An Exploration of and Reflection on China's System of Environmental Public Interest Litigation

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Commensurate with its significant environmental problems, China's environmental protection laws and court system have undergone profound changes in the past two years. In this Comment, we highlight the development and implementation of China's environmental public interest litigation (EPIL) system, which shifts the legal paradigm from tort suits to recover damages incurred by pollution victims to cases that more closely resemble U.S. citizen suits. Changes in both substantive and procedural laws have laid a foundation for nongovernmental organizations (NGOs or "social organizations" in China) to file public interest suits. The number of public interest cases seeking damages and remediation for air, water, and land pollution has skyrocketed.

China is also experimenting with other approaches to avoid problems such as local protectionism. Cases can now be filed in higher level courts. An expanded role for the procuratorate allows legal action against local government agencies and polluters, often with the cooperation of public interest groups. These changes are not a panacea, but offer promise. At the same time, practical problems, ranging from limited social organization capacity to bring suits to how to administer funds received from large judgments, will require solutions if the EPIL system is to thrive.

We first provide background for the development of environmental litigation in China, drawing on the work of scholars. We then examine particular cases over the past two years to highlight the success and challenges that Chinese courts face, reflect on how this system is working in practice, and conclude by offering suggestions for continued improvement of the EPIL system.

I. Background

A. *Initial Efforts by Chinese Courts to Address Pollution Cases*

Establishment of EPIL is a legislative affirmation of the role of China's local courts in enforcing environmental protection. At the beginning of this century, as a result of rapid industrialization and urbanization, China was experiencing numerous serious environmental problems including rampant air pollution, soil contamination, and unsafe drinking water, prompting widespread public concern over pollution issues.[1] This pollution extracts significant societal costs; "life expectancy in the north has decreased by 5.5 years due to air pollution, and severe water contamination and scarcity have compounded land deterioration problems."[2] According to one study, "only half of China's 200 major rivers and less than one-quarter of China's 28 major lakes and reservoirs [are] suitable for use as drinking water after treatment."[3]

The Chinese government undertook efforts to curb pollution over the past decade that have resulted in some improvements to both air and water quality.[4] However, efforts to address pollution have been compounded by continuing industrial and urban growth; for example, by 2008, Beijing had 3.5 million vehicles and was add-

1. *See, e.g.*, Chak K. Chan & Xiahong Yao, *Air Pollution in Mega Cities in China*, 42 Atmospheric Env't 1-42 (2008).
2. Eleanor Albert & Beina Xu, *China's Environmental Crisis*, CFR Backgrounders, Jan. 18, 2016, http://www.cfr.org/china/chinas-environmental-crisis/p12608.
3. Junfeng Zhang et al., *Environmental Health in China: Progress Towards Clean Air and Water*, 375 The Lancet 1110-19 (2010) (citing Ministry of Environmental Protection, Bulletin of China's Environmental Conditions (2009)).
4. *Id.*

ing new cars to its streets at the rate of 1,000 per day.[5] Concerted localized efforts at pollution control achieved significant results; China lowered air pollution levels by more than 50% for the 2008 Olympics by requiring cleaner fuels, moving plants from urban areas, and controlling traffic.[6] China launched an ambitious five-year Air Pollution Action Plan in 2013 aiming for significant fine particle ($PM_{2.5}$) reductions in three target areas, with some demonstrated success.[7] Still, China's pollution problems are widespread, difficult to control, and compounded by ever-expanding economic growth. The winter of 2016-2017 witnessed severe air pollution across large swaths of China.[8]

In addition to increased regulatory efforts, over the past two decades China has begun to evaluate the use of the judicial system as a means to address pollution issues.[9] The nascent development of environmental protection through the courts required an evolution of China's substantive and procedural laws, as well as a revamping of the court system. China's national environmental laws have been on the books for more than 30 years; the first Environmental Protection Law (EPL) was enacted in 1979.[10] However, enforcement was very limited.

A Chinese environmental law scholar noted in 1986 that "under the Chinese legal system, judges in China have either no power to make law or no authority to interpret the law at their own will."[11] Prof. Cheng Zheng-Kang provided a detailed review of Chinese environmental law, with many recommendations for more effective control of pollution; enforcement of those laws by civil society groups was not among them.[12] He described the three modes of enforcement: civil tort suits for damages by individuals, administrative enforcement by the local environmental protection bureau (EPB), or criminal prosecution.[13] These remedies remained the methods of environmental enforcement for three decades.

One of the early problems preventing effective judicial enforcement of environmental laws was jurisdictional, due to the structure of Chinese courts. For example, county-level courts could not deal with the issue of transadministrative-division water pollution. A local court could not address pollution emanating from another county. To strengthen the protection of drinking water resources and with the support of local government, a two-level environmental tribunal was set up by the Intermediate Court of Guiyang City and Qingzhen Municipal Court in Guizhou Province on November 20, 2007.[14]

Following the designated jurisdiction by Guizhou Higher Court, the environmental tribunal of Qingzhen City was then placed in charge of a transadministrative-division EPIL case covering the "two lakes and one reservoir" watershed. The Guiyang "two lakes and one reservoir" Agency[15] brought environmental civil public interest litigation as the plaintiff, to address pollution of drinking water supplies, resulting in the first EPIL case heard by an environmental tribunal.[16] A similar transboundary water pollution case occurred when blue algae broke out in Taihu Lake, Jiangsu Province. The Wuxi Intermediate People's Court of Jiangsu Province set up an environmental tribunal on May 6, 2008, and an NGO[17] brought a public interest case to address the water pollution.[18] These early cases demonstrate flexibility by the Chinese courts to use pilot projects to address pollution in a manner not expressly covered by procedural rules.

Courts in other provinces such as Fujian, Jiangsu, and Yunnan also made some early efforts to develop public interest litigation. These courts accepted public interest cases brought by forestry, environmental administrative authorities, and local procuratorates, as well as social organizations. Two important cases bear mentioning. The Tasman Sea oil spill case brought by Tianjin Oceanic Administration in 2002 resulted in a judgment against the shipping company for damages to the ocean envi-

5. *Id.*
6. *Id.*
7. Zhang Chun, *Can China Meet Its 2017 Air Quality Goals?*, ChinaDialogue, Jan. 25, 2017, https://www.chinadialogue.net/article/show/single/en/9574-Can-China-meet-its-2-17-air-quality-goals-.
8. Wang Yiwei, *Time-Lapse: 72 Hours of Air Pollution in Shijiazhuang*, ChinaDialogue, Dec. 13, 2016, https://www.chinadialogue.net/article/show/single/en/9483-Time-lapse-72-hours-of-air-pollution-in-Shijiazhuang.
9. *See generally* Alex Wang & Jie Gao, *Environmental Courts and the Development of Public Interest Litigation in China*, 3 J. Ct. Innovation 37-50 (2010).
10. Cheng Zheng-Kang, A Brief Introduction to Environmental Law in China (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1986).
11. *Id.* at 2.
12. *See id.* Sec. VI.
13. *Id.* Sec. VII.
14. Liu Chao, *Introspection of the System Logic of Environmental Protection Court—With Guiyang Environmental Protection Tribunal and Qingzhen Environmental Protection Tribunal as Object of Investigation*, 1 Wuhan U. L. Rev. 121-28 (2010).
15. In December 2007, the case of *Two Lakes & One Reservoir Admin. of Guiyang City v. Guizhou Tianfeng Chems. Co., Ltd.* for compensation of environmental damage, which was concluded by the People's Court of Qingzhen City, Guizhou Province, became the first environmental civil public interest litigation case in China, while the case of *All-China Env't Fed'n v. Land & Res. Bureau of Qingzhen City* for an administrative omission, which was concluded by the same court in September 2009, was the first environmental administrative public interest litigation case.
16. Sun Qian, *Some Legal Thoughts on Setting Up of Environmental Protection Court—With Guiyang Environmental Protection Tribunal as Object of Investigation*, 6 J. L. Application 44-46 (2008).
17. The term "social organization" has many characteristics of what other societies refer to as NGOs. Social organizations in China are nonprofit, government-registered entities that span a wide range of purposes. As in the United States, China's social organizations can be small, local groups or have a national presence. We use the terms interchangeably in this Comment, though there are of course differences. U.S. NGOs receive tax-deductible contributions from the public if they are qualified by the Internal Revenue Service (IRS); Chinese social organizations do not have an equivalent status.
18. On July 6, 2009, Wuxi Intermediate People's Court in Jiangsu Province accepted a case filed by All China Environmental Federation (ACEF) against Jiangsu Jiangyin Port Container Co., Ltd. ACEF alleged that the defendant discharged toxic wastewater without any treatment during its process of loading and unloading iron ore powder to the container. The wastewater flowed through the Huangtian Port of Jiangsu Province to the Yangtze River, which caused serious water pollution. After the court-led mediation, the parties reached a settlement that requires the defendant to install measures and equipment to ensure that the iron ore powder loading and unloading process is dust-free and that wastewater will not be discharged to the surrounding water bodies, which would affect the water quality. Xi Civil First Instance No. 0021 (2009) (copy on file with authors).

ronment.[19] Another case, involving soil pollution from chromium residue in Qujing City, was brought solely by two environmental protection NGOs, Friends of Nature and Chongqing Green Volunteer Federation.[20] At the time the suit was filed, Chinese civil procedure law did not expressly provide for a suit filed solely by NGOs or government agencies in the public interest; such parties would not have "standing" to invoke the court's jurisdiction. This suit again resulted in a successful outcome. The transadministrative-division trial of these EPIL cases by an environmental tribunal prevented local government intervention and allowed the courts a new role resulting in improved local environmental quality.[21]

These and other efforts at public interest litigation from 2007-2014 demonstrated the need for changes in Chinese law and court structure to expressly permit such actions. These cases brought the importance of EPIL onto the legislative horizon, and made the National People's Congress (NPC) realize both the necessity and feasibility of the establishment of a formal EPIL system.[22]

B. Changing Procedural and Substantive Laws to Accommodate EPIL

As explained above, China's court system has periodically made efforts to address pollution cases. However, no clear procedural mechanisms allowed for public interest suits, and many courts rejected them. Yet, the early cases showed that establishing and improving an EPIL system is an important channel to further environmental protection. According to Paragraph 1 of Article 108 of the Civil Procedure Law before its amendment in 2012, only "a citizen, legal person or any other organization that has a direct interest in the case" could bring suit. The term "direct interest" equates to tort-like injuries—health or property damages that could be compensated monetarily. A person with no "direct interest" in a case could not bring suit concerning public interest resources, such as loss of forest resources, or unhealthy air pollution levels.

For this reason, in 2012, the amended Civil Procedure Law stipulated in Article 55 that, for conduct that pollutes the environment, infringes upon the lawful rights and interests of many consumers, or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court. Amended Article 55 thus provided a basis for public interest litigation to be filed by a social organization even without a so-called direct interest in the case, as long as the NGO met certain requirements. But the term "relevant social organization" was not clearly defined and courts were still reluctant to accept cases filed by NGOs.

Article 58 of the amended EPL released in June 2014 defined the qualifications for a social organization to bring an EPIL case.[23] In addition, the former Civil Procedure Law did not designate the procuratorate[24] as a plaintiff to bring a public interest lawsuit because such a suit might affect the performance of its legal supervision duties over other parts of the government.

On July 3, 2014, the Supreme Court formally set up an environmental resources tribunal, and demanded that all higher provincial-level courts follow suit.[25] Intermediate

19. Jin Maritime Law Civil First Instance No. 183 (2003) (copy on file with authors). On Nov. 23, 2002, the *Tasman Sea* oil tanker owned by the defendant Infineet Shipping Co., Ltd. and the *Shunkai No. 1* cargo vessel owned by Dalian Lvshun Shunda Shipping Co., Ltd. collided in the eastern part of Tianjin Dagu Bay of the East China Sea. The collision occurred on the 23rd nautical mile (38°50.5'N, 118°26.6'E). The *Tasman Sea* was damaged in the starboard compartment three and 205.924 tons of Brunei light crude oil were discharged into the sea, causing serious marine pollution. The first instance court ruled that Infinite Shipping Co., Ltd. must compensate Tianjin Oceanic Bureau for the marine damages at 7,575 million yuan.
20. In June 2011, Yunnan Luliang Chemical Industry Co., Ltd. dumped more than 5,000 tons of industrial chromium residue in the Kirin Mountain area of Qujing City, Yunnan Province. The chromium residue caused water and soil pollution near the Nanpan River, which is a source of the Pearl River. Chongqing Green Volunteers Federation and Beijing Chaoyang District Friends of Nature Environmental Research Institute (referred to as Friends of Nature) filed EPIL with the Qujing Intermediate People's Court of Yunnan Province. The parties initially reached a mediation agreement, which required Luliang Co. to halt pollution and eliminate risks and to be responsible for environmental remediation efforts, while the plaintiff, including public supervision and a third party, will review the injunctive and remediation progress. *See Environmental Protection Organizations on Qujing Chromium Slag Pollution Caused by Public Interest Litigation Claims 10 Million*, LegalDaily, Sept. 20, 2011, http://www.legaldaily.com.cn/index_article/content/2011-09/20/content_2976993.htm. The defendant, however, refused to sign the final settlement agreement, so the case is ongoing.
21. In December 2007, Qingzhen Municipal People's Court, Guizhou Province, concluded the water pollution liability case entered by Guiyang City Two Lakes and One Reservoir Administration against Guizhou Tianfeng Chemical Industry Co. and ordered that the company immediately halt environmental infringement by the phosphogypsum tailing waste dump, stop the use of the waste dump, take countermeasures, and eliminate threats to the environment. The case has been referred to as the first EPIL case. The tailing reservoir of Guizhou Tianfeng Chemical Industry directly affected the quality of the drinking water source for Guiyang City; however, the company was situated in Anshun City, and Guiyang EPB could not directly administer an administrative penalty. According to the designated jurisdiction by Guizhou Higher Court, Qingzhen Municipal Environment Tribunal was in charge of all environmental resource protection first instances within the jurisdiction of Guiyang City, which effectively solved the problem of transadministrative-division pollution. Selection of Cases in Environment Tribunal 8 (Wang Li ed., Law Press 2012).
22. Explanations on the Civil Procedure Law of the People's Republic of China 106 (Wang Shengming ed., 2012).
23. Article 58 provides that Chinese social organizations that meet the following two requirements can bring suit on behalf of the public interest in cases involving pollution or ecological damage: (1) the organization has registered with the civil affairs departments at or above the municipal level within the district; and (2) the organization has specialized in environmental protection public interest activities for five or more consecutive years and has no record of violating the law. The amended rule thus allowed broader standing in some respects than is allowed by U.S. courts under Article III of the U.S. Constitution. A Chinese NGO need not have members with a direct tie to the site of the pollution; a Beijing NGO can sue over a violation in Yunnan Province.
24. The procuratorate is a government entity that investigates and prosecutes legal violations. The procuratorate is a feature of civil law legal systems that use an inquisitorial as opposed to an adversarial mode of justice. The Supreme People's Procuratorate is the highest such office in China. As well, provincial- and county-level procuratorates investigate and prosecute violations at the local level. Wikipedia, *Supreme People's Procuratorate*, https://en.wikipedia.org/wiki/Supreme_People's_Procuratorate (last modified Feb. 20, 2017).
25. In July of the same year, it promulgated the Opinions on Comprehensively Strengthening Environment and Resources Adjudication to Provide Powerful Judicial Assurance for Boosting Ecological Civilization Construction, emphasizing the need to "reasonably set up specialized institutions for

courts were permitted to set up an environmental resources trial program according to their trial volume, and for those with fewer cases, "collegial" (three-judge) panels could be set up instead. A few first-level trial courts with large caseloads were also permitted to set up environmental resource trial branches to handle environmental cases. These organizational developments at the provincial level are seen as a positive step for reasons discussed above; generally, the first instance of an EPIL case should be heard by an intermediate court that could avoid transboundary jurisdictional problems and undue influence at the local level.

As mentioned above, the increased role of the procuratorate is another important development for public interest litigation. Chinese law had to be modified to permit this development. The 2012 Civil Procedure Law only provides that "units stipulated by law or social organizations" could file EPIL cases. The EPL only authorized the NGOs that met its standing requirements (registration at the county level, five years with no violations) to sue. However, the Communist Party of China (CPC) also issued a plan to construct an "ecological civilization," which included encouraging the local procuratorate to file public interest cases both to protect state-owned natural resources and to challenge polluters. The existing Civil Procedure Law and EPL did not clearly provide for local procuratorates to file suits of this nature.

The Supreme People's Procuratorate then filed an application with the NPC seeking approval for a pilot program to allow local procuratorates to file both civil (suing polluters) and administrative (suing the government agencies) EPIL cases. The NPC approved the application in July 2015.[26] Shortly thereafter, the State Council and the Office of the Central Committee of the CPC developed another pilot program.[27] This program authorized 13 provinces to conduct a two-year EPIL project allowing the procuratorates to prosecute environmental civil public interest litigation and environmental administrative public interest litigation.[28] Allowing the procuratorates to bring public interest environmental cases adds an additional element to the development of EPIL by allowing local prosecutors to bring civil cases against polluters.

The State Council issued another plan in October 2015, which states that natural resources are state property and that provincial governments are to establish a legal mechanism to hold polluters accountable for environmental damages. The State Council selected seven pilot locations to experiment with the use of provincial-level governments to pursue EPIL cases.[29] The Ministry of Environmental Protection (MEP) is tasked with providing guidance to the seven provinces to implement the pilot programs. MEP designated the China Academy of Environmental Planning to draft the guidelines.

The final change in the environmental protection legal system occurred in January 2015, when the Supreme People's Court (SPC) published its Interpretations on Some Issues Concerning the Application of Law in Environment of Civil Public Interest Litigation Cases (the Judicial Interpretation), in which it further elaborated on the meaning of the 2014 EPL and the implementation of EPIL.[30] The Judicial Interpretation[31] clarified that NGOs registered at the district level of municipalities, including Beijing, are eligible EPIL plaintiffs; this includes long-standing Chinese groups like Friends of Nature and Nature University.[32] The Judicial Interpretation gave lower courts broad

environment and resources adjudication." In line with the principles of "actually needed, tailored criteria and progressive promotion," people's courts set up specialized adjudicating institutions for cases relating to the environment and resources, in order to provide organizational assurance for strengthening environmental and resource adjudication. Higher people's courts should, in line with the principle of adjudication specialization, filter institutional functions, reasonably allocate adjudication resources, and set up specialized institutions for environmental and resource adjudication. Intermediate people's courts should, under the unified guidance of higher people's courts, reasonably set up environmental and resource adjudicating institutions according to the load of environmental and resource cases or, if the caseload is not heavy, environmental and resource collegiate panels. Upon approval of higher people's courts, basic people's courts with relatively more cases may also set up environmental and resource adjudicating institutions. *See* The Supreme People's Court of the People's Republic of China, Environment and Resources Adjudication of China 94 (2016).

26. Decision of the Standing Committee of the National People's Congress on Authorizing the Supreme People's Procuratorate to Conduct Pilot Public Interest Litigation in Some Areas (Adopted at the 15th Session of the Standing Committee of the 12th National People's Congress on July 1, 2015). The pilot areas were identified as 13 provinces, autonomous regions, and municipalities directly under the central government, which include: Beijing, Inner Mongolia, Jilin, Jiangsu, Anhui, Fujian, Shandong, Hubei, Guangdong, Guizhou, Yunnan, Shaanxi, and Gansu.

27. In July 2015, the Standing Committee of the NPC released the Decision on Authorizing the Supreme People's Procuratorate to Launch Pilot Work of Public Interest Litigation in Some Areas, authorizing the Supreme People's Procuratorate to launch a two-year pilot of public interest litigation on environmental and resource protection in 13 provinces, autonomous regions, and municipalities directly under the central government, including Beijing, Inner Mongolia, and Jilin.

28. In July 2015, the Decision of the Standing Committee of the National People's Congress on Authorizing Supreme People's Procuratorate to Conduct Public Interest Litigation Experiment in Some Areas was put into effect.

29. In December 2015, the CPC Central Committee and State Council issued a "pilot program of ecological environmental damage compensation system," which authorized the pilot provincial governments to bring civil public interest litigation against individuals and legal persons who violated laws and regulations that caused damage to the environment. On Aug. 30, 2016, the Central Leading Group for Comprehensively Deepening Reforms approved seven provinces to be the pilot locations to experiment with environmental damage compensation system reform. These provinces are Jilin, Jiangsu, Shandong, Hunan, Chongqing, Guizhou, and Yunnan.

30. Ministry of Civil Affairs of the People's Republic of China, *Interpretation of the Supreme People's Court Concerning the Application of Law in Environmental Civil Public Interest Litigation Cases*, http://www.mca.gov.cn/article/zwgk/fvfg/mjzzgl/201501/20150100756493.shtml (last visited Apr. 18, 2017).

31. A Judicial Interpretation by the Supreme People's Court is a definitive statement on the meaning of a particular law, or section of a law. In American jurisprudential lexicon it would be called an "advisory opinion," which of course U.S. courts are not supposed to issue. However, in the Chinese legal system, these advisory opinions are the norm, and essentially have the force of law. The SPC regularly issues them based upon extensive internal research and debate across a broad spectrum of laws. Judicial Interpretations are crucial because many Chinese laws are drafted in far more general terms than U.S. statutes. Judicial Interpretations were officially recognized in Article 104 of the 2015 Legislation Law.

32. Article 2 states that social organizations that are registered with the civil affairs departments in accordance with the provisions of laws and regulations, such as social groups, private non-enterprise units, and foundations, may be considered "relevant organizations," as provided for by Article 55 of the Civil Procedure Law. Article 3 states that the people's government civil administration departments of sub-districted municipalities, autonomous

authority under Article 58 of the EPL to enjoin, remediate, and assess monetary costs for damage to public resources caused by private polluters.[33] It permits courts to assess damages based on the economic benefits gained by the polluters from noncompliance, in cases when restoration costs are difficult to determine.[34]

As discussed below, these improvements in the implementation of the amended EPL, structural changes in the courts, and the authorization of both social organizations and the local procuratorate to file public interest suits have allowed courts at all levels to use their authority to improve the country's environmental management. In short, the courthouse doors in China have been opened to increase both public and government participation in enforcing China's environmental laws.

C. A Goal to Create an "Ecological Civilization"

As scholars have noted, looking at the ups and downs of China's environmental justice development over the past two decades, national action to strengthen environmental legal practice was accomplished against the background of creating a society that is more in harmony with the natural environment.[35] In 2013, under President Xi Jinping, the central government introduced the concept of "ecological civilization" into the general layout of state development. This concept represents a party-level determination to change the course of China's relationship between economic growth and environmental protection. The time frame is relevant; the first decade of the 21st century witnessed growing attempts to use the court system for environmental protection. During this same period, the central organs of Chinese government strove to highlight the importance of environmental protection by proclaiming the need to develop an ecological civilization.[36]

The first formal mention of this concept occurred in 2007, when the 17th National Congress reported the need "to construct the ecological civilization and the consumption patterns." Thus, faced with increasing resource constraints, a rapidly growing economy, severe environmental pollution, and a deteriorating ecosystem, the Chinese government made a conscious decision to promote an ecological civilization.[37] This initiative represents a formal acknowledgement by the Chinese government of the need to rein in pollution. The concept can be summed up as an effort to raise, on a societal level, awareness of the need to respect, accommodate, and protect nature. In concert with economic development, ecological civilization prioritizes ecological progress and incorporates ecological awareness into all aspects of advancing economic, political, cultural, and social progress. In short, government at all levels needs to build both a prosperous and a beautiful country.[38]

The Report of the 18th National Congress mentioned that China must fully implement an overall plan for promoting economic, political, cultural, social, and ecological progress, and ensure coordinated progress in all areas within the modernization drive.[39] On November 12, 2013, the Communiqué of the Third Plenary Session of the 18th Central Committee of the CPC required China to accelerate its goal of creating an ecological civilization.[40] Further, the Communiqué of the Fifth Plenary Session of the 18th Central Committee of the CPC put forward the principles that must underlie an ecological civilization: that it be an innovative, coordinated, sustainable, open, and shared development.[41]

Finally, on September 21, 2015, the Central Committee and the State Council issued a directive entitled "The Overall Scheme of Reform of the Ecological Civilization System."[42] The document outlined the guiding ideology of the ecological civilization reform with some of the following key points: adhere to natural resource conservation and environmental protection as the basic national policy; restore and protect the environment with natural recovery as the main policy; protect national ecological security; improve environmental quality; improve the efficiency of resource utilization; and promote the harmonious development of humans and nature.

Advancing an ecological civilization has many practical ramifications for resource planning: preserving and conserving natural reserves, "greening" industrial infrastructure, and protecting air, water, and biodiversity.[43] The

prefectures, leagues, regions, or prefecture-level cities without sub-districts, or districts of direct-controlled municipalities or higher, may be considered "people's government civil affairs departments at or above the sub-districted municipality level" as provided for in Article 58 of the EPL.

33. For an in-depth discussion of an early EPIL case under these new laws, see Yanmei Lin & Jack Tuholske, *Field Notes From the Far East: China's New Public Interest Environmental Law in Action*, 45 ELR 10855 (Sept. 2015).
34. Article 23 of the Interpretations of the Supreme People's Court on Some Issues Concerning the Application of Law in Environment Civil Public Interest Litigation Cases.
35. Wang Jin, *Problems and Countermeasures in China's Environmental Protection Court Construction*, 5 Env't Protection 14-17 (2014).
36. Sam Geall, *Interpreting Ecological Civilisation (Part One)*, ChinaDialogue, July 6, 2015, https://www.chinadialogue.net/article/show/single/en/8018-Interpreting-ecological-civilisation-part-one-.
37. The Central People's Government of the People's Republic of China, *How to Promote the Construction of Ecological Civilization*, http://www.gov.cn/2013zfbgjjd/content_2365303.htm (last visited Apr. 18, 2017). In 2007, the 17th National Congress reported the goal to "construct the ecological civilization and the consumption patterns." *See* http://politics.people.com.cn/GB/30178/6499114.html.
38. *The CPC Central Committee and State Council Promulgated the Plan to Make Top-Level Design for the Field of Ecological Civilization*, Xinhua News Agency, Sept. 21, 2015, http://paper.ce.cn/jjrb/html/2015-09/22/content_257388.htm [hereinafter *The CPC Central Committee and State Council*].
39. *Hu Jintao Proposed Vigorously Promoting the Construction of Ecological Civilization*, Xinhua News Agency, Nov. 8, 2012, http://news.xinhuanet.com/18cpcnc/2012-11/08/c_113637931.htm.
40. *Gazette of the Third Plenary Session of the Eighteenth Central Committee of the Communist Party of China*, Xinhua News Agency, Nov. 12, 2013, http://news.xinhuanet.com/politics/2013-11/12/c_118113455.htm.
41. *Gazette of the Fifth Plenary Session of the Eighteenth Central Committee of the Communist Party of China*, Xinhua News Agency, Oct. 29, 2015, http://news.xinhuanet.com/politics/2015-10/29/c_1116983078.htm.
42. *The CPC Central Committee and State Council*, *supra* note 38.
43. The ecological civilization concept is of course much broader than passing laws and stopping pollution. One example the Chinese government points to is in Yunnan Province. "Changzhi engineering" obtained remarkable achievements in Yunnan. Along the upper Yangtze River, in a region encompassing 30 counties and 624 small watersheds, a more effective

concept lays the foundation for public interest litigation because, to create an ecological civilization, China must address the root cause of the deterioration of the environment—i.e., pollution—so as to reverse the trend, to ultimately create a sound working and living environment, and to contribute to China's[44] global ecological security.

The timing of the ecological civilization directives from the highest levels of government parallels increasing public awareness of pollution problems and the growing interest in seeking redress of pollution problems through the Chinese legal system.

II. Implementation of the EPIL System

A. Development of EPIL Cases in the Courts

Since implementation of the amended EPL in 2014, the number of EPIL cases has increased dramatically. From 2007 to 2014, courts at all levels accepted 65 EPIL cases, among which 57 were environmental civil public interest litigation and eight were environmental administrative public interest cases. However, after the changes to the legal infrastructure that opened the courts to environmental cases discussed above, the number of such cases has skyrocketed.

From January 2015 to June 2016, courts at all levels accepted 116 EPIL first-instance cases and 61 were concluded. Among these cases, 104 were environmental civil public interest litigation and 12 were environmental administrative public interest litigation.[45] From January to June 2015, courts at all levels accepted two environmental administrative public interest cases brought by procuratorates, and from July 2015 to June 2016, the number of such cases increased to 21, among which 11 were environmental civil public interest cases and three were concluded; 10 were environmental administrative public interest cases (including a case of environmental administrative incidental civil public interest litigation), and six were concluded.[46]

In addition, the location of EPIL cases likewise expanded from a concentration in a few provinces like Jiangsu, Guizhou, Fujian, and Shandong to encompass 21 provinces. Also, procuratorates filed public interest cases in 12 pilot provinces; to date the Beijing Municipal Court is the only one that has not accepted a case filed by the local procuratorate.

The vastly expanded number and geographic scope of EPIL cases demonstrates that the changes made in Chinese national environmental law are having significant impacts in the court system. Recognizing the importance of allowing social organizations as well as procuratorates to file environmental cases is having tangible results not only in solving specific environmental problems, but also in raising judicial awareness of the role of courts in upholding national environmental laws. Now that EPIL appears to be firmly established and is maturing in many parts of China, judges and litigants have to address the more complex and nuanced procedural and substantive aspects of EPIL. We discuss these issues in Part IV.

B. Categories of Plaintiffs in EPIL Cases

Under the 2014 EPL, an EPIL plaintiff can either be a qualified social organization or the local procuratorate.[47] Relevant social organizations must be registered at the county level or above, and have an organizational focus on environmental protection issues for at least five years, with no legal violations during that period.[48]

In 2015, EPIL cases were filed by only 10 such social organizations, though under the definition, potentially hundreds of social organizations were qualified. The EPIL plaintiffs were mostly well-established organizations with strong internal structures, and thus possessed the capacity to litigate.[49] Leading EPIL NGOs include the China Biodiversity Conservation and Green Development Fund (CBCGDF), China Environmental Protection Fund, and Friends of Nature Environment Institute of Chaoyang District, Beijing City. These organizations accounted for nearly 70% of the total accepted cases throughout China. However, there are more than 300 social organizations that

environmental watershed governance was instituted. The area of soil erosion decreased 2,098 square kilometers. Basic farmland per capita increased from 0.89 measurement units (mu) to 1.21 mu.

44. *Jian Mingjun: Strengthen the Construction of Ecological Civilization and Create a Safe Natural Environment*, People's Network (July 5, 2015), http://henan.people.com.cn/n/2015/0709/c353059-25518883.html; *Jiang Mingjun: Strengthen the Construction of Ecological Wen Ming, to Create a Safe Natural Environment*, People's Daily, July 7, 2015, http://henan.people.com.cn/n/2015/0709/c353059-25518883.html.
45. *See* The Supreme People's Court of the People's Republic of China, Environment and Resources Adjudication of China 80 (2016).
46. Environment Resource Trial in China (white paper, copy on file with the authors).
47. Though we use the terms NGO and social organization interchangeably, it is important to note that NGOs in China have some different characteristics from those in the United States and Europe. For example, social organizations are not governed by members. Chinese tax law does not currently offer the same advantages that IRS Code §501(c)(3) designation provides. However, in a broader sense, social organizations provide the same type of functions as those in the West to provide an avenue for citizen involvement in activities such as sponsoring field trips, publishing newsletters, supporting research, and so forth. *See*, *e.g.*, Friends of Nature, *Homepage*, http://www.fon.org.cn/index.php/en (last visited Apr. 18, 2017).
48. Article 58 of the EPL states:
> For activities that cause environmental pollution, ecological damage and public interest harm, social organizations that meet the following conditions may file litigation to the people's courts:
>
> (1) Have their registration at the civil affair departments of people's governments at or above municipal level with sub-districts in accordance with the law; (2) Specialize in environmental protection public interest activities for five consecutive years or more, and have no law violation records. Courts shall accept the litigations filed by social organizations that meet the above criteria. The social organizations that file the litigation shall not seek economic benefits from the litigation.

49. For example, Friends of Nature has a total of four staff attorneys, the largest number of any NGO in China. Friends of Nature registered with the Civil Affairs Bureau of Chaoyang District in Beijing on June 18, 2010. When it filed the EPIL case in Fujian Nanping Intermediate Court, it submitted its annual inspection of five-year proof of qualification, and five-year annual report to prove it had been engaged in environmental research and education, protection of the environment, and other public welfare activities; also, since its establishment, it has no record of violating any law.

are qualified to be plaintiffs in public interest environmental cases under the current rules of procedure according to statistics from the Ministry of Civil Affairs.[50] That is a rather large gap.

Practical obstacles prevent qualified NGOs from filing EPIL cases. Among the eligible nonprofit organizations, the first category is the government-organized nonprofit social organizations. Only a small number of these organizations, such as the All China Environmental Federation (ACEF),[51] have filed EPIL. These larger social organizations may lack the experience and political will to bring cases even though they meet standing requirements.

While larger nongovernment social organizations like Friends of Nature have brought EPIL cases, local grassroots organizations that may meet standing requirements have not been active in courts even while they are active in local communities on environmental issues. One problem is that some members of an NGO may have a conflict with an EPIL case that the NGO seeks to bring; for example, the Ala shan Society of Entrepreneurs and Ecology (Alxa SEE)[52] may have members who also have business interests. Others lack specialized legal personnel or the budget for public interest litigation.[53]

As discussed above, a local procuratorate may now bring suit if an NGO is not available or willing to bring the case.[54] The role of the procuratorate helps fill the gap when local organizations do not want to participate in court actions. For example, because of a serious pollution violation by a paper company, the Xuzhou City People's Procuratorate issued a notice to the public interest organizations in Xuzhou urging them to bring public interest litigation to address the pollution. However, no public interest organization in that area was willing to file the case. The Xuzhou Municipal People's Procuratorate then filed the case, *Xuzhou Municipal People's Procuratorate v. Xuzhou City Hongshun Paper Co., Ltd.*, in the Xuzhou City Intermediate People's Court as a civil case.[55] As discussed below, involvement by the public in protecting the environment is a goal of the EPIL system, and one that will require ongoing efforts to increase local NGO capacity.

C. *Types of Claims*

Because the public interest in natural resources is broadly defined under the 2014 EPL, EPIL cases are focused on a broad spectrum of public environmental problems. The EPIL cases accepted thus far include water, air, and soil pollution; damages to land, forest, sea, and endangered wild plant resources; destruction to natural reserves; and so on. A few examples below demonstrate the broad reach of China's environmental laws.[56]

Water pollution problems have been an important focus for EPIL cases. For example, a water pollution suit was brought by a local NGO, Taizhou Municipal Environmental Protection Association, and was supported by Tanzhou Municipal People's Procuratorate, against six chemical and pharmaceutical enterprises. The plaintiff alleged that the six defendants violated environmental protection law and hazardous waste management regulations by selling 25,934.795 tons of hazardous waste—waste hydrochloric acid and waste sulfuric acid generated in production—with no requirement for hazardous waste treatment (personnel involved were prosecuted by Tanxing Municipal People's Procuratorate). The defendants were paid from 20 to 100 yuan per ton to covertly discharge the waste into rivers including the Taiyuan River and the Gumagan River in Gaogang District, Tanzhou City, which caused serious pollution of the water and riverine environment.

The trial court issued a strong judgment. The six defendants were found liable for the damage and ordered to rehabilitate the polluted environment. The court of the first instance decided that the six defendants must pay 160 million yuan as compensation to rehabilitate Taixing's environment.[57] The second instance (appeal) and the retrial all affirmed the original judgment.[58]

On August 19, 2016, the defendants paid the damages of 160 million yuan to the Taizhou Intermediate People's Court of Jiangsu Province. The court has transferred 100 million yuan to the special account under the Taizhou Environmental Protection Federation. The fund will be used for environmental protection projects in Taizhou City. The local EPB will submit restoration project applications for approval from the Taizhou City government. This case illustrates the role of local NGOs and the procuratorate to obtain significant damages, not as tort-like compensation, but to restore the environment for the benefit of the broader public interest.

50. *More Than 300 Social Organizations Can File Environmental Protection Public Interest Litigation*, Beijing News, Apr. 25, 2014, http://news.xinhuanet.com/gongyi/2014-04/25/c_126433775.htm.
51. ACEF is a nonprofit, national social organization registered with the Ministry of Civil Affairs, and is organized under MEP. Its mission is as follows: the implementation of a sustainable development strategy, the realization of national environmental and development goals, and safeguarding public and social environmental rights and interests. *See also* All China Environment Federation, http://www.acef.com.cn/index.html (last visited May 5, 2017).
52. Alxa SEE was established on June 5, 2004, and is funded by nearly 100 well-known entrepreneurs in China's environmental protection organizations. The association is committed to Alxa region desertification control and ecological protection, and encourages entrepreneurs to assume more responsibility. *See* Alxa SEE Ecological Association, *About Alxa SEE Ecological Association*, http://see.sina.com.cn/en/xh/ (last visited May 5, 2017).
53. *See* Wang Canfa, *Difficulties and Solutions for the Environmental Public Interest Litigation Under the New Environmental Protection Law*, 8 J. Legal Application 46-51 (2014).
54. Article 1 and Paragraph 3 of Article 2, Implementation Measures of People's Court on Trial of Public Interest Litigation Case Brought Experimentally by Procuratorate.
55. Xuzhou Mun. People's Procuratorate v. Xuzhou City Hongshun Paper Co., Ltd. (Xuzhou City Intermediate People's Court 2015), Xu Environment Citizen First Instance No. 6.
56. For an overview of the first EPIL case brought to judgment, the Nanping case involving illegal mining, see Lin & Tuholske, *supra* note 33. Since the publication of that article, the Nanping case is in a retrial proceeding.
57. Taizhou EPIL Civil First Trial No. 00001 (2014). Taizhou Environmental Federation vs. Jiangsu Changlong Chemical Company Water Pollution Public Interest Case.
58. Jiangsu EPIL Civil Final No. 00001 (2014); Civil Application No. 1366 (2015). Taizhou Environmental Federation vs. Jiangsu Changlong Chemical Company Water Pollution Public Interest Case.

Another major focus of EPIL cases concerns air pollution, and NGOs have filed several high-profile cases in several provinces. For example, the Intermediate Court of Xingtai City, Hebei Province, accepted the air pollution case brought by CBCGDF, another long-standing Chinese NGO, against Jiajing Glass Co. of Hebei Daguangming Industry Group. Another case has been filed in the Second Intermediate Court of Tianjin City by CBCGDF against Volkswagen (China) Sales Co. Yet another air pollution case was brought in the Fourth Intermediate Court of Beijing City by the China Environmental Protection Fund against Chongqing Changan Automobile Holding Co. These recent cases, all filed by social organizations, focus on air pollution related to automobiles.

EPIL suits are also aimed at other industries causing damaging air pollution. The All China Environmental Federation, another long-standing environmental NGO, sued Zhenhua Co. of Dezhou Jinghua Group for causing such pollution. The company, located in Shandong Province, manufactures glass. Though Zhenhua Co. invested in desulfurization and dust removal technology, the facility continued to emit pollutants from two large stacks, affecting surrounding neighborhoods. In 2014, Zhenhua Co. was penalized by the environmental protection administrative authority of Shandong Province on several occasions, but continued to discharge excessive air pollutants.

On March 25, 2015, China Environmental Protection Association sued, requesting broad relief including a court order to stop emitting excessive pollutants, increase air pollution control devices, require inspection and approval of the facility by the local EPB, and collect payment of 2.04 million yuan for environmental damages and 7.8 million yuan for the company's refusal to correct its excessive emissions. The plaintiff asked that payments be made to a designated financial account of the local government for air pollution treatment in Dezhou City.

The Dezhou City government and the Dezhou EPB supported the suit. Before trial, the first instance court organized a settlement conference with the local government and the company. As a result, the case settled; Zhenhua Co. will close all its production lines and move to Tianqu Industrial Park, which is far from residential areas, and build a new factory there.[59] The combination of a significant civil penalty and the relocation of the factory demonstrates a strong judicial commitment to implementing the spirit and the letter of the 2014 EPL.[60]

59. Dezhou Intermediate EPIL Civil First Trial No. 1 (2015). All China Environmental Federation vs. Dezhou Jinghua Group Zhenhua Ltd. Air Pollution Public Interest Case.

60. Beijing, Tianjin, Hebei, Shanxi, Inner Mongolia, and Shandong belong to the Airshed Pilot Project for joint pollution control according to the Regulations for the Implementation of the Air Pollution Prevention and Control Plan for the Implementation of the Air Pollution Prevention and Control in Beijing, Tianjin, and Surrounding Regions, issued by the State Council on Sept. 17, 2013. Therefore, these areas need to coordinate joint efforts to control air pollution. *See* MEP, *Homepage*, http://www.zhb.gov.cn/gkml/hbb/bwj/201309/t20130918_260414.htm (last visited Apr. 18, 2017).

III. Observations on the Effects of the New EPIL System

It is clear that China's environmental laws provide a powerful tool to prevent pollution and restore the environment, but only if they are fully utilized to achieve that end. Article 1 of the EPL clarifies that the purpose of the law is to protect and improve the environment, prevent and control pollution and other public hazards, safeguard human health, further construction of "ecological civilization," and construct and promote the sustainable development of the economy and society. Article 55 of the Civil Procedure Law and Article 58 of the EPL define the ultimate goal of the EPIL system as protecting social public interest.

Thus, EPIL not only plays the role of providing environmental justice to protect environmental rights and interests in particular cases, it furthers broader public policies,[61] safeguards public participation, and suppresses local interference in rule of law matters. Though development of the EPIL system is in its formative stages, some of its intended benefits have been achieved, and these are discussed below.

A. Enhancing Environmental Rights and Interests Through Litigation

The most direct effect of EPIL's enhancement of environmental rights and interest is the improvement of local environmental quality through enforcement of environmental law. Involving both social organizations and the procuratorate in public interest litigation has resulted in a rapid increase in the number of filed cases and an expanded role for the courts. Traditional tort suits address after-the-fact damages. The new variety of EPIL suits can result in local environmental improvement that serves a broader public interest, like the relocation of the glass factory in the Dezhou City air pollution case, and the establishment of court-supervised funds for restoration projects. Such results were not possible under the legal structure prior to development of the EPIL system.

Chinese courts have other means to further EPIL suits, which should lead to more cases. Article 33 of the Judicial Interpretation stipulates that if a social organization requests deferred payment of litigation costs because of financial difficulty, the court shall grant it.[62] This article aims to encourage public interest organizations to file EPIL cases. Under the incentive mechanism, when choosing a case, some public welfare organizations with a relatively strong litigation capacity can focus on cases with great social impact, especially pollution affecting regional environmental management and causing serious damage, without concern for the costs of bringing suit.

61. Wang Xuguang, *On the Basic Function of Environment Resource Justice*, People's Court Daily, Sept. 9, 2015, at 9.

62. Article 33 of the Judicial Interpretation provides: where plaintiffs truly have difficulty to turn in litigation fees and apply to defer the payment of the litigation fee, the people's court shall permit it.

Moreover, Chinese courts have also awarded expert and attorney fees to successful EPIL plaintiffs. This too is a positive development, and one that correlates with many U.S. statutes that award fees to prevailing parties in citizen suits. Where social organizations act in the public interest, they should recover their costs and fees against private parties who damage the environment.

B. *Judicial Role of Supervising Administrative Authorities' Performance of Their Legal Duties*

Another long-standing problem in the enforcement of environmental law in China is the unwillingness of local authorities to enforce laws against local companies. In the process of pretrial procuratorate supervision, the local administrative authority often did not correct the legal violation, it continued unabated.[63] However, the revised EPL provides intermediate courts with jurisdiction over these types of cases, in an effort to remove undue pressure from local governments.

Under this new arrangement, when a court receives a case filed by a procuratorate, the intermediate-level court will suppress local interference in order to deliver the material of the alleged pollution violation, organize the exchange of evidence and pretrial meeting, and use its judicial authority and supervision to require the local administrative authority to perform its legal duty, thus upholding the public interest. At present, most of the EPIL cases brought by a procuratorate have led to the local EPB correcting the violations, achieving favorable legal and social effects.[64]

For example, the Bengbu Municipal Land and Resource Bureau in Anhui Province issued an administrative penalty decision to an enterprise that began a major construction project without authorization and ordered it to dismantle illegal construction, including previously installed cement foundations. However, the local bureau did not require the enterprise to restore the land to its preconstruction status. On January 19, 2016, the procuratorate brought an EPIL case against the local government entity, based on its failure to perform its legal duty to restore the area damaged by the illegal construction.

The court organized a pretrial negotiation and required the offending business to reclaim the land. The joint inspection by the local land and resource bureau, agricultural bureau, and forestry bureau found that the efforts of the company brought the damaged land up to the standard of general cultivated land; thus, the land was restored to its original status. The procuratorate then withdrew its administrative public interest litigation before the trial and the court granted it.[65] This case illustrates how the procuratorate can successfully assist in protecting and restoring public resources damaged by private pollution, when local governments are reluctant to enforce the law.

C. *Safeguarding Public Participation*

Another important aspect of the EPIL system aims to increase public participation in solving China's environmental problems. The scope of social organizations that have the capacity to bring EPIL has been expanded under the 2014 law. Social organizations that meet the requirements can bring a suit in the public interest.

Some scholars have compared China's public interest litigation system with America's "citizen suit" and argued that there should be no restrictions to the qualifications of a plaintiff who brings public interest litigation. However, without an explicit understanding of the U.S. judicial system, with its very different U.S. Constitution and civil procedure law, we should not have preconceived ideas that equate "citizen suit" with "public interest litigation."[66] Though citizen suits broadly allow "any person" to bring a suit,[67] U.S. constitutional requirements limit the reach of citizen suits by requiring litigants to be directly "injured" by the offending action.[68] Chinese law does not impose these limitations, as a qualifying social organization can bring a suit anywhere in China without demonstrating specific harm to its members. In that sense, though social organizations are more narrowly defined than "persons"

63. For example, in the case of *Jinping County People's Procuratorate of Guizhou Province v. Jinping County EPB* (an administrative public interest litigation), Hongfa Stone Co. and seven other stone processing companies in Jinping Township, Guizhou, did not comply with environmental legal requirements to operate their environmental protection facilities for production and discharged the wastewater directly into Qingshui River. On Aug. 5, 2014, Jinping County EPB ordered these companies to immediately cease operations and to comply with the correction orders before Sept. 30, 2014. The operations could not reopen until they received approval from the EPB. However, the Jinping County EPB did not fulfill its obligations to ensure its orders were implemented by the polluters, which resulted in continuing illegal operations. According to Article 97 of the Administrative Litigation Law, "an administrative organ may apply to the people's court for compulsory execution or enforce its orders according to law" if the citizen, legal person, or other organization fails to bring an administrative action in the statutory period to challenge the orders. However, the EPB did not apply for court enforcement, and hence failed to perform its duties. Fu Environment Administrative No. 2 (2015).

64. On Nov. 5, 2016, the Procurator-General of the Supreme People's Procuratorate Cao Jianming reported the progress of the procuratorate-led public interest litigation at the 24th session of the Standing Committee of the 12th NPC. After a year of trials, the procuratorate gradually made progress with public interest litigation. First, it filled the gap where no suitable entity existed to file the administrative public interest litigation, and strengthened the state and social protection of public interests. Second, it urged executive agencies to take the initiative to correct the violations. Third, it mobilized other entities and enhanced public participation in protecting the public interest. *The Superiority of the Procuratorial Organs to Bring the Public Interest Litigation System Gradually Appeared*, Justice Network, Nov. 15, 2016, http://news.xinhuanet.com/legal/2016-11/05/c_129352256.htm.

65. Anhui 0311 Administrative First Trial No. 2 (2016). Anhui Bengbu Huaishang People's Procuraterate vs. Bengbu Land and Resources Bureau Administrative Public Interest Litigation.

66. Zhang Hui, Research on US Environmental Law 433 (2015).

67. *See*, *e.g.*, 33 U.S.C. §1365(a), the citizen suit provision of the Clean Water Act. Most U.S. citizen suit provisions are similarly couched in broad terms.

68. *See* Lesley K. McAllister, *Environmental Advocacy Litigation in Brazil and the United States*, J. Comp. L. 6:2 (2011). Constitutional limitations can present significant hurdles to enforcing environmental laws. *See*, *e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 22 ELR 20913 (1991) (dismissing citizen suit under the Endangered Species Act for lack of standing); Washington Envtl. Council v. Bellon, 732 F.3d 1131, 43 ELR 20231 (9th Cir. 2013) (citizen suit under the Clean Air Act, 42 U.S.C. §§7401-7671q, seeking to compel the Washington State Department of Ecology and other regional agencies to regulate greenhouse gas emissions from the state's five oil refineries dismissed for lack of standing).

in citizen suit provisions in U.S. law, Chinese laws have less stringent regulations on where social organizations can bring suit.[69]

As U.S. courts have continued to refine standing under citizen suit provisions, so too have Chinese courts begun to address the standing requirements under the 2014 EPL. For example, because of the polluting of Tengger Desert, CBCGDF filed an EPIL against Ningxia Huayu Chemical Industry Co.[70] The Intermediate Court of Zhongwei City, Ningxia Hui Autonomous Region, held that the articles and registration certificate of CBCGDF did not show that the organization registered to "engage in environmental protection public interest activity," and dismissed the case for lack of standing. The court of the second instance dismissed CBCGDF's appeal and upheld the original verdict using the same reasoning.

However, during retrial, the SPC ruled that "environmental public interest has the quality of general preference and sharing and there's no particular legal person of direct interest, so it's necessary to encourage, guide and regulate social organizations to enter EPIL according to law, to fully display the function of EPIL."[71] When the aim and business scope of a social organization includes maintaining environmental public interest, the organization's standing should be judged upon its activities, not simply upon words expressed in its social charter. Even though the NGO's articles did not explicitly state that the organization shall maintain environmental public interest, the organization had a long history of protecting various natural and man-made elements that influence the survival and development of humans. Therefore, the SPC determined that the organization falls within the intent of the 2014 EPL and its Judicial Interpretation regarding standing.

The SPC considered various factors in reaching its decision. Since its founding in 1985, CBCGDF has been engaging in environmental public interest activities such as holding environmental protection seminars, organizing ecological investigations, and publicizing environmental protection, which were in conformity with legal regulations. The Court reasoned that the requirement that public interest litigation brought by a social organization should be related to its aim and business scope was meant to guarantee that the social organization has the capacity for public interest litigation.[72] Even though the allegations in the lawsuit did not precisely conform to the plaintiff's aim and business scope, but did align with the environmental elements or ecological system that the organization tried to protect, SPC determined that courts should have affirmed its standing based on a broad interpretation of the NGO's articles and the broad purposes of EPIL.

The public interest aspect of this case was triggered by the pollution in Tengger Desert, and the interaction of desert species and their environment that forms a complex and fragile desert ecosystem. Taking care of this ecosystem was within the organization's purpose. CBCGDF sued Huayu Co. for discharging excessive wastewater directly into an evaporation pond, which gravely damaged the fragile ecosystem in Tengger Desert. The SPC concluded that what the organization did in bringing suit was to maintain environmental public interest in these resources, which was in conformity with its aim and business scope.

This important decision demonstrates the willingness of the SPC to interpret standing requirements broadly and thus promote the role of Chinese social organizations to participate directly in environmental protection. The affirmation of the role of social organizations has a parallel with early U.S. Supreme Court decisions on environmental standing.[73] While capacity barriers to broad public participation remain, as many social organizations have small budgets and staffs, legal impediments to public participation have been removed.

D. Promoting Implementation of Public Policy

The new EPIL system also demonstrates how one case can have broader implications for environmental policy that reach beyond the result in the case before the court. For example, in a case brought by public interest litigant Jinping County Procuratorate against Jinping County EPB for administrative incompetency,[74] a local stone material manufacturer did not build an auxiliary environmental protection facility as per the requirement of the "three simultaneities" of environmental protection.[75] The facility then began operation and discharged production wastewater directly into Qingshui River, causing aquatic contamination. The local EPB issued an administrative penalty but

69. According to Article 58 of the EPL and Articles 3, 4, and 5 of the Interpretations of the Supreme People's Court on Some Issues Concerning the Application of Law in Environment Civil Public Interest Litigation Cases, a social organization must be:

> (1) Social group, private non-enterprise and fund registered in civil affairs unit of or above municipal level (city with districts); (2) Aim and main business scope defined in the articles of the social organization is to maintain social public interest and it engages in environmental protection public interest activity; (3) Social public interest involved in the litigation brought by the social organization should be associated with its aim and business scope; (4) Social organization has been engaging in environmental protection public interest activity for five consecutive years before bringing the case, during the five years, it did not break any law or regulation and received no administrative or criminal penalty.

70. Supreme Court Civil Retrial No. 50 (2016). China Biodiversity Conservation and Green Development Foundation vs. Ningxia Mingsheng Ltd. Environmental Public Interest Litigation.

71. *Id.*

72. *Id.*

73. Parallels can be drawn between the *Tengger Desert* case and *Sierra Club v. Morton*, 405 U.S. 727, 2 ELR 20192 (1972). The latter opened the doors of U.S. federal courts to NGOs to gain access to sue under environmental laws based on aesthetic and noneconomic injuries. Had the Court reached a different result, U.S. public interest law would surely have evolved much differently.

74. Fu Environmental Administrative First Trial No. 2 (2015). Guizhou Jinping County People's Procuraterate vs. Jinping Environmental Protection Bureau Administrative Public Interest Litigation.

75. Article 16 of the Regulations on the Administration of Construction Project Environmental Protection stipulates: "Construction project shall build auxiliary environmental protection facility, and it must be designed, constructed and put into use with the main body." Article 23 stipulates: "Only after the examination and pass of the auxiliary environmental protection facility of the construction project, the construction project can be put into production or put into use."

did not supervise its implementation, and the stone material manufacturer continued its illegal operation.

After the Jinpin County Procuratorate filed suit, the court organized a pretrial meeting, under the leadership of county government. The result was that the local land and resource bureau and the EPB began a concentrated effort to enforce the law and closed all stone material processing factories that broke environmental protection regulations. Because of this case, the local environmental protection administrative authority now requires local stone material manufacturers to start operation only after the "three simultaneities"[76] for environmental protection auxiliary facilities are built and have passed inspection by the EPB.

IV. Suggestions for Further Refinement of EPIL Development

The emerging development of public interest litigation in China has raised a number of important questions that need to be addressed in order to fully implement the fundamental purpose of the EPL. As the experience in the United States in the 1970s demonstrates, simply passing environmental statutes with citizen suit provisions does not lead to immediate salvation of the environment.[77] Inherent complexities abound in creating effective environmental enforcement mechanisms. As China implements its own style of environmental enforcement and protection through the courts, a number of pressing issues have already arisen. Below, we highlight some of the key problem areas, and offer suggestions for legislative and judicial improvement of EPIL.

A. Defining Proper Plaintiffs in EPIL Cases

The issue of defining the relationship between an NGO, procuratorate, and local EPB is important to an effective EPIL system, but as yet remains undefined. Which of these entities should have the initial, or primary, role to file suit, seek restoration funds, and correct the illegal behaviors of enterprises that violate the law? What is the most appropriate relationship between the procuratorate and NGOs in an EPIL case? These questions are discussed below.

An important unresolved issue is whether a social organization or the procuratorate should have priority to bring an EPIL case. When a procuratorate files an EPIL, the pilot project requires a public notice to be issued 30 days before the acceptance of the case.[78] Currently, an unresolved issue is how widely the notice must be circulated—locally versus nationally. If a social organization applies to join the suit during the notice period, should the procuratorate withdraw from the litigation? Some scholars argue that because the resources at issue in public interest litigation are "owned" by and benefit the public (air, water), the bifurcation of civil public interest litigation and administrative public interest litigation generates theoretical and practical dilemmas.[79]

For example, if a local EPB uses its power illegally or does not perform its legal duty to supervise a polluter, causing infringement to state and social public interest, a social organization cannot bring administrative public interest litigation against the agency. However, allowing public participation in administrative public interest litigation that a procuratorate would normally bring not only broadens the role of the public in the rule of law, but also helps ensure that the procuratorate fulfills its duties as well. Local protection of polluters is an ongoing concern.

The opportunity for social organizations to participate in administrative public interest cases should continue, though the primary role of supervising the local EPB should be with the procuratorate. Social organizations are limited in number and resources. China needs to develop an effective system of administrative EPIL, centered on using the procuratorate to ensure local EPBs apply the laws properly, but supervised by the public, and safeguarded by the courts.

Another emerging issue is to clearly define the relationship between an administrative authority enforcement action brought by a provincial government and an EPIL brought by a social organization against the same polluter. There is some legislative authority for allowing a provincial administrative authority to order a polluter to restore public resources that had been damaged by pollution. In theory, if the polluter fails to restore the resources, the provincial administrative authority may step in and restore the damages, with the cost to be paid by the polluter. If the polluter will not pay the cost, the provincial administrative authority may apply to the court for compulsory execution. In this situation, in theory, the provincial government is then protecting the public interest and perhaps there is no need to pursue an EPIL case against the pol-

76. Article 41 of the EPL. Installations for the prevention and control of pollution at a construction project must be designed, built, and commissioned together with the principal part of the project. Installations of the pollution prevention and control facility shall comply with the requirements of the approved environmental impact assessment report, and shall not be dismantled or left idle without authorization. This is called the "three simultaneities" system. Sino-Italian Cooperation Program for Environmental Protection, *"Three Simultaneities" System and Its Supervision*, http://www.sinoitaenvironment.org/ReadNewsex1.asp?NewsID=248 (last visited Apr. 18, 2017).

77. The Clean Water Act of 1972 is a case in point. It has taken 40+ years to develop the infrastructure within both EPA and state agencies to create an effective permit and enforcement mechanism. Even after 40 years, courts are providing important interpretations of the most basic terms, such as what is a "pollutant" subject to regulation. *See*, *e.g.*, Northern Plains Res. Council v. Fidelity, 325 F.3d 1155 (2003). Perhaps the most profound unresolved controversy, defining the water bodies that are subject to pollution control, has been the subject of several Supreme Court decisions, including *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 31 ELR 20382 (2001), and *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006). Forty-six years after the enactment of our nation's most important water pollution law, we still do not have a clear, final definition of "waters of the U.S."

78. Article 10, Interpretations of the Supreme People's Court on Some Issues Concerning the Application of Law in Environment Civil Public Interest Litigation Cases.

79. Lv Zhongmei, *Analysis on Environmental Public Interest Litigation*, 6 ZUEL L.J. 131-37 (2008).

luter. However, enforcement by provincial authorities is a new concept.[80]

In December 2015, the Experimental Program of Eco-Environmental Damage Compensation System Reform was released. In August 2016, seven pilot provinces and municipalities were selected to carry out the program of administrative action to recover damages against polluters.[81] There are no explicit regulations on whether an environmental damage compensation litigation brought by a provincial government falls into the type of EPIL cases brought by social organizations under the 2014 EPL. However, there is no difference in the scope of damage compensation except for the cost of cleaning up pollution.[82]

After a provincial government brings an environmental suit for damages to public resources, can a social organization also bring an EPIL case against the same polluter? If yes, how should courts handle the two cases procedurally? If the two suits seek differing relief, should they be combined into one trial against the same defendant? Because Chinese courts have not accepted EPIL cases brought by the provincial government, these issues are outstanding.

As with expanding the role of the procuratorate, allowing provincial governments to bring public interest cases adds another dimension to environmental protection, but leaves procedural and jurisdictional issues to be resolved by the courts. However, by experimenting with different modes of enforcement, the Chinese government is showing flexibility in tackling its pollution problems. The same urgency that prompted China's rapid economic growth to raise living standards must now be applied to address the pollution legacy of that growth. Given the broad geographic scope and seriousness of air, water, and soil pollution, multiple approaches under the law, and an enhanced role for the judiciary, is a positive development in China.

B. Scope of Liabilities of Defendants

The 2014 EPL provides the general standard to define the scope of environmental rehabilitation responsibility the defendant should bear: the defendant should bear the responsibility to restore the environment to the same status and function as before the damage.[83] In addition, the 2014 EPL[84] provides that when the environmental restoration cost is hard to define, or the appraisal cost to determine the damages is too costly, a court may define a rational environmental restoration plan according to the scope of the pollution, the extent of ecological damages, the scarcity of the resources at stake, the difficulty of restoration, the operation cost of pollution treatment equipment, and the financial advantage gained from the infringement.[85] However, this general standard must be refined to allow courts to develop fair and effective remedies.

1. Defining the Baseline for Restoration

Defining the proper baseline and standard for restoration is a complex issue. In China, as in many parts of the world, humans have altered the environment for centuries or millennia.[86] Before a court can order restoration of a polluted site, a standard must be developed to define the appropriate starting point for assessing what constitutes the environment that restoration efforts are designed to achieve. A related issue is to define "how clean is clean."

In some instances, restoration to a pristine state is impractical. Remedial statutes in the United States could provide guidance. One approach under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (Superfund)[87] and the Oil Pollution Act (OPA) of 1990[88] is that the cleanup of contaminated sites must conform to the applicable or relevant and appropriate requirements (ARARs) standard, or a waiver of such standard must be obtained. The ARARs standard applies the applicable federal standard for a particular contaminant, which does not require 100% removal of pollutants.

For example, if an aquifer is polluted by cadmium, the ARAR standard would require that the water meet the 0.005 milligram per liter (mg/L) standard for drinking water if the aquifer was used for such.[89] The U.S. Environmental Protection Agency (EPA) has developed comprehensive guidelines that explain in detail how ARARs function in cleanup and restoration actions.[90] ARARs are one of many tools that state and federal agencies use to gauge "how clean is clean."[91]

As EPIL cases reach the remedy phase, Chinese courts will have to develop approaches to determine "how clean is clean." The EPIL cases to date have not provided consis-

80. Explanations of the Environmental Protection Law of the People's Republic of China 200 (Xin Chunying ed., 2014).
81. In August 2016, the Central Leading Group for Comprehensively Deepening Reforms approved the Report on Conducting Pilot Eco-Environmental Damage Compensation System Reform in Some Provinces.
82. Article 4 of the Experimental Program of Eco-Environmental Damage Compensation System Reform specified the compensation scope, including the costs of pollution cleanup, environmental restoration, loss of service function during the restoration period, losses caused by permanent damage of environmental functions, and environmental damage compensation investigation and appraisal.
83. Paragraph 1 of Article 20 and Article 21, Interpretations of the Supreme People's Court on Some Issues Concerning the Application of Law in Environment Civil Public Interest Litigation Cases.
84. Article 33 of the EPL stipulates that when plaintiffs can demonstrate difficulty in paying litigation costs, a plaintiff may apply to defer the payment of the litigation fee. The court should ordinarily grant such a request.
85. Article 23, Interpretations of the Supreme People's Court on Some Issues Concerning the Application of Law in Environment Civil Public Interest Litigation Cases.
86. For a fascinating account of China's 3,000 years of environmental manipulation and changes to the landscape, see Mark Elvin, The Retreat of the Elephants: An Environmental History of China (2008).
87. 42 U.S.C. §9621(d).
88. 33 U.S.C. §§2701 et seq.
89. Agency for Toxic Substances & Disease Registry, *Cadmium Toxicity: What Are the U.S. Standards for Cadmium Exposure?*, http://www.atsdr.cdc.gov/csem/csem.asp?csem=6&po=7 (last visited Dec. 10, 2013).
90. U.S. EPA, *Applicable or Relevant and Appropriate Requirements (ARARs)*, https://www.epa.gov/superfund/applicable-or-relevant-and-appropriate-requirements-arars (last updated Oct. 3, 2016).
91. In the United States, there are myriad state and federal approaches to remediation. See Cleanup Levels, *Cleanup/Screening Levels for Hazardous Waste Sites*, http://www.cleanuplevels.com/ (last visited Apr. 18, 2017), for a more comprehensive list of different state and federal standards.

tent results, yet the remediation task confronting China is huge. A 2014 report issued by MEP noted, 19.1% of China's farmland and 16.1% of the nation's soil is polluted by a variety of contaminants.[92] This is an area where MEP can provide national-level guidance, by drawing on the experiences of its sister agencies in the United States and elsewhere.

2. Mitigation as a Component of Damage Compensation

Another concern for defendants is whether a polluter can use the cost of mitigation at the facility to offset its responsibility to compensate for pollution damage. A 2015 case illustrates the issue. In an EPIL case brought by China Environmental Protection Association against the Zhenhua Co. of Dezhou Jinghua Group for air pollution, the plaintiff relied upon an accreditation body to appraise the actual value of property loss directly caused by pollution and the cost of necessary reasonable measures to eliminate the pollution.[93] The accreditation body calculated the loss caused by the excessive emission of pollutants with the formula of unit treatment cost per volume of excessive discharge. Defendant Zhenhua Co. asked the court to deduct 1,815,000,000 yuan based on the cost of its desulfurization equipment.

The court declined for two reasons. First, the defendant failed to prove it actually purchased the equipment. Second, the court noted that the appraisal report already considered the current desulfurization and dust removal equipment and calculated the excessive discharge volume and treatment cost against this base. Though Chinese law does permit offsets for damages in some instances, the court declined to allow it in this case. On July 18, 2016, Dezhou Intermediate Court ruled that the defendant must pay 2,198,360,000 yuan for the loss caused by excessive pollution and restore Dezhou's air quality; the company was also ordered to make a public apology on media at or above the provincial level.[94]

This case has led to several key questions regarding environmental law research and practice for Chinese judges and scholars. Under what circumstances should a court permit a defendant to deduct improvements in pollution control operations from an environmental restoration payment? Could operation costs of such a facility used during or after the litigation process be deducted or exempted against pollution damage compensation responsibility? The issue presents a significant dilemma. A major goal of the EPIL system is to improve the environment by encouraging companies to use clean technology. But another, equally important goal is to secure full payment for pollution damages and remediation costs for public resources. Defendants will naturally want to minimize their overall financial exposure. These important issues will need to be addressed by Chinese courts as more EPIL cases reach the remedy phase.

3. The Relationship Between Administrative Penalties and Civil Damages

Yet another issue that Chinese courts face is the relationship between civil penalties assessed by an administrative body and those assessed by a court following an EPIL case. Should civil damage public interest compensation responsibility be mitigated or exempted after the defendant has paid an administrative penalty incurred by illegally polluting? For example, if an automobile maker manufactures and sells automobiles that are not in conformity with automobile pollution emission standards, and a social organization brings a case against the enterprise, how are the damages calculated? The local EPB is likely to issue an administrative penalty, issue an order to the defendant to cease its violations, confiscate illegal income gained by the enterprise, and impose a fine. Besides asking a court to order the defendant to immediately stop selling automobiles that are not in conformity with automobile pollution emission standards, the EPIL plaintiff may also request the court to order the defendant to adopt restoration or substitute restoration measures to restore any damages to the environment. If the defendant does not perform its restoration responsibility, it should bear restoration costs and compensate for the function loss from the time of damage to completion of restoration and elimination of the hazard.

However, the possibility exists for a single company to incur "double jeopardy" from EPIL and administrative cases against it for its pollution. The administrative penalty of confiscating illegal income may overlap with the financial advantage the defendant gained from the polluting activity, a component of EPIL damages. The issue then is whether the polluting enterprise should bear a second round of damages for environmental restoration costs after it pays an administrative fine. Current Chinese environmental law does not provide an answer.

4. Who Performs the Duty of Rehabilitation?

Deciding what entity should be responsible for implementing and overseeing the restoration of a polluted site is another issue that will need to be addressed. Though courts have increasingly shown a willingness to order polluters to pay for natural resource damages and restoration, no regulations or laws provide a clear path for the administration of such funds. A plaintiff can request that a court order a defendant to stop discharging pollutants, and also request a defendant to bear the responsibility to restore the environment and compensate for environmental damage.[95]

92. See Gabriel Dominguez, *Millions of Hectares of China's Arable Land Are Polluted*, DW, July 24, 2014, http://www.dw.com/en/millions-of-hectares-of-chinas-arable-land-are-polluted/a-17807684, for a more detailed discussion of the soil pollution and remediation challenges that China faces.

93. De Zhong Environment Citizen First Instance No. 1 (2015). All China Environmental Federation vs. Dezhou Jinghua Group Zhenhua Ltd. Air Pollucation Public Interest Litigation.

94. *Id.*

95. Paragraph 2 of Article 20, Interpretations of the Supreme People's Court on Some Issues Concerning the Application of Law in Environment Civil

While courts have agreed that it is not appropriate to award damage funds to the social organization plaintiff, courts differ on the proper approach. For example, the Kunming Intermediate Court, Yunnan Province, ordered the defendant to pay the environmental restoration cost to the EPIL relief special account of Kunming City set up by the Kunming municipal government.[96] In another case, the Qingzhen Municipal Court of Guizhou Province determined that the defendant should bear restoration responsibility, and attached the environmental restoration plan as a part of the verdict to be carried out and supervised by the court.[97] Yet another approach is represented by Nanping Intermediate Court, Fujian Province, where the court ordered the defendant to fulfill its environmental restoration responsibility on its own within a specific time limit. If the defendant failed to comply, the court required the defendant to pay for environmental restoration costs so that a third party could perform the restoration.[98]

Because of the relatively small number of final judgments resulting in restoration orders, it is not clear which of these approaches will lead to the prompt and efficient remediation of damaged resources. It is clear that Chinese courts are willing to experiment with different approaches. Here, again, the judiciary has a key role in refining the EPIL system, by sanctioning different approaches to the important task of administering large damage awards to restore the environment.

V. Conclusion

China's explosive economic growth has left a legacy of pollution that is staggering. The country appears to be confronting that legacy with the same urgency and commitment that drove the country's economic expansion. The rapid expansion of a comprehensive approach to holding polluters accountable—the EPIL system—holds great promise. A hallmark of the approach is great flexibility that provides a wide spectrum of opportunities to confront polluters: strengthening existing laws, opening standing to a broad spectrum of NGOs, expanding the role of the procuratorate, and encouraging provincial and municipal governments to bring public interest suits while maintaining the traditional role of administrative enforcement actions.

The rapid rise in EPIL cases and the increasing number of judgments for damages and restoration attests that environmental courts are "open for business." The EPIL system is "top down" in that the central directives come from NPC legislation like the 2014 EPL and the 2015 Judicial Interpretation. The system is also "bottom up" in that local courts develop their own approaches to the many questions left unanswered by national law.

Yet significant challenges remain. Though China has set up hundreds of environmental courts, those courts are not functioning at full capacity. Local protectionism remains a problem. Holding major industries accountable remains elusive. The number of social organizations that have the will and the resources to file cases is too small.

An overarching lesson from the U.S. experience is that enacting environmental protection laws and using the courts to enforce them took years to bear fruit. The "Environmental Decade" of the 1970s did not translate into immediate improvements to air and water. Indeed, it has taken decades for the system to mature. But the strength of those legislative efforts, the role of citizen suits, and the evolution of the role of EPA and U.S. state environmental agencies has proved enduring. The public's natural resources in the United States are measurably better because of it. In the 1950s and 1960s, the Cuyahoga River in Ohio caught fire 13 times because of pollution, and it became a poster child of U.S. environmental degradation leading to passage of the Clean Water Act (CWA).[99] Today, the Cuyahoga supports a fishery that includes steelhead trout and walleye.[100]

The same may be true for China's quest to rein in pollution and to remediate damaged public resources. While it is too early to predict the long-term results of the developments described in this Comment, China has the elements of the legal architecture to implement an effective EPIL system. Change will not happen overnight. The long arc of environmental protection requires persistence in not only promoting the rule of law, but in maintaining the social and political will to balance economic development with protection of the environment. Achieving an ecological civilization will require nothing less.

Public Interest Litigation Cases.

96. *Yunnan Issued Judgment on the First Environmental Public Interest Case and Established a Specialized Fund for Environmental Remediation Projects*, China News Network (May 31, 2011), http://www.chinanews.com/fz/2011/05-31/3080545.shtml.
97. Qing Environmental Protection First Trial No. 4 (2010). All China Environmental Federation, Guiyang Public Environmental Education Center vs. Guiyang Wudang District Dingpa Paper Mill Water Pollution Public Interest Case.
98. Nanping Civil First Trial No. 38 (2015). Beijing Chaoyang District Friends of Nature Environmental Research Institute and Fujian Green Home vs. Xie Zhijing Ecological Destruction Public Interest Case.
99. 33 U.S.C. §§1251-1387; ELR Stat. FWPCA §§101-607.
100. For current stories about the return of fisheries in the Cuyahoga, see James F. McCarty, *Cuyahoga River Cleanup Reaches New Benchmark With Walleye Discovery*, Cleveland.com, Sept. 13, 2015, http://www.cleveland.com/metro/index.ssf/2015/09/cuyahoga_river_water_improveme.html.