

FEATURE ARTICLE

Legal Advocacy in Environmental Public Participation in China: Raising the Stakes and Strengthening Stakeholders

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This article describes the political and legal dynamics of the development of public participation in the environmental sphere in China. With reference to recent experiences, particularly China's initial implementation of public hearings on environmental impact assessments, this article examines recent public participation successes and obstacles that may block further development of public participation mechanisms. Successes have included: raising public consciousness and mobilization, creating channels for public feedback to policymakers, involving the public in enforcement, and linking to international resources and legal frameworks. Remaining obstacles to effectiveness include: delays by government in involving the public on project approval decisions; inexperience and imprecise understanding of the government's responsibility and options in responding to public opinion; political and economic pressures on officials and private individuals; and gaps in the legal framework for enforcement of environmental rights. Finally, the article discusses the need and points of entry for addressing such obstacles by increasing the participation of legal advocates in environmental protection through various roles as public interest advocates and technical legal experts in the environmental hearing, legislative drafting, and enforcement process.

A sense of injustice over the sacrifice of environmental and human health in the name of economic development is mobilizing Chinese citizens to voice environmental concerns through both official channels and unauthorized protest. Over the past few years the government, increasingly concerned about the sustainability of China's environment and about responding to social instability caused by environmental harms, has officially embraced public participation (*gongzhong canyu*) as a way to bolster environmental protection—through public hearings, strengthened access to information, and government/private sector collaborations. This experiment with public participation, undertaken in part with assistance from international organizations such as the American Bar Association (ABA), is beginning to accumulate a record of experience that highlights openings for fundamental changes in the political dynamics of environmental protection and local governance.¹

Public participation unlocks a door to new resources in managing China's difficult path forward to develop sustainably and govern more responsibly. It can bring diverse knowledge and expertise

to the table, alert all parties to community concerns and latent environmental problems, enhance public knowledge about and support for development projects, give weight to public values favoring environmental protection, and strengthen civil enforcement of environmental regulations. These resources could prove critically useful as China faces increasingly dire environmental woes. Air and water pollution claim hundreds of thousands of lives annually; the country's ecosystem is irreparably losing ground to economic development projects; and large-scale environmental accidents threaten public health and stability. Moreover, "incidents" of social disorder, many of which are in response to environmental fears, are occurring widely and more frequently throughout the country (Economy, 2004; Orts, 2003; Yardley, 2005). In 2005, public security authorities reported 87,000 public protests, and the Chinese government reported 39,000 cases of "public order disruptions" for the first six months of 2006 (Ni, 2006).² Strengthened public participation mechanisms could provide a legitimate, effective means for citizens to have their voices heard in addressing environmental crises.

Nevertheless, it has become apparent that introducing effective processes will require more than increasing support for public participation in China. There is a disjuncture between legal environmental public participation requirements and their implementation that reflects in part the strong tension between public participation goals and a widespread official concern that participatory processes will open the floodgates to public disorder and conflict among different social factions. A change of orientation towards governance, including greater tolerance for early information disclosure and early public involvement in planning and resolving conflicts, will be needed to translate public participation mechanisms into government accountability from below.

This paper gives an overview of obstacles that continue to limit effective implementation of citizen participation in environmental regulation, and identifies openings for addressing remaining issues. It finds that increasing the role of third-party advocates, including public and private lawyers, nongovernmental organizations (NGOs), and lay advocates, in supporting implementation of public participation can overcome the obstacles and broadly strengthen enforcement of environmental regulations.

With reference to recent case studies of environmental conflicts that highlight obstacles to, and strategies for, effective public participation, this paper argues that the increased confrontation *and* facilitation—all within the formal legal system—that legal advocates bring could offer the most realistic hope for positive change in strengthening China's environmental governance system.

THE LEGAL FRAMEWORK FOR PUBLIC PARTICIPATION IN REGULATING CHINA'S ENVIRONMENT

National environmental regulators, in their attempt to recognize and moderate the environmental impact of China's rapid urbanization and development, have shown an unusual willingness to incorporate civil society into their dialogue and regulatory regime (Alford & Liebman, 2001). This concept, referred to as "public participation," has been officially noted as having its basis in a bundle of different citizen rights that

can be identified as the right to information; right to comment; right to organize; and right to sue for enforcement (Jia, 2005; Xia, 2005).³ Although the Chinese central government has traditionally sought informal, non-binding feedback for proposed policies, this view of public participation as a civil right is new. The ongoing development of the legal framework for environmental public participation reflects this evolving orientation from nonbinding advisory mechanisms to binding obligations grounded in citizen rights.

"Public participation" already implicates a rich set of implementation mechanisms that have started to be introduced in China, including public hearings (*gongzhong tingzheng hui*), intergovernmental coordination meetings (*xietiaohui*), advance briefings (*chufenghui*), surveys (*diaocha*), solicitations of opinion (*zhengqu yijian*), as well as government hotlines and Internet communications. This paper focuses heavily on public hearings as mechanisms with the capacity to strengthen transparency and accountability in environmental governance; however, many comments about the openings and limitations of public hearings apply generally to all of these tools. (See Box 1).

BOX 1. Experiments in Public Hearings

China has been holding legislative public hearings for the last decade, as well as hearings (publicly) on administrative penalties, including environmental penalties. Among these experiments, hearings on setting prices (of train tickets, park admission tickets, and school tuition) are by far the most commonly used; over 200 pricing hearings have been held in China to date (Jia, 2005). Pricing hearings, legislative hearings, and penalty hearings are different in kind and purpose than the types of public hearings beginning to occur on environmental planning and licensing related to EIA. However, the concepts are still so new that Chinese officials often fail to distinguish between public hearings held to assess environmental impact before Environmental Protection Bureau (EPB) approval of construction projects or environmental plans, and these other types of hearings. This can lead to confusion about how much actual experience is being reported by local authorities on holding "public hearings" (Jia, 2005).

Key Public Participation Laws

The key laws in China's current environmental public participation regime are the 2003 Environmental Impact Assessment Law (EIA Law) and the 2004 Administrative License Law (ALL).⁴ These laws require public participation under certain circumstances, and introduce certain disclosure obligations (see Box 2), but generally leave discretion to local authorities to select public hearings from among a variety of other public participation tools, such as

surveys and solicitation of public opinion. There are also broad exceptions to protect "state secrecy." Often, this has translated into non-compliant processes and non-representative citizen participation, as evidenced in several examples discussed herein. In one recent national survey, Chinese citizens across the board described themselves as sorely underrepresented in environmental decision-making.⁵

In an attempt to address some of these gaps, clarify legal obligations, and strengthen

BOX 2. Legal Provisions for Public Participation in Chinese Laws

The legal foundation for public participation in China's environmental regime is contained in the 2003 Environmental Impact Assessment Law (EIA Law), the 2004 Administrative Licensing Law (ALL), and related implementing measures. Select provisions include:

Public participation is required for:

- Construction projects that may have a major environmental impact (EIA Law, Art. 21);
- Certain "special plans" which may possibly cause adverse environmental impact and directly interfere with the environmental rights and interest of the public (EIA Law, Art. 11; EIA Implementing Measures, Art. 33);
- When the license is of direct significance to the interest of the applicant and others and the hearing is requested following a public notice period (ALL, Art. 47); and,
- When license applicants and interested parties request a hearing in cases of significant impact on their interests (ALL Implementing Measures, Art. 5).

Public hearings are permitted:

- When the license is of great importance to public interest and the agency considers it necessary (ALL, Art. 46);
- Whenever environmental agencies desire to hold a hearing for administrative licenses touching upon major environmental protection in the public interest (ALL Implementing Measures, Art. 5);
- In connection with EIAs for construction projects (ALL Implementing Measures, Art. 6);
- In connection with environmental impact reviews of government policy "plans" (ALL Implementing Measures, Art. 7); and,
- Whenever environmental agencies are drafting policies that engender great divisions of public opinion, and for environmental legislation (ALL Implementing Measures, Art. 39).

In each case above, there are exceptions to protect "state secrecy." Public participation obligations are often discharged through surveys or collection of expert opinion.

Information disclosure provisions further enhance public participation rights:

- The developer and the EPB each shall disclose key information concerning the EIA process to the public at relevant points during the EIA report preparation and review process, and provide a mechanism for collecting public opinion (EIA Implementing Measures, Arts. 5 and 7-9); and,
- License applicants and interested parties have the right to "consult the files" (ALL Implementing Measures, Art. 12(8)).¹

compliance, SEPA recently issued implementing measures under both laws. The 2004 “Environmental Protection Administrative Licensing Hearings Provisional Measures” (*huanjing baohu xingzheng xuke tingzheng zanxing banfa*) (hereafter, ALL Implementing Measures) and 2006 Provisional Measures for Public Participation in Environmental Impact Assessment (*gongzhongcanyuhuanjingyingxiang pingjia banfa*) (hereafter, EIA Implementing Measures) delineated and expanded citizens’ participation rights in EIAs for environmental administrative licensing of projects and plans, as well as in construction projects’ preparation and agency evaluation of EIA reports. The EIA Implementing Measures, which were developed through a participatory process that included solicitation of public comment through SEPA’s website, also introduced a new focus on information disclosure in addition to the solicitation of public opinion.⁶ International organizations such as American Bar Association, have been working with SEPA and environmental

protection bureaus (EPBs) on public participation training. (See Box 3).

In certain cases, municipal governments have passed measures that expand on the national-level public participation rights in the environmental sphere. Most notably, Shenyang adopted Measures on Public Participation in Environment (hereafter, Shenyang Measures), that detail public disclosure and public participation requirements, and direct the EPB to assist with discovery in private environmental lawsuits.⁷ SEPA officials reference the Shenyang Measures as the first and best example of local government regulations on implementing comprehensive environmental public participation rights. Several provincial and large municipal level governments have adopted “open government information” initiatives (the most notable being Guangzhou and Shanghai), which have encouraged broader access to government information. In January 2006, there were at least 30 such provisions in place (Horsley, 2006).

BOX 3. American Bar Association’s Environmental Governance Work in China

The American Bar Association (ABA) was invited by China’s State Environmental Protection Administration (SEPA) in 2002 to provide technical and financial support for SEPA’s governance reform efforts, including promoting public participation, increasing environmental NGO capacity, and improving environmental enforcement and dispute resolution through courts. With assistance from SEPA and ABA (as well as other foreign technical assistance providers), local governments have begun to adopt public access regulations, create channels for providing public feedback to policymakers, and raise public consciousness and mobilization.

Although the legal framework continues to develop, implementation remains weak and geographically disparate.⁸ Recent experiments with public hearings that SEPA and some municipal EPBs have carried out illustrate specific implementation deficiencies and obstacles. Recent case studies elucidate these obstacles to implementation. As they indicate, a strengthened role for public participation may help address deficiencies that currently exist in the environmental protection regime.

ENVIRONMENTAL PUBLIC HEARINGS CASE STUDIES

Over the last few years, as the momentum grew for expanded environmental consciousness and legislative reforms favoring greater environmental public participation, China implemented its first public hearings on local environmental licenses and environmental plans. The first national public hearing on environmental impact assessment (EIA) was held

in 2005. This public hearing on the Yuanmingyuan (Old Summer Palace) lake drainage project EIA attracted national attention, and is widely viewed as being the first of its kind in China and a model for future environmental public hearings. Yuanmingyuan was preceded by a noteworthy public hearing the previous year, held by the Beijing Municipal EPB on the approval of an EIA administrative license for construction of a high-voltage power lines project. Although local government agencies in China have held public hearings on other issues prior to these cases, the level of attention and interest in these two hearings is rightly deserved because they were generated by and responded to true civil society movements at the local and national level.

CASE 1: High-Wire Act—The Baiwangjiayuan Public Hearing

In 2002, in order to power the myriad sporting facilities, residential, and commercial developments that have resulted from Beijing's pre-Olympiad building boom, the Beijing Electric Power Company developed a plan to construct a series of high-voltage electric towers running through the northwestern quadrant of Beijing, known as the "*Xi-Shang-Liu*" (also called "9950") project. The project's EIA report, prepared in 2003 by Capital Railway Scientific Research Institute, concluded that the proposed power line route was basically reasonable and feasible, and that the average electromagnetic radiation along the route (220KV) would meet the requirements of the national standard (500KV) and its safe distance requirements (more than 5 meters).⁹ The EIA recommended safety warnings on the electric towers located in residential areas, as well as public education to increase the community's understanding of and support for the project. The report contained a section on "public participation" that reportedly surveyed the opinions of 102 people in Beijing's northwestern quadrant and concluded they favored the project (Licensing Hearing System, 2005).

When construction in residential areas commenced, residents in the affected Baiwangjiayuan community mobilized to question the project's assessment of "safe" environmental impact. Residents sought to block construction and requested, under Chapter 4 of the EIA Law, that the Beijing Municipal EPB hold a public hearing on whether to grant the environmental administrative license. Using foreign environmental health data and international standards, they raised concerns about the Chinese

national standards used to determine what constituted a "safe" distance from the radiation that would be emitted by the lines, particularly with respect to the safety of children in preschools and sick people in hospitals along the route. As an alternative, they advocated burying the high voltage wires underground, a concededly more expensive measure that would significantly reduce radiation exposure.

With community discontent simmering and confrontations with power line construction crews flaring up, SEPA was spurred on 17 June 2004 to quickly issue and put into effect the ALL Implementing Measures. SEPA used the ALL Implementing Measures to compel the Beijing EPB to grant the request for a public hearing in the Baiwangjiayuan case.

On 13 August 2004, the Beijing EPB thus convened China's first administrative licensing EIA public hearing (Zhu, 2004). Vocal community residents, including engineering and environmental experts living in Baiwangjiayuan, were invited to make statements, challenge the EIA report's conclusions, and present their own evidence. Although participation was by invitation only, participants and experts generally agree that the selected speakers were broadly representative and the hearing permitted an open airing of the conflicting views challenging the government's proposed decision (Licensing Hearing System, 2005; China's Environmental Protection, 2005; Environmental Public Interest Litigation, 2005). As one SEPA official has commented, "a rural migrant [such as the one pictured] would never otherwise have the opportunity to express his opinions directly to [Beijing] government officials" (China's Environmental Protection, 2005).



Rural migrant making comments at the high voltage wire hearing.
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Moreover, the hearing room was open to the interested public as audience—which filled the room to capacity and spilled into an overflow room, where they watched the hearing via television. Outside the Beijing EPB hearing site, community residents organized a large and peaceful crowd, all wearing matching T-shirts under the banner “Resist Radiation Pollution,” to demonstrate their support. Local and national media reported widely on the strikingly well organized community members participating at this hearing. (See photo below).



Community residents protest peacefully outside the Baiwangjiayuan hearing. © Bie Tao

Despite residents' apparent success in bringing attention to their environmental impact concerns, less than a month following the hearing, the Beijing EPB issued a decision declining to reconsider its earlier approval of the project. As basis for its decision, it relied both on the Beijing People's Government's prior general approval of the power construction project, and the national standards for electromagnetic radiation exposure, without addressing directly the hearing's evidence of problems with these sources (China's Environmental Protection, 2005; Environmental Public Interest Litigation, 2005). Community residents appealed the Beijing EPB decision to SEPA, arguing among other things that the EPB had failed to make its decision according to the hearing record or to issue an explanation of its decision to accept or reject the main views presented in the public hearing, as required by Art. 48 of the ALL and Art. 30 of the ALL Implementing Measures. In April 2005, SEPA issued a decision

rejecting their arguments and affirming the Beijing EPB decision (SEPA Decision No. 21, 2005).

The consensus of Chinese experts is that the Baiwangjiayuan public hearing simply happened too late in the process for the proposed alternative of burying the lines to be adopted. Approximately three-quarters of the project's towers had already been constructed by the time the hearing was held (Licensing Hearing System, 2005). Despite theoretical agreement that the EPB should consider the environmental impact and alternatives of a project based on conditions *before* the project began, it was practically impossible for the EPB not to consider the Beijing Power Company's sunk costs in the already-constructed towers. As a result, although the public hearing provided an outlet by which the affected communities could express their views, the community continues to await a substantive response to their concerns.¹⁰

In addition to administrative appeals, community residents also sought to appeal the Beijing EPB's decision to the Beijing Haidian District People's Court.¹¹ The court held a hearing on the case on 3 December 2005, and plaintiffs presented their arguments that the Beijing EPB failed to base its decision on appropriate evidence and law. While awaiting this hearing, residents had sought to obtain a court order staying construction until the litigation was resolved. After issuing a temporary initial stay in December 2004, in January 2005 the court determined that a stay was unnecessary because continued construction was necessitated by important public interests and would not affect the outcome of the case (Haidian People's Court, 2005). Although approximately 20 to 30 members of the interested public turned out to observe the court hearing on the merits in December 2005, knowledgeable observers comment that the delay and disappointment to date since the Baiwangjiayuan public hearing have caused many community residents to lose confidence in the legal process (Expert B, 2006).

CASE 2: Addressing the Drought of Experience—Yuanmingyuan Public Hearing

Building on the Beijing EPB's experience in holding the Baiwangjiayuan hearing, less than a year later, SEPA held China's first national-level public hearing on the environmental impact of a proposed government action. As with Baiwangjiayuan, the Yuanmingyuan public hearing was generated by civil

society pressures, started by a Lanzhou University professor who visited the Old Summer Palace Park in March 2005. He observed that park officials were engaged in a massive construction project to line the Old Summer Palace's famous lakes with plastic and cement in order to prevent drainage.

Water shortages in Beijing have meant the lakes at this major tourist site are dry nine months a year. To protect the Old Summer Palace lake scenery, various Beijing and national government authorities had apparently prepared and approved the anti-drainage project.¹² Outraged at the serious permanent ecological damage threatened by the project, the professor exposed the construction on a website and sparked widespread national attention and public concern.¹³

The quickly escalating public outcry prompted the Beijing Municipal EPB and Haidian District EPB to investigate, whereupon they concluded that the project was being carried out without regard for EIA procedures and approvals. The park administration defended itself with the surprising argument that projects like this one, for the purpose of protecting the park's lake environment, are not the type of projects that "impact" (meaning, apparently, *incidentally* impact) the environment under the law ("Old Summer Palace," 2005). Nevertheless, on 31 March 2005, SEPA ordered the developers to immediately cease construction on the Old Summer Palace project and undertake the missing EIA application and approval procedures.

On 7 April 2005, SEPA announced that it would convene a public hearing on the matter and invited interested members of the public to apply to participate in the hearing (SEPA Announcement No. 13, 2005). Although the timing was extremely compressed, more than 200 people applied to participate by the deadline four days later, and SEPA announced the names and work units of the 73 chosen "public hearing representatives." These included Old Summer Palace officials, Beijing government officials, scholars (including the Lanzhou professor who catalyzed the issue), students, business representatives, engineers, other professionals, and NGOs (SEPA Circular No. 117, 2005). On April 13, these representatives gathered for the public hearing at SEPA headquarters to consider whether: (1) the project failed to protect the local ecology, (2) the expert opinion on which the project plan relied was based on true science, and (3) the construction that had already begun should be demolished and removed.

The Yuanmingyuan hearing is widely perceived in China as a model example of implementation of the public hearing process. As in the Baiwangjiayuan case, a cross-section of the interested public was invited to participate in the hearing, and participants vigorously presented opposing viewpoints. They directly and publicly contested the position and evidence offered by government officials in the park administration.¹⁴ Unlike the Baiwangjiayuan case, the Yuanmingyuan hearing was broadcast nationally on central television and widely covered in the news media, providing a huge civic legal education benefit. As SEPA Vice Minister Pan Yue summed up:

Regarding the result of the Yuanmingyuan construction public hearing, I think a democratic process is the most important goal. The whole process of this public hearing, including the sign-up, the hearing itself, the EIA report, [and] the implementation of the administrative result all were made public through the Internet and media, and one can say this is our most thorough public participation attempt to date (Xia, 2005).

Importantly, NGO representatives from prominent national environmental groups such as Friends of Nature and Global Village Beijing played a leading role in planning and presenting the case in the "public interest." By contrast, no NGOs were officially represented in the Baiwangjiayuan hearing; rather, civil society was represented by *ad hoc* committees of concerned residents who had organized around the single issue of the power lines. In part due to national NGO participation, the Yuanmingyuan hearing involved greater attention to the public's procedural participation rights and implementation through hearing rules, as well as greater national publicity, more expert participation, and increased attention to the report's conclusions.

Following the hearing, SEPA gave the park administration 40 days to submit an EIA report. Initially, the publicity and political sensitivity of the case reportedly scared off all of the potential environmental assessors from being the lead work group on the report, delaying the starting of the evaluation and report for more than a month after the hearing, until Tsinghua University Environmental Impact Assessment Office finally agreed to undertake the task ("High Degree of Difficulty," 2005; "SEPA Vice Minister Criticizes EIA," 2005). Tsinghua

organized several other prominent Beijing universities to join the assessment, and submitted the EIA report by the last week of June. Although critics noted that the allotted timeframe for conducting the assessment was far too short for a project of this complexity and importance, they generally praised the report for its breadth of scope and depth of analysis. In another first, SEPA made the EIA report publicly available on its website.¹⁵

The report's detailed analysis addressed the ecological concerns raised in the hearing, and concluded that the park's plan lacked reasonable scientific basis and failed to consider alternatives, and that the lake lining had already seriously damaged the park's ecology. The report thus recommended the project's remaining plan be completely altered. Rather than lining the lake bottoms with plastic and concrete composites, it described alternative measures involving both increased water conservation and water reclamation within the park, and more environmentally friendly methods of preventing drainage by lining the lake bottoms with natural materials (Yuanmingyuan EIA Report, 2005). On 7 July 2005, SEPA approved the EIA report.

Although the Yuanmingyuan hearing appears to be groundbreaking for China, there was a major shortfall that ultimately weakened the process. Legal experts have pointed out that SEPA voluntarily convened its public hearing during the stage prior to the EIA report, when public hearings are not in fact mandated; it then failed to convene a public hearing after the EIA report had been submitted, while the agency was considering the report's approval, when a public hearing *is* mandated by the EIA Law and Implementing Measures (China's Environmental Protection, 2005; Environmental Public Interest Litigation, 2005).

The final EIA report contained important assumptions and limitations that would have warranted public input. Significantly, the assessment explicitly limited its evaluation and recommendations to the narrow question of analyzing the impact of the relatively small part of the project remaining to be constructed, taking the existing investment and its environmental impact as given (Yuanmingyuan EIA Report, 2005). By the time SEPA halted the project and held the hearing, the project was already approximately 90 percent completed, at a cost of 37 million Yuan (over \$4.6 million) (Yuanmingyuan EIA Report, 2005). SEPA's approval, sticking closely to the report's conclusions, left the existing construction mostly intact, ordering only a part of it

to be dismantled ("SEPA Demands," 2005; "SEPA Says Old Summer Palace," 2005). In what was evidently a political decision, SEPA thereby rejected arguments by experts and the public to dismantle the entire project, with the park administration liable for the ecological losses and restoration costs caused by its unlawful action.¹⁶

Also, despite clear evidence of the park authorities' fault in failing to conduct an EIA on the project and the EIA report's evidence of the resulting serious ecological impact of their actions, to date, no park officials have been sanctioned for this failure, nor has the agency been ordered to otherwise pay for the damage.

Even with these limitations, however, the Yuanmingyuan hearing—and the related public attention and feedback—was successful in sparking some modifications to the remaining project. More importantly, perhaps, the case demonstrates that direct conflict between public opinion and government decision-makers can be aired in an orderly way through a public hearing, without threatening the stability of social order. By potentially assuaging fears of government officials about public participation in the EIA process, Yuanmingyuan thus deserves praise as China's first successful public hearing on environmental impact of a controversial and high visibility construction project.

OBSTACLES: LIMITATIONS ON THE IMPLEMENTATION OF MEANINGFUL PUBLIC PARTICIPATION

In over two years since the regulatory regime for public participation in environmental decision-making was established, Baiwangjiayuan and Yuanmingyuan stand out as China's primary examples of its implementation.¹⁷ Officials outside Beijing, as a rule, have not yet emulated these examples, and are not yet providing regular channels for the public to provide input to, or to raise concerns and challenges with regulatory policymaking such as EIAs.

Why has public participation developed in such a halting and ineffective way in China? At a fundamental level, local and provincial environmental authorities have exhibited different levels of tolerance for opening up environmental decision-making to allow greater public participation. As one participant at a SEPA/ABA training session put it, when the EIA Law first appeared, it was believed that, "public participation would cause confusion and chaos and only when everything

was completely controlled by the government can a burst of energy be formed.” (ABA Report, 2005). There is a common anxiety that runs deeper than the mere concern over how to hold an orderly hearing. It goes to the underlying concern with finding “harmonious” solutions to public conflicts between government and citizens and between different factions of the citizenry. SEPA itself has identified some of the challenges that have resulted from this tension, noting:

[A]s two years of experience implementing the EIA Law demonstrates, there still exist some problems in China’s public participation in EIA, concentrated on issues that information is not being fully and timely disclosed; the scope of public participation is not comprehensive; the representativeness of the people being targeted is not strong; and there is a lack of necessary information feedback [provided to the government] (SEPA Solicitation of Public Comment, 2005).

The Baiwangjiayuan and Yuanmingyuan public hearings and other recent public participation experiences suggest that these are not the only challenges in translating public participation from concept into reality.

Loopholes in the EIA legislative framework

The fact that both the required EIA reports and the public hearings over the Baiwangjiayuan and Yuanmingyuan developments occurred well into the construction process was *de facto* sanctioned by a loophole within the EIA regulatory regime. Article 31 of the EIA Law explicitly permits construction projects and government to “make up” (*bubao*) a missing EIA report after the construction project has started, essentially without penalty for the consequences of the delay. Crucially, there is no counterpart requirement that the environmental impact of a project be evaluated as of a date prior to construction, when the public participation process should originally have been implemented. Nor does the law specifically provide that the responsible agency or enterprise must assume liability for environmental damage imposed because of failure to conduct the EIA in advance.

The so-called “Environmental Impact Assessment Tempest” (*huanping fengbao*) of 2005 is another telling example of this and other legislative loopholes. In what was seen as a bold political

move by SEPA, in early 2005, the agency temporarily halted construction on 30 high profile, large-scale, construction projects, including the Three Gorges Dam (Chuan, 2005; “Halt of Projects,” 2005). SEPA’s order pointed out that these projects (most of which were being constructed by state-owned enterprises) were all unlawfully approved by relevant government departments because they had started construction either without having an EIA or without obtaining the environmental protection administrative authority’s approval of the EIA.¹⁸ The State Council ultimately intervened to “coordinate a solution” (*xietiao*), and settled the matter by permitting the projects to make up their EIA requirements and restart construction, apparently without consequence or penalty (Environmental Public Interest Litigation, 2005). As one Chinese commentator noted, “[if] you can just start projects without EIA and then make it up later, the point of EIA itself is not accomplished, which is to have consideration of environmental impact in advance” (Environmental Public Interest Litigation, 2005).

A lack of defined standards can also create loopholes under which officials, developers, and work units can argue they have complied with EIA Law without implementing governance practices. For example, current law fails to provide standards for appropriate representativeness and informed comment. As in the Baiwangjiayuan case, developers often discharge their EIA obligations through surveys, and no standards exist for ensuring a representative sample. In one other exemplary case from 2004, after 200,000 residents of the southern city of Shenzhen organized strong opposition to a throughway being built to Hong Kong, it was discovered that EIA requirements had been satisfied by surveying 50 people on the eastern side of the city—even though residents on the western side of the city would suffer the greatest impact (Environmental Public Interest Litigation, 2005). Such cases illustrate why in practice the “public participation” section of most EIA reports in China, under which public opinion is supposedly collected and summarized, invariably concludes that the public has no significant concerns that are not addressed by the project. The 2006 EIA Implementing Measures (which do not contain any specific penalty or enforcement provisions) try to produce more representative samplings, by setting out what procedures should be followed through respective public participation mechanisms (Art. 15).

Weak Institutional and Judicial Enforcement Mechanisms

The failures to apply environmental impact modifications to the entire projects in Yuanmingyuan and Baiwangjiayuan illustrate the institutional weaknesses of environmental protection authorities in China. Seeking a broader outcome that incorporates appropriate incentives for early compliance, but that may be more costly and thereby more punitive for developers and local government, ultimately requires political tradeoffs that environmental authorities may not have the clout or resources to make or enforce. Implementation and enforcement of the EIA Law and its public participation requirements are weakened by overlapping and confusing jurisdiction and by severe institutional and financial deficiencies, of both regulatory and judicial entities, as well as underdeveloped civil enforcement mechanisms.

/// To date, courts have been reluctant to exercise their authority to enforce mandatory environmental public participation or information disclosure requirements.

In addition to SEPA, provincial, municipal, county and township level EPBs are tasked with implementing environmental laws and regulations. Even as public observers celebrated the EIA Tempest, other Chinese legal analysts privately shared with the authors the observation that SEPA in fact may have lacked legal authority for halting construction on some of the targeted sites. That is, regulatory power over requiring EIA on some of the more local projects might arguably have fallen only within the purview of local or provincial EPBs, or even only of local or provincial people's governments, depending on the type of project involved. This may be one reason for the State Council's involvement in resolving big cases such as the "EIA Tempest" and the Songhua River accident. The State Council is reportedly committed to drafting EIA implementing measures that will extend

detailed EIA public participation requirements to all relevant agencies, following the February 2006 issuance of a Decision on Fulfilling Scientific Development and Strengthening Environmental Protection. It remains to be seen whether this anticipated regulatory guidance will resolve these interagency and intergovernmental coordination problems that still leave gaps in the framework.

As many commentators have observed, SEPA and EPB governance is also generally hampered by insufficient resources, understaffing, lack of training, political pressures favoring local development, conflicts of interest, and corruption (Economy, 2004, 2005; Ferris & Zhang, 2005; Tang, Tang, & Lo, 2005). These same issues affect political will to invite public participation in environmental governance. Under the ALL, relevant government authorities (not the project applicant or hearing applicant) are responsible for all costs incurred in carrying out public participation (Art. 47). Compounding the problem, the central government does not allocate any funding to support such efforts.

Legal advocates are left with limited recourse for enforcement or redress in the event environmental rights are breached. To date, courts have been reluctant to exercise their authority to enforce mandatory environmental public participation or information disclosure requirements. Although the EIA Law, the ALL, and the related implementing measures are silent as to matters of private enforcement, these requirements are in theory enforceable through the general right to seek higher government administrative review of lower government decisions (*fuyi*) and, if not satisfied, then to bring administrative lawsuit in court (*susong*), that is available under the organic Environmental Protection Law (1989), the Administrative Litigation Law (1989), and the Administrative Review Law (1996).¹⁹ Nevertheless, the effectiveness of such civil recourse is limited by well-known political and capacity problems with judicial enforcement of the law, such as insufficient judicial independence, undue local influence over the courts, and insufficient training (Alford & Shen, 1997; Kahn, 2005). To the authors' knowledge, no Chinese court has yet to accept a case and issue a judicial decision to mandate government compliance with public participation or information disclosure rights.

Compounding the situation of weak government implementation and enforcement authority, China has limited the avenues through which NGOs, the bar, or private citizens can seek to share SEPA's

burden by pursuing civil enforcement of policy decisions. NGOs in particular face onerous and arbitrary licensing restrictions, and environmental advocacy NGOs across China are closely scrutinized (Yardley, 2005; CECC, 2005; US Embassy, 2003; Ma, 2005). In 2005, Chinese governmental NGOs were required to join and pay dues to a new quasi-governmental umbrella organization, the All-China Environment Federation (ACEF). Although officials assert that the ACEF will ensure better coordination and encourage NGO/governmental communication, it has the capacity to regulate, and potentially co-opt, civil society groups (CEEC, 2005).

Legal advocates, too, have been increasingly scrutinized and penalized for trying to assume roles in legal disputes (Cohen, 2005). In May 2006, the All China Lawyers Association (ACLA) issued a controversial Guiding Opinion for lawyers participating in sensitive cases involving “mass litigation.”²⁰ The opinion, specifically applicable to environmental cases with ten or more plaintiffs, instructs lawyers to: (1) obtain approval from at least three partners in the law firm before taking on such a case; (2) “promptly and fully communicate” their taking on the case to the local justice bureau and local bar association; (3) accept the “supervision and guidance” of local justice authorities and bar associations in handling the case; and (4) refrain from advising clients submitting petitions (through the *shangfang* system of petitioning legislative representatives, separate from complaints in the court case) to the government regarding the case (Guiding Opinion, 2006). While some lawyers defend the ACLA opinion on the grounds that it is intended to provide greater political and professional support for lawyers handling these difficult cases, many others have publicly objected to the opinion’s control and potential chilling of lawyer involvement in environmental and other important public interest litigation.²¹

The problems and limitations in administrative and civil enforcement authority may explain in part China’s resort to draconian punitive measures in egregious environmental disasters. The prosecutions following the accidental large-scale ammonium nitrate spill by a Chuanda Conglomerate factory in the Tuojiang River in Sichuan in February 2004 are typical examples. This spill killed huge numbers of fish, caused a month-long water suspension emergency in Jianyang city, and created lasting ecological problems. The primary enforcement response was imposition of very large administrative fines and compulsory compensation, as well

as the convictions in criminal trials of three high company officials, the Qingbaijiang District EPB Vice Director, the District environmental monitoring station head, and the District environmental management office head.²² Criminal prosecutions are generally expected in most high-profile environmental accidents, including the most recent Songhua River toxic spill in November 2005.

While the possibility of severe punitive sanctions should in theory deter violations, this approach underscores the lack of consistent monitoring and enforcement standards, on a routine level, that could be more successful in preventing such extreme environmental disasters from occurring. As others have noted, localities have generally not established appropriate routine incentives for compliance (for example, fines are set too low to effectively encourage compliance) (Economy, 2005). Although “environmental prizes” in the form of public recognition and small cash awards are springing up, these are still far from constituting a comprehensive system of positive incentives under which local officials might expect commendation for preempting such egregious outcomes.

Moreover, while the possibility of severe punitive sanctions should in theory deter violations, they can also, ironically, deter officials from disclosing pollution, as they fear personal liability (Economy, 2005). Possibly fearing such retribution, local officials in Jilin initially withheld information about the Songhua River toxic spill from environmental agencies, government officials in the downriver province of Heilongjiang and Beijing, and the public (Pan, 2005).

Insufficient Responsiveness and Accountability to the Public

The Baiwangjiayuan and Yuanmingyuan hearings provided concerned citizens with public opportunities to present and discuss their environmental concerns with government officials, but in neither case did members of the affected community receive a complete substantive response to issues they had raised. Yuanmingyuan’s detailed EIA report in fact honored the public’s ecological concerns in the breach—Chinese environmental law experts note that it is rare for EIA reports to respond even as completely as in Yuanmingyuan (ACLA Workshop Materials, 2005).

Although applicable Chinese law calls for environmental authorities to make EIA decisions

“according to the hearing record” and to “attach in the license decision an explanation of the acceptance or not of the main viewpoints made known in the hearing” (ALL Art 48; ALL Implementing Measures Art 30; EIA Implementing Measures, Art. 34), the standard under which the government should accept or reject the public’s concerns and suggestions is undefined (the problem is magnified, by the lack of precedent and training that is available in China). Under the recent EIA Implementing Measures, regulators shall announce the results of their examination and approval of an EIA review (Art. 13), and the public can report to the agency if it finds the public opinion has not been sufficiently reported or considered (Art. 18).

Anecdotal evidence from ABA training sessions involving mock public hearings generally suggests that modern decision-makers in China are more comfortable providing a general justification of their overall decision rather than a detailed examination of their acceptance or rejection of the individual main arguments and evidence put forward. This too easily allows decision-makers to dodge the necessary implications of certain arguments and thereby avoid full accountability for their ultimate decision. Similarly, in Baiwangjiayuan and Yuanmingyuan, the Beijing EPB and SEPA relied on the standards or decisions of other government authorities to sanction approval of the projects, and thereby avoided confronting the public’s specific challenges and concerns.

Instilling a greater sense of responsibility for public explanation would of course require more than stronger legal mandates—it would call for Chinese government officials to change their understanding of and approach to public interaction. Rhetoric from SEPA officials suggests that the goal is to, “make the relevant departments truly adopt the public’s opinion in the decision-making process” (Xia, 2005). SEPA and central government officials are quite conscious of how significant an undertaking this is. It would require moving from an orientation of “leading” the public to an orientation of “serving” the public; from an understanding that the public has a “duty to participate” to an understanding that the public has a “right to participate” (Xia, 2005).

The Baiwangjiayuan case study indicates that implementation of new public participation requirements is often incomplete because local officials interpret it within a rigid paradigm of governance. In Baiwangjiayuan, the final EIA report specifically directed that the power company engage in

public education for the purpose of avoiding community conflict and increasing the community’s understanding of and support for the project. This indicates an emphasis on the government’s opportunity to impact the public’s opinion—to disregard the way the public’s concerns should impact the government. One provincial EPB leader who had received exposure to more accountable public hearing mechanisms reported, “[p]reviously, government officials thought mostly about instilling the provisions of law and policies into people’s mind[s]” (Expert A, 2005).

Even if officials are able to reorient themselves towards greater accountability and responsiveness to public opinion, the legal framework still needs to clarify precisely in what way public opinion should influence decisions. Presumably the purpose of a public hearing is not just for the government to reflexively “do what the public wants,” but rather, through eliciting information from the public about its concerns and proposed alternatives, make a decision based on evidence and reasoning related to those concerns and alternatives. While interpretations of the applicable laws have progressively sought to provide greater clarity (with the EIA Implementing Measures providing that developers shall “carefully consider public opinions, and attach in the environmental impact report a description as to whether or not to adopt their opinions,” subject to EPB’s possible examination and judgment on the reasonableness of this decision (Art. 17)), neither the law nor the rhetoric on this crucial point are clear. Greater explicitness and sophistication in explaining expectations for responding to public opinion and understanding how to incorporate it in decision-making would help strengthen accountability of both developers and regulators.

Rigid Environmental Information Control

Among the greatest successes of the Yuanmingyuan and Baiwangjiayuan cases is that the public movement successfully yielded valuable environmental impact information. Although Article 4 of the EIA Law requires EIA reports to be made public (*bixu gongkai*), and the EIA Implementing Measures require a more systematic and accessible disclosure process (Arts. 8-11), the provision is not self-enforcing in practice. Environmental authorities, including SEPA, still fail to make EIA reports publicly available as a general practice, even when explicitly demanded. Especially where environmental impact is significant and controversial.

In one case, national and local environmental NGOs spent two years pressing the Yunnan provincial government to make public its EIA report on a huge hydroelectric dam construction project on the Nu River (Nujiang), for the planned cascade of 13 dams presents potentially serious geological, biodiversity, cultural diversity, and other impacts that the Chinese environmentalists believed warranted public examination. In August 2005, the Chinese NGOs Green Earth Volunteers and Friends of Nature organized an open letter signed by hundreds of individuals primarily representing Chinese civil society and NGOs. Only after the letter was published did the provincial EPB finally release the government's order approving the EIA report (Yardley, 2005; Environmental Public Interest Litigation, 2005), however the report itself has reportedly been deemed a state secret.

In the case of the Shenzhen/Hong Kong throughway discussed above, despite the large-scale protests, the Guangdong EPB has not made public any information about the throughway's potential environmental impact on Shenzhen residents. In stark contrast, *all* the information materials on the impact of the Hong Kong end of the tunnel have been made publicly available by the Hong Kong government on the Internet.²³

Finally, where NGOs, lawyers, and other representatives of civil society undertake to fill the gap by disclosing environmental impact information themselves, they are often subject to retaliation. Examples of media blackouts, or personal scrutiny, harassment, or arrests are not uncommon (Yardley, 2005; CECC 2005; Cohen, 2005). In the dam-building case on the Nujiang, Chinese environmental NGOs have taken up further calls for a public hearing to confront the EIA reports' basis and raise alternative concerns. These efforts have to date produced no response except for, according to private conversations with the authors, a ban on further media publicity of dam building on the Nujiang. In an unwelcome recent development, in June 2006 it was reported that the Standing Committee of the National People's Congress, is considering legislating fines for media that publish information about a sudden event "without authorization" (Kahn, 2006).²⁴

With many civil society mechanisms foreclosed, the main cause for hope for information disclosure to become more institutionalized comes from government authorities themselves. The Shenyang Measures (Art. 10) specifically

make broad categories of environmental information "public" information and specify the public's right to information in specific categories—such specificity is essential to actual implementation of such rights. It appears that the public is taking advantage of its rights to request this information—the Shenyang EPB reported a thousand separate requests for information in the first six months of operation as internal rules.²⁵ In private conversations with the authors, government officials have cited the Shenyang Measures as showing the need for increasingly specific requirements for disclosure (with time limits attached and specific categories of information elaborated) to enforce disclosure obligations.

The recent EIA Implementing Measures provide promise for more systematic disclosures

BOX 4. Zhejiang Hotel Association Environmental Boycott

In an example of using information to create economic pressures for change, in 2004 the Zhejiang Hotel Association organized what is arguably China's first civil society boycott of a company's products on the basis of the company's detrimental environmental practices. The boycott was based on a research report conducted by Greenpeace-China that provided substantial evidence about how APP, which had supplied paper products purchased by Zhejiang member hotels, was illegally logging in southwest China. But the hotel association faced prompt retaliation for its "green purchasing appeal," with APP suing for defamation (*APP Jinguang v. Zhejiang Hotel Association*). Although APP quietly dropped the lawsuit a few months later in favor of its own media public relations campaign emphasizing its environmental friendliness, the underlying land use issues and their irremediable impact on the region's biodiversity have not yet been addressed. Chinese legal scholars note that it is a shame the case did not reach a decision, because it might have set a good example for upholding the rights of civil society groups in China to organize an environmental boycott.

during the EIA process. Nevertheless, where political will exists for “open government,” such as evidenced in Guangzhou and Shanghai municipal “right-to-know” regulations applying to government information generally, the overall presumption of a right to open information may be sufficient. (See Box 4). The most important factor in the long run may be the general attitudinal shift in China (possibly spurred by experience with public health-related emergencies such as SARS and the Songhua River spill) towards the idea that the public really does have an immediate right to know.

Lack of Overall By-in by Local Government

It is not coincidental that both Yuanmingyuan and Baiwangjiayuan took place in Beijing. SEPA and ABA conducted a survey of local EPB concerns in early 2005 and found that, in striking contrast with EPBs in more urban and economically developed areas, EPBs in rural areas, such as Inner Mongolia, Xinjiang, and Ningxia, believe that they lack scientific technical capacity to measure environmental impact and formulate environmental protection policy. Through the survey and in subsequent interviews with the authors, local level officials declared that governance issues were, for them, secondary to more “fundamental” problems of doing environmental protection work.

Environmental officials in comparatively wealthier provinces such as Hebei also express doubt that public participation will be helpful to furthering environmental enforcement policy and practices or will justify the procedural burden it imposes. One participant at an ABA-sponsored training event summed up this sentiment: “If the EPB finally approves the project [that is opposed by the public], then what is the point of the public hearing?” (See also Si Yu, 2005). This problem is sometimes referred to as, “hearing held, final decision approved” (*fengtingbiguo*). These local government concerns are mirrored by a general consensus that citizens’ participation will not be taken seriously. SEPA officials like Pan Yue cite the lack of public confidence in the government as a key impediment to the successful implementation of the entire public participation experiment (Xia, 2005).

One of the most straightforward practical solutions to this problem of government and citizen discomfort with public participation would be to implement such processes *before* the decision is a foregone conclusion and to fully consider public

input. The very possibility that the outcome—even the questions and concerns—would be undefined in advance might seem untenably risky to government officials accustomed to (or attempting to) maintain social control. In interviews with the authors, officials who have participated in the ABA public participation training program and follow-on activities over the last few years have reflected that their own starting point was that the government is the best environmental protection policymaker and implementer; only with experience and greater consciousness did they report coming to see how civil society can supplement government’s efforts to protect the environment. As one official put it, “[w]ith nearly two years of experience after the training, the EPB increasingly understands that they must include the public to participate in their work in order to better protect the environment. This cannot be done by a few people or a few agencies” (Expert A, 2005). In the end, the experiment in public participation will require leaps of faith by both the public and the government.

Lack of Legal Expertise on the Part of the Government and Public

Finally, failures in implementation of public participation to date rest in part on a lack of legal expertise and experience with public participation among government organs, construction and environmental impact assessment units, and the public. Chinese government, NGOs, and multilateral assistance providers are working to try and address these needs (Xia, 2005; Si Yu, 2005; Zusman & Turner, 2005).²⁶ The authors’ experience has consistently shown that local trainings are the first systematic exposure that most local EPB officials and other environmental stakeholders have to the basic legal framework of environmental protection and public participation in theory and practice. One highly promising way to address this lack of legal expertise would be to increase the role of lawyers in policy development, training or counseling of stakeholders, as well as facilitating dispute resolution and public hearing processes.

OPENINGS: LEGAL ADVOCATES’ ROLE IN THE WAY FORWARD

In the environmental public participation movement in China to date, legal advocates—such as public and private sector attorneys, NGOs, prosecutors and other governmental advocates, and legal

aid centers—have played only a minor role. A small but growing number of NGOs and lawyers provide legal representation in environmental cases, primarily in environmental compensation litigation, and still others have organized to bring public pressure on development projects, using law as a tool. The Center for Legal Assistance to Pollution Victims (CLAPV) and Green Earth Volunteers are notable examples. While the importance of the roles assumed by such organizations is not to be underemphasized, there has been little attention to the other many varied roles that legal advocates can play to raise stakeholder legal consciousness and rights awareness, enforce public participation rights, and organize more orderly and effective public participation. Some of these roles are outlined below.

Legal advocates can provide much needed training, technical support and guidance for all environmental stakeholders. In drafting legislation and regulatory measures, the national government has commonly taken advantage of legal expertise within the bar, relying in particular on ACLA and prominent environmental law scholars; but local governments outside of Beijing need greater access to such professional legal expertise. Legal advocates can address the variety of practical legal questions that arise in implementing public participation at the project level, through trainings offered to both public and private sectors and in institutional roles as in-house legal counsel for government, enterprise, and NGOs. Some groups are beginning to find this niche. For example, the Wuhan “Green Stars” NGO provides technical legal and scientific advice to private enterprises on compliance with “green products” and pollution regulations. In Jinan, the former director of the Shandong EPB training center is seeking to establish a group to provide environmental law advising services to EPB officials, NGOs, and interested community groups. Regional EPBs could further refine this idea by creating a “public adviser” office within their agencies, in order to provide specific expertise on outreach, planning, and implementation of rules for public hearings and other public participation in environmental decision-making.

Legal advocates can strengthen official channels for raising concerns and resolving disputes, and help the public to voice them in an effective way. Legal advocates can organize the issues, frame them in a way that is capable of legal resolution, and direct

them into proper judicial or administrative channels.²⁷ This role is not limited to public hearings or enforcement litigation. In Wuhan, the EPB has experimented with linking legal advisors with the government and the interested public through a radio call-in show and related website Q&A platform focused on environmental legal advice.²⁸ Since the program’s launch in July 2005, hundreds of audience members have expressed their interest and support for the show, and in at least two instances the audience’s participation revealed actionable legal complaints. In one, the project’s legal advisors decided to represent the caller in filing a formal petition for government attention.

Legal advocates can assume a “watchdog” role. A carrot and stick approach—with lawyers providing the enforcement “stick”—might be needed to compel local EPBs to enforce national environmental policies. As one American environmental lawyer and activist noted in conversations with the authors, U.S. environmental government authorities, too, treated public participation laws as voluntary until lawyers took cases to court to enforce the public’s participation rights. In such cases, the experience of going through the required steps, even under duress, can cause disclosure of valuable information and educate the public about its legal rights.

There are, however, some positive signs that environmental public interest litigation of this sort may be developing in China. ACLA’s environmental committee and others are promoting legislative changes that would explicitly sanction and promote the role of NGOs and other organizations in suing to compel administrative action in the public interest. Interestingly, China’s Procuratorate—the public prosecutor’s office—also recently expressed interest in engaging in environmental public interest litigation.²⁹ Such efforts by public and private “attorneys general” would bring additional technical expertise (and, in the case of the Procuratorate in particular, powerful investigative authority) into the enforcement process; transfer costs from individuals to NGOs and government institutions better positioned to represent the public interest as a whole; and alleviate the need for SEPA to significantly increase its resources in order to more effectively serve as the sole environmental “watchdog.”

Legal advocates can encourage and facilitate information sharing. The Shenyang Measures, SEPA’s EIA Implementing Measures, and other isolated

local government agreements such as a Guangdong EPB memorandum of understanding with local law firms, all exhort environmental government authorities to provide environmental information to involved parties (*libai guanxi ren*) in environmental cases. In Yuanmingyuan, public advocacy led to the publication of the EIA report on the SEPA website—the first time that many environmental NGOs or the general public in China had ever read an EIA report. Following this successful example, the NGO community demanded public disclosure of EIA reports under applicable law in the Nujiang case discussed above and others. Legal advocates can help the public and NGOs know what they have the right to ask for and make the demands through proper channels.

Legal advocates can promote a culture of respect for citizens as rights-holders. Finally, the participation of legal advocates can help create a political and legal culture of respect for citizens as rights-holders entitled to government responsiveness and accountability. The authors' experience in implementing mock EIA public hearings in ABA training sessions for government officials and local stakeholders confirms that the lawyers who participate in these mock hearing exercises do in fact take a leadership role in organizing the groups' arguments and in relating the public demands to the legal issues that are within the government agency's authority. Lawyers' participation offers access to justice as well as to power, gives a voice to disadvantaged groups, and compels argument for the issues at stake.

In part, the under-involvement of legal advocates in China in supporting good governance practices is due to the relative newness of the environmental bar and environmental law as a specialty. The ACLA Environmental Law and Natural Resources Committee was formed only in 2000 (although its capacity has rapidly increased). At the same time, one of the ACLA committee's founders and its Chair, Peking University Law Professor Wang Jin, as well as Professor Wang Canfa of China University of Politics and Law and Director of CLAPV, each started large-scale training programs for judges and lawyers on environmental law. Prior to this time, there was essentially no professional training available for environmental lawyers and judges in China, and few opportunities to study environmental law. Today, in addition to increased training opportunities, China's new environmental bar is leading a reform movement for "public interest litigation," bringing a variety of pollution compensation suits, administrative

litigation challenges, and other cases testing the boundaries of the judicial system to enforce protection for the environment under law.³⁰

Legal advocates will have an uphill battle before their participation is not simply viewed as "troublemaking." For many officials in China, involving lawyers in organizing public legal demands will raise the stakes and heighten anxiety over public disorder (*luan*) and social conflict. The recent ACLA Guiding Opinion on lawyer involvement in mass cases, discussed above, is a case in point.

Yet in some regards, these same anxieties over public discontent and its impact on societal harmony and social order, which contribute to the lack of political will and buy-in for participatory processes generally, can also provide a way forward. Ordered public hearings, training, counsel and guidance, and encouraged use of proper legal channels—that is, formalizing and institutionalizing the role of advocates—have the possibility of not only channeling discontent into orderly forums, but also of forging publicly acceptable resolutions. Indeed, various pilot projects in China show that participation of legal advocates does not always sharpen disputes. Chinese legal professionals might sometimes choose a "teacher/arbitrator" rather than a "partisan advocate" approach. Relying on their legal expertise, they explain to both sides what the law requires, towards the goal of leading both sides to agree to abide by the solution proposed by the lawyers.

CONCLUSION

In interviews with the authors and in training for local government officials and other stakeholders, SEPA and NPC officials express that the larger goals of the public hearing system should be to: (1) improve the Party's democratic legitimacy with the Chinese people to govern by providing a procedural outlet for public input and local government accountability (thereby staunching the complaints and criticism appearing on the Internet and elsewhere); (2) strengthen environmental protection; and (3) irrespective of decision-making on any individual construction project, collect information that will contribute to and enhance policy and policy implementation (Xia, 2005; Licensing Hearing System, 2005; China's Environmental Protection, 2005; Expert A, 2005). Over the last two to three years, local government officials have started to experiment with ways to better advance these goals. Nevertheless, significant legal, institutional, and political obstacles continue to pose a challenge to full and

satisfactory development of public participation in China, obstacles that may not, due to a lack of political will and anxieties about public disorder, be resolved unless legal advocates are able to develop their role, without fear of reprisal, to help affected parties lay claim to their participation rights under law.

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NOTES

1. The information and conclusions presented in this paper largely reflect the authors' personal experiences from 2002 through 2005 as the American Bar Association (ABA) worked with SEPA, local environmental protection bureaus, the bar, quasi-governmental organizations, and civil society groups, to advance good governance practices in the environmental area. For a description of the ABA's environmental governance work, see Rohan (2003).

2. Notably, Chinese citizens often resort to petition and protest when legal grievance channels have been closed to them, and the government's response can lead to violence.

3. This definition is consistent with international definitions. The international standards, as articulated in the 1998 Convention on Access to Information, Public

Participation in Decision-making and Access to Justice in Environmental Matters (the “Aarhus Convention”) state that public participation has three components: access to justice; public participation in environmental decision-making; and access to justice in environmental matters.

4. Public participation and other good environmental governance principles were first articulated in connection with EIA requirements under the Environmental Protection Law (EPL), provisionally promulgated in 1979 and adopted in 1989. The EPL required EIA reports to be prepared for construction projects, but delegated legal authority for establishing the environmental review and approval criteria to various local-level governments (Art. 6). Citizens were also accorded the right to bring charges against entities or individuals causing pollution and damage to the environment (Art. 8). The discretion left to local authorities to conduct public hearings led to a regulatory process that excluded almost any form of public participation (Tang, Tang, & Lo, 2005; Ferris & Zhang, 2005). For an excellent overview of the structure of China’s environmental law regime, see Ferris and Zhang (2002, 2005) and Bie (2005).

5. In a survey conducted by the All-China Environment Federation between December 2004 and June 2005, 97.2 per cent of the surveyed public said the nation should collect more information from them when mapping out plans and making decisions in the nation’s environmental protection (Yang, 2005).

6. The EIA Implementing Measures overlap to some extent with the ALL Implementing Measures, which concern EPB obligations for licensing of projects requiring EIA, primarily at the hearing stage. Solicitations for comment in the EIA Implementing Measures were requested (in Chinese) at <http://www.sepa.gov.cn/eic/649094490434306048/20051110/12698.shtml>.

7. The Shenyang Measures, first adopted by the Shenyang EPB as internal rules in 2002 (predating even the 2003 national EIA Law), became municipal law in 2005.

8. The evolution of implementing regulations may reflect a gradual introduction of debated or controversial points considered during the drafting of the ALL and the EIA Law. For a fascinating discussion of the evolution of legal standards in the environmental area, see Alford & Liebman, 2001.

9. The EIA report also found that the project would have a certain impact on the visual landscape of the Summer Palace—thus touching coincidentally on the neighboring area to the Old Summer Palace area that became the site of controversy in the 2005 Yuanmingyuan case.

10. Negotiations (and conflict) between community residents and the power company also have continued beyond the hearing, with the result that the power company has voluntarily removed the transmission towers closest to the Summer Palace,

but has dismantled the physical barriers erected by residents to complete construction on others within the Baiwangjiayuan residential community. The Baiwangjiayuan community maintains a website with information, chat board, and news links related to the Baiwangjiayuan project. See <http://seek.focus.cn/results.jsp?gid=800&sid=&t=f&log=1&q=>.

11. The relatively well-off Baiwangjiayuan community hired private lawyers to bring the case.

12. A 2004 feasibility study and report on the lake bottom-lining plan was prepared internally by the Park Administration, based on the 2002 Beijing Olympics plan and a 2000 study by the Beijing City Planning Research Institute that was approved by the Beijing City Government and the National Department of Culture. None of these studies or plans were made public (See ACLA Workshop Materials, 2005).

13. The site is still active, with links to dozens of articles published on the issue (in Chinese only). See <http://news.sina.com.cn/z/ymypm/index.shtml>.

14. A website devoted to covering the Yuanmingyuan anti-drainage project’s environmental impact and related policy developments has posted a collection of viewpoints quoted from experts, NGOs, environmental protection authorities, and park officials. See <http://news.sina.com.cn/z/ymypm/index.shtml>.

15. The report is available (in Chinese) at: www.sepa.gov.cn/eic/649083521138163712/20050705/9349.shtml.

16. Environmental advocates appealed SEPA’s approval of the EIA report within the administrative review process. SEPA affirmed the approval, citing as its basis the prior approval by the Beijing municipal government of the overall Yuanmingyuan water drainage and conservation scheme. Chinese legal experts have noted the constitutional problem of a central government authority abdicating its independent review role and relying instead on approvals by a local government authority. It also shows the relative strength of the Beijing municipal government (Environmental Public Interest Litigation, 2005).

17. Some other public hearings on environmental impact have reportedly been held, with no available public record and little or no NGO, media and scholarly attention. These include a public hearing by the Hebei EPB on environmental impact of an application to expand construction on a power plant in Xibaipo in 2004, and a public hearing by the Beijing EPB on environmental impact of a proposed cell phone components plant near a Beijing residential community in 2005.

18. In response to SEPA’s action, responsible government authorities and project officials on some of the projects publicly asserted (apparently without basis) that they *had* met all legal requirements. Because of this and similar misinformation or lack of information surrounding the projects, local residents in many cases did not complain or request environmental hearings, lacking the

information that would have been the basis for lodging a complaint (*suyuan*) about failure to hold one.

19. China's 1996 Administrative Penalty Law also provides the right to a hearing on the imposition of administrative penalties. Such hearings are different in scope and purpose from public hearings to inform policy decisions.

20. The Opinion is similar to a series of recent opinions at the local and provincial level that restrict the participation of lawyers in sensitive rights defense work (See CEEC, 2006).

21. On 14 June 2006, a new initiative called "China Lawyer Watch" held a spirited debate on the ACLA opinion and freedom of legal practice. See <http://www.ccwlawyer.com/index.asp>, for a summary of opinions expressed at the forum.

22. Specifically, the Provincial EPB imposed on the Chuanhua LLC parent company an administrative fine of 1,000,000 Yuan and fees of 4,050,000 Yuan, and required it to pay 11,000,000 Yuan in compensation to fisheries, of which 3,500,000 Yuan was put toward water cleanup and fish recovery.

23. See http://www.epd.gov.hk/eia/english/textonly/aspd_298.html.

24. It remains uncertain how "sudden events" will be interpreted, but it is anticipated that the term will extend to incidences of environmental pollution (Kahn, 2006).

25. These requests followed a local publicity campaign in Shenyang (through newspaper ads and "fairs" with information booths) to make the new rights under the Measures known to the public. Naturally, the demand for environmental information is likely to be strongly related to efforts to publicize the right to obtain it. For a broader discussion of the complex system of news media control, affecting more than just environmental information, see Liebman (2005).

26. In addition to the ABA's program discussed herein, the World Bank, GTZ, and the United

Kingdom's Department for International Development (DFID) have all worked with Chinese governmental partners on environmental governance projects; Environmental Defense, General Electric, and others have introduced projects aimed at building civil society capacity in environmental governance (*Editor's Note: See the Inventory of Environmental and Energy Projects in China in this and previous issues of China Environment Series for information on other organizations*).

27. Baiwangjiayuan illustrated the problems that can occur when only lay advocates are involved; in this case, citizens made demands for issues to which they had no legal right, e.g., requests that the EIA and environmental license approval take into account the property values of homeowners affected.

28. See the Wuhan EPB Q & A page at: www.hb12369.com.

29. Under current Chinese law, public prosecutors are limited to enforcement of criminal (not civil) laws.

30. The development of public interest litigation is still nascent, and will face its own set of hurdles as it develops. For example, China has a very rigid application of standing in pursuit of public interest cases (Alford & Shen, 1997). China's groundbreaking public interest lawyers are thus seeking to define and expand their ability to bring cases on behalf of citizens. In one very interesting recent test case, three Peking University law professors represented the fish, an island, and the water itself in the Songhua River to sue for compensation (to be dedicated to remedial measures) for harm caused to the ecosystem from the benzene spill. The Heilongjiang court in which the case was filed rejected the case for the lawyers' lack of connection to the subject matter. It also made the (surprising) argument that the subject was properly not in front of the court system because it was being resolved by the State Council—a statement that perhaps reflects reality but does not reflect constitutional procedure under Chinese law.

Yuanmingyuan's Shifting Landscape: From Emperor's Resort to a Public Green Space

By Linden Ellis

Nestled among the bustling Haidian District in Beijing is the famous Yuanmingyuan (Old Summer Palace). Once the sparkling private playground of the Qing emperors, the changing state of this 350-hectare garden reflects the prosperity, political aspirations, and whims of past rulers and looters of China. For example, at the violent start of the Qing Dynasty, the Manchu invaders used the gardens as a political tool to show how similar they were to the native Han Chinese, helping to establish the legitimacy of their new government. In 1860 and 1900, Yuanmingyuan was looted and destroyed by foreign powers. During the early years of the Communist regime the gardens' "bourgeois" brick buildings were taken apart to build homes and pigsties, and its lakes silted to form rice patties. It was converted into a public park after the Cultural Revolution. A new kind of "looting" of Yuanmingyuan has emerged over the past few years, as developers eye this valuable piece of land for luxury housing and amusement parks. In response, new political and cultural forces are pushing Yuanmingyuan through yet another metamorphous—into a protected green space for nature hungry urbanites. The well-publicized debates over the garden are but a microcosm of the broader environmental movement in China. Public demands to protect the park have led to the following environmental victories.

Preservation of natural lakes. In late 2004, controversy erupted over the installation of impermeable lining in Yuanmingyuan's lakes. A Lanzhou professor's website tipped off journalist Zhao Yongxin that the Yuanmingyuan authorities had not conducted a mandatory environmental impact assessment (EIA) on the lining project, already halfway completed. Public outcry then pressured the State Environmental Protection Administration (SEPA)

to suspend the project and put a 40-day deadline on completing the EIA. The assessment revealed the lining would so alter drainage as to cause an environmental hazard to the local ground water. After one public hearing, SEPA announced the project would be halted, although the installed linings were allowed to remain. In December 2005, Zhao Yongxin was recognized as one of five recipients of SEPA's new Green China Awards.

Protection of native flora. The increasingly vigilant public discovered in April 2005 that Yuanmingyuan workers were replacing well-established native flora with cultivated ornamentals on a massive scale as part of the Olympics preparation. These new plants would require more watering, fertilizers, and frequent replacements in the garden, altering the natural landscape and threatening species of plants and animals living in this little oasis. A reevaluation of the natural landscaping of the garden is underway in response to public criticism.

Limitation on development. Reports condemning all forms of profiteering by Yuanmingyuan officials have been widely circulated in Chinese newspapers. On 25 May 2005, *Xinhua* reported that authorities were renting an island in the park to two wealthy comedians, which prompted the two to make a hasty retreat. In conjunction with such complaints, authorities are slowly emptying ten-year old South Pacific style luxury villas in the eastern section of the park, and have announced that, "...all planned amusement projects, including a bumper car ride and water related entertainment facilities, have been scrapped."¹ The goal is for the park to reflect its new official theme of historic and environmental preservation.

These efforts to halt profit seeking and protect the environmental integrity of Yuanmingyuan

demonstrate both a vigilant corps of environmental journalists and the public's desire to preserve what little green space remains in Beijing. Most strikingly is how heavy public pressure has changed the political dynamics on how decisions are made in managing this park. For example, currently public hearings are being held on all park development projects. The green and the political landscapes are shifting; perhaps, these two changing landscapes of Yuanmingyuan will continue to reflect and be reflected throughout the rest of the country.

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NOTES

1. "Old Summer Palace in new controversy." (May 25, 2005). *Xinhua: English*, <http://english.sina.com/china/1/2005/0525/32204.html>

The Asia Program at the Woodrow Wilson Center



Zhou Yongming

China and Democracy: A Contradiction in Terms

All participants at this 22 March 2006 Asia Program event agreed that while there has been some progress towards democracy in China over the past decade, especially in terms of individual freedoms, there are definite limits on how far the Chinese government is prepared to tolerate genuine pluralism. **Merle Goldman** of Harvard University explored how select groups of intellectuals, journalists, businessmen, lawyers, and ordinary citizens have been calling for political reform, challenging the party and its policies, and attempting to assert their political rights. **Suisheng Zhao** of the University of Denver noted that the Party itself has promulgated a host of laws to try and make it more responsive to the people, but that such “rule of law” is more paternalistic than democratic. **Zhou Yongming** of the University of Wisconsin discussed Internet politics in China, asserting that the West often focuses only on the issue of freedom of information on the Internet, while overlooking how such information is being received. Dr. Goldman also summarized a paper by UCLA’s **Richard Baum** that pointed to the limits of “consultative Leninism” and warned that the current system may already be living on borrowed time.

China’s NGOs: Independent Actors or Government Puppets?

In a 15 May 2006 event co-sponsored by the Asia Program and the China Environment Forum, Syracuse University’s **Hongying Wang** noted the tremendous explosion of nongovernmental organizations (NGOs) in China, from almost none a decade ago to over half a million (registered and unregistered) today. In her opinion, the trajectory is for NGOs in China to keep moving towards greater autonomy. **Joseph Fewsmith** of Boston University presented the case study of flourishing trade associations in Wenzhou, a city in China’s booming east. **Jennifer Turner** of the Wilson Center’s China Environment Forum stated flatly that environmental NGOs are the vanguard of civil society development in China. **John Callebaut** of the Center for International Private Enterprise, which works to develop Chinese trade associations, said such associations were not puppets, but conceded that there is an inherent tension between them and local government.

For special reports on these and other Asia Program meetings or to receive Asia Program meeting invitations please go to www.wilsoncenter.org/asia or contact Mark Mohr at mark.mohr@wilsoncenter.org.



Hongying Wang