

C O M M E N T U P D A T E

Green NGOs Win China's First Environmental Public Interest Litigation: The Nanping Case

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The September 2015 issue of *News & Analysis* looked at China's new Environmental Protection Law, including the first environmental public interest litigation (EPIL) case heard under it, the "Nanping case."¹ On October 29, 2015, the court ruled in the environmentalists' favor.² The decision sends a strong signal that Chinese courts have jurisdiction to enforce environmental laws beyond awarding money damages for pollution injuries. It may also signal a more active role for Chinese courts and nongovernmental organizations (NGOs) in protecting natural resources.

The Ruling

The court held the four defendants liable for damaging 1.89 hectares of forestry land due to illegal mining operations. The court ordered the defendants to remove mining materials and waste rock from the damaged site, to restore the site by planting new trees, and to ensure successful reforestation for three years. If they fail to comply with the court order, the defendants will have to pay 1.1 million yuan (\$180,000) to a special account designated by the court for site remediation. The court also held the defendants liable for 1.27 million yuan (\$200,000) in ecological interim losses, to be paid into a remediation account for other ecological restoration projects. Finally, the court awarded the plaintiffs expert consultation fees for assessing damages (6,000 yuan, \$968), attorneys fees (121,461 yuan, \$19,590), and litigation costs (38,702 yuan, \$6,450). There were five key issues decided by the court relevant to NGOs.

Standing: Article 58 of the new Environmental Protection Law provides that Chinese social organizations can bring suits on behalf of the public interest in situations involving

pollution or ecological damage if the organizations: (1) registered with the civil affairs departments at or above the municipal level within the district; and (2) specialized in environmental protection public interest activities for five or more consecutive years.

Even though plaintiff Friends of Nature (FON) had not technically been registered for five years when it first filed the case on December 4, 2014, the court held it had standing because FON had been engaged in environmental protection public interest activities prior to registering, and it met the five-year registration requirement during the adjudication of this case.

Defendants' Liability: The court held that the defendants' mining activities constituted ecological destruction harming the public interest for which they should bear joint and several tort liability. Although the defendants claimed they received "verbal approval" from local officials, they lacked the proper permits to clear trees and start mining operations. The court found irrelevant the defendants' two pieces of evidence they claimed legitimized the unpermitted mining: meeting notes and an investment policy notice.

Remedies: The key issue with regard to remedies was whether the Supreme People's Court's (SPC's) judicial interpretation on EPIL could be applied to this case.³ Although the SPC's interpretation was not effective until January 7, 2015, years after the mining started, the court held that the judicial interpretation applied because there was no clear rule denying liability on this matter when the defendants' actions occurred. The new law, however, only supports interim losses of service functions during the recovery of ecological environment. As such, FON and Fujian Green Home, the second plaintiff NGO in the case,

1. Yanmei Lin & Jack Tuholske, *Field Notes From the Far East: China's New Public Interest Environmental Protection Law in Action*, 45 ELR 20855 (Sept. 2015).
2. Friends of Nature, Fujian Green Home v. Xie Zhijin et al., Nan Min Chu Zi No. 38 (Nanping Intermediate People's Ct. Oct. 29, 2015).

3. SPC, INTERPRETATION REGARDING CERTAIN ISSUES RELATED TO APPLICATION OF THE LAW IN ENVIRONMENTAL CIVIL PUBLIC INTEREST LITIGATION (Jan. 7, 2015). Article 21 provides: Where plaintiff requests defendant to afford damage of interim losses of service functions during the recovery of ecological environment, people's courts should support it according to law.

could not seek actual damages for the loss of trees. Rather, actual damages could only be claimed by the local collective that had use rights to the forest. The court therefore dismissed plaintiffs' claims for actual damages for trees, totaling 1.39 million yuan (\$224,194).

Attorneys Fees and Costs: The court held that the plaintiffs' claims for attorneys fees and litigation costs were reasonable and not contradicted by any applicable law. But because attorneys fees are based on the prevailing local market rates, fees for the Shanghai attorney representing FON were awarded at a higher rate than Fujian Green Home's attorney, who practices in the more rural Hubei Province.

Third Parties' Responsibilities: The court held that the district land and resource bureau and the forestry bureau were not responsible for supervising the restoration work because they have no civil legal relationship to the case. Although they are charged with enforcing forestry and land protection laws and regulations in their jurisdiction, they only have administrative authority.

Looking Ahead

The defendants stated that they will appeal the decision to the Fujian Provincial High Court.⁴ Nevertheless, NGOs and environmental groups view this ruling as a victory.

The court's decision signals two important rules for EPIL standing: (1) NGOs may file EPIL cases outside of their registration area (FON is a Beijing-registered NGO); and (2) the requirement that NGOs engage in environmental protection activities for five years does not necessarily look back from the date the NGO filed the case.⁵ These two underlining rules are very important in light of the political and legal reality that makes it more complicated for NGOs to register in China than in the United States.

In addition, while the stakes here were relatively small, the decision represents the first ecological damage public interest case filed in China. Previous environmental cases focused on monetary damages for victims of pollution. As Ge Feng, coordinator of public participation for FON, explained, "this is the first ecological damage public lawsuit, so the hearing, decision and final execution [of the court's order] will have real meaning."⁶

Notably, the requirement for a certified assessment agency to conduct an environmental damage assessment is a key barrier in many environmental cases. But in the Nanping case, the court accepted the China Forestry Appraisal Company's assessment report as evidence in determining ecological damages. Liu Xiang, a lawyer with Beijing Huanzhu Law Firm that represented the two groups said, "although expert opinions are well accepted in foreign countries, China has rarely allowed the use of such expert opinions."⁷

Further, the court also exempted the NGOs from filing fees and awarded the plaintiffs attorneys fees and costs. FON believes this could "greatly enhance initiatives by NGOs to file environmental public interest lawsuits and more lawyers may be willing to represent these cases as well."⁸

Perhaps, most important was the court's rejection of defendants' claimed verbal approval of the mine. Under China's current Administrative Litigation Law, judicial review of local rules and decrees is not allowed, yet many local rules and plans are in conflict with national laws and are the primary cause of the environmental problems. The court's decision may therefore signal a change in the dynamics.

As of November 4, 2015, 37 cases filed under China's new environmental law had been accepted by the courts. Most of these are pollution cases involving big companies. Among them, nine were rejected by the lower courts, but then reversed by the provincial high courts. China Biodiversity Conservation and Green Development Foundation (CBCGDF) has filed eight cases against various companies for contaminating an area of the Tengger Desert (Tenggeli in Chinese) in the Ningxia-Hui autonomous region. Zhongwei Intermediate People's Court held CBCGDF lacked standing because its services did not include public interest litigation on environmental protection.⁹ CBCGDF has appealed the decisions.

The Nanping case represents only a small step in addressing natural resource destruction in China. Whether larger industrial enterprises can also be held accountable remains to be seen. Clearly, Chinese NGOs and lower courts are testing the bounds of China's new public interest litigation laws. Decisions over the next year will provide further insight as to the role that courts and NGOs will play in addressing China's severe pollution and resource damage issues.

4. Article 12 of the Law on the Organization of People's Courts states that the courts have to try cases on two levels, with the second instance being the final judgment. See *China's Judiciary*, China.org.cn, <http://www.china.org.cn/english/Judiciary/31280.htm>.

5. Prof. Wang Canfa's comments to the Environmental Public Interest Support Network "Wechat Group." Prof. Wang Canfa is a prominent environmental scholar and practitioner from the China University of Political Science and Law.

6. Michael Standaert, *Green Groups Win Public Interest Lawsuit in China*, BLOOMBERG BNA (Oct. 30, 2015), available at <http://www.fon.org.cn/index.php/en/post/id/3106>.

7. *Id.*

8. *Id.*

9. Zheng Jinran, *Pollution Lawsuit Rejected by Court*, CHINA DAILY (Oct. 24, 2015), at http://www.chinadaily.com.cn/china/2015-08/24/content_21684639.htm.