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Environmental Justice with Chinese Characteristics: Recent Developments in Using Environmental Public Interest Litigation to Strengthen Access to Environmental Justice

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I. INTRODUCTION

China's unprecedented economic growth and rapid urbanization in the past three decades has exerted a heavy toll on the country's environment. According to the 2010 Official Report on the Land and Resources released in October 2011, in 182 Chinese cities that monitor ground water quality, 40.44% of the ground water was graded four and 16.7% was graded five.[1] According to the National Standard for Ground Water Quality, Grade Four means the water should primarily be used for agricultural and industrial purposes, and can be used as drinking water only after proper treatment, while Grade Five means the water is not suitable for drinking.[2] This is devastating news to the over 400 cities which rely on ground water as their drinking water source out of China's 655 cities.[3] In particular, cities in northern China rely heavily upon ground water. Currently, 65% of the water used daily by the people, 50% of the water for industrial use, and 33% of the water used for agricultural irrigation of cities in northern China comes primarily from ground water.[4] In a study released in February 2012, researchers at the Massachusetts Institute of Technology (MIT) Joint Program on the Science and Policy of Global Change said although China has made substantial progress in reducing air pollution, the economic impact of air pollution has jumped from $22 billion in 1975 to $112 billion in 2005.[5] Acknowledging "the damages are even greater than previously thought," the MIT researchers concluded that China has already become the world's largest emitter of mercury, carbon dioxide and other pollutants, and only recently started to monitor ozone.[6]

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1. Libin Wang, *Official Report on the Land Resources: The Ground Water Quality of Over Half Chinese Cities Were Rated IV and V*, NEWS.COM, October 19, 2011, *available at* http://news.xinhuanet.com/politics/2011-10/19/c_111108310.htm.

2. Zhong Hua Ren Min Gong He Guo Guo Jian Biao Zhun Di Xia Shui Zhi Liang Biao Zhun GB/T 14848-93 (中华人民共和国国家标准地下水质量标准 GB/T 14848-93) [Quality Standard for Ground Water of the National Standards of the People's Republic of China, GB/T 14848-93(approved by the General Administration of Quality Supervision, Inspection and Quarantine, 1993, effective 1994) (China), *available at* http://kjs.mep.gov.cn/pv_obj_cache/pv_obj_id_B425DF8639DFD8C9839FAFC2297305244CDB0200/filename/W020061027512167894817.pdf.

3. Ground Sinking Occurred In Over 50 Cities Across China, PEOPLE.COM.CN, November 17, 2011, *available at* http://www.people.com.cn/h/2011/1117/c25408-3851284237.html.

4. *Id.*

5. Wendy Koch, *MIT: China's Pollution Costs $112B In Annual Health Care*, USA TODAY (February 14, 2012) http://content.usatoday.com/communities/greenhouse/post/2012/02/chinas-growth-worsens-air-pollution-hikes-health-costs/1#.Tzuc1SNJ_IU.

6. *Id.*

Set against the backdrop of China's daunting environmental challenges, this article will first discuss how the environmental justice issue manifests itself on Chinese soil and how its evolvement differs from the American experience. This discussion will be followed by an analysis on how environmental public interest litigation, inspired by citizen suits in the U.S., has been fermenting in China and advocated by environmentalists as a new approach to broaden and strengthen access to environmental justice. The article will then move on to analyze three high-profile environmental public interest cases recently brought by a Chinese NGO and a local environmental protection agency, respectively, at two specialized environmental courts, and discuss the important innovations and limitations of these cases. The article will conclude with some further thoughts on the direction of China's environmental public interest litigation experiment and how it can be effectively employed to strengthen environmental governance and ensure environmental justice for all.

II. ENVIRONMENTAL JUSTICE IN THE CHINESE CONTEXT

The concept of environmental justice in China has its own distinctive meanings, and is generally understood very differently from its original racial and income-based meanings defined by the environmental justice history of the United States.[7] Although China has 55 ethnic minority groups, the Chinese government has adopted a strict racial equality policy since its foundation in 1949, aiming to create a harmonious relationship among different ethnic groups and to minimize any potential conflicts.[8] Unlike in the United States, where Hispanics often engage in labor-intensive industries and therefore, are likely to suffer the negative consequences of pollution, minority groups in China are not discriminated when pursuing employment opportunities as a result of the "racial neutral" national policy.[9] Polluting industries and clean energy projects can both be sited in minority regions because of a

7. For example, Naikang Tsao described a striking feature of the American landscape as the prevalence of toxic waste dumps in low-income communities and communities of racial minorities. See Naikang Tsao, *Ameliorating Environmental Racism: A Citizens' Guide to Combating the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366, 366 (1992). The author discussed the environmental justice issue in the Chinese context also in a chapter titled "The Impacts of Climate Change on Indigenous Populations in China and Legal Remedies," co-authored with Wenxuan Yu and Pong Dong, for the book CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, edited by Randall S. Abate and Elizabeth Kronk, Edward Elgar Publishing, forthcoming March 2013.

8. Ruixue Quan, *Establishing China's Environmental Justice Study Models*, 14 GEO. INT'L ENVTL. L. REV. 461, 467 (2002).

9. *Id.* at 468.

particular region's natural conditions, rather than racial considerations.[10]

In mixed income communities, it is possible for wealth to play a role in affecting plaintiffs' chance of escaping pollution with richer residents moving away and leaving their poorer neighbors to bring lawsuits on their own.[11] When it comes to the intricate relationship between income level and environmental justice, there is no systematic evidence suggesting, from a microcosmic view, that low-income communities receive more environmental burdens and less environmental benefits because of their income status.[12] The dense population and existing formatted urban structure have effectively inhibited the trend of wealthier people congregating in environmentally more advantageous areas and driving lower-income population to environmentally less desirable regions.[13] Polluting industries, landfills, toxic facilities and other pollution sources in China's urban areas were not placed according to race or income, but on the need and convenience of disposal according to government urban planning.[14] Because of the racial and income neutral nature of China's environmental justice issue, it seems the concept of environmental justice should be understood more broadly as referring to the interests of the public at large, rather than a notion that all racial groups should bear the burdens and risks of hazardous waste facilities equitably.[15]

My own experience of overseeing an environmental justice exchange program between China and the United States seems to confirm this broader view of environmental justice in the Chinese context. In 2009, Vermont Law School was awarded a federal grant to support a U.S.-China exchange program for young professionals working in the field of environmental justice.[16] Funded by the Bureau of Educational and Cultural Affairs (ECA) of the State Department, this educational and cultural exchange was expected to provide leadership training opportunities to eighteen Chinese and American fellows (9 from each country), particularly members of minority groups, who are

10. *Id.* at 473.

11. Rachel E. Stern, *From Dispute to Decision: Suing Polluters in China*, THE CHINA QUARTERLY, 206, 308 (2011).

12. Quan, *supra* note 8, at 474.

13. *Id.* at 475.

14. *Id.*

15. Ke Jian, *Environmental Justice: Can An American Discourse Make Sense in Chinese Environmental Law?*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 253 (2005).

16. Final Program Report of Vermont Law School Environmental Justice Young Fellows Exchange Program, p. 1, March 31, 2011 (on file with author).

active in advocating for environmental justice.[17] The fellows were expected to jointly examine the environmental burdens, including climate change impacts, on minority and low-income populations in both countries through a six-week exchange (three weeks in the United States and three weeks in China) and design of individual projects to advance environmental justice efforts in their communities.[18]

There were 52 applications from Chinese citizens for the 9 slots. The Chinese applicants are from a diverse array of backgrounds all across the country, including leading environmental NGO activists, well-known environmental law scholars and researchers, judges, government officials, scientists as well as environmental lawyers.[19] Several applicants were members of ethnic minority populations and many came from relatively poor and underdeveloped areas of China.[20]

As the person overseeing this exchange program, I was able to interview around 20 finalists out of the 52 Chinese applicants face-to-face or over the telephone to determine the candidacy of the 9 Chinese fellows. When asked about their understanding of the term "environmental justice," a few of the 20 finalists were able to articulate the traditional racial and income aspects of it as defined in the United States; however, most of them interpreted "environmental justice" as "better environmental governance." With "better environmental governance," the environmental laws are well-drafted and strictly-complied with and enforced, the pollution victims can obtain adequate compensation through legal channels, the general public can effectively participate in government environmental decision-making, and the environmental quality can be gradually improved for the benefit of all members of the society.

The exchange program helped deepen the fellows' understanding of the possibilities of redefining environmental justice in China; a country whose history, political and legal system, and social development are drastically different from the United States. The exchange enabled fellows to have a vibrant discussion on the Chinese characteristics of environmental justice, since the topic is an emerging concept open for interpretation. Some of the fellows perceived urban-rural inequality, rather than racial profiling, as an important manifestation of environmental justice challenges in China. Others observed that the environmental justice endeavor in China was driven by the perception of preventing and remedying the negative impacts caused by people on

17. *Id.*
18. *Id.* at 1-4.
19. *Id.* at 2.
20. *Id.*

the ecosystem and public health in general. This approach was noted over dedication to alleviating disproportionate environmental burdens on low-income communities and communities of color as commonly understood in the American context.[21] Throughout the course of the exchange, environmental lawsuits brought on behalf of the public interest emerged as a hot topic as the Chinese fellows explored options to hold polluters and non-performing government agencies accountable and to improve access to environmental justice.

Even though environmental justice is interpreted more broadly in China, it has several distinctive characteristics: 1) Environmental disparities between eastern, more developed regions and western, less developed regions; 2) Environmental disparities as reflected in urban-rural inequality; and 3) Certain groups of the population, such as migrant workers, are more vulnerable to environmental risks because they have fewer resources to seek redress.

A. Environmental Disparities Between Eastern and Western Regions

While geographically Da Xing An Ling – Tai Hang Mountain – Xuefeng Mountain serves as the line of demarcation between eastern and western China, such division was shaped by a variety of factors including historical development, natural conditions, and human activities.[22] While Western regions have relatively rich natural resources, they are generally underdeveloped, economically disadvantaged, and suffer serious environmental destruction. On the other hand, while Eastern regions have limited natural resources, they have higher level of industrialization, urbanization, and modernization than their Western counterparts.[23]

Historically, Western regions have made significant contributions and sacrifices towards the economic development of Eastern regions and the entire country by transferring their abundant mineral reserves to the East free of charge, while leaving behind serious environmental damage as a result of these mineral and resources extraction activities.[24] In addition, after the Reform and Opening Up policy was instituted in the late 1970s, with natural resources supplied by Western regions and preferential policies granted by the central

21. *Id.* at 6.

22. Dengqiao Zhang, Xi Bu Kai Fa Zhong De Huan Jing Zheng Yi Wen Ti Yan Jiu [Analysis of Environmental Justice Issues During the Course of Developing Western China], 26 JOURNAL OF JISHOU UNIVERSITY 56, 58 (2005) (China).

23. *Id.*

24. *Id.*

government, Eastern regions spearheaded in economic development, while their Western counterparts were not compensated sufficiently and therefore, lagged far behind in economic development.[25]

As economic disparity among different regions continues to widen in contemporary China, environmental enforcement facilities, competence, and efficiency could potentially vary significantly from region to region.[26] An example may be found in examining the enforcement of environmental information disclosure. In a recent survey conducted in 113 selected cities across China to evaluate how effectively local governments disclose environmental information to the general public, provinces in the Eastern part of China outperform their counterparts in central China, and provinces in central China outperform their counterparts in Western China.[27] Out of these 113 cities, the top two are Ningbo of Zhejiang Province and Shenzhen of Guangdong Province, both of which are located along China's eastern coast.[28]

In addition, wealthier regions are generally able to devote more financial and technical resources to protecting the local environment than their poorer counterparts.[29] The more affluent regions in eastern China are able to devote more funding to environmental protection and therefore enjoy better environmental quality within the regions, while their western counterparts are trapped in the cycle of exacerbating pollution and increasing poverty.[30]

B. Environmental Disparities Between Urban and Rural Areas

As observed by some fellows of the environmental justice exchange program, significant environmental disparities exist between China's urban and rural areas as a result of urban-rural inequality. Urban-rural inequality is a pervasive phenomenon in developing countries, and it is particularly visible in China.[31] Compared to their urban counterparts, rural residents in China have limited income sources, ed-

25. *Id.*

26. Quan, *supra* note 8, at 480.

27. Fang Zhang, *Progress Slow for Pollution Data Transparency*, CHINA.ORG.CN, January 17, 2012, *available at* http://www.china.org.cn/environment/2012-01/17/content_24428092.htm.

28. *Id.*

29. Quan, *supra* note 8, at 480.

30. Zhang, *supra* note 22.

31. Hai Jin, Zou Xiang Cheng Xiang Huan Jing Zheng Yi: Yi Fa Zhi Bian Ge Wei Shi Jian [Achieving Environmental Justice in Both Urban and Rural Areas in China: From the Lens of Legal Reform], 10 LEGAL STUDY MAGAZINE 74, 76 (2009) (China).

ucational facilities, employment opportunities, and social security. Such inequality has exerted a profound impact on the environmental protection efforts in rural areas.[32] Vice Minister Ganjie Li of China's Ministry of Environmental Protection, openly expressed concern over environmental disparities between urban and rural areas as a result of "putting the emphasis only on urban areas, industry and point source pollution, while ignoring rural areas, agriculture and nonpoint source pollution" when it comes to environmental protection.[33] According to Vice Minister Li, the rural areas in China produced over nine billion tons of sewage and 280 million tons of municipal solid waste each year, and most of them are randomly discharged without treatment.[34] The vast majority of China's rural villages lack basic environmental infrastructure.[35]

Many cities treat rivers as pollution discharge channels, and discharged pollutants cause frequent outbreak of environment-related diseases in rural areas along the rivers and coasts. This is particularly a problem in rural villages along the Huai River watershed as well as eastern coastal areas where certain communities have become known as the "Cancer Villages".[36] Xiao Jia Dian Village in Feicheng City, Shandong Province is an example.[37] Feicheng City is a newly-industrialized city engaged primarily in coal mining, coking, papermaking, and brewing; all of which are pollution-causing industries.[38] These industries discharged wastewater to the local Dawen River, which caused many sections of the Dawen River watershed to have a water quality graded less than five,[39] according to the water quality monitoring reports from Feicheng Municipal Environmental Protection Bureau

32. *Id.*

33. Jianrong Qie, *Rural Pollutants Account for Half of China's Pollutants and Need to Be Regulated Immediately,* LEGAL DAILY, March 29, 2011, *available at* http://news.xinhuanet.com/legal/2011-03/29/c_121242239.htm.

34. *Id.*

35. *Id.*

36. Shuming Wang & Yan Zhang, Wo Guo Shui Wu Ran Yu Huan Jing Zheng Yi Yan Jiu [Analysis on China's Water Pollution and Environmental Justice], 11 JOURNAL OF HOHAI UNIVERSITY 50, 51 (2009) (China).

37. *Id.*

38. *Id.* at 51-52.

39. For a water quality graded less than five, it means the water cannot be used for industrial or agricultural purposes. See Zhong Hua Ren Min Gong He Guo Guo Jian Biao Zhun Di Biao Shui Huan Jing Zhi Liang Biao Zhun GB 3838—2002 (中华人民共和国国家标准地表水环境质量标准GB 3838—2002) [Environmental Quality Standards for Surface Water of the National Standards of the People's Republic of China, GB 3838—2002 (promulgated by the State Environmental Protection Administration and the General Administration of Quality Supervision, Inspection and Quarantine, 2002, effective 2002) (China).

(EPB).[40] In particular, the level of nitrite, a carcinogen, in the water far exceeded what is permitted by the national standard. After extensive fieldwork, scientists preliminarily confirmed that the high cancer rate among Xiao Jia Dian's villagers was closely connected with local water pollution.[41]

The pervasive environmental problems in China's rural areas can be attributed to the urban centralism in environmental legislation and enforcement.[42] Compared to a relatively comprehensive set of legislation protecting the urban environment, there is extremely limited legislation targeting the rural environment.[43] For example, China's rural areas face a variety of significant environmental challenges such as soil pollution, nonpoint source pollution, and transfer of pollution from cities to the countryside, but relevant legislations remain vacant.[44] In addition, existing environmental laws, regulations and standards were enacted primarily to prevent and control urban and industrial point source pollution.[45]

Although some laws and regulations established general principles related to rural environmental protection, these provisions lack enforceability and cannot effectively handle the increasingly severe and complicated rural environmental problems.[46] An additional challenge to China's rural environmental governance is the weak enforcement of the environmental laws and regulations. Most of the provincial-level Environmental Protection Bureaus have not established a division devoted to rural environmental protection; most of the rural townships do not have an environmental protection office and lack necessary monitoring and enforcement capacity.[47]

C. Migrant Workers As A Vulnerable Group to Environmental Risks

The issue of migrant workers has become one of the most contentious social issues in China in recent years. Migrant workers, termed by some as the "peasantry workers," generally refers to those Chinese rural residents who have very limited employment opportunities at home and therefore leave their lands for the urban areas that

40. Wang & Zhang, *supra* note 36, at 52.
41. *Id.* at 51-52.
42. Jin, *supra* note 31, at 74.
43. *Id.*
44. *Id.*
45. Jianrong Qie, *supra* note 33.
46. *Id.*
47. *Id.*

demand labor for low-paying jobs.[48] The vast majority of migrant workers can only be employed in labor-intensive occupations because they lack proper education, training, and social connections.[49] According to a survey conducted in 2006, out of the more than 2,000 migrant workers in Zhejiang Province, one of the most economically developed provinces in eastern China and a major province importing migrant workers, most of the migrant workers surveyed have only junior high (50.3%) or high school (31.9%) education.[50] Among migrants workers aged between 16 and 23 years old, 60.3% only have a junior high school level education or even lower.[51] These young migrant workers lack the necessary professional knowledge and skills and therefore, work primarily in labor-intensive industries and encounter significant difficulty in learning new skill sets to improve their career potential.[52]

Although migrant workers have made important contributions to China's urbanization, as well as miraculous economic achievements, the fact that most of them are employed in low-paying jobs with less-than-desirable working conditions, such as construction, landfill treatment, incineration, and sewage treatment, exposes them to more pollution and makes them particularly vulnerable to occupational diseases.[53] According to a 2010 survey by the Ministry of Health regarding the occupational health situations of younger-generation migrant workers, 60% of the nearly 100 million younger-generation migrant workers are employed in industries that pose high risks for occupational health problems.[54] In recent years, over 80% of the occupational disease patients are migrant workers and the incidents in which a large number of migrant workers contracted occupational diseases around the same time have occurred frequently.[55] In Guangzhou, the capital city of Guangdong Province in southern China, the occupational diseases contracted in the past five years include primarily pneumoconiosis, occupational poisoning (e.g. lead poisoning) and hearing impairment caused by industrial noise, according to a sur-

48. Quan, *supra* note 8, at 484-485.

49. *Id.* at 485.

50. Xuefei Huang, *The Investigation Report on the Migrant Worker Issue*, MINGONG 123, August 29, 2011, *available at* http://www.mingong123.com/news/13/201108/5489543719805b65.html.

51. *Id.*

52. *Id.*

53. Quan, *supra* note 8, at 485.

54. Jie Lin & Jianming Zhou, *Migrant Workers Become the Primary Patients of Occupational Disease*, YANG CHENG EVENING NEWS, September 8, 2011, *available at* http://www.ycwb.com/ePaper/ycwb/html/2011-09/08/content_1205994.htm.

55. *Id.*

vey published by the Guangzhou Institute of Occupational Disease Prevention and Treatment.[56]

In practice, it is very difficult for migrant workers to enforce their legitimate rights to occupational disease-related compensation from their employers because of the obstacles in obtaining official assessment of occupational disease.[57] For example, Shenzhen, one of the wealthiest cities in southern China, requires a potential victim of occupational disease to first prove the employment relationship between himself and the employer before he can apply for official assessment on whether he has occupational disease.[58] However, many businesses refuse to sign labor contracts with migrant workers because they do not wish to establish a formal employment relationship that will lead to higher costs for the employers. Further, many migrant workers either lack the consciousness to safeguard their own rights or cannot afford insisting that their employers sign a labor contract before they are hired because they are under pressure to get a job.[59] Therefore, most migrant workers do not have a labor contract, and usually lack other means to prove the existence of an employment relationship with the employer.[60] According to a survey conducted by a sociology professor at Peking University on more than 120 migrant workers who work for the construction industry in Shenzhen, none of these migrant workers had a valid labor contract with their employers.[61]

There are other restrictions on migrant workers' rights to claim compensation for occupational diseases. For example, Guangdong Province, one of the major manufacturing hubs in China, has a rule which prohibits a worker from seeking compensation from a former employer for an occupational disease that was likely developed during his former employment if he has not worked for the former employment for over two years.[62] It can sometimes take years to show the

56. *Id.*

57. Boxin Yuan, *Enterprises in Shenzhen Refused to Sign Labor Contracts and Migrant Workers Suffered Enormous Difficulties to Obtain Official Assessment for Their Occupational Diseases*, NEWS.CN, December 21, 2009, *available at* http://news.xinhuanet.com/local/2009-12/21/content_12679200.htm.

58. *Id.*

59. Yingting Lian, *Only 20% of the Migrant Workers Have Signed Labor Contracts, and Protection of the Rights and Interests of Migrant Workers Should Be Concerned*, LEGAL DAILY, May 27, 2007, *available at* http://news.xinhuanet.com/legal/2007-05/27/content_6158346.htm.

60. Boxin Yuan, *supra* note 57.

61. *Id.*

62. Guangdong Sheng Guan Yu Jin Yi Bu Wang Shan Wo Sheng Gong Shang Bao Xian Zhi Du You Guan Wen Ti De Tong Zhi (广东省关于进一步完善我省工伤保险制度有关问题的通知) [Notice on Relevant Issues

symptoms of an occupational disease, thus this rule will likely have a detrimental impact on migrant workers' legitimate rights to work-related compensation.

The challenges faced by migrant workers in protecting their health and work safety have drawn widespread attention, including international efforts to improve their access to justice. For example, Vermont Law School collaborated with Sun Yat-sen University Law School (SYSU) in Guangzhou, the capital city of Guangdong Province, to launch the Environmental and Worker Health and Safety Advocacy Initiative (the Initiative) at SYSU's existing environmental law clinic (the "Clinic").[63] Through the Initiative, the Clinic trains SYSU law students to provide legal and advocacy services to migrant workers and pollution victims in Guangzhou and its surrounding areas in workplace safety cases. The cases that SYSU law students are trained to handle include those involving environmental health and safety issues.[64] By applying the laws and regulations they have learned regarding workers' rights related to workplace injury and occupational diseases, the students provide face-to-face legal consultations to migrant workers at industrial parks, conduct trainings on relevant Environment, Health and Safety (EHS) issues, draft legal documents for those who fight for the compensation they are entitled to, and even represent the workers before labor arbitration committees and judges.[65]

The Clinic has actively engaged in legal and policy reform initiatives that will enhance protection of the migrant workers by leveraging the insights and experiences it has accrued through providing legal and advocacy services to migrant workers. As mentioned above, Guangdong Province has a rule which permits workers to seek compensation for occupational diseases contracted in former employment only within two years after they have left the former employment.[66] This rule not only creates significant barriers for mi-

Regarding Further Improvement of Guangdong Province's Work Injury Insurance System] (promulgated by the Labor and Social Welfare Department of Guangdong Province, 2008, effective 2008) (China).

63. Quarterly Program Report of Vermont Law School Environmental Advocacy Initiative for China, p. 3, December 31, 2011 (on file with author).

64. *Id.*

65. *Id.* at 5.

66. Guangdong Sheng Guan Yu Jin Yi Bu Wang Shan Wo Sheng Gong Shang Bao Xian Zhi Du You Guan Wen Ti De Tong Zhi (广东省关于进一步完善我省工伤保险制度有关问题的通知) [Notice on Relevant Issues Regarding Further Improvement of Guangdong Province's Work Injury Insurance System] (promulgated by the Labor and Social Welfare Department of Guangdong Province, 2008, effective 2008) (China).

grant workers to pursue their legitimate claims for compensation, but is in conflict with the national law, which does not impose a two-year limit.[67] The Clinic has worked with two other institutions to submit their opinions and suggestions to the Department of Human Resources and Social Security, the Legislative Affairs Office, the Provincial High People's Court and the Provincial Union of Guangdong Province.[68] Specifically, they requested to revise this rule, requested that courts not deny workers' compensation applications on an individual basis, and requested the Provincial Union to propose a draft revision of this rule.[69] While the Department of Human Resources and Social Security still refuses to revise this rule, the Provincial Union plans to question their decision at this year's Guangdong Provincial People's Congress. Additionally, the Legislative Affairs Office helped arrange a meeting between the Clinic, the other institutions, and senior officials of the Work Injury Division of the Department of Human Resources and Social Security to discuss and debate the legitimacy and reasonableness of this rule because of the Clinic's concerted efforts to push for legislative changes.[70]

III. EMPLOYING ENVIRONMENTAL PUBLIC INTEREST LITGIATION TO IMPROVE ACCESS TO ENVIRONMENTAL JUSTICE

In order to address the country's formidable environmental challenges as well as its citizens' desire for environmental justice, China started to develop its environmental legislative framework at the end of 1970s, and has enacted an extensive set of environmental laws, regulations, and rules in the past 30 years. According to Professor Jin Wang of Peking University, the enacted environmental statutes account for over 10% of all the statutes passed by the Chinese national legislature in the past three decades.[71] However, many of these laws were broadly drafted, and suffer from significant enforcement difficulties that characterize modern Chinese legislations more generally.[72]

67. Quarterly Program Report, *supra* note 63. at 11.

68. Email exchange on April 19, 2012 with the professor in charge of Sun Yat-sen University's Labor Law Clinic (on file with the author).

69. *Id.*

70. *Id.*

71. Jin Wang, Remarks at the Special Third Forum on Legal Mechanisms To Ensure Fulfillment of the Environmental Protection Tasks Under the 12th Five-Year Plan, September 21, 2011. The notes of this event are available at http://www.acef.com.cn/news/lhhdt/36482.shtml.

72. William Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125, 127 (1997).

Compounded by local government's ruthless pursuit of economic development, weak regulatory infrastructure, lack of financial and human resources, limited engagement of civil society and a relatively weak judiciary,[73] China faces enormous challenges to bridge the alarming gap between laws "on-the-book" and actual enforcement on the ground. In order to address the enforcement issue, in particular as a way to rectify lax enforcement by administrative agencies, the role of the judiciary, in particular with respect to allowing for environmental public interest litigation, has been emphasized to give teeth to China's environmental legislations.[74]

In recent years, a "green court movement" has emerged in China. There are 86 specialized environmental courts, tribunals and panels established in 14 provinces (close to half of all provinces in China) across the country as of October 2011.[75] These specialized environmental courts and tribunals help streamline the trial process of environmental cases, allow the cases to be heard by judges and environmental experts with enhanced technical expertise, and liberalize the standing to encourage public interest lawsuits that regular courts commonly do not accept under existing Chinese law.[76] Such a "bottom-up" activist approach[77] by the judiciary is not commonly seen in China, and will likely have ripple effects across other areas of law and hold

73. Jingjing Liu & Adam Moser, *Environmental Law-China*, *in* THE ENCYCLOPEDIA OF SUSTAINABILITY VOL. 3: THE LAW AND POLITICS OF SUSTAINABILITY 220, 222 (Klaus Bosselmann, Daniel Fogel, & J.B. Ruhl eds., 2011).

74. For example, the Supreme People's Court issued Several Opinions on Providing Judicial Guarantee and Services for Accelerating the Transformation of the Economic Development Mode, which requires the courts to properly hear various types of environmental protection disputes, to timely adjudicate cases against environmental protection agencies and to improve the review of environmental administrative non-litigation cases in order to support and supervise environmental government agencies' performance of environmental protection responsibilities according to law. The courts are also required to strictly enforce environmental and natural resources protection laws and regulations to promote social and economic sustainable development. See Zui Gao Ren Min Fa Yuan Guan Yu Wei Jia Kuai Jing Ji Fa Zhan Fang Shi Zhuan Bian Ti Gong Si Fa Bao Zhang He Fu Wu De Ruo Gan Yi Jian (最高人民法院关于为加快经济发展方式转变提供司法保障和服务的若干意见) the Supreme People's Court's Several Opinions on Providing Judicial Guarantee and Services for Accelerating the Transformation of the Economic Development Mode] (promulgated by the Supreme People's Court, 2010, effective 2010) (China). See also Heyan Wang, *Civil Groups Sue A Paper Mill, and the Defendant Said It Will Not Appeal*, SINA, January 18, 2011, *available at* http://green.sina.com.cn/news/roll/2011-01-18/152121834363.shtml.

75. Minchun Zhang & Bao Zhang, Specialized Environmental Courts in China, INT'L B. ASS'N. J. ENERGY & NAT. RESOURCES (forthcoming Fall 2012).

76. Liu & Moser, *supra* note 73, at 222.

77. Jingjing Liu & Dejin Gu, *Judicial Activism and Sustainability*, *in* THE ENCYCLOPEDIA OF SUSTAINABILITY VOL.7: CHINA, INDIA, AND EAST AND SOUTHEAST AISA: ASSESSING SUSTAINABILITY (forthcoming June 2012).

the potential for increased competency and transparency in the judicial branch itself.

Since over a decade ago, China's environmental legal academia have been writing about environmental public interest litigation and the potential to give standing to a broader range of individual citizens and social groups.[78] Inspired by citizen suits in the U.S.,[79] many hope that environmental lawsuits brought on behalf of the public interest can help address the various obstacles that exist in traditional environmental tort (pollution compensation) cases, including the exorbitant costs of environmental lawsuits, hesitation to bring lawsuits, and the challenges of proving causation.[80] Although environmental public interest litigation is theoretically not permitted under existing Chinese law[81] and involves the interests of a much broader constituency and therefore, may seem more controversial and challenging than regular environmental tort cases, it has so far received relatively uncommon acceptance and support by the Chinese government.[82] This is partly because the government is eager to explore solutions to China's daunting environmental problems and sees the benefits of having citizens play a watchdog function.[83] This movement is also partly because environmental public interest cases are more technical and less political, and do not arouse as much sensitivity as those high-profile cases involving constitutional issues. Support from the government, combined with significant international efforts to train the Chinese judiciary on

78. Rachel E. Stern, *On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits*, 32 LAW & POLICY 79, 94 (2010).

79. Since 2007, the U.S.-China Partnership for Environmental Law at Vermont Law School has received many Chinese judges, government officials, lawyers and scholars who are interested in learning citizen suit in the U.S. and exploring how it can serve as a model for China's environmental public interest litigation.

80. Alex Wang, *The Role of Law In Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 220 (2007).

81. According to China's Civil Procedure Law, the plaintiff in a civil lawsuit must have a direct interest with the lawsuit being brought. See Art.108, Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (中华人民共和国民事诉讼法) [the Civil Procedure Law of the People's Republic of China (enacted by the National People's Congress, 1991, effective 1991, revised 2007) (China).

82. This can be evidenced through the Ministry of Environmental Protection's willingness to introduce environmental public interest litigation by incorporating it into the draft amendment to China's Environmental Protection Law. The latest draft amendment to China's Civil Procedure Law included also a provision that permits relevant government agencies and social groups to bring lawsuits against activities that infringe upon social and public interest, such as environmental pollution or activities infringing upon the legitimate rights and interests of multiple consumers.

83. Stern, *supra* note 78, at 95.

environmental adjudication, particularly in public interest cases,[84] provides an excellent platform for judges to think creatively and explore innovative options in relatively uncharted territory. The choices the judiciary makes today will ultimately shape the development of China's environmental law and governance, as well as the long-term sustainability of the world's most populous country and second largest economy.

IV. Analysis of Three Recent Environmental Public Interest Cases

This section will discuss three environmental public interest cases recently brought by a Chinese NGO and a local EPB, respectively, at two specialized environmental courts, with an analysis of the important innovations, as well as limitations, of these cases.

A. All-China Environment Federation & Guiyang Public Environmental Education Center v. Dingpa Paper Mill of Wudang District, Guiyang City (2010)

All-China Environment Federation (ACEF), one of the two plaintiffs, claimed it received complaints on October 18, 2010 from residents living along the Nanming River, the so-called "Mother River" of Guiyang City, capital of Guizhou Province in southwest China. The complaints alleged that the defendant, Dingpa Paper Mill, had discharged industrial waste water to the Nanming River and caused water pollution.[85] On October 30, ACEF sent out staff to investigate the pollution on site, and found although the defendant did not discharge industrial waste water during daytime, it discharged large quantities of waste water to the Nanming River in the evening.[86] Dingpa Paper Mill was originally built in 1993 along the downstream of the Nanming River to produce corrugated paper from recycling used

84. In addition to the significant efforts of the U.S.-China Partnership for Environmental Law at Vermont Law School, where I have been working for the past five years, many U.S. NGOs and foundations, such as the Natural Resources Defense Council, the American Bar Association Rule of Law Initiative, the Ford Foundation, have been playing an active role in promoting environmental lawsuits or enhanced environmental adjudication in China, eg. improving Chinese judges' skills to write injunctive orders, weigh between conflicting scientific evidences, craft innovative remedies to restore environmental integrity, etc.

85. No.4 Verdict of Civil Environmental Cases of Qingzhen People's Court of First Instance Trial (2010), at 2.

86. *Id.*

cardboards.[87] After several renovations, the defendant was expected to recycle all waste water (i.e. zero emission of waste water) and discharge waste gas within the prescribed limit and therefore, the pollution discharge permit issued by the local EPB allowed the defendant to discharge sulfur dioxide and dust only, not waste water.[88] However, the defendant did not heed the EPB's requirement of strictly treating and recycling waste water, and simply built two water tanks with a total storing capacity of 800 cubic meters and transferred waste water to the tanks for deposition.[89] Since 2003, the defendant was imposed administrative penalties by the local EPB on several occasions for secretly discharging waste water to the Nanming River or discharging waste gas exceeding the prescribed limits.[90]

Based on evidence gathered by the plaintiffs prior to the lawsuit, evidence preserved by the Qingzhen Environmental Court, as well as admission by the defendant's legal representative during evidence preservation by the court, the defendant did not treat the waste water at all, and simply transferred the waste water to the tanks for deposition during daytime and discharged the waste water secretly at night to the Nanming River.[91] Commissioned by the court, Guiyang Environmental Center Monitoring Station sampled the waste water discharged by the defendant, and found the concentration of ammonia nitrogen, chemical oxygen demand, and biochemical oxygen demand all far exceeded national emission standards. Further, the water quality of downstream Nanming River near the defendant's discharge pipe was graded less than five,[92] which means the water cannot be used for industrial or agricultural purposes.

In November 2010, ACEF teamed up with Guiyang Public Environmental Education Center to jointly bring public interest litigation at Qingzhen Environmental Court, requesting the defendant to immediately stop illegal discharge of waste water to the Nanming River, pay for 10,000 RMB ($1,587)[93] of attorney's fee incurred by the plaintiffs, and cover relevant litigation expenses.[94] On December 10, 2010, the plaintiffs requested the court issue a preliminary injunction requiring

87. *Id.* at 6.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 7.

92. *Id.*

93. The exchange rate between USD and RMB as of April 23, 2012 is 1:6.3. See http://www.exchange-rates.org/history/CNY/USD/T.

94. No.4 Verdict of Civil Environmental Cases of Qingzhen People's Court of First Instance Trial (2010), at 1-3.

the defendant to stop illegal discharge of industrial waste water immediately, prior to the final judgment of the case. The court granted the preliminary injunction.[95]

On December 30, 2010, the court issued the decision, which recognized that the two plaintiffs, as lawfully registered environmental protection organizations, can represent the public environmental interest and bring a lawsuit when the public interest is being infringed upon and there is no specific victim to bring the lawsuit.[96] Bringing such an environmental public interest lawsuit fully reflects the fact that environmental organizations and groups in China have actively participated in environmental management, supervised the implementation of environmental law, and promoted environmental protection efforts.[97] The court ruled in favor of the plaintiffs and ordered the defendant to stop discharging waste water to the Nanming River immediately, pay for 10,000 RMB ($1,587) of attorney's fees to ACEF, pay for water sampling fee of 1,500 RMB ($238) to Guiyang Two Lakes and One Reservoir Foundation who prepaid this fee, and cover the case acceptance fee of 60 RMB ($10).[98]

This case has received significant attention from the environmental legal community in China, because it is the first successful environmental civil public interest case brought by an environmental NGO.[99] Peking University environmental law professor Jin Wang[100] gave very positive comments regarding this case, calling it "the first complete environmental civil public interest litigation case."[101] There

95. Heyan Wang, *Civil Groups Sue A Paper Mill, and the Defendant Said It Will Not Appeal*, SINA, January 18, 2011, *available at* http://green.sina.com.cn/news/roll/2011-01-18/152121834363.shtml.

96. No.4 Verdict of Civil Environmental Cases of Qingzhen People's Court of First Instance Trial (2010), at 10-11.

97. *Id.* at 10.

98. *Id.* at 10-11.

99. Shixin Liu, *Why Did China's First Environmental Public Interest Case Adjudicated In Guizhou Province?* CHINA YOUTH DAILY, January 20, 2011, http://zqb.cyol.com/html/2011-01/20/nw.D110000zgqnb_20110120_1-05.htm?div=-1. 1. In addition, ACEF brought a lawsuit against a container company in Jiangyin Port, Jiangsu Province, for air and water pollution in 2009. This was the first environmental public interest case brought by an environmental NGO in China, and both parties in this case reached an agreement mediated by the court.

100. Professor Jin Wang is arguably the first law professor experimenting with environmental public interest litigation in China. After the Songhua River benzene spill in 2005, he and several other professors and students from Peking University brought a civil environmental public interest lawsuit on behalf of the Xunhuang Fish, the Songhua River as well as the Sun Island who were polluted by the benzene spill. This is the first time natural objects such as fish serve as plaintiffs in a civil environmental public interest lawsuit in China. The case was not accepted by court. See Shixin Liu, *supra* note 99.

101. *Id.*

are several important innovations related to this case that should be pointed out. First, the court granted the plaintiffs' request to preserve evidence related to the defendant's illegal discharge activities, and sent court staff to the pollution site early in the morning to collect and preserve the evidence related to the defendant's secret discharge of waste water.[102] In environmental litigation, it is crucial and difficult, to obtain relevant evidence. Here, the court's efforts to preserve important evidence not only helped facilitate this particular lawsuit, but also set a good precedent for other courts to follow.[103]

Second, as mentioned previously, the court issued a preliminary injunction prior to the judgment. According to Judge Guangqian Luo who presided over this case, if the court waited until the judgment to order the defendant to stop discharging waste water, the defendant may have continued to polluting the environment while the case was pending.[104] A preliminary injunction forces the defendant to stop its illegal discharge before the final judgment is rendered, thus ensuring timely and effective mitigation of the negative impacts upon the local environment.[105]

Third, this is the first public interest case in which the appraisal fee was covered by a foundation.[106] Due to the complexity and technicality of environmental litigation, upfront costs related to environmental quality sampling, appraisal of environmental harm and economic loss can be substantial, and sometimes the financial burden alone may deter NGOs and individuals from bringing an environmental public interest lawsuit. Even before this case, the court reached a consensus with Guiyang Two Lakes and One Reservoir Foundation that the latter would provide financial support to relevant assessment, appraisal and monitoring expenses resulting from environmental public interest lawsuits.[107] In this case, the plaintiffs applied to Guiyang Two Lakes and One Reservoir Foundation to cover the water sampling fee, and the foundation prepaid the expense based on the court's recommendation.[108]

102. Zhijiang Yan, *New Measures Taken by the Environmental Courts to Resolve Difficult Issues in Adjudication*, LEGAL DAILY, January 4, 2011, *available at* http://www.legaldaily.com.cn/bm/content/2011-01/04/content_2425760.htm?node=20733.

103. Although China is a civil law country and cases generally do not have precedential effect, good judicial practices do travel around and can potentially be picked up by other courts when handling similar cases.

104. Shixin Liu, *supra* note 99.

105. Zhijiang Yan, *supra* note 102.

106. *Id.*

107. *Id.*

108. *Id.*

In addition, the court was willing to take suggestions from an environmental expert consultation committee into consideration when identifying the proper enforcement action that would achieve the objectives of the court's decision.[109] Given the lack of professional institutions specialized in appraising pollution damages in China, as well as the length of time and high costs required to appraise causation and the scope of environmental harm, Qingzhen Environmental Court established an environmental expert consultation committee in 2008. This committee provides professional opinions on relevant technical issues in pending environmental public interest lawsuits.[110] According to the experts on this committee, Dingpa Paper Mill is a pollution-intensive and energy-intensive small enterprise, and in order to stop discharging waste water to Nanming River, it needs significant funding for pollution treatment facilities and a sound management system, which prove to be difficult to achieve given its current situation.[111] As a result, the experts recommended shutting down Dingpa Paper Mill, which is the only way to thoroughly stop discharging pollution.[112] According to Judge Luo, under existing law the court cannot directly order the defendant to shut down its production line, but it would send out notice to relevant government agencies to ask for their assistance in stopping pollution discharge. One possibility would be urging the polluter to rectify within a certain period of time or shut down the polluting facility.[113]

Lastly, the court ruled that the losing party in this case, the defendant, would be responsible for the attorney's fees prepaid by ACEF. The standard practice in China is that each party to a civil lawsuit bears its own attorney's fees, but in this case the court ordered the losing party to bear the attorney's fees incurred by ACEF. This will certainly help ACEF to reduce its financial burden for the pursuit of public interests, and will encourage other public interest minded groups and individuals to bring similar lawsuits in the long run.

Despite the above-mentioned noteworthy innovations in this case, ACEF is keenly aware of its limitations. According to ACEF's litigation department director, Dingpa Paper Mill is a small plant that

109. Shixin Liu, *supra* note 99.

110. *Qingzhen Environmental Court Actively Explore Innovative Adjudication Practices to Safeguard the Construction of Ecological Civilization,* GUIZHOU COURT, November 30, 2010, *available at* http://www.guizhoucourt.gov.cn/viewarticle.aspx?id=204.

111. Shixin Liu, *supra* note 99.

112. *Id.*

113. *Id.*

has an annual production capacity of only 6,000 tons.[114] If the defendant is a major company that makes significant contribution to local tax revenue, it is difficult to predict whether a lawsuit against such a big player will be accepted by a court or if accepted, will be decided fairly.[115] This case also has some unresolved issues. The defendant not only secretly discharged waste water without a valid permit, the waste water it discharged significantly exceeded the national emission standards and caused severe pollution to the Nanming River.[116] However, the plaintiffs only asked for an injunction, compensation of the attorney's fees, and the case acceptance fee without requesting the defendant to compensate the environmental harm[117] or pay for the costs to restore the bio-integrity of the Nanming River. The total amount of the attorney's fees and the case acceptance fee is only 10,060 RMB ($1,597). Compared to the economic benefits the defendant has garnered from illegal discharge and the costs of restoring the water quality of the Nanming River,[118] this amount is only a "drop in the bucket" and will not prevent the defendant or other similarly positioned polluters from further violations.[119]

B. Kunming Municipal EPB v. Kunming Sannong Agriculture and Animal Husbandry Company and Kunming Yangpu United Animal Husbandry Company (2010)

Starting in June 2008, the two defendants in this case subcontracted animal farm lands to more than 200 pig farmers, even though the pollution treatment facilities of the land had not yet passed the completion examination.[120] According to the agreement signed by the defendants with the individual pig farmers, the pig farmers were responsible for constructing their own pig-raising facilities and operating the business on their own. The defendants were responsible for land

114. Heyan Wang, *supra* note 95.

115. *Id.*

116. No.4 Verdict of Civil Environmental Cases of Qingzhen People's Court of First Instance Trial (2010), at 7.

117. ACEF did express at trial that it reserved the right to pursue claims over the environmental harm caused by the defendant. *See* Heyan Wang, *supra* note 95.

118. Dingpa Paper Mill paid only around 600,000 RMB ($95,238) of tax annually, and this was hardly enough to pay for Nanming River's pollution clean-up cost. On the other hand, the illegal discharge of waste water by Dingpa Paper Mill saved itself a substantial amount of pollution levy. See Heyan Wang, *supra* note 95.

119. Unlike the U.S., there is no civil penalty under existing Chinese environmental laws to deter polluters.

120. No.1Verdict of Civil Environmental Cases of Kunming Intermediate People's Court of First Instance Trial (2010), at 18.

administration, epidemic prevention, and pollution treatment; with pig farmers paying a fee for the service.[121] After the pig farmers started to raise pigs in their subcontracted lands, the waste water resulting from pig farming seeped into the underground water system and caused the drinking water source for a local village less than 1,000 meters from the contracted farm land to be seriously contaminated. This occurred because the defendants' pollution treatment facilities had not yet passed the environmental impact evaluation.[122] Local residents and animals that relied upon this drinking water source had difficulty accessing clean drinking water. The multiple water samplings conducted by local environmental monitoring authority confirmed the concentration of ammonia nitrogen and Escherichia coli in the contaminated drinking water source far exceeded the acceptable level.[123]

As a result of the water pollution, Local EPB ordered one of the defendants, the Sannong Company, to stop pig farming and pay a fine of half a million RMB ($79,365).[124] The Sannong Company paid the fine in two installments, but the waste water from pig farming seeped into the underground water system again in early 2010, and the concentrations of relevant pollutants still exceeded the allowable limits according to the most recent water sampling conducted on December 6, 2010.[125] In order to prove the scope of the environmental harm caused by these water pollution incidents, Kunming Municipal EPB commissioned Kunming Environmental Science Academy to conduct an assessment, and the conclusion of the assessment specified it would take 3.64 million RMB ($577,778) to build the pollution treatment facility plus 532,700 RMB ($84,556) to operate the facility annually.[126]

In June 2010, Kunming Municipal EPB, with the support from Kunming Municipal People's Procuratorate,[127] brought a public inter-

121. *Id.*
122. *Id.* at 3, 18.
123. *Id.* at 18-19.
124. *Id.* at 19.
125. *Id.*
126. *Id.* at 15.
127. The procuratorate is the highest organ for legal supervision in China. Armed with extensive powers, the Chinese procuratorates cannot only conduct criminal investigations and prosecutions, but also exercise supervision of the police as well as the courts to ensure they act in accordance with the law. If for certain reasons the victim of a tortious action is not able to take his claim to court, the procuratorate can step in to support the victim to bring a lawsuit so as to ensure justice is served. *See* Jingjing Liu, *China's Procuratorate In Environmental Civil Enforcement: Practice, Challenges & Implications for China's Environmental Governance*, 12 VT. J. ENVTL. L. (forthcoming Spring 2012). This article provides further information on Chinese procuratorate's role in promoting environmental public interest litigation in China.

est lawsuit at the environmental tribunal of Kunming Intermediate People's Court (the Kunming Court) against the two defendants, and requested them to (1) stop damaging the environment immediately, (2) pay for all expenses related to pollution treatment of the local drinking water source, estimated to be 4.17 million RMB ($661,905)[128], (3) pay for 155, 293 RMB ($24,650) for environmental emergency monitoring fees (22, 773 RMB) ($3,615) resulting from managing the water pollution incidents and assessment fee (132,520 RMB) ($21,035) for pollution remediation costs, and (4) cover litigation expenses of this case.[129] The Sannong Company did not deny that the pollutants resulting from pig farming seeped into the underground water system and caused pollution to the local drinking water source, but argued it took measures immediately after water pollution occurred to ensure access to drinking water and sold all of the pigs it raised by October 2010.[130] In addition, the Sannong Company called for the Kunming Court's attention to the fact it had already been imposed an administrative penalty.[131]

In January 2011, the Kunming Court issued its decision, which affirmed the Kunming EPB's standing to represent the state in a public interest lawsuit against the two defendants by referring to the Environmental Protection Law. The Court also relied upon a piece of the Supreme People's Court's judicial interpretation that requires the courts to hear pollution compensation cases brought by environmental protection agencies on behalf of the state.[132] The decision stated that although the two defendants resolved the villagers' drinking water problem, their pollution treatment facilities had not yet passed the environmental impact evaluation. Although the two defendants no longer raised pigs, the individual pig farmers currently did and continued to discharge waste water.[133] The two defendants were responsible for providing unified waste water treatment facilities, according to the agreements with these individual pig farmers. Therefore, the two defendants should be liable for the individual pig farmers' activities of discharging waste water and polluting the environment.[134] The court also distinguished civil liability and administrative punishment, and

128. As mentioned above, this includes 3.64 million RMB to build the pollution treatment facility plus 532,700 RMB to operate the facility annually.

129. No.1 Verdict of Civil Environmental Cases of Kunming Intermediate People's Court of First Instance Trial (2010), at 2, 4.

130. *Id.* at 5.

131. *Id.*

132. *Id.* at 20, 21, and 24.

133. *Id.* at 21.

134. *Id.*

concluded although the defendants had already shouldered administrative penalties; it should not offset their civil liabilities.[135] Finally, the court ruled for the plaintiff, and ordered the two defendants to stop damaging the environment immediately, pay 4.17 million RMB ($661,905) to Kunming Environmental Public Interest Litigation Special Fund (the Fund) for pollution remediation, pay 132,520 RMB ($21,035) to the Fund for assessment fee for pollution remediation costs, and cover the case acceptance fee of 40,177 RMB ($6,377).[136] The two defendants appealed the decision to Yunnan Provincial People's High Court, which affirmed the judgment in May 2011.[137]

This was the first environmental public interest lawsuit in Yunnan Province, almost two years after the Kunming Court was established with the purpose of promoting public interest litigation.[138] There are many reasons which contribute to the lack of public interest cases. First, many of the environmental courts/tribunals were established in response to serious environmental disasters and the associated political needs to display the government's good-will towards environmental protection, not because there are already a steady flow of environmental cases in the places where these environmental courts/tribunals are established. Second, environmental cases are generally more complicated, technical, and expensive to litigate than other types of cases. Many potential plaintiffs, particularly NGOs and individuals, lack either the legal skills, financial resources, or both to bring an environmental public interest lawsuit. In addition, China is still in the process of developing a critical mass of well-trained, public-minded environmental lawyers, and could benefit enormously from an environmental bar capable of putting these environmental courts/tribunals to good use.

From a pragmatic point of view, it is understandable that Kunming Court may want to carefully pick its first environmental public interest case to ensure it is the "right" case, particularly after such an unexpected long wait. In fact, one month before the Kunming EPB brought this lawsuit, in May 2010, Chongqing Green Volunteers

135. *Id.* at 22.

136. *Id.* at 23. The court considered the monitoring fees to be part of the standard costs incurred by the day-to-day work of environmental protection agencies and therefore, should not be borne by the two defendants.

137. Yang Yang, *Yunnan Province Adjudicated the First Environmental Public Interest Litigation Case and Compensation Went to A Special Fund*, CHINANEWS.COM, May 31, 2011, *available at* http://www.chinanews.com/fz/2011/05-31/3080545.shtml.

138. Dengke Meng, *Wielding A Big Bat to Beat A Mosquito: Inside Stories of the First Environmental Public Interest Case in Yunnan Province*, SOUTHERN WEEKEND, October 1, 2010, *available at* http://www.infzm.com/content/50783.

Union, a well-known grassroots environmental NGO in southwest China, filed a public interest lawsuit against Guo Dian Yang Zong Hai Power Plant (Yang Zong Hai) at the Kunming Court.[139] Yang Zong Hai is the largest sulfur dioxide emitter in Kunming and one of the most serious polluters in Yunnan Province.[140] If the case against Yang Zong Hai was accepted by Kunming Court, it would be the first environmental public interest case brought by a grassroots NGO in China,[141] with the defendant being a major state-owned enterprise. Potentially, it might be a precedent-setting case and help elevate the profile of the Kunming Court and potentially even the environmental courts/tribunals in the entire Yunnan Province.

The plaintiff actually discussed the Yang Zong Hai case with judges from Kunming Court prior to filing this case, and decided to file this case only after receiving positive feedback from the judges that this would be a good case.[142] The plaintiff argued that Yang Zong Hai, in clear violation of national and Yunnan provincial laws, intentionally and fraudulently prolonged repairs that led to irregular use of its desulfurization units for a long period of time. In addition, the plaintiff requested a set of relatively unique civil remedies that perfectly demonstrated the public interest nature of this case.[143] The remedies requested included an order that Yang Zong Hai adopt effective rectification measures for properly using its desulfurization equipment and ensure its sulfur emissions meet relevant emission standards and targets. It also included a request for an order that Yang Zong Hai provide plans for controlling nitrogen oxide and carbon dioxide emissions and implement the plans after court approval, as well as payment of 3,000,000 RMB ($476,190) to the Kuming EPB who would use it to establish a fund devoted to supporting environmental public interest litigation.[144]

However, in the end, the Kunming Court did not give a clear answer on acceptance of the lawsuit filed against Yang Zong Hai, and

139. *Id.*

140. *Id.*

141. ACEF, the plaintiff in the Dingpa Paper Mill case, has strong ties with China's Ministry of Environmental Protection, and is generally not considered a true, independent NGO. To a certain degree, because of its connection with the top environmental agency in the country, it is relatively easier for ACEF to bring environmental public interest cases of experimental nature than an NGO without such government background.

142. Adam Moser & Benjamin K. Sovacool, *Public Participation in China's Energy Governance: The Non-Case of* Chongqing Green Volunteers v. Guodian Yangzonghai Power Company, *Energy Governance Case Study #13*, LKY, at 9, December 2011, *available at* http://www.spp.nus.edu.sg/docs/energy-case/%2313-China.pdf.

143. *Id.* at 10.

144. *Id.* at 10-11.

the Kunming EPB, instead of a grassroots environmental NGO, became the plaintiff of the first environmental public interest case in Yunnan Province.[145] On one hand, it is disappointing that the Kunming Court conducted "selective judicial enforcement" by picking a relatively easier case against two private pig farms over a powerful, large state-owned enterprise.[146] On the other hand, it is understandable that the Kunming Court wanted to be cautious with its first environmental public interest case, and taking on a big polluter that has strong government connections might be too risky and controversial. In particular, given the enormous difficulty the Chinese judiciary has experienced in enforcing its own civil awards,[147] it will be much easier for the court to enforce a ruling against two small private entities than against one of China's largest power generators.[148] If the court's first environmental public interest case cannot be properly enforced, it might set a less desirable precedent for the Kunming Court's future endeavors in entertaining public interest lawsuits. Despite the disappointing selective judicial enforcement, the case brought by the Kunming EPB against two pig farms was awarded the largest amount of civil compensation ever in a single environmental public interest lawsuit. This factor will play an active role in helping deter and educate other polluting enterprises and individuals from committing similar environmental violations.[149]

C. All-China Environment Federation v. Xiuwen County Environmental Protection Bureau of Guizhou Province (2012)

In October 2011, ACEF brought an environmental public interest case in the Qingzhen Environmental Court against a dairy company in Guizhou Province for excessive discharge of industrial wastewater.[150] Since this case required ACEF to collect relevant environmental information regarding the dairy company, ACEF submitted

145. Dengke Meng, *supra* note 138.

146. Kunming EPB even looked into the defendants' ability to pay for what it requested in this case, and concluded that the defendants should be able to pay for 4.3 million RMB of compensation. *See* Dengke Meng, *supra* note 138.

147. It is estimated that as many as 50% of civil awards went unenforced. *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 287 (Cambridge University Press 2002).

148. Moser & Sovacool, *supra* note 142, at 11.

149. Yang Yang, *supra* note 137.

150. No.1 Verdict of Environmental Cases of Qingzhen People's Court of First Instance Trial (2012), at 6.

an application to the defendant, the Xiuwen County EPB, for disclosure of the following information: The dairy company's pollution discharge permit, the number and location of its pollution discharge outlets, the type and amount of the pollutants discharged, the pollution levy standard determined by the EPB, the pollution monitoring record and administrative penalty imposed by the EPB, and the environmental impact assessment documents, etc.[151] After receiving this open information request, the defendant determined that the content and format of the information requested by the plaintiff, as well as the means of obtaining such information, were not clear or specific, and that the plaintiff did not pay for relevant costs to locate, copy and mail such information.[152] The plaintiff brought a public interest lawsuit against Xiuwen EPB for its failure to disclose the information requested or reply to the application within the legally prescribed period of time, in violation of the Open Government Information Regulations[153] of the State Council and the Environmental Information Disclosure Measures[154] of the Ministry of Environmental Protection.[155]

The court wrote in its decision that obtaining environmental information through legal channels is an important right of the citizens as well as an important means to ensure public participation in environmental protection.[156] The court went on to assert that "disclosure of environmental information should be the general rule, while non-disclosure should be the exception."[157] The court determined that the plaintiff's requested information falls within the scope of government environmental information that can legally be disclosed and does not involve state secrets, commercial secrets, or personal privacy.[158] The court decided that the plaintiff properly completed the open information application form, and the content of the information it requested is clear and detailed.[159] Even if the defendant considered the content of the information requested by the plaintiff unclear, the defendant failed

151. *Id.*

152. *Id.* at 4.

153. Zheng Fu Xin Xi Gong Kai Tiao Li (政府信息公开条例) [Open Government Information Regulations] (promulgated by the State Council, 2007, effective 2008) (China).

154. Huan Jing Xin Xi Gong Kai Ban Fa (Shi Xing) (环境信息公开办法(试行)) [Environmental Information Disclosure Measures (for Trial Implementation)] (promulgated by the Ministry of Environmental Protection, 2007, effective 2008) (China).

155. No.1 Verdict of Environmental Cases of Qingzhen People's Court of First Instance Trial (2012), at 2.

156. *Id.* at 6.

157. *Id.*

158. *Id.* at 7.

159. *Id.* at 7-8.

to issue to the applicant a notice to rectify the application according to law, and the notice should instruct the applicant on how to make rectifications or provide further information.[160] In terms of costs related to information disclosure, the court held that although government agencies can require applicants to cover costs related to locate, copy, and mail requested information, the defendant did not ask the plaintiff to pay for relevant costs and the plaintiff did not explicitly say that it would not pay for such costs and therefore, the defendant's claim cannot be substantiated.[161] On January 10, 2012, the court ruled in favor of the plaintiff and ordered the defendant to reply to the open government information application filed by ACEF and disclose relevant environmental information of the dairy company within ten days after the judgment becomes effective.[162] The court also decided to waive the case acceptance fee of 50 RMB ($8).[163] Later, the defendant appealed the decision to the Guiyang Intermediate People's Court, but withdrew the appeal at the last minute before the trial, leaving this decision in effect.[164]

When the Open Government Information Regulations were promulgated in 2007, it was widely praised as a milestone to increase government transparency and accountability. This law is particularly meaningful given China's deeply rooted tradition of withholding information from the public.[165] Ancient rulers in China were concerned about the moral and political risks associated with public promulgation of legal norms.[166] Although such concerns related to making the law accessible to the public have long gone, many officials still have the mindset of keeping government activities in secrecy[167] for the sake of convenience and avoiding accountability. In a political culture in which non-disclosure of governmental information is the rule and disclosure is the exception, the Open Government Information Regulations could play an important role in empowering citizens to de-

160. *Id.* at 8.

161. *Id.*

162. *Id.* at 10.

163. *Id.*

164. Email exchange with the plaintiff's lawyer on April 11, 2012 (email on file with the author).

165. TOD KAISER & RONGKUN LIU, TAKING THE PULSE: THE ONE-YEAR ANNIVERSARY OF CHINA'S OPEN GOVERNMENT INFORMATION MEASURES 1 (China Environment Forum 2009), *available at* http://www.wilsoncenter.org/sites/default/files/ogi_final21.pdf.

166. DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 17 (University of Pennsylvania Press 1973).

167. *See* KAISER & LIU, *supra* note 165, at 5.

mand information and in reshaping the relationship between a powerful government and a nascent civil society.[168]

Although the Open Government Information Regulations requires various levels of governments to proactively disclose applicable government information or disclose upon open government information requests from citizens, legal persons or other organizations,[169] it suffers from inadequate and uneven enforcement in the environmental field.[170] Some EPBs are concerned about the potential impacts that disclosing environmental information may have on business investment in their jurisdictions.[171] Concern of data inaccuracy as a result of relatively underdeveloped monitoring capacity in central and western China is another contributing factor to inadequate disclosure.[172] On other occasions, EPBs at the lowest administrative level do not have a clear idea on how and to what degree to open environmental information.[173]

In order to provide a comprehensive picture on efforts to disclose environmental information to the public, the Institute of Public and Environmental Affairs (IPE), a Beijing-based environmental NGO dedicated to promoting environmental information disclosure and public participation, and the Natural Resources Defense Council established the Pollution Information Transparency Index (PITI) in 2009 and have recently completed their third annual assessment of environmental information disclosure among 113 selected cities across the country.[174] The assessment criteria of the PITI includes publication of records of violations of environmental standards and rules, information related to the overall evaluation of enterprises' environmental behavior, information related to complaints and how these complaints are handled, information related to pollution levy, information disclosure upon requests and several other indicators.[175] The

168. *Id.* at 1.

169. Articles 9-13, Zheng Fu Xin Xi Gong Kai Tiao Li (政府信息公开条例) [Open Government Information Regulations] (promulgated by the State Council, 2007, effective 2008) (China).

170. Xianghui Zhang, *The 2011 Ratings of the Pollution Information Transparency Index Is Released*, XIAOXIANG MORNING NEWS, February 14, 2012, *available at* http://www.xxcb.cn/show.asp?id=1155185.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Assessment of Open Environmental Information In the Past Three Years: 2011 Annual Evaluation Results of Pollution Information Transparency Index of 113 Chinese Cities*, January 16, 2012, *available at* http://www.ipe.org.cn//Upload/IPE报告/环境信息公开_三年盘点_2011年PITI评价结果.pdf, at 3.

175. *Id.*, at 50-51.

average PITI rating for 2011 was 40.14 of 100, which represents an increase of 4.17 from 2009-2010 and 9.08 from 2008.[176] Also, 19 out of the 113 cities surveyed met the passing score of 60, compared to 11 in 2009-2010 and 4 in 2008.[177] Despite such modest progress, the mere fact that less than 17% of all the cities surveyed met the passing score indicates that there is significant room for improvement to ensure citizens' adequate access to information.

As China's first environmental public interest case involving open government information and called by the media "a victory of the people,"[178] the case of *ACEF v. Xiuwen EPB* will play an important role in promoting public access to environmental information, which is the prerequisite for meaningful public participation in environmental protection. Average citizens have limited means and resources to collect such information, which could potentially be critical evidence in environmental lawsuits. By requesting the basic information of a polluter's pollution activities, including its pollution record and history of enforcement by environmental agencies, pollution victims and public-minded professionals obtain a powerful weapon to pursue their environmental claims more effectively.[179]

V. CONCLUSION

While environmental justice is interpreted more broadly in China to imply the need for better environmental governance, the enforcement of environmental laws has been uneven and challenging. Despite encouraging developments in the past several years, there is still significant room for improvement to ensure meaningful public participation in government environmental decision-making. In recent years, environmental public interest litigation has become one of the hotly debated issues among Chinese environmental professionals, most of whom view it as an important means to achieve improved environmental justice for all members of the society.

176. *Id.* at 9.

177. *Id.* at 15.

178. *Guilin Qian, the Victory of All-China Environment Federation Is "A Victory of the People"*, LEGAL DAILY, January 20, 2012, *available at* http://www.legaldaily.com.cn/commentary/content/2012-01/20/content_3315843.htm?node=34252.

179. For example, the plaintiff in the case against Yang Zong Hai acknowledged that the Open Government Information Regulations emboldened it to file this lawsuit with the Kunming Court, because it was able to take advantage of the increased public disclosure of pollution information to obtain the evidence of Yang Zong Hai's violations. *See* MOSER & SOVACOL, *supra* note 142, at 8.

The three cases appearing in the discussions above have shown some of the enforcement efforts made by the judiciary to address China's pervasive and severe pollution problems, particularly when the polluters do not take administrative enforcement measures seriously. In two of the three cases, local EPBs imposed administrative penalties on the polluters, but the administrative actions did not curb the pollution activities.[180] This illustrates the urgent need to involve the Chinese judiciary in the enforcement efforts to make sure the enacted environmental laws do not stay only on the paper. Despite the constraints on the standing issue under existing Chinese law, many environmental courts/tribunals are experimenting with liberalized standing to allow for public interest litigation,[181] and such bottom-up efforts will provide experiences and support to the change of national laws.

By entertaining a growing number of environmental public interest cases, judges at these environmental courts/tribunals have accrued experience in adjudicating public interest cases, gradually built the confidence to hear more complicated and technical environmental disputes, and become increasingly sophisticated in crafting innovative and practical solutions to ameliorating China's daunting environmental problems. Through developing special rules to promote public interest litigation, gradually formalizing the procedures of hearing public interest case and developing complementing mechanisms, such as the environmental public interest fund, to support litigation efforts, these environmental courts/tribunals have become pioneers in leading China's environmental public interest litigation path, and their efforts will likely encourage regular courts to accept these types of cases.

Although some environmental courts have displayed a greater willingness to take on more difficult cases and a greater degree of innovation in exploring solutions to environmental problems,[182] overall most of the civil environmental public interest cases brought so far are

180. The two cases are *All-China Environment Federation & Guiyang Public Environmental Education Center v. Dingpa Paper Mill of Wudang District, Guiyang City (2010)* and *Kunming Municipal EPB v. Kunming Sannong Agriculture and Animal Husbandry.*

181. For example, environmental public interest litigations are permitted by environmental courts/tribunals in Kunming, Yunnan Province, Guiyang, Guizhou Province, and Wuxi, Jiangsu Province. *See e.g.* Several Provisions Regarding Dealing with Environmental Civil Public Interest Cases (for Trial Implementation) (promulgated by Kunming Intermediate People's Court & Kunming Intermediate People's Procuratorate, Oct. 2010, effective Nov. 2010) (China).

182. Alex Wang, *Green Litigation in China Today*, CHINA DIALOGUE, July 18, 2011, *available at* http://www.chinadialogue.net/article/show/single/en/4413.

relatively "easier" cases that involve small or medium-sized enterprises or individuals as defendants and have relatively straightforward facts and solid evidence in favor of the plaintiffs.[183] With few exceptions,[184] the courts have not yet taken on landscape-changing or precedent-setting cases that involve powerful defendants that have either much sway over the government or much deeper pockets, or cases that are very complicated, controversial and require judges to adjudicate between competing social values. It is particularly disappointing in the Yang Zong Hai case that, the Kunming Court, as an intermediate-level court, was statutorily and pragmatically in a good position to take on a case that involves a powerful, high-profile defendant, but at the end chose not to do so. Hopefully, as the courts continue to experiment with adjudicating environmental public interest cases and gradually build the knowledge, skill and confidence, they will be able to avoid selective enforcement and start taking on much more difficult and controversial cases that will ultimately shape China's environmental governance landscape and ensure environmental justice to all.

183. Such selective enforcement has also occurred in civil environmental public interest cases brought by China's procuratorates. Most of the public interest cases handled by the procuratorates so far had relatively clear facts supported by strong evidence against defendants who were usually individuals or small to medium-sized, privately owned businesses. *See* Jingjing Liu, *China's Procuratorate In Environmental Civil Enforcement: Practice, Challenges & Implications for China's Environmental Governance*, 12 VT. J. ENVTL. L. (forthcoming Spring 2012).

184. One of such exceptions is a chromium pollution case currently pending in front of an environmental tribunal of Yunnan Province. This is the first environmental public interest case brought by grassroots NGOs in China, and the defendants are two major chemical plants in the local area.