ENVIRONMENTAL CIVIL PUBLIC INTEREST LITIGATION IN CHINA

Empowering Green NGOs to Fight Against Pollution

by Yanmei Lin & Shaobo Hu

We will resolutely declare war against pollution as we declared war against poverty.

Premier Li Keqiang

National People’s Congress Meetings, March 5, 2014

A BREAKTHROUGH IN CIVIL PROCEDURE LAW

In 2012, Chinese legislators finally gave the green light to environmental civil public interest litigation. This move represented a turning point and builds on the attempts by Chinese local and central governments and other stakeholders to find ways to address the grave environmental problems facing the country including the creation of environmental courts and right to file environmental public interest litigation (Wang & Jie, 2010). The key step occurred on 31 August 2012, when the Standing Committee of China’s National People’s Congress adopted the amendments to China’s Civil Procedure Law, allowing for the first time “governmental agencies and relevant organizations stipulated by laws” to initiate lawsuits for “acts that harm the public interest,” including environmental pollution (NPC, 2012a). This new provision not only created an avenue through which citizens may bring their complaints, but is also a legal tool that has the potential to permit greater access to the courts and empower environmental nongovernmental organizations (NGOs) to act as private enforcers of environmental laws.

Environmental public interest litigation is generally defined as cases filed by “units and individuals who have no direct statutory
interests related to the claims...against those who polluted the environment and/or damage natural resources or against administrative agencies that failed to fulfill their legal duties to protect the environment and natural resources” (Wang, 2011). Based on this definition, there are two types of environmental public interest litigation: (1) environmental civil public interest litigation in which the public interest litigants sue the polluters and (2) environmental administrative public interest litigation in which the government agencies are the defendants. Unfortunately, the most recent amendments to China’s Administrative Litigation Law did not adopt the provision to allow citizen groups or procuratorates who have no property or personal interest involved in the case to sue government agencies on behalf of the public.

Chinese environmental NGOs had brought environmental civil public interest suits in the past. The pilot environmental courts established since late 2007 were the first places that witnessed environmental public interest litigation in China. Before the national legal provision was adopted, local courts accepted ten test cases, for the most part leading to positive environment and social results (Lin, 2010). Unlike “pollution compensation cases,” environmental civil public interest litigation once filed can potentially hold polluters accountable at an earlier stage—before the pollution causes actual harm to individuals’ property and health and limit damages to natural resources that are either state property or public goods.

TABLE 1. Number of Environmental Civil Public Interest Cases Accepted by Local Courts from 2007-2014

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<tr>
<th>Plaintiffs</th>
<th>Number of Environmental Civil Public Interest Cases</th>
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<tbody>
<tr>
<td></td>
<td>2007</td>
</tr>
<tr>
<td>NGOs</td>
<td>0</td>
</tr>
<tr>
<td>Procuratorates</td>
<td>0</td>
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<tr>
<td>Government Agencies</td>
<td>1</td>
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<tr>
<td>Others*</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
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Source: (Lin, 2014) *Individual Citizens or other Social Organizations.

PREDAWN DARKNESS

With the breakthrough in the new Civil Procedure Law in 2012, China’s environmental NGOs were ready to test the boundary of the new law and the court’s interpretation and application of it to specific cases. However, to their surprise, almost all of the filed cases were rejected by local courts in 2013. In the end only two cases were adjudicated in Qingzhen Environmental Court. These failures were disappointing, but provided learning opportunities for the NGOs, particularly the well prepared case brought against a coal-to-chemical company that belongs to Shenhua Corporation.
THE SHENHUA COAL TO LIQUID AND CHEMICAL CASE

On 26 July 2013, Environmental Research Institute of Beijing Chaoyang District (known as Friends of Nature, FON) and Source Enthusiasts Environment Institute of Beijing Fengtai District (known as Nature University) filed a case in the People’s Court of Beijing East District to sue China Shenhua Coal to Liquid and Chemical Co., Ltd and China Shenhua Coal to Liquid and Chemical Co., Ltd Ordos Branch.

The plaintiffs alleged the defendants had illegally extracted groundwater from the Haolebaoji agricultural and grazing region, an important source of water within Inner Mongolia’s Mu Us desert region. The defendants constructed 22 wells that are more than 300-meters deep in the region and began extracting water on a large-scale in 2006. According to the local Haolebaoji residents, Shenhua’s water extraction resulted in significant drops in groundwater levels and deterioration of the quality of groundwater. As a result, extremely low water levels in the region led to the die-off of surface vegetation and some areas to experience total desertification. In addition, drinking water for people and livestock was also severely threatened, as water quality testing revealed toxic and hazardous substances. The plaintiffs also alleged that defendants had unlawfully discharged untreated waste water to the nearby river ways and sandy lands, consequently forming a large wastewater pit located 500 meters away from defendants’ plant.

The plaintiffs, on behalf of the public, sought for the alleged to: (1) stop discharging waste water to sandy land, (2) take measures to remediate the waste water pit and restore the ecological function of that area, (3) stop extracting water from Haolebaoji region, and (4) to pay the plaintiffs’ litigation fee and attorney fee.

If the court accepted and adjudicated this case it would represent the first legal step in holding Shenhua accountable for its illegal polluting activities and negative impact on the local environment and communities. Environmental public interest litigation could have become a powerful tool for FON and NU in this fight.

Unfortunately, on 30 August 2013, the court informed the representing attorney by phone that the case had not been accepted. The court concluded that the Civil Procedure Law does not provide clear provision on who can bring environmental public interest litigation: article 55 of the Civil Procedure Law explicitly...
allows “relevant organizations” stipulated by law to sue on behalf of the public on matters such as environmental pollution and consumer rights but there was no national law defining what qualifies as a “relevant organization.”

Seven other lawsuits filed by All-China Environment Federation (ACEF), an organization affiliated with the Ministry of Environmental Protection, faced the same fate and were rejected, even though these cases were arguably less politically sensitive compared to the Shenhua case. Various local courts have since stated that they would not accept any NGO-initiated civil public interest cases without a clear mandate from national legislators.

**LEGISLATIVE BATTLE ON THE AMENDMENTS TO ENVIRONMENTAL PROTECTION LAW**

In 2012 and 2014, the Standing Committee of the National People’s Congress (NPC) considered several amendments to China’s 1979 Environmental Protection Law (EPL). This was a historic opportunity to include the legal provisions favoring the expansion of environmental public interest litigation in the new law. The 11th NPC released its first draft of the amendments to the EPL on 31 August 2012 but not a single word in this draft touched upon public interest litigation (NPC, 2012b).
On the heels of this disappointing first draft, environmental NGOs such as Friends of Nature led efforts to fight for a favorable provision on environmental public interest litigation. The new 12th NPC Standing Committee promulgated the second draft version on 19 July 2013 adding one article to stipulate that the All-China Environment Federation (ACEF) and its member associations at the provincial, autonomous region and self-governing municipality levels could present in people’s courts environmental cases where the social public interest was damaged (NPC, 2013). This proposed provision excluded all other environmental organizations from using public interest tool in courts and triggered an intense public debate.

On 21 October 2013, the Standing Committee reviewed the third draft, which was not released for public comments. It was reported that this version “expanded” the peripheries of who could file environmental public interest cases from only one organization—the ACEF and its member associations—to include all environmental social organizations registered with the Ministry of Civil Affairs (MOCA). However, MOCA has only registered only 12 such organizations, most of which are academic societies and industry associations that are unlikely to file environmental public interest litigation standing. Article 58 of the new EPL permits Chinese social organizations to file suits on behalf of the public interest involving pollution or ecological damage if they: (1) are registered with the civil affairs departments at or above the municipal/district levels, (2) have specialized in environmental protection public interest activities for five or more consecutive years and (3) have no record of violating the law. This new environmental public interest

Judicial Interpretation on Environmental Civil Public Interest Litigation is a powerful sword that can cut through the dirty stream and clean the grey smog air. It will be like a sword of Damocles that hangs above the polluters.

Justice Zheng Xuelin
Director of Environment and Resources Law Tribunal, Supreme People’s Court, January 7, 2015
litigation provision is much more expansive than expected.

Although falling short of calls by activists to give public interest standing to all environmental NGOs, the new provision is a positive step forward, permitting grassroots and more independent NGOs to bring suit. It has the potential to have an enormous impact, changing the current government regulator and regulated industry paradigm by strengthening the influence of civil society on environmental protection in China.

SUPREME PEOPLE'S COURT AND ITS JUDICIAL INTERPRETATION

Following the adoption of the new Environmental Protection Law, the Supreme People's Court (SPC), China's highest court and critical stakeholder in this new system, took action to lead the development of environmental public interest law.

- **Creation of a New Environmental Law Division:** On 23 June 2014 the SPC announced the establishment of a new Division on Environmental and Resources Law within the SPC, which is responsible for developing judicial interpretations related to environmental and natural resources law. There are 32 judges and clerks in this new division.

- **Guidance to Lower Courts:** The SPC also issued an opinion on improving effective environmental adjudication. Though there is no binding effect on the lower court, SPC's opinion showed the higher court's position and efforts to promote environmental civil public interest litigation. The opinion specifically directs the lower courts to accept cases filed by NGOs meeting the criteria stipulated in Article 58 of the EPL.

- **Opinion to Limit Local Government Interference:** The opinion also states that the intermediate people's courts located where the offending activities take place or where the offending parties are based have jurisdiction over environmental public interest cases. This is meant to address possible interference of local governments with the decisions of local courts in this type of cases (SPC, 2014).

Given the clear support from the SPC, a few local courts, especially in Jiangsu Province, began to take on more environmental public interest law cases. In total, 13 such cases were accepted in 2014, even before the new EPL took effect. Among these, one resulted in a landmark decision as the court ordered six companies to pay 160 million RMB (~$26 million) in restoration costs for illegally dumping about 25,349 tons of chemical waste into two rivers in 2012 and early 2013 in the Taizhou area. On 29 December 2014, the high court upheld the lower court's decision, but ordered the companies to pay 60 percent of the restoration costs within 30 days to a special fund that would be used to restore the environment in Taizhou area. The court also ordered that the companies use the remaining 40 percent of the settlement to upgrade their pollution prevention and control system within a year, stating that if the companies failed to do so, they would be required to pay that amount to the restoration fund. This is the biggest award ever issued in an environmental public interest lawsuit in China (Zhang, 2015).

In addition to issuing the opinion providing guidance to lower courts, the SPC promulgated a judicial interpretation entitled Interpretation Regarding Certain Issues Related to Application of the Law in Environmental Civil Public Interest Litigation (MOCA, 2015) to clarify and elaborate on stipulations related to the environmental public interest lawsuits in the revised Civil Procedure Law, the new Environmental Protection Law and the Tort Law.

The judicial interpretation includes the following provisions to help eliminate certain barriers and create incentives that shape the
future development of environmental public interest law:

- Article 1 in the interpretation adds a stipulation that courts shall hear environmental public interest law suits not only after harm has occurred, but also if the conduct of a polluting party poses serious risks to the public interest, which expands on the provision in the Environmental Protection Law and the Civil Procedure Law. It should be noted that showing imminent environmental or ecological harm is comparatively easier than proving that actual harm has occurred.

- Articles 2 and 3 in the interpretation clarify and expand on which environmental organizations may present a lawsuit. According to the SPC “social organizations” (shehui zuzhi) include social groups, private non-enterprise units, and foundations. Groups registered with civil affairs bureaus in sub-districted municipalities, autonomous prefectures, regions or prefecture-level cities without sub-districts or districts of direct-controlled municipalities or higher level can bring environmental public interest case to courts. This expansion is important as it allows NGOs like FON and Nature University that registered at the district civil affair bureaus in Beijing to have standing. An official from MOCA estimates around 700 NGOs in China are now eligible for filling environmental public interest lawsuits.

The interpretation’s Article 18 sanctions remediation efforts that a court may impose based on the types and scope of environmental damages. These remedies include to “stop harm,” “cessation of inference,” “elimination of danger,” “return of property,” “restoration to original status,” and “damages.” SPC further clarifies that in cases where the plaintiff requests so, courts may require the polluters to restore the environment to the original condition and function. In cases where complete restoration is not feasible, the courts may allow other measures. For example, a natural wetland was filled by an illegal construction project and it was economically impossible to removing the illegal construction project and to restore the natural wetland. Thus, the court will allow restoration of another natural wetland in another location. If the polluters fail to implement its restoration obligations, the court can order the defendant to cover ecological restoration costs, such as the cost of designing and implementing restoration projects and the cost of monitoring supervision (Article 20). The remedy tool box of environmental public interest law incorporates market-based principles such as capturing the economic benefits of non-compliance from polluters. This stipulation has the potential to strengthen incentives for companies to comply with environmental laws.

- Article 22 of the interpretation provides that courts should support public interest plaintiffs’ claims for attorney fees, investigation costs, assessment fees, and other reasonable litigation costs if they prevail. This attorney fee and litigation cost recovery provision will provide incentives for private attorneys and NGOs to engage in environmental public interest law.

Justice Zheng Xuelin, Director of Environment and Resources Law Tribunal proclaimed that the “Judicial Interpretation on Environmental Civil Public Interest Litigation is a powerful sword that can cut through the dirty stream and clean the grey smog air. It will
be like a sword of Damocles that hangs above the polluters.”

HAS CHINA’S ENVIRONMENTAL PUBLIC INTEREST LITIGATION ERA ARRIVED?

There has not been explosive growth in the number of environmental public interest litigation cases since 1 January 2015 when the Environmental Protection Law came into force. As of the end of March 2015, there were only five cases filed and accepted by the courts. While it may be an exaggeration to consider this “the era of the environmental public interest litigation,” with the new law and the new judicial interpretation, it merits pondering whether such cases could boom in the near future. Will civil public interest litigation become a powerful weapon for citizens to address environmental problems and challenge big state-owned companies in China’s judicial system?

Though these questions remain to be answered in the years to come, Chinese environmental NGOs continue to take action. A number of environmental NGOs led by FON and the Center for Legal Aid to Pollution Victims formed an advocacy and legal support network to develop collective action and public interest litigation strategies for civil society. The Friend of Nature Foundation, with support from the Alibaba Foundation, established a special fund to provide financial support to NGOs interested in filing environmental public interest lawsuits (FON, 2015). Some 2015 cases that were accepted include the following:

- In 2015, FON and Fujian Green Home, a local environmental NGO, filed a complaint with the Nanping Intermediate People’s Court in Fujian Province to seek the cleanup and restoration of an illegal mining site. This case was accepted as the first environmental civil public interest case under to the new Environmental Protection Law (“Civil group,” 2015).

- In March 2015, Dezhou Intermediate Court accepted a case filed by ACEF against the Dezhou Jinghua Group, which makes chemicals for the glass industry, requesting environmental damage compensation of 30 million RMB ($4.8 million) for air pollution. The proposed amount of damage is based on the economic benefits of the company’s non-compliance (EBN) and the monetary gains from shutting down its air pollution treatment facilities. If the court upholds this claim, this case will set a strong precedent; damage compensation based on EBN can be imposed on environmental violators through environmental civil public interest litigation.

It is true that Chinese environmental NGOs still lack tremendously funding, knowledge, and legal support to file cases, but the new Environmental Protection Law and Judicial Interpretation represents a significant change from before. One can be hopeful that the era of citizen enforcement with Chinese characteristic is on its way.

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