

# **Progress and Embarrassment of Environmental Public Interest Litigation in China**

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**Abstract:** This paper introduces the history and background of environmental public interest litigation and illustrates the status quo, problems and challenges it faces in China. This paper conducts a case study and envisions the prospect for environmental public interest litigation. The author argues that the practice of environmental public interest litigation as a legal system is dependent on various factors, including the nature of the system itself and its supporting systems.

**Key words:** environmental public interest litigation, environmental protection court, environmental public interests, judicial protection

In 2008, environmental public interest litigation in China made a long-expected jump from theory to practice. The establishment of environmental protection courts opened the judiciary door to environmental public interest litigation. However, few of the cases accepted by these courts, which were established specially for environmental public interest litigation, are targeted at environmental public interest. Consequently, queries concerning the environmental protection court arise along with applauses for it. How will environmental public interest litigation develop in China?

## *I. History of Environmental Public Interest Litigation*

Environmental public interest litigation is a system in which certain state organs, related organizations or individuals bring an action against civil or administrative infringement on environmental public interest, and the court pursues legal liability of the acting party according to law. The system was originally introduced to China along with the introduction of environmental protection legal system of the United

States<sup>1</sup>. Scholars made consequent studies on this system and proposed the establishment of environmental public interest litigation system in China. Results from theoretical studies on the system have the following two major impacts.

#### A. Legislative Practices of Environmental Public Interest Litigation in China

*The Law of the People's Republic of China on Environmental Impacts Assessment* promulgated in 2002 explicitly defines the concept of “environmental rights” and “public environmental rights and interests”. Article 11 of the law provides, “In case a program may cause unfavorable environmental impacts or directly involve the environmental interests of the general public, the organ that works out the special programs shall, prior to submitting the draft of the programs for examination and approval, seek the opinions of the relevant entities, experts and the general public about the draft of the report about the environmental impacts by holding demonstration meetings or hearings or by any other means...” This is regarded as the earliest legislation in China that defines environmental public interests. According to the legal principle that “where there is a right, there is a remedy,” environmental public interest shall certainly be protected. Environmental public interest litigation shall be included in the litigation mechanism that protects environmental public interest.

On December 3, 2005, the State Council issued the “Decision on Implementing the Scientific Outlook on Development and Strengthening Environmental Protection”. The Decision requests the “establishment of environmental civil and administrative public prosecution system”, and explicitly provides that “giving play to the role of social organizations, encouraging reporting and disclosing illegal acts against the environment and promoting environmental public interest litigation”. This was the first time that the concept of environmental public interest litigation was clearly defined in China’s administrative laws and regulations.

In 2005, the then State Environmental Protection Administration (SEPA)

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<sup>1</sup> Wang Xi, *An Introduction to American Environmental Laws* (Wuhan: Wuhan University Press, 1992), 151-152.

consulted opinions of the Supreme People's Procuratorate in the process of drafting decisions on environmental protection. On August 5 the same year, the Supreme People's Procuratorate replied, "In recent years, there has been a sharp increase of cases caused by environmental pollution. However, due to the lack of a litigation remedy system, cases of environmental pollution that endangers the public and results from apparent illegal administration and abuse of power of administrative licensing by administrative organs fail to be resolved through litigation. It is therefore necessary and feasible to establish an environmental civil and administrative public prosecution system." As to the establishment of environmental public prosecution system, SPP also suggested that "the State establishes environmental civil and administrative public prosecution system through revision and improvement of related laws, and clearly provides for civil and administrative public prosecution procedure". This was the first time that the state judicial organ of China explicitly expressed its attitude to and made suggestions on the establishment of administrative public prosecution system.

At the Third Session of the 10th China People's Political Consultative Conference (CPPCC) held in March, 2005, twenty-eight members of CPPCC including LIANG Congjie, an environmental activist in China, and several Chinese celebrities submitted a joint-proposal entitled "Proposal on Establishing and Improving as Soon as Possible Environmental Protection Law for Public Interest Litigation". It was written in the proposal that "We earnestly call for the establishment of a civil litigation system for environmental public interest as soon as possible, so as to guarantee environmental rights of the public and protect social public interest and state interest in a more effective way." This proposal, listed as Proposal No. 1223, was later submitted to the Legislative Affairs Commission of the Standing Committee of the National People's Congress (NPC) and the State Environmental Protection Administration for consideration and processing.

At the Fourth Session of the 10th NPC held in March, 2006, thirty deputies, including the author of this paper, proposed the "Motion on the Establishment of Environmental public interest litigation System": "China should establish

environmental public interest litigation system, so as to guarantee environmental rights of the public, protect social public interests and state interests in a more effective way and provide systemic guaranty for building a social environment that features the harmonious coexistence between human and the nature.” The proposal gave a detailed outline on how to build an environmental public interest litigation system and suggested the establishment of public interests litigation system in China through revising the Civil Action Law and the Administrative Action Law. The motion was listed as Motion No. 691 of the NPC the very year. In March, 2008, at the First Session of the 11th NPC, Deputy WANG Enduo put forward a motion entitled “Establishing Public Interest Litigation System and Protecting State, Social and Special Groups’ Interests”, in which he called for wide practices of environmental protection public interest litigation, so as to protect social vulnerable groups including consumers, women and coloured people and other common social interests. Another deputy to the NPC, HAN Deyun, also suggested that public interests litigation system should be established in China and that citizens or groups should be allowed to start public interests litigation.

Legislation on public environmental rights and interests, definite expression of stand on environmental public interest litigation made by administrative and judicial organs as well as proposals and motions on establishing environmental public interest litigation system made by NPC deputies and CPPCC members - they have all provided legislative and judiciary guidance to the practice of environmental public interest litigation in China.

## B. Tentative Practices of Environmental Public Interest Litigation

Since 2000, there have been various litigation cases initiated by citizens on the protection of public environmental rights and interests.

On December 30, 2000, three hundred residents in Qingdao, a coastal city in northern China’s Shandong Province, sued the Municipal Planning Bureau, accusing the latter of approving residential quarters to the north of the Music Square of the city, which would destroy the landscape around the square and infringe the citizens’ rights

to enjoying the beauty of the environment<sup>2</sup>.

On October 17, 2001, two professors from the Law Department of Southeast University, located in Nanjing, capital city of southeastern China's Jiangsu Province, SHI Jianhui and GU Dasong sued the Municipal Planning Bureau at Nanjing Intermediate People's Court. They claimed that the construction of a scenic overlook stand on the Purple Mountain would impair their "joy of enjoying the natural landscape" and requested the Planning Bureau's revocation of the planning license to build the stand<sup>3</sup>.

In June, 2002, a farmer named CHEN Faqing in Hangzhou, capital city of southeastern China's Zhejiang Province, sued the Environmental Protection Bureau of Yuhang District for administrative omission. CHEN accused the latter of taking no efforts in punishing mining enterprises that produced dusts and noises. The prosecution was dismissed by the court. In December, 2003, CHEN sued both Zhejiang Provincial Government and the Environmental Protection Bureau of Zhejiang Province for the same accusation<sup>4</sup>.

In February, 2003, JIN Kuixi, a lawyer from Hangzhou, sued the Municipal Planning Bureau at the West Lake District Court, requesting the revocation of the license of building a university for senior citizens, so as to protect the scenic spots around the West Lake<sup>5</sup>.

Although the above cases have apparently touched upon the protection of public environmental rights and interests, one thing that they share in common is that these plaintiffs took the litigation only for their individual rights or interests. Therefore, these cases should not be considered as public interests litigation in a real sense.

On November 13, 2005, an explosion in Jilin Petrochemical Company, a branch

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<sup>2</sup> "300 Qingdao Residents Sue Planning Bureau, Asking for 'Environmental Rights'", *People's Daily Online*, December 22, 2000, <http://www.people.com.cn/GB/channel4/27/20001222/359231.html>

<sup>3</sup> Jiang De, "University Teachers Take Administrative Litigation against Building of Reviewing Stand on Purple Mountain", *Legal Daily*, October 23, 2001; HUANG Jinrong, "A Burgeoning Campaign of Practicing Public Interests Law: Observations on Practices of Public Interests Law in Contemporary China", *China Reform*, no. 10 (2006).

<sup>4</sup> ZhANF Xiangfang, Zhang Huihuang, "Farmer Chen Faqing – An Environmental Safeguard Luckier than Don Quixote", *Youth Times*, May 27, 2005; A Qing, "Chen Faqing – The Farmer who Tries to 'Repair' Environmental Protection Awareness", *China Industry & Commerce News*, May 31, 2005.

<sup>5</sup> Wei Huabing, "Residents Take Planning Bureau to Court for Irrelevant Construction by West Lake", *Zhejiang Online*, March 28, 2003, <http://www.zjol.cn>

of China National Petroleum Corporation (CNPC) in the northeastern province of Jilin, caused about the spill of 100 tons of nitrobenzene into the Songhua River. The accident severely polluted the water body. Cities along the lower reaches were victimized in this accident, including Harbin, capital of Heilongjiang Province, and even the Russian city Khabarovsk.

According to news reports, after the accident, people took litigation to demand compensation for damages. For example, there were residents who demanded a refund of RMB15 for buying water when the supply was cut off, restaurants and bathhouses asking for compensation for losses during the water-cut and decline of customers thereafter, water suppliers who claimed losses of water fees caused by the water-cut, and local governments that tried to demand compensation for taking emergency measures, etc. On December 7, 2005, three professors and three postgraduate students from the Law School of Peking University took lawsuit to Heilongjiang Higher People's Court. This was the first environmental public interest litigation in China with natural beings (huso sturgeons, the Songhua River and the Sun Island) as co-plaintiffs. The court was demanded to pronounce the accused to pay RMB10 billion for establishing a fund for tackling pollution in Songhua waters, so as to restore ecological balance in the area and guarantee huso sturgeons' rights of existence, the rights of the Songhua River and the Sun Island to a clean environment and natural persons' rights of travelling, enjoying and envisioning the beauty of nature. However, none of these cases against Songhua pollution was accepted by courts and none of them had the chance of entering litigation proceedings.

Legal issues around the Songhua River Chemical Spill accident has, anyway, started in-depth discussion and evoked a direct and deep understanding about possible damage to public interests caused by pollution. In this sense, environmental public interest litigation has already obtained its social foundation.

## *II. Judicial Door Opened to Environmental Public Interest Litigation*

Since environmental public interest litigation still stays on its theoretical and

experimental, courts tend to take a cautious attitude by not accepting cases that are against current procedural law. However such attitude changed at the end of 2007 and the beginning of 2008. The court opened the judicial door for environmental public interest litigation.<sup>6</sup>

In November, 2007, an environmental protection tribunal was established by the Intermediate People's Court of Guiyang, capital city of southwestern China's Guizhou Province. At the same time, an independent environmental protection court was set up in the People's Court of Qingzhen, a city under Guiyang. The court was specially created to deal with cases on water resources in Hongfeng and Baihua Lake sand Aha Reservoir as well as waters, land or forests protection in areas under the jurisdiction of Guiyang. The Administration Bureau of Hongfeng and Baihua Lakes and Aha Reservoir, the Environmental Protection Bureau, the Forestry Bureau and the Procuratorate were qualified as subjects of starting environmental public interest litigation.

On May 6, 2008, with the approval from the Higher People's Court of Jiangsu Province, the first environmental protection tribunal of the province was established in the Intermediate People's Court of Wuxi. At the same time, environmental protection collegiate benches were set up in Districts of Binhu, Xishan and Huishan and Jiangyin and Yixing, two cities under the jurisdiction of Wuxi. In the "Regulations on Handling Cases by Environmental Protection Judicial Tribunals" released by the Intermediate People's Court of Wuxi, the domain of acceptable cases of environmental public interest litigation and plaintiff subjects were clearly defined.

The domain of acceptable cases is: public interests litigation against acts that may have impacts on ecological environmental protection in conservation areas; on environment in residential communities; on environmental protection in conservation waters of the Taihu Lake, the Yangtze River and the ancient Beijing-Hangzhou Canal; and on environmental protection in conservation areas of key tourist areas. Plaintiff subjects are: procuratorial organs and environmental protection administrative

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<sup>6</sup> Unless otherwise specified, all sources in this paper are quoted from on-the-spot research results of "Remedy Mechanism Studies on Infringement to Environmental Rights in an Environmentally-Friendly Society", a state-funded key social sciences project conducted by the author of this paper.

departments at all levels, environmental protection organizations and logistics segments in residential communities.

In addition, it is learned that there were already environmental protection courts established in some parts of northern China's Hebei Province in 2004. In November, 2008, there came news that in Kunming, capital city of southeastern China's Yunnan Province, "environmental protection police, environmental protection courts and environmental public interest litigation system" were to be established. Faced with law-enforcement problems in dealing with a series of environmental pollution incidents in recent years that have aroused strong social responses, Kunming is going to enact the "Suggestions on Establishing Environmental Protection Law Enforcement Coordination Mechanism". It will be the first cooperative law-enforcing mechanism in China that combines efforts from police, procuratorial organs, courts and environmental protection departments.

Once again, environmental public interest litigation is clearly defined in the portfolio of environmental protection courts. We could say that environmental protection courts are established not only as a result of the serious environmental pollution at present, but also for environmental public interest litigation. In our investigation we learned that the establishment of any environmental protection judicial tribunal, collegiate bench or court has direct bearing on the seriousness of local pollution. For example, the establishment of environmental protection judicial tribunal in Guiyang is the result of deterioration of waters of Hongfeng and Baihua Lakes and Aha Reservoir, all being the source for drinking water supply for the city. In the past three years, waters in these areas deteriorated to Level V (i.e. non-drinkable) and even Worse than Level V, which is toxic. Environmental protection tribunal in Wuxi was also established as a result of the serious pollution in the Taihu Lake in recent years and environmental protection court in Kunming was established due to this year's severe pollution in Yangzong Lake. These incidents put forward the question that who should advocate for environmental public interest and how it should be protected. Theoretically, the establishment of environmental

protection courts is a way for the settlement of this issue. Therefore, environmental public interest litigation spontaneously becomes the responsibility for these courts.

### *III. A Case of Environmental Public Interest Litigation*

On December 27, 2007, the Guiyang Administration Bureau of Hongfeng and Baihua Lakes and Aha Reservoir took environmental public interest litigation against Guizhou Tianfeng Chemical Company to the environmental protection court of Qingzhen People's Court. This was the first case accepted by this environmental protection court.

Tianfeng Chemical Company is located in Pingba County of Anshun, a city more than 40km away from Guiyang. For years, phosphogypsum residues discharged by the company was piled up in a phosphogypsum gangue about 3km away, creating a 4.5m-high waste heap, the size of several football fields. About 800m from the heap is the Yangchang River, upper reaches of Hongfeng Lake. The river is within the drinking water supply conservation area of the lake. Due to lack of water-proofing, anti-seepage and waste-water-processing measures, residues spilt into the river and finally gathered in the Hongfeng Lake. In the past ten years, pollution in the lake deteriorated. However, since the company was out of the jurisdiction of Guiyang, it managed to get away with the pollution.

After the establishment of environmental protection court in Qingzhen, it accepted the case after receiving the determination of designative jurisdiction issue by Guizhou Higher People's Court, in accordance with methods approved by the latter. It was finally determined that: "From the day that this judgement becomes effective, Guizhou Tianfeng Chemical Company shall stop immediately all damages to the environment done by its waste material field at the phosphogypsum gangue, namely, by stopping using the waste material field at the phosphogypsum gangue and, prior to March 31, 2008, shall take measures to remove any impediment or danger to the environment that may be caused by the field."

The judgment recognized the qualification of plaintiff subject of the Administration Bureau of Hongfeng and Baihua Lakes and Aha Reservoir, which is also an apparent indication of its support of environmental public interest litigation. The method of designative jurisdiction by Guizhou Higher People's Court skillfully solved problems caused by administrative divisions and subordination relations of the area of Hongfeng and Baihua Lakes and Aha Reservoir. Meanwhile, it should be noted that compensation to damages was not mentioned. The litigation and the judgement of this case concerned only stopping damages, removing impediments or dangers to the environment.

It is learned that the execution of the judgment had been completed by July, 2008.

#### **IV. Environmental Public Interest Litigation :Where to Go?**

##### **A. Low Case-handling Volume of Environmental Protection Courts**

While environmental public interest litigation in 2008 gave us great hopes, it brought disappointment, too. Environmental protection courts were originally designed to mainly handle environmental public interest litigation, accompanied by other cases. To date, however, the number of environmental public interest litigation accepted by those judicial tribunals or courts remains too small.

Of cases accepted by the environmental protection court in Qingzhen since its establishment, 85% are about illegal forestry acts and only 5% are about water pollution. Among these cases, criminal cases are the majority. This seems ironical to the fact that the court was originally set up to deal with "water" issues and environmental public interest litigation. It is also out of tune with the status quo of water pollution in Guiyang. After the public interests litigation of Tianfeng, the Administration Bureau of Hongfeng and Baihua Lakes and Aha Reservoir have not taken any more public interest litigation. As to other institutes qualified as the plaintiff subjects, no environmental public interest actions are taken by now. According to frank comments made by the leadership of the Administration Bureau

of Hongfeng and Baihua Lakes and Aha Reservoir, polluting enterprises out of its jurisdiction may be directly sued to the environmental protection court, while those within its jurisdiction could not be easily dealt with in the same way, unless all administrative means have been exhausted. If an environmental supervisory organ initiates such litigation, it would indicate the organ's administrative omission, and would give people reasons to accuse against it-self.

Likewise, no environmental public interest litigation has yet been taken in the environmental protection court of Wuxi since its establishment, though the domain of plaintiff subjects have been extended to environmental protection organizations and logistics segments in residential communities. This phenomenon has attracted close attention.

#### B. Problems behind "Zero Case"

Faced with the embarrassment of little litigation to environmental protection courts, some begins to doubt the environmental public interest litigation system itself. They regard it as a castle in the air, which is not worth great expectation. But some takes the current situation as only temporary and suggests a long-term perspective. The author suggests that the situation should be examined with rational understanding.

At a first glance, it seems that "zero case" is due to the fact that no one bothers to be engaged in a lawsuit. However in fact, this is not as simple as such, since a lot of systemic problems are yet to be resolved. For example, although procuratorial organs and environmental protection organizations are already qualified as plaintiff subjects, the former's enthusiasm is often dampened by the cost of public interest litigation. Likewise, although lawyers and lawyers associations are the best representative of class litigation, they, as the subjects of public interest litigation, are also impeded by potential costs as well as obtainment of authorization.

There are practical problems, too. Take the pollution in the Taihu Lake for example. Three provinces - Anhui, Zhejiang and Jiangsu – and a number of cities are involved. Even if the boundaries of administrative divisions could be broken, for

example, by appointing a certain maritime court within one drainage area to handle cases, there are still problems, including lack of judges, untimely evidence collection or over-extended jurisdictional area. What is more, other problems would come up even if the plaintiff eventually wins the lawsuit: Should the compensation for infringement of environmental rights be paid directly to the plaintiff or to the public who suffered from environmental damages? Who should pay for the costs involved in the public interests litigation, such as litigation fee, lawyer's fee, expert evaluation fee and personnel costs of public interest litigation organizations for lawsuit?<sup>7</sup>

The above analysis shows that the practice of environmental public interest litigation as a legal system is dependent on multiple factors, including the nature of the system itself and its supporting systems.

First of all, let us examine the public interests litigation system itself. Theoretical studies of environmental public interest litigation still focus on the necessity of its establishment in China and the introduction of such systems in foreign countries. Studies on fundamental issues of environmental public interest litigation are still insufficient, not to mention in-depth research on environmental legislation and adjudication in China. There lack the design of a complete system of both substantive and procedural laws and a systematic study on norms of substantive and procedural laws - problems that must be addressed in the practice of environmental public interest litigation, including plaintiff qualification, linkup between public power of the state and individual rights of citizens, litigation participants, burden of proof, evidence verification, causal relations, remedy methods, compensation for damages and litigation expenses, etc. In practice, there is in China neither established legislation on environmental public interest litigation nor procedural regulations to ensure the smooth proceedings of such litigation; it is impossible for courts to handle environmental public interest cases in accordance with the Civil Procedural Law. In a civil law country like China, it is against the legal principle that the court handling cases with no definite legal basis.

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<sup>7</sup> Ding Guofeng, "Why does the First Environmental Protection Court in Jiangsu Meet 'Zero Case'?", *Legal Daily*, July 7, 2008.

The judicatory working mechanism is another important factor, too. Whether to set up environmental protection judicial tribunals or how to meet the demands of the operation of environmental public interest litigation system through reasonable distribution of judicial resources within the court calls for an overall solution to the working mechanism of the operation of public interest litigation. At present, local environmental protection judicial tribunals, collegiate benches, courts and circuit courts bear same problems regarding the distribution of judicial power and judicial resources. Is a higher people's court, in the absence of legal regulations, entitled to decide the establishment of a new judicial organ within the court? Is an intermediate court entitled to decide the party to preside over a case or its plaintiff subject qualification? Is a people's court, in the absence of legal basis, entitled to define the qualification of plaintiff subjects of an environmental public interest case in the form of a written order? The answer is clear: judicial resources, as state resources, should not be distributed by local authorities on their own will. Because of the absence of a rational systemic arrangement and judicial working mechanism, the current practices apply only to individual cases. They are too difficult to be sustainable or extended

### C. The Future of Environmental Public Interest Litigation

Although due to various reasons, environmental public interest litigation is in a difficult stage, it does not mean that those difficulties can not be overcome. It depends on whether we are confident enough in the environmental public interest litigation system. The author contends that with "scientific development" being the only option for China's future, environmental public interest litigation is irreplaceable. It is an important means to protect environmental public interests, safeguard ecological security and realize the harmonious coexistence between human and the nature. Great importance should be attached to the functions of environmental public interest litigation.

In terms of legislation, substantive rights and procedural rules related to environmental public interest litigation should be established and legal basis of citizen

litigation should be defined through the revisions of laws including the *Environmental Protection Law*, the *Civil Procedural Law* and the *Administrative Procedural Law*. At the same time, feasible systems, including plaintiff qualification, remedy methods, incentive mechanism, rules of evidence, verification of litigation participants and special procedures, etc., should be established so as to improve the environmental public interest litigation system and change the status quo of deficient juridical basis.

In terms of the judicial working mechanism, we should keep up with the ongoing national reform on judicial system and working mechanism, integrate national standards for setting up environmental protection tribunals, collegiate benches and environmental protection courts and define the party to preside over environmental protection cases. The Supreme People's Court should exercise the judicial interpretation power in accordance with related laws and regulations, and guide and supervise the adjudication of environmental public interest litigation nationwide. In addition, problems concerning the integrated exercise of judicatory power should also be resolved to guarantee the smooth operation of judicatory working mechanism.

At the same time, efforts should be taken to enhance the public's environmental protection awareness through conducting educating activities widely. Social organizations and individuals should be actively encouraged to participate in environmental protection. Citizen participation procedures should be improved, too, to guarantee citizens' rights to know, express and participate and to push forward environmental democracy. Through combined efforts from the whole society, there surely will be a better future for environmental public interest litigation.