

# CASTLES MADE OF SAND: PUBLIC-INTEREST LITIGATION AND CHINA'S NEW ENVIRONMENTAL PROTECTION LAW

*Daniel Carpenter-Gold\**

*It has long been a truism that China's environmental legislation is plentiful and powerful, but only unevenly enforced. Given China's reputation as an authoritarian state with immense capacity to regulate its citizens, this is counter-intuitive. To understand the latest environmental legislation in China, we must make sense of this seeming paradox. The lack of enforcement is a product of a governance structure that entrusts local governments with substantial power over the local environmental protection organs and local courts, incentivizing short-term economic development at the cost of environmental protection. Public-interest litigation can help to mitigate this problem because China's new Environmental Protection Law encourages action by citizens, who are directly affected by pollution and therefore difficult to coopt. However, litigation cannot guarantee regulation without a stronger judiciary. This reality suggests that the national government might instead intend environmental suits to serve as a monitoring, rather than a regulatory, mechanism.*

<i>Introduction</i> .....	242
<i>I. Background</i> .....	243
<i>A. Dependent Judiciary</i> .....	243
1. <i>Internal Hierarchies</i> .....	244
2. <i>Diagonal Dependence: Influence of the Local Government and the Communist Party</i> .....	246
<i>B. Governance Structure</i> .....	247
1. <i>Communist Party Control</i> .....	247
2. <i>Green GDP: A Case Study in the Central Government's Capacity for Environmental Governance</i> .....	249
<i>II. Fragmented Authoritarianism and Information Availability</i> .....	250
<i>A. Fragmented Authoritarianism</i> .....	251
1. <i>Decentralization Creates Monitoring Problems</i> .....	251
2. <i>China Lacks an Effective Monitoring System for Local-Level Violations</i> .....	252
<i>B. Environmental Governance and Monitoring Costs</i> .....	253
1. <i>"Police Patrol"</i> .....	254
2. <i>"Fire Alarm"</i> .....	255
<i>III. Environmental Public-Interest Litigation</i> .....	256
<i>A. A Place to Stand</i> .....	256
1. <i>The Environmental Protection Law of 1989 and the Civil Procedure Law of 1991</i> .....	257
2. <i>Local Legislation and the Environmental Courts</i> .....	258

---

\* J.D. Candidate, Harvard Law School, Class of 2016. The author would like to thank the Beijing Office of the Natural Resources Defense Council, in particular Kate Logan, Sun Tianshu, Wang Yan, Wu Qi, Zhang Xiya, and Zhou Yuelin, of the Environmental Law and Governance Program, for help with arranging interviews, finding sources, and understanding the framework of the Chinese legal system, and Sean Song, of the Communications Program, for providing invaluable research and translation assistance. The author is also grateful to Professor William Alford for commenting on a draft of this Note; any remaining mistakes are the author's own.

3. Success? Friends of Nature and Chongqing Green Volunteer League v. Luliang and Heping Science and Technology .....	262
4. Civil Procedure Law of 2012 .....	263
B. Environmental Protection Law of 2014 .....	265
1. Standing .....	265
2. Information Availability .....	267
3. Improving Central Control over Local Governments .....	268
4. Related Material from the SPC .....	269
Conclusion .....	271
A. Analysis of the EPL .....	271
B. Final Thoughts .....	272
C. Further Research .....	273

*China's got some of the best environmental laws in the world. But they're just a pile of sand. You can't build anything out of them because nobody applies them.*

—Anonymous Beijing journalist<sup>1</sup>

## INTRODUCTION

Now is an exciting time for environmental law in China. After a long period of prioritizing economic development over environmental protection, the Chinese government appears to be getting serious about instituting meaningful environmental regulations. As part of what Premier Li Keqiang has called a “war” on pollution in China,<sup>2</sup> the government has passed a set of amendments substantially reforming the country’s Environmental Protection Law (“EPL”).<sup>3</sup> The amendments were enacted in 2014 and went into effect on January 1, 2015. One of the more interesting and innovative reforms that has surfaced is the expansion of rules governing standing to allow environmental public-interest litigation.<sup>4</sup> Policies encouraging public-interest litigation first appeared several years ago in municipal- and provincial-level regulations.<sup>5</sup> The policy has since gained acceptance at the central level and has been included in the new EPL.<sup>6</sup> However, China’s governmental structure, in which substantial power over environmental agencies and courts is left to local governments, could make public-interest litigation difficult to implement.<sup>7</sup> This Note dis-

<sup>1</sup> Yeling Tan, *Transparency Without Democracy: The Unexpected Effects of China’s Environmental Disclosure Policy*, 27 GOVERNANCE 37, 58 (2014) (quoting anonymous interviewee).

<sup>2</sup> See Ben Blanchard & David Standway, *China to ‘Declare War’ on Pollution, Premier Says*, REUTERS (Mar. 4, 2014), <http://perma.cc/9YWR-VJDK>.

<sup>3</sup> Huanjing Baohu Fa (环境保护法) [EPL ‘14] (promulgated by Standing Comm. Nat’l People’s Cong., Apr. 24, 2014, effective Jan. 1, 2015) [hereinafter EPL ‘14].

<sup>4</sup> See *id.* art. 58.

<sup>5</sup> See *infra* Part III.A.2.

<sup>6</sup> Throughout this Note, “central” and “national” will be used interchangeably.

<sup>7</sup> See *infra* Part II.A.

cusses the possibilities and limitations of environmental public-interest litigation in China.

This Note is organized into five Parts, including this introduction. Part I gives a brief overview of the relevant parts of China's governmental structure, laying out the argument for treating local courts as arms of the local government rather than as independent actors. Part II introduces the regulatory theory behind the argument. Part III discusses the primary question of this Note: What role can public-interest litigation play in China's environmental governance? A conclusion follows and offers further avenues for research.<sup>8</sup>

## I. BACKGROUND

The Chinese legal system is characterized by strong governmental influence over the judiciary, meaning that it is important to see the courts as players in a larger governance structure. When courts have strong incentives to decide cases based on politics rather than the facts and the law, it makes little sense to evaluate the law, or any court's interpretation of the law, independent of the broader political context. The judiciary's limited independence has made environmental governance dependent on the overall governance structure, which was greatly affected by the country's decentralization in the 1980s and 1990s.<sup>9</sup> The end result is that local governments have substantial power to resist environmental policy enacted by the central government.

### A. *Dependent Judiciary*

An exploration of the Chinese judiciary reveals that it is not structurally independent from the government.<sup>10</sup> Chinese courts are organized in a regional hierarchy similar to that of the U.S. federal court system, with primary, intermediate, and high courts, each covering progressively wider jurisdictions.<sup>11</sup> Tri-

---

<sup>8</sup> This Note will not attempt to give a complete overview of environmental legislation in China, but instead presents only that information necessary for the argument. For readers seeking an introduction to the subject, see generally RACHEL STERN, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE (2013) and see ELIZABETH ECONOMY, THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE 95–181 (2010).

<sup>9</sup> See Gabriella Montinola, Yingyi Qian & Barry R. Weingast, *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50, 68–73 (1995) (tracing the history of decentralization in China from 1989–94).

<sup>10</sup> This Note will use “local government” to refer to the people's congresses at the relevant level, which form the nexus of formal political power in China. See XIANFA art. 96 (2004) (“Local people's congresses at various levels are local organs of state power.”). Of course, this still leaves a gradient: governments at the county level are “more local” than governments at the provincial level. The arguments made in this Note are primarily based on the size of the government's jurisdiction, so in general it is appropriate to think of governments which are “more local” as being subject to the perverse incentives described below, e.g. *infra* Part I.B.1, to a greater extent than those which are “less local.”

<sup>11</sup> Renmin Fayuan Zuzhi Fa (人民法院组织法) [Organic Law of the People's Courts] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007), arts. 17, 22, 25, 31, ZHONGGUO FALÜ GUIDING XINXI XITONG [hereinafter Organic Law of the People's Courts].

als are generally heard at the lowest level, with a few exceptions: statutes may authorize a case to be brought at a higher level, a case may be transferred to a higher-level court by a decision of the trial court, and the Supreme People's Court ("SPC") may try lower-level cases itself if the Court so wishes.<sup>12</sup>

Courts at the intermediate level and above are required to have at least three separate divisions for civil, criminal, and economic cases, but may develop additional internal divisions as they see fit.<sup>13</sup> Almost all courts in China have created separate divisions for accepting cases, trying cases, enforcing judgments, and supervising judges.<sup>14</sup> Primary courts may also establish "people's tribunals" which serve as specialized trial courts.<sup>15</sup>

The SPC serves as the "highest judicial organ" of the state.<sup>16</sup> As a civil-law country, however, China does not require that its courts follow the SPC's rulings. Instead, the SPC plays an advisory role, issuing "judicial interpretations," which serve as supplements or regulations to fill in the detail of statutes, and publishing "model cases," which can be used as guidance by lower courts.<sup>17</sup>

### 1. Internal Hierarchies

Although China's Constitution provides for the independence of its judiciary, this guarantee applies to the courts as a whole and not to individual judges.<sup>18</sup> This system differs from the American model, in which individual

<sup>12</sup> *Id.* arts. 20, 24(1)–(2), 31(1).

<sup>13</sup> *Id.* arts. 18, 19, 23, 26, 30.

<sup>14</sup> See Nanping Liu & Michelle Liu, *Justice Without Judges: The Case Filing Division in the People's Republic of China*, 17 U.C. DAVIS J. INT'L L. & POL'Y 283, 293 (2011). Liu and Liu claim that these requirements are the result of a 1998 command from the SPC to the lower courts; however, it is not clear that the SPC has such authority. Furthermore, courts were still adapting to this system (sometimes called the "three separations") as late as 2013. See, e.g., Sun Dejiang, *Guta fayuan caiqu "san ge fenli" zhiyue guifan zhixing gongzuo* (古塔法院采取“三个分离”制约规范执行工作) [Guta court adopts "three separations" system to regulate implementation of its work], ZHONGGUO FAYUAN WANG (Dec. 20, 2013), <http://perma.cc/GEM5-TGS3>. Regardless, nearly all courts now follow this system. STERN, *supra* note 8, at 46.

<sup>15</sup> Organic Law of the People's Courts, *supra* note 11, art. 19. This power is used to establish environmental tribunals—effectively separate environmental courts—at the trial level. For a discussion of the environmental tribunals, see *infra* Part III.A.2.

<sup>16</sup> XIANFA art. 127 (2004).

<sup>17</sup> Jingjing Liu, *Overview of the Chinese Legal System*, 41 ENVTL. L. REP. NEWS & ANALYSIS (ENVTL. LAW INST.) 10885, at 10887 (2011) [hereinafter Liu, *Overview of the Chinese Legal System*] (discussing judicial interpretations). Specific authority is granted by the Organic Law of the People's Courts, *supra* note 11, art. 32. The precedential value of "model cases" or "guiding cases" published by the SPC is vague, at best, and purposefully obfuscated at worst. See NANPING LIU, JUDICIAL INTERPRETATION IN CHINA: OPINIONS OF THE SUPREME PEOPLE'S COURT 180–85 (1997) [hereinafter LIU, JUDICIAL INTERPRETATION IN CHINA]. As Liu puts it, "A lower court follows a precedent not because it has given a good legal analysis to the issue involved, but because it is set by the [Supreme People's] Court based on its understanding of contemporaneous Party policy and the political situation at the moment." *Id.* at 184. A recent set of model cases dealing with environmental suits will be discussed *infra*.

<sup>18</sup> XIANFA art. 126 (2004) ("The people's courts exercise judicial power independently, in accordance with the provisions of law.") (emphasis added). See also Liao Guangsheng, "Independent Administration of Justice" and the PRC Legal System, 16 CHINESE L. & GOV'T 123, 147 (1983).

judges are the absolute authority within the bounds of a given trial.<sup>19</sup> Instead, each court contains its own hierarchy, with a president, vice president, and chief judges for each division.<sup>20</sup> In addition, a “judicial committee,” chaired by the court president and consisting of members recommended by the president and approved by the local government, takes a supervisory role.<sup>21</sup>

These are not empty titles. The president of the court may, upon a finding of “definite error of fact or law” in any judgment or ruling the court issues, refer the case to the judicial committee, which then takes over the case.<sup>22</sup> The judicial committee is to “practice democratic centralism,”<sup>23</sup> a requirement that gives precedence to the chair’s opinion and effectively gives the president veto power.<sup>24</sup> Furthermore, although many cases in China are tried by a panel, the court president or chief judge of the relevant division (or a judge of her choosing) has special powers, ranging from ruling on requests to have a judge recused<sup>25</sup> to, in criminal trials, veto power over questions or presentations by either party.<sup>26</sup>

The evaluations and sanctions to which judges are subject likewise contribute to judicial dependence. Officially, judges are subject to punishments ranging from simple fines to demotion or dismissal for issuing an “incorrect” judgment.<sup>27</sup> As a result, courts tend to make extensive use of advisory opinions from higher courts rather than risk giving their own opinions and being over-

<sup>19</sup> See, e.g., *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, 398 U.S. 74, 84 (1970) (“There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.”); *Quercia v. United States*, 289 U.S. 466, 469 (1933) (“In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.”).

<sup>20</sup> Organic Law of the People’s Courts, *supra* note 11, arts. 18, 23, 30.

<sup>21</sup> *Id.* art. 10.

<sup>22</sup> *Id.* art. 13.

<sup>23</sup> *Id.* art. 10.

<sup>24</sup> See, e.g., LIU, JUDICIAL INTERPRETATION IN CHINA, *supra* note 17, at 16.

<sup>25</sup> Minshì Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 31, 2012, effective Jan. 1, 2013), art. 46, ZHONGGUO FALÜ GUIDING XINXI XITONG [hereinafter CPL ‘12].

<sup>26</sup> Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by Nat’l People’s Cong., Mar. 14, 2012, effective Jan. 1, 2013), arts. 186, 189, 193, ZHONGGUO FALÜ GUIDING XINXI XITONG. The hierarchical system is even more powerful in practice, with researchers reporting that presidents and presiding judges regularly dictate case outcomes. See, e.g., Ling Li, *The “Production” of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State* 37 J. LAW & SOC. INQUIRY 848, 858–61 (2012).

<sup>27</sup> Renmin Fayuan Gongzuoren yuan Chufen Tiaoli (人民法院工作人员处分条例) [Regulations for Disciplinary Action Against the Staff of the People’s Courts] (promulgated by Sup. People’s Ct., Dec. 31, 2009, effective Dec. 31, 2009), arts. 43, 83, ZHONGGUO FALÜ GUIDING XINXI XITONG. These regulations specify that, in order to impose sanctions, the judge must have been at least negligent in making the incorrect ruling. *Id.* art. 83. Under local regulations, however, judges are often strictly liable for any “incorrectly decided case,” which, depending on the jurisdiction, could mean any reversal on appeal. Carl Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, N.M. L. REV. 63, 69–73 (2009). But see Li, *supra* note 26, at 859 n.19 (finding that “lower court judges are more likely to consult the higher courts only in cases in which there are few corrupt interests from which to gain,” which would suggest that sanctions are not strong checks on local corruption).

turned.<sup>28</sup> Unofficial factors also encourage judges to seek judicial opinions from higher courts: judges may want to pass the buck for sensitive decisions to a higher court, seek to evade political pressure resulting from local corruption, or the law may simply be unclear.<sup>29</sup> The end result is that judges and courts use advisory judgments extensively and as surrogates for their own decisions, limiting judicial independence at its source.

## 2. *Diagonal Dependence: Influence of the Local Government and the Communist Party*

To an American observer, more foreign than Chinese courts' internal hierarchy is the high level of control that political figures exert over the decisions of Chinese courts. The courts' subservience to the governments at their equivalent level is written into both the statutes dictating the composition of the courts<sup>30</sup> and the Constitution itself.<sup>31</sup> Judges can be appointed or removed at any time by the people's congresses at their level, and their positions in the court hierarchy are determined by the congresses' standing committees.<sup>32</sup> Court budgets are also in the hands of the local governments.<sup>33</sup>

Running parallel to the governmental structure is the Communist Party's hierarchical system for positioning, commanding, and evaluating its own members. Courts are included in this framework, with each court containing a group of Party members responsible for "leading" the courts.<sup>34</sup> The head of the group is typically appointed as the president of the court<sup>35</sup> and, although the local people's congress, and not the Party, nominally makes the decision, the congress itself is typically screened by a Party committee.<sup>36</sup> Since Party members are expected to follow the orders of their superiors, the decision of higher-level Party members—even those that are not otherwise part of the court system—can overrule a judgment.<sup>37</sup>

---

<sup>28</sup> Minzner, *supra* note 27, at 74.

<sup>29</sup> *Id.* at 74–76 (discussing effects of politics); Li, *supra* note 26, at 859 n.19 (noting that trial courts use advisory opinions "as a strategy to shift responsibilities or to preempt blame").

<sup>30</sup> Organic Law of the People's Courts, *supra* note 11, art. 16.

<sup>31</sup> XIANFA art. 128 (2004).

<sup>32</sup> Organic Law of the People's Courts, *supra* note 11, art. 34. Of course, federal judges and many state judges in the United States are also appointed by the government. However, they are appointed by the executive (and for life tenure), U.S. CONST. arts. II, § 2, III, § 1, whereas people's congresses are legislatures with supervisory responsibilities over the executive, *see* XIANFA arts. 99–110 (2004).

<sup>33</sup> Donald C. Clarke, *The Execution of Civil Judgments in China*, 141 CHINA Q. 65, 71 (1995). One of the few independent sources of funding is case-filing fees, levied on plaintiffs when they initiate a case. The positive effect of greater independence is unfortunately offset by courts' reliance on them, which creates new difficulties for litigants. *See* STERN, *supra* note 8, at 54.

<sup>34</sup> Li, *supra* note 26, at 854.

<sup>35</sup> *Id.*

<sup>36</sup> *See infra* note 46 and accompanying text.

<sup>37</sup> Li, *supra* note 26, at 854–61.

## B. Governance structure

Because of the substantial influence the government has over the judiciary, it is important also to understand China's governance structure. The current system was established over a period of time starting with Deng Xiaoping's reforms in the early 1980s and continuing through the 1990s.<sup>38</sup> The primary effect of this restructuring on governance was to devolve the power to levy and distribute taxes (broadly defined) to local governments.<sup>39</sup> This was accomplished primarily by formalizing the division of revenue between the central government and the local governments, so that local governments could be expected to profit directly from increasing the amount of revenue production within their jurisdictions.<sup>40</sup> The end result has been that the Chinese government, despite its reputation as an authoritarian monolith, is by some metrics one of the least centralized countries in the world.<sup>41</sup>

### 1. Communist Party Control

The 1982 Constitution reduced the Party's formal control over the Chinese government,<sup>42</sup> but in practice the Party has retained the capacity to influence governmental decisions through its own internal hierarchy.<sup>43</sup> Ostensibly, direct elections are conducted at the lowest levels of the people's congresses, and higher-level congresses are elected by the congresses directly below them.<sup>44</sup> The Party maintains a parallel, inverted system, however, in which officials are evaluated, and can be transferred, promoted, or demoted, by the level *above* them in the Party hierarchy.<sup>45</sup> Through this system, the Party allows only approved candidates to run for election and controls appointments to important positions.<sup>46</sup>

<sup>38</sup> See Montinola et al., *supra* note 9, at 61–63.

<sup>39</sup> See *id.* at 64.

<sup>40</sup> *Id.* at 60–61; see also generally Olivier Blanchard & Andrei Shleifer, *Federalism with and Without Political Centralization: China Versus Russia* (Nat'l Bureau of Econ. Research, Working Paper No. 7616, 2000), <http://perma.cc/9GJM-XJ3Q> (modeling the political impacts of decentralizing revenue collection and distribution and suggesting that retaining political centralization was important to China's successful fiscal decentralization).

<sup>41</sup> PIERRE LANDRY, *DECENTRALIZED AUTHORITARIANISM IN CHINA: THE COMMUNIST PARTY'S CONTROL OF LOCAL ELITES IN THE POST-MAO ERA* 3 (2008).

<sup>42</sup> Compare XIANFA art. 2 (1978) ("The Communist Party of China is the core of leadership of the whole Chinese people. The working class exercises leadership over the state through its vanguard, the Communist Party of China.") with XIANFA (1982) (lacking any mention of the "Communist Party" in its operative paragraphs).

<sup>43</sup> Maria Edin, *State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective*, 173 CHINA Q. 35 (2003).

<sup>44</sup> XIANFA art. 97 (2004).

<sup>45</sup> Edin, *supra* note 43, at 44.

<sup>46</sup> This is termed the *nomenklatura*, after a similar system that existed in the Soviet Union. *Id.* The relationship between the Party and the formal government is complicated and, beyond this brief overview, unnecessary for the present discussion. For an overview of the system in practice, see Melanie Manion, *Chinese Democratization in Perspective: Electorates and Selectorates at the Township Level*, 163 CHINA Q. 764 (2000). For a more recent view of the election chances of non-Party members, see *Vote As I Say; China*, THE ECONOMIST, June 18, 2011, at 46.

Decentralization allowed the local people's congresses substantial room for maneuvering within the bounds of central policy. Rather than require local officials to implement specific economic policy, the national government allowed local governments to keep a larger percentage of the economic productivity of their region, and thereby gave them incentives to increase their regions' productivity.<sup>47</sup>

This reform also gave local governments freedom to control revenue distribution.<sup>48</sup> Government organs, though they are at least nominally responsible to the corresponding central-government agency, are primarily funded by the local governments.<sup>49</sup> The allocation of expenditure (and hiring and firing) authority to local governments effectively put the court system under the control of the local governments, as discussed above.<sup>50</sup> The Environmental Protection Bureaus ("EPBs")—the local organs of environmental protection, under the Ministry of Environmental Protection ("MEP")—suffered the same fate: in localities where governments do not value environmental protection, EPBs have been given few resources.<sup>51</sup> Top EPB officials are also subject to appointment and removal by the people's congresses—an additional avenue for control by local governments.<sup>52</sup>

Under this system, then, some of the central government's goals are more beneficial to local governments than others. Local governments often prefer policies that encourage economic development, which local governments can then tax or otherwise take advantage of, over policies with less direct benefit to

<sup>47</sup> Montinola et al., *supra* note 9, at 64 ("The importance of these new fiscal arrangements is that they induce a strong positive relationship between local revenue and local economic prosperity . . . thus providing local officials with an incentive to foster that prosperity."). This policy also formalized budget flows from the top down, and as a result local government officials could not rely as heavily on bailouts from the central government. *See id.* at 64–65.

<sup>48</sup> Local governments in China account for seventy percent of total government expenditures. LANDRY, *supra* note 41, at 3. By comparison, local-government spending took up a little less than half of U.S. government expenditures. *Id.* at 3, 4.

<sup>49</sup> *See* Jessica Scott, *Cleaning up the Dragon's Fountain: Lessons from the First Public Interest Lawsuit Brought by a Grassroots NGO in China*, 45 GEO. WASH. INT'L L. REV. 727, 731–32 (2013) ("The people's government at the corresponding level appoints the head of the EPB and provides most of its funding.").

<sup>50</sup> *See supra* Part I.A.

<sup>51</sup> *See, e.g.,* Yifan Shi & Benjamin van Rooij, *Prosecutorial Regulation in the Global South: Environmental Civil Litigation by Prosecutors in China Compared to Brazil* 7 (Univ. of Cal., Irvine, Sch. of Law Legal Studies Research Paper Series, No. 2014-18, 2014), <http://perma.cc/T93H-LWW8> (noting that EPBs are particularly weak when "national laws . . . run against local interests"); Benjamin van Rooij & Carlos Wing-Hung Lo, *Fragile Convergence: Understanding Variation in the Enforcement of China's Industrial Pollution Law*, 32 L. & POL'Y 14, 25–26 (2010) (noting substantial discrepancy in EPB quality between regions). One extreme example, reported by an environmental lawyer, was the case of a Yunnan EPB official who could not fulfill his inspection responsibilities because he had no car and no way to borrow one on a regular basis. Alex Wang, *View from China: The Yunnan Arsenic Spill Criminal Trial*, SWITCHBOARD (Apr. 24, 2009), <http://perma.cc/4QPQ-YAKN>.

<sup>52</sup> Scott, *supra* note 49, at 731–32. Economy also recounts a story in which EPB employees were forced to petition the MEP anonymously to avoid being targeted by the local government. ECONOMY, *supra* note 8, at 113.



the local governments, such as environmental protection.<sup>53</sup> This misalignment is partially alleviated by the “cadre responsibility system,” under which the Party conditions certain rewards, such as promotions and raises, on the success of government officials at meeting specified goals, which are in turn drawn from national policies.<sup>54</sup> However, this system is, in practice, more often used for political goals—particularly the preservation of social stability—than for environmental policies.<sup>55</sup>

## 2. *Green GDP: A Case Study in the Central Government’s Capacity for Environmental Governance*

The fate of China’s much-publicized “Green GDP” initiative from 2005 to 2007 provides a case study of the central government’s capacity to set environmental policies and monitor their implementation in contemporary China.<sup>56</sup> Green GDP was an effort to include environmental damage in the official statistics on economic development, which experts had estimated cost the country eight to twelve percent of its GDP annually.<sup>57</sup> However, the central government was “stonewall[ed]” by local governments when it attempted to collect data on environmental degradation.<sup>58</sup> Without local support, the government was forced to release a watered-down version of the report, identifying a drop of only three percent in GDP and without any regional statistics that could be used to evaluate local governments.<sup>59</sup> Soon after, the government distanced itself from its results, with the National Bureau of Statistics stating that the report should not be used for evaluations and with the State Environmental Protection Administration (“SEPA”) (a precursor to the MEP) declaring the results inaccurate and incomplete.<sup>60</sup> The program was soon discontinued.<sup>61</sup>

As a case study, the Green GDP failure reveals some weaknesses of China’s quasi-federalist structure. The most obvious of these is the difficulty in implementing policies that might slow down short-term economic growth. Green GDP was, at its heart, as much a long-term economic-planning policy as an environmental policy, since it aimed to bring costs for necessary pollution abatement from the future into the present, and focused largely on restoring

---

<sup>53</sup> See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA: AN ASSESSMENT OF CURRENT PRACTICES AND WAYS FORWARD 18 (2006), <http://perma.cc/4TQX-W7MT> (noting, as a “main structural obstacle[ ],” that EPBs are “subordinate to provincial and local governments,” which “tend to favour economic development over environmental considerations”).

<sup>54</sup> See generally Edin, *supra* note 43, at 42–50 (describing the use of the responsibility system to monitor and control local officials).

<sup>55</sup> *Id.* at 38–40; Kai-Yuen Tsui & Youqiang Wang, *Between Separate Stoves and a Single Menu: Fiscal Decentralization in China*, 177 CHINA Q. 71, 77 (2004). See also ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 53, at 19.

<sup>56</sup> ECONOMY, *supra* note 8, at 127.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 127–28.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 128.

<sup>61</sup> *Id.* at 128–29.

stocks of natural resources that would be used for later development.<sup>62</sup> However, local governments have primarily short-term incentives: under fiscal decentralization, they can tax thriving industries or even become entrepreneurs themselves, but they cannot capture benefits (or suffer from harms) that will accrue after they retire, are transferred, or are promoted.<sup>63</sup>

Perhaps the larger problem, however, is that local governments were able to effectively prevent SEPA from gathering environmental-performance data. Were the state able to gather the necessary data, it would know what policies to implement to prevent long-term environmental and economic harm. Thus, it would be able to determine, from its relatively long-term perspective,<sup>64</sup> the appropriate balance of immediate growth and future contraction, and to sanction noncomplying local officials. Information availability is also necessary to implement these policies, since without knowing which localities are in compliance and which are not, enforcement is impossible. The theory behind regulatory monitoring is explored in the next Part of this Note.

## II. FRAGMENTED AUTHORITARIANISM AND INFORMATION AVAILABILITY

If courts are no more than arms of the local governments, and local governments have little incentive to enforce the law, what is the purpose of allowing litigation at all? Scholars of Chinese law urge readers to see the Chinese courts as dispute-resolution mechanisms,<sup>65</sup> but this model operates poorly in public-interest cases, where the dispute is not between the plaintiff and the defendant but between the defendant and a group of people too large to bring into court. Here, the theories of principal-agent relations and “fragmented authoritarianism” better explain the turn toward public-interest litigation, which can be used not merely (and perhaps not at all) as a means to resolve the immediate dispute, but also as a tool for monitoring compliance with environmental regulations.

---

<sup>62</sup> Vic Li & Graeme Lang, *China's “Green GDP” Experiment and the Struggle for Ecological Modernisation*, 40 J. CONTEMP. ASIA 44, 48 (2009).

<sup>63</sup> As Li and Lang put it, “Decentralisation . . . further exacerbated the locals’ penchant to cheat and act without reference to central directives. But there is an important difference: they were no longer running after commands and decrees, but instead, they pursued every opportunity for profit and economic growth.” *Id.* at 55.

<sup>64</sup> This assumes that central-government officials take into account the long-term wellbeing of the country to a larger extent than those at the local level. This is justified by the fact that the government at the highest level has a longer tenure, since they are unlikely to be reassigned, while local officials are often promoted or rotated, and, because the whole country is their revenue base, cannot avoid long-term consequences by changing localities. Edin, *supra* note 43, at 47.

<sup>65</sup> E.g., STERN, *supra* note 8, at 44.

### A. *Fragmented Authoritarianism*

A basic framework for analyzing Chinese politics is the “fragmented authoritarianism” model.<sup>66</sup> This approach describes a semi-decentralized system where the central government has the capacity to set policies with complete freedom, but local governments are able to alter those policies in the implementation process in order to further their own goals.<sup>67</sup> In this context, information availability is crucial, since the central government cannot fix what it cannot see.<sup>68</sup> Under fragmented authoritarianism, the devolution of power ends with the local government, meaning that there is no opportunity for bottom-up monitoring, as there would be in more democratic decentralized systems such as the United States.

#### 1. *Decentralization Creates Monitoring Problems*

The theory behind decentralizing policies such as those implemented by China in the 1980s and 1990s is fairly simple: because of disparities in information availability, individual localities are better at maximizing their own production than the state would be. Therefore, if the state allows those localities to operate with relatively little interference, while giving them an incentive to maximize their production (in this case, by allowing them to keep much of it), the country as a whole will be more productive.<sup>69</sup> Thus, decentralization can enable economic growth at the expense of central-government control over local activity.

But this model takes into account only economic productivity, and only that productivity that occurs over the course of a local government’s tenure. Since the local government cannot take advantage of benefits (or, equivalently, harms avoided) that accrue over the long term or accrue to others in a manner that cannot be captured, it will not seek to maximize true utility. Local government officials may have little to gain from preventing water pollution that forces the evacuation of a village not their own, or cleaning up soil contamina-

<sup>66</sup> Kenneth G. Lieberthal, *Introduction: The “Fragmented Authoritarianism” Model and its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1, 8 (Kenneth G. Lieberthal & David M. Lampton eds., 1992). This system has been less charitably, though perhaps no less accurately, described as “a series of feudal baronies.” Jerome Cohen, *An Introduction to Law in China*, 8 VT. J. ENVTL. L. 393, 401 (2007).

<sup>67</sup> Andrew Mertha, “*Fragmented Authoritarianism 2.0*”: *Political Pluralization in the Chinese Policy Process*, 200 CHINA Q. 995, 996 (2009).

<sup>68</sup> In this respect, this Note follows Mertha’s approach. *Id.* at 1012 (“Political fragmentation provides fissures in which one of the most important aspects of power—information—is jealously guarded.”). Problems of information availability and collection are particularly strong in autocratic countries; perhaps the best example of such problems is China’s agricultural policy under the Great Leap Forward. *See, e.g.*, Xin Meng et al., *The Institutional Causes of China’s Great Famine, 1959–61* 26–29 (Nat’l Bureau of Econ. Research, Working Paper No. 16361, 2010), <http://perma.cc/8S94-FCG9>.

<sup>69</sup> *See generally* Yingyi Qian & Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, 11 J. ECON. PERSP. 83 (1997). Qian and Weingast draw on Hayek’s theory of information in federalism. *See* Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. R. 519 (1947).

tion that will not have an impact until long after they have retired—or have been promoted for their performance.<sup>70</sup> This incentive structure creates environmental externalities.

## 2. *China Lacks an Effective Monitoring System for Local-Level Violations*

Under more democratic systems, perverse incentives at the local level may be partially mitigated by the influence of a variety of stakeholders at many levels of the political process—elected officials are held accountable to their constituents, for example.<sup>71</sup> Under China's system, however, the channels for such accountability from the ground up are few. Although village-level governments are directly elected in many cases, they have little regulatory authority over environmental issues.<sup>72</sup> Democratic elections are ostensibly held for the lowest levels of the people's congresses,<sup>73</sup> but they are largely seen as ineffective in expressing the will of the electorate.<sup>74</sup>

Instead, China has a fairly strong governmental hierarchy, in which the Communist Party system provides much of the supervision through the cadre responsibility system.<sup>75</sup> Indeed, the Party recently launched an initiative to increase the importance of environmental targets in its evaluation of Party members.<sup>76</sup> Unfortunately, this effort has been hampered by substantial information

---

<sup>70</sup> Government officials are often transferred between localities, or given multiple positions in which to serve concurrently, Edin, *supra* note 43, at 45–50, making the long-term condition of the locality in which they serve irrelevant to their interests. Although it may be argued that local authorities could begin to identify with the locality as a result of having served or lived there, field researchers observe that this is relatively rare and does not appear to impact officials' policies. *See id.* at 48 (arguing that rotation between many different localities erodes localism); *see also* David S. G. Goodman, *The Localism of Local Leadership Cadres in Reform Shanxi*, 9 J. CONTEMP. CHINA 159, 181 (2000) (noting that, although localism was present in Shanxi political leaders, "its translation to political action may be fairly ephemeral and last no longer than a tour of duty in a particular locality").

<sup>71</sup> One example of this is William Buzbee's model of environmental enforcement in the United States, which argues that elected officials tasked with enforcement (such as state attorneys general) will respond to voter preferences more strongly than to those of the national government. William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 116–17 (2005).

<sup>72</sup> "Villagers' committees," as the elected governments of a village are termed, do not have the rights that people's congresses have to form governments. *Compare* XIANFA art. 111 (2004) (permitting villagers' committees to establish specific "sub-committees . . . in order to manage public affairs"), *with* XIANFA arts. 95, 107 (2004) (establishing "people's governments," with authority to "conduct administrative work" only as low as the town level). For the purposes of this Note, the primary distinction is that only environmental protection departments of "people's governments," and not villagers' committees, are given responsibility under the EPL '14 and the EPL '89. <sup>73</sup> XIANFA art. 97 (2004).

<sup>74</sup> *See, e.g.,* *Vote As I Say; China*, *supra* note 46. This theoretical framework is largely in line with the "fragmented authoritarianism" model of regulation in China. *See* Van Rooij et al., *From Support to Pressure: The Dynamics of Social and Governmental Influences on Environmental Law Enforcement in Guangzhou City, China*, 7 REG. & GOVERNANCE 321, 322–23 (2013).

<sup>75</sup> *See supra* Part I.B.1.

<sup>76</sup> Alex L. Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARV. ENVTL. L. REV. 365, 368–69 (2013).

problems, stemming in part from the control that local officials have over their jurisdiction.

Decentralization and the resultant lack of information are, in large part, to blame for the poor enforcement of environmental legislation for which China has become infamous. China's high-level governmental agencies, when prompted, are fully able to sanction noncompliance. This has been demonstrated, for instance, in a series of crackdowns on environmental violations known in China as the "environmental storms":<sup>77</sup> in 2005, the head of what was then SEPA demanded that thirty "mega-scale" projects cease construction until they had submitted the required Environmental Impact Assessments ("EIAs").<sup>78</sup> In 2006, SEPA issued an order refusing to approve EIAs for construction projects that violated a wide range of environmental standards—without EIA approval, the construction projects could not legally move forward.<sup>79</sup> In 2007, taking it a step further, the Agency issued a blanket moratorium on all construction projects in ten cities, two counties, and five industrial parks.<sup>80</sup>

As the "environmental storms" themselves indicate, China has not been able to expand its high-level enforcement power sufficiently to ensure routine, on-the-ground implementation of environmental legislation.<sup>81</sup> One of the likely reasons is that the local government control over the EPBs, which are responsible for monitoring and enforcing compliance with environmental regulations, creates a "built-in conflict[ ] of interest."<sup>82</sup> This conflict is manifested in both the understaffing and under-equipping of EPBs, reflecting resistance of local government to monitoring, and the reported collusion of EPBs with polluters, reflecting the cooption of the environmental enforcement bureaucracy.<sup>83</sup>

### B. Environmental Governance and Monitoring Costs

The choice of public-interest litigation as a monitoring tool, rather than recentralization of monitoring capacity, is not an obvious one. It may partially be explained by politics—localities may have sufficient political power to sim-

<sup>77</sup> SEPA based its "storm" on the statutory authority granted by the Huanjing Yingxiang Pingjia Fa (环境影响评价法) [Environmental Impact Assessment Law] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 31 [hereinafter EIA Law].

<sup>78</sup> Yuhong Zhao, *Assessing the Environmental Impact of Projects: A Critique of the EIA Legal Regime in China*, 49 NAT. RESOURCES J. 485, 486 (2009).

<sup>79</sup> *Id.* at 487–88.

<sup>80</sup> *Id.* at 488. For other examples of "enforcement campaigns," see ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 53, at 28–29.

<sup>81</sup> The reason for the breadth of the "environmental storms" was that violations of the laws requiring EIAs was routine. Another example of the pervasive disregard for environmental law is the failure to implement environmental transparency legislation: in a recent evaluation of cities' compliance with relevant legislation, sixty points were awarded for mere compliance with the law; only 19 cities out of 113 surveyed passed that threshold. INST. OF PUB. & ENVTL. AFFAIRS & NATURAL RES. DEF. COUNCIL, OPEN ENVIRONMENTAL INFORMATION: TAKING STOCK 13 (2012), <http://perma.cc/MC6W-JYHF>.

<sup>82</sup> Yasheng Huang, *Administrative Monitoring in China*, 143 CHINA Q. 828, 842 (1995).

<sup>83</sup> ECONOMY, *supra* note 8, at 115.

ply refuse to recentralize. However, this explanation seems unlikely, given that the Party retains its top-down control. The theory of monitoring under a principal-agent model (with the central government as the principal and the local government as the agent) provides a more convincing theoretical explanation: using citizens as monitors is simply a more efficient means of regulating an enormous, decentralized country like China.

### 1. "Police Patrol"

Principal-agent theory breaks down monitoring efforts into two broad categories: "police patrols" and "fire alarms."<sup>84</sup> Police-patrol regulation is the active investigation by the regulator of the regulated, on a regular basis, in the hopes of detecting violations as they occur.<sup>85</sup> This is largely the strategy employed by the Chinese government to regulate pollution under the environmental regulations now in effect—EPBs have primary responsibility for enforcement<sup>86</sup> and, although citizen involvement is possible to a limited extent,<sup>87</sup> individuals cannot initiate disciplinary action.<sup>88</sup> This method has its advantages: it is easy to maintain control over the process and the amount of regulation achieved, some violations are more easily detected, and the regulator has a direct understanding of the situation.

However, there are also substantial drawbacks. First, the police cannot be everywhere.<sup>89</sup> As a result, it is often easier to be in compliance with regulations while the regulator is watching, and not in compliance otherwise. This problem is exacerbated when the regulator has very limited resources, since each "patrol" costs a greater percentage of the regulator's budget.

Second, some cops are corrupt. So long as the regulator's incentives are not precisely aligned with the public's, there is the risk of collusion between regulators and industry from which the public does not benefit. This collusion can be checked by the central government, which has a broader tax base and

<sup>84</sup> This terminology is adapted from Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984), who use the framework to analyze delegation of congressional responsibilities to agencies. See also Kal Raustiala, *States, NGOs, and International Environmental Institutions*, 41 INT'L STUD. Q. 719, 729–30 (1997) (applying the concept to NGO monitoring of the development of international treaties).

<sup>85</sup> See McCubbins & Schwartz, *supra* note 84, at 166.

<sup>86</sup> See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 53, at 17–18 (noting that EPBs are responsible for the EIA process, permitting, monitoring and assessing fees for pollution, and "initiating legal action against firms that fail to meet environmental requirements").

<sup>87</sup> For example, the EPL that was in effect prior to January 1, 2015 guarantees the right of citizens to submit complaints to the government regarding environmental problems. Huanjing Baohu Fa (环境保护法) [EPL '89] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989), art. 6, ZHONGGUO FALÜ GUIDING XINXI XITONG [hereinafter EPL '89].

<sup>88</sup> Although a civil suit is a potential pathway for redress, this is difficult for the average citizen. See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 53, at 35 (noting several obstacles to environmental civil suits, and that "[i]n 60 to 70% of cases, pollution victims are not successful in redressing their losses in court").

<sup>89</sup> See McCubbins & Schwartz, *supra* note 84, at 168 (noting that in any "realistic police-patrol policy," relatively few potential violations are reviewable).

therefore less to gain from any one industry group. Where the central government has little capacity to punish or assist regulators, however, this effect is limited.

The “police patrol” model is largely what can be seen in China today: local EPBs are expected to regularly monitor the activity of local industry, sometimes by physically inspecting sites and sometimes as part of a standardized process, such as an EIA.<sup>90</sup> However, EPBs are given scant resources and, because they may be removed by the local people’s congress at any time, they have very little political or institutional capital.<sup>91</sup> Furthermore, the fact that the MEP provides few resources to the EPBs also means that it is difficult for the central agency to control the local organizations.<sup>92</sup>

## 2. “Fire Alarm”

The “fire alarm” is a more decentralized approach, which relies on local organizations to observe and report violations (thus pulling the fire alarm) rather than requiring the regulator to sniff them out.<sup>93</sup> One advantage is that it is far less expensive to rely on citizens than it is to field monitors.<sup>94</sup> A corollary is that a regulator can have a great number of monitor-citizens on the lookout for violations at all times, making it possible to monitor on a far larger scale with fewer resources. Furthermore, it is likely to be more difficult to coopt the entire population than a single bureaucracy.

There is good reason for the Chinese government to seek to employ decentralized, “fire alarm”-type monitoring. Although villages are sometimes successfully bought off,<sup>95</sup> the sheer scale of environmental regulation in China could daunt even the most organized and well-funded central regulatory authority. This is compounded by the fact that many of the worst environmental pol-

<sup>90</sup> See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 53, at 17.

<sup>91</sup> ECONOMY, *supra* note 8, at 114 (“EPBs are both institutionally and financially subordinate to provincial and local governments and are generally low-ranking in the overall government hierarchy.”).

<sup>92</sup> See Abigail Jahiel, *The Organization of Environmental Protection in China*, 156 CHINA Q. 757, 759 (1998) (“In all cases . . . it is the local government, not the higher levels of the environmental protection apparatus, that provides environmental agencies with their annual budgetary funds, approves institutional advancements in rank and determines increases in personnel and even allocation of such resources as cars, office buildings and employee housing.”). Jahiel notes elsewhere that “[t]he more a functional department depends on the local government for its funding . . . the greater the local government’s authority over the department.” *Id.* at 765–66.

<sup>93</sup> See McCubbins & Schwartz, *supra* note 84, at 166.

<sup>94</sup> Less expensive for the government, that is. See *id.* at 168 (noting that, “although fire-alarm oversight can be as costly as police-patrol oversight, much of the cost is borne by the citizens and interest groups who sound alarms”). McCubbins and Schwartz’s framework was based on reducing costs for the national legislature; the burden in the Chinese case is shifted from administrative agencies to NGOs and from lower- to higher-level courts. See *infra* Part III.B (discussing the EPL’s structural changes in detail).

<sup>95</sup> ECONOMY, *supra* note 8, at 72 (“In some cases, too, local residents have accepted the pollution generated by [the township- and village-level enterprises] because they depend on the factories for jobs.”).

luters are small-scale enterprises established at the township and village level, making inspection by a central bureaucracy substantially more difficult.<sup>96</sup>

Public-interest litigation, particularly when combined with transparency requirements, can serve as a means for non-governmental organizations (“NGOs”) to “pull the fire alarm” by suing companies that are in violation of environmental regulations. Of course, this strategy requires cooperation from the courts, at least to the extent that they would hear an environmental case that was brought in the public interest. As discussed above, in Part I.A, there is reason to doubt a local court’s ability to act in this capacity if the local government is in opposition. Part III reviews the development of environmental public-interest litigation in China and offers some historical evidence on the efficacy of past efforts to expand standing.

### III. ENVIRONMENTAL PUBLIC-INTEREST LITIGATION

Public-interest litigation can, as noted above, be used by the Chinese government as a means of expanding the reach of government regulation. In this view, the courts can take on a regulatory role similar to that of the EPBs: they hear complaints, determine whether a violation of the law has occurred, and issue punishment accordingly. Since NGOs play the role of monitor, monitoring costs should be cheaper than those of a state-run bureaucracy.<sup>97</sup>

Of course, this is how it works on paper; the reality is somewhat less rosy. This Part of the Note reviews the history of public-interest litigation, focusing on the evolution of standing requirements in Chinese courts. Following the historical review, Part III.B examines the provisions of the new EPL most relevant to public-interest litigation—standing requirements, information availability, and strengthening of the EPB bureaucracy.

#### A. *A Place to Stand*

Public-interest litigation, as the phrase is used here, requires courts to allow plaintiffs with a more tenuous connection to a case than an ordinary civil plaintiff to file a suit.<sup>98</sup> This system rarely creates a problem in U.S. environmental public-interest litigation because the requirements to demonstrate standing in the United States are relatively low: under “citizen suit” provisions contained in almost all environmental statutes, NGOs are permitted to sue individuals or companies that violate the relevant laws or regulations.<sup>99</sup> Chinese

---

<sup>96</sup> *Id.* at 62–64.

<sup>97</sup> See *supra* Part II.B.

<sup>98</sup> Ordinarily, plaintiffs in Chinese civil suits must have a “direct interest” in the case. CPL ‘12, *supra* note 25, art. 119(1).

<sup>99</sup> See, e.g., 42 U.S.C. § 7604 (2012) (Clean Air Act citizen suit provision). An organization in the United States has “standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires individual members’ participation



standing requirements, by contrast, are creatures of statute.<sup>100</sup> The evolution of the law on standing and the resultant developments in public-interest litigation are traced in this section.

1. *The Environmental Protection Law of 1989 and the Civil Procedure Law of 1991*

Essentially the first comprehensive environmental law in China was the Environmental Protection Law, passed as a trial in 1979, which the Environmental Protection Law of 1989 (“EPL ’89”) superseded.<sup>101</sup> The EPL ’89—which remained the law until January 1, 2015<sup>102</sup>—is, on its face, consistent with modern environmental standards. It gives the MEP broad authority to set emissions standards and create a system for monitoring compliance,<sup>103</sup> provides for EIAs which must be approved by the local EPB before construction can begin,<sup>104</sup> and even punishes EPB officials who “neglect their duties.”<sup>105</sup>

The weakness of the EPL ’89, as with any law in the Chinese system, is a lack of enforcement. Local EPBs are responsible for monitoring industry, reviewing EIAs, and collecting fines.<sup>106</sup> The EPBs are overseen by the people’s congresses, who may themselves be tied to the regulated industries as tax collectors, recipients of bribes, or even owners.<sup>107</sup> Ultimately, the amount of the fine actually levied could easily be less than the cost of compliance.<sup>108</sup>

Enforcement of the EIA provisions has been similarly lax. The owners of many construction projects have found it easier to simply forgo the EIA than to modify their projects so that they are in compliance with relevant regulations.<sup>109</sup> If the project is completed before the local EPB successfully sanctions its owner, the Bureau’s only recourse is to fine the owner a maximum of RMB 50,000–200,000 (approximately \$8,000–32,000)—almost certainly less than

---

in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

<sup>100</sup> The Chinese standing requirements currently in force are set out in the CPL ’12. *See* CPL ’12, *supra* note 25, arts. 55, 119(1).

<sup>101</sup> EPL ’89, *supra* note 87.

<sup>102</sup> EPL ’14, *supra* note 3.

<sup>103</sup> EPL ’89, *supra* note 87, art. 10.

<sup>104</sup> *Id.* arts. 13, 26.

<sup>105</sup> *Id.* art. 45.

<sup>106</sup> *Paiwu Fei Zhengshou Shiyong Guanli Tiaoli* (排污费征收使用管理条例) [Regulations on the Collection and Use of Pollution Fines] (promulgated by the State Council, Jan. 2, 2003, effective July 1, 2003), art. 13, ZHONGGUO FALÜ GUIDING XINXI XITONG.

<sup>107</sup> Stories of corruption and abuse of the system abound. For example, Kenneth Lieberthal reports a case where an EPB would collect fines and pass them on to the local government, as it is required to do by law, at which point the local government would grant a tax break to the polluting industry equal to the fine collected. Kenneth Lieberthal, *China’s Governing System and Its Impact on Environmental Policy Implementation*, 1 CHINA ENV’T SERIES 3, 6 (1997).

<sup>108</sup> Stefanie Beyer, *Environmental Law and Policy in the People’s Republic of China*, 5 CHINESE J. INT’L L. 185, 207 (2006).

<sup>109</sup> *See, e.g.*, Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 166 (2007); Alex Wang, *The Role of Law in Environmental Protection in China*, 8 VT. J. ENVTL. L. 195, 204 (noting that “a significant percentage” of construction projects do not file EIAs).

the cost of compliance.<sup>110</sup> If the project is not yet completed, the EPB may also require it to stop construction until it completes a “make-up” EIA.<sup>111</sup>

Most public-interest litigation, meanwhile, has taken place in the shadow of the Civil Procedure Law of 1991 (“CPL ’91”).<sup>112</sup> Article 108 of the CPL ’91 lays out the requirements for bringing a civil suit in Chinese courts, including that the plaintiff must “have a direct interest in the case.”<sup>113</sup> This “direct interest” requirement kept public-interest litigation out of the courts until quite recently.<sup>114</sup> Although some environmental NGOs—the Center for Legal Assistance for Pollution Victims is the best known example—provided legal aid to individuals, these cases were usually settled or ended in damages awards rather than injunctions, making them helpful only to the plaintiffs.<sup>115</sup>

## 2. Local Legislation and the Environmental Courts

Local governments took the first steps toward environmental public-interest litigation: largely in response to major pollution incidents, a few local governments that felt particular pressure to protect their natural resources

<sup>110</sup> EIA Law, *supra* note 77, art. 31. The cost of pollution-control technology can easily run into the millions. *See, e.g.,* Yuan Xu, *Improvements in the Operation of SO<sub>2</sub> Scrubbers in China’s Coal Power Plants*, 45 ENVTL. SCI. & TECH. 380, 382 (2011) (noting that emissions-monitoring technology alone can “cost around \$132,000” and that this would only be “.5% of the capital costs of the plant’s SO<sub>2</sub> scrubbers”).

<sup>111</sup> EIA Law, *supra* note 77, art. 31; *see also* Zhao, *supra* note 78, at 501. The most famous use of this provision was a series of “environmental storms,” described above. *See supra* text accompanying notes 77–80. This speaks more to the weakness of the EIA Law than its strength, however, since the bulk of the projects targeted were already out of compliance with the law, *see* Zhao, *supra* note 78, at 488 n.13, and it was only the comprehensive refusal to obey environmental regulations that made the “storms” so large, *see* Liu Yi (刘毅), *Bu Gai Guaqi de “Fengbao”: 30 ge Daxing Xiangmu Ting Jian de Beihou* (不该刮起的“风暴”：30个大型项目停建的背后) [*The Storm That Should Not be Blowing: Behind the Order to Suspend Thirty Giant Projects*], RENMIN RIBAO, Jan. 27, 2005 (“If everyone was acting according to the law, this ‘storm’ would not be blowing.”).

<sup>112</sup> Minshi Susong Fa (民事诉讼法) [CPL ’91] (promulgated by the Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991), ZHONGGUO FALÜ GUIDING XINXI XITONG (repealed 2012) [hereinafter CPL ’91].

<sup>113</sup> CPL ’91, *supra* note 112, art. 108(1). Administrative litigation has a similar standing requirement, under the Xingzheng Susong Fa (行政诉讼法) [Administrative Litigation Law] (promulgated by the Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 41(1), ZHONGGUO FALÜ GUIDING XINXI XITONG (requiring “a specific administrative action to have infringed upon [the plaintiff’s] legal rights”).

<sup>114</sup> *See* ALL-CHINA ENV’T FED. & NATURAL RES. DEF. COUNCIL, MINJIAN HUANBAO ZUZH ZAI HUANJING GONGYI SUSONG ZHONG DE JIAOSE JI ZUOYONG (民间环保组织在环境公益诉讼中的角色及作用) [THE ROLE AND FUNCTION OF ENVIRONMENTAL ORGANIZATIONS IN ENVIRONMENTAL PUBLIC-INTEREST LITIGATION], app. 5 (2014) (finding no environmental cases brought by NGOs accepted in Chinese courts before 2009). During this period “public-interest” cases were brought by governments and government agencies, *see id.* at app. 4, and some agencies were given the right to sue over marine pollution by the Marine Environment Protection Law (MEPL), Haiyang Huanjing Baohu Fa (海洋环境保护法) [MEPL] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 25, 1999, effective Apr. 1, 2000), art. 90, ZHONGGUO FALÜ GUIDING XINXI XITONG.

<sup>115</sup> Environmental class-action litigation has also been restricted by national policy in the form of Agency regulations, instructions from the SPC, and guidelines from the All-China Lawyers Association. STERN, *supra* note 8, at 114–15.

established separate courts to deal with environmental cases.<sup>116</sup> Although there were attempts to establish local environmental courts as early as 1989, they were prohibited by the SPC.<sup>117</sup> It was not until 2007 that the first environmental court system was established, and it would take until 2010 for NGOs to gain standing there.<sup>118</sup>

This system consisted of two environmental tribunals, established at the Guiyang Intermediate Court and the Qingzhen Primary Court.<sup>119</sup> The Guiyang People's Congress originally granted the Guiyang Intermediate Court authority to take cases brought by specified governmental agencies, but in 2010 expanded this to include all "environmental public-interest organizations."<sup>120</sup> It is important to note that this substantial expansion of standing was not publicly authorized by the central government<sup>121</sup> and, in fact, directly contradicted the CPL '91.<sup>122</sup>

In 2008, the intermediate courts at Wuxi (in Jiangsu province) and Kunming (in Yunnan province) each issued their own regulations intended to bolster environmental litigation.<sup>123</sup> Kunming's allowed "relevant social groups" to

<sup>116</sup> For example, the Guiyang court was set up to deal with cases related to pollution in Hongfeng Lake, Baihua Lake, and Aha Reservoir, while the Wuxi court was established after an algal bloom on Tai Lake. Alex Wang & Jie Gao, *Environmental Courts and the Development of Environmental Public Interest Litigation in China*, 3 J. Ct. INNOVATION 37, 40 (2010). This example also demonstrates an important nuance in the theory regarding local-government reluctance to support environmental regulation: where pollution threatens immediate backlash, either in the form of economic problems or social upheaval, environmental protection may be in local governments' interest. Chinese courts at the trial level have the power to establish separate tribunals as required by "the conditions of the locality, the population, and the cases" of the jurisdiction. Organic Law of the People's Courts, *supra* note 11, art. 19. Courts above the trial level may establish specialized divisions within the court. *Id.* arts. 23, 26, 30.

<sup>117</sup> See, e.g., *Reply of the Supreme People's Court with Regard to the "Report on the Circumstances of Establishing an Environmental Division by the People's Court of Qiaokou District in the Wuhan Municipality,"* 43 CHINESE L. & GOV'T 41 (2010).

<sup>118</sup> Wang & Gao, *supra* note 116, at 38–39, 45.

<sup>119</sup> *Id.* at 40. Qingzhen is a city within the Guiyang municipality, thus Guiyang Intermediate Court has authority over the Qingzhen Primary Court and, under the CPL '91, could delegate any case it received to Qingzhen. See CPL '91, *supra* note 112, art. 39.

<sup>120</sup> Guiyangshi Cujin Shengtai Wenming Jianshe Tiaoli (贵阳市促进生态文明建设条例) [Guiyang Ecological-Civilization Regulations '10] (promulgated by Standing Comm. Guiyang People's Cong., Jan. 14, 2010, effective Mar. 1, 2010), art. 23, GUIYANGSHI SHENGTAI WENMING JIANSHE WEIYUANHUI (repealed 2013).

<sup>121</sup> See Wang & Gao, *supra* note 116, at 45 n.26 (noting that the legal basis for standing was "unclear"). But see Rachel E. Stern, *The Political Logic of China's New Environmental Courts*, 72 CHINA J. 53, 59 (2014) (citing a judge involved in the Guiyang environmental court, who claimed that the SPC privately supported its establishment).

<sup>122</sup> See CPL '91, *supra* note 112, art. 108(1) ("the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case" (emphasis added)).

<sup>123</sup> Guanyu Banli Huanjing Minshi Gongyi Susong Anjian de Shixing Guiding (关于办理环境民事公益诉讼案件的试行规定) [Jiangsu Regulations on Environmental Public-Interest Litigation], translated in Jiangsu Province Wuxi Municipal Intermediate People's Court & Jiangsu Province Wuxi Municipal People's Procuratorate, *Regulations on the Handling of Civil Environmental Public Interest Litigation Cases (for Trial Implementation)*, 43 CHINESE L. & GOV'T 59 (2011), <http://perma.cc/9BC9-58A3> [hereinafter *Jiangsu Regulations*]; Guanyu Jianli Huanjing Baohu Zhifa Xietiao Jizhi de Shishi Yijian (关于建立环境保护执法协调机制的实施意见) [Kunming Environmental Law Enforcement Opinion], translated in Kunming Municipal Intermediary People's Court et al., *Implementation*

bring environmental public-interest cases,<sup>124</sup> while Wuxi's allowed only the procuratorate—the organ responsible for enforcing legislation in the courts—to bring “public-interest” cases.<sup>125</sup> Yunnan has since established a substantial network of environmental courts.<sup>126</sup>

Reflecting the informal nature of the environmental courts, it was Wuxi's environmental court that took China's first environmental public-interest case with an NGO plaintiff: *The All-China Environment Federation and Zhu Zhengmao v. Jiangyin Port Container Co.*<sup>127</sup> *Jiangyin Port Container* is the seminal case in Chinese environmental public-interest litigation. Jiangyin was an unlicensed business that unloaded iron ore from shipping vessels, in the process spraying powdered iron ore into the nearby air and water. The litigation was at first to be a private suit by Zhu Zhengmao, who had suffered direct harm and thus was eligible to be a plaintiff.<sup>128</sup> The All-China Environment Federation (“ACEF”), after learning of the case from a call to the MEP's “environmental hotline,” had originally planned only to help Ms. Zhu bring her case.<sup>129</sup> However, once the group began its investigation, it realized that there was far more harm being done to the surrounding area than would be encapsulated in Ms. Zhu's complaint alone.<sup>130</sup> Since she would only have standing to sue for the damage to her own person and property, ACEF decided to join the lawsuit, representing the public interest and requesting an injunction against all unpermitted emissions.<sup>131</sup>

ACEF is not a “grassroots” NGO, but an NGO supported by and partially subservient to the MEP (a “government-organized NGO” or “GONGO”). The Wuxi Intermediate Court explained its decision to allow the case to go forward, despite ACEF's apparent lack of standing, by referring to the GONGO's status as an organization “approved by the state.”<sup>132</sup> It also referenced, without specifically basing its decision on, the fact that the MEP supervises ACEF.<sup>133</sup> ACEF was joined by a plaintiff who had more traditional standing; although the court does not say so in its opinion, it is possible that this arrangement made it easier

---

*Opinions on the Establishment of Mechanisms for Coordinating the Enforcement of Environmental Protection Laws*, 43 CHINESE L. & GOV'T 69 (2011), <http://perma.cc/EFW3-2NDB> [hereinafter Kunming Opinion].

<sup>124</sup> Kunming Opinion, *supra* note 123, at 72. Kunming also required the establishment of environmental courts. *Id.* at 74.

<sup>125</sup> Jiangsu Regulations, *supra* note 123, art. 2. Cases brought by the local government will rarely fall into the definition of “public interest” used in this article, though they are sometimes called “public-interest” cases in Chinese laws and regulations.

<sup>126</sup> Wang & Gao, *supra* note 116, at 46–47.

<sup>127</sup> *Id.* at 46.

<sup>128</sup> Interview with Ma Yong, Dir., All-China Env't Fed'n Litig. Dep't, in Beijing, China (Aug. 18, 2014).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Jiangsusheng Wuxishi Zhongji Renmin Fayuan Minshi Tiaojieshu

(江苏省无锡市中级人民法院民事调解书) [Statement of Civil Mediation], translated in *Jiangsu Province Wuxi Municipal Intermediate People's Court Statement of Civil Mediation*, 43 CHINESE L. & GOV'T 89, 93 (2010), <http://perma.cc/9895-KLF4> [hereinafter Statement of Civil Mediation].

<sup>133</sup> *Id.* at 92.

to qualify ACEF as a plaintiff.<sup>134</sup> Whatever the reason, this decision was cited approvingly as one of a recent set of “model cases” that the SPC released this year.<sup>135</sup> The case was eventually settled in a court-mediated agreement, with the defendant consenting to a monitoring program to ensure compliance with environmental regulations.<sup>136</sup>

In 2010, the Guiyang courts took the first environmental public-interest case which went to judgment, *ACEF v. Dingba Papermaking Factory*.<sup>137</sup> Dingba had been storing its wastewater, which contained pollutants for which it had not obtained a permit, in pools and secretly releasing it into the Nanming River at night.<sup>138</sup> The Guiyang government supplied substantial assistance to ACEF, with the Guiyang Public Environmental Education Center joining as plaintiff and the Two Lakes, One Reservoir Fund—a governmental organ which supports water-quality efforts in the Hongfeng Lake, Baihua Lake, and Aha Reservoir—fronting the cost of expert witnesses.<sup>139</sup> ACEF won an injunction against further water pollution and costs, including the money that the Two Lakes, One Reservoir Fund had supplied.<sup>140</sup>

Some governments have taken advantage of the laws to set up their own, local GONGOS. In December 2011, a few months after local regulations allowing NGOs to bring public-interest cases were passed in Changzhou (in Jiangsu province), a coalition of government organizations founded the Changzhou Environmental Public-Interest Federation (“CEPIF”).<sup>141</sup> The NGO went on to bring two public interest cases in 2012.<sup>142</sup> Both ended in successful settlements—in one, a water-pollution case brought in Liyang, the defendant agreed to pay RMB 240,000 (about \$39,000) in compensation and cleanup expenses;<sup>143</sup> in the other, a lawsuit brought against a chemical company for bury-

<sup>134</sup> *Id.* at 93.

<sup>135</sup> *Zuigao Fayuan Gongbu Jiu Qi Huanjing Ziyuan Shenpan Dianxing Anli* (最高法院公布九起环境资源审判典型案例) [*The SPC Publishes Nine Model Environmental Cases*], ZHONGGUO FAYUAN WANG (July 3, 2014), <http://perma.cc/5EGA-QETH>.

<sup>136</sup> Statement of Civil Mediation, *supra* note 132, at 94.

<sup>137</sup> *Zhonghua Huanbao Lianhehui, Guiyang Gongzhong Huanjing Jiaoyu Zhongxin yu Guiyang Shi Wudang Qu Dingba Zaozhi Chang Shui Wuran Zeren Jiufen An* (中华环保联合会，贵阳公众环境教育中心与贵阳市乌当区定扒造纸厂水污染责任纠纷案) [*Water Pollution Case: ACEF and Guiyang Center for Environmental Education v. Dingba Papermaking Factory of Guiyang City, Wudang District*], ZHONGGUO FAYUAN WANG (July 3, 2014) [hereinafter *Water Pollution Case*] <http://perma.cc/65NM-JGVM>. In 2009, ACEF brought another case in Guiyang against the Qingzhen Land and Resources Management Bureau to require them to undertake land reclamation. Wang & Gao, *supra* note 116, at 44. The court took the case (contrary to Guiyang’s standing rules at the time), but the Bureau then voluntarily took the actions requested, so the case did not go to judgment. *Id.*

<sup>138</sup> *Water Pollution Case*, *supra* note 137.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Cai Wei, *Huanjing gongyi susong, Changzhou shuaixian pobing* (环境公益诉讼，常州率先破冰) [*In environmental public-interest lawsuits, Changzhou takes the lead*], SINA XINGWEN ZHONGXIN (Dec. 3, 2012), <http://perma.cc/SRV6-BCSB>.

<sup>142</sup> Jiangsu Sheng Gaoji Renmin Fayuan Ketizu (江苏省高级人民法院课题组), *Guanyu Jiaqiang Ziyuan Huanjing Sifa Huanbao Gongzuo de Diaoyan Baogao* (关于加强资源环境司法环保工作的调研报告) [*Research Report on the Strengthening of Environmental Legislation*], SHENPAN YANJIU (June 2013), at 3, <http://perma.cc/8BLE-YLNU>.

<sup>143</sup> Wei, *supra* note 141.

ing hazardous waste near Changzhou without permission, the defendant paid over RMB 1.5 million (about \$245,000) in compensation as well as removal and restoration costs.<sup>144</sup> Since one of the agencies founding CEPIF was the Changzhou procuratorate, it is unclear what the advantage of suing through the NGO was—possibly, the government was hoping to gain points on its evaluations for being “innovative.”<sup>145</sup>

### 3. *Success? Friends of Nature and Chongqing Green Volunteer League v. Luliang and Heping Science and Technology*

The local environmental courts have been an important step forward for Chinese environmental public-interest litigation, particularly in their expansion of standing, which is a key barrier to NGO-initiated public-interest lawsuits.<sup>146</sup> However, environmental courts may not be the perfect solution for environmental NGOs, given that the success of environmental cases has been mostly limited to those brought by GONGOs.

The only environmental public-interest case to date successfully filed by a “grassroots” NGO—i.e., an NGO that is founded by private citizens<sup>147</sup>—is *Friends of Nature and Chongqing Green Volunteer League v. Luliang and Heping Science and Technology*.<sup>148</sup> *Friends of Nature*, brought in 2011 in the Qujing Intermediate Court’s environment division, is the first environmental public-interest lawsuit originally brought by a grassroots NGO.<sup>149</sup> Friends of Nature (“FON”) and Chongqing Green Volunteer League (“CGVL”) initiated the lawsuit in an effort to stop Luliang and Heping’s dumping of chromium slag in the mountains near Qujing, requesting both compensation and an injunction that would prevent further dumping and require a cleanup of the hazardous

<sup>144</sup> *Quan Sheng Fayuan Ziyuan Huanjing Sifa Baohu Dianxing Anli*

(*全省法院资源环境司法保护典型案例*) [*Model Cases from Throughout the Province for Judicial Protection of the Environment and Natural Resources*], JIANGSU FAYUAN WANG (Dec. 11, 2013), <http://perma.cc/E2U2-E3QN>.

<sup>145</sup> The author is indebted to Sean Song for this insight. Shi and van Rooij also point out the potential for prosecutors to benefit professionally from being “innovative” in this manner. Shi & van Rooij, *supra* note 51, at 21–22.

<sup>146</sup> See, e.g., “0 Tupo” Tuidong Lifa (“0 突破” 推动立法) [*“0 Breakthroughs” in Promoting Legislation*], ZHONGHUA HUANJING (中华环境) (Mar. 2014), at 53 [hereinafter *0 Breakthroughs*], <http://perma.cc/L4RV-5UPW> (noting that all seven public-interest cases brought by ACEF in 2013 were rejected on the grounds that the plaintiffs lacked standing).

<sup>147</sup> Of course, even grassroots NGOs are subject to some monitoring and supervision by the government. See *infra* notes 171–75 and accompanying text.

<sup>148</sup> Scott, *supra* note 49, at 729 (referring to *Friends of Nature* as the “only” such case). China having no central database of reported judgments, it is difficult to determine whether this remains the only environmental public-interest case brought by a grassroots NGO; the author’s research failed to uncover any since this one.

<sup>149</sup> *Id.* at 745. This “first” needs some qualification: there have been a few cases brought by ACEF, including one that included a grassroots NGO as a plaintiff. *Id.* at 749 n.193. See also ALL-CHINA ENV’T FED. & NATURAL RES. DEF. COUNCIL, *supra* note 114, at 34 (providing a selection of environmental public-interest cases by year). Furthermore, the plaintiffs in *Friends of Nature*, at the request of the court, joined the Qujing EPB as plaintiff. Scott, *supra* note 49, at 750. Regardless, the original acceptance of the case without government involvement was a substantial step for environmental public-interest litigation in China.

waste.<sup>150</sup> The case quickly ran into problems, however. The plaintiffs joined the local EPB, which got them better access to some relevant evidence and environmental reports, but they were unable to afford a court-requested third-party assessment of the damage the pollution caused.<sup>151</sup> FON and CGVL then offered to settle with the two companies, but Luliang and Heping abandoned the (court-mediated) negotiations in April 2013.<sup>152</sup>

*Friends of Nature* portrays well some of the difficulties Chinese NGOs have had in bringing public-interest lawsuits without government support. One is access to information that can be used as evidence—as in this case, many environmental lawyers complain of the difficulty of acquiring evidence, particularly reports from court-approved assessors, which can be extremely expensive and difficult to obtain in politicized cases.<sup>153</sup> Funding problems also come up when dealing with case-filing fees, since plaintiffs are expected to front a certain percentage of the compensation that they are requesting.<sup>154</sup>

Comparing the outcomes of environmental public-interest cases brought by GONGOs and those cases brought by a grassroots NGO sheds light on local governments' use of the courts as a tool for governance. Where it is in local governments' interests to encourage environmental protection—as when there are substantial environmental concerns that threaten immediate stability—public-interest litigation can be allowed to continue as both a gesture of support and a useful tool for monitoring, as in *Dingba Papermaking Factory*.<sup>155</sup> The government will provide the necessary support in the form of funding, expert assistance through the EPBs and procuratorates, and political assistance by insisting that courts take such environmental cases, even where national law forbids it, as it did in *Jiangyin Port Container*.<sup>156</sup> However, when the local government has no interest in promoting the case, as in *Friends of Nature*, even the simplest of matters can become insurmountable obstacles.

#### 4. Civil Procedure Law of 2012

Article 119 of the Civil Procedure Law of 2012 (“CPL ’12”) retained the strict standing requirements of the CPL ’91,<sup>157</sup> but made a special exception for some types of public-interest litigation. Article 55 reads in full: “Against actions which pollute the environment, infringe upon consumers’ rights and interests, or otherwise harm the public interest, legally mandated government organs and relevant organizations may bring suit to the People’s Courts.”<sup>158</sup>

<sup>150</sup> Scott, *supra* note 49, at 748–49.

<sup>151</sup> *Id.* at 750–52.

<sup>152</sup> *Id.* at 753.

<sup>153</sup> STERN, *supra* note 8, at 57.

<sup>154</sup> *Id.* at 54.

<sup>155</sup> *Water Pollution Case*, *supra* note 137.

<sup>156</sup> See *supra* notes 132–35 and accompanying text.

<sup>157</sup> CPL ’12, *supra* note 25, art. 119.

<sup>158</sup> *Id.* art. 55. Scholars seem to agree that “legally mandated” modifies “government organs” only, so that the relevant question is whether a given NGO is “relevant” to the case. This view has been most strongly defended in the SPC’s own journal on legal scholarship. Gao Minzhi (高民智), *Guanyu Minshi Gongyi Susong de Lijie yu Shiyong* (关于民事公益诉讼的理解与适用) [On the

If the National People's Congress ("NPC") intended to expand standing for environmental public-interest lawsuits, CPL '12 fell short of the mark. ACEF, the most prominent NGO environmental litigator in China, brought no fewer than eight cases under the new law in 2013, and all were rejected for lack of standing.<sup>159</sup> The courts turned down several of the cases without issuance of a written judgment, making appeal difficult.<sup>160</sup>

FON has faced similar difficulties. The NGO partnered with Nature University in July 2013 to bring a case against Shenhua Coal-to-Liquid and Chemical Company for illegal use of groundwater.<sup>161</sup> A lawyer for the case said that the plaintiffs had a very difficult time even submitting the documents for the case and that, at the end of August, the judge told him over the phone that his case would be "provisionally refused."<sup>162</sup>

Furthermore, jurisdictions that were previously very friendly to environmental public-interest litigation appear to be changing their regulations to match the new CPL. Following the passage of the CPL '12, the Guiyang People's Congress changed its environmental regulations, replacing the provision allowing standing to environmental NGOs generally with language taken directly from Article 55.<sup>163</sup> In July, new regulations from the Guizhou People's Congress (Guiyang is located in Guizhou Province) came into effect, which contained essentially the same language.<sup>164</sup> Although it is not yet clear whether the Guiyang environmental courts will change their practice under the new regulations, the pressure of three levels of government (national, provincial, and municipal) will likely have a substantial effect.

---

*Interpretation and Application of Civil Public-Interest Litigation*], RENMIN FAYUAN BAO (Dec. 7, 2012), <http://perma.cc/QMU8-XUNJ>. See also Stern, *supra* note 121, at 64; Xi Jianrong (郝建荣), *Huanbao Lianhe Hui Gongyi Susong Zaoyu Gang* (环保联合会公益诉讼遭遇尴尬) [*Environmental Federation's Public-Interest Lawsuits Encounter an Awkward Position*], FAZHI RIBAO (Mar. 27, 2013), <http://perma.cc/BXP3-PMFU>. However, at least one court has interpreted "legally mandated" to apply to "relevant organizations" as well. Zhonghua Huanbao Lianhehui Su Hainan Luoniushan Zhongzhu Yuzhong Youxian Gongsi (中华环保联合会诉海南罗牛山种猪育种有限公司) [ACEF v. Luoniushan Pig Breeding Co., Ltd.], TIANYA FALU WANG (Hainan High Ct. 2013).

<sup>159</sup> *0 Breakthroughs*, *supra* note 146; see also Tongbao Hui Jizhe Wenda (通报会记者问答) [Q&A Bulletin], ALL-CHINA ENV'T FED'N (Feb. 28, 2014), <http://perma.cc/86V-SSK6>. Prior to 2013, ACEF had only brought eight public-interest cases, all in environmental courts, but had won all of them. *Id.*

<sup>160</sup> *0 Breakthroughs*, *supra* note 146.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Guiyangshi Jianshe Shengtai Wenming Chengshi Tiaoli (贵阳市建设生态文明城市条例) [Guiyang Ecological-Civilization Regulations '13] (promulgated by Standing Comm. Guiyang People's Cong., Apr. 25, 2013, effective May 1, 2013), art. 37, GUIZHOU SHENG RENDA CHANGWEIHUI.

<sup>164</sup> Guizhousheng Shengtai Wenming Jianshe Cujin Tiaoli (贵州省生态文明建设促进条例) [Guizhou Province Regulations to Promote Ecological Civilization] (promulgated by Standing Comm. Guizhou People's Cong., May 17, 2014, effective July 1, 2014), art. 61, GUIZHOU SHENG RENDA CHANGWEIHUI.



## B. Environmental Protection Law of 2014

It is against this backdrop that the new Environmental Protection Law (“EPL ’14”)<sup>165</sup> was negotiated. The EPL ’14 was a particularly contentious piece of legislation: it took four reviews over two sessions of the NPC to pass, whereas a revision to a law typically takes half of that.<sup>166</sup>

### 1. Standing

The key provision of the EPL ’14 for this discussion is Article 58, which clarifies the standing requirements for environmental public-interest litigation:

Against acts which pollute the environment, damage the ecosystem, and harm the public interest, social organizations which meet the following requirements may bring suit in the People’s Courts:

(1) legally registered with the civil affairs department of a people’s government at the level of a city with districts or above;

(2) continuously specializing in environmental-protection public-interest activities for the last five years with no record of illegal activity. When a social organization which meets the above regulations brings a lawsuit to a people’s court, the people’s court shall accept it.

A social organization which brings a lawsuit shall not use it for economic benefit.<sup>167</sup>

On its face, the new law is more restrictive than the CPL ’12 because it provides more specific requirements for NGOs to have standing than that they simply must be “relevant.” However, this specificity will likely make it more difficult for courts to refuse cases when a plaintiff meets the law’s requirements.<sup>168</sup> As a result, the limitations of Article 58 may actually expand standing for environmental organizations.

The restrictions will still be formidable for many NGOs, however. One point of concern is the breadth of the language: in particular, Article 58(2) requires that an NGO have “no record of illegal activity,” but China’s NGO laws are fairly restrictive, and the phrase “illegal activity” is very broad.<sup>169</sup>

<sup>165</sup> EPL ’14, *supra* note 3.

<sup>166</sup> Bie Tao, Deputy Dir. Gen., Dep’t of Law & Policy, Ministry of Env’tl. Prot., Presentation at the Conference on Environmental Transparency (July 16, 2014) (on file with the Harvard Law School Library).

<sup>167</sup> EPL ’14, *supra* note 3, art. 58. Interestingly, early drafts of the law allowed only ACEF as a plaintiff in environmental public interest litigation. Zhou Tian (周天), *Xin “Huanbao Fa” Tongguo Fagongwei Shi Fa Gongyi Susong* (新《环保法》通过法工委释法公益诉讼), CAIXIN (Apr. 25, 2014), translated in *The NPC Law Committee Presents Features of the New Environmental Protection Law Concerning Public Interest Lawsuits*, CHINA DEV. BRIEF (May 15, 2014), <http://perma.cc/7MBW-3288>.

<sup>168</sup> Telephone interview with Zhu Xiao, Assoc. Professor of Env’t & Natural-Res. Law, Renmin Univ. Law Sch. (Aug. 5, 2014).

<sup>169</sup> EPL ’14, *supra* note 3, art. 58(2). For example, all NGOs registered as “associations” or “non-enterprise entities” are required to register their “purposes, operational scope and areas of activi-

Similarly, it is not clear what constitutes an “economic benefit”—would an NGO be invalidated if it collected membership fees? In a civil-law jurisdiction like China’s, there will be no final definition of any unresolved terms; at best, the SPC may issue an interpretation.<sup>170</sup> Local courts, and therefore local governments, may be able to change their interpretation of the standing rules based on whether they wish to have the case litigated.

A second potential problem lies with the difficulty of registering an NGO in the first place. In order to benefit from Article 58, the NGO must be a “social organization.”<sup>171</sup> Among other requirements, a registered organization must find a “supervising agency”—a government organ responsible for a relevant area of regulation at the appropriate level—that will agree to sponsor it.<sup>172</sup> This agency then must approve a yearly report from the NGO and all changes to the NGO’s registration.<sup>173</sup> This requirement also excludes small NGOs, since such registration requires at least fifty members and an operational fund of RMB 30,000 (about \$4,900).<sup>174</sup> An NGO may register as a “non-enterprise entity” to get around this requirement, but that carries its own risk: such organizations are forbidden from establishing branch offices, which curtails the effectiveness of the organization on the national level.<sup>175</sup>

---

ties” and may be subject to sanctions for exceeding those. Shehui Tuanti Dengji Guanli Tiaoli (社会团体登记管理条例) [Registration and Management of Social Organizations] (promulgated by the State Council, Oct. 25, 1998, effective Oct. 25, 1998), arts. 16(3), 33(2), ZHONGGUO FALÜ GUIDING XINXI XITONG [hereinafter Registration of Organizations]; Minban Fei Qiye Danwei Dengji Guanli Zanxing Tiaoli (民办非企业单位登记管理暂行条例) [Registration of Non-Enterprise Entities] (promulgated by the State Council, Oct. 25, 1998, effective Oct. 25, 1998), arts. 10(2), 25(2), ZHONGGUO FALÜ GUIDING XINXI XITONG [hereinafter Registration of Non-Enterprise Entities]. Although the sanction may be as simple as a warning, Registration of Organizations, *supra*, art. 33, it is not clear that there is any *de minimis* limit on “illegal activity” as used in the EPL ’14.

<sup>170</sup> Organic Law of the People’s Courts, *supra* note 11, art. 32; *but see* Li Wei, *Judicial Interpretation in China*, 5 WILLAMETTE J. INT’L L. & DISP. RESOL. 87, 92–93 (1997) (“[N]othing in the constitution or any statute directly or indirectly indicates that the SPC’s judicial interpretation can function as legislation. . . . [T]he primacy of executive power has significantly limited the legal status of judicial interpretation as well. . . . Ministries within the State Council are likely to interpret any statute at their will, and the SPC must concur with that interpretation, merely for the sake of maintaining conformity.”).

<sup>171</sup> EPL ’14, *supra* note 3, art. 58 (applying only to “social organizations”).

<sup>172</sup> Registration of Organizations, *supra* note 169, art. 6; Registration of Non-Enterprise Entities, *supra* note 169, art. 6.

<sup>173</sup> Registration of Organizations, *supra* note 169, art. 31; Registration of Non-Enterprise Entities, *supra* note 169, art. 23.

<sup>174</sup> Registration of Organizations, *supra* note 169, art. 10(1), (5). It is not clear how restrictive the funding requirement would be. A 2006 study by ACEF found that 81.5% of environmental NGOs in China operated on less than RMB 50,000, while 22.5% had “basically no funds raised,” ALL-CHINA ENV’T FED & NATURAL RES. DEF. COUNCIL, *supra* note 114, at 8 (citing ALL-CHINA ENV’T FED., ZHONGGUO HUANBAO MINJIAN ZUZHI FAZHAN ZHUANGKUANG BAOGA).

(中国环保民间组织发展状况报告) [REPORT ON THE DEVELOPMENT OF CHINESE ENVIRONMENTAL CIVIC ORGANIZATIONS] (2006)), while a more recent survey of a group of environmental NGOs found that only 7% had an annual budget of RMB 100,000 or less, *id.* at 12.

<sup>175</sup> Registration of Non-Enterprise Entities, *supra* note 169, art. 13.

## 2. Information Availability

Where the EPL '14 truly shines is in its information transparency provisions. Article 54 substantially expands the requirement of the old law that local EPBs “regularly issue bulletins on the environmental situations”<sup>176</sup> by adding disclosure requirements for all information on monitoring, permitting, pollution “fees” (effectively pollution taxes), and any sanctions imposed by the EPB.<sup>177</sup> Furthermore, the law establishes a “social credit database” in which all violations of environmental laws or regulations by any entity will be recorded.<sup>178</sup>

Article 55 requires the “key polluting units” to publicize some information that is crucial for environmental litigation, such as the total amount of each pollutant emitted and the use of pollution-control equipment.<sup>179</sup> Of course, any system of self-monitoring poses its own compliance problems, but the public availability of information will also serve as a check on falsification of self-monitoring requirements, as the public will be able to keep watch for signs of data falsification.<sup>180</sup>

Article 56 of the EPL '14 makes the EIA regime first established in the EPL '89 substantially more transparent by requiring that EPBs make all EIA reports public, excepting only “state and business secrets.”<sup>181</sup> While this exception has the potential to be abused, this is nonetheless a substantial step forward from the current regime, under which the prevailing philosophy was not to disclose any EIA material unless it was positively required by law.<sup>182</sup>

In addition to expanding standing in Article 58,<sup>183</sup> the law encourages an alternative use for the information obtained through the transparency provisions. Article 57 formalizes individuals’ ability to report violations of the law to

<sup>176</sup> EPL '89, *supra* note 87, art. 11.

<sup>177</sup> EPL '14, *supra* note 3, art. 54.

<sup>178</sup> *Id.* The new provisions on transparency partially incorporate preexisting regulations from the Huanjing Xinxī Gongkai Banfa (Shixing) (环境信息公开办法 (实行)) [Environmental Transparency Regulations (Trial)] (promulgated by the Ministry of Env'tl. Prot., Apr. 11, 2007, effective May 1, 2008), ZHONGGUO FALÜ GUIDING XINXI XITONG. As the name suggests, these regulations were not guaranteed full implementation, so the EPL '14 had the important effect of enshrining them in more permanent legislation.

<sup>179</sup> EPL '14, *supra* note 3, art. 55.

<sup>180</sup> There are substantial technological barriers to be overcome with regard to self-reported data, though a combination of continuous monitoring systems and in-person inspections may work well. See Jeremy J. Schreifels, Yale Fu & Elizabeth J. Wilson, *Sulfur Dioxide Control in China: Policy Evolution During the 10th and 11th Five-Year Plans and Lessons for the Future*, 48 ENERGY POL'Y 779, 786 (2012) (noting that recent MEP inspections have proved relatively successful at deterring falsification of self-monitoring data); Wang, *supra* note 76, at 425–26 (noting the difficulty of verifying self-reported data generally); Xu, *supra* note 110 (citing evidence for and against the effectiveness of continuous self-monitoring systems in ensuring accurate reporting). An example of initial steps toward public monitoring of compliance with environmental transparency regulations is the Pollution Information Transparency Index published yearly by the Institute of Public & Environmental Affairs and the Natural Resources Defense Council. INST. OF PUB. & ENVTL. AFFAIRS & NATURAL RES. DEF. COUNCIL, *supra* note 81.

<sup>181</sup> EPL '14, *supra* note 3, art. 58.

<sup>182</sup> Hu Jing, Assoc. Professor, Env'tl. Law Research Inst., China Univ. of Political Sci. & Law, Presentation at the Conference on Environmental Transparency (July 16, 2014) (on file with the Harvard Law School Library).

<sup>183</sup> EPL '14, *supra* note 3, art. 58.

the local EPB or, where local governments do not respond, to a higher level in the hierarchy.<sup>184</sup> The law even provides a measure of whistleblower protection, ordering that government “departments receiving the reporting shall keep confidential the relevant information of the reporters and protect the legitimate rights and interests of the reporters.”<sup>185</sup>

### 3. *Improving Central Control over Local Governments*

The final element of the new EPL that will be discussed here is the strengthening of central control over the implementation of environmental-protection policies. This recentralization takes two forms: first, it increases EPB enforcement capacity and strengthens sanctions for violating the law, and second, it grants higher-level governments more control over the governments below them in the hierarchy.

The EPL '14 enhances EPBs' enforcement powers by providing a strengthened and formalized right to inspect polluters<sup>186</sup> and to prevent further violations by “seiz[ing] or detain[ing] the facilities and equipment causing the discharge of pollutants.”<sup>187</sup> While the EPL '89 provided for one-off fines for illegal discharges,<sup>188</sup> the EPL '14 radically expands industry liability by allowing EPBs to impose the fine once for every day the polluter is out of compliance.<sup>189</sup> The law also strengthens EIA enforcement, as projects will no longer be able to submit a “make-up” EIA if they fail to go through the process ahead of time.<sup>190</sup> Finally, EPB personnel are now directly liable for a wide range of malfeasance and nonfeasance with regard to enforcement, and may be fired for serious incidents.<sup>191</sup>

A subtler, but perhaps more effective, tool for strengthening central environmental enforcement power is Article 26's requirement that “people's governments at or above the county level” use environmental-protection targets “as an important basis for assessment and evaluation” for EPBs and lower-level governments.<sup>192</sup> Coupled with Article 44's mandate to create a national “total emissions control” system, which would then be allocated among local governments, this provision should strengthen the State Council's capacity to control local-level environmental performance.<sup>193</sup> Requiring that environmental

---

<sup>184</sup> *Id.* art. 57.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* art. 24.

<sup>187</sup> *Id.* art. 25. *See also id.* art. 60 (granting EPBs the right to require violators to shut down).

<sup>188</sup> *See* EPL '89, *supra* note 87, arts. 36–38.

<sup>189</sup> EPL '14, *supra* note 3, art. 59. Local people's congresses may also expand this provision to include other violations. *Id.*

<sup>190</sup> *Id.* art. 61.

<sup>191</sup> *Id.* art. 68.

<sup>192</sup> *Id.* art. 26. Governments must also use these indicators as a basis for review of their own EPBs. *Id.*

<sup>193</sup> *Id.* art. 44. This provision has teeth: in a provision similar to the Clean Air Act's “non-attainment areas,” EPBs in areas that do not meet centrally-prescribed environmental targets are required to “suspend the examination and approval of the environmental impact assessment documents for construction projects that add to the total emission volume of major pollutants.” *Id.*

protection be part of the cadre responsibility system may have the important effect of countering the focus on economic indicators that prevails in the current system.<sup>194</sup>

Finally, Article 67 reinforces the hierarchy of environmental governance, which allows EPBs and related governmental organs to suggest disciplinary sanctions in cases of official malfeasance at lower levels.<sup>195</sup> If the lower-level governments do not implement appropriate punishments, the higher-level governments are permitted to impose their own sanctions.<sup>196</sup>

#### 4. Related Material from the SPC

After the NPC promulgated the EPL '14, the SPC released a pair of documents related to environmental public-interest litigation: an opinion, a draft interpretation, and a set of "model environmental cases."<sup>197</sup>

The SPC's opinion, though not law, strongly supports environmental public-interest litigation. It pushes for courts to implement the standing provisions of the CPL '12,<sup>198</sup> encourages injunctive relief,<sup>199</sup> and allows the courts to award costs to public-interest plaintiffs.<sup>200</sup> In the opinion, the SPC even goes so far as to recommend establishing environmental courts, a full reversal from the Court's position twenty-five years earlier.<sup>201</sup> Interestingly, the SPC's opinion also calls on courts hearing environmental public-interest cases to report on the status of their environmental cases to the local EPBs.<sup>202</sup>

The model cases were likewise supportive of environmental public-interest litigation. The SPC included the first public-interest case brought by ACEF, referring only obliquely to the questionable legality of ACEF as a plaintiff: "Wuxi Intermediate Court . . . undertook an exploratory practice with regard to the question of the requirements to serve as a plaintiff in environmental public-interest litigation."<sup>203</sup> Similarly, the SPC included ACEF's case in Guiyang in

<sup>194</sup> See *supra* Part I.B.1.

<sup>195</sup> EPL '14, *supra* note 3, art. 67.

<sup>196</sup> *Id.*

<sup>197</sup> Sup. People's Ct., *Guanyu Quanmian Jiaqiang Huanjing Ziyuan Shenpan Gongzuo wei Tuijin Shengtai Wenming Jianshe Tigong Youli Sifa Baozhang de Yijian*

(关于全面加强环境资源审判工作为推进生态文明建设提供有力司法保障的意见) [*Opinion on Comprehensive Strengthening of Trials on the Environment and Natural Resources to Promote the Construction of an Ecological Civilization and Support Strong Judicial Protection*], RENMIN FAYUAN BAO (July 4, 2014), at 4, <http://perma.cc/AH4C-CNAF>, translated in CLT Community, *SPC Opinion on Environmental Litigation*, CHINA LAW TRANSLATE (July 5, 2014), <http://perma.cc/F5AD-LZRQ> [hereinafter SPC Opinion]; *The SPC Publishes Nine Model Environmental Cases*, *supra* note 135.

<sup>198</sup> SPC Opinion, *supra* note 197, para. 11.

<sup>199</sup> *Id.* para. 14.

<sup>200</sup> *Id.* para. 15.

<sup>201</sup> *Id.* para. 16.

<sup>202</sup> *Id.* para. 13.

<sup>203</sup> Zhu Zhengmao, *Zhonghua Huanbao Lianhehui yu Jiangyin Gang Jizhuangxiang Gongsi Huanjing Wuran Zeren Jiufen An*

(朱正茂·中华环保联合会与江阴港集装箱公司环境污染责任纠纷案) [*Environmental Pollution Case: Zhu Zhengmao and ACEF v. Jiangyin Harbor Cargo Container Company*], ZHONG-GUO FAYUAN WANG (July 3, 2014), <http://perma.cc/99QH-3SV8>.

its recent set of “model cases,” though without any mention of the GONGO’s standing.<sup>204</sup> This expression of the SPC’s approval of the Guiyang and Wuxi courts’ decision to take ACEF as a legitimate plaintiff shows a reversal from the SPC’s earlier opposition to environmental courts and is a positive sign for the future of environmental regulation from the central government.

The SPC has also established an environmental tribunal at its own level.<sup>205</sup> This court will serve as a source for further research and guidance to lower courts. It could also theoretically hear appeals from environmental cases tried at the High People’s Court level<sup>206</sup>—as such, it serves as a partner to China’s first environmental court at that level, which opened in Fujian about a month before the SPC’s tribunal.<sup>207</sup> This level of government activity may signal an enhanced commitment to both environmental litigation and a centralization of environmental-enforcement capacity.

Most recently, the SPC has released a draft “interpretation” of the new EPL’s public-interest lawsuit provisions,<sup>208</sup> which will serve to implement the details of the law in a manner analogous to a regulation in U.S. law.<sup>209</sup> The draft interpretation reinforces some aspects of the SPC’s earlier opinion: injunctive relief is authorized,<sup>210</sup> plaintiffs’ costs are specifically included as possible monetary damage awards,<sup>211</sup> and courts are required to allow public-interest plaintiffs to defer the payment of their court fees.<sup>212</sup>

The SPC interpretation also shows an effort to avoid some of the problems with environmental public-interest litigation outlined in this Note. The interpretation shifts the default trial-level jurisdiction for public-interest cases from pri-

<sup>204</sup> See *Water Pollution Case*, *supra* note 137.

<sup>205</sup> *China’s Supreme Court Sets up Environment Cases Division*, SUP. PEOPLE’S CT. (July 20, 2014), <http://perma.cc/UN6F-PQGQ>.

<sup>206</sup> Organic Law of the People’s Courts, *supra* note 11, art. 32(2).

<sup>207</sup> *China Inaugurates First Environmental Court*, CHINA DAILY (May 23, 2014), <http://perma.cc/8J7A-BEG5>.

<sup>208</sup> *Zuigao Renmin Fayuan Jiu Huanjing Minshi Gongyi Susong Anjian Sifa Jieshi Zhengqiu Yijian* (最高人民法院就环境民事公益诉讼案件司法解释征求意见稿) [*Environmental Public-Interest Interpretation Draft*], *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan* (Sept. 30, 2014), translated in CLT, *SPC Interpretation on Public Interest Environmental Litigation (Comment Draft)*, CHINA LAW TRANSLATE (Oct. 3, 2014), <http://perma.cc/8QYS-PCZZ> [hereinafter *Environmental Public-Interest Interpretation Draft*]. It is important to note that this is only a draft version of the interpretation, especially since the SPC is soliciting public comments. *Id.*

<sup>209</sup> See Liu, *Overview of the Chinese Legal System*, *supra* note 17, at 10887 (“Chinese laws do give authority to the Supreme People’s Court to issue judicial interpretations, essentially interpretive regulations . . . . In practice, the Supreme People’s Court is very active in issuing judicial interpretations that are oftentimes extensive and detailed, and are treated as supplementary laws.”).

<sup>210</sup> *Environmental Public-Interest Interpretation Draft*, *supra* note 208, art. 18 (“If the plaintiff, in order to prevent occurrence and expansion of ecological and environmental harm, requests a remedy stopping the harm, removing obstacles, or eliminating dangers, the People’s Court may give its support in accordance with the law.”); *id.* art. 19 (“If the plaintiff requests the restoration of prior conditions, the People’s Court may in accordance with the law require the polluter to restore the state and function of the environment prior to the occurrence of the harm.”).

<sup>211</sup> *Id.* art. 20 (“The scope of a polluter’s liability for compensation for losses includes . . . [r]easonable lawyers’ fees and other costs of the litigation.”).

<sup>212</sup> *Id.* art. 31 (“If the plaintiff has difficulty paying case fees, and applies in accordance with the law for delayed payment of case fees, the People’s Courts shall grant [the request].”).

mary-level courts (which are established by, and subject to, the control of county-level governments<sup>213</sup>) to intermediate-level courts (controlled by prefecture-level governments<sup>214</sup>).<sup>215</sup> Under the framework this Note has presented, trying cases at the intermediate level makes sense as a means of reducing the impact of local protectionism, since prefecture-level governments cover a broader physical area (and have a broader tax base) and are therefore less likely to be reliant on local enterprises.

The draft interpretation also requires courts that accept an environmental public-interest case to “within ten days notify the department bearing environmental protection and administrative supervision responsibilities.”<sup>216</sup> This provision, which comes under the heading “[j]oining public interest and administrative supervision,”<sup>217</sup> appears to be aimed at ensuring that any environmental violations which reach the attention of the court are also passed on to the EPBs—in other words, it uses public-interest litigation as a monitoring mechanism for the environmental-protection administration.

## CONCLUSION

### A. *Analysis of the EPL*

The EPL '14 adds a number of provisions that will be beneficial to public-interest plaintiffs. Standing is probably the most important element, because without a clear law on what organizations have standing, litigation is impossible. The information transparency articles, meanwhile, may provide potential plaintiffs with the raw material of lawsuits—evidence of malfeasance on the part of factories and other manufacturers. But, crucially, none of these articles will be of any use without the cooperation of local governments, because they have effective control over the courts.

The EPL '14 uses the political power that the central government has retained to attempt to push the incentive structure of officials further toward environmental protection. Article 26 provides a mandate for assessing officials based on their success in meeting environmental targets; Article 44 effectively imposes a blanket suspension of construction permits for areas out of compliance with national pollution standards. It is important to note, however, that the “Green GDP” initiative already attempted to encourage lower-level governments to pay attention to the environmental effects of economic development,

---

<sup>213</sup> Organic Law of the People's Courts, *supra* note 11, art. 17.

<sup>214</sup> *Id.* art. 23.

<sup>215</sup> *Environmental Public-Interest Interpretation Draft*, *supra* note 208, art. 6. Intermediate-level courts are permitted to restore jurisdiction to primary-level courts only by permission of the high-level courts. *Id.*

<sup>216</sup> *Id.* art. 11. It is worth noting that this provision is analogous to provisions in U.S. environmental law requiring citizen suits to give notice to the relevant agency, *see, e.g.*, 42 U.S.C. § 7604(b) (2012), except that the notice in this case comes *after* the suit has commenced, and therefore serves only to notify the agency of the violation, not to allow the agency to step in before the public-interest suit is brought.

<sup>217</sup> *Environmental Public-Interest Interpretation Draft*, *supra* note 208, art. 11.

and there local noncompliance largely frustrated evaluators' efforts.<sup>218</sup> The EPL '14 provides local governments with a useful tool for monitoring industry compliance with environmental laws and then encourages them to use this tool by putting greater pressure on officials to meet environmental-protection targets. What it cannot do is guarantee noninterference in the course of litigation. Until substantial centralization of the courts is achieved, it is likely that local governments need to at least tacitly consent to bring environmental public-interest litigation.

The EPL '14, by empowering citizen groups to keep an eye on industry, helps the central government to solve a further problem: the difficulty of monitoring compliance with central-government policies under fiscal decentralization. When local governments may be tempted to weaken their enforcement of environmental legislation, either in order to promote short-term economic growth in their jurisdiction or for personal gain, it is difficult for EPBs to intervene—although Article 67 (allowing higher-level EPBs to impose punishments directly on lower-level officials) will provide a counterweight to threats from local governments. Citizen groups, on the other hand, are likely to prefer long-term policies and so make for a handy monitoring tool.<sup>219</sup>

### B. *Final Thoughts*

Public-interest litigation will be a useful monitoring tool, but it is by no means a magic bullet. One possible outcome of the new EPL is that local governments, pressured by the strengthened top-down sanctioning enabled by Articles 26 and 67 of the new law, will attempt to comply with environmental legislation. In this case, they could allow or even encourage environmental litigation as a means of more cheaply monitoring and enforcing environmental litigation. Under this scenario, China will see a rise in environmental public-interest litigation that could go a long way toward solving the country's implementation problems.

Even without local-government participation, public-interest litigation could serve a number of useful roles. The nearly simultaneous establishment of an environmental tribunal at the SPC and an environmental court at the next-highest level may be intended to encourage plaintiffs to bring environmental cases at higher levels, where local protectionism would presumably be less of a

---

<sup>218</sup> See *supra* Part I.B.2.

<sup>219</sup> A similar monitoring function (additional to enforcement) was part of the rationale behind U.S. citizen suit provisions: groups of citizens were to engage in the initial fact-finding and legal work and then bring suit, at which point the government would take over. Will Reisinger, Trent A. Dougherty & Nolan Moser, *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 11–12 (2010) ("One of the drafters of the CAA's citizen suit provision said he envisioned that citizens would be useful 'for detecting violations and bringing them to the attention of the enforcement agencies,' who presumably would then take over enforcement proceedings." (quoting Senate Debate on S. 4358, Sept. 21, 1970, reprinted in A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 280 (1974))).



concern, and the central government would have more control.<sup>220</sup> Alternatively, local public-interest cases, and the media attention they tend to attract, could be used as a means to alert higher-level officials to environmental problems.

The Communist Party walks a tightrope with regard to environmental regulation: if it fails to satisfy the needs of its population with regard to basic public health and environmental rights, it could face a crisis of legitimacy;<sup>221</sup> if it substantially reforms its political or judicial system, however, it may fear a slowdown in economic development or a weakening of Party control.<sup>222</sup> The EPL '14 is a careful step, not a great leap, toward a more sustainable system. Whether it will succeed will depend on the reaction of local governments, the capacity of the NGO community to step up to the plate as public-interest litigators, and the implementation efforts of the central government.

### C. Further Research

The author would like to point out a few caveats to this Note's arguments. First, a basic sort of rationally maximizing behavior is assumed: officials obey when they are threatened, and at other times attempt to maximize the benefits of their office; likewise, environmental groups operate because their members have longer-term interests in the area than the government. Relaxing this assumption could lead to some interesting exploration into culture under authoritarian regimes which is not covered by this Note. Second, information on local court cases is difficult to track down, and even some local regulations are not easily available; as a result, there may be activity in the courts which is unknown to the author. Finally, this Note treats the central government as a monolith, when in fact it consists of a number of different power centers with varying spheres of influence.

These flaws hopefully indicate to the reader that contemporary Chinese environmental policy is a fertile field for future research. The law is constantly evolving—the NPC is currently in the process of revising the Air Pollution Prevention and Control Law,<sup>223</sup> which provides for a stronger permitting system,<sup>224</sup> relatively stiff penalties for violations of the law,<sup>225</sup> and the respective role of the central and local governments.<sup>226</sup> Another interesting avenue for re-

<sup>220</sup> A case could be brought to a Higher People's Court as a court of first instance if the local court where it was brought transfers it. Organic Law of the People's Court, *supra* note 11, art. 27(2). The SPC can elect to hear any case as a court of first instance. *Id.* art. 31(1).

<sup>221</sup> See generally Wang, *supra* note 76.

<sup>222</sup> Erin Ryan, *The Elaborate Paper Tiger: Environmental Enforcement and the Rule of Law in China*, 24 DUKE ENVTL. L. & POL'Y F. 184, 226–28 (2014).

<sup>223</sup> Zhonghua Renmin Gonghe Guo Daqi Wuran Fangzhi Fa (Xiuding Caoan)

(中华人民共和国大气污染防治法 (修订草案)) [People's Republic of China Air Pollution Prevention Law (revised draft)] ZHONGGUO RENDA WANG [hereinafter Air Pollution Prevention Law]. For an overview of the draft amendment, see Barbara Finamore, *Cleaning China's Smoggy Skies: China Released Draft Air Pollution Law Amendments for Public Comment*, SWITCHBOARD (Sept. 11, 2014), <http://perma.cc/4QAK-N82Y>.

<sup>224</sup> See Air Pollution Prevention Law, *supra* note 223, arts. 16, 76(1).

<sup>225</sup> See *id.* ch. 7.

<sup>226</sup> See *id.* arts. 3–7.

search is the use of environmental provisions from the United States and elsewhere in constructing China's system of environmental law.<sup>227</sup>

---

<sup>227</sup> This Note has already pointed out the similarities between Chinese public-interest cases and U.S. citizen suits. *See supra* Part III.A. Compare, e.g., *Environmental Public-Interest Interpretation Draft*, *supra* note 208, arts. 19, 20 (allowing compensation sufficient to “restore the environmental ecology to the state and function it was in before the harm occurred,” as well as to cover “loss of service functions during the period of . . . restoration” and “emergency disposal costs”), with 15 C.F.R. § 990.10 (2014) (“The goal of the Oil Pollution Act . . . is achieved through the return of the injured natural resources and services to baseline and compensation for interim losses of such natural resources and services from the date of the incident until recovery . . . and pursuing implementation or funding of this plan by responsible parties.”), and 33 U.S.C. § 2702(b)(1) (2012) (allowing recovery of costs incurred in responding to oil spills).