



# Environmental Impact Assessment Law in China's courts: A study of 107 judicial decisions



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## ARTICLE INFO

### Article history:

Received 9 February 2015  
Received in revised form 25 June 2015  
Accepted 26 June 2015  
Available online 9 July 2015

### Keywords:

Environmental Impact Assessment  
China's court  
EIA lawsuit  
Judicial decision

## ABSTRACT

The article explores the practices of Environmental Impact Assessment (EIA) Law in China's courts by examining 107 judicial decisions. Each of the 107 judicial decisions has been analyzed to determine the time/location of the decision, what type of EIA document was referred to, what specific claim was made by the plaintiffs, and what the court's ruling was on the case. The results indicate that: unlike in Germany or Japan, all kinds of EIA decisions made by environment protect bureaus (EPBs) in China were widely taken as justiciable, and China's courts generally allowed local residents to have standing and thus challenge the EPBs' decisions made during the EIA process. On the other hand, the research also shows the EPBs overwhelmingly prevailed in those EIA lawsuits. It is also found that China's reviewing judges were highly self-restrained, giving obvious deference to the technocrat with the substantial contents of EIA documents. Also, the concept of "flaw" was created when it came to procedural issues. These two factors, among others, were both helping the EPBs' prevailing successes.

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## 1. Introduction

The concept and practice of Environmental Impact Assessment (EIA) in the People's Republic of China (the PRC) can be traced back to the early 1970s. *The Environmental Protection Law (EPL) for trial implementation of the PRC*, promulgated in 1979, marked the formal introduction of EIA to China's legal system (Jin RL, 2006; Chen W et al., 1999) providing that EIAs must be approved by the environment protect bureaus (EPBs) before construction can begin. Ever since then, China has gradually established a complex institutional framework for EIA: EPL set out the basic requirements of EIA, which were elaborated in the laws, regulations and rules of specific sectors (such as air law, water law, and land law). EIA has been developed as one of the main regulatory instruments for environmental protection.

After more than 20 years, *the Environmental Impact Assessment Law* was passed in 2002 ("*EIA Law 2002*") and came into force in 2003. The *EIA Law 2002* actually "doesn't modify the existing EIA system in any radical way". Nevertheless, it is a "recognition of how much has been achieved in developing institutional structures and processes since the early 1970s, in the face of dramatic economic growth and ever-increasing pressure on environmental systems." (Yan W et al., 2003).

Although the *EIA Law 2002* extended EIA to certain government plans as well as construction projects, the scope of this study is limited

to EIA of construction projects<sup>1</sup> (Project-EIA). This is because this paper is designed to take the existing judicial decisions as the basis of study, while planning is not subject to judicial review under China's *Administrative Litigation Law (ALL)*. Therefore, there are no judicial decisions addressing Plan-EIA in China.

According to China's EIA law, EPBs are the administrative authorities in charge of the EIA process. Under the *ALL of the PRC*, the administrative decisions made at all steps of the process of Project-EIA, including screening, documentation examining, and monitoring, can be challenged in China's courts.

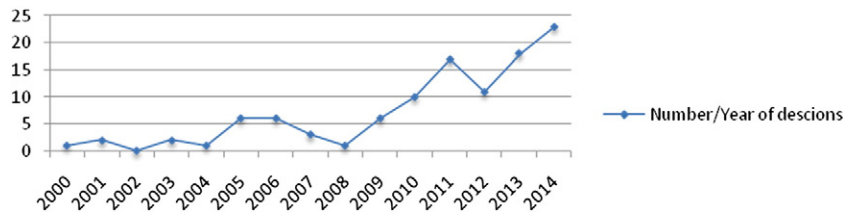
### 1.1. Screening

There is no definition of "construction project" in EIA law and to require all construction projects to provide detailed EIAs is infeasible. After a developer submits the project proposal, whether an EIA is required and what kind of EIA should be done must be decided, which is where the EIA Category Management System comes in.

Under the EIA Category Management system in China, construction projects were categorized to 3 groups: for projects in the first group, which have the potential to have significant environmental impact, a full Environment Impact Report (报告书EIR) is required; for projects in

<sup>1</sup> There is no definition of "Construction Project" in EIA law 2000, while article 1 of *Notice on Issues Related to the Implementation of the Construction Project Environmental Impact Assessment System* (关于执行建设项目环境影响评价制度有关问题的通知)(环发(1999)107号) provides the following: "construction project" refers to: "All development and construction activities carried out by the way of investment in fixed assets....."

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Graph 1. Time trend of the 107 decisions.

the second group, which are likely to have limited environmental impact, a less detailed Environment Impact Report Form (报告表EIF) is required; and for projects in the third group, which are expected to have a minimal impact on the environment, the developer just needs to fill in the basic Environment Impact Registration Form (登记表EIRF) (Article 7 of OEMCP 1998).

### 1.2. Examination of documentation

EIRs and EIFs must be produced by licensed EIA institutions and practitioners. The developer usually contracts a licensed institution (and the institution shall hire licensed practitioners) to conduct the EIA and prepare the EIR or EIF. According to the *Ordinance of Environmental Management for the Construction Project 1998* (建设项目环境保护管理条例OEMCP 1998), the content of the EIR, should include: a description of the proposed project; the present environmental conditions; predictions and evaluations regarding the Environmental Impact; economic and technical analysis of mitigation measures; CBA of Environmental Impact; proposals for monitoring; and conclusions of the EIA (Article 8 of OEMCP 1998). The contents and formats of EIF and EIRF should follow the rules (including templates) issued by the environmental department of the State Council.<sup>2</sup>

EIA documents should be examined by EPBs (Article 13 EPL 1989 & Article 17 of EPL 2014). If the conclusion of the examination is negative about either the process or the quality of EIA, the EIA documents will be rejected. When approval is not granted after the examination, “the project licensing authorities shall not approve the project for construction, and the developer shall not commence the construction” (Article 25 of EIA Law 2002)—this is the so called EIA “veto” arrangement.

### 1.3. Monitoring

EPBs have the authority to monitor whether the approved EIA documents are observed during project construction and operation. The developer is required to file an application with the EPBs to check the compliance when the construction has been completed (Article 20 of OEMCP 1998). The outcome from monitoring and checking can influence the EPBs' decisions whether the project construction/operation shall be terminated.

The goal of China's *EIA Law 2002* has been clearly stated as “implementing the strategy of sustainable development, preventing adverse impact on the environment due to execution of plans and construction projects, and facilitating the coordinated development of the economy, the society and the environment” (Article 1 of *EIA Law 2002*). As the environmental costs of China's rapid economic development have been more and more recognized (World Bank, 2001), the pressing need to reconcile economy, society, and environment has been more and more emphasized (Pan Y, 2006) and EIA Law is supposed to play a critical role in this process.

While 12 years have passed, EIA law is still an important, yet under-researched area in China's legal academic world, in spite of the fact that there are known problems with both the institutional/procedural

arrangements (Yan W et al., 2003) and its implementation and enforcement (Zhao YH, 2009). One manifestation is that we still know little about how the EIA law has been practiced in courts. In other words, we know generally that the EPB's EIA decisions could be questioned and challenged in courts under EIA law, however little is known about who have brought their claims to courtroom, what the specific challenges have been, and how the judges have dealt with these cases.

With those questions, this study aims to increase the understanding of the practices of EIA law in China's courts by observing the existing EIA lawsuits, analyzing the available judicial decisions referring to EIA law, examining a number of critical legal issues in those cases, and exploring the implications of both the statistics and the case-by-case studies. As an initial research that none else has done before, the purpose of this study is more descriptive than critical or normative.

## 2. Method

The study presented here was designed to examine how EIA law was practiced in China's courts. For those who are not familiar with China's legal system, it might be necessary to point out that there are no case laws in China. EIA law, as a widely-used term in China's legal academic and in this paper, refers to a complex legal system which includes all kinds of EIA provisions from laws issued by the National People's Congress (such as the EPL and EIA Law 2002), regulations issued by the State Council (such as the OEMPC 1998) and rules issued by agencies (such as SEPA's *Rules on the Procedures of EIA Documents Examination*). According to the *ALL of the PRC*, judges shall follow the laws and regulations while refer to the rules when they deal with administrative litigations. According to the *Legislation Law of the PRC*, regulations, as subordinated to the laws, shall be in accordance with the related laws; and rules, as subordinated to the regulations, shall be in accordance with the related regulations and laws. In this sense, to ask how EIA law was practiced in China's courts is to ask how China's judges decided EIA lawsuits applying the EIA provisions included in laws, regulations and rules.

To find relevant judicial cases, a database search was conducted with Beida Fabao (北大法宝)<sup>3</sup>: 1711 results were found in its “judicial cases” sub-database with the keywords “Environmental Impact (环境影响)”, while the defendants are EPBs in 195 results. After all irrelevant and duplicated cases were excluded, a total of 107 judicial decisions have been identified as addressing challenges against EPBs' decisions made in the EIA process under EIA law.

Each of the 107 judicial decisions has been analyzed to determine the time/location of the decision, what type of EIA document was referred to, what kind of administrative decision of the EPBs was challenged, what specific claim was made by the plaintiffs, and what the court's ruling was in the case. These 107 judicial decisions are listed in the Appendix A, which includes case name, recording information, the date/location the cases were decided, the types of EIA documents referred to and whether the EPBs being challenged failed or not.

It should be noted that not all EIA judicial decisions are included in Beida Fabao. Therefore the 107 judicial decisions used in this study are

<sup>2</sup> The Environmental Protection Ministry (EPM国家环保部) (from 2008) and its predecessor: the State Environment Protection Administration (SEPA国家环保总局) (from 1998).

<sup>3</sup> <http://www.pkulaw.cn/> The English version can be found at: <http://en.pkulaw.cn/> (Sep 5, 2014).

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