

Field Notes From the Far East: China's New Public Interest Environmental Protection Law in Action

by Yanmei Lin and Jack Tuholske

Yanmei Lin is an Associate Professor of Law and Associate Director at U.S.-Asia Partnerships for Environmental Law at Vermont Law School. Jack Tuholske is Director of the Vermont Law School Water and Justice Program and a Technical Advisor to the Partnerships program.

Judicial Interpretation on Environmental Civil Public Interest Litigation, which is a powerful sword, has been made. We hope this sword can cut through the dirty stream and clean the grey smog air. It will be like a sword of Damocles that hangs above the polluters.

—Justice Zheng Xuelin, Director of Environment and Resources Law Tribunal, Supreme People's Court, January 7, 2015¹

I. Introduction

On May 15, 2015, the Nanping Intermediate People's Court in Fujian Province conducted the first-ever Chinese trial involving environmental civil public interest litigation.² The case, which concerned resource destruction and environmental restoration related to an illegal mining site, was heard under China's new Environmental Protection Law (EPL),³ a strongly worded mandate that includes, among other potentially far-reaching provisions, a right of standing for nongovernmental organizations (NGOs) to bring environmental cases. While China's long-term commitment to environmental protection through judicial action is not yet clear, this case, and others still pending, may one day be seen as a pivotal turning point in Chinese

environmental litigation, akin to landmark U.S. cases in the 1960s and early 1970s such as *Sierra Club v. Morton*⁴ and *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*⁵ that heralded a sea change in U.S. environmental protection and established the role of the courts in enforcing environmental laws.

The widespread failure of Chinese environmental law to stem pollution and destruction of natural resources is well-documented.⁶ As one author notes, "China is responsible for a third of the planet's greenhouse gas output and has sixteen of the world's twenty most polluted cities. Life expectancy in the north has decreased by 5.5 years due to air pollution, and severe water contamination and scarcity have compounded land deterioration problems."⁷ China has allowed private tort law

1. See Zheng Xuelin, *Spending Ten Years Polishing a Sword and Showing It Today*, http://mp.weixin.qq.com/s?__biz=MzAxODA5MjIzNA==&mid=203515662&idx=1&sn=2ad0d4217bfb1bb14355e52706d0f9fa#rd.

2. See Te-ping Chen, *Environmental Trial Tests Beijing's Nerve on Pollution*, WALL ST. J., May 18, 2015, available at <http://www.wsj.com/articles/environmental-trial-kicks-off-in-china-1431939272>.

3. Environmental Protection Law (promulgated by the Standing Comm. Nat'l People's Congress on April 24, 2014, effective Jan. 1, 2015) (China), available at http://www.npc.gov.cn/huiyi/lfxz/hjbhfxzaca/2014-04/25/content_1861320.htm.

4. 405 U.S. 727, 2 ELR 20192 (1972). A classic "lose-the-battle-win-the-war" paradigm, the decision opened the door to NGO standing to sue based on noneconomic injury and gave litigants a simple road map for standing that endures to this day, despite occasional attempts by more conservative justices to rein in environmental litigation.

5. 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971). Circuit Judge J. Skelly Wright's admonishment that the National Environmental Policy Act (NEPA) (42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209) "is not a 'paper tiger' and 'promises a flood of litigation,'" proved prescient. 449 F.2d at 1111, 1114. *Calvert Cliffs* and a few other early decisions paved the way for NEPA to become the backbone of U.S. environmental law, to serve as a catalyst and conduit for public participation, and to foster far-reaching judicial oversight of federal agency environmental review. Notwithstanding a string of defeats at the hands of the U.S. Supreme Court, NEPA remains a highly effective public interest litigation tool. See Michael C. Blumm & Keith Mosman, *The Overlooked Role of the National Environmental Policy Act in Protecting the Western Environment: NEPA in the Ninth Circuit*, 2 WASH. J. ENVTL. L. & POL'Y 193 (2012).

6. See generally Erin Ryan, *The Elaborate Paper Tiger: Environmental Enforcement and the Rule of Law in China*, 23 DUKE ENVTL. L. & POL'Y F. 183 (2014).

7. Beina Xu, *China's Environmental Crisis*, <http://www.cfr.org/china/chinas-environmental-crisis/p12608> (last visited Apr. 25, 2014).

claims for pollution victims for about three decades⁸; yet, courts remained reluctant to permit NGOs to sue on behalf of the public interest for natural resource damages and restoration.⁹

However, over the past three years, the National People's Congress has reformed both China's civil procedure and environmental protection laws, opening the door to NGO participation in enforcing the environmental laws. In December 2014, the Supreme People's Court (SPC) gave its blessing to the new EPL through a formal interpretation of the law, which became effective in January 2015.¹⁰ Since that time, multiple cases have been filed under the new law by China's leading NGOs, occasionally with local NGOs as co-plaintiffs.¹¹ The case in Nanping Intermediate People's Court was the first to go to trial. Because of the broad scope of the requested relief, including restoration, loss of ecological services, and attorneys fees, the court's final decision could stimulate a sea change for Chinese environmental protection.

Reading the tea leaves of Chinese environmental law is complicated. Yet, the central government is acutely aware of both the enormous and devastating environmental problems the country faces, and the difficulties in enforcing environmental laws at the local level.¹² Thus, the country has ample motivation to foster a Chinese-style rule-of-law approach to rein in polluters.¹³ NGOs play a critical role in the enforcement of environmental laws in Western countries.¹⁴ For the moment, the Chinese government appears willing to see if the fruits of public interest environmental law can achieve success in China too.¹⁵

This Comment begins with a short discussion of the development of Chinese environmental civil litigation and the courts over the past decades. We then provide an overview of China's new EPL, focusing on sections that promote standing and access to information. We

conclude with a detailed examination of the Nanping case, including observations from the lead attorney and others involved with the case, and some thoughts about the future of environmental public interest litigation in China.

II. First Steps: China's Experiment With Tort Suits Against Polluters

Suits between private parties for damages to health and property from industrial pollution appeared in China in the late 1980s.¹⁶ Styled as traditional tort claims for damages, these suits resulted in money damages of modest proportions.¹⁷ While an in-depth discussion of environmental tort law is beyond the scope of this Comment, the difficulties of using tort law to remedy pervasive pollution problems provides a backdrop for understanding why public interest suits are an important component of using the legal system to protect the environment.

Tort law has been and remains a means of holding polluters legally accountable. However, tort law has inherent weaknesses as a means for remedying pervasive pollution problems, and those weaknesses are amplified by structural problems in China's legal system.¹⁸ The first weakness stems from the nature of tort law itself. Cases focus on a specific problem and proceed on a random, ad hoc basis, with varying results. While it is true that the deterrent value of tort law may prompt polluters to modify their behavior to avoid liability, the process is slow and the results are uncertain. Even large judgments and punitive damage awards may equate to only a fraction of a single year's profits for a large multinational corporation. Consequential damages can be limited in scope and difficult to prove. Injunctive relief is not ensured.

American environmental tort law has evolved considerably. Large pollution-related tort judgments and settlements in the United States are routine and run into the hundreds of millions of dollars. The availability of significant punitive damage awards by juries adds to the heft of tort suits. For example, the *Exxon Valdez* Alaskan oil spill litigation resulted in a judgment of approximately \$507 million for Alaskan natives, fishermen, and others suing over the loss of fish resources. Attorneys also secured a \$2.5 billion punitive damage award, later reduced by the U.S. Supreme Court to \$500 million.¹⁹ A trial judge in California ordered three companies to pay \$1.15 billion dollars into the state's Childhood Lead Poisoning Prevention

8. China's General Principle for Civil Law, first adopted in 1986, provided a legal basis for tort liability claims. In 2001, the SPC promulgated Several Issues Related to Civil Litigation that included provisions on environmental private tort cases, such as shifting the burden of proof on causation.

9. Robert Percival & Huiyu Zhao, *The Role of Civil Society in Environmental Governance in the United States and China*, 24 DUKE ENVTL. L. & POL'Y F. 142, 171 (2014).

10. Barbara Finamore, *New Weapons in the War on Pollution: China's Environmental Protection Law Amendments*, http://switchboard.nrdc.org/blogs/bfinamore/new_weapons_in_the_war_on_poll.html.

11. Liu Qin, *China Court to Hear 30m Yuan Air Pollution Lawsuit*, <https://www.chinadialogue.net/article/show/single/en/7790-China-court-to-hear-3-m-yuan-air-pollution-lawsuit> (last visited Mar. 25, 2015).

12. Agence France-Presse, *China Vows to Fight Pollution "With All Our Might,"* GUARDIAN, Mar. 5, 2015, available at <http://www.theguardian.com/environment/2015/mar/05/china-vows-to-fight-pollution-with-all-our-might>; see also Debra Tan, *The War on Water Pollution*, <http://chinawatererrisk.org/resources/analysis-reviews/the-war-on-water-pollution/>.

13. See generally Ryan, *supra* note 6, at 221-25.

14. Public interest environmental litigation has blossomed into a strong and widespread legal community in the United States since the 1970s. For example, the NGO Earthjustice's website lists more than 75 full-time attorneys, plus an equal number of supervisory, media, and policy personnel on staff. See <http://earthjustice.org/about/staff> (last visited July 2, 2015). Other national, regional, and local NGOs employ several hundred additional full-time public interest attorneys. We estimate that there are 400-500 private attorneys who work on public interest environmental cases.

15. See Percival & Zhao, *supra* note 9, at 143-79.

16. Private tort litigation against polluters in China was first provided for in the civil liability principles of Article 124 of the General Principles of the Civil Law in 1986, and Article 41 of the 1989 EPL. The 1989 EPL was originally enacted in 1979 on a trial basis and then reaffirmed in 1989.

17. Adam Moser & Tseming Yang, *Environmental Tort Litigation in China*, 41 ELR 10895-99 (Oct. 2011).

18. *Id.* at 10897-98.

19. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). Writing for a divided Supreme Court in this controversial opinion, Justice David Souter expressed concern about the "stark unpredictability" of punitive damage awards, and limited such damages in maritime cases to an amount equal to the actual damages. *Id.* at 499.

Branch in 2014 based on a public nuisance theory.²⁰ In California alone, numerous groundwater contamination suits have led to decades of litigation and settlements in the hundreds of millions of dollars.²¹ The story embodied in the popular book and movie *A Civil Action* has been replayed throughout courtrooms in the United States; environmental tort actions do hold polluters liable and result in significant damage awards.

Further, many states permit restoration damages under common-law principles,²² and those restoration damages can greatly exceed consequential damages for property loss in cases of soil and groundwater contamination. For example, in *Sunburst School District No. 2 v. Texaco, Inc.*, the Montana Supreme Court upheld a damage award of \$16 million, though actual nuisance and wrongful occupation property damages were less than \$1 million.²³ Pollution prevention is now a cost of doing business, and accordingly, practices in many industries have changed. Moreover, tort liability is now complemented by statutory environmental laws permitting citizen suits, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).²⁴

China's initial foray into holding polluters legally accountable was premised on private tort law. However, the inherent problems in using private tort law to address pollution and destruction of natural resources are amplified in China by its limited court system, vaguely worded laws, and lack of legal tradition.²⁵ Thus far, judgments have been modest and remedies have been difficult to enforce. Even the largest damage award in the Rongping Joint Chemical Plant case in Fujian Province in 2005 did not solve the environmental problems that caused the pollution.²⁶ Yet, the Chinese government is acutely aware of the huge cost that pollution is taking on the country, and the growing discontent among citizens who must bear these costs.

Thousands of public protests over environmental problems occur each year, and the government has openly noted failures in environmental protection.²⁷

III. Seeds of Change: Public Interest Law in China

Chinese NGOs first filed public interest pollution cases beginning in 2009. Friends of Nature, China's oldest registered NGO, filed test cases that did not seek tort damages for individuals, but instead damages for loss of natural resources and restoration of the environment.²⁸ These cases achieved some success²⁹; however, considerable barriers to public interest litigation remained. China established specialized environmental courts, but their jurisdiction remained murky. Courts could simply refuse cases that were politically sensitive. Unlike the United States where lifetime-tenured federal judges provide an alternative forum to state and local courts, Chinese courts at the county and provincial level remain susceptible to the same political pressures that stymie enforcement of environmental laws and implement the pervasive mandate from the central government for gross domestic product growth.³⁰

The central government began addressing these barriers. On August 31, 2012, the Standing Committee of the National People's Congress adopted amendments to China's Civil Procedure Law that, for the first time, allow "governmental agencies and relevant organizations stipulated by laws" to initiate lawsuits for "acts that harm the public interest," including environmental pollution.³¹ The new provision appeared to open the door to case filings by NGOs as a "relevant organization stipulated by law."

However, Chinese environmental courts still refused to accept cases from NGO plaintiffs seeking direct enforcement of environmental laws. One high-profile case, a suit against the Shenhua Coal to Liquid and Chemical plant for allegedly causing both water pollution and desertification on a massive scale, was rejected through a phone call to the plaintiff's attorney.³² The All China Environmental Federation, an NGO affiliated with the Ministry of Environmental Protection, had several similar but less sensitive suits rejected. Chinese courts were reluctant to accept cases based on the change in the Civil Procedure Law without

20. *People v. Atlantic Richfield Co.*, No. 788657 (Santa Clara Cnty. Super. Ct., filed Mar. 23, 2000). The decision is currently under appeal. For a summary of the litigation, see <http://blog.pacificlegal.org/plf-files-amicus-brief-california-lead-paint-case/>.

21. See, e.g., https://en.wikipedia.org/wiki/Hinkley_groundwater_contamination (\$333 million settlement (the Erin Brockovich litigation)); <http://www.pe.com/articles/site-685565-epa-perchlorate.html> (\$11 million settlement).

22. See RESTATEMENT (SECOND) OF TORTS §929.

23. 165 P.3d 1079 (2007). The terms of the jury's damage award were complicated. "The jury awarded Sunburst compensatory damages of approximately \$16 million. The jury's special verdict included awards of \$170,000 for wrongful occupation of property, \$371,000 for constructive fraud, \$350,000 for the costs of environmental investigation, and a single award of \$226,500 for private nuisance, public nuisance and constitutional tort." *Id.* at 1085.

24. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405. See 42 U.S.C. §6972.

25. See Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 202-05 (2007).

26. *Id.* at 212-19. In *Zhang Changjian v. Pingnan Rongping Chemical Plant* (the Rongping Case), the Fujian High Court issued a judgment of 680,000RMB as property damage to 1,721 plaintiffs in Pingnan Village and an order to "stop harm." But the chemical plant did not cease operation; instead, it expanded production and obtained an environmental impact assessment approval for its expansion in 2009, four years after the judgment. According to a blog entry by Zhang Changjian, the lead plaintiff, the chemical plant continued posing harm to the plaintiffs' community. See Zhang Chanjian, http://blog.sina.com.cn/s/articlelist_1210028007_1_1.html.

27. See Wang, *supra* note 25, at 200 (noting that in 2005, more than 50,000 public protests over environmental issues occurred, and cataloguing official government statements about the lack of enforcement of environmental laws).

28. 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. 727-30 (2013).

29. For a more thorough discussion of these early cases, see, e.g., Wang Canfa, *Plaintiffs for China's Environmental Public Interest Litigation and the Controversy*, http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=63899#; Yanmei Lin, *Development of Environmental Public Interest Litigation in China: Seven Test Cases Studies*, in 5 CHINA ENVTL. Y.B. (2011).

30. See Ryan, *supra* note 6 at 215-16.

31. Civil Procedure Law art. 55 (2012) (China).

32. See Yanmei Lin & Shaobo Hu, *Environmental Civil Public Interest Litigation: Empowering Chinese Environmental NGOs to Fight Against Pollution*, CHINA ENVIRONMENT SERIES 13 (Wilson Center forthcoming fall, 2015).

a clear definition from the central government of the term “relevant organizations.”³³ American-style public interest law was not part of the judiciary’s legal vernacular.

Chinese environmental law shifted in a more profound way in 2014, when the National People’s Congress published proposed revisions to the EPL.³⁴ China’s basic environmental protection laws have been on the books since 1979, covering all major resources such as air, water, and forests. However, the country’s burgeoning pollution problems and the difficulties with enforcement highlighted the lack of an effective legal structure to control pollution. The cost of pollution to human health, productivity, and social stability did not escape the attention of the central government. The 2014 revisions were subject to two years of intense debate and scrutiny, both within the party and from NGOs that pushed for liberalized standing and broader remedies to strengthen judicial enforcement.³⁵

On April 24, 2014, the Standing Committee of the National People’s Congress approved the amendments to the EPL. The new law contains many groundbreaking provisions that can fundamentally change the role of courts in environmental protection.³⁶ For example, Article 58 provides that Chinese social organizations can bring suits on behalf of the public interest in situations involving pollution or ecological damage if the organizations meet the following two requirements: (1) they have registered with the civil affairs departments at or above the municipal level within the district; and (2) they have specialized in environmental protection public interest activities for five or more consecutive years and have no record of any violations of law. The term “relevant organizations” in the Civil Procedure Law is now clearly defined in a way to foster true public interest litigation.

Further, the SPC issued an important judicial interpretation of Article 58 of the new EPL that strengthens standing in environmental law. Entitled *Interpretation Regarding Certain Issues Related to Application of the Law in Environmental Civil Public Interest Litigation* (Judicial Interpretation),³⁷ it clarifies that Article 58 provides jurisdiction not only for past and ongoing harm, but also for “imminent” future harm. The scope of eligible NGOs with standing was clarified to include those registered at the district of municipalities directly under the central government, where many important Chinese environmental groups are registered, including Friends of Nature

and Nature University, both of which are registered at district civil affair bureaus in Beijing. An official from the Ministry of Civil Affairs estimates that approximately 700 NGOs in China are now eligible to file environmental public interest litigation.³⁸

The new EPL contains numerous other provisions that were given a strong interpretation by the SPC. While a thorough discussion of the new law is beyond the scope of this Comment, a few key provisions as interpreted by the SPC bear mention. First, the SPC clarified that courts have broad authority to remedy environmental harm that extends beyond traditional tort money damages. These remedies include issuing orders of “stop harm,” “cessation of inference,” “elimination of danger,” “return of property,” “restoration to original status,” and “damages.”³⁹ The new law provides for full restoration of a site to its pre-damage ecological condition and makes available damages for interim losses of ecological functions between actual ecological damage and restoration.⁴⁰ The Judicial Interpretation also allows a court to assess environmental damages based on the economic benefits gained by the polluters from noncompliance in cases where ecological environmental restoration costs are difficult to determine, such as air pollution cases.⁴¹ While NGOs may not accrue financial benefit from litigation, recovery of expert witness costs and fees is possible.

In addition, the SPC designates people’s courts of intermediate level or above as having jurisdiction in the first instance over environmental public interest cases.⁴² This jurisdictional arrangement helps prevent local protectionism where the local government would intervene in the decision of the basic people’s court to accept cases in order to shelter large polluters who support the local economy.⁴³

IV. New EPL in Action: The Nanping Case

A. Background

On December 21, 2014, Friends of Nature, a Beijing-based environmental NGO and one of the oldest independent NGOs in China, and Fujian Green Home, a local environmental NGO established in 1998, filed a complaint against four individuals in the Nanping Intermediate People’s Court, seeking cleanup and restoration of an illegal mining site.⁴⁴ The complaint alleged that three individual

33. *Id.*

34. For a cautious perspective on reading too much into changes in China’s legal structure, see Carl Minzner, *After the Fourth Plenum: What Direction for Law in China?*, CHINA BRIEF, Nov. 20, 2014, at http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=43105&cHash=2e9d73833dfb58abb3e530acc76f4ca4#.VWTQGUff8rU.

35. *Id.*

36. Tseming Yang, *The 2014 Revisions to China’s Environmental Protection Law* (Oct. 16, 2014), at http://cgd.swissre.com/risk_dialogue_magazine/Environmental_liability/The_2014_Revisions_of_Chinas_Environmental_Protection_Law.html.

37. SPC, INTERPRETATION REGARDING CERTAIN ISSUES RELATED TO APPLICATION OF THE LAW IN ENVIRONMENTAL CIVIL PUBLIC INTEREST LITIGATION, available at <http://www.mca.gov.cn/article/zwgf/fvfg/mjzgg/201501/20150100756493.shtml> [hereinafter Judicial Interpretation].

38. Hong Liao, Deputy Chief of Social Organizations Management Division at the Ministry of Civil Affairs, gave this estimate in response to a journalist’s question at a press conference organized by the SPC to release the Judicial Interpretation on Environmental Civil Public Interest Litigation on Jan. 7, 2015. The transcript for the press conference is available at <http://www.chinacourt.org/article/subjectdetail/id/MzAwNEJm4ABAA%3D%3D.shtml>.

39. Judicial Interpretation, *supra* note 37, art. 18.

40. *Id.* arts. 20-21.

41. *Id.* art. 23.

42. *Id.* art. 6.

43. See Rachel Stern, *From Dispute to Decision*, CHINA Q., 206, 294-312 (June 2011).

44. Friends of Nature, Fujian Green Home v. Xie Zhijin et al. (Nanping Interm. People’s Ct. filed Dec. 21, 2014), on January 1, 2015, Nanping Intermedi-

defendants purchased a mining claim from a fourth defendant, and then carried out mining activities at the Hulu Mountain Sand Base Hengxing Stone Factory without receiving a permit from the Land and Resources Bureau. The three individuals carried out mining activities from 2008 to 2010 and again in June 2011 without obtaining permits for occupation of wooded land and extension of the mining right in Hulu Mountain in Nanping City of Fujian Province, despite the repeated demands from the local Land and Resources Bureau to stop their activities.

Prior to the civil action, the Yanping District Procuratorate successfully brought criminal charges against the three individuals. The assessment report conducted by the Fujian Tianxian Judicial Appraisal Institute concluded that the three individuals destroyed 18,890.6 mu (approximately 3.112 acres) of wooded land.⁴⁵ In July 2014, the three individuals were sentenced to 14-18 months' imprisonment after being convicted of illegally occupying agricultural land.

However, the harm to the area's vegetation and ecological system as a result of the illegal mining operation remained unaddressed. In December 2014, representatives of the NGOs and their lawyers conducted a joint investigation of the site and interviewed local officials from both the Forestry Bureau and the Land and Resources Bureau. They also reviewed the judgment against the three individuals in the criminal case and consulted experts on the costs and methods to restore the damaged site.

Based on the evidence, interviews with officials, and evidence collected from the site visit, the two NGO plaintiffs filed their environmental public interest litigation against the four individuals under the new EPL, invoking the standing provisions of Article 58. Friends of Nature was represented by Xiang Liu, one of China's most experienced environmental lawyers, while Anxin Wu represented the local NGO Fujian Green Home.⁴⁶ On January 1, 2015, the same day that the newly amended EPL became effective, the court accepted the case as the first public interest case brought under the law.

The NGO plaintiffs sought remedies for restoration of the two hectares (approximately 4.9 acres) destroyed by mining, including: (1) cleaning and restoring the site; (2) ordering the defendants to retain a competent entity to assess the cost and develop the plan for cleanup and restoration of the damaged site and implement the plans accordingly; or, if the defendants failed to do so, ordering the defendants to pay the third parties who have regula-

tory responsibilities to clean up and restore the site; and (3) recovery of costs and litigation fees including attorneys fees. The NGO plaintiffs added Nanping Yanping District Land and Resources Bureau and the Forestry Bureau as the third parties.

On April 19, 2015, Friends of Nature and Fujian Green Home submitted an application to modify the remedies to be consistent with the provisions in the new Judicial Interpretation issued by the SPC.⁴⁷ The modified remedies included a three-month time frame on restoration, cleanup, and restoration costs of 1,101,900 Renminbi (RMB), loss of interim "ecological services" valued at 1,340,000 RMB, and itemized attorneys fees, expert witness fees, and travel costs for both plaintiffs.

B. Trial in Nanping Intermediate People's Court

Attorneys for the NGO plaintiffs as well as three of the defendants (without counsel) appeared in Nanping Intermediate People's Court on May 15, 2015, for the Chinese equivalent of a trial for civil liability and damages for the illegal mining. Unlike previous environmental damage cases where plaintiffs sought compensation for personal injuries, the thrust of this case was to obtain damages for loss of ecosystem services and restoration of the damaged mining site. Key evidence from the plaintiffs included the criminal case judgment, the judicial assessment about the scope of the damaged site conducted during the criminal prosecution, and the corrective orders issued by the local Land and Resources Bureau. Despite apparent clear liability, the case presented issues of first impression under the new EPL.

Underneath the veneer of a seemingly simple case (the defendants had already been convicted of criminal liability for the same acts), five novel and complex legal issues needed to be resolved: (1) whether Friends of Nature met the legal requirements for standing (the NGO plaintiff had registered as China Culture Academy Green Institute with the Ministry of Civil Affairs in 1999, then registered as Beijing Chaoyang District Friends of Nature Environmental Research Institute in May 2010); (2) whether the defendants' mining activities constituted ecological destruction harming the public interest for which they should bear joint and several tort liability⁴⁸; (3) whether the requested remedies were reasonable and should be the methods by which the defendants would bear the tort liability; (4) whether the new EPL, effective January 1, 2015, applied retroactively to the defendants' actions during 2008-2010; and (5) whether the two government agency third parties had legal responsibilities to clean up and restore the site if the defendants failed to do so; the two parties objected to the

ate Court accepted the case (Nan Min Chizi No. 38) (copy of Complaint on file with authors).

45. Mu is a Chinese unit of land. While the area of land in this case is relatively small, it is a steep hillside and the mine left a significant scar. Still, the harsh penalty for the relatively small disturbance seems significant.

46. Xiang Liu is the Huanzhu Law Firm's managing attorney, and is registered as a lawyer at the Shanghai Jinzhuan Law Firm. Anxin Wu, Beijing Huanzhu Law Firm's fellow, is registered as a lawyer at the Hubei Longzhong Law Firm. The Huanzhu Law Firm is a public interest environmental law firm affiliated with the Center for Legal Assistance to Pollution Victims, which was founded by Prof. Wang Cangfa, one of China's leading authorities on environmental law who has been at the forefront of efforts to use the legal system to address pollution problems.

47. An application to modify and add claims to *Friends of Nature, Fujian Green Home v. Xie Zhijin et al.* submitted by the plaintiffs to the court on April 19, 2015 (copy on file with the authors).

48. Public interest law is still considered in the overall context of tort law in China. Defendants are always private entities, unlike public interest law in the United States, where government entities are often taken to court for failing to enforce the law.

plaintiffs' proposed remedies to order them to clean up and restore the site.

Key evidence the NGO plaintiffs provided to support their remedies claim included an initial assessment report by Beijing China Forestry Assets Appraisal Company. Two experts who worked for that company, and a scientist from Xiamen University, collected the initial data from the destroyed site including tree species, soil damage, extent of damaged vegetation, and the site's value as wildlife habitat. These experts were present at the trial and provided expert testimony on their data-collection methods and conclusions.

Both parties examined the witnesses (who did not include the parties themselves). Three judges also questioned the experts extensively from the bench on the basis for their opinions. The plaintiffs' attorneys presented oral argument and introduced the evidence.

In addition to opinions presented by their attorneys, the defendants individually presented their version of the facts and arguments verbally, without any supporting documents or witnesses.⁴⁹ Their chief argument was that mining activities were legal, based on verbal permission given by local authorities to begin mining while the permits were being processed. They argued that similar mines in that area had not received permits but were allowed to operate. Because the defendants intended to restore the damaged site once the mining was completed, they claimed the mining was a reasonable use of resources, was undertaken at the urging of local authorities, and was not an act of ecological destruction.

During the trial, the plaintiffs' lead attorney, Xiang Liu, presented arguments on the five key legal issues. First, although Friends of Nature had registered under a different legal status due to changes of social organization regulations in China, ample evidence, including the decisions and minutes of the board of directors of the NGO and annual reports and records the plaintiffs provided, showed that the NGO had specialized in environmental protection public interest activities for more than five consecutive years and thus met the standing requirement. Second, it was clear that defendants' "illegal mining activities"⁵⁰ caused the destruction of the natural wooded land and was an act of ecological destruction that resulted in harm to the forest and wildlife habitat. Verbal permissions by local authorities, if there were any, did not change the illegal nature of the defendants' activities. Whatever the relationship between the mining companies and local governments, it should not exempt them from civil liability under national environmental laws.

Third, the requested remedies for restoration of the damaged site and compensation for the interim losses of

ecological function were based on Article 20 of the Judicial Interpretation, and the methods of the assessment used in this case were recommended by the Ministry of Environmental Protection⁵¹: thus, the plaintiffs used accepted methodologies to prove the public interest natural resource damages. Fourth, because the ecological harm has not been remedied and continues impacting the public interest, the defendants should bear civil liability even though their acts of ecological destruction were carried out from 2008 to 2010, prior to the enactment of the new EPL. Finally, the third parties are government agencies that have responsibilities to protect the forest and determine proper land use; thus, those governmental third parties should supervise the restoration work undertaken by the defendants and implement the restoration plan with the money paid by the defendants if the defendants failed to complete the restoration remedies on time.

At the conclusion of the trial, the presiding judge allowed the defendants to submit new evidence within 15 days, based in part on the fact that one defendant was still in prison. On June 5, 2015, the court held a second hearing to examine the new evidence submitted by the defendants.⁵² To support their defense that they had received verbal permission to mine, the defendants presented copies of local authorities' official documents that investors of mining would receive policy benefits so that they can start mining immediately while applying for permits.

The defendants also made a new argument that they would have received all the permits required by law if the Hefei-to-Fujian high-speed railroad did not pass through the Hulu Mountain where the mining site is located. The railroad was lawfully permitted, and the railroad company was required to pay compensation to ongoing activities that had to be halted because of construction. Because they had not yet received compensation from the railroad construction company, the defendants claimed that they would not be able to implement the remedies even if the court found them liable for the restoration damages. The plaintiffs contested the new evidence and restated their argument that permission from the local governments did not change the fact that the defendants had violated China's national forest protection law by causing harm to the natural forest.

At the conclusion of the hearing, the court did not announce a judgment. However, based on conversations with the judge following the hearing (such ex parte communications are not unlawful or unusual in China), the plaintiffs believe a final decision will be forthcoming in the near future.

49. This description of the trial in Nanping Intermediate People's Court is provided by the Comment's co-author Yanmei Lin, who was present in the courtroom and observed the proceedings. The court provided a real-time record of the trial to the public through its official Sina Weibo account, a social media in China.

50. The defendants conducted mining without permits and transferred mining rights without approval.

51. Ministry of Environmental Protection, Recommended Methods for Evaluation and Assessment of Environmental Damages, MEP Gen. Office No. 90 (2d ed. 2014) (in Chinese), available at http://www.mep.gov.cn/gkml/hbb/bgt/201411/t20141105_291159.htm.

52. The description of the second court hearing is provided by Comment co-author Yanmei Lin, who was present in the courtroom and observed the proceedings.

V. A “Road Less Traveled” No More?

The importance of the Friends of Nature case in Nanping Intermediate People’s Court in terms of defining the role of Chinese courts in environmental protection was noticed by Western media as well.⁵³ And the Nanping case is only one of at least 15 public interest environmental cases that have been filed under the new EPL as of July 2015.⁵⁴ The outcome of these cases will provide a critical measure of whether the Chinese government is serious about allowing NGOs to participate in the enforcement of China’s new EPL.

Significant barriers remain. Some NGOs are reluctant to use the courts at all, due to frustration with years of refusal by environmental courts to even accept cases,⁵⁵ difficulties in enforcing remedies, and fears of reprisals. In China, NGOs must be officially registered (that is to say, approved) by local governments and must undergo an annual good-standing check. NGOs, in particular local NGOs, might risk their registration status by bringing controversial cases.

Another barrier is lack of access to information. While we were working with the Environmental Law Clinic at Southwest China Forestry University in Kunming, we witnessed repeated resistance by local Environmental Protection Bureaus to obtaining basic information such as environmental impact assessments and water quality monitoring data. The new EPL tries to remedy this long-standing problem by mandating that government agencies provide access to information.⁵⁶ The language in Article 53 is clear and direct:

Citizens, legal persons and other organizations shall have the right to obtain environmental information, participate and supervise the activities of environment protection in accordance with the law. The competent environmental protection administrations of the people’s governments at various levels and other departments with environmental supervision responsibilities shall disclose environmental information pursuant to the law, improve public participation procedures, and facilitate citizens, legal persons

and other organizations to participate in, and supervise, environmental protection work.⁵⁷

The Judicial Interpretation also creates a presumption in favor of the plaintiff if a defendant does not disclose information.⁵⁸ However, the new EPL lacks clear enforcement mechanisms for access to information; recalcitrance by local governments to sharing information is deeply engrained and will not change quickly.

Yet another barrier is the lack of resources to hire attorneys and fund public interest environmental litigation. There is but one public interest environmental law firm in China, the Huangzhu Law Firm in Beijing. Some NGOs, like Friends of Nature, have staff attorneys. But funding for public interest litigation remains a barrier. China lacks a tax structure similar to Internal Revenue Code §501(c)(3) that incentivizes private charitable donations to NGOs and has been so critical to the funding of Western environmental NGOs such as Earthjustice and the Natural Resources Defense Council.

Enforcement of environmental law in the United States also benefits from fee-shifting citizen suit provisions in many environmental laws⁵⁹ and from the Equal Access to Justice Act⁶⁰ for legal challenges under the Administrative Procedure Act.⁶¹ Fee-shifting creates a level playing field in the courtroom: Large industries can afford corporate counsel; NGOs often cannot. Attorneys fees have been awarded in Chinese tort cases. The Nanping case and others will test whether public interest NGOs can also recover fees. As in the United States, it will take time to develop yardsticks for measuring recovery of attorneys fees based on factors such as appropriate hourly rates and reasonableness of amount of attorney time billed.⁶²

We began this Comment by noting that reading the tea leaves of China’s legal system is difficult. Our cautious optimism about environmental public interest litigation is

53. See, e.g., Chen, *supra* note 1; Sui-Lee Wee, *In China, a Fight to Save a Forest Tests Toughened Environment Law*, REUTERS, Feb. 10, 2015, available at <http://www.reuters.com/article/2015/02/10/us-china-environment-law-suit-idUSKBN0LE2P20150210>; *China Landmark Environmental Lawsuit Trial Begins*, <http://blackstonetoday.blogspot.com/2015/05/china-landmark-environmental-lawsuit.html>.

54. Judge Bi Dongsheng from the Supreme People’s Court mentioned that 15 environmental public interest cases have been accepted in China as of July 20, 2015, in his opening remarks to an annual conference of China Environment and Resources Law Society in Shanghai. See Xu Hui, *Courts Accepted 15 Environmental Public Interest Cases Since the Environmental Protection Law Came Into Effect*, SHANGHAI LEGAL DAILY, July 20, 2015, available at http://newspaper.jfdaily.com/shfzb/html/2015-07/20/content_114428.htm.

55. See Wang, *supra* note 25. We do not mean to imply that all courts refuse to accept cases. At a recent presentation to government and business leaders in Kunming regarding the new EPL, Judge Wang Xianghong of the Kunming Environmental Court remarked that “the courthouse door is open” and expressed surprise at the paucity of cases that had been filed in her court.

56. See Yang, *supra* note 36.

57. Environmental Protection Law (China), *supra* note 2, art. 58.

58. In Article 13 of the Judicial Interpretation, the SPC creates a presumption in favor of the plaintiff if a defendant refuses to provide information to the plaintiff about pollution from a facility, stating:

If law, regulations, and rules stipulate that the defendant should have the information or there is evidence proving that the defendant has the information but refuses to provide it, and the plaintiff claims that the relevant information is not in favor of the defendant, the people’s court may infer that the assertions of the plaintiff have been established.

See Judicial Interpretation (China), *supra* note 37, art. 13.

59. Examples include the Clean Air Act (CAA), 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618, see 42 U.S.C. §7604; the Clean Water Act (CWA), 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607, see 33 U.S.C. §1365; and the Endangered Species Act (ESA), 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18, see 16 U.S.C. §1540(g).

60. Equal Access to Justice Act, 28 U.S.C. §2412.

61. 5 U.S.C. §§501 et seq.

62. In Article 22, the Judicial Interpretation provides that “where plaintiff requests defendant to afford testing and appraisal fees, reasonable attorney fees and other reasonable costs related to the litigation, people’s courts should support it.” See Judicial Interpretation (China), *supra* note 37, art. 22. Article 58 of the new EPL prohibits NGOs from profiting from environmental public interest litigation, see Environmental Protection Law (China), *supra* note 2, art. 58; and Article 34 of the Judicial Interpretation further clarifies that such prohibition applies to NGOs seeking illegal economic benefits by accepting properties from third parties or other methods, see Judicial Interpretation (China), *supra* note 37, art. 34.

tempered with a realism that courthouse doors can close as quickly as they have opened. Moreover, the above-noted structural barriers are formidable. Perhaps even more important, key issues regarding damages and remedies will have to be resolved by test cases like the Nanping mining case. As with test cases in the United States, we believe that these early cases will go a long way toward shaping the future of environmental public interest litigation in China. The path forward is far from certain.

Still, the 2014 EPL, strengthened by the SPC's Judicial Interpretation, has enabled NGOs to bring the first true public interest environmental litigation. NGOs have a much stronger seat at the table of environmental governance. Many of the leading Chinese environmental NGOs are eager to use these new legal tools.⁶³ Moreover, the structure of the new law, coupled with the Judicial

Interpretation, makes it a strong tool to change the local-central government, regulated-regulator political dynamic that could deepen the rule of law in China. The central government appears willing to tackle its serious pollution challenges in a new fashion, with rule of law according to Chinese principles. The degraded status quo is unacceptable to the Chinese people.

With the Nanping mining case and other test cases, environmental public interest litigation might be "sharpened and shaded as a powerful tool" to correct environmental abuses, in the words of Chief Justice Zheng Xuelin, Director of the Environment and Resources Law Tribunal of the SPC. Such a tool certainly has been a key element in the development of U.S. environmental protection over the past four decades. We believe the timing is ripe for a similar development in China.

63. We note that the rise of public interest litigation is occurring in other parts of the developing world that confront similar problems of horrendous pollution and lax and/or underfunded government enforcement of existing environmental laws. *See, e.g.,* JONA RAZZAQYE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN, AND BANGLADESH (2004).