may similarly have been due to the unique context of water pollution. Provisions regarding the assessment of fines in the Water Pollution Law were in part made possible by a compromise that permits the Fisheries Ministry, rather than environmental bureaus, to collect fines. Interview with Official F, *supra* note 68.

153. In addition to the laws and regulations discussed here, in 1996 China enacted a Law on Coal that includes provisions stating that coal washing shall be encouraged. See *China Adopts Effective Measures to Control Pollution*, XINHUA NEWS AGENCY, Oct. 14, 1996, available at LEXIS, World Library, ALLWLD File. The relationship of the law to the APPCL is, however, unclear, and presents an additional avenue for further research.

154. Ross, *supra* note 35, at 56.

targeted regulations containing provisions regarding total loading, while China's 1996 Law on Coal (which is chiefly concerned with production and marketing) provides at article 35 that the state "shall encourage . . . coal washing" and at article 36 that it "shall develop and disseminate clean coal technology." Officials also note that the State Council's 1996 Decision on Seven Issues Concerning Environmental Protection calls upon industrial polluters to comply with local and national standards by the end of 2000.<sup>155</sup> Although SEPA's review of compliance with standards is ongoing as this Article is being concluded, environmental officials state that seventy percent of enterprises have reached these targets—though even these overly sanguine officials acknowledge that such figures may well be inflated.<sup>156</sup> Such targets, in any event, are significant in representing the first time China "has set a specific date for compliance on such a large scale."<sup>157</sup>

### (3) *Local Regulations*

The 1995 APPCL also provided the impetus for a number of provinces and municipalities to revise their own environmental standards. In some cases, sub-national entities have sought to do locally what could not be accomplished nationally. For example, Beijing revised its regulations, enacting provisions significantly stricter than those in the 1995 APPCL. In particular, Beijing took specific steps to tighten the control of automobile emissions, banning the sale of unleaded gasoline, and tightening regulations on the use of coal.<sup>158</sup> Beijing also announced in 1998 that it would issue weekly reports on the level of certain pollutants in the city's air.<sup>159</sup> These have proven so popular that the municipal government now issues them daily. Although not directly linked to provisions in the APPCL, the publication of such information is consistent with ENRPC's

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155. *Id.*

156. Interview with Official A (2000); Interview with Official C (2000).

157. Ross, *supra* note 35, at 56.

158. Interview with Official H (1996); Interview with Official I, *supra* note 75. Other cities, including Shenyang, Shanghai, and Hangzhou, took similar steps to tighten local regulation of air pollution.

159. Ted Plafker, *Beijing Coming Clean over Air*, BOSTON GLOBE, Mar. 27, 1998, at A15. Twenty-seven other Chinese cities already provide such information. *Beijing Starts Weekly Air Quality Reports*, XINHUA NEWS AGENCY, Feb. 28, 1998, available at LEXIS, World Library, ALLWLD File.

attempts to increase public awareness of and participation in environmental impact assessments.<sup>160</sup>

Local debates at times have mirrored those at the national level. In Jiangsu, for example, the provincial environmental bureau first undertook to draft provincial regulations on environmental protection in 1992. An original draft of Jiangsu's regulations that included provisions on total loading and on fines for polluters generated strong opposition within the provincial people's congress. After significant debate—and twelve revisions of the proposed regulations—Jiangsu approved regulations that did not provide for either total loading or fines for exceeding emissions levels.<sup>161</sup>

#### (4) *A New APPCL*

The most significant effect of the debates both over total loading, permits, automobile emission standards, and other controversial topics during consideration of the 1995 APPCL and over the implementing regulations may have been in laying the groundwork for future revisions to the APPCL itself. Indeed, the debates ensured that by the end of the 1990s, such controversial proposals were no longer new.

The decision to revise the 1995 law stemmed from two primary factors. First, while officials in the ENRPC and NEPA had earlier expressed the hope that the 1995 law would be made tougher via the implementing regulations,<sup>162</sup> by the late 1990s the implementing regulations still had not been passed. In particular, NEPA had originally sought to include provisions requiring total loading, emissions permits, and tighter regulations regarding automobile regulations in administrative regulations. Yet such provisions had been explicitly rejected by the Standing Committee during consideration of the 1995 law. Opponents of such provisions apparently argued, cogently, that to include such provisions in State Council regulations would be inconsistent with the 1995 APPCL. SEPA and ENRPC officials felt that the 1995 APPCL provided too low a base on which to draft regulations, and thus argued that the APPCL itself should be revised.<sup>163</sup>

Second, significant support for a new law came from local governments, in particular Beijing, which faced massive

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160. Interview with Academic A, *supra* note 65; Interview with Official A (1999), *supra* note 94.

161. Interview with Academic Y, *supra* note 110.

162. Interview with Official A (2000), *supra* note 156.

163. *Id.*

environmental problems but which felt that their ability to enact tougher regulations was limited by the 1995 APPCL.<sup>164</sup> Beijing had sought to include provisions regarding total loading and emissions permits in local regulations, but feared that doing so would be inconsistent with the national law. Beijing originally sought authorization (*shou quan*) to enact such regulations. ENRPC officials, however, felt that this procedure was inappropriate, particularly given the likelihood that other cities would face similar problems in the future.<sup>165</sup> The ENRPC itself spent a long year considering whether weaknesses in the 1995 law could be cured either through implementing regulations or by allowing local authorities to enact tougher laws. In the end, the ENRPC concluded that neither alternative was appropriate, and thus decided to seek revisions to the law itself. Opponents argued against making changes to the law, protesting that revising it a third time within thirteen years would undermine its stability and erode public confidence in law more generally.<sup>166</sup> But the ENRPC apparently succeeded in convincing the Standing Committee that a revised law was urgently needed.

Judged from the perspective of China's environmental lawmakers, the 2000 APPCL<sup>167</sup> is a significant success. The Standing Committee enacted provisions that had been rejected during the debates over the 1995 law, and used far more specific language than had been included in the 1995 law. The law-making process itself was also comparatively smooth, with the ENRPC generally winning the support of the NPC's CLA.

The revised law includes a number of provisions that the ENRPC sought, but failed to obtain, in the 1995 law. Article 3 of the 2000 law explicitly calls on the use of total loading to measure pollution.<sup>168</sup> The law also provides for the establishment of a national system for the collection of emissions fees.<sup>169</sup> Although the law leaves the details to be worked out in State Council regulations, the establishment of such a system would mark a major departure from the 1995 law, which required that emissions fees be paid only by polluters whose

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164. *Id.*

165. *Id.*

166. *Id.*

167. 2000 APPCL, *supra* note 5. Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa [The Air Pollution Prevention and Control Laws of the People's Republic of China] (enacted Apr. 29, 2000, effective Sept. 1, 2000).

168. *Id.* art. 3. The law also states that pollution density shall not exceed levels provided for in national and local regulations.

169. *Id.* art. 14.

emissions levels exceeded permitted levels. The law similarly includes broad language calling for the establishment of total loading districts and provides for the issuance of pollution permits in such districts; again details are left to future State Council regulations.<sup>170</sup>

The new law also includes references to sustainable development,<sup>171</sup> encourages the use of solar, wind, and hydro power,<sup>172</sup> calls for increased use of clean energy sources,<sup>173</sup> authorizes key cities (*zhongdian chengshi*) to designate districts in which the use and sale of polluting energy sources will be banned,<sup>174</sup> and includes various provisions calling for the reduced use of heavily-polluting coal and for the increased use of natural gas.<sup>175</sup>

The 2000 law also takes steps toward increasing public awareness of environmental problems. Article 20 states that local governments should inform the public of any dangerous environmental conditions or pollution incidents.<sup>176</sup> Article 23 calls on the governments of large- and medium-sized cities to release environmental reports at fixed intervals, including details of the types and potential harmful effects of local pollutants.<sup>177</sup> The 2000 APPCL likewise strengthens regulation of automobile emissions, banning the sale, import, or manufacture of automobiles that do not meet environmental standards<sup>178</sup> and barring the use of vehicles that fail to meet the standards in effect at the time of their production.<sup>179</sup> It also includes new provisions regarding emissions inspections<sup>180</sup> and limits on the sale of doped fuel.<sup>181</sup>

Finally, the 2000 law includes a range of new provisions regarding sanctions to be imposed on non-complying polluters. These include provisions granting county- or higher-level environmental bureaus the power to impose fines up to RMB 100,000 on polluters who exceed national or local emissions standards,<sup>182</sup> and measures

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170. *Id.* art. 15.

171. *Id.* art. 1.

172. *Id.* art. 9.

173. *Id.* art. 25.

174. *Id.*

175. *Id.* arts. 26, 28, 29. The law also includes new provisions calling on local governments to increase and protect greenspace and establishes a rough outline for the regulation of ozone-depleting substances.

176. *Id.* art. 20.

177. *Id.* art. 23.

178. *Id.* art. 32.

179. *Id.* art. 33.

180. *Id.* art. 35.

181. *Id.* art. 34.

182. *Id.* art. 48.

permitting environmental departments to shut down non-complying polluters,<sup>183</sup> and impose fines of up to RMB 200,000 for excessive sulphur dioxide emissions.<sup>184</sup> The revised law also provides for the imposition of criminal liability in egregious cases.<sup>185</sup>

Not all of the revisions sought by the ENRPC were incorporated in the final law. Although ENRPC and SEPA officials state that all of the principles that they sought to include in the law were in fact incorporated in the final draft,<sup>186</sup> certain specific provisions were deleted during the Standing Committee's consideration of the law. For example, the original ENRPC draft of the law included detailed provisions regarding procedures for establishing both total loading districts and a permit system; after opposition arose, the law reduced these to a call for the creation of a national system for collecting emissions fees.<sup>187</sup> Opponents stated that if such provisions were overly specific, they would be more likely to be incorrect; the NPC thus agreed to leave detailed provisions for the State Council to consider. ENRPC officials did not view this change as a major defeat, stating that the State Council may indeed be able to do a better job of fine tuning future regulations.<sup>188</sup> Given the State Council's failure to enact implementing regulations for the 1995 law, such views appear to be somewhat optimistic; at the very least, the failure to enact detailed provisions regarding total loading and permits means that the actual implementation of the corresponding provisions of the 2000 APPCL will be delayed until regulations are enacted.

## II.

As interesting as the sectoral and regional battles recounted in the preceding section of this Article may be, they ought not to divert our attention from the broader institutional implications of the struggle over the 1995 revision of the APPCL. These implicate relations between China's legislative and executive arms of government, within the NPC, between Beijing and sub-national units of government, and between state and society, all transpiring, as with virtually every issue of significance in the PRC, against the backdrop of the Communist Party.

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183. *Id.* arts. 50-54.

184. *Id.* art. 57.

185. *Id.* art. 61.

186. Interview with Official A (2000), *supra* note 156; Interview with Official C, *supra* note 156.

187. Interview with Official A (2000), *supra* note 156.

188. *Id.*

To the extent that governmental bodies have been the motivating force in developing China's law-making agenda, throughout much of the history of the PRC, the impetus has reposed with the administrative arm of the Chinese state. So it was through the PRC's first four decades that the State Council played the principal role among state organs in drawing up the legislative plans that largely defined the NPC's priorities in law-making, while the various ministries and commissions arrayed under the State Council generally took the lead in shaping legislation. By the early 1990s, however, this had begun to change. This was due in significant part both to the efforts of a succession of important party personages—Peng Zhen, Wan Li, Qiao Shi, and now Li Peng—who, whether for their own political reasons, or for larger institutional purposes, or some combination thereof, were determined to build up the NPC relative to other parts of the state apparatus and also to the work of the increasingly specialized committee structure and professionalized staff fostered by the leadership.<sup>189</sup> As a consequence, from the opening of the Eighth National People's Congress in 1993, the NPC Standing Committee has taken the lead in developing both five year and annual legislative plans and in determining which combination of NPC committees, other state agencies and actors outside the government should undertake the initial drafting of key pieces of national legislation.

The 1995 APPCL, arguably, presented an especially pronounced example of this shift, as the ENRPC sought to take advantage of the NPC's growing assertion of its prerogatives and to compensate for what was understood at the time to be the relatively weak position politically of NEPA by seizing the initiative and reworking NEPA's preliminary draft into a relatively ambitious set of revisions to the 1987 APPCL.<sup>190</sup> From one perspective, this shift of the focal point of the drafting process would seem conducive to legislation that might both represent a broader range of interests than that prepared under the auspices of the State Council, given the wider spectrum of constituencies seemingly having a voice in the NPC, and be better crafted, given that body's growing expertise in legislative drafting. The ENRPC's relative youth notwithstanding, for example, informants suggest that it was able through the strength of its

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189. See MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA, INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS* (1999).

190. The 1987 APPCL had been drafted by the BLA. As the experience of the drafting of the 2000 APPCL suggests, the elevation of SEPA to ministerial level appears to have strengthened its position politically.

leadership, which included the founding director of China's national environmental agency, and through the intensity of its involvement in a variety of law-making projects, rapidly to develop an expertise in environmentally-focused drafting.<sup>191</sup>

From another vantage point, however, the putative rise of the NPC and, in particular, of its specialized committees was not without its costs in terms of the law-making process, at least at this relatively early stage in their history. Again, the experience of the ENRPC with the 1995 APPCL is illustrative. In its effort to control the drafting process for the APPCL, the ENRPC did manage to develop for presentation to the Standing Committee a set of proposals that, had they found acceptance, would have substantially strengthened the law. Arguably, however, the ENRPC draft engendered even more pronounced opposition than might otherwise have been the case both from ministries representing industrial and other interests that did not believe that they had sufficient opportunity to register their views at earlier stages in the process and from a BLA bureaucracy concerned about a possible or, at least perceived, diminution of its authority.<sup>192</sup> In effect, the belief that this specialized committee had been captured by one set of special interests drove opponents even more strenuously to seek to counter its work through other fora.

One such forum was the NPC's CLA. The issues raised by efforts of the BLA and others to work through it go beyond their dissatisfaction with what they perceived to be the ENRPC's stealth to fundamental matters of institutional design. As its actions in the case of the 1995 APPCL revisions suggest, the rise of the NPC to a more prominent position in law-making has been accompanied by efforts of the CLA to fulfill a variety of functions,<sup>193</sup> some of which may, at points, not be entirely consistent and for which it may not have expertise (as in the technological questions raised by total loading and other issues central to the proposed legislation). These have included providing the full Standing Committee with technical assistance in legal drafting, serving as an honest broker of the substantive views of other potential actors within and beyond the NPC in the sense of consolidating such views in draft legislation for presentation to the Standing Committee, providing access for important entities whose views might otherwise not reach the Standing Committee, and espousing strong opinions, either as a mouthpiece for other actors or

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191. Interview with Official A (1999), *supra* note 94; Interview with Official D (1997).

192. Interview with Academic AA, *supra* note 100.

193. Dowdle, *supra* note 69, at 64-78.

of its own regarding the merits of legislative proposals emanating from specialized committees.

The CLA is, of course, hardly unique among legislative committees worldwide in wearing multiple hats (one thinks, for example, of the confluence of substantive and technical roles of the Rules Committee of the United States Senate).<sup>194</sup> Arguably, however, this confluence has a potential to create particular havoc in the Chinese setting in view of the relative absence of well-established customary practices or well-publicized legal or other external reference points that might provide a widely understood clarification of its various roles. Notwithstanding the praise that one experienced observer has accorded the CLA's multiplicity of roles for constituting the first open acknowledgment "at China's central level [of] the value of pluralist political dynamics,"<sup>195</sup> at least in the case of the 1995 APPCL uncertainty as to the CLA's purposes within the NPC process appears to have deprived the ENRPC of what it deemed a sufficient opportunity to familiarize itself with and respond to opposing viewpoints (though some might suggest that such an outcome was fitting, considering that ENRPC did not go out of its way to elicit opposing views in preparing its original draft). Moreover, and perhaps ultimately more significantly (as will be discussed further below), the CLA's multiple roles contribute to the opacity of governmental processes that remains a deterrent to the creation of "pluralistic political dynamics" in Michael Dowdle's words, involving more than political elites.<sup>196</sup>

The uncertainty regarding the CLA's role (at least as concerns the gathering of views from governmental actors beyond the NPC) is perhaps better appreciated if considered in the context of the broader relationship between the NPC and other state entities. Notwithstanding a growing body of scholarship that quite understandably heralds the rise over the past decade of the NPC relative to its position in earlier times vis-à-vis the State Council,<sup>197</sup> an argument could be made that at least in some key respects, the NPC is still, functionally, less the supreme organ of state and instead more

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194. See, e.g., James J. Mangan, *Contempt for the Fourth Estate: No Reporter's Privilege Before a Congressional Investigation*, 83 GEO. L.J. 129, 138-39 (1994).

195. See Dowdle, *supra* note 69.

196. The need for greater transparency may be the biggest challenge confronting China as it is about to enter the World Trade Organization.

197. See Dowdle, *supra* note 69; TANNER, *supra* note 189; CAI DINGJIAN, ZHONGGUO RENDA ZHIDU [THE SYSTEM OF THE NATIONAL PEOPLE'S CONGRESS OF CHINA]; GUO DAOHUI, FA DE SHIDAI JINGSHEN [THE SPIRIT OF THE AGE OF LAW] (1997).

analogous to one among many administrative agencies—and not an especially powerful one at that. It is true that the NPC and its Standing Committee enjoy sole authority to issue laws, but it is also true that the authority to promulgate the implementing regulations needed to make these laws fully operational reposes with the State Council. Given the high level of generality in which much legislation is framed, the wariness of administrative agencies about perceived encroachments on their prerogatives, and the fact that courts, as a practical matter, may lack the capacity routinely to secure agency compliance, they provide regulatory authorities with the opportunity, in effect, to rewrite or veto laws duly passed by the NPC.<sup>198</sup>

The 1995 APPCL illustrates both phenomena. As noted earlier, the acid rain regulations include provisions specifically rejected during the drafting of the very law from which they purportedly draw authority.<sup>199</sup> Conversely, the deadlock that eventually stifled the general implementing regulations meant that provisions of the 1995 APPCL that required State Council action remained effectively in abeyance, while many others continued to be vague both for those who would regulate and those to whom the law might apply, at least until the APPCL itself was revised in 2000. And although the 2000 law is significantly more stringent and detailed than was its immediate predecessor, many provisions of the 2000 law now await specific regulations from SEPA and the State Council. Although officials in both the ENRPC and SEPA appear confident that they will be able to pass such regulations, there is at least a significant risk that the 2000 law will experience some of the same pitfalls as the 1995 law.

These risks and difficulties are exacerbated, as one of the co-authors has noted elsewhere, by the nature of the problems that central governmental authorities have, even when dealing with a more concrete body of law, in insuring that sub-national units of government discharge their responsibilities in the manner that national legislation envisions.<sup>200</sup> China is a unitary state in which sub-national legislative and administrative measures are required to be consistent with national legislation and in which the Standing Committee has the authority to bring this about by invalidating any

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198. This phenomenon is insightfully discussed in Donald C. Clarke, *State Council Notice Nullifies Statutory Rights of Creditors*, 19 E. ASIAN EXECUTIVE REP. 9, Apr. 15, 1997. Concern about the reluctance of some governmental units to comply with court orders was a major motivation for a campaign launched jointly in 1999 by the Supreme People's Court and the Communist Party to promote better observance of judgments.

199. See *supra* notes 138-142 and accompanying text.

200. See Alford & Shen, *supra* note 17, at 139-43.

sub-national enactments it deems inconsistent.<sup>201</sup> Nonetheless, the dependence of local officials of national bureaucracies and local branches of the supposedly national judiciary on local governments financially and in other ways can be a strong pull in a very different direction,<sup>202</sup> while as a practical matter, the Standing Committee is unable to review the torrent of legal measures being produced at the sub-national level, notwithstanding the requirement of the newly issued Law on Legislation that it do just that.<sup>203</sup>

One reason that the NPC may have difficulty in more fully asserting its role as the supreme organ of state and highest legislative body, or otherwise distinguishing itself from administrative agencies, lies in the fact that it has but an attenuated public mandate upon which it might rely to ground its legitimacy in general or buttress its position with respect to particular measures. Talented scholars both Chinese and foreign, including Cai Dingjian, Guo Daohui, Murray Scot Tanner, Kevin O'Brien, and Michael Dowdle, have written on the growing capacity of NPC delegates to serve as "agents and remonstrators," to use O'Brien's phrase, and of the institution itself to reflect the growing pluralization of interests and viewpoints in today's China.<sup>204</sup> As the case of the 1995 APPCL shows, the NPC does, indeed, provide an arena in which competing interests can be expressed and resolved. Nonetheless, we ought not to ignore the limited character of that representation and the impact that it may have upon the articulation of interests and their competition. The 3,000-odd delegates to the NPC's plenary session are not elected by the public. Instead, the provincial Communist Party Standing Committee and the provincial People's Congress each draw up lists of nominees who are then acted upon by the latter and its standing committee.<sup>205</sup> The former list includes candidates proposed by the NPC Standing Committee itself and/or in consultation with organizations representing various societal interests, though it should be remembered that such groups are typically constituted from the

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201. See PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* (1997).

202. See Alford & Shen, *supra* note 17, at 140.

203. CAI, *supra* note 197, at 310; Zhonghua Renmin Gongheguo Lifa Fa [The Law on Legislation of the People's Republic of China] (promulgated Mar. 15, 2000).

204. Kevin J. O'Brien, *Agents and Remonstrators: Role Accumulation by Chinese People's Congress Deputies*, 138 CHINA Q. 359, 359 (1994) [hereinafter O'Brien, *Agents*]; KEVIN J. O'BRIEN, *REFORM WITHOUT LIBERALIZATION: CHINA'S NATIONAL PEOPLE'S CONGRESS AND THE POLITICS OF INSTITUTIONAL CHANGE* (1990) [hereinafter O'BRIEN, *REFORM*]; CAI, *supra* note 197; GUO, *supra* note 197; Dowdle, *supra* note 69.

205. See Dowdle, *supra* note 69, at 37-38.

top down and likely to be comprised, especially at the leadership level, of Communist Party members.<sup>206</sup>

Whatever the case may be with respect to delegates to the NPC's plenary session, it is even more pronounced with respect to its Standing Committee, which, by virtue, *inter alia*, of passing the bulk of national legislation, determining much of the agenda for the plenary session, and being charged with identifying conflicts between national and sub-national legislation is, at least functionally, China's most consequential legislative body. The Standing Committee's 155-odd delegates are nominated by the preceding Standing Committee and then voted upon by the full plenary membership at the outset of each session.<sup>207</sup> Approximately one-half of the Standing Committee's members are said to represent particular parts of the country while the other half have an unofficial interest group constituency-based portfolio (such as the All China Women's Federation, as Dowdle notes).<sup>208</sup> In actuality, the large majority of delegates live in Beijing (60-80% according to some counts),<sup>209</sup> which ought not to be surprising, given that they meet regularly, and are selected from government or state-led civic organizations and, indeed, in some instances, have held such positions concurrently with serving on the Standing Committee.<sup>210</sup>

The issue of popular representation arguably poses a particular dilemma for advocates within and beyond the Chinese government of stricter environmental regulation. Sensing that they lack the political power of their opponents, at least some such advocates have thought that their position might be enhanced by a careful and selective enlisting of public opinion in their cause. Toward that end, they have encouraged the publication in sympathetic state media of stories making their case, elicited "public" opinion about pending legislation (more systematically in the case of the water and land use laws than the 1995 APPCL), and have sought to use the NPC's investigative powers (*zhifa diaocha*) to draw attention to their cause.<sup>211</sup>

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206. See O'Brien, *Agents*, *supra* note 204, at 364.

207. Dowdle, *supra* note 69, at 39-40.

208. *Id.*

209. See O'BRIEN, *REFORM*, *supra* note 204.

210. *Id.*

211. Interview with Official D (1997), *supra* note 191; Interview with Official A (1999), *supra* note 94. See, e.g., Bian Jian, *Quanguo Renda Zhifa Diaocha Zu Jinri Qicheng* [The Recent Launch of the NPC's Investigation of Law Implementation], *ZHONGGUO HUANJING BAO* [CHINA ENVIRONMENTAL NEWSPAPER], May 15, 1998, at 1 (discussing *zhifa diaocha* with reference to the oceanic environmental protection law).

As adroit as these efforts may have been—and the ENRPC's utilization of the *zhifa diaocha* process to, *inter alia*, establish hotlines on which citizens could anonymously report pollution problems in Beijing, Tianjin, and other major locales garnered considerable attention<sup>212</sup>—they raise very difficult questions on at least two discrete levels. First, the relatively high profile approach these actions suggest is in some tension with less publicized attempts by the ENRPC, working with NEPA, to take advantage of the NPC's rising status to push emerging parliamentary procedures to their fullest as an avenue for advancing more environmentally focused legislation. Even more importantly, the invocation by advocates of stricter environmental regulation of public opinion runs the risk of “politicizing” environmental issues.

Ironically, throughout the history of the PRC, the environment has not been considered to involve politics, at least in the sense of raising questions about the authority of the Communist Party, notwithstanding the ways in which this issue has implicated interest group politics of the type that cut across the Party described earlier in this Article and has been the focus of some of the more pronounced and violent expressions of popular discontent in various localities across the nation.<sup>213</sup> Indeed, some Chinese observers have suggested that the perception that matters of the environment are largely divorced from front line politics may be a prime reason accounting for much of whatever success pro-environmental forces have achieved,<sup>214</sup> while one co-author of this study has argued elsewhere that low political visibility may also be a primary factor in the rapid spread of environmentally focused litigation (including class actions).<sup>215</sup> The effort to enlist public opinion to advance an environmental agenda may now have the unintended effect of demonstrating that, contrary to earlier assumptions, issues of the environment have the potential to pose very substantial questions of an intensely political nature with implications both for environmentally-oriented forces and Chinese authorities in general. This is particularly so as these issues implicate the amassing at a central level of expressions of public discontent and as they highlight

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212. Interview with Official D (1997), *supra* note 191.

213. Jun Jing, *Environmental Protests in Rural China*, in CHINESE SOCIETY: CHANGE, CONFLICT, AND RESISTANCE 143, 144 (Elizabeth J. Perry & Mark Selden eds., 2000).

214. Interview with Official A (1999), *supra* note 94.

215. Benjamin L. Liebman, Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1997).

the need for institutional channels through which such concerns might be articulated.

If institutional design may account in part for dimensions of the 1995 APPCL—such as its generality—that made enforcement problematic, it also, ironically, suggests paths for the law's further development. Although advocates of the 1995 revision of the APPCL were disappointed by their inability either to incorporate in the APPCL itself or re-capture through comprehensive implementing regulations many environmentally protective measures of the type discussed earlier in this Article, at least some believe that they were able to turn what many observers might deem serious structural problems—including the general language in which the APPCL and many other laws have typically been cast and the growing functional autonomy of sub-national units of government—to advantage.<sup>216</sup> So it is that sub-national authorities in parts of the country that evidence a relatively high concern with environmental issues and that enjoy relative proximity to inexpensive sources of cleaner fuels cited the 1995 APPCL to justify adopting measures such as tighter local standards regarding sulphur content and firm deadlines concerning the use of leaded gasoline. The Beijing and Shanghai governments, for instance, have been at the forefront of such measures: during internal debates over local rules, they cited Article 7 of the 1995 APPCL, which specifically authorizes sub-national authorities to set discharge standards that are “more stringent” than their national counterparts, as evidence of higher support for a cleaner environment in order to establish the nation's first mandated phase-out of leaded gasoline.<sup>217</sup> Proponents of stronger environmental regulation at the national level, in turn, have relied on such sub-national examples to demonstrate that stronger regulation does not necessarily entail weakened economic performance or other difficulties, thereby buttressing their own calls for further revision of the APPCL.<sup>218</sup>

Most notable, of course, has been the 2000 revision of the APPCL. Officials involved in drafting the new law attribute their success to three factors. First, and foremost, they state that overall consciousness about environmental problems, within the government and among the general population, increased significantly between 1995 and 1999,<sup>219</sup> as China witnessed a massive decline in air quality

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216. Interview with Academic A, *supra* note 65; Interview with Official A (1999), *supra* note 94.

217. *Id.*

218. Interview with Official A (1999), *supra* note 94.

219. Interview with Official A (2000), *supra* note 156.

nationwide. Although pollution was serious in the early 1990s, government and popular awareness of the problem was just beginning to form. By 1999, the seriousness of China's air pollution crisis could not be ignored. Concepts such as total loading, which had been fought over fiercely in the 1995 revisions, had already been incorporated into other governmental measures and policy statements by the time revisions were again being considered, so that by 2000 the perceived radicalness of these measures had decreased. In particular, the State Council's 1998 reply (*pifu*) on acid rain, which explicitly referred to total loading,<sup>220</sup> provided the ENRPC with a significantly changed legal and political backdrop, meaning that the ENRPC no longer needed to incorporate entirely new concepts into the law.

Second, the ENRPC's success also appears to have resulted in part because the committee learned from its experience in 1995. The ENRPC, backed by a strengthened environmental ministry, sought comments on the 2000 law early in the drafting process, and thus appears to have been aware of industrial ministry concerns well ahead of the bill's first reading. Officials state that they did a much better job both of soliciting views regarding the law and of explaining the need for the law.<sup>221</sup> The ENRPC held a series of meetings designed to "seek views," attended by representatives of affected industries and local governments. This work was also done much earlier in the drafting process than had been the case with the 1995 law.<sup>222</sup>

The ENRPC also appears to have been relatively successful in incorporating "public views" into the law. The ENRPC and SEPA conducted a series of investigations of environmental conditions at the local level, collecting materials both on the seriousness of environmental problems and on public attitudes toward the environment.<sup>223</sup> The ENRPC used these investigations to support its

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220. Reply of the State Council, *supra* note 140, art. 2.

221. Interview with Official A (2000), *supra* note 156; Interview with Official C, *supra* note 156.

222. Interview with Official A (2000), *supra* note 156.

223. *Id.*; Interview with Official C, *supra* note 156. For example, a 1998 SEPA nationwide survey on environmental attitudes, published in 1999, found that while environmental consciousness generally remains low, 56.7% of the people polled rated pollution as either "extremely serious" or "relatively serious." The survey found that 86% of respondents attributed environmental problems to the failure to enforce laws or the failure to obey laws; only a very small percentage of respondents stated that the problem was with weaknesses in laws themselves. See GUOJIA HUANJING BAOHU ZONGJU [STATE ENVIRONMENTAL PROTECTION ADMINISTRATION], JIAOYU BU [MINISTRY OF EDUCATION], QUANGUO GONGGONG HUANJING YISHI DIAOCHA BAOGAO [REPORT ON THE NATIONWIDE SURVEY ON ENVIRONMENTAL CONSCIOUSNESS] No. 4 (1999).

arguments that public concern for the environment had increased dramatically, and that the public was demanding tougher environmental standards.

After the draft was completed, it was also circulated to each province and major city; the provinces in turn were responsible for seeking views from subordinate levels of government. The ENRPC incorporated these views into a book, which, along with other materials regarding the need for revisions to the APPCL, was then provided to the NPC Standing Committee.<sup>224</sup> Thus it appears, at a minimum, that the law was presented to the Standing Committee in a form designed to show that the ENRPC had done its homework.

Third, part of the ENRPC's success in winning passage of the 2000 law may also be attributable to changes in the CLA. Whereas the CLA was a chief obstacle to tougher regulations in 1995, in 2000 it appears to have cooperated with the ENRPC.<sup>225</sup> At the very least, the CLA does not seem to have acted as an advocate for opponents of the law, as it had done in 1995.<sup>226</sup>

Changes in the CLA's approach to the APPCL may derive not only from changes in its views of environmental legislation, but also from changes in how the CLA views the specialized committees. Officials comment that since the beginning of the 9th NPC in 1998, the CLA has taken a more accommodating role toward its specialized committees, attempting to work with the drafts they provide, instead of assuming that the drafts require significant rewriting.<sup>227</sup> Although changed political attitudes toward the environment appear to have been the primary reason the 2000 APPCL passed with little trouble, comments regarding an institutional shift in the CLA's approach to draft laws suggests at least a possible trend worth further research.

Although officials involved in drafting the 2000 APPCL state that its progress through the NPC was relatively smooth, the law did face fierce opposition.<sup>228</sup> In particular, electricity producers (reorganized into companies after the abolishment of the electricity ministry) fought against its provisions regarding acid rain districts and sulphur dioxide districts. Electricity producers requested that the Economic and Finance Committee of the NPC oppose the law, and

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224. Interview with Official A (2000), *supra* note 156; Interview with Official C, *supra* note 156.

225. Interview with Official A (2000), *supra* note 156.

226. *Id.*

227. *Id.*; Interview with Official B (2000).

228. Interview with Official A (2000), *supra* note 156.

also sought to influence the changes through other channels.<sup>229</sup> Likewise, the coal industry, automobile producers, and the construction industry opposed various portions of the law, both through the Economic and Finance Committee and directly through meetings held by the ENRPC to receive opinions regarding the law.<sup>230</sup>

The nuances of the debates over the 2000 revisions are beyond the scope of this Article, which was largely completed prior to the passage of the 2000 APPCL. It is tempting to view the 2000 APPCL as somehow bringing closure to the controversy over the 1995 law, with environmentalists coming out on top this time. In many ways, the story of the 2000 law appears consistent with that of the 1995 law, with a fierce clash between environmentalists and industry representatives, albeit with a different result in 2000 than in 1995. The 2000 revisions are also consistent with a view of the NPC continuing to increase the depth and scope of its legislative drafting, with specialized committees, and in particular the ENRPC, still in the process of defining the particular roles they should play. Indeed, ENRPC officials clearly appear to have learned valuable political skills as a result of their defeat before the Standing Committee in 1995.

Yet it would also most likely be a mistake to read too much into the 2000 revisions. The ENRPC success was also heavily dependent on a changed political atmosphere, and in particular on the decision of the central government to make environmental protection a national priority. The ENRPC and SEPA have helped raise awareness of the need for tighter environmental regulations, and thus perhaps have played a role in altering how China's leaders conceive of environmental problems. In the end, however, it appears that the greater rigor of the 2000 APPCL was made possible because the central government had decided that curbing pollution would be a priority; viewed in this light the NPC appears to be continuing to act within the context of a system in which the central government (and thus the Party), not the NPC, is setting the terms of the political debate.

Therein lies both an irony and a larger lesson about the evolving role of the NPC. Because the Communist Party did not treat the environment as involving core political issues through the mid-1990s, the ENRPC and NEPA were able to achieve some victories through parliamentary maneuvers and a careful tapping of public opinion, but

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229. *Id.*

230. *Id.*

these triumphs were modest. It was only when the central leadership began to appreciate the extent to which environmental problems might be destabilizing and to mount vigorous national campaigns to foster environmental awareness that the ENRPC was able to push through strong air pollution legislation.

It is tempting to read this history as the product of the growing autonomy and institutional development of the NPC. There is, to be sure, something to be said for this perspective, given the ways in which the ENRPC was able to elicit and give voice to popular views, at least among intelligentsia and similar elites in Beijing and Shanghai. Representation is, after all, a prime function of legislative bodies. One could, however, alternatively read this same history as indicative of how tied the NPC remains to orthodoxy laid down by the Party. In this account, the different fates of the ENRPC's two efforts to promote a strong air pollution law may be explained by the fact that the Party leadership, which did not view the environment as politically freighted in 1995, had come to embrace at least the rhetoric of environmentalism by 2000. And while it is true that the impetus for that embrace owes something to rising public opinion that the ENRPC has helped articulate, the NPC's role appears less that of a pluralistic, democratic body providing routinized outlets for the expression of citizen viewpoints generally and more that of another elite bureaucratic entity whose role remains incompletely defined in a world in which political power, at least in central government and party circles, continues to be tightly held.

Stated differently, although the NPC is maturing as a legislative body, it continues to operate on a playing field that remains in significant respects pre-set by the Party. Responsiveness to certain concerns from elite circles, though arguably laudable, is not necessarily equivalent to democratization. Law does matter in China—as evidenced in sectoral battles over substantive issues such as coal washing and more symbolic skirmishing over use of the label “illegal,” not to mention the extensive procedural maneuvering between the NPC and State Council. Yet we would be well-advised not to lose sight of the institutional context within which it operates. China is not alone in suffering from problems of institutional design when it comes to combating air pollution, as Ackerman and Hassler demonstrated years ago with respect to the United States, but that provides scant consolation to those who hope to bring law to bear in addressing the PRC's many and serious environmental dilemmas.