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**Assessing China's Environmental NGO Public Interest Litigation
Against the U.S. Citizen Suit Model**

**A dissertation submitted to the Faculty in partial fulfillment of the requirements for
the degree of Doctorate in Judicial Studies (S.J.D.) in environmental law
at the Elisabeth Haub School of Law at Pace University**

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September 2021

Assessing China's Environmental NGO Public Interest Litigation

Against the U.S. Citizen Suit Model

Huishihan Wang

Abstract

The U.S. citizen-suit mechanism, an epitome of public participation, was established and acted in many cases based on the rapid growth of the government agencies, legislation, and Environmental Non-Governmental Organizations (ENGOS) since the 1960s. As an advanced private enforcement measure, the citizen suit was acknowledged as a supplement and effective assurance to environmental governance.¹ The post-1960s also witnessed a dramatic growth of the U.S. citizen suit with the evolutions of all-level administrative agencies, legislation, and environmental movements. Simultaneously, the U.S. ENGOS, such as the Sierra Club, the Natural Resources Defense Council (NRDC), and the Environmental Defense Fund (EDF), proactively utilized citizen suits to promote legislation and regulations. (e.g., *Sierra Club v. Morton*,² *NRDC v. Train*³, *EDF v. TVA*⁴.) Gradually, the U.S. citizen-suit mechanism's legislative spirit and the

¹ Nat. Res. Def. Council v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974) (The CAA Amendments revealed that Congress issued citizen-suit provisions as a supplemental and effective assurance that the Act's implementation and enforcement); Katherine A. Rouse, *Holding the EPA Accountable: Judicial Construction of Environmental Citizen Suit Provisions*, 93 N.Y.U. L. REV. 1271, 1282 (2018).

² *Sierra Club v. Morton*, 405 US 727 (1972).

³ Nat. Res. Def. Council v. Train, 166 U.S. App. D.C. 312, 510 F.2d 692 (1974) (The NRDC brought this action to against the EPA and its Administrator Russell E. Train, seeking to compel the publication of effluent limitation guidelines under the section 304(b) (1) (A) of the Federal Water Pollution Control Amendments of 1972.)

⁴ *Env't Def. Fund v. Tenn. Val. Auth.*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972); *Env't Def. Fund v. Tennessee Val. Auth.*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

effective implementation of provisions have become an advanced archetype to solve various problems to achieve environmental justice.

Since the “Reform and Opening,” China’s economy has been booming as various industries have been constantly developed, but environmental quality and public health have suffered severe problems.⁵ Besides Chinese slow but ambitious environmental legislation and administration, Chinese ENGOs and attorneys consciously initiated Chinese-style citizen-suit experiments based on the U.S. private enforcement experiences, known as China’s environmental public interest litigation (EPIL) mechanism.⁶ The EPIL mechanism was then officially established by the amendment of the Civil Procedural Law 2013 and Environmental Protection Law 2015 as a significant legal breakthrough to authorize ENGOs and agencies to file lawsuits to improve environmental law enforcement.

However, the Chinese EPIL provisions adopted the theory of making private laws public to practice the EPIL system but lacked some essential procedures of the U.S. citizen suit, including pre-suit notice and injunctive relief. Additionally, Chinese ENGOs have not been authorized to

⁵ See Hu Jintao (胡锦涛), Address at the 18th Nat’l Cong. of the Communist Party of China (CPC) *Firmly March on the Path of Socialism with Chinese Characteristics and Strive to Complete the Building of a Moderately Prosperous Society in All Respects--Report to the Eighteenth National Congress of the Communist Party of China*, CHINA. ORG. CN (Nov. 8, 2012), http://www.china.org.cn/china/18th_cpc_congress/2012-11/16/content_27137540.htm

⁶ In China, the term environmental public interest litigation (EPIL) is to authorize representatives of the public, ENGOs and some government agencies to enforce against violations. The term is contrasted with the private interest litigation, the tort cases. The system was proposed to design and establish same as the U.S. citizen suit before 2012, but lawmakers did not authorize citizen individuals to enforce against environmental violations. This dissertation selects ENGO EPIL to compare with the U.S. citizen suit and concentrate on the ENGOs actions. The research papers that were comparative studies between the two countries’ private enforcement were always focused on ENGO EPIL in China and the U.S. citizen suit because of the same kind of plaintiff.

enforce against government agencies' violations. Gradually, although China's forward-looking ENGOs and attorneys endeavored to commence EPIL actions, ENGOs have struggled to survive and act weakly recently, so that the efficacy of public participation and private enforcement has gradually become powerless. Meanwhile, Chinese procuratorates and provincial and prefecture city governments were also approved to litigate EPIL actions.⁷ One purpose of EPIL – that of overseeing and compelling government agencies to carry out their responsibilities – then has been downplayed, as officials increasingly focused on enforcing violations through judicial proceedings instead of their primary administrative accountabilities of environmental protection. On the whole, the Chinese ENGO EPIL system has created more problems than it has solved.

At present, this assessment will be beneficial to correct theoretical underpinnings, build a comprehensive and sound EPIL system, and appeal to augment ENGOs' practical skills. Although various dispute resolution systems in the two countries have been constructed by disparate social and cultural traditions, the theories, procedures, and ENGOs' operations could continue to be compared and imitated by China. In particular, a comparison still has underlying and empirical significance to reexamine and recalibrate Chinese ENGO EPIL systems' theories and practice.

⁷ Decision of the Standing Comm. of the Nat'l People's Cong. on Authorizing the Sup. People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Actions in Certain Areas 全国人民代表大会常务委员会关于授权最高人民检察院在部分地区开展公益诉讼试点工作的决定 (adopted at the 15th session of the Standing Comm. of the Twelfth Nat'l People's Cong. on July 1, 2015), CLI.1.250522(EN) (Lawinfochina); *see also* Plan for the Pilot Reform of the Ecological Environment Damage Compensation System (Expired) 生态环境损害赔偿制度改革试点方案, (adopted by General Office of the Central Comm. of the Communist Party of China (General Office, CCCPC) General Office of the State Council on Dec. 3, 2015, (Revised in 2017), CLI.16.260967(EN) (Lawinfochina). (In 2015, the Standing Comm. of the Nat'l People's Cong. issued the plan to authorize the Sup. People's Procuratorates to launch a pilot project to file EPIL actions, and the compensation for damage to the ecological environment system was regulated in a Party regulation to authorize provincial and prefecture city governments to sue for compensation.)

This dissertation introduces the U.S. and China's environmental governance evolution, the background of their private enforcement provisions, including each country's environmental legislative, administrative, and judicial development before establishing private enforcement. After the introduction, the second section examines the U.S. environmental citizen suits' origin, environmental movements during the 1960s and 1970s, and pioneer ENGOs' legal experiences. Statutory provisions are reviewed in various aspects in order to fully present this significant U.S. private enforcement measure. The third section analyzes the trajectory of Chinese ENGO EPIL development, including the provisions and typical actions according to several scattered provisions. Section four compares the theoretical and procedural distinctions between the two. Finally, in section five, specific legislation and implementation recommendations to Chinese legislatures and growing Chinese ENGOs are also discussed. One recommendation is to comprehensively legislate an Environmental Public Interest Relief Law in China by integrating statutes-to reframe a sound legal system with a rectified understanding of the U.S. environmental citizen-suit system. Another suggestion is to encourage ENGOs to positively and actively reinforce their professionalism through achievable and practical actions based on steady resources and altruistic ethical compliance. As a vital type of private enforcement, ENGO EPIL actions would be oriented to assuring environmental governance compliance to ultimately promote the fundamental and comprehensive environmental governance pattern, environmental administrative enforcement. The recommendations will help systematically realize and regulate environmental EPIL proceedings and continually promote the primary environmental administrative enforcement in an increasingly open and inclusive social context in the coming future.

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Four years ago, I arrived in White Plains, New York to attend my LLM courses of the U.S. and international environmental law and became an intern in U.N. externship program. All instructors provided a lot of guidance and encouragement to me. After the deliberation and application, I accepted an offer of an SJD candidate in environmental law with a scholarship from Pace Law School and China Scholarship Council's Sponsorship.

The research experience during my LLM and SJD was joyful, despite the pandemic years. I overcame many challenges during the pandemic when I studied in my bedroom in White Plains, which was an unforgettable journey and experience to do me good for my maturity, physically and mentally. I did indoor exercise every day, cooked nutritious food for myself, watched and listened to some high-quality programs, played the piano, practiced oral English every day, and translated significant environmental and climate governance news into Chinese to publish on the social media platform to follow up the current world. The Pomodoro technique also helped me stay focused when I studied. Fortunately, I kept safe and healthy during the pandemic and the way back to China with my caution and much help, despite some skin allergies, knee subluxation, and sometimes depression. Those self-adjustment methods drove me to recover myself and kept working on my study over the past years and would convert to my courage and wisdom to face challenges in the future.

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Chapter 1 Introduction

1.1 The Background of the Research

With the rapid global industrial growth in recent decades, environmental pollution and ecological destruction have given rise to urgent challenges, while many severe environmental crises emerged worldwide. Since the development of environmental governance and legislation always lags behind pollution and destruction, environmental laws with public participation are considered an effective direction to eliminate the possible laxity and inefficiency of exclusive governmental enforcement.

Surging industrial development has led to the establishment of comprehensive environmental governance and increased public awareness since the 1960s in the United States. In particular, weak environmental law enforcement spurred the progress of private enforcement to protect private individuals' interests in various environmental realms.⁸ Private enforcement has been acknowledged as a desirable public-participation approach to improve environmental governance, driven by growing public environmental awareness and desire for profound improvements, such as supporting EPA to reduce non-compliance.⁹ Many amendments and new environmental acts were passed to authorize individual citizens and NGOs to enforce compliance with each provision and administrative order and allow actions against governmental agencies (EPA) to require the

⁸ Senate Debate on S. 4358, Sept. 21, 1970, *reprinted in* A Legislative History, at 280 (remarks of Senator Muskie); *See* S. Rep. No. 1196, at 36-38, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 436-439.

⁹ *See* JEFFERY G. MILLER & ENV'T L. INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 13 (1987).

performance of mandatory duties.¹⁰ During the past five decades, citizen-suit provisions and seminal cases have realized environmental goals, complementing the primary governmental public enforcement role. Simultaneously, ENGOs litigation skills and influence continually promoted environmental compliance while sustainable and rapid economic growth in the United States. The U.S. citizen-suit enforcement undoubtedly has been acknowledged as a model mechanism in environmental governance.

With the “Reform and Opening” since 1978, China’s industrial evolution caused nationwide environmental concerns of pollution and comprehensive environmental governance.¹¹ The basis was to establish environmental governance measures, including administration, legislation, judiciary proceedings, and public awareness. After two decades of lagging and insufficient environmental governance, the eighteenth National Congress of the Chinese Communist Party (CPC) raised ecological civilization, emphasizing the construction of an environmental governance system. It was crucial to build a sound system, including legislation, administration, and judiciary development.¹² Although the ambitious plan has been established over a decade, huge gaps are existing between expectation and reality. Complementary private enforcement was ready to come out to improve environmental governance. In such a context, the U.S. citizen-suit system was acknowledged as effective complementary enforcement, imported to China early this

¹⁰ See Clean Water Act §505(a)(2), 33 U.S.C. § 1365(a)(2); RCRA §7002, U.S.C. §6972(a)(2), Clean Air Act §304(a)(2), 42 U.S.C. § 7604(a)(2). (providing that claims to compel administrator to perform non-discretionary duties could be brought in district courts.) See also *Env’t. Def. Fund v. Thomas*, 870 F.2d 892, 894 (2d Cir. 1989).

¹¹ Hu, *supra* note 5.

¹² *Id.*

century because of various stakeholders' communication and research. In 2015, the Environmental Protection Law officially enacted environmental public interest litigation (EPIL) provisions, authorizing qualified ENGOs to commence EPIL actions for the public interest.¹³

Although the Chinese EPIL actions were increasingly reported and studied, ENGOs, a major category of litigants, faced numerous barriers so that their enforcement efforts became cumbersome and powerless, such as ambiguous provisions for standing, unnecessarily stringent requirements, and ENGOs' lack of litigation capacity in practice. Meanwhile, Chinese procuratorates and provincial and prefecture city governments were robustly litigating EPIL actions nationwide.¹⁴ Local governments increasingly depended on enforcing violations through judicial proceedings instead of their primary administrative mechanisms of environmental protection. However, ENGOs are not allowed to enforce against government agencies for their violations or laxities and prompt them to perform administrative duties. In short, China's EPIL lacks provisions for ENGO comprehensive oversight of government agencies' violations. Significant features of classic private law enforcement may thus have been omitted.

In order to analyze and resolve these issues, besides examining China's legal theory and structure, it is imperative to comprehensively present the U.S. citizen suit, the archetype of China's

¹³ Huanjingbaohu Fa [中华人民共和国环境保护法] (Environmental Protection Law of the People's Republic of China) (adopted at the 11th session of the Standing Comm. of the Seventh Nat'l People's Cong., Dec. 26, 1989, and revised at the 8th session of the Standing Comm. of the Twelfth Nat'l People's Cong., Apr. 24, 2014), CLI.1.223979(EN) (Lawinfochina) [hereinafter the Environmental Protection Law].

¹⁴ See Decision of the Standing Comm. of the Nat'l People's Cong. on Authorizing the Sup. People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Actions in Certain Areas; Plan for the Pilot Reform of the Ecological Environment Damage Compensation System (Expired), *supra* note 7.

EPIL, from origins, theory, prominent provisions, and cases. Different social systems and legal systems exist, but core features of environmental legal governance would be deliberately imported to revise China's ENGO EPIL system to promote primary governmental enforcement.

This dissertation aims to probe into the EPIL's theory, provisions, and deficiencies in China based on a comprehensive comparison of the U.S. citizen-suit enforcement after the introduction of two systems and of their origins and public enforcement structures. The recommendations would be put forward in the light of these analyses.

1.2 Literature Review

Since the origin of the Chinese EPIL in 2005, numerous Chinese and U.S. comparative studies began to be initiated and published. Through reading and analyzing many of this analytical research, English and Chinese articles expressed various conclusions, but several gaps in analysis exist. These prior studies can be classified into two stages, before 2015 and after 2015 to the present.

Not all Chinese studies on EPIL were comparative research between China and the United States. Only eighteen comparative papers and books were published before 2015, and twelve comparative research papers were published after 2015, including comparisons or lessons from the U.S. that can be drawn.¹⁵ Although comparative studies on the U.S. citizen suit and Chinese EPIL

¹⁵ CHINA ACADEMIC JOURNALS (CNKI), <https://kns.cnki.net/kns8/defaultresult/index> (last visited Mar. 9, 2021) (Searching in search bar “公益诉讼” “环境” “公民诉讼” (“EPIL” “Environmental” “Citizen Suit” in Chinese), then choose 2001 to 2015, and selecting most related papers and books, then counting eighteen articles in total.) (Based on the statistics from China Academic Journals database, eighteen Chinese articles deeply analyzed or introduced the U.S. citizen suit published before Jan.1, 2015 when the Environmental Protection Law adopted. From 2015 to present, although seventy-three papers were listed, but only twelve comparative research. These studies include books, degree theses, conference papers, and periodical academic articles.)

have declined since the Chinese official legislation, the contents have been enlarged from a focus on plaintiffs' standing to other noteworthy procedures of the citizen suit, such as the pre-suit conditions and injunctive relief. The studies' topics and contents were simple and obvious, without any histories and theoretical discussions; hence, most were not valuable as comparative studies. In addition, most studies have not clarified the concepts and terms in their studies, as well as some research, has misinterpreted the standing of the U.S citizen suit.

Firstly, before 2015, most Chinese articles were one kind of structure, including introductions to the U.S. citizen-suit and several suggestions to the Chinese anticipated citizen-suit system or EPIL system.¹⁶ That is, without any domestic substantial statutes before 2015, only a few studies were titled like research on China-U.S. public interest litigation. For example, one research collection in 2009 called *Public Interest Environmental Litigation: Comparison between China and American*,¹⁷ edited by two recognized professors from China and UCLA, but each of the articles was the separate introduction of the U.S. citizen-suit cases and provisions, as well as anticipation of Chinese official EPIL system. This book was a product of a colloquium in 2007 by some of the attendees, held in Guizhou Province, an advanced environmental protection province in China.¹⁸ In short, due to active international communication around 2010, many hands-on

¹⁶ Chen Dong (陈冬), MEIGUO HUANJING GONGMINSUSONG YANJIU (美国环境公民诉讼研究) [STUDY ON THE ENVIRONMENTAL CITIZEN SUIT OF USA] (2014); Wang Xi (王曦), MEIGUO HUANJINGFA GAILUN (美国环境法概论) [INTRODUCTION TO THE U.S. ENVIRONMENTAL LAW] (1992).

¹⁷ HUANJINGGONGYISUSONG: ZHONGMEIZHI BIJIAO (环境公益诉讼：中美之比较) [PUBLIC INTEREST ENVIRONMENTAL LITIGATION: COMPARISON BETWEEN CHINA AND AMERICAN] (Lü Zhongmei (吕忠梅), Alex Wang (王立德) eds., 2009).

¹⁸ See Alex Wang, *Spotlight on NGO Activism in China*, Natural Resources Defense Council China Program, in WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, CHINA ENV'T SERIES, Issue 9, 148, 150, (Jennifer L.

citizen-suit experiences sparked Chinese academics and ENGOs' actions in some pilot provinces. Another similar study was Chen Dong's Study on the Environmental Citizen Suit of the USA, including explicit procedures of both federal and Michigan state citizen-suit statutes, published as a book in 2013.¹⁹ This book's last chapter did not compare the two countries' statutes but offered suggestions to China's legislation and judiciary development based on the U.S. experiences. The reason for these kinds of studies was a lack of domestic EPIL provisions at that time but based on local courts' explorations. Similarly, some environmental law textbooks introduced the general U.S. citizen-suit principles and typical cases. Examples include *Introduction to the U.S. Environmental Law* by Wang Xi,²⁰ *Green Justice: Environmental Law Protection* by Wang Jin,²¹ *Research on the Concept of Public Interest Litigation* by Yan Yunqiu,²² and *Study on the Environmental Citizen Suit of USA* by Chen Dong.²³ In these books, the U.S. citizen suit system was introduced and analyzed, and these authors also generally discussed the typical characteristics, such as broad citizen's standing in lawsuits and precedent conditions. However, due to the absence of parallel Chinese provisions earlier, the studies were considered from the basic statutory view

Turner ed. 2007) <https://www.wilsoncenter.org/sites/default/files/media/documents/publication/ces9.pdf> ("NRDC has worked extensively with the Center for Legal Assistance to Pollution Victims (CLAPV) and the Zhongnan University of Economics and Law to train judges, lawyers, environmentalists and others in environmental and public participation law" in 2007.)

¹⁹ CHEN, *supra* note 16.

²⁰ WANG, *supra* note 16.

²¹ WANG JIN (汪劲), TIAN QIN (田秦), LÜSE ZHENGYI: HUANJING DE FALÜ BAOHU (绿色正义：环境的法律保护) [GREEN JUSTICE: ENVIRONMENTAL LAW PROTECTION] (2000).

²² YAN YUNQIU (颜运秋), GONGYISUSONG LINIAN YANJIU (公益诉讼理念研究) [Research on the Concept of Public Interest Litigation] (2002).

²³ CHEN, *supra* note 16.

and proposed legislative suggestions.

Through reading these relevant studies, several deficiencies could be discovered. The terms were confusing, as these studies referred to the U.S. EPIL instead of the U.S. citizen suit. For instance, Zhao Chenchao's *Comparison and Reference of Environmental Public Interest Litigation System in America, Japan, and India* applied the term EPIL instead of the actual name, citizen suit.²⁴ In addition, almost all these studies have not provided sufficient and precise citations, especially to the U.S. resources. For example, in Chen's book, *Study on the Environmental Citizen Suit of (the) USA*, there is no citation in the section of the citizen-suit legislative background and no citation in the section of pre-suit limitations.²⁵ In Li Yanfang's article *U.S. Citizen Suit System and its Inspiration-Using for Reference for the Establishment of Public Interest Action in China*, only nine endnotes were listed.²⁶ Yan's introduction to the U.S. citizen suit also lacks precise citations, in which those descriptions were not from the authors' original concept but citizen-suit provisions.²⁷ The third issue is that their descriptive errors that rooted in their misunderstandings of the citizen suit. An apparent mistake was about the scope of the citizen plaintiff's standing, incorrectly stating that the citizen-suit plaintiff's scope was broad so that anyone can bring up

²⁴ See Zhao Chenchao (赵陈超), *Mei Ri Yin Sanguo Huanjing Gongyisusong Zhidu Bijiao ji Jiejian* (美、日、印三国环境公益诉讼制度比较及借鉴) [Comparison and Reference of Environmental Public Interest Litigation System in America, Japan and India], *Fazhi yu Shehui* (法制与社会) [LEGAL SYS. & SOC'Y], No. 31, 2013, at 30-31.

²⁵ CHEN, *supra* note 16, at 5, 33.

²⁶ See Li Yanfang (李艳芳), *Meiguo de Gongminsusongzhidu jiqi Qishi* (美国的公民诉讼制度及其启示) [U.S. Citizen Suit System and its Inspiration- Using for Reference for the Establishment of Public Interest Action in China] *Zhongguo Renmin Daxue Xuebao* (中国人民大学学报) [J. OF RENMIN U. OF CHINA], No. 2, 2003, at 122-129.

²⁷ YAN, *supra* note 22, at 330-331.

lawsuits to courts.²⁸ Another kind of mistake was a statement that “the citizen-suit system was not an isolated system but a class action system.”²⁹ These typical inadequacies of the books are repeated in published papers. In summary, those studies before 2015 could be regarded as introductions to the groundbreaking citizen-suit system and reference suggestions. Due to the absence of comparable provisions earlier, the comparative studies were not precise comparisons between the two countries’ systems, but some introduction of the U.S. citizen suit and several legislative suggestions of China’s counterpart.

With the implementation of the new Environmental Protection Law 2015,³⁰ some comprehensive and experimental comparative studies have been published, including theoretical and pragmatic studies, which were gradually accepted and guide the research tendencies. For instance, Hou Jiaru’s *the American Blueprint of Environmental Public Interest Litigation, and China’s Reference* first discussed the American public laws’ history, theory and introduced the differences between public law litigation, public interest litigation, and citizen suit. Hou raised several suggestions of appropriate adaptation of private enforcement in China without any case examples in early 2015.³¹ Gong Gu’s *Just Looks Like Twins: Comparative Research on EPIL*

²⁸ *Id.* at 330; see discussion *infra* Section 2.2.4. (To authorize individuals standing in citizen suits, a citizen plaintiff must satisfy three elements: injury in fact, causation, and redressability, instead of no restrictions.)

²⁹ *Id.*; *Class Action*, BLACK LAW DICTIONARY (9th ed. 2009); and see discussion *infra* 2.2.4. (A citizen suit is not a lawsuit, which authorizes a single person or a small group of people to represent the interests of a larger group, as the description of the class action in the Black Law dictionary.)

³⁰ Environmental Protection Law, *supra* note 13.

³¹ See generally Hou Jiaru (侯佳儒), *Huanjing Gongyisong de Meiguolanben yu Zhongguojiejian* (环境公益诉讼的美国蓝本与中国借鉴) [The American Blueprint of Environmental Public Interest Litigation and China’s Reference], *Jiaoda Faxue*, (交大法学) [SJTU L. REV.], No. 4, 2015, at 39-47.

between China and the U.S. was a real sense of comparative research paper between China's EPIL and the U.S. citizen-suit based on the distinct theories, procedures, and case examples in the two countries.³² Another kind of typical comparative studies concentrated on one procedure or one statute between the countries. Wang Yan's *A Probe into the Standing of Citizen Plaintiff in Environmental Public Interest Litigation in China--Based on the Perspective of Drawing on American Environmental Citizen Suits* was a comparative study that concentrated on the plaintiff's standing.³³

It is worth noting that many post-2015 studies remain flawed from aspects ranging from inaccurate terms, absence of citations, and biased understandings of ENGOs. For example, there is no reference to the term "citizen suit" in Liu Haiou and Luo Shan's *The Comparative Study of Environmental Public Interest Litigation between China and the United States*,³⁴ or in Xu Cong's *Environmental Public Interest Litigation from the Perspective of Comparative Law*.³⁵ There was

³² Gong Gu (巩固), Datongxiaoyi Yihuo Maooheshenli? Zhongmei Huanjing Gongyisusong Bijiao Yanjiu (大同小异抑或貌合神离? 中美环境公益诉讼比较研究) [Just Looks Like Twins: Comparative Research on EPIL between China and U.S.] Bijiaofa Yanjiu (比较法研究) [J. OF COMPAR. L.], Vol.2 (2017).

³³ See Wang Yan (王燕), Woguo Huanjing Gongyisusong Gongminyuangao Zige Tanxi—Jiyu Jiejian Meiguo Huanjing Gongminsusong de Shijiao (我国环境公益诉讼公民原告资格探析——基于借鉴美国环境公民诉讼的视角) [A Probe into the Standing of Citizen Plaintiff in Environmental Public Interest Litigation in China--Based on the Perspective of Drawing on American Environmental Citizen Suits] Fazhi yu Shehui (法制与社会) [LEGAL SYS. & SOC'Y] no. 31, 2015, at 106-107.

³⁴ See Liu Haiou (刘海鸥), Luo Shan (罗珊), Zhongmei Huanjing Gongyisusong Lifa Bijiaoyanjiu (中美环境公益诉讼立法比较研究) [the Comparative Study of Environmental Public Interest Litigation between China and the United States] Xiangtan Daxue Xuebao (Zhhexueshehuikexueban) [湘潭大学学报(哲学社会科学版)] [J. OF XIANGTAN U. PHIL. & SOCIAL SCI.], no.41, 2017.

³⁵ See Xu Cong (徐聪), Bijiaofa Shiyezhong de Huanjing Gongyisusong (比较法视野中的环境公益诉讼) [Environmental Public Interest Litigation from the Perspective of Comparative Law], Shehui Guanli (社会管理) [SOCIAL MGMT.], no. 5, 2017, at 274-275.

confused and mixed usage of the terms “American Citizen suit” and “American EPIL” in Han Xin’s thesis, *the Comparing Research on Subject Qualification on Environment Public Interest Litigation in Chinese and American*.³⁶ These articles, including the repeated term errors, do not help any research progress and in-depth understanding of two systems’ similarities and distinctions.

The other repeated deficiency in post-2015 studies was a lack of citations of both Chinese and American data. Wang Xi and Zhang Yan’s *On the American Environmental Citizen-suit System* omitted citations in many sections, such as the part on the origin of the citizen suit, precedent conditions, and injunctive relief. What was worse, secondary sources in Chinese accounted for one-third of the footnotes.³⁷ A high-quality paper by Gong Gu also provided no citations in the injunctive relief section.³⁸ The lack of citations seems common in Chinese scholarly contributions, but it indeed reduces academic rigor and research accuracy.

As a primary type of plaintiffs in the U.S. citizen suits and Chinese EPIL, ENGOs have rarely been the subject of in-depth investigation and analysis by academics. Most studies directly concluded the weakness of ENGOs without any investigation and examples. For example, Gong’s *Just Looks Like Twins: Comparative Research on EPIL between China and the U.S.* concluded that ENGOs’ EPIL actions were “utilitarian actions” only based on case reports instead of

³⁶ See Han Xin (韩鑫), *Zhongmei Huanjing Gongyisusong Zhutishige Falüwenti Bijiao Yanjiu* (中美环境公益诉讼主体适格法律问题比较研究) [The Comparing Research on Subject Qualification on Environment Public Interest Litigation in Chinese and American] (May 18, 2018) (The Degree of Juris Master thesis, Shanghai International Studies University) (on file with the Shanghai International Studies University and China Academic Journals, CNKI).

³⁷ See Wang Xi (王曦), Zhang Yan (张岩) *Lun Meiguo Gongmin Susong Zhidu* (论美国公民诉讼制度) [On the American Environmental Citizen-suit System] *Jiaoda Faxue* (交大法学) [SJTU L. REV.], No. 4. (2015), at 27-38.

³⁸ See Gong, *supra* note 32, at 109.

interviewing with any ENGO plaintiffs. Gong suspected the effectiveness of ENGO's actions but spoke highly of traditional tort lawsuits by victims without any support.³⁹ Even in the Supreme People's Court (SPC) endorsed-report, the researchers rarely deeply prob the reasons for Chinese ENGOs' ineffectiveness in commencing EPIL cases but assumed individual plaintiffs' situation.⁴⁰ Even in the papers on the U.S. citizen suits, Chinese researchers rarely mentioned pioneer ENGOs.⁴¹ Only a few monographs have explicitly discussed ENGOs' actions and their practice based on their work with ENGOs, including Ge Feng and Wang Huishihan' *A Summary of Civil Environmental Public Interest Litigation under the Environmental Protection Law Amendment in 2015*,⁴² Gefeng's *Analysis on the Course and Typical Cases of EPIL in China, Take FON's EPIL Practice as an Example*,⁴³ Ma Rongzhen's thesis *Environmental NGOs to Bring up Environmental*

³⁹ *Id.* at 119.

⁴⁰ Zhang Zhongmin (张忠民), Huang Jianyong (黄剑勇), Peng Qingxia (彭青霞), and Deng Jinghui (邓婧晖), *Huanjing Gongyisusong de Shuliang yu Zhiliang* (环境公益诉讼的数量与质量) [The Quantity and Quality of EPIL] in 2015-2017 ZHONGGUO HUANJING SIFA FAZHAN BAOGAO (2015-2017 中国环境司法发展报告) [CHINA ENVIRONMENTAL JUSTICE DEVELOPMENT REPORT (2015-2017)] (Lü Zhongmei (吕忠梅) et al. eds., 2017) at 185-187. (The report in this Green Book directly stated without any reference and research: The lack of social organization capabilities is reflected in many aspects such as environmental protection expertise, legal talents, and financial guarantees. For example, the staff are mostly volunteers, and there are neither environmental protection professionals nor full-time personnel engaged in legal services. And because ENGO has no fixed funding source, the organization is small and it is difficult to raise funds, and its own living conditions are worrying. As a result, unable to initiate environmental public interest litigation) (Similar assertions have been made in other articles as well.)

⁴¹ See Wang & Zhang, *supra* note 37, at 27-38.

⁴² See Ge Feng(葛枫), Wang Huishihan(王惠诗涵), *Xin Huanjingbaohufaxiade Huanjing Gongyisusong Zongshu* (新环境保护法下的环境公益诉讼综述) [A Summary of Civil Environmental Public Interest Litigation under the New Environmental Protection Law Amendment in 2015, in REVIEW OF PUBLIC INTEREST LITIGATION IN ENVIRONMENTAL PROTECTION IN 2015 261-276 (Li Dun (李楯) et al. eds., 2016).

⁴³ See Ge Feng (葛枫), *Woguo Huanjing Gonyisusong Licheng ji Dianxing Anlifenxi, yi Ziranzhiyou Huanjing Gongyisusong Shijian Weili*, (我国环境公益诉讼历程及典型案例分析--以"自然之友"环境公益诉讼实践为例) [Analysis on the Course and Typical Cases of EPIL in China, Take FON's EPIL Practice as an Example] *Shehui Zhili* (社会治理) [SOCIAL GOVERNANCE REV.], no. 2, 2018, at 51-63.

Public Interest Litigation: the Barriers and Institutional Guarantee,⁴⁴ and Liu Lili's *An Empirical Study of Social Organizations Participating in Environmental Public Interest Litigation*.⁴⁵

In addition, very few English-language academic papers discuss China's EPIL actions, to say nothing of comparative studies between the U.S. citizen suits and China's EPIL. Several papers could be pursued. Like Chinese papers, there were no strictly comparative studies between the U.S. citizen suits and China's EPIL in U.S. journals before 2015 because of no nationwide adopted EPIL provisions in China. Thus, the papers that mentioned China's EPIL anticipated systematic provisions, including typical procedures, based on the published explanations of U.S. citizen suits. The purpose of these papers was to propose to import the citizen suit system to establish a similar system in China. For instance, Patti Goldman's *Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience* not only compared tort cases, known as litigation to seek compensation for victims of pollution but also suggested enlarging the scope of plaintiffs' standing to allow citizens to protect the public interest, like the citizen enforcement.⁴⁶ Goldman's paper also compared the Chinese Environmental Impact Assessment Law 2003 (EIA Law 2003)⁴⁷

⁴⁴ Ma Rongzhen (马荣真), *Huanbao Minjianzuzhi Tiqi Huanjing Gongyisusong de Zhangai ji Zhidubaozhang Yanjiu* (环保民间组织提起环境公益诉讼的障碍及制度保障研究) [Environmental NGOs to Bring up EPIL: The Barriers and Institutional Guarantee] (May 2015) (The Degree of Juris Master thesis, Peking University) (on file with the Peking University and China Academic Journals, CNKI).

⁴⁵ Liu Lili (刘丽莉), *Shehuizuzhi Canyu Huanjing Gongyisusong de Shizheng Yanjiu--Jiyu Falujihui Jiegou De Shijiao* (社会组织参与环境公益诉讼的实证研究——基于法律机会结构的视角) [An Empirical Study of Social Organizations Participating in Environmental Public Interest Litigation-- Based on the perspective of legal opportunity structure] *Fudan Gonggong Xingzheng Pinglun* (复旦公共行政评论) [FUDAN PUBLIC ADMIN. REV.], No.2, 2019, at 84, 95.

⁴⁶ Patti Goldman, *Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience*, 8 VT. J. ENV'T. L. 251, 254, 258 (2007).

⁴⁷ Law of the People's Republic of China on Appraising of Environment Impacts 中华人民共和国环境影响评价法

and its similar provisions in the U.S. National Environmental Policy Act (NEPA) of 1969.⁴⁸ It appealed to disclosure and hearings on administrative approvals based on probable judicial interpretation or laws. Thus, based on the temporal environmental legal system, Goldman's paper suggested expanding citizen standing for public protection and appeal for publication of EIA documents to effectively "prevent pollution and deter polluters" and enable public participation in decision-making of EIA procedures, according to the U.S. citizen-suit and environmental impact statement provisions and cases.⁴⁹ After this earliest comparative study, another research paper, *Environmental Public Interest Litigation in China* by Cao Minde and Wang Fengyuan, discussed whether NGOs would be suitable litigants in private enforcement based on various plaintiffs' natures and actions according to some local legislations at that time.⁵⁰ Through the introduction to the plaintiff provisions and seminal cases of the citizen-suit system, the paper appealed to establish expansive and smooth standing provisions in China's environmental laws.⁵¹ Despite inconsistencies in the title and content of this article and a partial lack of citations, it clearly illustrated China's local EPIL's pilot progress. Moreover, research into Chinese ENGOs was also increasingly welcomed during the Environmental Protection Law's revision, ranging from their identities, operations, and participation in EPIL actions, as ENGOs have been regarded more

(adopted at the 30th session of the Standing Comm. of the Ninth Nat'l People's Cong. on Oct. 28, 2002) (Then was amended in 2016 & 2018).

⁴⁸ National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq.

⁴⁹ Goldman, *supra* note 46, at 278-279.

⁵⁰ Cao Mingde & Wang Fengyuan, *Environmental Public Interest Litigation in China*, 19 ASIA PAC. L. REV. 217 (2011).

⁵¹ *Id.* at 225-229, 235.

skillful in investigations and litigation in the paper by prof. Percival and prof. Zhao.⁵²

With the adoption of the domestic legislation, the Environmental Protection Law 2015, some research unveiled the practice and barriers of China's EPIL and proposed solutions based on the archetype, citizen-suit mechanism. The legislation only authorized ENGOs to enforce against private parties to require compliance; some studies appealed to authorize ENGOs to sue undiligent governmental agencies, similar to the U.S citizen suit, by revising legislation or judicial interpretations in the future.⁵³ It is worth noting that some case studies cited citizen-suit content after describing EPIL's actions after 2015, pointing out several ENGOs' practical shortcomings.⁵⁴

With the evolution of China's EPIL, two more kinds of plaintiffs, procuratorates and provincial and prefecture city governments, were authorized to have standing. The analyses and criticisms have emerged in English language papers recently.⁵⁵ Qi Gao and Sean Whittaker expressed that these two official agencies' standing should be revoked via public interest litigation to facilitate public participation and civil society in China.⁵⁶ Similar research into these kinds of EPIL actions has been rare.

⁵² Robert V. Percival & Zhao Huiyu, *The Role of Civil Society in Environmental Governance in the United States and China*, 24 DUKE ENV'T L. & POL'Y F. 141, 181-183 (2014).

⁵³ *Id.*; Kathryn McCallum, *Changing Landscapes: Enforcing Environmental Laws in China through Public Interest Litigation*, 20 ASIA PAC. J. ENV'T L. 57, 92-93 (2017); Daniel Carpenter-Gold, *Castles Made of Sand: Public-Interest Litigation and China's New Environmental Protection Law*, 39 HARV. ENV'T L. REV. 241, 272 (2015).

⁵⁴ Yanmei Lin & Jack Tuholske, *Field Notes from the Far East: China's New Public Interest Environmental Protection Law in Action*, 45 ENV'T L. REP. NEWS & ANALYSIS, 10855 (2015); ⁵⁴ Qi, Gao. "'Public Interest Litigation' in China: Panacea or Placebo for Environmental Protection?" CHINA: AN INT'L J. 16, 47, 63-66 (2018).

⁵⁵ Qi Gao, Sean Whittaker, *Standing to Sue Beyond Individual Rights: Who Should Be Eligible to Bring Environmental Public Interest Litigation in China?* 8 (2) TRANSNAT'L ENV'T L., 1, 36-37 (2019).

⁵⁶ *Id.*

1.3 Significance & Methodology

This research would provide theoretical and practical significance in contents and forms.

At present, as we witnessed the tremendous progress that China has made drawing on the experiences and lessons of the U.S. environmental private enforcement, it continues to suggest comprehensive comparative studies between the private enforcement in the two countries. Only by conducting in-depth and sophisticated discussions from various aspects can EPIL's issues be better analyzed and solved step by step. As the old proverb says, "History is a mirror that reflects the vicissitude of society."⁵⁷ It is imperative to review the history and origins of the ENGOs and EPIL's archetype, the U.S. citizen suit, in order to expect China's ENGO EPIL's value to protect the environment for China and the international community. Moreover, precise terms, the latest bilingual resources, and detailed citations should be demonstrated in comparative studies to avert the deficiencies mentioned above.

This dissertation firstly has a certain significance for the theoretical development of the environmental rule of law in China. Although China's EPIL is a new topic, it has many ambiguous theoretical issues without relevant history and jurisprudence. This study will systematically trace the U.S. citizen enforcement and progress of the Chinese EPIL system based on their legal structures and ENGOs growth. By reviewing the U.S. ENGOs' environmental movements in the green decades, public governance, and widened social awareness, citizen suits' legislative purposes would be clear and logical. The core features and procedures would be better understood based upon the origins and theories when the citizen suit became an applicable and importable model.

⁵⁷ Tang Taizong (唐太宗), *JIUTANGSHU WEIZHENG ZHUAN* (旧唐书·魏徵传) (643, Tang Dynasty).

The second significance of this dissertation would be its practical significance to the environmental rule of law based on the analyses of their theories and concepts. By comparing the U.S. citizen suit and China's ENGO EPIL actions based on field investigations and practice, the primary resistance and obstacles facing the practice of the ENGO EPIL would be identified. In addition, reasonable suggestions are to offer practical significance for improving the legislation and ENGOs' actions. It is imperative to review the five-decade U.S. citizen-suit system and its features to recalibrate and promote Chinese private enforcement and public participation in environmental governance.

Last but not least, this study would be helpful to balance the power among the three social elements: government, business, and NGOs, as well as examines the nature of environmental crises stemming from industrialization and rapid economic development. In China, in addition to private companies, the expanding administrative power also escalates the impact on the ecology and environment, being similar to the U.S. industrial process in the last century. China, the second economy with more developing industries, should be responsible for taking comprehensive action in environmental governance. Taking the EPIL as the starting point may trigger changes in Chinese environmental governance, thereby the full development of ENGOs can be recalibrated from the perspective of institutional adaptation.

This study contains the sociology of law and comparative legal study to demonstrate the comparison of the U.S. citizen-suit and ENGO EPIL in China based on their developing process to analyze and recognize the deficiencies of the effective EPIL's theory, provisions, and ENGOs' practice. In light of ENGO EPIL's institutional and practical barriers, the achievable suggestions

will be proposed based on China's current circumstance and the U.S. long-term experiences of the citizen-suit mechanism.

The main research methods used in this thesis are literature research, case study, comparative analysis, and field investigation.

The literature research includes English and Chinese primary and secondary sources. The author searched LexisNexis, Westlaw, HeinOnline, China Academic Journals (CNKI), Lawinfochina database, and relevant statutes and books in libraries. The latest changes and bilingual sources ensure the accuracy of the research. The method of case study is adopted amid in introduction and comparison sections in combination with statutes and rules.

The method of comparative analysis is used for comparison between the advanced U.S. citizen-suit system with China's ENGO EPIL from the perspectives of theories, provisions, and practices in the two countries. As Konrad Zweigert and Hein Kötz concluded in their book, *An Introduction to Comparative Law*, "experience shows that this is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, ending up with conclusions about the proper policy for the law to adopt which may involve a reinterpretation of his own system."⁵⁸

Fieldwork is another method for acquiring the latest and accurate information about the actions. The study is based on the author's work experiences at Friends of Nature (FON), a historic ENGO in China, as well as surveys by interviewing other ENGOs' attorneys. FON is one of the

⁵⁸ KONRAD ZWIEGERT& HEIN KÖTZ: AN INTRODUCTION TO COMPARATIVE LAW 6 (Tony Weir trans., Oxford University Press, 3d ed. 1998).

earliest ENGOs since 1994 in China, gaining rich accumulation in advocacy and environmental education. FON also appealed to litigate in EPIL actions by submitting proposals to legislatures and jointly initiated “the first case of civil public interest litigation by grass-root NGOs,” Yunnan Province Qujing chrome slag pollution case to cease the soil pollution and removal.⁵⁹ After the EPIL provisions were officially legislated, the author twice represented the FON in courts and worked with Alibaba Foundation to operate an EPIL support platform to encourage and help more ENGOs participate in EPIL actions. Based on these hands-on work experiences and notes of the interview with ENGOs, judges, and other stakeholders in the past three years, the research reflects a survey of contemporary ENGO EPIL’s situations and challenges.

Through the integrated application of the above methods, the study accumulated a large amount of valuable practical information. For example, the author traced the decision of a case that the author had represented in order to conduct a thorough investigation and analysis.

1.4 The Backgrounds of U.S. Environmental Citizen-suits and China’s EPIL

1.4.1 The Advanced U.S. Public Enforcement System

Two major agencies specialized in environmental enforcement at the federal level are the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ), undertaking by their own sections.

⁵⁹ Cao Yin, *Talks begin in Landmark Case*, CHINA DAILY USA, May 24, 2012.

http://usa.chinadaily.com.cn/epaper/2012-05/24/content_15377876.htm; FON v. Yunnan Luliang Chemical Industry Co., Ltd, Qujing Interm. Ct. 2020.

a. A Brief of the U.S. Environmental Public Enforcement—The EPA and Other Administrative Enforcement

The EPA is a major pollution regulatory and independent agency in the United States. It was formed in 1970 as an agency to implement and enforce the environmental requirements on December 2, 1970, acknowledging as one of the most significant environmental accomplishments of Nixon's Administration.⁶⁰ When Congress enacted environmental laws, the EPA implements the laws by promulgating regulations. Since enforcement is an essential part of the EPA Strategic Plan in each phase, the EPA assumed a strong administrative enforcement posture and settled on an organizational structure to operate, such as setting national standards that states and tribes enforce through their own regulations.⁶¹ The EPA also enforces the regulations by taking civil or criminal enforcement action against violators of environmental laws. The EPA also works cooperatively with states and tribes to ensure compliance with the law and create consistency and certainty for the regulated community.⁶² Moreover, through the Environmental Justice Plan, the EPA plans and directs enforcement within the EPA's programs to protect communities disproportionately affected by pollution.⁶³

Administrative enforcement is a fundamental and effective tool for the agencies that enforce

⁶⁰ EPA Order 1110.1. and Jack Lewis, The Birth of EPA, *EPA Journal*, Vol. 11, No. 9, Nov. 1985.

⁶¹ EPA Order 1110.2.

⁶² EPA, Enforcement Goals, <https://www.epa.gov/enforcement/enforcement-goals> (Last visited Apr. 25, 2021).

⁶³ EPA, Environmental Justice, <https://www.epa.gov/environmentaljustice/about-cj-2020#about>; EPA, EJ 2020 Action Agenda, The U.S. EPA's Environmental Justice Strategic Plan for 2016-2020, Oct. 2016, at iii. (Last visited Apr. 25, 2021).

environmental laws at all levels of government—federal, state, and local.⁶⁴ For the EPA, administrative enforcement represents a large proportion of all enforcement since ninety percent of EPA’s enforcement actions are administrative actions.⁶⁵ Administrative enforcement measures include notice, administrative compliance orders, clean-up orders, and administrative penalty assessments.⁶⁶ An essential premise of administrative enforcement is that a violation has occurred; that is, some pollutant has been released. Enforcement is primarily reactive, halting and punishing the illegal activity, but not constantly correcting the harm.⁶⁷ The EPA also initiated pollution prevention programs with the development.⁶⁸ Administrative enforcements do not require collaboration with other judicial agencies, such as the U.S. DOJ or state attorney general’s office, instead of requiring their own administrative law judges.⁶⁹

Civil judicial enforcement is another kind of enforcement, which is usually filed in courts against persons or entities that have failed to comply with statutory or regulatory requirements, failing to comply with an administrative order, or violate the cleanup regulations.⁷⁰ However, the

⁶⁴ JOEL A. MINTZ, CLIFFORD RECHTSCHAFFEN, AND ROBERT KUEHN, ENVIRONMENTAL ENFORCEMENT, CASES AND MATERIALS (2007) at 79.

⁶⁵ Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, Part One: Statutory Bars in Citizen suits*, 28 HARV. ENV’T. L. REV. 401 (2001); *Oversight of U.S. Environmental Protection Agency Enforcement and Compliance Programs: Hearing before the Subcommittee on Superfund, Waste Management, and Regulatory Oversight of the Committee on Environment and Public Works, United States Senate*, 114th Cong. Second Session, 13 (2016) (Testimony of Cynthia Giles, Assistant Administrator Office of Enforcement and Compliance Assurance U.S. Environmental Protection Agency).

⁶⁶ MINTZ, RECHTSCHAFFEN, AND KUEHN, *supra* note 64, at 79.

⁶⁷ Dana A. Rasmussen, *Enforcement in the U.S. Environmental Protection Agency: Balancing the Carrots and the Sticks*, 22 ENV’T. L. 333, 339 (1992).

⁶⁸ *Id.* at 340-341.

⁶⁹ MINTZ, RECHTSCHAFFEN, AND KUEHN, *supra* note 64, at 79.

⁷⁰ *Id.* at 111.

cases are filed by the DOJ on behalf of the EPA, as the EPA doesn't have the standing; that is, the DOJ is the representative of the federal government in the court. In civil cases, they are typically filed by the Attorneys General on behalf of the states.⁷¹ Supplemental Environmental Projects (SEPs) are a kind of typical and vital settlement of civil judicial cases.⁷²

Criminal enforcement prosecutions may occur when the EPA or a state enforces against a company or person through a criminal action, which threatens people's health and the environment. Criminal prosecutions of environmental violations are also a small proportion of all environmental enforcement actions, resulting in serious consequences, such as incarceration, significant fines, imprisonment, or no more governmental contracting.⁷³ Criminal actions are usually committed the most severe violations willful or knowingly. Since the first federal statute to make polluting the environment a crime, the Rivers and Harbors Act, also known as the Refuse Act, federal and state environmental agencies have increasingly taken on criminal provisions to enforce compliance with environmental statutes and regulations.⁷⁴ The EPA enforces the federal laws by investigating cases, collecting evidence, conducting forensic analyses, and providing legal guidance to assist with prosecutions with the DOJ and U.S. attorneys.⁷⁵ The EPA also closely works with the law enforcement partners at the state and local levels, with states often taking the lead on prosecuting

⁷¹ *Id.* at 112.

⁷² Joel M. Gross, *Civil Environmental Enforcement Litigation*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 97, 133-134 (Kegan A. Brown, Andrea M. Hogan 2d. ed. 2019).

⁷³ *Id.* at 45-46; MINTZ, RECHTSCHAFFEN, AND KUEHN, *supra* note 64, at 211.

⁷⁴ Rivers and Harbors Act, 33 U.S.C. §§ 407, 411 (2012); MINTZ, RECHTSCHAFFEN, AND KUEHN, *supra* note 64, at 211.

⁷⁵ EPA, Criminal Enforcement, <https://www.epa.gov/enforcement/criminal-enforcement> (Last visited Apr. 25, 2021).

environmental crimes that endanger public health and damage.⁷⁶

Most of the environmental protection statutes passed by Congress contemplate an eventual delegation of EPA's regulatory authority to the states. A mature state program that demonstrates adequate resources, along with legislative and regulatory provisions that equal or exceed federal standards, can qualify for program delegation. Where a program has been delegated to a state, EPA's role changes to providing funding, technical assistance, oversight, and backup enforcement. EPA and the state become partners. The altered nature of the state-EPA relationship is another factor causing EPA to search for new ways to meet its charge of environmental protection.⁷⁷

Besides the EPA, several federal agencies related to environmental enforcement, including the:

U.S. Department of the Interior (DOI). DOI administers federal laws with public lands and minerals, national parks, and wildlife refuges and upholds Federal trust responsibilities to Indian tribes and Native Alaskans. Additionally, the DOI is responsible for endangered species conservation and other environmental conservation efforts.⁷⁸

U.S. Army Corps of Engineers (USACE). USACE regulates the disposal of dredged or fill material in waters subject to Clean Water Act jurisdiction, as well as activities and structures in navigable waters under the Rivers and Harbors Act⁷⁹ and Section 404 of Clean Water Act.⁸⁰ The

⁷⁶ *Oversight of U.S. Environmental Protection Agency Enforcement and Compliance Programs*, *supra* note 65, at 13. (Testimony of Cynthia Giles, Assistant Administrator Office of Enforcement and Compliance Assurance U.S. Environmental Protection Agency).

⁷⁷ David L. Markell, *The Role of Deterrence-Based Enforcement in a Reinvented State/Federal Relationship: The Divide between Theory and Reality*, 24 HARV. ENV'T L. REV. 1, 7-9 (2000).

⁷⁸ U.S. Department of the Interior, <https://www.usa.gov/federal-agencies/u-s-department-of-the-interior> (Last visited Apr. 25, 2021).

⁷⁹ Rivers and Harbors Act, 33 U.S.C. §§ 407, 411 (2012).

⁸⁰ Clean Water Act, § 404, 33 U.S.C. §1344 (2018).

USACE takes on the enforcement of Section 404 permit provisions.⁸¹

National Marine Fisheries Service (NOAA). The NOAA is a sub-agency within the Department of Commerce; the agency administers programs relating to the conservation and management of marine resources and understanding and predicting changes in climate, weather, oceans, and coasts.⁸² Except for implementing the National Artificial Reef Plan with State and Federal agencies to promote responsible and effective artificial reef use, the NOAA also implements the Endangered Species Act⁸³ and the Marine Mammal Protection Act.⁸⁴

U.S. Department of Justice (DOJ). The DOJ's Environment and Natural Resources Division (ENRD), a core litigation component of the DOJ, represents federal agencies in litigation arising under federal environmental laws. Ten sections consist of the ENRD to carry out the environmental enforcement work, including Appellate Section; Environmental Crimes Section; Environmental Defense Section; Environmental Enforcement Section; Executive Office Section, Indian Resources Section; Land Acquisition Section; Law and Policy Section; Natural Resources Section; Wildlife and Marine Resources Section.⁸⁵ The ENRD also cooperates with state and local law enforcement officials in prosecuting pollution cases.⁸⁶ Many of the enforcement cases are handled by DOJ's Environment and Natural Resources Division (ENRD).⁸⁷ The DOJ plays an integral role

⁸¹ 33 U.S.C. §1344 (d) (2018).

⁸² NOAA, About our agency, <https://www.noaa.gov/our-mission-and-vision> (Last visited Apr. 25, 2021).

⁸³ Endangered Species Act (ESA), 16 U.S.C. § 1531-1544 (2018).

⁸⁴ Marine Mammal Protection Act (MMPA), 16 U.S.C. §1361 (2018).

⁸⁵ Environment and Natural Resources Division, About the Division, <https://www.justice.gov/enrd/about-division> (Last visited Apr. 25, 2021).

⁸⁶ *Id.*

⁸⁷ See also DOJ, ENRD Accomplishments Report Fiscal Year 2018,

in judicial federal enforcement actions of environmental regulations and statutes.⁸⁸

b. Oversight of the U.S. Environmental Public Enforcement

As described that the EPA is the major environmental enforcement agency, which has authorized to issue penalties and pursue criminal and civil actions in order to enforce requirements of environmental laws. The EPA Office of Enforcement and Compliance Assurance (OECA), administers EPA's environmental enforcement and compliance programs and provides compliance assistance to the EPA's regional offices, states, businesses, local governments, and tribes. Over decades, it is hardly unusual that the EPA's indulgent and lagging enforcement, wrongful enforcement on penalties, and a lack of transparency regarding environmental violations occurred increasingly.⁸⁹ Private individuals play an important role in enforcing certain aspects of federal pollution control laws. Citizen participation, specifically authorized by Congress in many of the federal pollution control statutes, occurs in several ways. Individuals are able to identify and report violations of the laws and initiate enforcement proceedings directly in response to alleged violations. In addition, individuals may bring

<https://www.justice.gov/enrd/page/file/1174746/download> , In fiscal year 2018, ENRD worked on approximately 3,800 cases and matters, while maintaining a robust docket of over 6,750 cases and matters. (Last visited Apr. 25, 2021).

⁸⁸ Robert Esworthy, *Federal Pollution Control Laws: How Are They Enforced*, Congressional Research Service, 9 (Oct. 7, 2014).

⁸⁹ See *Oversight of U.S. Environmental Protection Agency Enforcement and Compliance Programs: Hearing before the Subcommittee on Superfund, Waste Management, and Regulatory Oversight of the Committee on Environment and Public Works, United States Senate*, 114th Cong. Second Session, 1-2 (2016) (Opening Statement of Hon. Mike Rounds, U.S. Senator from The State Of South Dakota).

actions against EPA for failing to execute nondiscretionary duties required under federal environmental laws according to the Administrative Procedure Act (APA) directly.⁹⁰ Chapter

7 provides the judicial-review provision, and Section 701 of the APA provides:

- (a) This chapter applies, according to the provisions thereof, except to the extent that
 - (1) statutes preclude judicial review; or
 - (2) agency action is committed to agency discretion by law.⁹¹

Section 702 also provides that persons who suffer a “legal wrong because of agency action” or are “adversely affected or aggrieved by agency action within the meaning of a relevant statute” have the standing to receive judicial review of the agency’s action.⁹² The court may compel agency action unlawfully withheld or unreasonably delayed; or hold unlawful and set aside agency action, findings, and conclusions found to be—(A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B)contrary to constitutional right, power, privilege, or immunity; (C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D)without observance of procedure required by law.⁹³

In summary, according to the citizen-suit clauses in other environmental laws, NGOs can also enforce when the federal and state environmental protection agencies fail under specific laws.

1.4.2 The Lagging but Ambitious Environmental Governance in China

China’s EPIL system was a product of the times, a product of environmental governance and the environmental rule of law. Some aspects of economic development have resulted in severe

⁹⁰ Esworthy, *supra* note 88, at 14.

⁹¹ 5 U.S.C. § 701 (a) (2018).

⁹² *Id.* § 702.

⁹³ Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393. (5 U.S.C. § 706).

environmental problems since the “Reform and Opening,” a significant societal evolution in China. An ecological society was constructed from establishing government agencies, legislation, and judicial powers to tackle the backdrop of the prioritization of economic development and the mode of pollute first, control later over the last four decades.

a. Governmental Agency and Public Enforcement

China’s environmental government agencies were established gradually, and local agencies were guided by the agency that in the central government. The environmental agency in the central government has been evolved by the eight National Environmental Protection Conferences over the last four decades.⁹⁴ In China, the National Environmental Protection Conferences always lead and pioneer environmental protection events, administrative reforms, and development. Due to the increasing pollutions, the Conferences were becoming more frequent and important, so that the conferences have carried out numerous reforms and tactics.

Inspired by the first National Environmental Protection Conference and the 1972 Stockholm Conference on Human Environment, as well as the rapid economic development, the predecessor of the environmental protection ministry, the first national environmental agency, the Leading Group for the Environmental Protection was established under the State Council in 1974 to issue guidelines and regulations, and to coordinate local agencies for the environmental protection.”⁹⁵

⁹⁴ See Xinhua Net (新华社), Xi Jinping Chuxi Quanguo Shengtaihuanjing Baohu Dahui bing Fabiao Zhongyao Jianghua (习近平出席全国生态环境保护大会并发表重要讲话) [Xi Jinping Attended the National Environmental Protection Conference and Delivered an Important Speech] May 19, 2018.

https://www.mee.gov.cn/home/ztbd/gzhy/qgsthjhbhdh/qgdh_tt/201807/t20180713_446605.shtml..

⁹⁵ MEE, History, Ministry of Ecology and Environment, The People Republic of China.

http://english.mee.gov.cn/About_MEE/History/ (Last visited Apr. 23, 2021).

Then an internal department, the Environmental Protection Bureau, was established under the Ministry of Urban and Rural Development and Environmental Protection in 1982. The Environmental Protection Bureau was in charge of environmental protection in this Ministry.”⁹⁶ In 1988, the Environmental Protection Bureau and its responsibilities were severed from the Ministry of Urban and Rural Development and Environmental Protection and transferred to the newly founded National Environmental Protection Agency (a sub-ministerial level agency). The environmental protection agency at the state level was finally independent after fifteen years’ development, which led to upgrading all the local environmental protection agencies’ in China.⁹⁷ After two decades, the Environmental Protection Administration was upgraded to the Ministry of Environmental Protection, a cabinet-level department of the State Council, which was in charge of formulating and implementing environmental protection plans, policies, and standards.⁹⁸ Until 2008, the environmental administration finally upgraded to a department so that the local environmental bureaus became their major bureaus at all levels. The upgrading illustrates that the status of environmental agencies becomes important.

In 2018, the establishment of the Ministry of Ecology and Environment (MEE) was a positive and crucial change in the reform plan of the State Council. The purpose of establishing the MEE was to integrate hitherto fragmented ecological, environmental protection responsibilities and to unify supervision and enforcement responsibilities.⁹⁹ One of the requirements of ecosystem-based

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Xinhua News, Xinhua Headlines: China unveils cabinet restructuring plan, Mar. 14, 2018,

management was that management efforts must recognize the complexities and vulnerabilities of the ecosystem.¹⁰⁰ Therefore, various environmental realms would be systematically managed under an integrated institutional framework through administering regulations, laws, and standards governing different aspects of environment administration by MEE. It initiated environmental protection in almost all parts of environmental protection management, such as pollution control, climate change, and marine environment protection.

Even if energy (including both fossil fuel-based and renewable energy) continues to be managed by National Development and Reform Commission (NDRC) after the formation of MEE and National Energy Administration (NEA, a sub-ministerial agency in NDRC), NDRC's departments are in charge of national-level economic planning, price setting, and industrial policy coordination. MEE will still have the primary responsibility to address climate change. Under the division of authority between MEE and NDRC, NDRC makes second last decisions on some projects, leading to NDRC being called "mini-State Council."¹⁰¹ For instance, in China, the vast majority of carbon emissions come from the power sectors and heavy industries, and it remains to be seen if the new MEE will be able to drive emission reductions from these sectors effectively. At any rate, the MEE typically employs environmental law-based approaches, whereas the NDRC

http://www.xinhuanet.com/english/2018-03/13/c_137036855.htm (Last visited Apr. 25, 2021).

¹⁰⁰ Mark T. Imperial, *Institutional Analysis and Ecosystem-Based Management: The Institutional Analysis and Development Framework*, 24 (4) *Environmental Management*, 449-451 (1999).

¹⁰¹ Brian Woodall, *The Development of China's Developmental State: Environmental Challenges and Stages of Growth*, May 29, 2014.

https://www.chinacenter.net/2014/china_currents/13-1/the-development-of-chinas-developmental-state-environmental-challenges-and-stages-of-growth/. (Last visited Apr. 25, 2021).

is more used to industrial policy control. Hopefully, a more law-based approach to China's environment and climate efforts will be seen in the coming years since this updating of the environmental administration in 2018. The chart below clearly displayed the upgrading of the environmental administration in 2018, which transferred and integrated all the “environmental-related issues” to the new MEE finally.

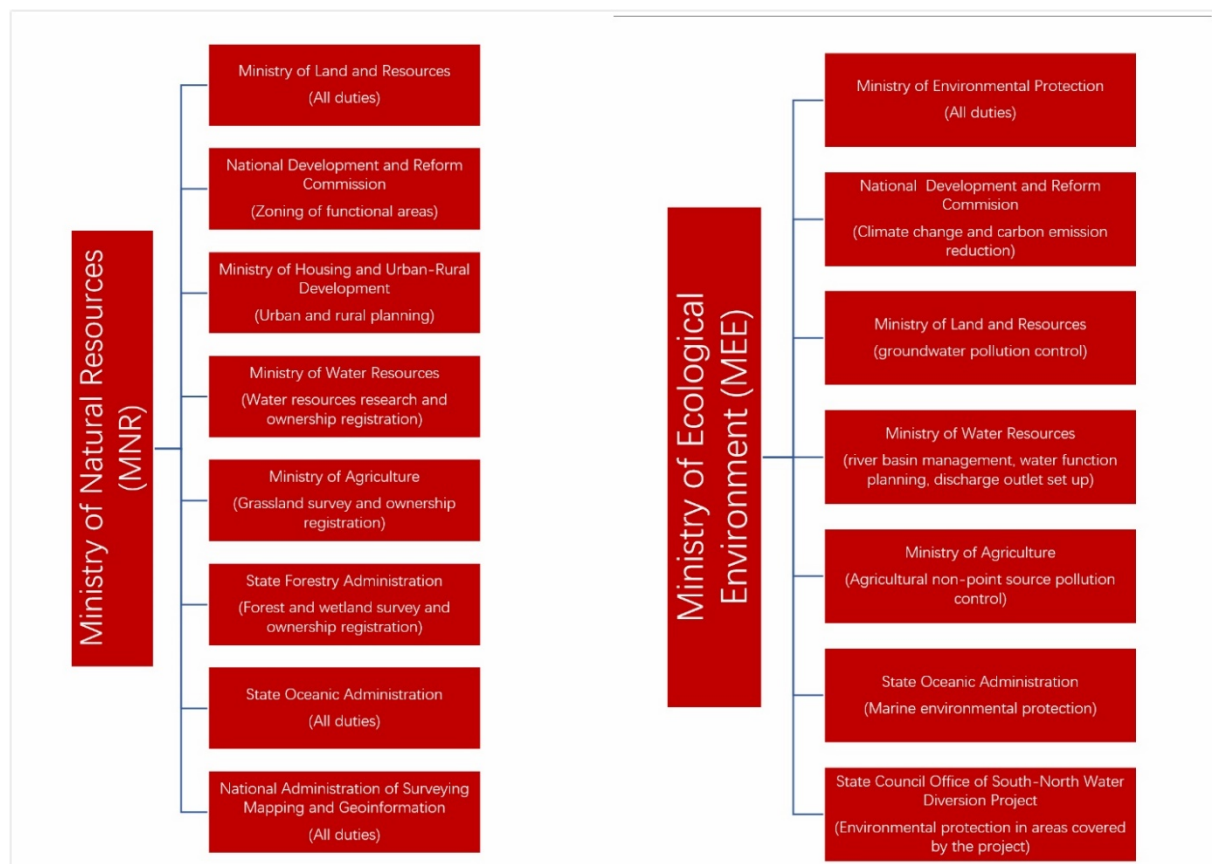


Chart 1.4.2 Reorganization of Ministry of Natural Resources and Ministry of Ecology and Environment¹⁰² (The official English translation should be Ministry of Ecology and Environment)

The development of environmental protection government agencies experienced bumpy

¹⁰² Tianjie Ma & Qin Liu, *China Reshapes Ministries to Better Protect Environment--Two New Cabinet Level Ministries will be Tasked with Managing Natural Resources and Fighting Pollution*, CHINA DIALOGUE, (Mar. 14, 2018) <https://chinadialogue.net/en/pollution/10502-china-reshapes-ministries-to-better-protect-environment/> (Last visited Apr. 25, 2021).

upgrading during decades because of the evolution of the governments' awareness and direction on environmental protection. Even though environmental protection had fallen behind in the past century, it caught up recently to achieve administrative progress and triggered other influences on environmental protection legislation, enforcement, and judiciary development to some degree.

Over the 40 years of Reform and Opening in China, changes to environmental enforcement have also been significant. They included enforcement innovation, an increase of enforcement methods, enlargement and enhancement of enforcement, and expansion of enforcement bodies.¹⁰³ Since 1978, Environmental law enforcement in China had experienced a process of administrative omission, fearfulness, and active enforcement. Especially in recent years, there have been many innovative ideas of environmental law enforcement, which has formed a development process: “penalty-based, governance-oriented, prevention and control combination, and highlight prevention.”¹⁰⁴ After 40 years' evolution, prevention work in current environmental law enforcement accounted for an increasing proportion of enforcement activities, which is also the current environmental law enforcement philosophy.¹⁰⁵

There has been a spotlight on environmental law enforcement, first directed toward an array of enforcement methods. Over the 40 years' enforcement revolution, agencies' enforcement methods had long been based on fines instead of injunction and closure. However, the relevant

¹⁰³ Gao Guilin (高桂林) Gaigekaifang 40 Nian Huanjing Zhifa de Fazhan (改革开放 40 年环境执法的发展) [Development of Environmental Law Enforcement for 40 years' “Reform and Opening”] CHINESE SOCIAL SCIENCES NET, July 25, 2018. http://news.cssn.cn/zx/bwyc/201807/t20180725_4509419.shtml (Last visited Apr. 25, 2021).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

environmental laws provided minor penalties in years, which were unable to deter violators. In other words, ineffective environmental law enforcement resulted in the minimal cost of the violation. With the implementation of the Environmental Protection Law 2015, enforcement efforts have been greatly strengthened, and the deterrent effect on violators has been enhanced through the use of detection tools, such as drones and satellite surveillance.

Moreover, because of the Environmental Protection Law 2015 and the adoption of other relevant laws, the enforcement was enlarged and enhanced. The object of environmental law enforcement was no longer limited to the violations of environmental pollution. It also includes the destruction of ecological resources and ecological compensation according to different relevant environmental laws, such as Water Pollution Prevention and Control Law and Solid Waste Environmental Pollution Prevention Law. Additionally, environmental protection oversight was launched in early 2016, mainly for local environmental protection agencies' administrative omissions and state-owned enterprises' violations. The goal was to urge environmental protection agencies to perform their duties by interviews and receiving report letters in provinces when the MEE and State Council's officials visit the local bureaus. And after the oversight, a tracking method was called "revisit," focusing on the problems or public questioning from the past oversight. The oversights greatly enhance the local environmental protection agencies to environmental protection law enforcement attention.¹⁰⁶ By the end of 2019, there were two rounds of revisits in twenty provinces. There were more than 212,000 report cases from the individuals.

¹⁰⁶ *Id.*

Finally, the fine was Y2.46 billion (\$350 million) to the violators, according to the report of MEE.¹⁰⁷ The revisit effectively compacted the responsibilities of local party committees and government agencies to promote to solve environmental protection issues.

Finally, the increase in enforcement personnel includes the total number, institutions and the development of the institutional functions in years. The expertise of environmental protection agencies had made significant progress. As of the end of 1985, the total number of law enforcement personnel of environmental agencies nationwide was 39,112, and 232,388 people by 2015.¹⁰⁸ Second, central and local environmental protection agencies were established and upgraded as major environmental enforcement agencies, including MEE's establishment in 2018.¹⁰⁹ Moreover, environment police have been authorized to enforce against violations, which was integrated into the functions of administrative law enforcement and combated criminal offenses, and played a positive role in promoting environmental law enforcement.¹¹⁰

It can be seen that the environmental enforcement developed slowly, unevenly, and did not make a corresponding breakthrough most of the time until the Environmental Protection Law 2015 and 19th session of the National Congress of the CPC with the state's emphasis on the evolution of enforcement, major environmental governance measure. Environmental enforcement's revolution thus has been mainly changed due to the administrative reform and legislation adoption.

¹⁰⁷ MEE, 第二批中央生态环境保护督察“回头看”完成督察反馈工作, May 15, 2019 http://www.mee.gov.cn/xxgk/xxgk15/201905/t20190515_703050.html (Last visited Apr. 25, 2021).

¹⁰⁸ Gao, *supra* note 103.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

b. Legislation

China's environmental legislation was initiated late but obtained considerable achievements since 1979.¹¹¹ Thirty-three environmental laws have established rules about preventing and controlling pollution, resource utilization, and ecological protection in China. During the development of China's environmental legislation, critical internal motivation was the reality of increasingly serious pollution problems. Through the spiraling environment and development issues worldwide, Chinese emerged two peaks of environmental legislation in the early time.

The first peak was influenced by the United Nations Conference on the Human Environment in 1972, sparking China's interest in creating legal systems for environmental protection. This conference triggered the Environmental Protection Law in 1979. The U.N. conference influenced legislation as well as the administration of environmental legislation. The 1979 Environmental Protection Law (Trial)¹¹² was the first environmental protection legislation in China without any articles of civil liabilities, which raised confusion in enforcement actions.¹¹³ The Environmental Protection Law was revised in 1989, which was no longer a trial legislation.

The second peak was inspired by the United Nations Conference on Environment and Development (UNCED) in 1992, which advanced the goal of filling legislative gaps and improving

¹¹¹ Zhilin Mu, Shuchun Bu, and Bing Xue, *Environmental Legislation in China: Achievements, Challenges and Trends*, Sustainability 2014, 6, 8967-8979; at 8969.

¹¹² Huanjing Baohu Fa (Shixing) (环境保护法试行) [Environmental Protection Law (Trial)] (promulgated by Standing Comm. Nat'l People's Cong., Sept. 13, 1979, effective Sept. 13, 1979) 1979 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2 (China).

¹¹³ Lü Zhongmei: *Promoting Environmental Rule of Law and Developing in Depth*, LEGAL DAILY, (Nov. 29, 2018) http://www.legaldaily.com.cn/environmental_protection/content/content_7704940.html. (Last visited Apr. 25, 2021).

the existing legal systems. From 1993 onward, the National People's Congress, the highest legislative institution in China, adopted not only new environmental protection laws but also revised many existing environmental laws. After thirty years of unremitting efforts, China's environmental legislation has developed from a blank space into one of its most active legal fields, playing an essential role in the Chinese legal system. Through the end of August 2014, the Standing Committee of the National People's Congress had approved over thirty laws about environmental protection and resources conservation, including five comprehensive laws, five pollution prevention and treatment laws, eleven resources conservation and utilization laws, four energy laws, and seven other laws.¹¹⁴ Thus, China's environmental legal framework was ambitiously established for various environmental realms. Nevertheless, China's environmental law and regulations were numerous and facially robust but unevenly enforced, so that pollution and destructions were widespread phenomena.¹¹⁵

The Environmental Protection Law 2015¹¹⁶ (also known as the New Environmental Protection Law) is the effective and principal law of environmental protection after rare four drafts since 2012. This legislation was also called “the strictest environmental protection law in history,” reasoning from several provisions.¹¹⁷ Besides “daily penalty” administrative enforcement and the

¹¹⁴ Mu, Bu, and Xue, *supra* note 111.

¹¹⁵ See generally Goldman, *supra* note 46, at 252-53.

¹¹⁶ Environmental Protection Law, *supra* note 13.

¹¹⁷ Xinhua Net (新华社), NPC (全国人大), Woguo Tongguo Shishang Zuiyan Xinhuanbaofa, Xinfu yu Mingnian lyuelri Shixing (我国通过史上最严新环保法, 新法于明年1月1日施行) [The Most Severe New EPL Will Be Put into Effect on Jan. 1, 2015] Apr. 25, 2014. http://www.npc.gov.cn/zgrdw/huiyi/lfzt/hjbhfxzaca/2014-04/25/content_1861232.htm (Last visited Apr. 25, 2021).

introduction into the law of Environmental Impact Assessments (EIA) for government agency plans and policies, these noteworthy features, the law also formalizes the EPIL.¹¹⁸ The provisions for EPIL broaden the scale of the standing of ENGO plaintiffs, allowing social organizations (NGOs) who meet specified requirements to file lawsuits. “In its final iteration, the provision has the potential to have an enormous impact, strengthening the influence of civil society on environmental protection in China.”¹¹⁹ Thus, combined with other improvements in the law, the Environmental Protection Law and the authorities finally have been strengthened.

The chart below shows the existing environmental and resources legislation and their revisions on different aspects of the environment and complex government agencies. The chart was improved based on a chart in “Environmental Legislation in China: Achievements, Challenges and Trends” by Zhilin Mu, Shuchun Bu, and Bing Xue.

Existing environmental and resources laws in China.

Note	Name	Adopted	Went into Effect	Revised	Went into Effect
1	Environmental Protection Law	1979.09.13	1979.09.13	1989.12.26 2014.04.24	1989.12.26 2015.01.01
2	Marine Environment Protection Law	1982.08.23	1983.03.01	1999.12.25 2013.12.28 2016.11.07 2017.11.04	2000.04.01 2013.12.28 2016.11.07 2017.11.05
3	Law on Prevention and Control of Water Pollution	1984.05.11	1984.11.01	1996.05.15 2008.02.28 2017.06.27	1996.05.15 2008.06.01 2018.01.01
4	Forestry Law	1984.09.20	1985.10.01	1998.04.29	1998.07.01

¹¹⁸ Environmental Protection Law, *supra* note 13, art. 19, 55, 59.

¹¹⁹ Jost Wübbeke, The Three-year Battle for China’s New Environmental Law, Apr.25, 2014.

<https://www.chinadialogue.net/article/show/single/en/6938-The-three-year-battle-for-China-s-new-environmental-law> (Last visited Apr. 25, 2021).

				2009.08.27	2009.08.27
5	Grassland Law	1985.06.18	1985.10.01	2002.12.28 2009.08.27 2013.06.29	2003.03.01 2009.08.27 2013.06.29
6	Fisheries Law	1986.01.20	1986.07.01	2000.10.31 2004.08.28 2009.08.27 2013.12.28	2000.12.01 2004.08.28 2009.08.27 2013.12.28
7	Mineral Resources Law	1986.03.19	1986.10.01	1996.08.29 2009.08.27	1997.01.01 2009.08.27
8	Land Administration Law	1986.06.25	1987.01.01	1988.12.29 1998.08.29 2004.08.28	1988.12.29 1999.01.01 2004.08.28
9	Law on Prevention and Control of Atmospheric Pollution	1987.09.05	1988.06.01	1995.08.29 2000.04.29 2015.08.29 2018.10.26	1995.08.29 2000.04.29 2016.01.01 2018.10.26
10	Water Law	1988.01.21	1988.07.01	2002.08.29 2009.08.27 2016.07.02	2002.10.01 2009.08.27 2016.09.01
11	Law on the Protection of Wildlife	1988.11.08	1989.03.01	2004.08.28 2009.08.27 2016.07.02 2018.10.26	2004.08.28 2009.08.27 2017.01.01 2018.10.26
12	Law on Urban and Rural Planning (City Planning Law)	1989.12.26 2007.10.28	1990.04.01 2008.01.01 (City Planning Law was abolished)	2015.04.24 2019.04.23	2015.04.24 2019.04.23
13	Law on Water and Soil Conservation	1991.06.29	1991.06.29	2010.12.25	2011.03.01
14	Surveying and Mapping Law	1992.12.28	1993.07.01	2002.08.29 2017.04.27	2002.12.01 2017.07.01
15	Law on Prevention and Control of Environmental Pollution by Solid Waste	1995.10.30	1996.04.01	2004.12.29 2013.06.29 2015.04.24 2016.11.07	2005.04.01 2013.06.29 2015.05.24 2016.11.07
16	Electric Power Law	1995.12.28	1996.04.01	2009.08.27 2015.04.24 2018.12.29	2009.08.27 2015.04.24 2018.12.29

17	Law on the Coal Industry	1996.08.29	1996.12.01	2011.04.22 2013.06.29 2016.11.07	2011.07.01 2013.06.29 2016.11.07
18	Law on Prevention and Control of Environmental Noise Pollution	1996.10.29	1997.03.01	2018.12.29	2018.12.29
19	Flood Control Law	1997.08.29	1998.01.01	2009.08.27 2015.04.24 2016.07.02	2009.08.27 2015.04.24 2016.09.01
20	Law on Energy Conservation	1997.11.01	1998.01.01	2007.10.28 2016.07.02 2018.10.26	2008.04.01 2016.09.01 2018.10.26
21	Law on Protecting Against and Mitigating Earthquake Disasters	1997.12.29	1998.03.01	2008.12.27	2009.05.01
22	Meteorology Law	1999.10.31	2000.01.01	2009.08.27 2014.08.31 2016.11.07	2009.08.27 2014.08.31 2016.11.07
23	Law on Prevention and Control of Desertification	2001.08.31	2002.01.01	2018.10.26	2018.10.26
24	Law on the Administration of the Use of Sea Areas	2001.10.27	2002.01.01	-	-
25	Law on Promotion of Cleaner Production	2002.06.29	2003.01.01	2012.02.29	2012.07.01
26	Law on Evaluation of Environmental Effects	2002.10.28	2003.09.01	2016.07.02 2018.12.29	2016.09.01 2018.12.29
27	Law on Prevention and Control of Radioactive Pollution	2003.06.28	2003.10.01	-	-
28	Renewable Energy Law	2005.02.28	2006.01.01	2009.12.26	2010.04.01
29	Law on Promotion of Circular Economy	2008.08.29	2009.01.01	2018.10.26	2018.10.26
30	Law on the Protection of Offshore Islands	2009.12.26	2010.03.01	-	-
31	Nuclear Safety Law	2017.09.01	2018.01.01	-	-
32	Environmental Protection Tax Law	2016.12.25	2018.01.01	2018.10.26	2018.10.26
33	Soil Pollution Prevention	2018.08.31	2019.01.01	-	-

	and Control Law				
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(Note: In order of adopted date; date current to May 29, 2019)

c. Judiciary Development

With the development of environmental legislation and government agencies, the environmental protection judiciary began to grow up. The establishment of the specialized environmental court was an appropriate and fundamental indicator. Since 2007, some pioneer environmental courts in Guizhou Province, Jiangsu Province, and Yunnan Province were established and explored to accept environmental cases to promote the professional capacities to address environmental pollution.¹²⁰

After the adoption of the specialized environmental courts and the new Environmental Protection Law, the first national people's courts environmental adjudication conference was held in November of 2015, in which the Supreme People's Court (SPC) advocated specialized environmental courts nationally to achieve centralized jurisdiction and converged adjudication of environmental and resources cases.¹²¹ In short, the SPC initiated "five-in-one" specialized mechanism to fully promote the environmental courts' construction, judges' professionalization, judicial procedure, judicial theory, and work system.¹²² By June of 2019, 1,271 specialized

¹²⁰ THE SUP. PEOPLE'S CT. OF THE PEOPLE'S REPUBLIC OF CHINA (最高人民法院), 2016-2017 ENVIRONMENTAL AND RESOURCES ADJUDICATION IN CHINA (中国环境资源审判 2016-2017), 66 (2017).

¹²¹ *Id.*

¹²² Luo Shuzhen (罗书臻), Diyici Quanguofayuan Huanjingziyuanshenpan Gongzuohuiyi Zhaokai (第一次全国法院环境资源审判工作会议召开) [The first environmental adjudication conference of national-wide was held] PEOPLE'S COURT DAILY, Nov. 8, 2015, at 1.

http://rmfyb.chinacourt.org/paper/html/2015-11/08/content_104500.htm?div=-1 (Last visited Apr. 25, 2021).

institutions for environmental and resource cases, including environmental and resource tribunals, collegial panels, and circuit courts, have been established. Nearly 300 institutions were added in two years. Among all the institutions, there were 352 specialized environmental and resource trial tribunals, 779 specialized collegiate panels (collegiate benches), and seventy circuit courts.¹²³ By 2019, twenty-one High People's Courts had established environmental and resources tribunals. Some provincial areas, such as Fujian, Henan, Guizhou, Jiangsu, Hainan, and Chongqing, set up a three-level environmental and resources trial organization system that contained local, municipal, and provincial courts. 162 Intermediate People's Courts and 160 local People's Courts have set up specialized environmental and resources tribunals.¹²⁴ This courts' reform was for environmental proceedings in all-level courts nationwide.

One kind of centralized jurisdiction adjudication is about environmental realms and areas. For example, the Intermediate People's Court of Zhengzhou City was designated to exclusively accept all significant pollution cases in the eastern region along the Yellow River since the river flows through Zhengzhou City.¹²⁵ Also, the High People's Courts of Beijing, Tianjin, and Hebei signed *the Framework Agreement on Collaboration in Environmental and Resources Adjudication* in 2016 to jointly establish a leading group to explore and improve the mechanism for hearing cases

¹²³ The Sup. People's Ct. of the People's Republic of China, Zuigaofa Zhaokai Huanjingziyuanshenpanting Chengli Wuzhounian fabuhui (最高法院召开环境资源审判庭成立五周年发布会) [The Press Conference on the Fifth Anniversary of the Establishment of the Environmental Resources Tribunal in SPC] July 30, 2019. <http://www.court.gov.cn/zixun-xiangqing-173942.html> (Last visited Apr. 25, 2021).

¹²⁴ The SPC, *supra* note 120, at 67.

¹²⁵ *Id.* at 60-70.

to tackle joint environmental crises, such as air pollution in the Beijing-Tianjin-Hebei Region.¹²⁶

In recognition of several features of environmental and resource cases, adjudication of these cases in specialized environmental courts has been required since 2017. Environmental and resources adjudication includes criminal, civil, and government agency compliance cases (known as administrative cases in Chinese)¹²⁷ that would benefit from being adjudicated in a single tribunal.¹²⁸ Besides this “three-in-one” model, the SPC also allows implementing the “two-in-one” converged adjudication of civil and administrative cases related to the environment and resources.¹²⁹ These integrations of these cases sought to improve judges’ environmental judicial competence and efficiency.

Furthermore, all-level people’s courts have developed many new ways of adjudicating cases and enforcing judgments to ensure efficient restoration of the environment and ecology, such as “replanting to restore forestation,” “forest protection and bird protection,” and “replacement and compensation.”¹³⁰ An environmental restoration system that combines criminal sanctions, civil compensation, and ecological compensation has been established to ensure that the crimes are punished, economic damages are compensated, and the environment is remediated and restored.

In summary, China’s environmental protection judiciary developed late but ambitiously over

¹²⁶ *Id.*

¹²⁷ In the United States and China, cases in which the defendant is the government have different names. In Chinese, the name is Xingzheng Anjian, (Administrative case), but in English, the name is government agency compliance. *See* JEFFREY G. MILLER, ANN POWERS, NANCY LONG ELDER, AND KARL S. COPLAN, INTRODUCTION TO ENVIRONMENTAL LAW, CASES AND MATERIALS ON WATER POLLUTION CONTROL, 2nd Edition, 758 (2017)

¹²⁸ The SPC, *supra* note 120, at 70.

¹²⁹ *Id.*

¹³⁰ *Id.*

the past four decades.

d. Performance Assessment

As mentioned above, the environmental administration, legislation, enforcement, and judiciary were reforming slowly, which resulted from the lack of integrated mechanisms for environmental protection conflict resolutions during those decades. Because of the political power of local combined economic and governmental units and slow progress of updating the environmental management, the local environmental protection agencies and courts complied with the local governments' decisions.

China's environmental governance development period was divided into three stages since "Reform and Opening": 1979-2008, 2008-2015, 2015-present. During these stages, many scholars paid attention to China's development path and transformation structure.

Historically, modern China came into being a sub-feudal and sub-colonist country after the end of the Second Opium War in 1840.¹³¹ Over those years, China's political and economic system experienced several periods before and after the foundation of the People's Republic of China in 1949 as the people suffered a long and challenging path to revival and development after the Second Sino-Japanese War and the Chinese Civil War. Moreover, the Great Leap Forward in the 1950s and the Cultural Revolution (1966-1976) dragged Chinese development down for almost three decades. During those periods, economic and social development was in stagnation and

¹³¹ The History of Modern China (Beijing, 1976) quoted in Janin, Hunt, THE INDIA-CHINA OPIUM TRADE IN THE NINETEENTH CENTURY 207 (1999).

decline.¹³² Since the “Reform and Opening” of recovery, China created its unique economic and political system, which included units ranging from the Work Unit System,¹³³(单位体制) Planned Economic System,¹³⁴(计划经济体制) to Urban-rural partition. (城乡分治).¹³⁵ These systems influenced economic development in diverse and occasionally unfortunate directions during each period. No statute for environmental protection in these systems since every kind of resource (including natural resources) belongs to work units or the governments for development.¹³⁶ Hence, governments or units undertake the development to vigorously develop the economy. However,

¹³² See Ye Yonglie (叶永烈) *Zhongguo Jingji Chengzhang Zhimi* (中国经济成长之谜) [The mystery of China's economic growth] (2004)

¹³³ Work units were the principal method of implementing party policy. Also, workers were bound to their work unit for life. Each unit created their own housing, childcare, schools, clinics, shops, services, post offices, etc. The influence of a work unit on the life of an individual was substantial and permission had to be obtained from the work units before undertaking everyday events such as travel, marriage, or having children. https://en.wikipedia.org/wiki/Work_unit.

¹³⁴ A planned economy is a type of economic system where investment, production and the allocation of capital goods take place according to economy-wide economic and production plans. A planned economy may use centralized, decentralized or participatory forms of economic planning. Alec Nove (1987); *Planned Economy*, THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS. vol. 3. p. 879.

¹³⁵ Wang Shekun (王社坤) & Ma Rongzhen (马荣真), *Huanjing Gongyisusong Beijing Zongshu* (环境公益诉讼背景综述) [The Background of the EPIL Before 2015] in *HUANJING GONGYISUSONG GUANCHAO BAOGAO 2015* (环境公益诉讼观察报告 2015 卷) [REVIEW OF PUBLIC INTEREST LITIGATION IN ENVIRONMENT PROTECTION IN 2015] (Li Dun (李楯) et al. eds., 2016) at 253.

¹³⁶ Land Administration Law of the People's Republic of China 中华人民共和国土地管理法 (adopted at the 16th Session of the Standing Comm. of the Sixth Nat'l People's Cong. on June 25, 1986; amended for the first time according to the Decision on Amending the Land Administration of the People's Republic of China at the Fifth Session of the Standing Comm. of the Seventh People's Republic of China; revised at the Fourth Session of the Standing Comm. of the Ninth Nat'l People's Cong. of the People's Republic of China on Aug. 29, 1998; amended for the second time according to the Decision on Amending the Land Administration of the People's Republic of China at the 11th Session of the Standing Comm. of the Tenth Nat'l People's Cong. on Aug. 28, 2004; and amended for the third time in accordance with the Decision of the Standing Comm. of the Nat'l People's Cong. to Amend the Land Administration Law of the People's Republic of China and the Urban Real Estate Administration Law of the People's Republic of China at the 12th Session of the Standing Comm. of the Thirteenth Nat'l People's Cong. of the People's Republic of China on Aug. 26, 2019) CLI.1.335313(EN) (Lawinfochina).

these unsustainable development modes had posed many obstacles to environmental protection and negative impacts, while there was no adequate base for economic and environmental protection development when the economy was expanding.¹³⁷ China sacrificed the environment by ignoring pollution during the expansionist decades during the dedication to growing its economy sufficiently to become the second-largest economy worldwide.

In summary, China's history of environmental pollution and ecological damage was similar to the experience of other developed countries: polluting the environment during decades of economic development before public recognition that uncontrolled economic growth and excessive consumption would undergo the public hazards. China, on the other hand, started to develop its economy while preserving the environment, knowing that unrestrained growth would dramatically pollute the environment and destroy the ecology.¹³⁸ The ecological civilization was initiated in the 18th of National Congress of the CPC to require all stakeholders' actions to protect the environment while accomplishing the economic robust, including China's ENGOS' public participation. Private enforcement was officially considered to be established to promote public enforcement.¹³⁹

¹³⁷ Wang & Ma, *supra* note 135.

¹³⁸ *Id.* at 254.

¹³⁹ Hu, *supra* note 5.

Chapter 2 Environmental Citizen Suit in the United States

The citizen suit, a relatively modern invention, was a mutual product of the times and administrative supervision with the evolution of legislation in the United States. Initially, ENGOs were impelled to develop compelling approaches to promote environmental preservation and challenge violations as an outgrowth of the passionate and prosperous environmental movement. A citizen suit is a supplemental tool in environmental governance designed to avoid lack of enforcement due to regulatory capture as industries influence the regulatory agency, and the agencies were close to the industries. The objects of citizen suits can be both administrations and private sectors to supervise government agencies or enforce against violators directly. ENGOs were skilled in environmental science and law in environmental citizen enforcement cases for decades, so that the practical experience enhanced environmental legislation, enforcement, and adjudication development gradually since the 1960s.

2.1 U.S. Environmental Legislation Background and ENGOs' Movements in the 1960s-1970s

2.1.1 Background and Evolution of Environmental Legislation in the 1960s-1970s

In the 1960s, in order to respond to demands for action from different regions and based on many pollution events, Congress passed laws and regulations to protect wildlife and rivers and form a network of scenic trails among historic landmarks.¹⁴⁰ The following table introduces the remarkable environmental legislation evolution in the 1960s-1970s, which systematically influenced American environmental governance.

¹⁴⁰ History.com editors, GREAT SOCIETY (Nov.17, 2017)

https://www.history.com/topics/1960s/great-society#section_7. (Last visited Apr. 25, 2021).

Title	Brief
The Clean Air Act of 1963	The first federal legislation regarding air pollution control, which established a federal program within the U.S. Public Health Service and authorized research into techniques for monitoring and controlling air pollution. ¹⁴¹
The 1967 Air Quality Act	The Air Quality Act was enacted to expand federal government activities, allowing the federal government to conduct extensive ambient monitoring studies and stationary source inspections, including studies of air pollutant emission inventories, ambient monitoring techniques, and control techniques. ¹⁴²
The Clean Air Act Amendments of 1972	The 1972 legislation replaced the Refuse Act for pollution control, which put EPA and states in charge of issuing permits to industrial and municipal pollution sources. ¹⁴³ It also empowered ordinary citizens to participate in the implementation and enforcement of the program, where before their only remedies for water pollution were common-law tort actions. ¹⁴⁴
The Clean Air Act Amendments of 1977	The 1977 Amendment focused on establishing technology-based requirements for toxic pollutants. ¹⁴⁵
The 1961 Federal Water Pollution Control Act Amendments	The 1961 Federal Water Pollution Control Act Amendments stipulated that Federal agencies consider during the planning for any reservoir, storage to regulate streamflow for the purpose of water quality control. ¹⁴⁶
The Clean Water Restoration Act of 1966	The Clean Water Restoration Act of 1966 authorized the Secretary of Interior, the Secretary of Agriculture, and the Water Resources Council to conduct a comprehensive study of the effects of pollution, including sedimentation in the estuaries and estuarine zones of the U.S. on fish and wildlife, sport and commercial fishing, recreation, water supply, and power, and other specified uses. ¹⁴⁷

¹⁴¹ Pub. L. 88-206, 77 Stat. 392 (1963). *See also* Clean Air Act Review, Evolution of the Clean Air Act, <https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act> (Last visited Apr. 25 2021.)

¹⁴² Pub. L. 90-148, 81 Stat. 485 (1967).

¹⁴³ Pub. L. 92-500, 86 Stat. 816 (1972); MILLER, POWERS, ELDER, AND COPLAN *supra* note 127, at 63.

¹⁴⁴ *Id.* at 60-61.

¹⁴⁵ Pub. L. 95-217, 91 Stat. 1566 (1977).

¹⁴⁶ Pub. L. 87-88, 75 Stat. 204 (1961), 33 U.S.C. 1252.

¹⁴⁷ Pub. L. 89-753, 80 Stat. 1246 (1966).

The Water Quality Improvement Act of 1970	The Water Quality Improvement Act of 1970 described federal agencies' responsibility to ensure that any Federal facilities were operated in compliance with applicable water quality standards, ¹⁴⁸ as well as amended the prohibitions on discharges of oil, required that performance standards be developed for marine sanitation devices, and authorized the control water pollution within the watersheds of the Great Lakes. ¹⁴⁹
The 1972 Federal Water Pollution Control Act Amendments	The most comprehensive amendment to the Federal Water Pollution Control Act was the 1972 Federal Water Pollution Control Act Amendments, which included water pollution control legislation and initially established a comprehensive water pollution regulation system. ¹⁵⁰
The Wilderness Act of 1964	The Wilderness Act of 1964 was passed by Congress in 1964 to preserve and protect certain lands "in their natural condition" and thus "secure for present and future generations the benefits of wilderness." ¹⁵¹
The National Environmental Policy Act (NEPA) of 1969	The National Environmental Policy Act was enacted in 1969 to establish a national policy for the environment, create Environmental Impact Statements (EIS), provide for the establishment of a Council on Environmental Quality (CEQ), to declare a national policy to encourage productive and enjoyable harmony between man and the environment, and other purposes. ¹⁵²
The Marine Mammal Protection Act	The Marine Mammal Protection Act was the first legislation to mandate an ecosystem-based approach to marine resource management. ¹⁵³
The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in 1972	Congress enacted the major revision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in 1972, under which a program for controlling the sale, distribution, and application of pesticides through an administrative registration process as well as authorized experimental use permits and provided for administrative review of registered pesticides and for penalties for violations of the statute under the EPA. ¹⁵⁴

¹⁴⁸ Pub. L. 91-224, 84 Stat. 91 (1970), 33 U.S.C. 1323.

¹⁴⁹ Pub. L. 91-224, 84 Stat. 91 (1970), 33 U.S.C. 1258.

¹⁵⁰ Pub. L. 92-500, 86 Stat. 816 (1972).

¹⁵¹ Pub. L. 88-577, 78 Stat. 890 (1964) (Codified at 16 U.S.C. §1131 (1964) (a)).

¹⁵² The National Environmental Policy Act (NEPA) of 1969, §1.

¹⁵³ Pub. L. 92-522, 86 Stat. 1027 (1972) (Codified at 42 U.S.C. §300f (1972)).

¹⁵⁴ Pub. L. 92-516, 86 Stat. 973 (1972) (Codified at 7 U.S.C. §136 (1972)); *See also* Federal Environmental Pesticide Control Act of 1972, FWS.GOV <https://www.fws.gov/laws/lawsdigest/FEDENVF.HTML> (Last visited Apr. 25, 2021).

The Endangered Species Act	The Endangered Species Act was enacted to protect and recover imperiled species and the ecosystems upon which they depended in 1973. ¹⁵⁵
The Coastal Zone Management Act	The Coastal Zone Management Act was passed in 1972 to encourage coastal states to develop and implement coastal zone management plans (CZMPs). This act was established to preserve, protect, develop, and where possible, restore or enhance the resources of the Nation's coastal zone. ¹⁵⁶
The Safe Drinking Water Act (SDWA)	The Safe Drinking Water Act (SDWA) was established in 1974 to protect drinking water quality in the U.S. This law focuses on all waters actually or potentially designed for drinking use, whether from above ground or underground sources. ¹⁵⁷
The Toxic Substances Control Act	The Toxic Substances Control Act (TSCA) was enacted in 1976 to regulate the introduction of new or already existing chemicals. ¹⁵⁸

Table 2.1.1.1 The Remarkable Environmental Legislation Evolution in the 1960s-1970s,

In addition, as it is difficult to prove environmental damages and causation according to tort law, as well as statutory laws can fill the legal vacuum left by the common law's lack of remedies for water pollutions, the Clean Water Act began to be frequently amended since the 1960s.¹⁵⁹ Whereafter, the Clean Water Act spelled out ambitious programs for water quality improvement and are still being implemented.¹⁶⁰ Besides the Clean Air Act and Clean Water Act, several other laws or amendments were enacted successively. In summary, in the 1970s, a series of

¹⁵⁵ Pub. L. 93-205, 87 Stat. 884 (1973).and U.S. Fish & Wildlife Service, Endangered Species Act | Overview, FWS.GOV <https://www.fws.gov/endangered/laws-policies/> (Last visited Apr. 25, 2021).

¹⁵⁶ Pub. L. 92-583, 86 Stat. 1280 (1972) (Codified at 16 U.S.C. §1451 (1972)).

¹⁵⁷ Pub. L. 93-523, 88 Stat. 1660 (1974) (Codified at 42 U.S.C. §300f (1974)); and EPA, Summary of the Safe Drinking Water Act, EPA, <https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act> (Last visited Apr. 25, 2021).

¹⁵⁸ Pub. L. 94-469, 90 Stat. 2003 (1976) (Codified at 15 U.S.C. §2601 (1976))

¹⁵⁹ MILLER, ANN POWERS, NANCY LONG ELDER, AND KARL S, COPLAN, *supra* note 127, at 63.

¹⁶⁰ Claudia Copeland, *Clean Water Act: A Summary of the Law*, CONGRESSIONAL RESEARCH SERVICE, Oct. 2016, at 2. <https://fas.org/sqp/crs/misc/RL30030.pdf>, at 1-3.

environmental emergencies prompted Congress to reach a consensus and move quickly to achieve great triumphs, so the decade of the 1970s came to be known as the Green Decade.¹⁶¹ The new legislation and amendments consolidated environmental governance in response to the environmental concerns that continued to grow among the public. The public gradually accepted environmental legislation as a feasible and significant way to protect nature and the public from the hazards of industrial growth.

The decades witnessed not only legislative achievements but also an essential one, the Environmental Protection Agency (EPA)'s establishment as an agency to implement and enforce the environmental requirements in December 1970.¹⁶² EPA, as a unified agency, would be in charge of pesticide research, radiation, standards, and other ecological, environmental research programs. EPA assumed a strong enforcement posture and settled on an organizational structure to operate.¹⁶³ Congress also enhanced the federal government's responsibility as a regulator.¹⁶⁴

Moreover, with the increasingly sophisticated domestic legal system and administration system, U.S. environmental achievements were discovered by other nations. Numerous American laws were cited for adoption by other nations to promote environmental governance.¹⁶⁵

¹⁶¹ See Adler, *supra* note 184, and Cleve, *supra* note 185.

¹⁶² EPA Order 1110.1. and Jack Lewis, The Birth of EPA, EPA Journal, Vol. 11, No. 9, (Nov. 1985) <https://archive.epa.gov/epa/aboutepa/birth-epa.html> (Last visited Apr. 25, 2021).

¹⁶³ EPA Order 1110.2.

¹⁶⁴ Pub. L. 92-500, 86 Stat. 816 (1972).

¹⁶⁵ Tseming Yang and Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615 (2009), at 617, 628-629; See also Philippe Sands, *The "Greening" of International Law: Emerging Principles and Rules*, INDIANA J. OF GLOBAL LEGAL STUD. Vol. 1: Iss. 2, art. 2, at 293, (1994).

2.1.2 Environmental Movements Overview in the 1960s and 1970s

Following World War II, America achieved rapid economic and population growth. The robust postwar development resulted in visible environmental degradation such as deadly smog in Pennsylvania and wildlife injured by chemicals pesticides such as Dichloro-Diphenyl-Trichloroethane (DDT).¹⁶⁶ Due to the post-war baby boom, population growth also dramatically increased the consumption of environmental resources. Air pollution spread throughout the country, such as the severe air pollution in New York and California.¹⁶⁷

In this background, Rachel Carson's first book, the *Sea Around Us*, conveyed complex environmental and technology issues to the public and earned her national fame in public science in 1951.¹⁶⁸ In 1962, Rachel Carson then published *Silent Spring*,¹⁶⁹ which raised public awareness of threats to ecosystems by narrating and proving the inevitable harm and other environmental influence. The point of harm to humans by the indiscriminate pesticide use widely raised the profile of the environmental movement in the United States.¹⁷⁰ The book has been acknowledged as "the declaration of the World Environmental Protection Movement,"¹⁷¹ reminded us that all lives in nature should be respected instead of human life only with a profound

¹⁶⁶ BENJAMIN KLINE, *FIRST ALONG THE RIVER, A BRIEF HISTORY OF THE U.S. ENVIRONMENTAL MOVEMENT*, 81 (4th Ed, 2011).

¹⁶⁷ *Id.*

¹⁶⁸ RACHEL CARSON, *THE SEA AROUND US* (1951); *The Sea Around Us*, *THE LIFE AND LEGACY OF RACHEL CARSON*, <https://www.rachelcarson.org/SeaAroundUs.aspx> (Last visited Apr.25, 2021).

¹⁶⁹ RACHEL CARSON, *SILENT SPRING* (1962).

¹⁷⁰ *Id.* and see *Silent Spring*, *THE LIFE AND LEGACY OF RACHEL CARSON*, <https://www.rachelcarson.org/SilentSpring.aspx> (Last visited Apr. 25, 2021).

¹⁷¹ Interview by Dong Qing with Zhao Baisheng, Professor of School of Foreign Language in Peking University; Director of Institute of World Literature in Peking University. Beijing, (May 19, 2018).

transformation from anthropocentrism to environmentalism.¹⁷² In 1966, *Science* defined: “One of the newest fads in Washington and elsewhere is ‘environmental science.’”¹⁷³

With the idea tied between quality-of-life and environmental issues in the late 1960s, the first Earth Day celebration in 1970 was initiated, encouraging environmental governance and public awareness.¹⁷⁴ As Professor Spears described, the history of the first Earth Day spurred that legislators need to hear mass demands for environmental protection before they would act because a Wisconsin Senator, Gaylord Nelson, initiated actions on Earth Day to pressure his Congressional colleagues.¹⁷⁵ He planned and proposed a nationwide “teach-in” on college campuses in 1969 and then called on environmental actions because of the increasing national obsessions with industrial growth and consumerism.¹⁷⁶ On April 22, 1970, there were 2,500 colleges, 10,000 schools, and one thousand communities, around twenty million people in parades and rallies in New York, Washington, and San Francisco, who joined the event to care about the Earth exceeded organizers’ expectations.¹⁷⁷ “It was about to making sure this would be attractive enough to the largest number of college students and other people,” which awoke public awareness and spread the influence due

¹⁷² *Id.*

¹⁷³ Paul E. Klopsteg, Environmental Science, *Science*, 595, Apr. 22, 1966, Vol. 152, Number 3722. <https://science.sciencemag.org/content/152/3722/595> (Last visited Apr. 25, 2021).

¹⁷⁴ ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 148 (2005).

¹⁷⁵ ELLEN GRIFFITH SPEARS, RETHINKING THE AMERICAN ENVIRONMENTAL MOVEMENT POST-1945, 101 (2020).

¹⁷⁶ KIRKPATRICK SALE, THE GREEN REVOLUTION, THE AMERICAN ENVIRONMENTAL MOVEMENT 1962-1992, at 24 (1993); KLINE, *supra* note 166, at 90.

¹⁷⁷ Olivia B. Waxman, Meet ‘Mr. Earth Day,’ the Man Who Helped Organize the Annual Observance, TIME MAGAZINE, (Apr. 19, 2019), <https://time.com/5570269/earth-day-origins/> (Last visited Apr.25, 2021).

to the careful and sound planning and organizations.¹⁷⁸ As *The New Republic* said: “In retrospect, Earth Day was not just a channel for frustrated antiwar energies, as we thought. It signaled an awakening to the dangers in a dictatorship of the technology.”¹⁷⁹ Earth Day thus became the first opportunity for the public to participate in an environmental nationwide demonstration and communication with the politicians.¹⁸⁰

As described in Robert Gottlieb’s book on the influence of the first Earth Day, new environmentalism began to take shape in the months following Earth Day. It evolved in relation to the series of laws and regulatory initiatives establishing a massive pollution control apparatus at the federal level.¹⁸¹ The Earth Day event indeed benefited from the public’s initial enthusiasm, as the public to care and talk about the environment. As historian Stephen Fox noted that “Now, suddenly, everybody is a conservationist.”¹⁸² The first Earth Day was thus concluded as an environmental development milestone and as a culmination.¹⁸³

¹⁷⁸ *Id.* Also Jeffrey Kluger, *How People Across the U.S. Celebrated the First Earth Day*, TIME MAGAZINE, (Apr. 21, 2020) <https://time.com/5824343/first-earth-day/> (Last visited Apr. 25, 2021).

¹⁷⁹ Tax exemptions for charitable organizations affecting poverty programs: Hearings on Examination of Internal Revenue Service Decision to Deny Tax-Exempt Status to Charitable organizations which Engage in Litigation Affecting Poverty Programs, Before the Subcommittee on Employment, Manpower, and Poverty, 91st Cong. 425 (Nov. 16 and 17, 1970) (*The New Republic*, Pollution Politics); Emily Atkin, Earth Day is too White and Out of Touch with Reality, *The New Republic*, Apr. 20, 2017, <https://newrepublic.com/article/142112/earth-day-white-touch-reality>

¹⁸⁰ *Id.* & Statement of Gaylord Nelson at Madison Beyond War Ceremony, at 2, (Dec. 8, 1990) http://www.nelsonearthday.net/docs/nelson_230-11_beyond_war_speech_8Dec90.pdf (Last visited Apr. 25, 2021).

¹⁸¹ GOTTLIEB, *supra* note 174, at 157.

¹⁸² STEPHEN FOX, THE AMERICAN CONSERVATION MOVEMENT, JOHN MUIR AND HIS LEGACY, 326 (1986); W. WILLIAM WEEKS, BEYOND THE ARK, 106 (1996).

¹⁸³ GOTTLIEB, *supra* note 174, at 157 (“This fix-it approach, even if huge and costly, would finally allow everyone, whether industry, government, or citizenry, to participate in helping the system work better); KLINE, *supra* note 166, at 91. (“The modern environmental movement in the United States was ushered in between the publication of Silent

Environmental conservation thus began to make ripples on the political and social agendas, as Congress enacted and revised various environmental legislation thoroughly and systematically in the 1960s and 1970s, including citizen enforcement systems.¹⁸⁴ Meanwhile, various ENGOs have actively fought violation reduction for conservation nationwide since the 1960s, ranging from several experienced conservation ENGOs and newly founded ENGOs adjusted their work approaches to active in environmental movements since the 1960s.¹⁸⁵

In terms of ENGOs, some ENGOs were founded between the end of the nineteenth century and the middle of the twentieth century, such as the Sierra Club (founded 1892), the National Audubon Society (founded 1905), the National Parks and Conservation Association (founded 1919), the Wilderness Society (founded 1935), and the National Wildlife Federation (founded 1936).¹⁸⁶ These long-standing associations with diverse missions stemmed from American traditions of outdoor recreation and enjoyment of nature. These “existing conservationist organizations, developed along more professional lines, creating a mainstream environmental movement in the process after the first Earth Day.”¹⁸⁷ Those old ENGOs concentrated on specific wildlife preservation and some species conservation activities for decades. For instance, the Audubon Society was an enthusiastic supporter of the anti-DDT measures and conservation of

Spring in 1962 and the Earth Day celebration of 1970. In many ways, the movement was a product of the times.)

¹⁸⁴ See Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV'T. & POL'Y F. 39 (2001).

¹⁸⁵ *Id.* at 96-97; See George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENV'T. REP. 10,028, 10,028 (Jan. 1999).

¹⁸⁶ SALE, *supra* note 176, at xi.

¹⁸⁷ *Id.* at 157-158.

wild areas,¹⁸⁸ and the Izaak Walton League was involved in various clean-water proposals based on their nationwide campaign.¹⁸⁹ The nationwide and scientific origins organizations laid a solid foundation for their prosperity and influence on the ENGOs' development and ecological protection.¹⁹⁰ Those long-standing associations began to attract public support with increasing membership.¹⁹¹ For example, the Audubon Society recruited 81,500 members in 1970, while 41,000 members in 1962.¹⁹²

Meanwhile, a wide range of ENGOs initiated legal and policy advocacy work during that time, and new ENGOs were explicitly founded to engage in actions.¹⁹³ The EDF, founded in 1967, became a major litigator in campaigns that focused on eliminating lead toxicity, fighting against supersonic transport, protecting sperm whales, and reducing pesticide hazards in the mid-1970s.¹⁹⁴ The Sierra Club spun off its legal department in 1971 (the group changed its name to Earthjustice in 1997).¹⁹⁵ Other lawyer-scientist-staffed ENGOs include the Nature Resources Defense Council (NRDC), which was also established in 1971. Friends of the Earth (FOE), on the other hand, focused on many issues and strategies, even international issues, which “including but not limited

¹⁸⁸ JOHN D. STINSON, NATIONAL AUDUBON SOCIETY RECORDS, 1883-1991, 6 (1994)

¹⁸⁹ Dawn Merritt, *90 Years of Conservation Success: From the Jazz Age to World War II*, OUTDOOR AMERICA, SPRING 2012, at 14-15. https://www.iwla.org/docs/default-source/about-iwla/iwla-history_1930s-and-40s.pdf?sfvrsn=2 (Last visited Apr. 25, 2021).

¹⁹⁰ STINSON, *supra* note 188, at 5.

¹⁹¹ SALE, *supra* note 176, at xi.

¹⁹² *Id.* at 23.

¹⁹³ KLINE, *supra* note 166, at 96.

¹⁹⁴ *Id.*, at 97.

¹⁹⁵ SPEARS, *supra* note 175, at 105.

to traditional wilderness and resource policy theme.”¹⁹⁶ FOE went through a separation in 1972 for the conflicts, establishing a new D.C.-based organization, the Environmental Policy Center.¹⁹⁷

Environmentalism was recognized as an integral part of the environmental movements of the 1960s.¹⁹⁸ The Encyclopædia Britannica defines environmentalism as a movement, which attempts to influence political processes by lobbying, activism, and education in order to protect natural resources and ecosystems.¹⁹⁹ Gottlieb defined environmentalism broadly to draw attention to the commonalities and connections among segments of complex and varied movements for change, which includes groups focused not just on wilderness or resource management but on issues affecting daily life, as a broad philosophy or ideology.²⁰⁰

In short, environmentalism claims that living things, including humans and the natural environment, deserving of consideration in reasoning about the morality of political, economic, and social policies, as the fundamental idea of the environmental campaigns. The various philosophical strands of environmentalism were given political expression through the green political movements in the form of passionate ENGOs and environmentalist political parties since the 1960s, as ENCYCLOPÆDIA BRITANNICA recorded.²⁰¹ The 1960s and 1970s have caused an

¹⁹⁶ GOTTLIEB, *supra* note 174, at 197-198.

¹⁹⁷ *Id.* at 198.

¹⁹⁸ See KLINE, *supra* note 166.

¹⁹⁹ Environmentalism, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/environmentalism> (Last visited Apr. 25, 2021).

²⁰⁰ GOTTLIEB, *supra* note 174, at 40.

²⁰¹ History of The Environmental Movement, Encyclopædia Britannica, <https://www.britannica.com/topic/environmentalism/History-of-the-environmental-movement>.

awakening of environmental awareness in the U.S., during which ENGOs rose in prominence.

Last but not least, the ENGOs' successful development was on account of not only the proliferating of environmentalist ideology but also the traditions in a long period of American political history. According to Alexis de Tocqueville's classic mid-nineteenth century study, *Democracy in America*, he portrayed the well-developed social organizations as the broad and deep foundation of public participation tradition in the U.S. According to de Tocqueville,

Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds -religious, moral, serious, futile, extensive, or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found establishments for education, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; and in this manner, they found hospitals, prisons, and schools. If it be proposed to advance some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States, you will be sure to find an association.²⁰²

Besides making associations, Americans also have a deep-rooted tradition of making charitable donations to support associations. Americans gave money to the associations to run their concerned topics and spheres for their operations and programs. This idea was well demonstrated by the nineteenth-century American industrialist Andrew Carnegie's *The Gospel of Wealth*:²⁰³

There are but three modes in which surplus wealth can be disposed of. It can be left to the families of the decedents, or it can be bequeathed for public purposes; or, finally, it can be administered during their lives by its possessors.²⁰⁴

²⁰² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 896 (Eduardo Nolla ed., 2012).

²⁰³ ANDREW CARNEGIE, *THE GOSPEL OF WEALTH, AND OTHER TIMELY ESSAYS*, 8-11 (1962).

²⁰⁴ *Id.*

Carnegie illustrated how this third way of wealth disposition would be in an ideal State:

In this State, the surplus wealth of the few will become, in the best sense, the property of the many, because administered for the common good; and this wealth, passing through the hands of the few, can be made a much more potent force for the elevation of our race than if distributed in small sums to the people themselves. Even the poorest can be made to see this, and to agree that great sums gathered by some of their fellow-citizens and spent for public purposes, from which the masses reap the principal benefit, are more valuable to them than if scattered among themselves in trifling amounts through the course of many years.²⁰⁵

In addition, Mr. Carnegie mentioned another principle: it is not the privilege of millionaires alone to donate for the benefit of the community. Everyone who has but a small surplus above his moderate wants may share this privilege. “Other people without surplus can give at least a part of their time, which is usually as important as funds.”²⁰⁶ Indeed, it is common that Americans donate their surplus property or leisure time for their public good in the community, or for specific issues, or for the whole society. The cultural inclination of making associations or donations has continued through the current era and flourished as an everyday activity in various kinds of organizations.

According to a report by Charities Aid Foundation of America (CAF America) in 2019, more than 55% of Americans in 2017 and 62% of Americans gave money in 2018 either by donating to a charity, by giving to a church/religious organization, or by sponsoring someone.²⁰⁷ In addition to giving money, over 35% of Americans also had volunteered in 2019.²⁰⁸ Through these ways,

²⁰⁵ *Id.* at 12-13.

²⁰⁶ *Id.* at 41.

²⁰⁷ Charities and Aid Foundation America, Charitable Giving in the USA, an overview of individual giving in the USA, at 5-6.

<https://www.cafamerica.org/wp-content/uploads/CAF-USA-Giving-Report-2019-US-Eng-Final16a-1.pdf>(Last visited Apr.25, 2021).

²⁰⁸ *Id.* at 7.

the Americans believed that charities have positively impacted their local communities, the USA, and internationally.²⁰⁹ The tradition and cultural inclination also contributed to the U.S. became the world's most generous country over the last ten years, according to the CAF World Giving Index 10th edition. Consistently high numbers of Americans say that they helped a stranger, donated money, or volunteered time, and this has ensured its position as the highest performer when we look at the last decade as a whole, with a score of 58%.²¹⁰

In summary, since the 1960s, environmental movements and ENGOs sprang up based on the basic idea of environmentalism incorporated into an American tradition of organized associations.

2.1.3 ENGOs' Classifications

It is necessary to recognize the various ENGOs that work on conservation issues from several perspectives and standards in the United States, including geographic focus, eras, types of missions, and approaches. This section will introduce some major kinds of U.S. ENGOs and enumerate typical examples instead of all the ENGOs in each category and international ENGOs.

The most common distinction divided ENGOs into mainstream and alternative, as the ENGOs' classifications described were mainstream and alternative organizations.²¹¹ However, this standard is subjective and inaccurate to classify ENGOs statistically. "[W]hile new organizations proliferated, environmentalists disagreed on the most effective methods to forward their cause and

²⁰⁹ *Id.* at 13.

²¹⁰ Charities and Aid Foundation America, World Giving Index 2019, 10th edition, at 7, CAFAMERICA (Oct. 2019) https://www.cafamerica.org/wp-content/uploads/WGI_2019_REPORT_2712A_WEB_101019.pdf

²¹¹ *Id.*; KLINE, *supra* note 166, at 96-99; SALE, *supra* note 176, at 12-16.

split into two general groups--mainstream and alternative.”²¹² This classification is also explained by Kline: “the mainstream groups focused on four arenas: legislation, administrative and regulatory action, the courts, and the electoral sphere. In contrast, alternative groups took a more direct-action approach that used protest to publicize environmental issues.”²¹³ Gottlieb also described the contemporary environmental movement as consisting of two broad tendencies: “mainstream” organizations and an “alternative” set of groups, including but not limited to the environmental justice groups that had formed in the 1980s.²¹⁴ For instance, The Wilderness Society, National Wildlife Federation, and the EDF were mainstream ENGOs as their work areas were mainstream.²¹⁵ However, this author insists that this standard is unclear and subjective, and classification standards should be transparent and objective as the influence of an organization is always changing. Mainstream and alternative are abstract words without fixed definitions. Moreover, whether the ENGO’s work field is mainstream or alternative requires subjective judgment. In fact, the missions or the work areas of ENGOs were all equally important and valuable, making it hard to evaluate whether the legislation and regulatory action or the protest campaign are essential, which had the mark of that era. Also, as described in Gottlieb’s admission, the term ‘mainstream environmental organization’ is ambiguous and not helpful. Many local groups have broadened and deepened their scope of activities. Several large national ENGOs had

²¹² KLINE, *supra* note 166, at 96.

²¹³ *Id.*

²¹⁴ GOTTLIEB, *supra* note 174, at 162.

²¹⁵ KLINE, *supra* note 166, at 96-99.

to connect to local issues and groups.²¹⁶ Therefore, this standard was not an appropriate standard.

Generally, objective standards of ENGOs' classification should be preferred, including the geographic focus, working approaches, and environmental specializations.

According to the standard of geographic focus, ENGOs could be classified into national ENGOs, regional ENGOs, and community or local ENGOs, which need to be based on a long-time horizon. With time changes, ENGOs might re-organize their structure to alter the scale or geographical scopes. For instance, the National Audubon Society is a national ENGO developed from the Massachusetts Audubon Society in 1896.²¹⁷ There were thirty-five similar Audubon societies in states independently without central coordination at a network.²¹⁸ In 1901, all the representatives of societies joined in New York City and formed a federation called the National Committee of Audubon Societies of America.²¹⁹ After four years, "prodded by an offer of a large endowment in exchange for incorporation and the broadening of its mandate to include all wildlife, the National Committee was incorporated in New York."²²⁰ The National Audubon Society was founded officially after a significant merger among the regional Audubon Societies.²²¹

Hudson River Fishermen's Association, the predecessor to the Riverkeeper, was one of the

²¹⁶ GOTTLIEB, *supra* note 174, at 162.

²¹⁷ STINSON, *supra* note 188, at 6; FRANK GRAHAM, JR., THE AUDUBON ARK: A HISTORY OF THE NATIONAL AUDUBON SOCIETY, at 8-9 (1990); History of Audubon and Science-based Bird Conservation, AUDUBON.ORG <https://www.audubon.org/about/history-audubon-and-waterbird-conservation>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 9-10.

typical regional ENGOs. The Hudson River Fishermen decided to establish an association to prosecuted Hudson's polluters to protect the Hudson River, known as "America's First River," from becoming an industrial sewer in 1966.²²² The Hudson River Association evolved in 1983 into Riverkeeper for conservation, which was "inspired by the British concept of appointing guardians of private fishing grounds."²²³

Local or community ENGOs were more rooted within a local community to focus on issues that matter to them.²²⁴ Community ENGOs also scaled up their activities to the regional level or worked with regional and national organizations on various issues.²²⁵ For example, in 1965, a small community organization, the Citizens Committee to End Lead Poisoning (CCELP), was formed in response to neighborhood concerns about several incidences of lead poisoning in Chicago.²²⁶ Moreover, many city-based community organizations were organized to address lead paint issues on East Coast by 1970. They focused not only on communities' awareness and prevention but also enlarged their focus to housing and community health.²²⁷

Another category of classifying ENGOs is based on their working approaches, more conservation-research-focused or more litigation-focused. For example, the Conservation

²²² History of the Hudson River Fishermen's Association, HRFA.NET <http://www.hrfa.net/History.htm>; Riverkeeper, Our Story—A Brief Story, RIVERKEEPER.ORG <https://www.riverkeeper.org/riverkeeper-mission/our-story/> (Last visited Apr. 25, 2021).

²²³ *Id.*

²²⁴ GOTTLIEB, *supra* note 174, at 406.

²²⁵ *Id.*, at 4.

²²⁶ *Id.*, at 321.

²²⁷ *Id.*

Foundation (CF) and Resources for the Future (RFF) were two explicitly research-focused organizations.²²⁸ RFF was founded as a presidential commission mandated to examine the nation's use of natural resources and implications for the future of the U.S. economy and national security in 1952.²²⁹ However, "Resources for the Future and the Conservation Foundation had shifted from material shortages to the externalities of resource development: inefficient projects, water pollution, waste discharges, air emissions."²³⁰ Many early conservational organizations focused on research into wilderness preservation, water, and birds, as research-focused ENGOs as well, such as the National Audubon Society (founded 1905), the Wilderness Society (founded 1935), and the National Wildlife Federation (founded 1936).²³¹

Litigation-focused ENGOs optimize legal proceedings to realize conservation goals, such as the Environmental Defense Fund (EDF) and NRDC. The EDF was one of these specific litigation-focused ENGOs, and was officially founded after their litigation that prevented the DDT from threatening the survival of magnificent birds in the 1960s.²³² EDF filed many cases ranging from challenging pesticides to forcing EIS since its establishment. Whereafter, EDF fought for a series of DDT prevention proceedings for decades. EDF also brought influential cases as the first interpretation of the Endangered Species Act of 1973.²³³ One seminal case *TVA v. Hill* discovered

²²⁸ *Id.* at 73-74.

²²⁹ Resources for the Future, About Us, <https://www.rff.org/about/>.

²³⁰ GOTTLIEB, *supra* note 174, at 75.

²³¹ The National Wildlife Federation, About us, <https://www.nwf.org/About-Us> (Last visited Apr. 25, 2021).; KLINE, *supra* note 166, at 97. THOMAS B. ALLEN, GUARDIAN OF THE WILD: THE STORY OF THE NATIONAL WILDLIFE FEDERATION, 1936-1986, 10-12 (1987).

²³² KLINE, *supra* note 166, at 97; Our story: How EDF got started, <https://www.edf.org/about/our-history>.

²³³ *Env't Def. Fund v. Tennessee Val. Auth.*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972), *aff'd*,

that the Tennessee Valley Authority (TVA)'s Tellico Dam construction violated the Endangered Species Act as the construction would destroy endangered snail darters and their critical habitat.²³⁴

NRDC is another lawyer-scientist-staffed organization founded in 1971, aiming to safeguard the Earth with the lawyers and environmental professionals' endeavors, including legal and science strategies to protect the environment as a whole.²³⁵ The EDF and NRDC had opposite directions as the EDF had begun as a group of scientists and later found that it needed to add legal skills to hire lawyers. NRDC, on the other hand, "started with nothing but lawyers, but in 1973 NRDC began to hire their first staff scientists."²³⁶ NRDC has made extraordinary achievements in its litigation-focused work since its first action. According to founders John H. Adams and Patricia Adams, by January 1974, NRDC was involved in more than fifty ongoing legal actions, and dozens of other lawsuits and administrative proceedings had been closed, most of them ending in victories for NRDC.²³⁷ By the 1980s, the NRDC, along with Sierra Club and EDF, became increasingly focused on global issues and helped promote certain domestic environmental approaches (such as energy efficiency and pollution control) within an international context. NRDC filed many compelling cases in various fields: In *Natural Resources Defense Council Inc. v. Morton*, NRDC alleged the EIS should address the physical impacts of grazing in its various grazing districts.²³⁸

468 F.2d 1164 (6th Cir. 1972); *Env't Def. Fund v. Tennessee Val. Auth.*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

²³⁴ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

²³⁵ NRDC, About NRDC, NRDC, <http://www.nrdc.cn/aboutus?cid=6&cook=1> (Last visited Apr. 25, 2021); JOHN H. ADAMS, PATRICIA ADAMS, A FORCE OF NATURE: THE STORY OF NRDC AND ITS FIGHT TO SAVE OUR PLANET, 33 (2010).

²³⁶ ADAMS & ADAMS, *supra* note 235, at 33-34.

²³⁷ *Id.*

²³⁸ *Nat. Res. Def. Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974). *Nat. Res. Def. Council, Inc. v. Morton*, 388 F.

In *Natural Resources Defense Council Inc. v. Callaway*, the Court decided that the Secretary of the Army, and the Chief Army Corps of Engineers, had no authority to amend or change the statutory definition of navigable waters.²³⁹ In *Natural Resources Defense Council Inc. v. Train*, it reflected “a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that environmental laws would be implemented and enforced.”²⁴⁰ In *Natural Resources Defense Council Inc. v. Costle*, the Court of Appeals for the District of Columbia Circuit stated that the EPA does not have “discretion to exempt large classes of point sources from any or all requirements of the Clean Water Act.”²⁴¹ “Over time, the NRDC became the environmental organization most identified with the technical expertise needed to draft legislation, issue reports, and use litigation as a tool in the policy process.”²⁴² NRDC has become an ascendancy of professionalism among ENGOS until nowadays.

In addition, Sierra Club spun off its legal department in 1971, which was Sierra Club Legal Defense Fund, and the name was tweaked to Earthjustice in 1997.²⁴³ *Sierra Club v. Morton*²⁴⁴ was an important precedent that any ENGO brought suits to the courts on behalf of environmental interests.²⁴⁵ Sierra Club then fought for various rights to involve in actions. For instance, in *Sierra Club v. Ruckelshaus*, the court held that the Clean Air Act precludes “significant deterioration” of

Supp. 829, 838-39

²³⁹ Nat. Res. Def. Council v. Callaway, 392 F. Supp. 685, 5ELR 20285 (D.D.C. 1975).

²⁴⁰ Nat. Res. Def. Council v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974).

²⁴¹ Nat. Res. Def. Council v. Costle, 568 F.2d 1369, 8 ELR 20028 (D.D.C. 1977),

²⁴² GOTTLIEB, *supra* note 174, at 196.

²⁴³ SPEARS, *supra* note 175, at 105.

²⁴⁴ *Sierra Club v. Morton*, 405 U.S. 727 2 ELR 20192 (1972)

²⁴⁵ MILLER, POWERS, ELDER, AND COPLAN *supra* note 127, at 141.

air quality in the clean air area without defining accurately what “significant deterioration” means. Clean Air Act 1977 amendments were issued to establish three classes of clean air regions and specified scaled amounts of permitted increments in different classes.²⁴⁶ In *Sierra Club v. Department of the Interior*²⁴⁷ and *Sierra Club v. Department of the Interior*,²⁴⁸ the critical upland areas surrounding a redwood forest have been added to the trust doctrine, besides the waterline. In *Sierra Club v. Clark*, Sierra Club filed this action seeking judicial review under the Administrative Procedure Act,²⁴⁹ of the failure of defendants Secretary of the Interior, Director of the Bureau of Land Management (BLM), and California State Director of BLM (Secretary) to close Dove Springs Canyon to off-road vehicle (“ORV”) use.²⁵⁰ Earthjustice has been dedicated to the NEPA-related litigations as a nonprofit public interest environmental law organization.²⁵¹

The last category for distinguishing ENGOs divides them into activist organizations and think tanks. Most of the ENGOs who joined the environmental movements in the United States were activist organizations. Activist ENGOs also work worldwide instead of domestic ENGOs with the process of globalization. Greenpeace was founded in 1971 to stop nuclear testing off the coast of Alaska, which sparked a movement and made history.²⁵² Greenpeace is a global and independent

²⁴⁶ *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), aff’d, 412 U.S. 541 (1973); See Terziev, *PSD: New Regulations and Old Problems*, 5 HARV. ENV’T L. REV. 130 (1981).

²⁴⁷ *Sierra Club v. Dep’t of the Interior*, 376 F. Supp. 90 (N.D. Cal.1974).

²⁴⁸ *Sierra Club v. Dep’t of the Interior*, 398 F. Supp. 284 (N.D. Cal.1975).

²⁴⁹ Administrative Procedure Act, 5 U.S.C. § 706(1).

²⁵⁰ *Sierra Club v. Clark*, 756 F.2d 686 (9th Cir. 1985).

²⁵¹ GOTTLIEB, *supra* note 174, 203; Earthjustice, *About us*, EARTHJUSTICE, <https://earthjustice.org/about>.

²⁵² Green Peace, *Who We Are*, GREEN PEACE, <https://www.greenpeace.org/international/explore/about/>.

campaigning ENGO that finds global environmental problems and promotes solutions.²⁵³ After four decades, Greenpeace achieved a ban on commercial whaling, a stop to above-ground nuclear testing, and protected Antarctica, inspiring many other ENGOs.²⁵⁴

On the other hand, a think tank (or policy institute) “is an organization or an institution organized for intensive research and solving of problems, especially in the spheres of technology, social or political strategy, industrial or business policies, or armament.”²⁵⁵ Most think tanks are NGOs, but some are semi-autonomous agencies within government or are associated with particular political parties or businesses.²⁵⁶ The 1980s saw the increasing visibility of several policy research institutions or think tanks.²⁵⁷ The think tanks played a major role in formulating research on various policy issues for political frameworks, shaping numerous processes and policy development mechanisms.²⁵⁸ Many think tanks work on environmental issues, such as the Resources for the Future (RFF) and the World Resources Institute (WRI). RFF was the first think tank devoted exclusively to natural resources and environmental issues, including pioneering and developing environmental and resource economics, combining techniques and economics with policy analysis, producing landmark surveys in the United States, and working on environmental,

²⁵³ Green Peace, About, GREEN PEACE, <https://www.greenpeace.org/usa/about/>.

²⁵⁴ *Id.*

²⁵⁵ *Think tank*, THE AMERICAN HERITAGE DICTIONARY (5th ed. 2020), *Think tank*, THE MERRIAM WEBSTER’S DICTIONARY (Newest ed. 2019); and R. KENT WEAVER, THINK TANKS AND CIVIL SOCIETIES, CATALYSTS FOR IDEAS AND ACTION, at 51 (James G. McGann, R. Kent Weaver ed. 2017).

²⁵⁶ Diane Stone, *Think Tanks and Policy Analysis*, in HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, METHODS, AND POLITICS, Frank Fischer, Gerald J. Miller, & Mara S. Sidney (eds.) at 149-150 (2006).

²⁵⁷ HANDBOOK OF RESEARCH METHODS IN PUBLIC ADMINISTRATION, at 886 (Gerald J. Miller, Kaifeng Yang ed. 2007)

²⁵⁸ *Id.* and University of Pennsylvania, *Think Tanks and Civil Societies Programs*, GOTOTHINKTANK, <https://www.gotothinktank.com/history-and-mission>.

energy, and natural resource regulatory regimes around the world.²⁵⁹ WRI, a global research organization, develops research-based solutions to focus on climate, energy, food, forests, water, cities, and the ocean to achieve environmental protection.²⁶⁰

Collectively, think tanks broadly focus on global environmental issues to influence the emergence of policy research.²⁶¹ Environmental issues are common for all humankind on this planet, as the various environmental realms influenced no boundaries of countries. For example, Earthwatch Institute and International Institute for Environment and Development are typical international ENGOs that connect scientists and the public to worldwide conserve the planet.²⁶²

The above brief classifications are according to ENGOs' explicit missions and works. Taking advantage of ENGOs' strengthened influence in different levels and areas, vanguard ENGOs acted on many environmental issues through diverse approaches nationwide over decades. Specifically, several influential ENGOs conducted citizen suits and addressed environmental law advocacy as pioneers to make a difference in environmental protection in the United States.

2.1.4 Pioneer ENGOs in Environmental Law Advocacy

a. Earlier Conservation Organizations

(1) Sierra Club

The Sierra Club, an outdoor recreation and advocacy group, has been a long-standing ENGO

²⁵⁹ Resources for the Future, *History*, RFF, <https://www.rff.org/about/> (Last visited Apr. 25, 2021).

²⁶⁰ WRI, *What We Do*, WRI, <https://www.wri.org/our-work> (Last visited Apr. 25, 2021).

²⁶¹ MCGANN & WEAVER ed., *supra* note 255.

²⁶² Earthwatch, *Missions & Values*, EARTHWATCH, <https://earthwatch.org/about/overview>; International Institute for Environment and Development, *About us*, IIED, <https://www.iied.org/about> (Last visited Apr. 25, 2021).

since 1892.²⁶³ “The Sierra Club was not initially formed strictly as a social change organization. In its original incarnation, the Sierra Club was a membership organization devoted to scheduling outings to enjoy and observe the natural environment on the Sierra Mountains range, as well as encouraging government action to preserve the environment.”²⁶⁴

The Sierra Club has spread its reputation for advocacy nationwide since the battle against the Echo Park Dam in Dinosaur National Monument in Utah in 1950.²⁶⁵ In the 1970s, the Sierra Club’s legislative activities were robust after the campaign of the Wilderness Act²⁶⁶ in 1964²⁶⁷: supporting the TSCA of 1976,²⁶⁸ the Clean Air Act amendments,²⁶⁹ and the Surface Mining Control and Reclamation Act of 1977,²⁷⁰ and zero-cut nest policy on public land.²⁷¹

A Sierra Club citizen suit, *Sierra Club v. Morton*,²⁷² was the first major Supreme Court case encouraging citizen participation in judicial standing in one of the seminal citizen suits.²⁷³ “The Supreme Court changed the rules of access to the courts for plaintiffs with aesthetic and

²⁶³ GOTTLIEB, *supra* note 174, at 56.

²⁶⁴ ALAN K. CHEN, SCOTT CUMMING, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE, 69 (2013).

²⁶⁵ Glen Canyon Institute, *History of the Environmental Movement*, GLEN CANYON INSTITUTE, <https://www.glencanyon.org/history-of-the-environmental-movement/> (Last visited Apr. 25, 2021).

²⁶⁶ Pub. L. 88-577, 78 Stat. 890 (1964) (Codified at 16 U.S.C. §1131(1964)); The Wilderness Act, 16 U.S.C. § 1131(a).

²⁶⁷ FOX, *supra* note 182, at 344.

²⁶⁸ Pub. L. 94-469, 90 Stat. 2003 (1976) (Codified at 15 U.S.C. §2601 (1976))

²⁶⁹ Pub. L. 95-95, 91 Stat. 685 (1977).

²⁷⁰ Pub. L. 95-87, 91 Stat.445 (1977).

²⁷¹ RENAE WRIGHT-DAVIDSON, STYLES OF WRITING FOR RESEARCH PAPERS IN PUBLIC ADMINISTRATION, 13 (2011).

²⁷² *Sierra Club v. Morton*, 405 U.S. 727 (1972)

²⁷³ ZYGMUNT J.B. PLATER, ROBERT H. ABRAMS, ROBERT L. GRAHAM, LISA HEINZERLING, DAVID A. WIRTH, NOAH D. HALL, ENVIRONMENTAL LAW AND POLICY NATURE, LAW, AND SOCIETY, Fifth Edition 228 (2016).

recreational harms as cognizable injuries under the Article III standing doctrine.”²⁷⁴ The *Sierra Club v. Morton* case to restrain the commercial development of the Mineral King area in Sequoia National Forest by Walt Disney Productions, Inc., which proposed to construct and maintain a recreational complex there under permits granted by the Forest Service of the Department of Agriculture.²⁷⁵ The Club contended that the Secretary of Agriculture, who had the responsibility under Congress for management of the national forests, had exceeded his authority and had acted illegally as well as arbitrarily and capriciously in approving the master plan proposed by Disney. Second, the Sierra Club also asserted that the Secretary of the Interior’s action to permit the State of California to construct a road across Sequoia National Park would be illegal.²⁷⁶ As a result, the district court granted an injunction against these activities. The U.S. Court of Appeals reversed, holding that the Club did not show that it would be directly affected by the actions of the defendants and therefore did not have the standing to sue under the Administrative Procedure Act.²⁷⁷ However, the appellate court also held that the Sierra Club had not made an adequate showing of irreparable injury or likelihood of their success on the merits of the case. The Supreme Court then affirmed, holding that the Sierra Club did not have the standing to sue under the APA as it failed to show that any of its members had suffered or would suffer injury as a result of the defendants’ actions.²⁷⁸ Hoping to establish broad standing for advocate ENGOs, Sierra Club chose to rely on

²⁷⁴ MILLER, POWERS, ELDER, AND COPLAN, *supra* note 127, at 133.

²⁷⁵ *Sierra Club v. Morton*, 348 F. Supp. 219 - Dist. Court, ND California 1972.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Sierra Club v. Morton*, 405 U.S. 727 (1972).

its organizational interest in protecting the Sierra Nevada mountains rather than submit proof of impacts on its individual members. Even though the constructions in the wilderness upset the enjoyment of the environment, the Court held that a general organizational environmental interest is an insufficient element to establish standing. The court held that “Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the ‘injury-in-fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”²⁷⁹ Even though the Sierra Club lost, the case held that ENGOs prove a particularized interest on the part of specific individual members who could assert standing in a court. Mineral King was ultimately never developed.

Moreover, one of this case’s dissenting opinions by Justice Douglas showed that the people who visit the Mineral King are legitimate spokesmen for it, whether they may be few or many, who have that intimate relationship with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.²⁸⁰ Some inanimate objects are sometimes parties in litigation. “The ordinary corporation is a ‘person’ for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.”²⁸¹ “The valleys, alpine meadow, rivers, and many other kinds of environmental objects feel the destructive

²⁷⁹ *Id.* at 734- 735.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 744.

pressures for modern technology and modern life, which also could be recognized as the plaintiff speaks for the ecological unit of life. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents, and which are threatened with destruction.”²⁸² Additionally, Justice Blackmun dissented that it shall expand the traditional concepts of standing to the organizations, such as Sierra Club, and it need only recognize the interest of one who has a provable, sincere, dedicated, and established status.²⁸³ *Sierra Club v. Morton* was a significant ruling for the U.S. citizen suit, which interpreted the standing clearly by the Supreme Court. The destruction of natural resources or the impact of the inherent value of a particular organization should have been used as the basis for the qualification of litigation standing. However, in response to this problem, the court made new regulations from the perspective of the injured individual, that is, to require ENGOs to explain the specific damage suffered by a particular individual.

The Sierra Club spun off its legal department in 1971 as the Sierra Club Legal Defense Fund, and the name was changed to Earthjustice in 1997.²⁸⁴ Earthjustice has been dedicated to the NEPA-related litigations, preserving wildlife and places, cleaning energy, and climate change.²⁸⁵

(2) National Audubon Society

As mentioned, the National Association of Audubon Society was incorporated in New York State by several state-level Audubon societies in 1905, with the protection of gulls and other water

²⁸² *Id.* at 744-745.

²⁸³ *Id.* at 757.

²⁸⁴ SPEARS, *supra* note 175, at 105.

²⁸⁵ GOTTLIEB, *supra* note 174, 203; Earthjustice, *About us*, EARTHJUSTICE, <https://earthjustice.org/about>.

birds high on its conservation priority list.²⁸⁶ Audubon established the first system of water-bird sanctuaries on the eastern coast of the United States to implement the large-scale, scientifically-based bird conservation efforts as the Migratory Bird Treaty Act (MBTA) passage in 1918.²⁸⁷

In addition to participating in the anti-DDT campaign with EDF and urban parks advocacy with EDF and NRDC,²⁸⁸ Audubon fought for the passage of major environmental laws, including the Clean Air and Water Acts, the Endangered Species Act, the National Environmental Policy Act, and the Toxic Substances Control Act.²⁸⁹ Audubon followed the Sierra Club and Wilderness Society to jointly fight against a jetport in the Everglades and the Wilderness Act legislation.²⁹⁰

With these actions, Audubon became one of the first traditional groups to try to adjust to the restructuring of the mainstream movement during the late 1960s and early 1970s.²⁹¹ Their legal skills enhancement because of the litigation and lawyers' significant role in the movement. As one of the mainstream and national conservational ENGOs, Audubon added pollution control to their agenda as the natural environment and resource conversation policy became a central concern.²⁹² This science-based ENGO adapted its development path and made use of legal advocacy to protect the birds and wild places constantly to become a primary bird protection ENGO.

²⁸⁶ STINSON, *supra* note 188, at 6, (1994) FRANK GRAHAM, JR., *supra* note 217, at 8-9 (1990); *History of Audubon and Science-based Bird Conservation*, AUDUBON, <https://www.audubon.org/about/history-audubon-and-waterbird-conservation> (Last visited Apr. 25, 2021).

²⁸⁷ *Id.*

²⁸⁸ STINSON, *supra* note 188, at 9

²⁸⁹ *Id.* at 9,

²⁹⁰ GOTTLIEB, *supra* note 174, at 206.

²⁹¹ *Id.*

²⁹² *Id.* at 181.

(3) The Wilderness Society

The Wilderness Society is another early ENGO, which started protecting wilderness and supporting people who fight for freedom of access and preservation to forests and public lands since 1935, especially from logging and mining.²⁹³

After 1964, the Wilderness Society maintained its earlier leadership style and wilderness focus via environmental law advocacy, such as campaigning to establish the Wilderness Act in 1964.²⁹⁴ Like other ENGOs in the early period, individual leaders played decisive roles in their campaigns and management.²⁹⁵ Howard Zahniser, one of the Wilderness Society's presidents, was dedicated to preserving the natural heritage for generations to come and the idea and advocacy of the Wilderness Act.²⁹⁶ As described in Greenberg's history of Zahniser and the Wilderness Society's advocacy, "after the campaign of the Echo Park Dam prevention in 1955, Zahniser realized to propose to enact a unified national act on protecting the wildest places. He sparked this idea and completed the first draft in 1956 to the first version of the wilderness protection bill in 1957."²⁹⁷ Through his many rewrites and resubmissions, hearings, and more than ten thousand pages of

²⁹³ The Wilderness Society, *Our History*, WILDERNESS <https://www.wilderness.org/about-us/our-team/our-history>.

²⁹⁴ GOTTLIEB, *supra* note 174, 210; See Stephen Fox, "We Want No Straddlers," *Wilderness*, Winter 1984, at 5–19; Max Greenberg, *A tribute to Howard Zahniser, unsung architect of the Wilderness Act*, WILDERNESS (Feb. 25, 2016) <https://www.wilderness.org/articles/blog/tribute-howard-zahniser-unsung-architect-wilderness-act>

²⁹⁵ See MAX WEBER, *ECONOMY AND SOCIETY*, 1111 (1978). Weber's Charismatic Authority: Charismatic authority is a concept of leadership developed by the German sociologist Max Weber. It involves a type of organization or a type of leadership in which authority derives from the charisma of the leader. This stands in contrast to two other types of authority: legal authority and traditional authority. Each of the three types forms part of Max Weber's tripartite classification of authority.

²⁹⁶ Greenberg, *supra* note 294.

²⁹⁷ *Id.*

testimony, his insistence and elucubrating contributed to his death.²⁹⁸ He inspired the Wilderness Society to continue the work on this Act, and the House finally passed the Wilderness Act in 1964, eight years after Zahniser's first draft.²⁹⁹ According to national legislation, the Act finally defined the wilderness in the United States and aimed to protect the nine million acres of federal wilderness land into the National Wilderness Preservation System.³⁰⁰

b. Regional Conservation Organizations

(1) Scenic Hudson

Scenic Hudson, founded in 1963, one of the Hudson Valley's most prominent ENGOs, with more than ten thousand members, is credited with launching the modern environmental movement, including citizens speaking out and initiating lawsuits to protect their environment.³⁰¹ Scenic Hudson's known battleground in the modern environmental movement was the fight to save Storm King Mountain on the Hudson River from a destructive hydroelectric pumped storage project.³⁰²

Scenic Hudson was inspired by Robert H. Boyle's article about electric utility Consolidated Edison's plan to petition to intervene in the Federal Power Commission's (FPC) hearing in 1964 to construct a pumped storage hydroelectric facility and its devastating impact on the Hudson River

²⁹⁸ *Id.*

²⁹⁹ The Wilderness Act, Pub. L. No.88-577, 78 Stat. 890 (1964) (Codified at 16 U.S.C. §1131(1964))

³⁰⁰ The Wilderness Act, 16 U.S.C. § 1131(a).

³⁰¹ Scenic Hudson, Hudson Valley's Largest Environmental Organization, <https://www.scenichudson.org/about-us/>, <https://www.scenichudson.org/about-us/our-legacy/>; JOHN CRONIN AND ROBERT F. KENNEDY, JR. THE RIVERKEEPERS, 29 (1999).

³⁰² *Id.*; DAVID SCHUYLER, EMBATTLED RIVER, THE HUDSON AND MODERN AMERICAN ENVIRONMENTALISM, 1 (2018).

striped bass fishery in 1963.³⁰³ However, the FPC granted a license for Storm King construction, reasoning that potential fishery impacts were irrelevant. Scenic Hudson challenged this action in *Scenic Hudson Preservation Conference v. Federal Power Commission* in the U.S Court of Appeals for the Second Circuit in 1965.³⁰⁴

According to the Circuit Court's decision, the FPC order licensing Consolidated Edison to build a pumped storage hydroelectric facility at Storm King Mountain on Hudson River was void. It remanded to FPC for new proceedings, which "must include as a basic concern the preservation of natural beauty and national historic shrines."³⁰⁵ Due to the FPC failed to weigh adequately the need to preserve an area of unique beauty and significant historical significance for recreational purposes as expressly mandated by the Federal Power Act,³⁰⁶ the court held that Scenic Hudson Preservation Conference had shown sufficient interest in aesthetic, conservational, and recreational aspects of power development to establish standing.³⁰⁷ The Federal Power Act approved a legal public interest in the scenic, historical, and recreational values of the area.³⁰⁸ The Second Circuit Court explicitly recognized judicial standing based on non-economic recreational, environmental, and aesthetic harms.³⁰⁹ The Scenic Hudson case thus set two vital legal precedents.

³⁰³ CRONIN & KENNEDY, *supra* note 301, at 28.

³⁰⁴ *Scenic Hudson Pres. Conf. v. Fed. Power Comm'n*, 354 F. 2d 608, 1 ERC 1084, 1 Env't. Rep. 20,292 (2d Cir. 1965)

³⁰⁵ *Id.* at 624.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Federal Power Act, § 313 (a), 16 U.S.C. § 8251 (a).

³⁰⁹ *Scenic Hudson Pres. Conf. v. Fed. Power Comm'n* at 624; Karl Coplan, *Twenty Years of Waterkeeper Alliance: How the Waterkeeper Movement Shaped and Was Shaped by U.S. Environmental Law*, AMERICAN COLLEGE OF ENVIRONMENTAL LAWYERS, (Aug. 6, 2019), <http://www.acoel.org/post/2019/08/06/Twenty-Years-of-Waterkeeper->

The appeals court ruled that federal agency actions were subject to judicial review, and plaintiffs did not have to show they had been injured economically to seek redress.³¹⁰

This case was cited by *Sierra Club v. Morton* for the proposition of interests in aesthetics, recreation, and orderly community planning affected by the FPC licensing of a hydroelectric project.³¹¹ “In order to ensure that the FPC would adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of ‘aggrieved’ or ‘adversely’ affected.”³¹² The *Sierra Club v. Morton* enlarged the interests available to potential litigants by writing into federal environmental law that can first be seen in the Scenic Hudson decision.³¹³

In 1966, Boyle founded the Hudson River Fishermen’s Association (HRFA), the predecessor organization to Riverkeeper, and the HRFA and New York City intervened in the remanded case, alleging dangers to Catskill Aqueduct in 1968.³¹⁴ Consolidated Edison then altered the location in the Palisades Interstate Park, as FPC reopened the case, and the Park Commission intervened.³¹⁵

[Alliance-How-the-Waterkeeper-Movement-Shaped-and-Was-Shaped-by-US-Environmental-Law.aspx](#) (Last visited Apr. 25, 2021).

³¹⁰ ADAMS & ADAMS, *supra* note 235, at 39; Scenic Hudson Pres. Conf. v. Fed. Power Comm’n, at 624.

³¹¹ *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

³¹² Scenic Hudson Pres. Conf. v. Fed. Power Comm’n at 624.

³¹³ *Id.* at 734; ROBERT D. LIFSET, POWER ON THE HUDSON: STORM KING MOUNTAIN AND THE EMERGENCE OF MODERN AMERICAN ENVIRONMENTALISM, 190 (2014).

³¹⁴ CRONIN & KENNEDY, *supra* note 301, at 34. Marist Environmental History Project, The Scenic Hudson Decision, <http://library.marist.edu/archives/mehp/scenicdecision.html> (Last visited Apr. 25, 2021).

³¹⁵ 40 FPC 1310 (1968)

In 1970, the FPC re-licensed Strom King, and the Court of Appeals upheld the FPC's license while denying Scenic Hudson and HRFA's petitions.³¹⁶ After the FPC rejected the plaintiffs' petitions in 1973, they appealed to accuse Consolidated Edison of dumping rock excavated from the project site into the Hudson River until a Corps of Engineers permit was obtained.³¹⁷

In 1974, Consolidated Edison began the construction with conditions. The federal district court enjoined Consolidated Edison from excavating the project site into the Hudson River until a Corps of Engineers permit was obtained.³¹⁸ At the end of 1978, the Scenic Hudson and HRFA petitioned Federal Power Commission (now known as Federal Energy Regulatory Commission, FERC) to terminate the Storm King license.³¹⁹

In 1980, Scenic Hudson and Consolidated Edison reached a settlement called the "Hudson River Peace Treaty," in which Consolidated Edison agreed to terminate its plans in Storm King Mountain to reduce fish kills along the Hudson River while establishing a research fund for the Hudson River ecosystem.³²⁰ According to the settlement, the FERC approved Consolidated Edison's surrender of the Storm King license in 1981.³²¹ However, the price was that Consolidated Edison built a permitted nuclear power plant to discharge condenser cooling water

³¹⁶ *Scenic Hudson Pres. Conf. v. Fed. Power Com.*, 453 F.2d 463 (2d Cir. 1971); *cert. denied*, 407 U.S. 926 (1972):8.

³¹⁷ *Scenic Hudson Pres. Conf. v. Fed. Power Com.*, 407 U.S. 926 (1972); *Scenic Hudson Pres. Conf. v. Callaway*, 370 F. Supp. 162 (S.D.N.Y. 1973), *aff'd* 499 F.2d 127 (2d Cir. 1974).

³¹⁸ *Scenic Hudson Pres. Conf. v. Callaway*, 370 F. Supp. 162 (S.D.N.Y. 1973), *aff'd* 499 F.2d 127 (2d Cir. 1974).

³¹⁹ *Id.*

³²⁰ Marist Environmental History Project, *The Scenic Hudson Decision*, MARIST LIBRARY <http://library.marist.edu/archives/mehp/scenicdecision.html> (Last visited Apr. 25, 2021).

³²¹ *Id.*

into the Hudson River from Indian Point in 1974.³²² Indian Point was finally closed by April 30, 2021, under a landmark agreement struck in 2017.³²³

Their persistent efforts in this action spread huge waves around the Hudson River. In collaboration with other ENGOs and individuals, Scenic Hudson, an excellent ENGO, conducted an intensive campaign to deter Consolidated Edison by legal means over seventeen years.³²⁴

(2) Riverkeeper (Hudson River Fishermen's Association, HRFA)

Riverkeeper's predecessor, the HRFA, was an environmental enforcement organization founded by a group of concerned fishermen who struggled to protect the Hudson River in 1966.³²⁵ The HRFA evolved in 1983 as it launched a patrol boat and created an organization called the Riverkeeper. The HRFA and the Riverkeeper merged in 1986 with the name the Riverkeeper.³²⁶

As mentioned, the HRFA had prosecuted Hudson's polluters since its founder Robert H. Boyle suggested that the HRFA should track down polluters and bring them to justice.³²⁷ "Its approach was to use law and science to confront polluters and reassert community control over waters that were injured by pollution or coveted by developers."³²⁸ Concerning these, the ENGO's

³²² LIFSET, *supra* note 313, at 162.

³²³ Indian Point Agreement, Jan. 8, 2017, <https://www.riverkeeper.org/wp-content/uploads/2017/01/Indian-Point-Closure-Agreement-January-8-2017.pdf>

³²⁴ Marist Environmental History Project, *supra* note 320.

³²⁵ CRONIN & KENNEDY, *supra* note 301, at 40; Riverkeeper, *Our Story*—A Brief Story, RIVERKEEPER <https://www.riverkeeper.org/riverkeeper-mission/our-story/> (Last visited Apr. 25, 2021).

³²⁶ CRONIN & KENNEDY, *supra* note 301, at 48; 70.

³²⁷ *Id.* at 19; Gwendolyn Chambers, *A Brief History*, June 2009, <https://www.riverkeeper.org/riverkeeper-mission/our-story/a-brief-history/> (Last visited Apr. 25, 2021).

³²⁸ CRONIN & KENNEDY, *supra* note 301, at 19.

environmental law advocacy work was designed to fight the polluters and protect the ecology along with the Hudson. For example, HRFA founder and a former Anaconda employee, Fred Danback fought against Anaconda Wire and Cable company by invoking the 1899 Refuse Act.³²⁹ Danback discovered Anaconda's large amounts of oil, metals, and solvents waste into the Hudson River, whereafter he quit and collaborated with the HRFA for further investigation based on the unresolved pollution.³³⁰ The U.S. Attorney of the Southern District of New York charged Anaconda with one hundred counts of violating the Refuse Act in 1899 based on the evidence from the HRFA.³³¹ Anaconda Wire and Copper were fined \$200,000, at the time the highest penalty amount ever assessed against a polluter in U.S. history, while the HRFA earned the reputation as a vigorous pollution enforcer on the Hudson River.³³² Afterward, regardless of the time-consuming and money-consuming campaigns, the energetic citizens and ENGOs were inspired.

Beyond that, the HRFA collaborated with the NRDC, the Hudson River Sloop Clearwater, and the Federated Conservationists of Westchester County (FCWC) to intervene in the New York State enforcement proceeding against General Electric (GE) in connection with GE's discharges of millions of pounds polychlorinated biphenyls (PCBs) into the Hudson River since 1946.³³³ GE

³²⁹ *Id.* at 46-47. (The 1899 Refuse Act, also known as Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. The Refuse Act was the first federal environmental statute, it was making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes. In 1972, National Pollutant Discharge Elimination System (NPDES) in the Amendments of the Federal Water Pollution Control Act (FWPCA) started to replace the Refuse Act permit program.)

³³⁰ *Id.* at 48.

³³¹ *United States v. Anaconda Wire & Cable*, 342 F. Supp. 1116 (S.D.N.Y. 1972).

³³² *Id.*; CRONIN & KENNEDY, *supra* note 301, at 47- 48.

³³³ *Id.* at 59-61; *Polychlorinated Biphenyls (PCBs): Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries House of Representatives*, 94th

was finally found guilty of two charges, and GE was required to create a \$7 million research and cleanup fund, build pollution abatement facilities and discontinue its PCBs use by 1977.³³⁴

The HRFA hired the first full-time Riverkeeper and built the first patrol boat, becoming an effective oversight over pollution on the Hudson River.³³⁵ With Robert F. Kennedy, Jr. working as its chief prosecuting attorney, the HRFA and Riverkeeper (as its successor ENGO) both commenced various actions around the Hudson River over decades. For instance, Riverkeeper aggressively reported the State Pollutant Discharge Elimination System (SPDES) violations and advocated for legislative and regulatory solutions to the New York Department of Conservation (DEC).³³⁶ The HRFA also brought charges against sixteen major polluters of Quassaick Creek, which empties into the Hudson River near Newburgh. All the cases settled, netting Riverkeeper \$200,000, which was used to establish a Quassaick Creek Fund.³³⁷

Another of Riverkeeper's seminal cases was the shutting down of the Croton Landfill, which was a Clean Water Act citizen suit against Westchester County for violating a 1972 federal court order to phase out the Croton Landfill, leaching toxins into the Hudson River.³³⁸ The Croton Landfill had destroyed sixty acres of tidal wetland for its thousands of tons of domestic garbage

Cong. 230-232(1976) (Statement of Sarah Chasis, and A. Karim Ahmed, Natural Resources Defense Council).

³³⁴ CRONIN & KENNEDY, *supra* note 301, at 59.

³³⁵ Riverkeeper, *Timeline*, <https://www.riverkeeper.org/riverkeeper-mission/our-story/timeline/>.

³³⁶ CRONIN & KENNEDY, *supra* note 301, at 177-180.

³³⁷ *Id.* at.95-109; Riverkeeper, *Our Story—A Brief Story*, <https://www.riverkeeper.org/riverkeeper-mission/our-story/> (Last visited Apr. 25, 2021).

³³⁸ Gwendolyn Chambers, *1980's Riverkeeper Timeline*, Apr. 1 2010, <https://www.riverkeeper.org/riverkeeper-timeline/1980s/>.

and industrial waste buried. Through the investigations and files, the Riverkeeper and the students from Pace University's Environmental Litigation Clinic proved that the Croton landfill violated the Federal Court's order in 1972 and to stop the landfill and restore the wetland.³³⁹ Besides preparing the citizen suit against Westchester County, the Riverkeeper also documented violations and petitioned the U.S. Attorney to reopen this case to file Croton against the county for contempt of the order of 1972.³⁴⁰ The landfill was finally shut down based on their agreement, and the leachate would be treated, and a restoration program of Croton Marsh was established.³⁴¹ According to the Clean Water Act, the county also paid the legal fees to the plaintiff as the substantially prevailing party. The Riverkeeper and the Pace Clinic retained the fees for the operating expenses.³⁴² Since 1987, the Riverkeeper helped create and cooperated with Pace Law School Environmental Litigation Clinic in this case, which provided actual cases and acquired considerable faculty and library resources as the mutual benefit over the decades.³⁴³

The Riverkeeper struggled for decades to restore the Hudson River from the industrial sewer to a thriving river ecosystem with diversified aquatic life. The HRFA and the Riverkeeper were instrumental in protecting and recovering the Hudson River, which inspired many grassroots organizations' emergence. In 1999, the Waterkeeper Alliance, a network of similar waterbody-based advocacy organizations, was organized to preserve water by connecting hundreds of local

³³⁹ *Id.*; CRONIN & KENNEDY, *supra* note 301, at 117-119.

³⁴⁰ *Id.* at 119.

³⁴¹ *Id.* at 120-121.

³⁴² *Id.* at 121.

³⁴³ *Id.* at 119.

Waterkeeper groups worldwide.³⁴⁴ The Waterkeeper Alliance initially united and encouraged Waterkeeper organizations to cooperate to protect rivers, lakes, bays, and other water bodies worldwide by collectively imparting their experiences within their regions, supervising violators, and advocating in communities or lecturing in classrooms.³⁴⁵

c. Active Environmental Law Advocacy ENGOs since the 1970s

(1) Environmental Defense Foundation

The Environmental Defense Fund (EDF) has been one of the most active environmental law advocacy ENGOs formed since 1967.³⁴⁶ It started as a local environmental discussion group, the Brookhaven Town Natural Resources Coalition (BTNRC).³⁴⁷ It consisted of scientists from the Brookhaven National Laboratory and the State University of New York at nearby Stony Brook and concerned the residents.³⁴⁸ The group addressed pollution from farms, dredging, sewage pollution, groundwater protection, dumpsites, wildlife and habitat preservation, and the use of DDT. EDF filed several cases seeking cancellation of registration for DDT. As a result, EDF was officially founded and organized formally to expand its work in 1967.³⁴⁹ “Throughout the mid-1970s, the EDF took a major leap in litigations that focused on eliminating lead toxicity, fighting against the supersonic transport, protecting sperm whales, and reducing pesticide.”³⁵⁰ The EDF has been committed to solving environmental problems through the aspects of scientific, legal, and

³⁴⁴ Waterkeeper Alliance, *Who we are*, WATERKEEPER, <https://waterkeeper.org/who-we-are/>.

³⁴⁵ *Id.*

³⁴⁶ KLINE, *supra* note 166, at 97; EDF *Our story: How EDF got started*, <https://www.edf.org/about/our-history>.

³⁴⁷ GOTTLIEB, *supra* note 174, at 188-189.

³⁴⁸ *Id.* at 189.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

economic means, such as climate and energy, human health, ecological conservation, and oceans.³⁵¹ EDF became a prestigious ENGO with is increasing members and offices worldwide.³⁵²

In the 1960s, scientists and a lawyer went to court on behalf of the environment to prevent the DDT from threatening the survival of magnificent birds like the osprey.³⁵³ In *EDF v. EPA*, EDF sued the EPA under the FIFRA³⁵⁴ for the immediate suspension and ultimate cancellation of all registered uses of aldrin and dieldrin, two chemically similar chlorinated hydrocarbon pesticides, in December 1970.³⁵⁵ In March 1971, the EPA Administrator announced the issuance of notices of cancellation of aldrin, but he declined to order the interim remedy of suspension, pending the final decision on cancellation after completion of the pertinent procedure.³⁵⁶ EDF then petitioned to review the EPA's failure to suspend the registration. Finally, the court remanded for further consideration about a 1972's Report of the Advisory Committee.³⁵⁷

EDF also filed Hardin, the U.S. Secretary of Agriculture, to issue cancellation notices for all economic poisons containing DDT and the suspension of registration for all such products pending the conclusion of cancellation proceedings.³⁵⁸ The case was remanded to the secretary for his

³⁵¹ EDF, *Timeline*, EDF, <http://www.cet.net.cn/plus/list.php?tid=2>.

³⁵² *Id.*

³⁵³ KLINE, *supra* note 166, at 97; EDF, *supra* note 346.

³⁵⁴ Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135-135k.

³⁵⁵ *Env't Def. Fund v. U.S. Env't Prot. Agency*, 465 F.2d 528 (D.C. Cir. 1972).

³⁵⁶ *Id.* at 531.

³⁵⁷ *Env't Def. Fund v. Env't Prot. Agency*, 510 F.2d 1292, 1297 (D.C. Cir. 1975)

³⁵⁸ *Env't Def. Fund v. Hardin*, 428 F.2d 1093 (D.D.C. 1970) (seeking cancellation of registration for DDT)

decision on whether to issue a notice of the cancellation on the remaining uses or, in the alternative, for an explanation of his inaction.³⁵⁹ In *EDF v. Ruckelshaus*, EDF petitioned the first Administrator of the EPA, Ruckelshaus, requesting him to issue notices of cancellation concerning all registrations of pesticides containing DDT, and further, to suspend those registrations pending the conclusion of the administrative proceedings.³⁶⁰ In 1972, Ruckelshaus issued an order finally canceling nearly all remaining federal registrations of DDT products, in public health, quarantine, minor crop uses were excepted, and the material export.³⁶¹ “DDT, this organochloride pesticide, was widely used following World War II and devastated many bird populations by causing the birds to lay thin-shelled eggs that broke during incubation. The founders of EDF brought the original DDT lawsuit in Suffolk County, New York, where they showed that ospreys had poor reproductive success and eggs that had not hatched contained high concentrations of DDT.”³⁶²

EDF also sued EPA in 1975 to attack its decision to permit the continued sale and use of pesticides aldrin and dieldrin’s existing stocks besides DDT’s issues.³⁶³ EDF continued suing EPA in 1976 to seek an injunction against the provisions permitting continued production and use of the pesticides on corn pests to suspend certain minor uses of chlordane.³⁶⁴ The series of EDF’s

³⁵⁹ *Id.* at 1100.

³⁶⁰ *Env’t Def. Fund v. Ruckelshaus*, 439 F.2d 584 2 ERC 1114, 142 U.S. App. D.C. 74, 1 Env’t. Rep. 20,059 (1971),

³⁶¹ EPA press release, DDT Ban Takes Effect, Dec. 31, 1972, <https://archive.epa.gov/epa/aboutepa/ddt-ban-takes-effect.html> (Last visited Apr. 25, 2021).; E. W. Kenworthy, *DDT Banned in U.S. Almost Totally, Effective Dec. 31*, N. Y. Times, June 15, 1972, at 1.

³⁶² EDF, *25 Years After DDT Ban, Bald Eagles, Osprey Numbers Soar*, EDF (June 13, 1997), <https://www.edf.org/news/25-years-after-ddt-ban-bald-eagles-osprey-numbers-soar>.

³⁶³ *Env’t Def. Fund v. Env’t Prot. Agency*, 510 F.2d 1292, 1297 (D.C. Cir. 1975).

³⁶⁴ *Env’t Def. Fund v. Env’t Prot. Agency*, 548 F.2d 998 (D.C. Cir. 1976).

lawsuits nudged the nationwide ban on DDT ultimately.

In addition, EDF fought to include whales on the U.S. endangered species list, which was vital to secure and help whale populations to recover in 1970.³⁶⁵ In *EDF v. TVA*, EDF filed another citizen suit to halt the dam project by forcing the Tennessee Valley Authority to finish an EIS process.³⁶⁶ This case helped lead to the famous case of *TVA v. Hill*,³⁶⁷ the Supreme Court's seminal case giving a robust interpretation of the Endangered Species Act of 1973.³⁶⁸

“Through the early and mid-1970s, the EDF became a major litigator in such areas as lead toxicity, the fight against the supersonic transport, the protection of sperm whales, and pesticide hazards.”³⁶⁹ EDF also devised a cap-and-trade approach, which was written into the 1990 Clean Air Act.³⁷⁰ This effort was expanded to help establish the carbon markets to cope with climate change recently. EDF maintains its environmental-economic-scientific influence all over the world.

(2) Natural Resources Defense Council (NRDC)

NRDC is a lawyer-scientist-staffed litigation-focused ENGO founded in 1970 by law students

³⁶⁵ MATTHEW J. LINDSTROM, *ENCYCLOPEDIA OF THE U.S. GOVERNMENT AND THE ENVIRONMENT: HISTORY, POLICY, AND POLITICS*, Vol.1, 2011, at 323; EDF, *Key Achievements from Our Past*, <https://www.edf.org/success-stories/past>.

³⁶⁶ *Env't Def. Fund v. Tennessee Val. Auth.*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972); *Env't Def. Fund v. Tennessee Val. Auth.*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

³⁶⁷ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

³⁶⁸ Pub. L. 93-205, 87 Stat. 884 (1973).

³⁶⁹ GOTTLIEB, *supra* note 174, at 192; United States. Tax exemptions for charitable organizations affecting poverty programs, *supra* note 179, at 388.

³⁷⁰ *Clean Air Act Amendments of 1983: Hearings on S.768, Before the Committee on Environment and Public Works*, United States Senate, 91st Cong. 13 (1983) (Statement of Robert Yuhnke, Attorney Environmental Defense Fund).

and attorneys at the forefront of the environmental movement to protect the environment.³⁷¹ NRDC “started with nothing but lawyers, but in 1973 NRDC began to hire their first staff scientists,” taking divergent directions to EDF, when they were initially founded.³⁷² NRDC has made extraordinary achievements in its litigation-focused work of protecting the air, land, water, and wildlife, many realms in the United States. NRDC has established its status and effectiveness in implementing environmental laws through its extensive civil litigation and other environmental legal actions over decades based on its attorneys’ trial expertise to significantly impact environmental justice, air and water pollution, public health, and ocean protection.³⁷³

The first NRDC lawsuit challenged strip mining by the Tennessee Valley Authority (TVA). NRDC, Sierra Club, and EDF alleged that its practice of purchasing and using strip-mined coal caused pollution, defaced the land, and violated the National Environmental Policy Act of 1969 (NEPA) in its planning, decision-making, and daily administration.³⁷⁴ The court finally denied TVA’s motion, although TVA bought strip-mined coal from third parties, that fact was not fatal to the citizens’ group’s action because the action sought to enforce an essentially public right, and the citizens’ group would not have had an adequate remedy if the action were dismissed.³⁷⁵ The court granted the plaintiffs’ motion, including the National Audubon Society’s intervene and found

³⁷¹ NRDC, About Us, NRDC <https://www.nrdc.org/about>.

³⁷² *Id.*

³⁷³ NRDC, litigation, NRDC <https://www.nrdc.org/about/litigation> (Last visited Apr. 25, 2021).

³⁷⁴ National Environmental Policy Act of 1969, § 4321.

³⁷⁵ Nat. Res. Def. Council, Inc. v. Tenn. Valley Auth., 340 F. Supp. 400, 402, 1971 U.S. Dist. LEXIS 10450, *1, 15 Fed. R. Serv. 2d (Callaghan) 1028, 1 ELR 20634, 3 ERC (BNA) 1468.

that its information would have proven helpful in ruling on the action.³⁷⁶

After the 1972 Clean Water Act was enacted, NRDC filed suit against Russell Train, the EPA Administrator, to force EPA to implement the portions of the CWA that dealt with Section 307(a) for the toxic pollutants in 1975.³⁷⁷ The consent decree between EPA and the plaintiffs identified sixty-five categories, 129 pollutants, in a list of toxic priority pollutants and twenty-one primary industries, for technology-based controls. The decree required technology-based effluent standards for these substances and industrial categories,³⁷⁸ which were adopted these requirements as 1977 the Federal Water Pollution Control Act.³⁷⁹ The NRDC realized that the ENGOs' litigation practice and suggestions improved the legislation.

In another seminal case, *NRDC v. Train*, the NRDC brought an action against the EPA and its Administrator to compel the publication of effluent limitation guidelines called for by section 304(b) (1) (A) of the Federal Water Pollution Control Act Amendments of 1972.³⁸⁰ The NRDC claimed that the Administrator had a nondiscretionary duty to publish guidelines for all point source categories. Then the federal court summarized the citizen-enforcement legislative history of the Clean Air Act and concluded that the citizen enforcement provisions were intended "to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be

³⁷⁶ *Id.*

³⁷⁷ Nat. Res. Def. Council, Inc. et al. v. Train, 8 ERC 2120 (D.D.C. Mar. 9, 1979).

³⁷⁸ *Id.*

³⁷⁹ Pub. L. 95-217, § 53(b), 91 Stat. 1566 (codified as amended at 33 U.S.C § 1317).

³⁸⁰ Nat. Res. Def. Council Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974); 33 U.S.C. § 1314(b) (1) (A) (Supp. II 1972).

implemented and enforced,” but not to “fling the courts’ door wide open.”³⁸¹ This case emphasized that citizen suit statutes were to widen citizen access to the courts as a supplemental and effective assurance that the Act would be implemented and enforced and that CWA citizen suit provisions were modeled on the provisions of the CAA and other legislation.³⁸²

Since 1981, the NRDC has addressed more issues, such as acid rain enforcement, according to the Clean Air Act amendments.³⁸³ As the NRDC testified in an acid program at testimony in a hearing of CAA Implementation before the Subcommittee on Energy and Power of the Committee on Energy and Commerce, House of Representatives in 1994, it stated that they challenged the utility industry’s tall stack program, which exacerbates the acid rain. Together with the EDF and the Sierra Club, the NRDC challenged EPA’s rules as the EPA had violated the requirements.³⁸⁴

With its growing environmental litigations experience, the NRDC helped halt Con Edison’s hydroelectric facility at Storm King along the Hudson River, which would have destroyed the mountain and devastated the Hudson River striped bass fishery.³⁸⁵ As a result, Con Edison formally abandoned to build the Storm King plant and donated the land for a state park based on

³⁸¹ Nat. Res. Def. Council Inc. v. Train v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974).

³⁸² *Id.*

³⁸³ Clean Air Act Implementation: *Hearings Before the Subcommittee on Energy and Power of the Committee on Energy and Commerce, House of Representatives*, One Hundred Third Cong., Second Session, Sept. 29 and Oct. 5, 1994, Vol. 4. at 112.

https://books.google.com/books?id=hEYffIE6G00C&pg=PA112&dq=NRDC+ACID+RAIN&hl=zh-CN&sa=X&ved=0ahUKEwjf54_QtYXqAhXARTABHfTpDWYQ6AEIPzAC#v=onepage&q=NRDC%20ACID%20RAIN&f=false

³⁸⁴ *Id.*

³⁸⁵ CRONIN & KENNEDY, *supra* note 301, at 39.

their bilateral settlement agreement.³⁸⁶

The NRDC won a landmark ruling requiring the Bureau of Land Management to assess the environmental impacts of livestock grazing on public lands since the 1970s.³⁸⁷ The *Natural Resources Defense Council, Inc. v. Morton* case promoted the Federal Land Policy and Management Act of 1976³⁸⁸ since the court held that the NEPA required assessment of the environmental effects of particular permits or groups of permits in specific spheres.³⁸⁹

NRDC also acted to remove ozone-depleting chlorofluorocarbons (CFCs) from aerosol cans, as the NRDC helped push to settle an agreement about the Montreal Treaty and the U.S. Clean Air Act's ozone protection provisions 1990.³⁹⁰ Since CFC gases were discovered to deplete the stratospheric global ozone shield to allow more dangerous UV radiation to reach the Earth's surface, increasing illnesses in 1974,³⁹¹ NRDC then sued the EPA to require it to protect the ozone layer from CFC emissions and challenged the EPA's delayed-regulating of the CFC emissions, and they reached a consent decree to end the case in 1985.³⁹² Finally, NRDC pursued stratospheric ozone protection by reaching the Montreal Protocol on Substances that Deplete the Ozone around

³⁸⁶ NRDC, Our Victories, NRDC <https://www.nrdc.org/our-victories> (Last visited Apr. 25, 2021).

³⁸⁷ *Id.*

³⁸⁸ 43 U.S.C. §§ 1701-1782 (1982)

³⁸⁹ *Nat. Res. Def. Council, Inc. v. Morton*, 388 F. Supp. 829, 838-41(1974).

³⁹⁰ Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399, Nov. 15, 1990.

³⁹¹ Mario J. Molina & F. S. Rowland, *Stratospheric sink for chlorofluoromethanes: chlorine atom-catalysed destruction of ozone*. NATURE 249, 810-812 (1974).

³⁹² *Nat. Res. Def. Council Inc. v. Ruckelshaus*, No. 84-3587 (D.D.C complaint filed Nov. 27, 1984); ARNOLD W. REITZE, AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT, 388 (2001); David Doniger, *Happy Birthday to the Ozone Layer*, NRDC (Sept. 2007), <https://www.nrdc.org/experts/david-doniger/happy-birthday-ozone-layer>.

1985, collaborating with UNEP's coordinating committee and a working group.³⁹³

NRDC also triggered a massive environmental cleanup since it filed a case to compel the U.S. Department of Energy (DOE) to comply with the Resource Conservation and Recovery Act³⁹⁴ and other environmental laws at all of the agency's nuclear weapons facilities from 1976 to 1984, ending nearly fifty years of secrecy and self-regulation.³⁹⁵

The NRDC became a dominant force in the professionalization of the reports and successful litigations over decades.³⁹⁶ In particular, along with several active ENGOs, NRDC optimized citizen enforcements to tackle various environmental problems, making the U.S. environmental laws and policy system stable and prosperous.³⁹⁷

Gradually, NRDC became increasingly focused on global issues to promote specific realms, such as energy efficiency and pollution control, combining the power of the members and expertise of scientists, lawyers within an international context.³⁹⁸ For instance, in China, NRDC has been a thought leader and trusted adviser to local ENGOs and governments by researching laws, policies,

³⁹³ 52 Fed. Reg. 47,488 (1987) (to be codified at 40 C.F.R. part 82); Lieutenant Colonel John S. Hannah, USAF, *Chlorofluorocarbons: A Scientific, Environmental, and Regulatory Assessment*, THE AIR FORCE LAW REVIEW, Vol. 30, Apr. 1989, at 99 (1989); U.S. Department of State, *The Montreal Protocol on Substances That Deplete the Ozone Layer*, Feb. 11, 2019.

<https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/the-montreal-protocol-on-substances-that-deplete-the-ozone-layer/>

³⁹⁴ Resource Conservation and Recovery Act, 42 U.S.C. § 6901-6987 (2018).

³⁹⁵ Karen Dorn Steele, *Hanford's Bitter Legacy*, January/February 1988, BULLETIN OF THE ATOMIC SCIENTISTS, at 23 (1988); Bonnie J. Ram, Energy Department's "good neighbor" policy, January/February 1988, Bulletin of the Atomic Scientists, at 23 (1988).

³⁹⁶ ADAMS & ADAMS, *supra* note 235, 183.

³⁹⁷ GOTTLIEB, *supra* note 174, at 196.

³⁹⁸ GOTTLIEB, *supra* note 174, at 196.

technologies, and market tools to conserve natural resources, curb pollution, and accelerate China's transition to a clean, low-carbon economy.³⁹⁹ NRDC not only advised on the drafting and amendment of major Chinese environmental laws and regulations by being engaged in some essential and challenging environmental governance issues but also provided training, research, and exchanges on environmental law practice to judges, lawyers, NGO staff, and governmental officials.⁴⁰⁰ NRDC's Beijing Representative Office was registered under the Beijing Municipal Public Security Bureau and supervised by the National Forestry and Grassland Administration of China,⁴⁰¹ according to the Law of Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China.⁴⁰²

The pioneer ENGOs initiated various legal actions since the late nineteenth century, focusing on various environmental issues in different areas in the United States. Cumulatively, as the rapid development of the economy brought about severe environmental problems, these ENGOs optimized their capacity-buildings, collaborations, and citizen suits skills to promote the environmental legal system as a preeminent model. Notably, litigations and other environmental laws advocacy actions realized that ENGOs explored different enforcement methods in their

³⁹⁹ NRDC, Environmental Governance, <http://www.nrdc.cn/?cook=1>.

⁴⁰⁰ *Id.*

⁴⁰¹ NRDC, *About NRDC China Program*, NRDC.CN, <http://www.nrdc.cn/aboutus?cid=7&cook=1>.

⁴⁰² Law of the People's Republic of China on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China, 中华人民共和国境外非政府组织境内活动管理法 (adopted at the 20th Session of the Standing Comm. of the Twelfth Nat'l People's Cong. of the People's Republic of China on Apr. 28, 2016; and amended in accordance with the Decision of the Nat'l People's Cong. on Amending Eleven Laws including the Accounting Law of the People's Republic of China at the 30th Session of the Standing Comm. of the Twelfth Nat'l People's Cong. of the People's Republic of China on Nov. 4, 2017), CLI.1.304348(EN) (LawinfoChina).

concentration spectrum. Moreover, the ENGOs' extensive alliance was an effective way to continue questioning environmental violations over an extended period.

2.2 Environmental Citizen Suits in the United States

2.2.1 Origin and History

Before the 1960s, environmental law in the United States stipulated that only legally interested in a case could become the plaintiff. However, due to the continuous occurrence of public nuisance incidents in the middle of the 20th century in various parts of the world and the United States, the public had actively carried out environmental campaigns for a safe and healthy life, with the help of petitions, protests, marches, and anti-epidemics. In terms of legislation, a citizen-suit provision was added to the Clean Air Act in 1970.⁴⁰³ In addition, the Act gives the public the right to urge law enforcement through federal courts, a milestone innovation.

The citizen suit, known as citizen enforcement, was a mutual product of times and administrative oversight as a modern invention in the United States. This new environmental citizen suit was the first statutory remedy that empowered so-called "private attorneys general"⁴⁰⁴ to sue for interests in environmental values instead of the traditional common law interests in damages remedies and protection of person and property.⁴⁰⁵ University of Michigan Law School Professor Joseph Sax advocated for citizen-suit theory, incorporating a citizen's right to litigate

⁴⁰³ Clean Air Act § 304, 42 U.S.C. § 7604 (2018); Pub. L. 91-604 § 12(a) (1970).

⁴⁰⁴ The term "private attorneys general" was first used by Judge Jerome Frank to refer to private litigants seeking to enforce the public interest by compelling government agencies to comply with congressional directives. *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

⁴⁰⁵ See generally Louis Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

and protect environmental and public trust resources of the Michigan Environmental Protection Act of 1969.⁴⁰⁶ This initiation was regarded as the origin of the citizen suit, which impelled incorporate this citizen enforcement's idea into the Clean Air Act in 1970. As professor Coplan described that "the final 1970 Clean Air Act that emerged from the Conference Committee provided for a direct citizen suit against violators to compel compliance, and it allowed a suit against the agency only in the case of its failure to perform a nondiscretionary duty."⁴⁰⁷ Moreover, the legislative history contains nothing to cast doubt on this interpretation, which "emphasized that citizen suit was to supplement the possible government laxity and observed that persons sued under Section 304 "would be performing a public service."⁴⁰⁸ In *NRDC v. Train*, the citizen suit was also pointed to achieve efficiencies of supplementing limited government enforcement resources.⁴⁰⁹ Citizen enforcement raises some of the same issues as government enforcement actions to supplement, which introduces a set of separate and vital questions. The citizen-enforcement provisions in most of the major federal environmental regulatory statutes as citizen enforcement's exclusive procedures present effective enforcement and a goad to effective government enforcement of the regulatory scheme.⁴¹⁰ Citizen enforcement is a critical supplement

⁴⁰⁶ see generally MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS Ch. 1 (1991); See also MILLER & ENV'T L. INST., *supra* note 9, at 4; JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION, 230 (1970); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473 (1970). (For the origins of the environmental citizen suit in the Michigan Environmental Protection Act.)

⁴⁰⁷ Clean Air Act Amendments of 1970, Pub. L. No. 91-604 § 304(a), 84 Stat. 1706 (1970).

⁴⁰⁸ *Clean Air Act Amendments of 1977: Hearing Before the Subcomm. on Environmental Pollution of the Comm. on Environment and Public Works, United States Senate, 95th Cong. 1st Session*, 337(1977).

⁴⁰⁹ *NRDC v. Train*, 510 F.2d 692, 727-30 (D.C. Cir. 1974).

⁴¹⁰ S. REP. No. 91-1196, 91st Cong., 2d Sess. 36 (1970) ("Government initiative in seeking enforcement under the Clean Air Act has been restrained."); *Nat. Res. Def. Council Inc., v. Train*, 510 F.2d 692 (D.C. Cir. 1974).

to public enforcement, filling important gaps that arise because of inadequate agency resources and the susceptibility of regulators to political pressure and capture by regulated entities.⁴¹¹ To achieve the goals of citizen enforcement, commencing a citizen suit must satisfy several procedural requirements, including statutory standing, prior notice, jurisdiction, and mootness.

Although it is generally acknowledged that the protection of public interests is the government's responsibility, and citizens can only claim rights and seek protection for their own interests based on the "zone of interests," test for standing requires that the interest sought to be protected be the sort of interest.⁴¹² However, under certain circumstances, the court held that the plaintiff was qualified to claim the interests of others, especially the public interest. The U.S. Supreme Court stated in *Associated Industries v. Ickes*:⁴¹³

While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or a designated group of non-official persons. The authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.⁴¹⁴

⁴¹¹ MINTZ, RECHTSCHAFFEN, AND KUEHN, *supra* note 64, at 258 (2007).

⁴¹² *Data Processing Svc. Orgs. v. Camp*, 397 U.S. 150 (1970).

⁴¹³ *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

⁴¹⁴ *Id.* at 704.

The private attorney general must be motivated to effectively proceed with the illegal actions that administrations or private sectors violate the public interest. The most typical case of the kind of litigation is that the environmental environmentalists brought up the violation of the environment, that is, citizen suit.

2.2.2 Citizen-suit Provisions

The environmental citizen suits originated in the 1970s while environmental movements impelled environmental legislation in the United States. At the federal level, citizen-suit provisions, in a wide range of legislations, illustrate the citizen enforcement system, originated in the 1970 Clean Air Act Section 304.⁴¹⁵ This original statute was the fundamental model for other citizen-suit provisions in various Acts, with their slight difference. Each of the major federal environmental statutes included citizen-enforcement provisions, except for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)⁴¹⁶ and the Marine Mammal Protection Act (MMPA).⁴¹⁷

Typical citizen-suit provisions provide that any person commence civil actions on his own behalf against any person, or a government agency, to enforce the statute, regulations promulgated under its authority, permits, or administrative orders.⁴¹⁸ Twenty-two federal environmental acts include citizen-suit provisions with slight differences. Several typical provisions are elaborated on below.

⁴¹⁵ Clean Air Act §304, 42 U.S.C. 7604 (2018).

⁴¹⁶ Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136 (2018).

⁴¹⁷ Marine Mammal Protection Act (MMPA), 16 U.S.C §1361 (1972).

⁴¹⁸ William H. Timbers, *David A. Wirth, Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 Cornell L. Rev., 403. 405-406 (1985).

(1) *Clean Air Act* (CAA). Clean Air Act Section 304 authorizes for any person may commence violation enforcement of “emission standard or limitation” or the order issued by the Administrator or a State with respect to such a standard or limitation.⁴¹⁹ Citizens also may enforce against the administrator’s nonperformance of duties, as well as the violators’ constructions of new or modified major emitting facilities without a permit according to the Clean Act Act’s requirements.⁴²⁰ In addition, the reviewing could award litigation costs to a citizen litigant when the court determines that the award is appropriate.⁴²¹ The penalty that shall not exceed \$100,00 may be received by the court and deposited in a special fund in the United States Treasury for their services.⁴²²

(2) *Clean Water Act* (CWA). Clean Water Act Section 505 provides that any citizen may commence citizen enforcement of an effluent standard or limitation of the Clean Water Act or an order issued by the Administrator or a State with respect to such a standard or limitation, which is similar to the Clean Air Act.⁴²³ It also allows citizens to enforce the mandatory duties of Administrators to implement the Act, such as enforcing the EPA’s Administrator to implement the CWA.⁴²⁴ The provision directly defines “any citizen” instead of “any person” in the CAA.⁴²⁵ However, the Act further defines “citizen” to

⁴¹⁹ Clean Air Act §304 (a)(1), 42 U.S.C. 7604 (a)(1) (2018).

⁴²⁰ *Id.* §304 (a)(2), (a)(3), 42 U.S.C. 7604 (a)(2), (a)(3) (2018).

⁴²¹ *Id.* §304 (d), 42 U.S.C. 7604 (d) (2018).

⁴²² *Id.* §304 (g), 42 U.S.C. 7604 (g) (2018).

⁴²³ Clean Water Act § 505(a)(1), 33 U.S.C. §1365(a)(1) (2018).

⁴²⁴ *Id.* § 505(a)(2), 33 U.S.C. §1365(a)(2).

⁴²⁵ *Id.* § 505(a)(1), 33 U.S.C. §1365(a)(1).

include “a person or persons having an interest which is or may be adversely affected.”⁴²⁶

In terms of “effluent standard or limitation,” it includes the violation of the prohibition of unlawful pollutants discharges into the waters of CWA Section 301(a), violation of state water quality certifications, and violations of permits issued under CWA Section 402.⁴²⁷

Notably, the dredge-and-fill discharge violation is also a kind of the general prohibition of CWA Section 301.⁴²⁸ The court may enforce effluent standards of limitation’s order or order penalties under CWA Section 459.⁴²⁹

(3) *Resource Conservation and Recovery Act* (RCRA). RCRA provides the citizen-enforcement requirements that operators’ permission for hazardous-waste treatment, storage, and disposal (TSD) facility, which may present an imminent and substantial endangerment to health or the environment, as well as the citizen enforcement of Administrators’ TSD mandatory implementation performance.⁴³⁰ The types of waste covered under citizen-suit provisions are broadly defined as “solid waste” instead of “hazardous waste.”⁴³¹ Under a plain reading of the RCRA citizen-suit provision’s remedial scheme, a citizen plaintiff could seek a mandatory injunction that orders a responsible party to “take action” by attending to the cleanup and proper disposal of waste,

⁴²⁶ *Id.* § 505(g), 33 U.S.C. § 1365(g).

⁴²⁷ *Id.* § 505(f), 33 U.S.C. § 1365(f).

⁴²⁸ Karl S. Coplan, *Citizen Suits*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 295, 296, (Kegan A. Brown, Andrea M. Hogan 2d. ed. 2019).

⁴²⁹ Clean Water Act § 505(a)(2), 33 U.S.C. § 1365(a)(2) (2000); § 459(d), 33 U.S.C. § 1319(d) (2018).

⁴³⁰ Resource Conservation and Recovery Act § 7002 (a), 42 U.S.C. § 6972(a).

⁴³¹ *Id.*

or a prohibitory injunction that “restrains” a responsible party from further violating RCRA.⁴³² Neither remedy, however, contemplates the award of past cleanup costs, whether denominated “damages” or “equitable restitution.” A comparison with the relief provided in the analogous, but not parallel, provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 demonstrates that Congress knows how to provide for the recovery of past cleanup costs and that § 6972(a) does not provide that remedy.⁴³³ The Administrator shall provide immediate notice to the appropriate local government agencies of the places of the hazardous waste, as well as the Administrator shall require notice of endangerment at the site.⁴³⁴ RCRA requires 90-days’ notice unless the endangerment results from a violation of the statute’s requirements on hazardous waste disposal.⁴³⁵ Costs, including attorney and expert fees, may be awarded to the prevailing or substantially prevailing party pursuant to RCRA Section 7002 (e).⁴³⁶

(4) *Comprehensive Environmental Response, Compensation, and Lands Act (CERCLA).*

CERCLA (or Superfund) allows citizens to file civil actions against any violators and agencies, which violated any CERCLA standard, regulation, condition, requirement, order.⁴³⁷ CERCLA also allows citizens to file against the President or any other officers,

⁴³² *Id.*

⁴³³ *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 479 (1996).

⁴³⁴ Resource Conservation and Recovery Act § 7003, 42 U.S.C. § 6973.

⁴³⁵ *Id.* § 7002 (b)(2)(A), 42 U.S.C. § 6972(b)(2)(A).

⁴³⁶ *Id.* § 7002 (e), 42 U.S.C. § 6972(e).

⁴³⁷ Comprehensive Environmental Response, Compensation, and Lands Act (CERCLA) § 310 (a)(1), 42 U.S.C. §

such as the EPA administrator and the Administrator of the Agency for Toxic Substances and Disease Registry, for the failure to perform any non-discretionary act or duty.⁴³⁸ Injunction relief and the civil penalty could be enforced on any violators and agencies, while the court may order the President or other Administrators to perform the act or duty concerned.⁴³⁹ In addition, CERCLA citizen-suit provisions do not affect or otherwise impair the rights of any person under federal, state, or common law, except with respect to the actions under State law. For example, citizen enforcement will not be brought if remedial action is to be undertaken at that site or actions under State law.⁴⁴⁰

(5) *Endangered Species Act* (ESA). ESA Section 11(g) allows any person may commence a citizen suit to enforce against any person in violation of any provision of the Act or compel the Secretary of the Interior, the Secretary of Commerce as program responsibilities are vested under the provisions of the Reorganization Plan Numbered 4 of 1970, or the Secretary of Agriculture's non-discretionary performance or mandatory duty on endangered species protection.⁴⁴¹ The injunctive relief could be applied, and there are no civil penalties' norms in this citizen-suit provision.⁴⁴²

(6) *Safe Drinking Water Act* (SDWA). SDWA Section 1449 (a) allows citizens to file a civil action against any person, the United States, or other government agencies if in violation

9659(a)(1) (2018).

⁴³⁸ *Id.* § 310 (a)(2), 42 U.S.C. § 9659(a)(2).

⁴³⁹ *Id.* § 310 (c), 42 U.S.C. § 9659(c).

⁴⁴⁰ *Id.* § 310 (h), 42 U.S.C. § 9659(h).

⁴⁴¹ Endangered Species Act (ESA), § 11(g), 16 U.S.C. § 1540 (g) (2018).

⁴⁴² *Id.*

or any SDWA requirement, as well as against any Administrator's failure to perform any act or Administrator's discretionary duty.⁴⁴³ Only injunctive relief is available, while no civil-penalty norms in this section.⁴⁴⁴

(7) *Emergency Planning and Community Right-to-know Act* (EPCRA). EPCRA provides that “any person may commence a civil action” against the owner or operator of a facility for failure to comply with the requirements of EPCRA.⁴⁴⁵ Citizen suits may also be filed against Administrators for failure to promulgate required regulations or State and local governments to provide a mechanism for public availability of information.⁴⁴⁶ Section 326 authorizes private parties to bring civil actions seeking injunctive relief and civil penalties for specific violations of the Act.⁴⁴⁷

(8) *Toxic Substances Control Act* (TSCA). The citizens-suit provisions in TSCA allow any person to bring lawsuits against alleged violations of TSCA by industry, as well as to compel the EPA to carry out a “nondiscretionary duty” under TSCA.⁴⁴⁸

The aforementioned citizen-suit provisions authorize two types of lawsuits: (1) enforcement actions against entities that violate environmental laws, including permit limitations and other regulatory and statutory requirements; and (2) actions to compel government agencies to carry out nondiscretionary duties, including promulgating statutorily required regulations or acting on a

⁴⁴³ Safe Drinking Water Act (SDWA) §1449(a), 42 U.S.C. § 300j-8(a) (2018).

⁴⁴⁴ *Id.* §1449(a)(3), 42 U.S.C. § 300j-8(a)(3).

⁴⁴⁵ Emergency Planning and Community Right-to-know Act (EPCRA) § 326 (a)(1), 42 U.S.C. § 11046 (a)(1) (2018).

⁴⁴⁶ *Id.* § 326 (a)(1)(B) -(C), 42 U.S.C. § 11046 (a)(1)(B)-(C).

⁴⁴⁷ *Id.* § 326 (c), 42 U.S.C. § 11046 (c).

⁴⁴⁸ Toxic Substances Control Act (TSCA) § 20(a), 15 U.S.C. § 2619(a) (2018).

listing petition under a specific time frame.

In general, the citizen-suit clauses in federal laws are derived from the provisions of various separate laws. As a whole, twenty-two acts authorized citizen suits. The articles are listed below.

- (1) Clean Air Act (CAA), § 304(g), 42 U.S.C. § 7604 (2018).
- (2) Clean Water Act (CWA), § 505, 33 U.S.C. § 1365 (2018).
- (3) Resource Conservation and Recovery Act (RCRA) § 7002 (a), 42 U.S.C. § 6972(a) (2018).
- (4) Comprehensive Environmental Response, Compensation, and Lands Act (CERCLA) § 310, 42 U.S.C. § 9659 (2018).
- (5) Endangered Species Act (ESA), § 11(g), 16 U.S.C. § 1540 (g) (2018).
- (6) Safe Drinking Water Act (SDWA) §1449, 42 U.S.C. § 300j-8 (2018).
- (7) Emergency Planning and Community Right-to-know Act (EPCRA) § 326, 42 U.S.C. § 11046 (2018).
- (8) Toxic Substances Control Act (TSCA) § 20, 15 U.S.C. § 2619 (2018).
- (9) Noise Control Act (NCA) §12, 33 U.S.C. §1415(g) (2018).
- (10) Deepwater Port Act (DPA) § 16, 33 U.S.C. § 1515 (2018).
- (11) Marine Protection, Research, and Sanctuaries Act (MRPSA) §105(g), 33 U.S.C. §1415(g) (2018).
- (12) Surface Mining Control and Reclamation Act (SMCRA) § 520, 30 U.S.C. § 1270 (2018).
- (13) Columbia River Gorge National Scenic Area Act (NSA) 16 U.S.C. §544 (m)(b)(2).

- (14) Outer Continental Shelf Lands Act (OSCLA) § 23, 42 U.S.C. §1349 (a) (2018).
- (15) Hazardous Liquid Pipeline Safety Act § 215, 49 U.S.C. § 2014 (2018).
- (16) Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435 (2018).
- (17) Energy Policy and Conservation Act § 335, 42 U.S.C. § 6305 (2018).
- (18) Act to Prevent Pollution of Ships, 33 U.S.C. § 1910 (2018).
- (19) Public Lands Act, 43 U.S.C. § 1349 (a) (2018).
- (20) Deep Seabed Hard Mineral Resources Act §117 (c), 30 U.S.C. § 1427 (c) (2018).
- (21) Ocean Thermal Energy Conservation Act §114 (d), 42 U.S.C. § 9124 (d) (2018).
- (22) Energy Sources Development Act §210 (e) (2), 42 U.S.C. §5851 (e) (2) (2018).

Notably, the NEPA does not contain citizen-suit provisions allowing a lawsuit to be brought directly under the relevant statute. The challenges are often brought under the APA to allege that the agency acted in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁴⁴⁹

2.2.3 Classification

In citizen suits, citizen-enforcement suits, and mandatory duty suits were two categories of causes of action in practice.

a. Citizen-Enforcement Suit

A Citizen-enforcement suit is a typical kind of citizen suit, which generally allows any citizen or any person to enforce compliance such as permits or standards. For instance, the CAA authorizes any person to enforce compliance with emission standards or limitations and orders

⁴⁴⁹ Administrative Procedure Act (APA), 5 U.S.C. § 706.

issued by the EPA Administrator or a State in order to reach injunction relief or penalties to the Department of the Treasury.⁴⁵⁰ Moreover, the proper plaintiff must satisfy several procedures before citizen enforcement suits on track. Statistically, the frequent citizen suits were easy to bring up so as to seek the injunctions and penalties as the permit violations according to the CWA during the 1980s and 1990s. The plaintiffs brought these cases as fundamental proof were the discharge monitoring reports (DMRs), which were submitted by the potential violators.⁴⁵¹ In the 1980s, the number of citizen-enforcement suits had soared as a result of the government not actively enforcing environmental protection laws during the eras of President Reagan and George H.W. Bush.⁴⁵² It is worth noting that Congress intended that the enforcement of these control provisions should be immediate, that citizens should be unconstrained to bring these actions simply and objectively, as well as that the courts would not re-evaluate the administrations' judgment.⁴⁵³

b. Mandatory-duty Suits

A mandatory duty suit is a suit against the EPA or other administrations to force the duties to perform the duties according to the acts. Take a CAA citizen-suit clauses for instance, when the administrator had not issued the regulations or standards required by the law, that is, it has failed to perform its statutory non-discretionary acts or duties, any person has the right to file a mandatory-duty enforcement suit against the administrator of the Federal EPA who neglects to perform his duties according to the provision.⁴⁵⁴ A mandatory citizen suit against a government

⁴⁵⁰ Clean Air Act §304 (a), 42 U.S.C. 7604(a) (2018).

⁴⁵¹ Karl S. Coplan, *supra* note 428, at 296.

⁴⁵² Philip Shabecoff, *Reagan and Environment: To Many, a Stalemate*, N.Y.TIMES, Jan. 2, 1989, at A1.

⁴⁵³ S. REP. No. 91-1196, 91st Cong., 2d Sess. at 37 (1970)

⁴⁵⁴ Clean Air Act §304 (a), 42 U.S.C. 7604(a) (2018).

that fails to perform the duties is required to perform. According to the Clean Air Act, citizen suits against the government only targets cases where the EPA neglects to perform its non-administrative discretion.⁴⁵⁵

This mandatory duty citizen suit is distinct from the judicial review against administrations, according to the Administrative Procedure Act (APA) Section 7. Judicial review is

1. A court's power to review the actions of other branches or levels of government, esp., the courts' power to invalidate legislative and executive actions as being unconstitutional.
2. The constitutional doctrine providing for this power.
3. A court's review of a lower court's or an administrative body's factual or legal findings.⁴⁵⁶

The judicial review of administrative legislation, such as the formulation of administrative regulations and rules, must not be based on the citizen-suit provisions of the environmental protection law but should be based on judicial-review provisions. The APA statutes provide the exercise of judicial review apply "except to the extent that statutes preclude judicial review."⁴⁵⁷ And the scope is enumerated in the APA Section 706.⁴⁵⁸ In particular, Citizens, especially ENGOs who have objections to the regulations, standards, or administrative decisions issued by EPA may initiate judicial review proceedings in accordance with the provisions of the judicial review under such as the CAA Section 307 and CWA Section 509,⁴⁵⁹ and sections in the APA as well. Thus,

⁴⁵⁵ Clean Air Act §304 (a), 42 U.S.C. 7604(a) (2018).

⁴⁵⁶ JUDICIAL REVIEW, BLACK'S LAW DICTIONARY, (9th 2009).

⁴⁵⁷ Administrative Procedure Act (APA), 5 U.S.C. 701 (2018).

⁴⁵⁸ Administrative Procedure Act (APA), 5 U.S.C. 706 (2018).

⁴⁵⁹ Clean Air Act §307, 42 U.S.C. 7607 (2018); Clean Water Act § 509, 33 U.S.C. 1369 (2018).

whether an agency decision could be challenged is subject to judicial review is a statutory question.

ENGOS have acted and challenged the EPA to comply with the various rulemaking procedures set out in the APA and CWA Section 509 (b) but did not always win in practice. In earlier, some uncomplicated cases were about regulations citizen participation. For instance, the EPA was accused of a failure to establish guidelines regarding public participation and ensure public participation in state NPDES enforcement under the CWA. The court also brought up a way to prevent unguided judgments from requiring the EPA to issue public participation regulations prior to ratifying a state NPDES program.⁴⁶⁰ In addition, the Supreme Court held that none of the acts had required to hold a public hearing on every NPDES permit action as the agencies' implementing the requirement of "an opportunity" for public hearing under the CWA §402 are valid, and activists' suggestion of the EPA's provision of notice to the general public concerning the proposed permit extension was inadequate.⁴⁶¹ Besides, ENGOS also challenged that the EPA's standard that not reflected the best technology available and contradicted the statute. The Court held that EPA's regulation should be precise and based on a reasonable interpretation and sufficiently supported by a factual record.⁴⁶²

ENGOS also had petitioned the EPA to withdraw approval of state NPDES programs if the state permit is contrary to EPA's guidelines after *Save the Bay v. Administrator of EPA* in 1977,⁴⁶³ although the court lacked jurisdiction to review, as the CWA §509 does not encompass the EPA's

⁴⁶⁰ *Citizens for Better Env't v. EPA*, 596 F.2d 720, 725 (7th Cir. 1979).

⁴⁶¹ *Costle v. Pac. Legal Found.*, 445 U.S. 198, 221, 100 S. Ct. 1095, 1108 (1980).

⁴⁶² *Riverkeeper, Inc. v. United States EPA*, 358 F.3d 174 (2d Cir. 2004).

⁴⁶³ MILLER, POWERS, ELDER, AND COPLAN *supra* note 127, at 500.

omission to veto a proposed permit under a state program in that case.⁴⁶⁴ Another typical example of judicial review is the water quality standard according to the total maximum daily load (TMDL) in the CWA. Anacostia Riverkeeper has been countenanced by the court as EPA acted arbitrarily and capriciously, in violation of the APA and the CWA by approving a sediment TMDL had ignored the sediment's effect and pollution on recreational and aesthetic uses of the Anacostia River. Although TMDLs are not "self-implementing instruments," they provide information to the EPA and state agencies "to coordinate necessary responses to excessive pollution in order to meet applicable water quality standards."⁴⁶⁵

ENGOS also petitioned under the Clean Air Act when the EPA's action may be set aside as arbitrary and capricious if the EPA failed to comply with its regulations in several cases.⁴⁶⁶

In sum, ENGOS initiated judicial review actions to challenged and rectified statutes but are acknowledged to be distinct from mandatory duty citizen suit action. Courts apply the *Chevron* framework⁴⁶⁷ except for the APA and other environmental laws, but courts have jurisdiction for direct review only of those EPA actions specifically enumerated in each act, such as in CWA 509

⁴⁶⁴ *Save the Bay, Inc. v. Adm'r of Env't Prot. Agency*, 556 F.2d 1282 (5th Cir. 1977).

⁴⁶⁵ *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011) *reprinted in* S. Appalachian Mt. Stewards v. Red River Coal Co., No. 2:14CV00024, 2015 U.S. Dist. LEXIS 48483, at *6 (W.D. Va. Apr. 13, 2015).

⁴⁶⁶ *Nat'l Env't Dev. Ass'ns Clean Air Project v. EPA*, 410 U.S. App. D.C. 50, 60, 752 F.3d 999, 1009 (2014); *Cal. Cmty. Against Toxics v. EPA*, 443 U.S. App. D.C. 94, 116, 934 F.3d 627, 649 (2019) (An EPA's memo on a source of toxic emissions declared easing its regulatory burden was not final action, so it had no direct and appreciable legal consequence. The petition was dismissed.)

⁴⁶⁷ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984) (The Chevron doctrine is a rule about court review of agency actions that many scholars consider central to modern administrative law. That doctrine calls for judges to accept reasonable interpretations of a statute by an administrative agency, even if the judges might have favored different interpretation themselves. The Supreme Court has cited two reasons to give agencies the power to interpret ambiguous statutes: (1) agencies are more democratically accountable than courts, and (2) Congress has given the agency the main responsibility for implementing the statute.)

(b)(1) and CAA 307(b)(1).⁴⁶⁸

2.2.4 Standing to Sue and Proper Plaintiff

The essential question for being a qualified plaintiff is if the plaintiff has standing. As described in Black Dictionary, standing is:

A party's right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.⁴⁶⁹

This definition also represents the eligibility rule for general litigation in the United States. The Plaintiff of the citizen suit must satisfy the justiciability requirements of Article III of the U.S. Constitution and statutory standing requirements in each provision. Almost all federal environmental citizen-suit provisions stipulate that any person or any citizen can file a civil lawsuit on his behalf against violators to implement and enforce the federal environmental law. In practice, plaintiffs in environmental citizen suits must meet the eligibility rule for plaintiffs in the United States law, which has been gradually relaxed since the 1970s after five decades' evolution.

In the United States, the standing rules for plaintiffs are mainly matters of public law, and its birth was regarded as "part and parcel of heated struggle, within the country and the courts about the constitutional legitimacy of the emerging regulatory state" in the 1920s and 1930s.⁴⁷⁰ In

⁴⁶⁸ Clean Water Act § 509(b)(1), 33 U.S.C. 1369(b)(1) (2018); Clean Air Act §307(b)(1), 42 U.S.C. 7607(b)(1) (2018).

⁴⁶⁹ Standing, BLACK'S LAW DICTIONARY (9th ed. 2009).

⁴⁷⁰ Cass R. Sunstein, *What's Standing After Lujan? of Citizen Suits, "Injuries," and Article III*, MICHIGAN LAW REV., Vol. 91, No. 2, 179 (Nov. 1992).

addition, in the early judicial review case of *Marbury v. Madison*, Justice Marshall repeatedly emphasized the necessity for the judicial protection of “vested” or “legal” rights, which declared that the province of the Court is solely to decide on the rights of individuals.⁴⁷¹ That is, the occasions for judicial review were limited to the protection of identifiable and concrete personal rights, similar to those protected by the common law courts.⁴⁷² Moreover, in *Tennessee Electric Power Co. v. Tennessee Valley Authority (TVA)* case, eighteen competing corporations sued to enjoin operations of the TVA, asserting unconstitutionality.⁴⁷³ The Supreme Court held the plaintiffs to be without standing to raise the constitutional issues because “the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue.”⁴⁷⁴ The “legal right doctrine” was established without application unless the right invaded is a legal right. “One of property, one was arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”⁴⁷⁵ The principle permitting suit against an agent of the Government to restrain the execution of an unconstitutional statute protects only legal rights.⁴⁷⁶ However, with the *Association of Data Processing Service Organizations, Inc. v. Camp* and *Sierra Club v. Morton*, two cases’ decisions, the Court held that interest, at times, may reflect aesthetic, conservation, and

⁴⁷¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴⁷² See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, YALE L. J., Vol. 82, No.7 (June 1973), at 1366.

⁴⁷³ *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1937).

⁴⁷⁴ *Id.* at 140.

⁴⁷⁵ *Id.* at 138.

⁴⁷⁶ *Id.* at 137.

recreational noneconomic values as well as economic values.⁴⁷⁷ The members of an organization who are injured may represent in a judicial review proceeding. That is, broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.⁴⁷⁸

Except for the extension of the interests, the expression of the plaintiff in provisions also indicates the evolution. The standing provisions from the CAA to the CWA also details the evolution of the legal requirements. Citizen-suit provisions in CAA did not require the “de facto damage” in 1970, which encouraged citizen participation in the enforcement and implementation. The CAA Amendments of 1970 included two citizen-suit provisions to authorize the public involved in the CAA enforcement and implementation. Section 304 authorized that any person is entitled to sue against the violators.⁴⁷⁹ Section 307 allows citizen enforcement to compel the EPA actions made pursuant to the CAA.⁴⁸⁰ However, in 1972 citizen-suit statute in CWA was updated to “any citizen,” and citizen was defined in CWA Section 505 (g), which provides “For the purposes of this section the term “citizen” means a person or persons having an interest which is or may be adversely affected.”⁴⁸¹

⁴⁷⁷ Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154. (1970); Sierra v. Morton, 405 U.S. 727, 738 (1972).

⁴⁷⁸ *Id.*

⁴⁷⁹ 42 U.S.C. § 7604(a).

⁴⁸⁰ *Id.* § 7607(d).

⁴⁸¹ Clean Water Act, §§ 505 (a), (g), 33 U.S.C. §§1365(a), (g).

a. ENGOs' standing

Although citizen-suits provisions authorized “any person (citizen)” to commence citizen suits in various legislations, ENGOs drove most citizen enforcement cases (rather than individuals) over decades. In *Sierra Club v. Morton*, the Supreme Court held that an ENGO’s standing has to rely on its members’ aesthetic, recreational, and non-economic interests instead of the general interest of an organization in aesthetic or environmental protection.⁴⁸² That is, ENGOs have standing as the representatives of members who have standing. The ENGO must be a membership ENGO, and the members must have a voice in their ENGOs.⁴⁸³ Since *Friend of the Earth v. Laidlaw Environmental Services (Laidlaw II)* began to establish the ENGO’s standing that required certification for an NGO whose members meet the requirements of individual standing as well through the necessary procedures.⁴⁸⁴

b. Individuals Standing

Although the Article III issues that most often prove controversial in citizen suits are the requirement that the plaintiff has standing to sue, as well as most U.S. citizen suit provisions, authorize any person or any citizen to be the plaintiffs. To authorize individuals standing in citizen suits, a citizen plaintiff must satisfy three elements: injury in fact, causation, and redressability.⁴⁸⁵

The “Injury-in-fact” provision provides that the plaintiff has suffered harm or damage to

⁴⁸² *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

⁴⁸³ *Sierra Club v. Aluminum Co. of America*, 585 F. Supp. 842, 14 ELR 20663.

⁴⁸⁴ *Friends of the Earth v. Laidlaw Env’t Servs. (TOC), Inc. (Laidlaw II)*, 528 U.S. 167, 180-181 (2000).

⁴⁸⁵ *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992); *Friends of Earth, Inc. v. Laidlaw Env’t Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000).

support access to judicial proceedings. Moreover, the Supreme Court broadened this spectrum in the case of *Sierra Club v. Morton*. The Court applied the standing test articulated in *Association of Data Processing v. Camp* and held that environmental injury was not limited to injury to private pecuniary or property interests.⁴⁸⁶ Whereas the injury-in-fact can be infringed for “aesthetic, conservational, and recreational interests.”⁴⁸⁷ Although the Court held that *Sierra Club* did not have standing, the Court held that the plaintiff must show that its member suffered the injury by the environmental utilization.⁴⁸⁸ Another extension of the injury was stated in the case of *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* as the “no significant adverse effect” could be recognized as the injury-in-fact since this case.⁴⁸⁹ Those courts’ recognition contributed to professor Barry Boyer, and professor Errol Meidinger described, “With standards such as these, issues of standing issues are becoming rather routine formalities that plaintiffs can easily meet if they are careful to confirm their allegations to the accepted formulae.”⁴⁹⁰ In the 1980s, injury-in-fact was not altered, instead of concretizing the content of the plaintiff-standing conditions. Not only injury-in-fact but also causation and redressability were

⁴⁸⁶ *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972); *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-154 (1970).

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* The Data Processing Court discussed various non-economic values including aesthetic, conservational, and recreational values, and even a spiritual stake in first amendment values and concluded: “We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here.” 397 U.S. at 154.

⁴⁸⁹ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 708 (1973).

⁴⁹⁰ Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental*, *Buffalo Law Rev.*, Vol. 34, No. 3 (Fall 1985) at 939.

added in standing rules, which reflected in the case *Lujan v. Defenders of Wildlife*.⁴⁹¹ The Court held that defenders of wildlife lacked standing to challenge regulations exempting federal actions outside the United States under the ESA requirement that federal agencies counsel with the DOI before taking the actions that might adversely affect endangered species.⁴⁹² The test was established that the plaintiff bears the burden of showing standing by establishing, inter alia, that they have suffered an injury-in-fact, a concrete and particularized, actual or imminent invasion of a legally protected interest.⁴⁹³ Moreover, Justice Antonin Scalia set three-pronged test for standing: (1) the plaintiff must suffer an injury-in-fact; (2) the injury must be a causal connection between the injury and the conduct complained of the injury, must be traceable to the complained of action; (3) the injury must be redressable by a favorable judicial decision.⁴⁹⁴ This case was the first time the Court had denied standing despite an explicit grant of standing in the citizen-suit provision of a statute passed by Congress.⁴⁹⁵

As for the causation, the injury-in-fact claimed by the plaintiff must be causally related to the alleged violated conduct. The U.S. Courts have ruled relatively simple and loose interpretations in citizen suits. The leading case on causation was held by the Third Circuit Court, which ruled that the plaintiff “need not to prove causation with absolute scientific rigor to defeat a motion for

⁴⁹¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁴⁹² 504 U.S. 555-556 (1992).

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 560-561.

⁴⁹⁵ PETER L. STRAUSS, TODD D. RAKOFF, CYNTHIA R. FARINA, & GILLIAN E. METZGER, GELLHORN AND BYSES’S ADMINISTRATIVE LAW 1207, 1267 (11th ed. 2011); Courtney Chin, Standing Still: The Implications of Clapper for Environmental Plaintiffs’ Constitutional Standing, *Columbia Journal of Env’tl. L.*, Vol. 40, No. 2 (Nov. 2019) at 335.

summary judgment.” That is, the fairly traceable requirement in a citizen suit is not equivalent to a requirement of tort causation.⁴⁹⁶ In detail, the Court explained three elements when accusing defendant in a citizen suit under the Clean Water Act:

- 1) discharged some pollutant in concentrations greater than allowed by its permit;
- 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that;
- 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.⁴⁹⁷

Then this relaxed causation rule has been applied in several seminal cases, such as *Massachusetts v. EPA*, the plaintiffs adequately established the causation between man-made greenhouse gas emissions and global warming, given that the U.S. motor-vehicle sector’s contribution of six percent of worldwide carbon dioxide emissions as evidence.⁴⁹⁸ Nevertheless, the Ninth Circuit Court did not apply the reasoning elaborated in *Massachusetts* to the case of *Washington Environmental Council v. Bellon* as the plaintiffs are private organizations in this case, not a state plaintiff to protect its quasi-sovereign interests, as well as the plaintiffs, did not provide any evidence of “the statistic in a national or global perspective to assess whether the refineries’ emissions are a ‘meaningful contribution’ to global GHG levels.”⁴⁹⁹ Therefore, due to the standing analysis in *Massachusetts* is only applied to state litigants, not individual plaintiffs, the relaxed standard of causation is restricted for standing.

In terms of redressability, the plaintiff must plead injury-in-fact that is subject to judicial

⁴⁹⁶ Pub. Interest Research Grp. v. Powell Duffryn Terminals, 913 F.2d 64, 68 (3d Cir. 1990).

⁴⁹⁷ *Id.* at 72.

⁴⁹⁸ *Massachusetts v. EPA*, 549 U.S. 497, 524, 127 S. Ct. 1438, 1457 (2007).

⁴⁹⁹ *Wash. Env’t. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013).

redress, which is for the probable injunctive relief requiring compliance with the statutes to discrete injury to himself. Injunctive relief, penalties are the typical remedies in practice.

According to the current rules of standing, no matter how closely the case is connected to the public interest, the plaintiff cannot file a lawsuit as a public interest representative on the grounds of victimization of the public interest, instead of its members' interest. Although there is no lack of criticism for this "private law model of plaintiff qualification,"⁵⁰⁰ statistics as of 2002 show that the *Lujan* case has been cited by courts of all levels 3,916 times in the ten years since it was issued, and the *Morton* case has also been cited 2,728 times by courts at all levels in the thirty years since it was issued.⁵⁰¹ Such a high rate of citation indicates that the above-mentioned judgment has been achieved widely by judiciary support. It is impossible if there is no functional convenience in practice.

2.2.5 Proper Defendant

The proper defendant in a citizen suit is selected based on the cause of action regarding the classification of the citizen suit. In the citizen-suits clauses prescribed by federal legislation, the proper-defendant provisions are clearly stipulated in each act, which seldom causes much controversy in practice. Generally, any "person" may be sued for violating pollution control requirements under the citizen suits section.⁵⁰² "Person" is typically defined to include business

⁵⁰⁰ Cass R. Sunstein, Standing and the Privatization of Public Law, Columbia L. Rev., Vol. 88, No. 7 (Nov.1988) at 1433.

⁵⁰¹ See James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, WIDENER L. REV., Vol. 10, No. 1 (2003) at 7.

⁵⁰² JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS, 26 (1987).

entities such as corporations and partnerships, as well as State governments and individuals.⁵⁰³ In addition, the CWA Section 505 provides that the potential defendants in citizen suit include the United States, governmental agencies, administrators, and any person, who violated the effluent standard, limitation, or the mandatory duties under this legislation.⁵⁰⁴ Moreover, the RCRA Section 7002 (a) enforced potential defendants, including the United States, any agencies, administrator, and any person, who violated any permit, standard, regulation, condition, requirement, prohibition, or order, including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment, and the administrator who failed to perform any mandatory duty under this act.

In summary, there are two types of defendants in environmental citizen suits. The first category is enterprises or other polluters suspected of violating environmental protection laws. The second category is the Administrator who failed to perform the mandatory duty.

2.2.6 Cause of action

The citizen suit may be filed against environmental violations in the United States. The violation here is neither all illegal acts nor all acts that violate all the articles provisions of the Acts containing the citizen-suit provisions. The cause of action of citizen suit is limited to the stipulated

⁵⁰³ E.g., CWA § 502, 33 U.S.C. § 1362; CAA § 302(e), 42 U.S.C. § 7602(e).

⁵⁰⁴ 33 U.S.C. § 1365 (a) (2018).

provisions of the citizens-suit clauses that allow initiating a citizen suit in various legislations. Thus, the cause of action depends on every different legislation. For instance, Clean Air Act citizen-suit provisions provide to against the “violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation”⁵⁰⁵ as well as against the proposals to construct or constructs any new or modified major emitting facility without a permit required to significant deterioration of air quality or to nonattainment or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to violate any condition of such permit.⁵⁰⁶ In addition, the Clean Water Act also limited the cause of action to specifically defined violations of an effluent standard or limitation or an order.⁵⁰⁷ However, only Endangered Species Act stipulated a wider scope of the cause of action, which provided the “violation of any provision of this chapter or regulation issued under the authority thereof” to consist of the sphere of the cause of action.⁵⁰⁸ Nevertheless, this kind of situation is rare since it is related to the limited number of endangered species.

2.2.7 Conditions Precedent to Suit

The environmental citizen-suit provisions stipulate three procedural requirements for the filing of environmental citizen suits, including two procedural requirements and one substantial requirement, that are the pre-litigation notice, the preemption by state or federal enforcement actions (or as known as diligent government enforcement), ongoing violation as the substantial

⁵⁰⁵ Clean Air Act § 304(a)(1), 42 U.S.C. § 7604(a)(1) (2018);

⁵⁰⁶ Clean Air Act § 304(a)(3), 42 U.S.C. § 7604(a)(3) (2018).

⁵⁰⁷ Clean Water Act § 505(a)(1), (f) 33 U.S.C. §1365(a)(1), (f) (2018).

⁵⁰⁸ Endangered Species Act (ESA), § 11(g)(1)(a), 16 U.S.C. § 1540 (g)(1)(a).

requirement. These two procedures are able to prevent the filing of a citizen suit.

a. Notice

Each environmental protection law stipulates that the potential plaintiffs, such as citizens or environmental groups who intend to file a citizen suit, must notify the defendants, the State, and the EPA of their intention to file a citizen suit in the form of a written notice. Moreover, the citizen-suit proceedings must wait sixty days after the notice had been served to the violators or the EPA in general. However, the RCRA provides for a ninety-day period in some cases. The typical provisions are CWA Section 505(b), while RCRA Section 7002 (b) provides the imminent and substantial endangerment to health or the environment actions.⁵⁰⁹

CWA Section 505(b):

No action may be commenced under subsection (a)(1) of this section- prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order.⁵¹⁰

RCRA Section 7002 (b) provides:

No action may be commenced under subsection (a)(1)(A) of this section-prior to sixty days after the plaintiff has given notice of the violation to (i)the Administrator; (ii)the State in which the alleged violation occurs; and (iii)to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order.⁵¹¹

No action may be commenced under subsection (a)(1)(B) of this section prior to

⁵⁰⁹ See CAA § 304(b), 42 U.S.C. § 7604(b) (2018) (60 days); CWA § 505(b), 33 U.S.C. § 1365(b) (60 days); RCRA § 7002(b)(1), 42 U.S.C. § 6972(b)(1) (sixty days for regulatory enforcement to the administrator action.); RCRA § 7002(b)(2), 42 U.S.C. § 6972(b)(2) (ninety days for imminent and substantial endangerment to health or the environment); CERCLA § 310 (d)(1), 42 U.S.C. § 9659 (d)(1) (60 days); SDWA § 20(b)(1)(A), 15 U.S.C. § 2619(b)(1)(A) (60 days); SDWA § 1449(b), 42 U.S.C. § 300j-8(b) (60 days); ESA § 11 (g)(2), 16 U.S.C. § 1540(g)(2)(60 days); EPCRA § 326(d), 42 U.S.C. § 11046(d) (60 days); Karl S. Coplan, *supra* note 428, at 300-301.

⁵¹⁰ CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (2018).

⁵¹¹ RCRA § 7002(b)(1), 42 U.S.C. § 6972 (b)(1) (2018).

ninety days after the plaintiff has given notice of the endangerment to—(i)the Administrator; (ii)the State in which the alleged endangerment may occur; (iii)any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.⁵¹²

During the precedent notice period, if the violators or the government environmental protection agencies take measures to correct the illegal act, the alleged illegal act no longer exists, and the citizen-suit procedure would therefore stop. The content of the precedent notice generally includes sufficient information of the defendant to find out the following: the specific standards, limitations, or orders that allegedly violated; the individual responsible for the violation; the place and time of the alleged violation; and the full contact information of the person who submitted the notice.⁵¹³ The purpose of the notice procedure is to allow the defendant to comply, allow agencies to perform enforcement, and discuss the settlement.⁵¹⁴

b. Timely and Diligent Government Enforcement

During the precedent notice period of citizen enforcement suit procedure, if the state or federal government has taken or is initiating certain enforcement measures to correct the same violation involved in the precedent notice, the governmental prosecutions are regarded as timely and diligent government enforcement.⁵¹⁵ At this time, the citizen-suit procedure should stop and to give way to government enforcement. The purpose of citizen enforcement is to assist the government's law

⁵¹² *Id.* § 7002(b)(2), 42 U.S.C. § 6972 (b)(2) (2018).

⁵¹³ *See* 40 C.F.R. § 54.3(b) (2018) (Notice content provisions under Clean Air Act); 40 C.F.R. § 135.3 (a) (2018) (Notice content provisions under Clean Water Act); 40 C.F.R. § 135.12(a) (2018) (Notice content provisions under Clean Water Act); 40 C.F.R. § 135.12(a) (2018) (Notice content provisions under SDWA); 40 C.F.R. § 374.3(a) (2018) (Notice content provisions under EPCRA); 40 C.F.R. § 706.62(a) (2018) (Notice content provisions under TSCA); Cary R. Perlman ed., *supra* note 509, at 301.

⁵¹⁴ *Hallstrom v. Tillamook County*, 493 U.S. 20, 29-31 (1989)

⁵¹⁵ *Karl S. Coplan, supra* note 428, at 305.

enforcement, and the government's law enforcement must be given priority. One of the specific provisions is CWA Section 505(b)(1)(B), which provides:

No action may be commenced (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.⁵¹⁶

The purpose of the pre-litigation notice and the preemption of government enforcement actions is to give administrative agencies and violators an opportunity to correct illegal violations before the lawsuit. Notably, there are two kinds of timely and diligent prosecutions, including enforcement actions in court, such as those described in CWA Section 505, and administrative enforcement actions, which are not provided in all the citizen-suits statutes.⁵¹⁷ Moreover, any citizen may intervene in the case during the period, which TSCA Section 20 also authorizes, to permit intervention in administrative enforcement proceedings and amendments under consideration to CWA Section 505.⁵¹⁸ That is, TSCA Section 20(b) excludes citizens from filing a civil action when EPA has filed and is diligently prosecuting a TSCA violation instead of intervening in the case.⁵¹⁹ "Courts generally apply a deferential standard when determining" whether government enforcement is timely and diligent in preempting a citizen suit.⁵²⁰ The burden on the plaintiff is to show that the government's enforcement action is inadequate.⁵²¹

⁵¹⁶ Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2018).

⁵¹⁷ Karl S. Coplan, *supra* note 428, at 305.

⁵¹⁸ Toxic Substances Control Act §20(b)-(c), 15 U.S.C. §2619(b)-(c) (2018).

⁵¹⁹ *Id.* §20(b), 15 U.S.C. §2619(b) (2018).

⁵²⁰ Karl S. Coplan, *supra* note 428, at 305-306.

⁵²¹ *Friends of the Earth, Inc. v. Laidlaw Env't Servs., (TOC), Inc.*, 890 F. Supp. 470, 486-487 (D.S.C. 1995).

Due to this unique procedure of the environmental citizen suit system, many environmental citizen suits have achieved the purpose of protecting the environment at this stage, without entering the stage of the citizen-suit procedure.

c. Ongoing Violation and Mootness

In addition to the two procedural conditions precedent to suit, there is only one substantial requirement, ongoing violation as a precedent condition. Continuing violation enforcement was required based on one of the most critical cases in environmental citizen suits, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, which arose as a CWA citizen suit.⁵²² The Supreme Court held that the language precluded citizen suits in which the plaintiff could not make good faith that the petitioner was continuing to violate its permit at the time the suit was filed.⁵²³ This case also illustrated that the citizen-suit system was a supplement enforcement tool instead of a replacement.⁵²⁴ Moreover, the notice and waiting period provisions were designed to allow the defendant to satisfy the compliance in advance to avoid the citizen suit.⁵²⁵ Moreover, the Supreme Court “subsequently constitutionalized the requirement of an ongoing violation” in *Steel Company v. Citizens for a Better Environment*.⁵²⁶ However, a problem that cannot be ignored is that a citizen suit may be kept as long as the plaintiff has a good-faith basis to allege that violations are ongoing at the time of the complaint or are likely to recur even though the defendant might not be in

⁵²² *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

⁵²³ *Id.*

⁵²⁴ Rouse, *supra* note 1, at 1282.

⁵²⁵ See Karl S. Coplan, *supra* note 428, at 306.

⁵²⁶ *Id.*; *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

violation at the time of the complaint.⁵²⁷

The principle of mootness means that if the defendant takes measures to correct the alleged illegal behavior during the litigation, the dispute no longer exists. In practice, the defendant has to bear a rigorous burden of proof. If illegal act no longer exists and cannot happen again. Otherwise, the non-existence of the dispute shall not be used as a reason to deny the availability of relief.⁵²⁸

2.2.8 Remedies

The remedies are essential content of the environmental citizen-suit system, which were recognized as pivotal. The purposes of the remedies' design of environmental citizen suits are to prevent a citizen-suit undertaking from becoming a private or group personal means of making a profit and provide reasonable incentives to encourage more citizens to use the legal weapon of each citizen suit. After more than fifty-year development and improvement, the environmental citizen-suit remedy system has been quite complete, with both the above functions.

a. Injunction Relief

An injunction is an essential remedy approach to citizen-suit enforcement. Citizen-suit provisions authorize the courts to enforce the environmental standard or order that the defendant is accused of violating.⁵²⁹ Courts generally apply the traditional four-step test to determine whether to grant a request for a preliminary injunction.⁵³⁰ Courts always decide preliminary

⁵²⁷ See Karl S. Coplan, *supra* note 428, at 306-307 (2019); Allen County Citizens for the Env't, Inc. v. BP Oil Co., 762 F. Supp. 733, 739 (N.D. Ohio 1991) (citing *Gwaltney* 844, F.2d at 171-172). *aff'd*, No. 91-3698, 1992 U.S. App. LEXIS 14906 (6th Cir. June 18, 1992).

⁵²⁸ *Id.*

⁵²⁹ CWA § 505(a), 33 U.S.C. § 1365(a) (2018).

⁵³⁰ *Ashkenazi v. U.S. Attorney Gen. of the United States*, 246 F. Supp. 2d 1,3 (D.D.C. 2003); (*Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 12 ELR 20538 (1982)); *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 18 ELR 20328

injunctive relief under a plaintiff has the burden of demonstrating: (1) a substantial likelihood of success on the merits; (2) that the plaintiff would suffer irreparable injury if the injunction is not granted; (3) that any injunction would not substantially injure other interested parties; and (4) that the public interest would be served by the injunction.⁵³¹ The *Tennessee Valley Auth. v. Hill* case was the first case that the court held under the Endangered Species Act (ESA)⁵³² to contain an outright ban on federal actions that would destroy the critical habitat of endangered species, the mandating injunction against the completion of the Tellico Dam.⁵³³

Although not all the citizen-suits provisions include injunctive relief in various Acts, injunctive relief still became an effective remedy in citizen enforcement in practice. The injunctive relief accords with the original legislative purpose of the environmental citizen suit initiation in the United States. The Citizens may not benefit financially from bringing a suit because relief generally is in the form of an injunction.⁵³⁴ This restriction pursues to ensure the plaintiffs have altruistic, rather than economic, motivations and bring the action as a kind of public service.⁵³⁵

b. Civil Penalties

Almost all the citizen-suit provisions provide the court to “apply any appropriate civil

(D.C. Cir. 1987).

⁵³¹ *Ashkenazi v. U.S. Attorney Gen. of the United States*, 246 F. Supp. 2d 1,3 (D.D.C. 2003; Edward Lloyd, Citizen Suits and Defenses Against Them, ALI-ABA Course of Study Materials, Environmental Litigation, June 2008, at 15.

⁵³² Endangered Species Act (ESA), 16 U.S.C. §§1531-1544.

⁵³³ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

⁵³⁴ Nathan A. Steimel, *Congress Should Act to Define "Prevailing Party" to Ensure Citizen Suits Remain Effective in Environmental Regulation*. *Sierra Club v. City of Little Rock*, 11 MO. ENV'T. & POL'Y REV. 282, 285(2004).

⁵³⁵ Kerry D. Florio, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?* 27 B.C. Env't Aff. L. Rev. 707, 709 (2000).

penalties.”⁵³⁶ In order to prevent citizen suit from becoming a tool for personal or organizational profit, environmental laws stipulate that these civil penalties should be handed over to the U.S. Treasury instead of the plaintiffs. Some citizen-suit clauses in the federal environmental law provide for establishing a special fund with this penalty. That is, the penalty was transferred to the Federal EPA after the defendant was handed over to the U.S. Treasury for special environmental protection to utilize exclusively. The provisions also limit the amount of penalty. Take the Clean Air Act for instance, which provides:

(1) Penalties received under subsection (a) shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed \$100,000.⁵³⁷

In addition, Courts have held that a penalty is mandatory once a violation has been established and awarded the amount under CWA and the CAA.⁵³⁸

⁵³⁶ Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (2018).

⁵³⁷ Clean Air Act § 304(g), 42 U.S.C. § 7604(g) (2018).

⁵³⁸ See *United States v. Lexington-Fayette Urban Cnty. Gov’t*, 591 F.3d 484, 488 (6th Cir. 2010); *Tyson Foods, Inc.*, 897 F.2d 1128, 1140-1141 (11th Cir. 1990) (awarding penalties according to the CWA); *Pound v. Airosol Co.*, 498 F.3d 1089, 1096-1098 (10th Cir. 2007); Karl S. Coplan, *supra* note 428, at 324.

c. Attorney Fees

Environmental citizen suits apply special attorney fees rules, including allocation of the attorney fees, instead of the traditional American Rule, which is the default rule in the United States controlling assessment of attorneys' fees arising out of litigation. The American Rule provides that each party is responsible for paying its own attorney's fees.⁵³⁹ The attorney's fee-shifting provisions of the citizen-suit system allow the court to decide on either party to the litigation under certain conditions (usually companies and governments) bear most of the litigation costs and attorney fees, as long as the court deems it "appropriate."⁵⁴⁰ This statute let the plaintiffs out of their own pockets to engage in public services to enforce when they are not offered any funds. In the United States, attorney fees and litigation fees are high, especially for complex environmental litigation, which undoubtedly causes a substantial economic burden for the plaintiffs, individuals, or organizations to initiate citizen suits. The attorney fee-shifting provisions eliminated this concern and become a powerful incentive for the public to file citizen suits.

2.2.9 Settlement

Citizen-enforcement cases are conducted under the Federal Rules of Civil Procedure and relevant laws and regulations. A complete citizen suit procedure mainly includes seven procedures: case investigation, precedent notice, bringing up, pre-trial motion, evidence disclosure, trial, and settlement. Besides the precedent notice, compared with general civil litigation procedures, the

⁵³⁹ FED. R. Civ. P. 54(b).

⁵⁴⁰ Clean Air Act § 304(d), 42 U.S.C. § 7604(d); Clean Water Act § 505(d), 33 U.S.C. § 1365(d); RCRA § 7002(e), 42 U.S.C. § 6972(e); CERCLA § 310(f), 42 U.S.C. § 9659(f) (2018); SDWA § 1449(d), 42 U.S.C. § 300j-8(d), ESA § 11(g)(4), 16 U.S.C. § 1540(g)(4), EPCRA § 326(f), 42 U.S.C. § 11046(f), TSCA § 20(c)(2), 15 U.S.C. § 2619(c)(2) (2018).

difference of citizen suit lies in its special provisions on the settlement.

Most environmental citizen lawsuits are resolved through settlements in the United States. Reaching a settlement motivated both parties to achieve environmental benefit projects instead of considering litigation risks and reducing litigation costs. Moreover, settling also could avoid submitting the penalties to the US Treasury and avoid bearing the plaintiff's and his litigation costs.

The Clean Water Act and Clean Air Act stipulate that the environmental citizen-suit settlement agreement must be notified to the Department of Justice and the Federal EPA before reaching the settlement agreement in the United States. The Department of Justice and the Federal EPA will review the settlement conditions in order to make suggestions to the court on whether the settlement agreement is fair, whether it conforms to the law and the public interest. After the review, the settlements are always embodied in two forms: Consent Order and Consent Judgement.⁵⁴¹

A typical settlement of an environmental citizen suit may provide four contents: a. a schedule for remediation and compliance measures, potential penalties for the future violations of regulatory or permit standards; b. plaintiff's claim on attorney fees; c. not to file a lawsuit on the matters resolved in this case; d. penalties to the US Treasury, or an environmental benefit project to ameliorate the environmental impacts of the violation.

According to the Clean Water Act and Clean Air Act citizen-suit provisions, the parties must notify the Department of Justice (DOJ) and wait forty-five days to enter the consent judgment.⁵⁴²

⁵⁴¹ Clean Air Act § 304(c)(3), 42 U.S.C. § 7604(c)(3); Clean Water Act § 505(c)(3), 33 U.S.C. § 1365(c)(3) (2018).

⁵⁴² Karl S. Coplan, *supra* note 428, at 325-326.

The Clean Water Act provides:

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.⁵⁴³

The Clean Air Act provides:

Whenever any action is brought under this section, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.⁵⁴⁴

Since establishing the environmental citizen suit in the Clean Air Act in 1970 over fifty years, citizen suit enforcement has become an essential and prevalent environmental law system in the United States effectively.⁵⁴⁵ “Citizen enforcement historically has acted a check on government, provoking enforcement action, or providing an alternative when the government fails to act. When a business fails to comply with environmental requirements, governmental and citizen enforcement together can create an impressive threat to business in the marketplace economy.”⁵⁴⁶ For example, in 2016, most of the reported federal court CWA cases were citizen suits. Of the seventy-nine CWA-reported decisions issued by the federal courts in 2016, fifty listed ENGOs or individuals as plaintiffs were proactive roles in citizen enforcement.⁵⁴⁷ The United States was the

⁵⁴³ Clean Water Act § 505(c)(3), 33 U.S.C. § 1365(c)(3) (2018).

⁵⁴⁴ Clean Air Act § 304(c)(3), 42 U.S.C. § 7604(c)(3).

⁵⁴⁵ Clean Air Act § 304, 42 U.S.C. § 7604 (2018); Pub. L. 91-604 § 12(a) (1970).

⁵⁴⁶ PLATER, ABRAMS, GRAHAM, HEINZERLING, WIRTH, AND HALL, *supra* note 273, at 816.

⁵⁴⁷ Mark A. Ryan, Clean Water Act Citizen Suits: What the Number Tell Us, Oct. 2017,

defendant in forty-one of those seventy-nine cases (primarily EPA and the United States Army Corps of Engineers).⁵⁴⁸ When it revised the Clean Water Act, Congress fully praised “Citizen suits are a proven enforcement tool. They operate as Congress -intended- to both spur and supplement government enforcement actions. They have deterred violators and achieved significant compliance gains.”⁵⁴⁹ Therefore, plenty of environmental citizen-enforcement cases effectively fight against various environmental violations and become a powerful complement to governmental enforcement according to citizen-suit provisions in the United States. This unique system is regarded as “the most important and most successful innovation of modern environmental law”⁵⁵⁰ due to it has well fulfilled its original legislative intention and has become an indispensable system in the U.S. environmental governance.

https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2017-18/fall/clewater-act-citizen-suits-what-numbers-tell-us/

⁵⁴⁸ *Id.*

⁵⁴⁹ S. Rep. No. 50. 99th Cong., 1st Sess. (1985) at 28.

⁵⁵⁰ Paul Alexander Fortenberry, *Deniel Canton Beck*, “Chief Justice Roberts- Constitutional Interpretations of Article III and the Commerce Clause: Will the ‘Hapless Toad’ and ‘John Q. Public’ Have Any Protection in the Roberts Court?” 13 (1) U. OF BALTIMORE J. OF ENV’T L. 61 (Fall 2005).

Chapter 3 China's ENGO Environmental Public Interest Litigation

3.1 ENGO—Representation of the Public Interest of Environment

Generally, social organizations or groups are similar to civil society organizations, and the term non-governmental organizations (NGOs) are universal in research. NGOs are defined as “Any scientific, professional, business, or public-interest organization that is neither affiliated with nor under the direction of a government.”⁵⁵¹ It refers to non-profit, non-governmental organizations with no administrative power that provide environmental public interest or public welfare services to society.⁵⁵² In China, the official name of NGO is social organizations (社会组织), which refers to social organizations with non-governmental, non-profit, and social characteristics outside the Party and government system and market system.⁵⁵³ NGOs represent the public, a wide range of social interests, under the condition of government and market failure. The Social Organization Administration (SOA, Social Organizations Law Enforcement and Supervision Bureau), in the Ministry of Civil Affairs at the central government level, launched NGOs registration and supervision regulations. It also conducts enforcement and advises local Social Organization Agencies on registration and enforcement.⁵⁵⁴

SOA officially classifies the Chinese NGOs into three categories: social associations (社会团体), foundations (基金会), and private non-enterprise units (民办非企业).⁵⁵⁵ ENGOs are

⁵⁵¹ *Non-government organization*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁵⁵² See WANG MING (王名), ZHONGGUO MINJIANZUZHI SANSHINIAN, ZOUXIANG GONGMIN SHEHUI (中国民间组织 30 年——走向公民社会) [EMERGING CIVIL SOCIETY IN CHINA, 1978-2008] (2008).

⁵⁵³ *Id.*

⁵⁵⁴ Ministry of Civil Affairs 民政部, Jigou Shezhi (机构设置) Social Organization Administration (Social Organizations Law Enforcement and Supervision Bureau), MINISTRY OF CIVIL AFFAIRS <http://www.mca.gov.cn/article/jg/jgsz/jgsj/201901/20190100014620.shtml> (Last visited Apr. 25, 2021).

⁵⁵⁵ *Id.*; WANG, *supra* note 552, at Ch. 1.

organized for the maintenance of the public interest in the environment.⁵⁵⁶ They are concerned about environmental issues according to their missions, such as policy advocacy, wildlife protection, water conservation, and solid waste research. The purpose of these organizations is directly or indirectly for the public interest of the environment, as determined by the characteristics of each organization.⁵⁵⁷ For instance, environmental foundations accept property donations through public or non-public offerings and engage in environmental activities. Social associations are allowed to enroll members in different industries. Private non-enterprise units work for various missions.⁵⁵⁸ In current China, the resources for the operation of ENGOs come mainly from individual and foundations' donations, which finance public interest activities through financial grants and individual contributions. Human resources may be provided by various types of volunteers. As the representatives of the public interest, the services offered by such organizations are public interest-oriented and benefit an unspecific majority of members of society. Notably, all NGOs, including ENGOs, are supervised by government agencies, not only SOA of each level but also each organization's authorized department.⁵⁵⁹

Even though China's ENGOs grew slowly from the beginning, there were some ways to get

⁵⁵⁶ See Wang Ming (王名) & Tong Lei (佟磊), *NGO Zai Huanbao Lingyunei de Fazhan ji Zuoyong* (NGO 在环保领域内的发展及作用) [Development and Effect of NGO in Environmental Protection], 35 *Huanjing Baohu* (环境保护) [ENV'T PROT.] (2003).

⁵⁵⁷ See *Huanjingbaohubu Guanyu Peiyu Yindao Huanbao Shehuizuzhi Youxufazhan de Zhidao Yijian* (环境保护部关于培育引导环保社会组织有序发展的指导意见) [Guidelines of the ministry of environmental protection on fostering and guiding the orderly development of environmental protection social organizations] (Effective Dec.10, 2010) CLI.4.144234 (Lawinfochina).

⁵⁵⁸ Wang & Tong, *supra* note 556.

⁵⁵⁹ Regulation on the Administration of the Registration of Social Associations 社会团体登记管理条例 (adopted at the 8th ordinary session of the State Council on Sept. 25, 1998; issued by the Order No.250 of the State Council of the People's Republic of China on Oct. 25, 1998; and revised in accordance with the Decision of the State Council on Amending Certain Administrative Regulations on Feb. 6, 2016), art. 9. CLI.2.269328(EN) (Lawinfochina).

communication and help from many experienced international NGOs since the 1990s, such as the Ford Foundation, EDF China Program, the NRDC China Program, and American Bar Association (ABA).⁵⁶⁰ Those organizations sponsored many Chinese NGOs' nationwide research projects and workshops, particularly benefitting Chinese NGOs' environmental legal actions from other countries. Decades of growth of ENGOs and their recognition as the representative of environmental public interests had broadened the public horizon and encouraged public participation capacity. Incidentally, due to their experiences of corporations with some of China's government agencies on legislation and enforcement, their environmental law programs improved not only official implementation and enforcement but also ENGOs' oversight capacity through workshops, surveys, and even publications.⁵⁶¹ In short, even though Chinese ENGOs started late in the 1990s, Chinese ENGOs endeavored to take advantage of the experience of international NGOs, especially the American NGOs, which offered many distinct boosts during their development.⁵⁶²

⁵⁶⁰ See Ford Foundation, Our Work around the World, <https://www.fordfoundation.org/our-work-around-the-world/china/>, NRDC, About NRDC China Program, <http://nrdc.cn/aboutus?cid=7&cook=1>; ABA, China Background, https://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/china/background/; and EDF, *EDF China Program*, EDF, <http://www.cet.net.cn/plus/list.php?tid=3> (Last visited Apr. 25, 2021).

⁵⁶¹ Based on the author's work experience at NGO—Friends of Nature since 2014-2017.

⁵⁶² See Wang & Tong, *supra* note 556.

3.1.1 ENGOs Development Overview

The development status of environmental protection social organizations in China is directly related to the litigation ability of the subject of EPIL. This part of the dissertation makes a separate examination of the development status of environmental protection social organizations. According to the Ministry of Civil Affairs, the number of NGOs in China increased during 2010-2019, including the social association, private non-enterprise units, and the foundations, even if all three increase has been flat, as shown in figure 3.1.1.1.



Chart 3.1.1.1: Chart of changes in the number of social organizations in China (2010-2019)

Source: 2017, 2018 and 2019 Statistical Bulletin on Social Service Development in China⁵⁶³

⁵⁶³ Ministry of Civil Affairs (民政部), 2017 Shehuifuwu Fazhan Tongji Gongbao (2017 社会服务发展统计公报) [2017 Statistical Bulletin on Social Service Development], Aug. 2, 2018. at 14. <http://www.mca.gov.cn/article/sj/tjgb/2017/201708021607.pdf>; Ministry of Civil Affairs (民政部), 2018 Minzhengshiye Fazhan Tongji Gongbao (2018 民政事业发展统计公报) [2018 Statistical Bulletin on Social Service Development] Aug. 15, 2019. at 12. <http://images3.mca.gov.cn/www2017/file/201908/1565920301578.pdf>; Ministry of Civil Affairs (民政部), 2019 Minzhengshiye Fazhan Tongji Gongbao (2019 民政事业发展统计公报) [2019 Statistical Bulletin on Social Service Development] Sept. 8, 2020. at 11-13. <http://images3.mca.gov.cn/www2017/file/202009/1601261242921.pdf>

Chinese NGOs are classified into different types based on different standards and definitions, such as social associations, private non-enterprise units, and foundations, or government-organized NGOs (GONGO⁵⁶⁴), Grassroots NGOs, and Foreign or International NGOs in China; National NGOs and Local NGOs.

Definition and Examples of Registered ENGOs and Subcategories

Chinese Concept	Translation	Definition	Examples
社会组织	Social organization (Non-governmental Organization)	Social organizations with non-governmental, non-profit, and social characteristics outside the Party and government system and market system. ⁵⁶⁵ Organizations include community groups, foundations, and private non-enterprise units. ⁵⁶⁶	Includes all examples below.
Same concept as a social organization in China after the Charity law			
慈善组织	Charitable Organizations	Nonprofit organizations that are formed following the law comply with the provisions of the Charity Law and are aiming at conducting charitable activities for the public. ⁵⁶⁷ Charitable organizations may adopt the forms of organizations such as foundations, social associations, and social service agencies (private non-enterprise units).	China Environmental Protection Foundation (2016) ⁵⁶⁹ , China Biodiversity Conservation and Green Development Foundation

⁵⁶⁴ Definition for a GONGO, The New York Times, Oct. 29, 2010.

<https://schott.blogs.nytimes.com/2010/10/29/gongo/>

⁵⁶⁵ See WANG, *supra* note 552.

⁵⁶⁶ 社会组织评估管理办法 Administrative Measures for the Assessment of Social Organizations, issued by the Ministry of Civil Affairs, effective on Mar. 1, 2011, art. 2. CLI.4.143984(EN) (Lawinfochina).

⁵⁶⁷ The Charity Law of the People's Republic of China, (慈善法) (adopted at the 4th Session of the Twelfth Nat'l People's Cong. of the People's Republic of China on Mar. 16, 2016, came into force on Sept. 1, 2016), CLI.1.266755(EN) (Lawinfochina) [Hereinafter Charity Law].

⁵⁶⁹ China Environmental Protection Foundation was first identified as a charitable organization by the Ministry of Civil Affairs, Sept. 2, 2016. http://www.cepf.org.cn/jjhd/201609/t20160902_363530.htm

		<i>Article 10 ...A foundation, social associations, social service agency, or any other nonprofit organization that has been formed before the issuance of this Law may apply to the civil affairs department registering it for recognizing it as a charitable organization.</i> ⁵⁶⁸	(CBCGDF) (2016) ⁵⁷⁰
Subcategories based on the relationship with the government			
有官方背景的社会组织	Government organized NGO (GONGO)	NGOs were initiated by governments or where governmental officials occupy vital functions but which are not directly controlled by national authorities. ⁵⁷¹ They are funded, staffed, and otherwise supported by governments.	All-China Environmental Federation (ACEF), China Biodiversity Conservation, and Green Development Foundation (CBCGDF), China Environmental Protection Foundation.
草根社会组织	Grassroots NGO	In contrast to GONGOs, grassroots NGOs refer to NGOs that do not have a governmental background.	Friends of Nature (FON)
Subcategories based on the geographical scope of activities			
全国型社会组织	National NGO	NGOs registered with prescribed central civil affairs authorities (i.e., the Ministry of Civil Affairs)	ACEF, CBCGDF, China Protection Foundation

⁵⁶⁸ In total, there are thirty-four environmental charitable organizations in China, among them, five organizations are allowed to fundraise from the public. (Searched Environment and Environmental Protection in Chinese and merge the quantities.) <http://cishan.chinanpo.gov.cn/biz/ma/csmh/a/csmhaindex.html/>

⁵⁷⁰ China Biodiversity Conservation and Green and Green Development Foundation was first identified as a charitable organization by the Ministry of Civil Affairs, Sept. 1, 2016. <http://www.cbcdgdf.org/NewsShow/4869/5122.html>

⁵⁷¹ See Reza Hasmath, Timothy Hildebrandt and Jennifer Y.F. Hsu, Address at Conceptualizing Government-Organized Non-Governmental Organizations, in Studies Association Annual Meeting, Oxford, Sept. 12–14, 2016), at <https://ssrn.com/abstract=2814215>

地方性社会组织	Local NGO	NGOs registered with prescribed local civil affairs authorities ⁵⁷²	FON, ⁵⁷³ and Guiyang Public Environmental Education Center
国际组织驻华机构	Office of International NGO in China	Their office of international non-governmental environmental protection organizations in China. ⁵⁷⁴	IUCN, WWF, Green Peace, and NRDC Beijing's offices.
Subcategories based on the registration of the organizations			
社会团体	Social Associations	Groups of individuals and legal persons (apart from national authorities) established in order to pursue a common objective through non-profit activities. ⁵⁷⁵	ACEF
民办非企业	Private non-enterprise Unit	Organizations established by enterprises,	FON

⁵⁷² Registration departments for NGOs could be searched in the website of National Administration for Code Allocation to Organization, at <http://www.nacao.org.cn/portal/>

⁵⁷³ The registered name of FON is "Beijing Chaoyang District Friends of Nature Environment Research Institute," and was registered in Chaoyang District Civil Affairs Bureau.

⁵⁷⁴ Law of the People's Republic of China on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China, *supra* note 402, art. 9 (providing to conduct activities within the territory of China, overseas NGOs shall undergo registration formalities for the formation of representative offices in accordance with the law.)

⁵⁷⁵ Regulation on the Administration of the Registration of Social Associations, *supra* note 559. art. 2.

		institutions, other civic entities, or individuals using private assets and conduct non-profit welfare activities. ⁵⁷⁶	
基金会	Foundation	Non-profit entities are entrusted with property donated by natural persons, legal persons, or other organizations to provide public services. ⁵⁷⁷	CBCGDF, China Protection Foundation

Table 3.2.1.1 Definition and examples of registered ENGOs and subcategories⁵⁷⁸

In summary, China's ENGOs are mainly classified into four types: Firstly, the ENGOs were initiated by governments and even managed by government agencies, such as the Chinese Society for Environmental Science, ACEF, China Environmental Protection Foundation. Secondly, grassroots NGOs are founded by civil society, such as the Liaoning Province Environmental Volunteer Federation, Saunders' Gull Conservation Society of Panjin City, FON, and Beijing Global Village. Thirdly, social associations are similar to some environmental volunteer groups, but social associations always absorb members in different realms to create different professional associations. Finally, branches of the foreign or international ENGOs in China work on Chinese and north-Asia environmental programs, such as IUCN, NRDC, Green Peace, and WWF.⁵⁷⁹

⁵⁷⁶ 民办非企业单位登记管理暂行条例 [Interim Regulations on Registration Administration of Private Non-enterprise Units] (effective on Oct. 25, 1998), art. 2. CLI.2.21052(EN) (Lawinfochina)

⁵⁷⁷ 基金会管理条例 [Regulation on Foundations Administration] (effective on June 1, 2004), art. 2. CLI.2.52033(EN) (Lawinfochina).

⁵⁷⁸ Qing Zhang & Benoit Mayer, *Public Interest Environmental Litigation Under China's Environmental Protection Law* (2017) 1:2 Chinese J. of Env't L., Table 1, at 30.

⁵⁷⁹ All-China Environment Federation, NRDC (Natural Resources Defense Council) "The Role of Environmental NGOs in EPIL: Research Report" Jan. 2014. <http://nrdc.cn/Public/uploads/2016-12-02/584164402a261.pdf>

In terms of Chinese ENGOs' engagement in environmental protection in past decades, the milestone events are listed below:

Time	Event	Significance
1978.5	Chinese Society for Environmental Science was founded ⁵⁸⁰	The first non-governmental environmental protection organization initiated by the government
1991.4	Saunders' Gull Conservation Society of Panjin City was registered ⁵⁸¹	It was the first grassroots social organization.
1994.3	With the approval of the General Office of the Ministry of Culture, the Chinese Academy of Culture and Green Culture Branch (the predecessor of the "Friends of Nature") was established and registered to the Ministry of Civil Affairs.	The first nationwide ENGO was established.
1995	ENGOs initiated a campaign to protect Yunnan golden monkeys and Tibetan antelopes	The first climax of the development of China's ENGOs

⁵⁸⁰ Chinese Society for Environmental Sciences (中国环境科学学会), CSES's Overview <http://www.chinacses.org/xhjs/> (Last visited Apr. 20, 2021).

⁵⁸¹ Gull Conservation Society of Panjin City, Introduction of Saunders. <http://www.heizuiou.com/index.php?c=about&id=2>

1999	Beijing Global Village cooperated with Beijing Municipal Government to carry out green community pilot activities	ENGOS cooperated with governments in the communities as a great example of ENGOS' development.
2003	Social organizations fought against the hydropower construction on Nu River. ⁵⁸²	The actions of environmental protection civil society organizations began to enter the era of mutual integration, the field of activities gradually developed to organize public participation in environmental protection, for the national environmental cause advice and suggestions, public supervision, to safeguard public environmental rights and interests, promote sustainable development and many other fields, environmental protection civil society organizations began to grow and
2005	“Public Participation in the Lake-lining Project of the Old Summer Palace (as known as Chinese Yuanmingyuan)” incident, ⁵⁸³ which led to the convening of China's first environmental protection hearing.	
2008.5	ENGOS participated in the relief and assistance work of the “5.12” Wenchuan earthquake.	
2009	Friends of Nature intervened in the “Liu Li Tun Garbage Incineration in Beijing” incident and the incident of the destruction	

⁵⁸² Meng Si, *Hydropower's Green Excuse*, CHINA DIALOGUE. Feb. 14, 2011.

<https://www.chinadialogue.net/article/show/single/en/4105-Hydropower-s-green-excuse>

⁵⁸³ State Information Center, *Transparency and Public Participation in Water Resources Management in China, 2007*, at 11.

<https://www.chinawaterrisk.org/research-reports/transparency-and-public-participation-in-water-resources-management-in-china/>

	of the National Fish Nature Reserve in the Upper Reaches of the Yangtze River by the Small South China Sea Hydropower Project in Chongqing.	develop.
2010	FON's annual inspection was in trouble, and the membership fees were called off. After the unsuccessful registration of Beijing associations and private non-enterprises, the civil affairs bureau in Chaoyang District finally obtained the registration of private non-enterprise.	The difficulties of registration problems of environmental, social organizations have been presented and gradually become more visible.
2011	"The first case of civil public interest litigation by grass-root NGO," Yunnan Province Qujing chrome slag pollution case was filed, Friends of Nature, Chongqing Green Volunteers Union, and Qujing City Environmental Protection Bureau were co-plaintiffs. ⁵⁸⁴	NGOs began to enter the field of EPIL, trying to protect the public rights and interests of the environment by legal means and carry out continuous policy advocacy in the field of EPIL and promote public participation in the legislative and policy-making process.
2012	Friends of Nature submitted suggestions in	

⁵⁸⁴ FON v. Yunnan Luliang Chemical Industry Co., Ltd, Qujing Interim Ct. 2020; *See also* Cao Yin, Talks begin in Landmark Case, CHINA DAILY USA, May 24, 2012. http://usa.chinadaily.com.cn/epaper/2012-05/24/content_15377876.htm;

	the process of amending the Civil Procedure Law to promote the entry of “public interest litigation” into the provisions of the Civil Procedure Law	Environmental protection civil society organizations’ own capacity-building has been gradually enhanced, professionalism gradually emerged.
2013	Friends of Nature and Nature University have carried out some advocacy works on the revision of the Environmental Protection Law, which closely echoes the NPC representatives and effectively promotes public participation in the legislative process.	
2014-2020	Several public interest lawsuits brought by environmental protection organizations such as ACEF, Fujian Green Home Environment-Friendly Center, and Friends of Nature were accepted by the courts and won.	

Table 3.1.1.2 Major events in the development of environmental, social organizations in China⁵⁸⁵

This table illustrates that although China’s ENGOs have developed late, they have played an indispensable role in the process of environmental protection. Public statistics showed that the

⁵⁸⁵ Ma, *supra* note 44, at 15-16.

quantities of ENGOs and associations decreased after the robust increase in 2013, showing in the chart below.⁵⁸⁶ Besides, there was no published statistic of ENGOs after 2017.⁵⁸⁷

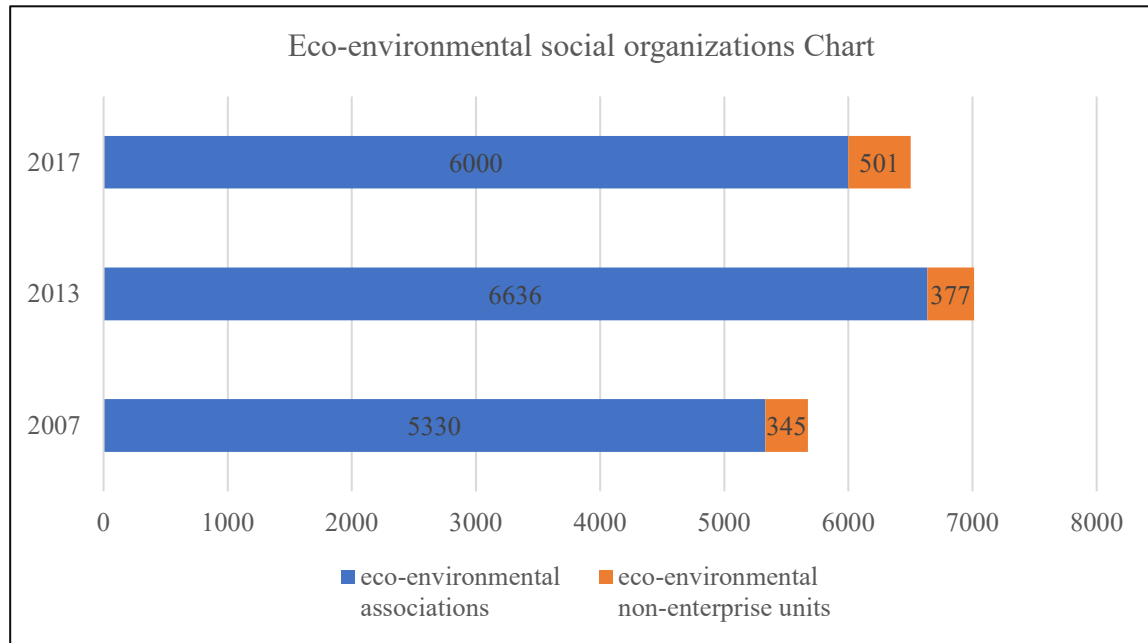


Chart 3.1.1.2 Chart of eco-environmental social organizations.

*Source: Ministry of Civil Affairs, 2007, 2013, and 2017 Statistical Bulletin*⁵⁸⁸

The bumpy increase of China's ENGOs' quantity and actions have been pursuing to become a significant force to promote environmental protection.⁵⁸⁹ However, China's ENGOs still face three significant obstacles:

⁵⁸⁶ Ministry of Civil Affairs (民政部), 2015 Shehuifuwu Fazhan Tongji Gongbao (2015 社会服务发展统计公报) [2015 Statistical Bulletin on Social Service Development], July 11, 2016.

<http://www.mca.gov.cn/article/sj/tjgb/201607/20160715001136.shtml>;

Ministry of Civil Affairs (民政部), 2016 Shehuifuwu Fazhan Tongji Gongbao (2016 社会服务发展统计公报) [2016 Statistical Bulletin on Social Service Development], Aug. 3, 2016.

<http://www.mca.gov.cn/article/sj/tjgb/201708/20170815005382.shtml>; Ministry of Civil Affairs (民政部), 2017 Shehuifuwu Fazhan Tongji Gongbao (2017 社会服务发展统计公报) [2017 Statistical Bulletin on Social Service Development], Aug. 2, 2018. at 14.

<http://www.mca.gov.cn/article/sj/tjgb/2017/201708021607.pdf>.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ Ge, Wang, *supra* note 42, at 262.

The first issue is the registration. In terms of the management of social organizations, implementing the regulations on social organizations' registration was amended 20 years ago, stipulating that social associations and private non-enterprise units should be sponsored by government agencies such as the Beijing Municipal Commission of Science and Technology. In addition, finding sponsors has always been a challenge for grassroots ENGOs. The registration proportion of ENGOs is low not only for social associations but also for private non-enterprise units. So, most ENGOs are only allowed to be registered as private non-enterprise units or as companies. Compared with social associations, the private non-enterprise units are often easier to register and be supervised because of the stricter rules on membership recruitment and fee collection of the social associations.

The second one is the lack of funds. According to the ACEF's "Report on the Development of Environmental Protection Civil Organizations in China," in 2006,⁵⁹⁰ 76.1% of China's ENGOs had no fixed funding sources, 22.5% of the ENGOs had no raised funds, and 81.5% raised funds were under ¥50,000. Due to lack of funds, more than 60% of ENGOs did not have their own office space; 96% of full-time workers were paid below the local level, of which 43.9% are mostly unpaid; and 72.5% of ENGOs could not afford the social insurance scheme for their employees.⁵⁹¹ These statistics have improved in recent years, but the overall picture is still grim. For instance, FON collected less than 3 million RMB (less than \$430,000) in 2014, of which only 2.01% were

⁵⁹⁰ ACEF, *Report on the Development of Environmental Protection Civil Organizations in China*, 2006, Doi: 10.3969/j.issn.0253-9705.2006.10.016

⁵⁹¹ *Id.*

individual donations,⁵⁹² and faced a high level of the tax burden due to its status as a “private non-enterprise unit.”⁵⁹³ In the entire year of 2018, FON raised 9.9 million RMB (less than \$1.4 million), of which 15% were individual donations.⁵⁹⁴ FON is an established ENGO, in existence since 1994, with some experience and resources in Beijing, which contains most of the foundations, rich people, and other abundant resources. However, many other newer start-up social organizations are based in other provinces in the country, which may not offer sufficient resources to their operations. Accordingly, many ENGOs lack competitive capacities, such as internal management experience and non-professional staffing. ENGOs cannot attract excellent human resources and suffer from the absence of capacity-building training or activities. Outside of Beijing, there were few capacity-building workshops for ENGOs in other provinces.

In addition, various and ambiguous regulations of ENGOs’ operations have been issued. ENGOs’ classification and development are affected by the Charity Law since 2016.⁵⁹⁵ The law regulated that three kinds of NGOs can be recognized as charitable organizations after more procedures.⁵⁹⁶ Before the promulgation of the Charity Law, China already had three major regulations in the legislation of NGOs (namely, Regulations on the Registration Administration of Social Associations,⁵⁹⁷ the Interim Regulations on Registration Administration of Private Non-

⁵⁹² Friends of Nature 2014 Annual Report, FON, May 11, 2017, at 27.

http://www.fon.org.cn/index.php?option=com_k2&view=item&id=6149:2014&Itemid=119

⁵⁹³ Friends of Nature has applied annually for tax exemption for five years, until July of 2019, and the application was not acted upon. Telephone Interview with Li Xiang, Operation Director of Friends of Nature (July 17, 2019) In Nov. 2020, the FON the eligibility of non-profit organizations for tax exemption but not approved of pre-tax deduction of public welfare donations.

⁵⁹⁴ Friends of Nature 2018 Annual Report, Apr. 19, 2019, at 67.

http://www.fon.org.cn/index.php?option=com_k2&view=item&id=13554:2018&Itemid=119

⁵⁹⁵ Charity Law, *supra* note 567.

⁵⁹⁶ *Id.* art. 8 & 10.

⁵⁹⁷ Regulation on the Administration of the Registration of Social Associations, *supra* note 559.

enterprise Units,⁵⁹⁸ and Regulations on the Management of Foundations).⁵⁹⁹ Accordingly, some terms are different. Precisely, the term “private non-enterprise units” was planned to change as a social service organization, established by enterprises, institutions, associations, or other civic entities as well as individual citizens using non-state assets and conduct not-for-profit social service activities.⁶⁰⁰ However, the term “private non-enterprise units” is still existing and effective. According to the Handbook of Charity Law and interviews with several directors of private non-enterprise units, the name of “social service organization” has to replace after the revision of Interim Regulations on Registration Administration of Private Non-Enterprise Units officially promulgated.⁶⁰¹ It can be seen that the government agencies’ understanding of the NGOs is disordered and confused to operating and apply as charitable organizations.⁶⁰²

Although the Charitable Law aims to more NGOs legally raise funds publicly to improve the financing issues, the rights and obligations of registered charitable organizations are not commensurate.⁶⁰³ The current law and policies provided many obligations for charitable organizations and few rights, which lead social organizations to have no incentive to register or be identified as charitable organizations.⁶⁰⁴ For example, there has been no modification of the tax

⁵⁹⁸ Interim Regulations on Registration Administration of Private Non-enterprise Units, *supra* note 576.

⁵⁹⁹ Regulation on Administration of Foundations, *supra* note 577.

⁶⁰⁰ Interim Regulations on Registration Administration of Private Non-enterprise Units, *supra* note 576, art. 2.

⁶⁰¹ UNDP, *Handbook of Charity Law of the People’s Republic of China*, at 39. Aug. 27, 2018.

<https://www.undp.org/content/dam/china/docs/Publications/UNDP-CH-Handbook%20of%20Charity%20Law%20of%20the%20Peoples%20Republic%20of%20China.pdf>

⁶⁰² Measures for the Accreditation of Charitable Organizations 慈善组织认定办法, (The Measures for the Accreditation of Charitable Organizations, as adopted at the executive meeting of the Ministry of Civil Affairs on Aug. 29, 2016, are hereby issued and shall come into force on Sept. 1, 2016), CLI.4.279253(EN) (Lawinfochina).

⁶⁰³ Xu Jialiang, *What changes have been made to the two-year anniversary of the Implementation of the Charitable Law?* (《慈善法》实施两周年, 带来了哪些改变) IFENG TALK (Sept. 27, 2018), https://gongyi.ifeng.com/a/20180928/45183235_0.shtml; <https://www.sipa.sjtu.edu.cn/info/1195/6411.htm>

⁶⁰⁴ *Id.*

preference provision in Charitable law. Instead, the three kinds of organizations of the former tax preference on NGOs still apply.⁶⁰⁵ Currently, private non-enterprise units and social associations could still collect funding from the platform of charitable foundations.

In summary, in the past decades, with few historic and influential movements, Chinese ENGOs have struggled to survive, facing various regulatory restrictions of registration and operation, especially grass-roots private non-enterprise units and social associations.

3.1.2 ENGOs' Participation as Advocate in EPIL System

Some scholars believed that non-governmental public interest litigation originated in Roman law as the ancient Rome granted people with no interest in the case the right to sue was that the enforcement structure of the regime was not considered sufficiently thorough, and relying on officials alone was not enough to safeguard public interests.⁶⁰⁶ Compared with private interest litigation and individual rights protection, the purpose of public interest litigation is to maintain social justice, achieve social fairness, and protect the public interest of society. Thus, The plaintiffs were acknowledged as the associations who have no relationship with the case when they file a public interest litigation case but fight against the violations by complementing government

⁶⁰⁵ Notice of the Ministry of Finance and State Administration of Taxation on Issues Concerning the Determination of Tax-free Eligibility of Non-profit Organizations 2008 财政部、国家税务总局关于非营利组织免税资格认定管理有关问题的通知 (2008) (effective Jan. 1, 2008, expired in Jan. 1, 2013) CLI.4.123861(EN) (Lawinfochina); Notice of the Ministry of Finance and the State Administration of Taxation on Issues Concerning the Administration of Tax-Exempt Eligibility of Non-profit Organizations 2013, 财政部、国家税务总局关于非营利组织免税资格认定管理有关问题的通知 (2013) (effective Jan. 1, 2013, expired in Jan. 2018) CLI.4.218947(EN) (Lawinfochina); Notice of the Ministry of Finance and the State Administration of Taxation on Issues concerning the Administration of the Determination of the Eligibility of Non-profit Organizations for Tax Exemption 财政部、税务总局关于非营利组织免税资格认定管理有关问题的通知 (2018) (effective Jan. 1, 2018) CLI.4.310510(EN) (Lawinfochina)

⁶⁰⁶ ZHOU ZHAN (周枏), ROMAN LAW THEORY (罗马法原论), 887 (1996).

agencies' enforcement.⁶⁰⁷ Professor Wang Jin stated that: "EPIL is an administrative or civil lawsuit that allows the plaintiff, who has no direct interest in the disputed case, to sue government agencies or violators as the defendant to protect the environmental public interest."⁶⁰⁸

As for the ENGOs' first advocacy to establish an EPIL system, one of the founders of FON, Mr. Liang Congjie, was a Chinese People's Political Consultative Conference member of the Third Session of the 10th National Committee of the CPPCC (Chinese People's Political Consultative Conference), and he proposed to initiate a system of citizen suits in China in 2005:

"We should establish an environmental civil public interest litigation system as soon as possible. We also should create a mechanism for environmental violations and sanctions that combines civil, administrative, and criminal liabilities to more effectively protect the public's environmental rights, public interest, and the national interest."⁶⁰⁹

FON, one of the earliest environmental NGOs in China, was founded in 1993 in Beijing. During its early years, FON had mainly undertaken environmental education, policies, and legislation suggestions to support citizens' participation in different environment-friendly activities. For example, it sought the protection of the wildlife habitats, such as Qinghai Hoh Xil and Tibetan antelope for years until Hoh Xil was reviewed and declared a World Heritage Site in 41st UNESCO World Heritage Committee in July 2017.⁶¹⁰

According to Liang's proposal, the environmental violators' penalties were so light that the

⁶⁰⁷ XI XIAOMING ED. (奚晓明), HUANJING MINSHI GONGYISUSONG SIFAJIESHI LIJIE YU SHIYONG (环境民事公益诉讼司法解释理解与适用) [UNDERSTANDING AND APPLICATION OF JUDICIAL INTERPRETATION OF ENVIRONMENTAL CIVIL PUBLIC INTEREST LITIGATION], 21 (2015).

⁶⁰⁸ Wang Jin (汪劲), Environmental Law (Third Edition) (环境法学), Peking University Press (2014), at 330.

⁶⁰⁹ Liang Congjie(梁从诫), (建立健全环保公益诉讼制度) [*Establish and Improve the Environmental Protection Public Interest Litigation System*], The Third Session of the 10th Nat'l Comm. of the Chinese People's Political Consultative Conference, CPPCC (Mar. 8, 2015), <http://www.cppcc.gov.cn/2011/10/25/ARTI1319532934281415.shtml>

⁶¹⁰ Decisions adopted during the 41st session of the World Heritage Committee (Krakow, 2017) WHC/17/41.COM/18, at 182. <https://whc.unesco.org/archive/2017/whc17-41com-18-en.pdf>

violation cost was low so that illegal behaviors persisted. Mr. Liang presented that EPIL refers to any citizens, social organizations, or government agencies that can bring a lawsuit to the courts for the public interest. However, at that time, only the direct victims of wrongdoing had the right to bring civil actions according to the torts law in China. Mr. Liang suggested legislating and enlarging the plaintiff's scope to individuals, administrations, and ENGOs to join the EPILs, which attempted to encourage and inspire ENGOs to utilize legal tools to protect the environment.⁶¹¹

ACEF, another forward-looking government-sponsored ENGO, filed the first Chinese EPIL case in China in 2009, captioned "*Zhu Zhengmao and All-China Environment Federation (ACEF) v. Jiangyin Port Container Company for Dispute over Liability for Environmental Pollution*," which was selected as one of the Model Trial Cases Involving Environmental Resources by the SPC.⁶¹² In addition to suing violators directly, ACEF tried to sue government agencies as well. In 2009, the first EPIL case against the agency was commenced by ACEF, captioned *ACEF v. Qingzhen City Land and Resources Bureau in Guizhou Province for Failure to Perform Legal Duties to Reclaim Land Use Rights*.⁶¹³ As China's citizen suits pioneer, ACEF recruits thousands of members to get environmental NGOs, state-owned enterprises, environmental lawyers, and other individuals together to improve environmental protection. ACEF set up an expert team that

⁶¹¹ State Council, *supra* note 609.

⁶¹² Zhuzhengmao, ACEF Su Jiangyingang Jizhuangxiang Gongsi (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) [Zhu Zhengmao and All-China Environment Federation v. Jiangyin Port Container Company for Dispute over Liability for Environmental Pollution] Nine Model Trial Cases Involving Environmental Resources Published by the Sup. People's Ct., 2014 SUP. PEOPLE'S CT. GAZ. 11 [217] (China) CLI.C.2991069(EN) (Lawinfochina).
<https://www.chinacourt.org/article/detail/2014/07/id/1329697.shtml>

⁶¹³ ACEF Su Qingzhenshi Guotuziyuanju (中华环保联合会诉贵州省清镇市国土资源局不履行收回土地使用权法定职责案) ACEF v. Qingzhen City Land and Resources Bureau in Guizhou Province for Failure to Perform Legal Duties to Reclaim Land Use Rights.
<http://www.acef.com.cn/zhuantilanmu/2013hjwqtbh/ljhjwq/2014/0228/12459.html>

includes several renowned academies in China, such as Tsinghua University, Peking University, Chinese Academy of Sciences (CAS), and the Chinese Academy of Engineering. In terms of environmental attorneys, ACEF connects with eighty-two volunteer lawyers and twenty-four professional law firms to support their legal aid program.⁶¹⁴ ACEF carries out relevant research and legislation suggestions and established a case collecting system for the public interest protection.⁶¹⁵

In addition to the rise of these Chinese ENGOs, several international NGOs offered professional assistance in research, shared experience, and funds for almost ten years. NRDC is one of the best examples. On environmental laws and governance and environmental law capacity-building programs, NRDC collaborated with government agencies, academic institutions, and local ENGOs to strengthen and improve the enforcement of environmental laws and policies. NRDC advised on the drafting and amendment of major Chinese environmental laws and regulations to overcome environmental governance issues.⁶¹⁶ NRDC also provided training, research, and exchanges on best practices in environmental law and governance issues to judges, lawyers, ENGO staff, and governmental officials. NRDC supported more than fifty environmental attorneys, located in many areas and working in many realms. NRDC built an environmental law study bridge between two countries, including the research achievement included the research report with ACEF, *The Role of Environmental NGOs in EPIL*⁶¹⁷ in 2014, and an article, U.S.

⁶¹⁴ About ACEF, *Introduction*, ACEF (Aug.30, 2012), <http://www.acef.com.cn/en/aboutacef/2013/1216/1004.html>

⁶¹⁵ *Id.*

⁶¹⁶ NRDC, *Environmental Laws and Governance*, NRDC, <http://nrdc.cn/work?cid=33&cook=1>

⁶¹⁷ NRDC, *The Role of Environmental NGOs in EPIL: Research Report*, NRDC (Jan. 2014), <http://nrdc.cn/information/informationinfo?id=37&cook=1>

EPIL: Experiences and Lessons Learned in 2016.⁶¹⁸ Beyond NRDC, another important supporter of ENGO litigation in China was the ABA China Program.⁶¹⁹ Starting in 2002, the ABA China Program aimed to improve the environmental rule of law by creating a network to train in environmental law by Chinese and American lawyers, professors, and judges. Some programs improve China's solid waste protection through various workshops and publications.

These international ENGOs came to China to work on China's environmental governance, environmental legal education, workshops, and communications, which encouraged many students, staff, and officials to study advanced environmental governance from other countries to act and improve environmental governance. In short, China's environmental rule of law could not increasingly develop without these international ENGOs' improvement over the past two decades.

Based on the corporation and efforts of domestic and international ENGOs, as well as legislatures, the first legislation about public interest litigation was initiated in the revised Civil Procedure Law 2013,⁶²⁰ which did not define the concept of "public interest." The revised Environmental Protection Law specifically mentioned EPIL,⁶²¹ but the definition was still absent.

⁶¹⁸ Orrick, Herrington & Sutcliffe LLP, U.S. EPIL: Experiences and Lessons Learned, Harvard LIDS, Supported by NRDC. 2016.10 <http://nrdc.cn/Public/uploads/2017-01-09/587300dc91878.pdf>

⁶¹⁹ Based on the author's work experience at NGO—Friends of Nature since 2014-2017.

⁶²⁰ Civil Procedure Law of the People's Republic of China 2013 中华人民共和国民事诉讼法 (adopted at the 4th Session of the Seventh Nat'l People's Cong. on Apr. 9, 1991; amended for the first time in accordance with the Decision on Amending the Civil Procedure Law of the People's Republic of China as adopted at the 30th Session of the Standing Comm. of the Tenth Nat'l People's Cong. on Oct. 28, 2007; and amended for the second time in accordance with the Decision on Amending the Civil Procedure Law of the People's Republic of China as adopted at the 28th Session of the Standing Comm. of the Eleventh Nat'l People's Cong. on Aug. 31, 2012), CLI.1.183386(EN) (Lawinfochina) (Hereinafter Civil Procedure Law 2013). art.55 For conduct that pollutes environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court.

⁶²¹ Environmental Protection Law, *supra* note 13, art. 58 (providing for an act polluting environment or causing ecological damage in violation of public interest, a social organization which satisfies the following conditions may institute an action in a people's court: (1) It has been legally registered with the civil affairs department of the people's government at or above the level of a districted city. (2) It has specially engaged in environmental protection for the public interest for five consecutive years or more without any recorded violation of law. A people's court shall,

In Black's law dictionary, the *public interest* is defined as "the general welfare of the populace considered as warranting recognition and protection; something in which the public as a whole has a stake; especially, an interest that justifies governmental regulation."⁶²² Moreover, the definition of public law in the latest version of Black's law dictionary was updated as follows:

1. A statute that advances social justice or some other cause for the public good, such as environmental protection.
2. A legal practice that advances social justice or other causes for the public good.⁶²³

Hence, environmental protection laws are for the public interest.

Therefore, in the background of lacking solid and fruitful research into the concepts, ENGOs have not given up the opportunity of powerful litigation actions, as well as practical lawsuit experiments and multi-dimension corporations to realize the EPIL's legislation.

3.1.3 Friends of Nature: Exploration of EPIL Actions

As mentioned, FON has joined the campaign to establish China's EPIL system since Mr. Liang Congjie's proposal in 2005. Although that proposal was not ultimately adopted, EPIL was established in legislation in 2013. Throughout the environmental public interest law development, FON conducted its practice and communications with experienced foreign NGOs. FON filed an EPIL case in Yunnan Qujing Intermedia People's Court on Chromium Slag Pollution in 2011, the first grassroots ENGO citizen suit in China, due to the violators illegally piled up 5,000 metric tons of chromium slag into the Nanpan River, causing severe pollution to the river and surrounding farmland.⁶²⁴ After FON and Chongqing Green Volunteers Union's two-month preparation and

according to the law, accept an action instituted by a social organization that satisfies the provision of the preceding paragraph. A social organization may not seek any economic benefit from an action instituted by it.)

⁶²² *Public interest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁶²³ *Public-interest law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁶²⁴ Cao, *supra* note 584.

filing, Qujing Intermediate People's Court accepted the case in October 2011. However, after the pretrial evidence exchange and several investigations, the two parties had not reached a settlement agreement. The defendant rejected the mediation plan on account of the number of damages.⁶²⁵ Before implementing the new Environmental Protection Law and other norms on judicial appraisal, the scarcity of environmental judicial appraisal agencies (official translation: Administration of the judicial identification of environmental damages) and the high cost of judicial appraisal (expensive expert report fees) limited the EPIL attempts. To determine the scope of the defendant's chromium pollution, FON asked experts and technical departments to extract soil and sediment samples for testing and analysis.⁶²⁶ Under the supervision of the judge, the parties and the experts from the Chinese Academy of Sciences (CAS) jointly collected and submitted a batch of soil samples through on-site inspections in 2015. However, the investigation was not recognized as an official expert report (known as judicial identification or judicial forensic), making it difficult to conduct a court hearing.⁶²⁷ Although official judicial identification institutions were developed and managed by the Ministry of Justice, FON and Chongqing Green Volunteers Union still did not get access to the evaluation and identification due to "the expense of environmental evaluation is too considerable to afford."⁶²⁸ In 2020, this case was finally settled online that the defendant would

⁶²⁵ FON, Yunnan Huanjing Gongyisusong Chengji Feiran, Ziranzhijie Sianjian Jinru Gaoyuan Baipishu (云南环境公益诉讼成绩斐然,自然之友四案件进入高院白皮书) [Yunnan's environmental public interest lawsuits have achieved outstanding results, and FON's Four Cases were in their White Paper] June 26, 2018, http://114.215.69.240/index.php?option=com_k2&view=item&id=13110:2018-06-26-03-05-51&Itemid=176.

⁶²⁶ *Id.*

⁶²⁷ *Id.*

⁶²⁸ FON v. Yunnan Luliang Chemical Industry Co., Ltd, Qujing Interm. Ct. 2020 (自然之友诉云南陆良化工厂); Mediation paper by the Qujing Interm. Ct. 2020, <https://rmfygg.court.gov.cn/web/rmfportal/noticedetail?paramStr=1121>; Telephone Interview with Chang Cheng, formal program officer of FON. July 29, 2019.

obligate to eliminate the danger and restore the environment, beside which the defendant would pay ¥3 million for the expert acceptance in the investigation and future restoration.⁶²⁹ This settlement would nudge the restoration of the cancer village where the factory is would start to change through the restoration under the plaintiffs' oversight after the defendant's thirty-year soil and underground water pollution.⁶³⁰ This case illustrated the uneven development of Chinese EPIL in every detail with the efforts, especially of the attorneys and ENGOs.

Based on this experience, FON prepared to integrate resources and construct an EPIL support network program with Alibaba Foundation in 2014, which consists of the EPIL Support Network and the EPIL Support Fund to support ENGO EPIL capacity building, external experts, and litigation practice resources around the enation of the official EPIL legislation. The network aimed to establish a communications platform among ENGOs, lawyers, and experts to facilitate specific case cooperation and jointly promote EPIL implementation. The network included two sub-networks, namely "the ENGOs sub-network" and "the EPIL attorneys' sub-network," which contained potential plaintiffs, attorneys, and experts. Alibaba Foundation created the fund in order to fund the litigation costs for potential plaintiffs.⁶³¹

Taking advantage of the support network program, FON implemented valuable EPIL efforts from 2014 to 2017. For instance, FON administered the support fund with Alibaba Foundation for EPIL to fund nearly thirty public interest litigation cases of various ENGOs, and FON encouraged

⁶²⁹ *Id.*

⁶³⁰ *Id.*

⁶³¹ Alibaba Foundation (阿里巴巴公益基金会), Construction of civil action network and support system for EPIL, 环境公益诉讼民间行动网络及支持体系建设, ALIBABA FOUNDATION (Dec. 30, 2014.), <http://www.alijinhui.org/content/12761>;

NGOs to become plaintiffs in EPIL through training, courses, and communication. FON wrote an NGO guidance book on EPIL as well as FON edited and published Review of Public Interest Litigation in Environment Protection in 2015 and 2016 with Law Press · China;⁶³² FON edited monthly newsletters on EPIL.⁶³³ During 2014-2017, this author was the full-time program manager of the EPIL support system and worked on most of the mentioned work at FON.

By the end of 2017, FON brought thirty-two EPIL cases and forty cases by the end of 2018 in both civil and administrative courts.⁶³⁴ In FON, all the litigation and policy advocacy work is conducted by the Department of Law and Policy Advocacy, which steps into four categories: blue sky defense war, clean soil action, ecological home guard action, addressing climate change, and promote the environmental rule of law to aim at different environmental realms by EPIL actions.⁶³⁵

Moreover, the Chinese slow but ambitious environmental rule of law, including the EPIL system, encouraged FON and other NGOs to foster their staff attorneys to enforce and achieve environmental protection. The team of the department of law and policy advocacy in FON decided to hire more employees with a legal education background in 2014. By the end of 2018, the whole team kept five to six full-time employees, and four of them held law bachelor's or environmental

⁶³² HUANJING GOONGYISUSONG GUANCHA BAOGAO 2015 (环境公益诉讼观察报告 2015) [REVIEW OF PUBLIC INTEREST LITIGATION IN ENVIRONMENT PROTECTION], (Li Dun (李楯), Wang Huishihan (王惠诗涵) & Ge Feng (葛枫) Eds., (2016); HUANJING GOONGYISUSONG GUANCHA BAOGAO 2016 (环境公益诉讼观察报告 2016) [REVIEW OF PUBLIC INTEREST LITIGATION IN ENVIRONMENT PROTECTION], (Li Dun (李楯) et al. eds.), (2018);

⁶³³ FON, EPIL Newsletter, (2014.12-2020.02) <https://mv.lingxi360.com/m/h9l2kh>

⁶³⁴ Ge Feng (葛枫), Woguo Huanjing Gongyisusong Licheng ji Dianxing Anlifexi, yi Ziranzhiyou Huanjing Gongyisusong Shijian Weili, (我国环境公益诉讼历程及典型案例分析--以“自然之友”环境公益诉讼实践为例) [Analysis on the Course and Typical Cases of EPIL in China, Take FON's EPIL Practice as an Example] Shehui Zhili (社会治理) [SOCIAL GOVERNANCE REV.], no. 2, 2018, at 57; Zhang Li (张黎), Ziranzhiyou Juban Zhuanchang Yinyuehui (自然之友举办专场音乐会) [FON Hosts a Music Concert], Apr. 24, 2019. https://www.cenews.com.cn/newpos/ngo/201904/t20190424_897799.html.

⁶³⁵ *Id.*

law master's degrees. Other employees hold master's degrees in environmental policy or Ph.D. The expertise of the ENGOs was and will always be the trend of the domestic ENGOs, even civil society development.

In addition, due to the network and collaborations among the active ENGOs, FON and ACEF, jointly litigated with small ENGOs in order to support their environmental legal work capacities as well as encouraged them to try the EPIL enforcement tool to protect the environment. For instance, because of the efforts of FON, ACEF, Center for Legal Assistance to Pollution Victims (CLAPV),⁶³⁶ and some local grassroots ENGOs attempted to join EPIL as co-plaintiffs or the support program. For instance, Green Home Environment-Friendly Center, Green Qilu,⁶³⁷ and Institute of Public and Environmental Affairs (IPE).⁶³⁸

EPIL actions, in nature, are to tackle social problems, which require comprehensive and

⁶³⁶ Center for Legal Assistance to Pollution Victims or CLAPV (CLAPV 污染受害者法律帮助中心 as also known as Environmental and resource law research and service center in China university of political science and law) at the China University of Political Science and Law is a legal-aid office, training center, and one of the most effective non-registered environmental social organization in China. CUPL, <http://msjifxy.cupl.edu.cn/info/1030/3039.htm> (Last visited Apr. 25, 2021).

⁶³⁷ Green Qilu (Jinan City Green Qilu Environmental Public Interest Service Center), was established on Apr. 22, 2012 in Jinan City, Shandong Province, is a voluntary preparation by the people to set up a public interest environmental protection organization. The center mainly through the mobilization of public participation, environmental supervision action, the implementation of policy advocacy and other means, is committed to building Shandong civil environmental supervision capacity, so that local environmental issues get rapid and strong intervention, so that the beautiful environment is accessible to all. At present, the main projects in development include the Green Bank Pioneer Environmental Pollution Supervision Project, Shandong Water Protection Network Environmental Public Advocacy Project, Environmental Information Disclosure and Policy Advocacy Project. <https://www.greenqilu.org/article/detail/57> (Last visited Apr. 25, 2021).

⁶³⁸ The Institute of Public & Environmental Affairs (IPE) is a non-profit environmental research organization registered and based in Beijing, China. Since its establishment in June 2006, IPE has dedicated itself to collecting, collating and analyzing government and corporate environmental information to build a database of environmental information. IPE's two platforms – the Blue Map website and the Blue Map app – integrate environmental data to serve green procurement, green finance and government environmental policymaking, using cooperation between companies, government, NGOs, research organizations and other stakeholders and leveraging the power of a wide range of enterprises to achieve environmental transformation, promote environmental information disclosure and improve environmental governance mechanisms. <http://www.ipe.org.cn/about/about.html> (Last visited Apr. 25, 2021).

multidimensional capabilities, not only their legal skills. Having been aware of China's grassroots NGOs' weak growth, including lack of experiences, funds, professionals, and unknown political climate, FON appealed for NGOs' broad participation in EPIL actions and facilitated and cooperated with companions and operation of the platform based on Alibaba's and more support.

3.2 History and Overview of ENGO EPIL in China

3.2.1 Before the New Environmental Protection Law

Before the ecological civilization's initiation, the State Council's "Decision of the State Council on the Implementation of the Scientific Outlook on Development to Strengthen Environmental Protection" has emphasized the public participation and NGOs' report and oversight of pollution and destructions by promoting the EPIL system.⁶³⁹ This decision was acknowledged as the first and the primary documentary basis of the EPIL. Several Chinese-style citizen suits had been filed before the Environmental Protection Law 2015. Based on research by Ma Rongzhen and other reports and open resources, the cases since 2000 can be summarized as follows.⁶⁴⁰ Plaintiffs in these cases were individuals, NGOs, Chinese prosecutors (Chinese official translation: procuratorates), and government agencies, like environmental protection bureaus. From the table below, although the EPIL cases generally increased year by year, no EPIL

⁶³⁹ State Council, Decision of the State Council on the Implementation of the Scientific Outlook of Development to Strengthen Environmental Protection, 国务院关于落实科学发展观加强环境保护的决定 国发(2005)39号 12.3, 2005. ¶19, &¶27, http://www.gov.cn/zwggk/2005-12/13/content_125680.htm (It decided to improve the social supervision mechanism, and give full play to the role of social organizations. For example, authorizing social organizations to report and expose various environmental violations, and promote EPIL.) (Last visited Apr. 25, 2021).

⁶⁴⁰ Ma, *supra* note 44, at 13.

case was accepted in 2013, with the Civil Procedure Law in place.⁶⁴¹ Furthermore, before the reform of the registration system for case dockets in 2015, every case in China had to be reviewed in the case filing tribunal.⁶⁴² Not every case would be accepted after reviewed. In 2015, the SPC issued the Opinions on Promoting the Reform of the Registration System for Case Docket by the People's Courts, so that the court must accept any case that meets the requirements in this opinion.⁶⁴³ The requirements contain almost all kinds of cases after the opinion. As no case was accepted in 2013 resulting from the conceptual statute in the Civil Procedure Law 2013,⁶⁴⁴ the Civil Procedure Law 2013 only gave a glimmer of hope to the ENGOs.

Conversely, seventy-two cases were accepted prior to 2015 based on different regulations and local legislation on EPILs in some provinces (like Guizhou) and cities (like Kunming, Wuxi), which were the pilot places of the EPIL system based on their local legislation.⁶⁴⁵ Moreover, according to jurisprudence, one characteristic of law is lag.⁶⁴⁶ Social norms, regulations, and legislation seem to lag social development, which limited the willingness of judges to accept the cases or innovate in the absence of statutory laws. However, these early attempts at environmental public interest law practice were valuable, as the law is a practical science, and practice promotes

⁶⁴¹ *Id.*

⁶⁴² Organization of the Sup. People's Ct., Case Filing Tribunal, SPC, (one of the tribunals in each court, the tribunal is responsible for registering various cases accepted by the courts; placing them on file for investigation and prosecution, handling cases that involve disputes over jurisdiction; examining appeals and retrials; and administering judicial.) http://english.court.gov.cn/2015-11/03/content_22357044.htm(Last visited Apr. 25, 2021).

⁶⁴³ Notice of the Sup. People's Ct. on Issuing the Opinions on Promoting the Reform of the Registration System for Case Docket by the People's Courts 最高人民法院关于印发《关于人民法院推行立案登记制改革的意见》的通知 (No. 6 [2015] of the Sup. People's Ct.) (promulgated by the 11th session of the Central Leading Group for Comprehensively Deepening Reforms, Apr. 1, 2015) CLI.3.246925(EN) (Lawinfochina).

⁶⁴⁴ Civil Procedure Law 2013, *supra* note 620, art. 55.

⁶⁴⁵ *Id.*

⁶⁴⁶ See Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, MICH. L. REV., Vol. 80, No. 4, 785-809 (Mar. 1982)

domestic legislation, enforcement, and judicial development. In essence, some scholars concluded that the formal establishment of public interest litigation commenced with the Environmental Protection Law in 2015.⁶⁴⁷ The ENGO EPIL case number dramatically increased due to the expanded statutory standing of the ENGOs, which allowed courts to officially accept cases onto their dockets according to the Environmental Protection Law. Hence, the system of EPIL in China is one of “practice comes before theory.”⁶⁴⁸

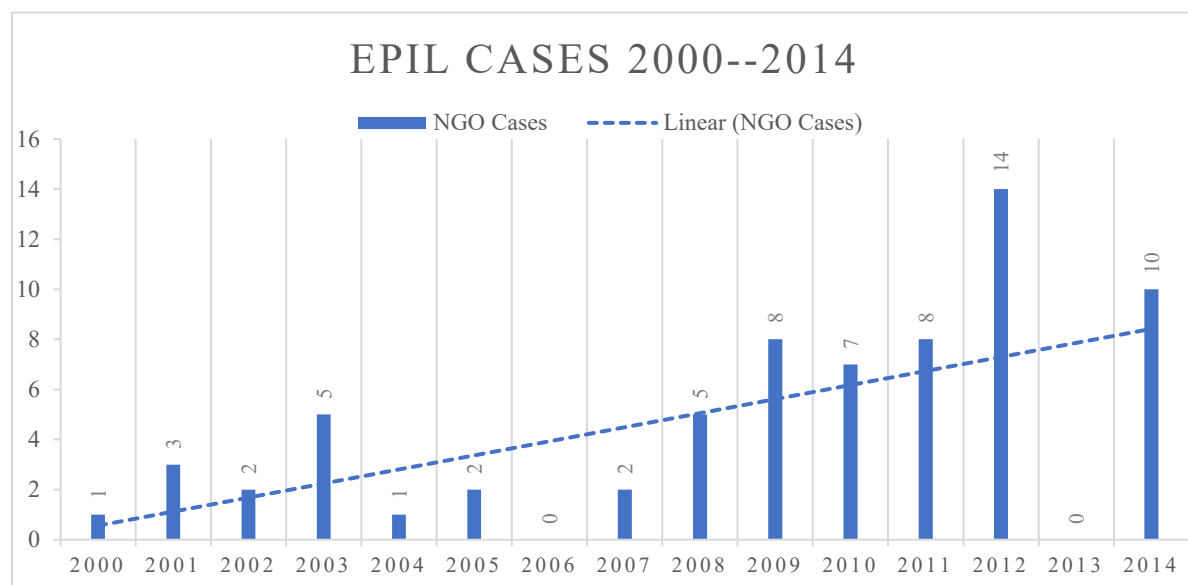


Chart 3.2.1.1 Numbers of EPILs 2000-2014

Source: 1. *The Background of the EPIL Before 2015*.⁶⁴⁹

In the cases mentioned above, the numbers of EPILs brought by the procuratorates and governmental agencies in the past decade were high, while less than 30% of the cases filed were

⁶⁴⁷ Zhang, Huang, Peng, and Deng, *supra* note 40, at 169.

⁶⁴⁸ See generally Hou, *supra* note 31, at 48-51.

⁶⁴⁹ Wang Shekun (王社坤) & Ma Rongzhen (马荣真), *Huanjing Gongyisusong Beijing Zongshu* (环境公益诉讼背景综述) [The Background of the EPIL Before 2015] in *HUANJING GONGYISUSONG GUANCHAO BAOGAO 2015* (环境公益诉讼观察报告 2015 卷) [REVIEW OF PUBLIC INTEREST LITIGATION IN ENVIRONMENT PROTECTION IN 2015] (李楯 et al. eds., 2016) at 257.

brought by ENGOs and individuals (Figure 3.2.1.2 Plaintiff Type). It can be seen that the field of EPIL was still dominated by public power and government before 2015, and the participation of individuals and ENGOs was weak.

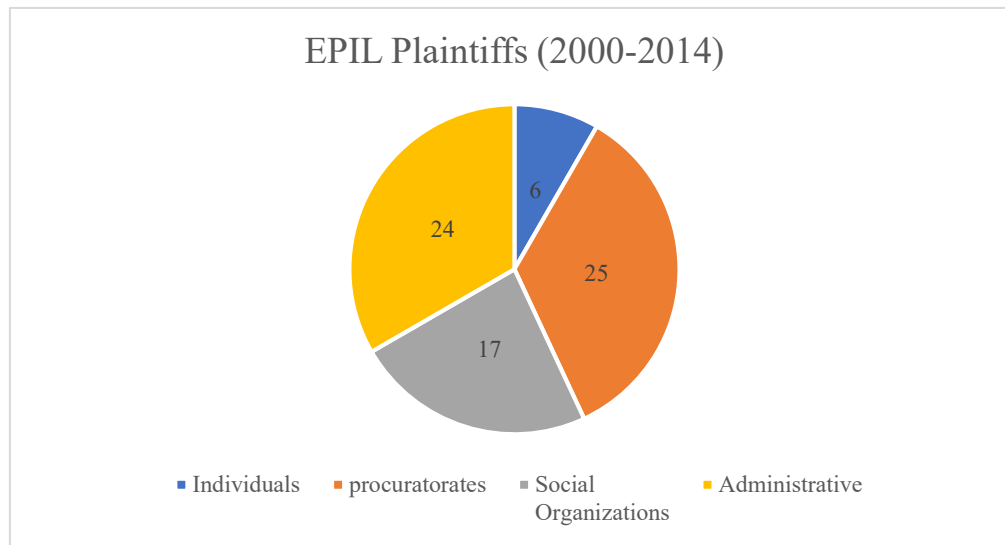


Chart 3.2.1.2 Plaintiff Type⁶⁵⁰

3.2.2 After the New Environmental Protection Law

Since the implementation of the Environmental Protection Law 2015, the SPC announced that there are 298 EPIL cases accepted and 119 cases finished by the end of July of 2019.⁶⁵¹

⁶⁵⁰ Wang & Ma, *supra* note 649, at 257.

⁶⁵¹ Briefing on the Work of the Sup. People's Ct. on the Fifth Anniversary of the Establishment of Adjudication Tribunal for Environment and Resources, SPC (July 29, 2019) <http://www.court.gov.cn/zixun-xiangqing-173942.html>

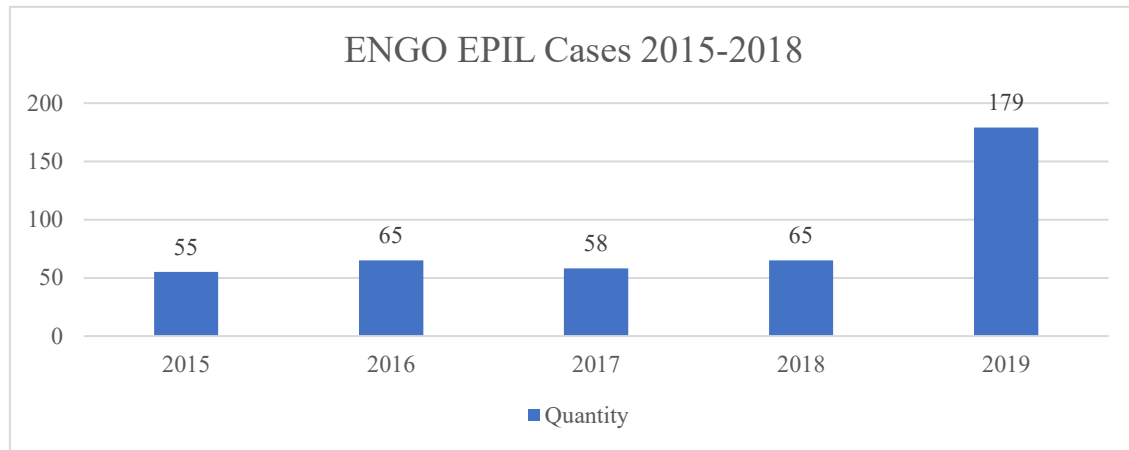


Chart 3.2.2.1 Numbers of EPILs by ENGOs (2015-2019)

1. SPC: 2015-2017 China Environmental Justice Development Report⁶⁵²

2. SPC: Press Conferences of 2017-2018 China Environmental Justice Development Report⁶⁵³

3. SPC: Press Conference of 2019 China Environmental Justice Development Report⁶⁵⁴

According to the chart, the court-accepted ENGO EPIL cases have increased steadily, mainly because of the implementation of the Environmental Protection Law and the SPC's Civil EPIL Interpretation, which issued standards for ENGOs standing in EPIL cases. In addition, ENGOs strengthened their capacity building on litigation work as they took advantage of the ENGOs sub-network to collaborate with environmental attorneys and get financial help on the cases. Nevertheless, there were only ten ENGOs in 2015 and fourteen ENGOs in 2016 filing cases.⁶⁵⁵ Besides active ACEF, CBCGDF, and FON, some local ENGOs, such as Guangdong

⁶⁵² Zhang, Huang, Peng, and Deng, *supra* note 40, at 169.

⁶⁵³ Press Conferences of 2017-2018 China Environmental Justice Development Report (Green Book) and Typical Cases. (《中国环境司法发展报告》(绿皮书)及典型案例新闻发布会), SPC (Mar. 2, 2019) <http://www.court.gov.cn/zixun-xiangqing-145072.html>; LÜ ZHONGMEI (吕忠梅) et al. eds., ZHONGGUO HUANJING SIFA FAZHAN BAOGAO, CHINA ENVIRONMENTAL JUSTICE DEVELOPMENT REPORT (中国环境司法发展报告 2017-2018) at 7-11 (2019).

⁶⁵⁴ Press Conferences of 2017-2018 China Environmental Justice Development Report (Green Book) and Typical Cases. (《中国环境司法发展报告》(绿皮书)及典型案例新闻发布会), SPC (May 8, 2020) <http://www.court.gov.cn/zixun-xiangqing-228351.html>.

⁶⁵⁵ Zhang, Huang, Peng, and Deng, *supra* note 40, at 184.

Environmental Protection Foundation and Fujian Green Home, initiated EPIL cases recently.⁶⁵⁶ ENGOs finally routinely prevailed and achieved the goal of public interest protection.

This phase stemmed from the invocation of established proper pleading claims. Six kinds of claims were selected based on Chinese tort law: cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration to the original state, compensation for losses, and apology.⁶⁵⁷ The claim for an apology was widely used; it was selected in half of the cases.⁶⁵⁸ The claims were sought to have the defendant apologize in the relevant public media in EPIL. This apology relief serves a public warning function. Restoration to the original state is always a core claim in ENGOs EPIL, which seems to be one goal. As an essential way to restore the original status, ecological restoration is a feasible and effective way. Instead of being ordered to restore the ecology, defendants are allowed to pay restoration fees or provide an alternative restoration.⁶⁵⁹ The issues of restoration realization and payment management occurred as no universal rules successively have been enacted.

In summary, before 2015, the ENGO EPIL cases and the NGOs were growing in number, but the judicial identification report fees were still unaffordable. Most ENGOs still lacked the

⁶⁵⁶ *Id.*

⁶⁵⁷ Minfa Dian (中华人民共和国民法典) [Civil Code of the People's Republic of China] (The Civil Code of the People's Republic of China, as adopted at the 3rd Session of the Thirteenth Nat'l People's Cong. of the People's Republic of China on May 28, 2020, is hereby issued, and shall come into force on Jan. 1, 2021), CLI.1.342411(EN) (Lawinfochina), art. 179.

⁶⁵⁸ Interpretation of the Sup. People's Ct. on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations 最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释 (adopted at the 1,631st session of the Judicial Comm. of the SPC on Dec. 8, 2014 and came into force on Jan. 7, 2015; Interpretation No. 1 [2015] of the Sup. People's Ct.), CLI.3.240914(EN) (Lawinfochina) [Hereinafter SPC's Civil EPIL Interpretation] art. 8 (providing for any conduct that pollutes the environment and damages the ecology, which has damaged the public interest or has the major risk of damaging the public interest, the plaintiff may request the defendant to assume the civil liabilities including but not limited to the cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration to the original state, compensation for losses, and apology.)

⁶⁵⁹ Zhang, Huang, Peng, and Deng, *supra* note 40, 187.

willingness to engage in litigation. ENGOs need further encouragement to use the tool of EPIL to appeal for the public interest.

3.3 The Chinese ENGO EPIL System

3.3.1 Statutes

The development of EPIL in China effectively started in 2015, with the implementation of the new Environmental Protection Law. The ENGO EPIL statutes is described below.

a. Civil Procedure Law:

In August 2012, the Civil Procedure Law was adopted,⁶⁶⁰ and article 55 stipulated:

For conduct that pollutes the environment, infringes upon the lawful rights and interests of vast consumers or otherwise damage the public interest, a governmental authority or relevant organization as prescribed by law may institute an action in a people's court.

This statute was considered to be a new establishment for the protection of the social public interest. However, a literal interpretation is confused whether the element “prescribed by law” encompassed only the authority or the authority and related organization. Secondly, if this article contemplated further implementation by other laws, the legal authority may be invoked by the Protection of Consumer Rights and Interests Law (2013 Amendment),⁶⁶¹ Marine Environment Protection Law,⁶⁶² and the Environmental Protection Law. However, there were no relevant

⁶⁶⁰ Civil Procedure Law 2013, *supra* note 620, art. 55.

⁶⁶¹ Civil Procedure Law 2013, *supra* note 620, art. 47 (providing for infringement upon the lawful rights and interests of vast consumers, the China Consumers' Association and the consumer associations formed in provinces, autonomous regions, and municipalities directly under the Central Government may file lawsuits in the people's courts.)

⁶⁶² Civil Procedure Law 2013, *supra* note 620, art. 89 (providing for any damages caused to marine ecosystems, marine aquatic resources or marine protected areas that result in heavy losses to the State, the interested department empowered by the provisions of this Law to conduct marine environment supervision and control shall, on behalf of the State, claim compensation to those held responsible for the damages.)

provisions in 2013 at the time of implementation of the Civil Procedure Law.

In 2017, the Civil Procedure Law maintained ENGO's standing as well as was revised to add another kind of plaintiff of EPIL, procuratorates.⁶⁶³ In short, a procuratorate is allowed to file a lawsuit if no ENGOs had filed a lawsuit according to the Civil Procedure Law 2017.⁶⁶⁴ If an ENGO files a case, procuratorate can be *amicus curiae*.

⁶⁶³ The people's procuratorates in China are state organs for legal supervision. The people's procuratorates have the right to exercise procuratorial authority. They exercise procuratorial authority over cases seriously endangering state and public security, and infringing upon citizens' personal and democratic rights, and other important criminal cases; examine the cases scheduled for investigation by public security organs, and decide on whether a suspect should be arrested or not, and whether a case should be prosecuted or exempt from prosecution; institute and support public prosecution in criminal cases; and oversee activities in public security organs, people's courts, prisons, lockups and reform-through-labor institutions. The people's procuratorates, as well as the people's courts, exercise their own authority, independent of interference by any administrative organ, social organization or individual person. Ministry of Foreign Affairs, People's Procuratorates, Political System and State Structure, https://www.fmprc.gov.cn/mfa_eng/ljzg_665465/zgjk_665467/3579_665483/t17849.shtml

⁶⁶⁴ Civil Procedure Law of the People's Republic of China 2017 中华人民共和国民事诉讼法 (adopted at the 4th Session of the Seventh Nat'l People's Cong. on Apr. 9, 1991; amended for the first time in accordance with the Decision on Amending the Civil Procedure Law of the People's Republic of China as adopted at the 30th Session of the Standing Comm. of the Tenth Nat'l People's Cong. on Oct. 28, 2007; and amended for the second time in accordance with the Decision on Amending the Civil Procedure Law of the People's Republic of China as adopted at the 28th Session of the Standing Comm. of the Eleventh Nat'l People's Cong. on Aug. 31, 2012; and amended for the third time in accordance with the Decision on Amending the Civil Procedure Law of the People's Republic of China and the Administrative Litigation Law of the People's Republic of China as adopted at the 28th Session of the Standing Comm. of the Twelfth Nat'l People's Cong. on June 27, 2017), CLI.1.297379(EN) (Lawinfochina) (Hereinafter Civil Procedure Law 2017), (providing art. 55 Where the people's procuratorate finds in the performance of functions any conduct that undermines the protection of the ecological environment and resources, infringes upon consumers' lawful rights and interests in the field of food and drug safety or any other conduct that damages social interest, it may file a lawsuit with the people's court if there is no authority or organization prescribed in the preceding paragraph or the authority or organization prescribed in the preceding paragraph does not file a lawsuit. If the authority or organization files a lawsuit, the people's procuratorate may support the filing of a lawsuit.); The Administrative Litigation Law of the People's Republic of China 中华人民共和国行政诉讼法 (adopted at the 2nd session of the Seventh Nat'l People's Cong. on April 4, 1989; and amended for the first time in accordance with the Decision of the Standing Comm. of the Nat'l People's Cong. on Amending the Administrative Litigation Law of the People's Republic of China adopted at the 11th session of the Standing Comm. of the Twelfth Nat'l People's Cong. on November 1, 2014; and amended for the second time in accordance with the Decision on Amending the Civil Procedure Law of the People's Republic of China and the Administrative Litigation Law of the People's Republic of China as adopted at the 28th Session of the Standing Comm. of the Twelfth Nat'l People's Cong. on June 27, 2017), CLI.1.297380(EN) (Lawinfochina) (Hereinafter Administrative Litigation Law), art. 25 (providing where the people's procuratorate finds in the performance of functions that any administrative authority assuming supervision and administration functions in such fields as the protection of the ecological environment and resources, food and drug safety, protection of state-owned property, and the assignment of the right to use state-owned land exercises functions in violation of any law or conducts nonfeasance, which infringes upon national interest or public interest, it shall offer procuratorial recommendations to the administrative authority, and urge it to perform functions in accordance with the law. If the administrative authority fails to perform functions in accordance with the law, the people's procuratorate shall file a lawsuit with the people's court in accordance with the law.)

b. Environmental Protection Law⁶⁶⁵

Since 2012, the Environmental Protection Law evolved through four reviews by the Standing Committee of the National People's Congress. One of the major points was ENGO's standing, and the tendency was enlarging the scope of the plaintiff through the four reviews.

In August of 2012, there were no EPIL articles in the draft of the first revision amendment. In June of 2013, the amendment draft was then reviewed again to add an EPIL statute to read:

For an act polluting [the] environment or causing ecological damage in violation of public interest, ACEF and its branches in provinces, autonomous regions, and municipalities (municipalities under the Central Government) level may commence an action in a people's court.⁶⁶⁶

In October of 2013, the third amendment draft of the revision was reviewed, and the related statute read:

For an act polluting environment or causing ecological damage in violation of public interest, a national social organization that has registered in the civil affairs department of the State Council in accordance with the law and which has specialized in environmental protection public interest activities for more than five years and which has a good reputation can file a lawsuit in the people's court.⁶⁶⁷

This third draft replaced the restrictive condition on standing with a provision opening EPIL to all NGOs registered with the Ministry of Civil Affairs. However, this expansion of standing had limited practical effect, as the requirement for registration at the national level narrowed the scope of the standing to only a few government-organized non-governmental organizations (GONGOs) which meet these requirements. According to the New York Times description, "GONGOs are

⁶⁶⁵ Environmental Protection Law, *supra* note 13.

⁶⁶⁶ See eg Lü Zhongmei, *Huanjing Baohufa de Qianshijinsheng* (环境保护法的前世今生) [The Past and Present of Environmental Protection Law] 5 *Zhengzhi yu Falü* (政治与法律) [J. OF POL. SCI. & L.] 51, 57 (2014).

⁶⁶⁷ Xinhua Net, *HuanBaofa Xiuding Caoan Bi Kuoda Tiqi Huanjing Gongyisusong de Zhutifanwei* (环保法修订草案拟扩大提起环境公益诉讼的主体范围) [Amended Draft Environmental Protection Law Intends to Expand the Scope of the Subject of EPIL] GOV.CN (Oct. 21, 2013), http://www.gov.cn/jrzq/2013-10/21/content_2511291.htm

funded, staffed, and otherwise supported by governments.”⁶⁶⁸

In April of 2014, the Environmental Protection Law 2015 was finally adopted, and article 58 was revised to:

For an act polluting the environment or causing ecological damage in violation of public interest, a social organization which satisfies the following conditions may institute an action in a people’s court: (1) It has been legally registered with the civil affairs department of the people’s government at or above the level of a districted city; (2) It has specially engaged in environmental protection for the public good for five consecutive years or more without any recorded violation of law; A people’s court shall, according to the law, accept an action instituted by a social organization that satisfies the provision of the preceding paragraph. A social organization may not seek any economic benefit from an action instituted by it.⁶⁶⁹

Several discussions ensued on this statute after its adoption. Firstly, based on several ENGOs’ and representatives’ proposals, the EPIL system was finally added in the Environmental Protection Law.” Apparently, this statute applies only to ENGOs instead of individual citizens. Here, the plaintiff may be an ENGO with several registration conditions.

The main restriction on eligible ENGOs in this article is the limitation to “organizations who have been legally registered with the Civil Affairs Bureau at or above the level of a districted city.” It is unclear whether this includes the districted level within municipalities or not, such as Chaoyang District of Beijing City. The deputy director of the Social Organization Administration in Ministry of Civil Affairs, Liao Hong, mentioned: “Concerning the provisions on ‘registration of civil affairs departments of the people’s governments at or above the municipal level of the districts, we understood that they should be included in the registration of Civil Affairs Bureau at or above

⁶⁶⁸ Definition for GONGO, *supra* note 564; Hasmath, Hildebrandt, and Hsu, *supra* note 571.

⁶⁶⁹ Environmental Protection Law, *supra* note 13.

the districted level in municipalities.”⁶⁷⁰ In addition, according to statistics of the Ministry of Civil Affairs, there were more than seven thousand ENGOs registered at all levels, of which thirty-six were registered with the Ministry of Civil Affairs, more than three hundred were registered in the provincial Civil Affairs Bureau. More than seven hundred were registered with the municipal Civil Affairs Bureau. The rest of the ENGOs were registered at the county or district level.⁶⁷¹

In addition, with reference to the phrase “specially engaged in environmental protection for the public good for five consecutive years or more and without any recorded violation of the law,” the deputy director, Liao, said that qualified ENGOs should be active in their work area instead of shell organizations, which engage in the protection of natural resources such as the atmosphere, water bodies, soils, or wild animals, and other environmental realms for at least five years. The phrase “no illegal record or without any recorded violation of law” means that there were no violations of administrative or criminal laws. It aims to doably document the lack of a record of violations to prove a good reputation when the action begins.

Finally, the qualification “for an act polluting environment or causing ecological damage in violation of public interest” raises the question of whether the environmental protection agency may be a defendant in an action to compel government agency compliance, if the “pollution of the environment, damage to the ecology, damage to the public interest” was caused by a government environmental agencies’ omission or inaction. There is thus a question whether government agency

⁶⁷⁰ Xu Mingxuan (徐明轩), *Gongyisusong Kaidamen, Huanbao Chuntian Keqi* (公益诉讼开大门, 环保春天可期) [Public Interest Litigation Open the Door, Environmental Protection Spring Can Be Expected] BEIJING NEWS (Jan.8, 2015), <http://www.bjnews.com.cn/opinion/2015/01/08/349021.html>.

⁶⁷¹ *Id.*

compliance (referred to as administrative EPIL in Chinese) is included in the statute or not. In 2015, experts had different opinions. A staff member of the Sub-Committee of Legislative Affairs of the Standing Committee of the National People's Congress believed that this statute did not exclude government agency compliance.⁶⁷² Thus, ENGOs can sue both private violators (enterprises and individuals) and government agencies. However, as the Administrative Litigation Law had not explicitly been revised by 2015, some experts asserted that the Administrative Litigation Law must be revised in order for government agency compliance to be subject to the EPIL provision.⁶⁷³ In this first legislation, the provisions on EPIL thus mainly dealt with the standing of plaintiffs.

c. Supreme People's Court's Interpretation

In January 2015, the Supreme People's Court issued the Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations (the SPC's Civil EPIL Interpretation)⁶⁷⁴ In China, the judicial interpretation constituted and issued by the SPC has legal effect in a judicial proceeding.⁶⁷⁵ This

⁶⁷² Ma, *supra* note 44, at 9.

⁶⁷³ Chang Jiwen (常纪文), *Huanjing Gongyisusong Xujiejue Bage Wenti [EPIL needs to solve eight problems]* 环境公益诉讼需解决八个问题, (经济参考报) ECONOMIC INFORMATION (Sept. 3, 2014), http://dz.jjckb.cn/www/pages/webpage2009/html/2014-09/03/content_95181.htm?div=-1

⁶⁷⁴ SPC's Civil EPIL Interpretation, *supra* note 658.

⁶⁷⁵ Resolution of the Standing Comm. of the Nat'l People's Cong. Providing an Improved Interpretation of the Law 全国人民代表大会常务委员会关于加强法律解释工作的决议 (adopted at the 19th Meeting of the Standing Comm. of the Fifth Nat'l People's Cong. on June 10, 1981); Organic Law of the People's Courts of the People's Republic of China 中华人民共和国人民法院组织法 (adopted at the 2nd session of the Fifth Nat'l People's Cong. on July 1, 1979, amended for the first time according to the Decision of the 2nd Session of the Standing Comm. of the Sixth Nat'l People's Cong. on Amending the Organic Law of the Peoples Courts of the People's Republic of China on Sept. 2, 1983; amended for the second time according to the Decision of the 18th Session of the Standing Comm. of the Sixth Nat'l People's Cong. on Amending the Organic Law of the Local People's Congresses at All Levels and Local People's Governments at All Levels of the People's Republic of China on Dec. 2, 1986; amended for the third time according to the Decision of the 24th Session of the Standing Comm. of the Tenth Nat'l People's Cong. on Amending the Organic Law of the People's Courts of the People's Republic of China on Oct. 31, 2006; and revised at the 6th session of the Standing Comm. of the Thirteenth Nat'l People's Cong. on Oct. 26, 2018), CLI.1.324530(EN)

SPC's Civil EPIL Interpretation further explained the requirements to establish the plaintiff's standing in environmental civil public interest litigation, allocating the burden of proof, and amicus curiae. This judicial interpretation regulates various elements of EPIL and clarifies some essential and practical issues of EPIL's implementation.⁶⁷⁶

This judicial interpretation defined the scope of ENGOs and the requirements to be met for commencing suit to explicate that the ENGOs that are registered in or above the districted city and a district of the municipality directly under the Central Government both can be acknowledged as the qualified registration elements. In addition, ENGOs have to file their five-year records or letter to prove their "no record of violations of laws" in practice.⁶⁷⁷

The SPC's Civil EPIL Interpretation also requires that the courts notice the environmental agency responsible for regulating the violator within ten days. However, this notice does not permit the environmental agency's enforcement action against the violator to impede the process of the EPIL.⁶⁷⁸ Hence, the purpose of this notice is not apparent. This notice might act as deterrence, not only to the violators but also to the environmental agencies, which may expose administrative enforcement omission.

The interpretation also regulates the co-plaintiffs and amicus curiae in detail. Including procuratorates, environmental government agencies, registered and unregistered ENGOs, and enterprises.⁶⁷⁹ The Chinese amicus curiae (supporting system) is to collect opinions of various

(Lawinfochina).

⁶⁷⁶ *Id.*

⁶⁷⁷ SPC's Civil EPIL Interpretation, *supra* note 658.

⁶⁷⁸ *Id.*

⁶⁷⁹ PAN SHENMING (潘申明), BIJIAOFA SHIYEXIA DE MINSHIGONGYISUSONG (比较法视角下的民事公益诉讼) [CIVIL PUBLIC INTEREST LITIGATION IN THE PERSPECTIVE OF COMPARATIVE LAW] 338 (2011).

agencies and organizations. The Chinese *amicus curiae* was established in 1982 Civil Procedure Law generally in Article 13:

Article 13 If the civil rights and interests of the state, a collective or an individual have been infringed, a state organ, public organization, enterprise or institution may support the injured unit or individual to initiate legal action in a people's court.⁶⁸⁰

Although it was established earlier, the agencies and organizations were rarely involved in the practice.⁶⁸¹ This SPC's Civil EPIL Interpretation in 2015 detailed Chinese *amicus curiae* to encourage procuratorates, organizations, and enterprises to participate in EPIL actions to provide consulting, written opinions, and assist investigations.⁶⁸²

Noteworthy, if individuals directly harmed by polluting activities, they must file a separate lawsuit according to the Torts Law.⁶⁸³ It made a distinction between the public and private interest remedies. Overall, the judicial interpretation was created as a detailed guideline on EPIL, and it was applied in each case during the past five-year adoption.

At the same time, the SPC, the Ministry of Civil Affairs, and the Ministry of Environmental Protection (now known as the Ministry of Ecology and Environment, MEE) jointly issued "Notice of the Supreme People's Court, the Ministry of Civil Affairs and the Ministry of Environmental Protection on Implementing the Environmental Civil Public Interest Litigation System,"⁶⁸⁴ which

⁶⁸⁰ Civil Procedure Law of the People's Republic of China (For Trial Implementation) (Expired) 《中华人民共和国民事诉讼法（试行）》 (adopted at the 22nd Meeting of the Standing Comm. of the Fifth Nat'l People's Cong. of the People's Republic of China on Mar. 8, 1982, is hereby promulgated, and implemented on a trial basis as of Oct. 1, 1982), CLI.1.1216(EN) (Lawinfochina).

⁶⁸¹ *Xi, supra* note 607, at 155.

⁶⁸² SPC's Civil EPIL Interpretation, *supra* note 658, art. 11.

⁶⁸³ *Id.*, art. 29.

⁶⁸⁴ Notice of the Sup. People's Ct., the Ministry of Civil Affairs and the Ministry of Environmental Protection on Implementing the Environmental Civil Public Interest Litigation System 最高人民法院、民政部、环境保护部关于贯彻实施环境民事公益诉讼制度的通知 (No. 352 [2014] of the Sup. People's Ct.) Dec. 26, 2014. CLI.3.240915(EN) (Lawinfochina).

formulated implementation methods for common issues and related duties involving the three departments.

3.3.2 Standing

The article on the standing of EPIL in the 2013 Civil Procedure law was too broad to adopt in practice. After almost three years of struggling to revise the Environmental Protection Law, the major point of discussion in public interest litigation was the scope of standing. According to Article 58 of Environmental Protection Law and Article 2, 3, 4, and 5 of SPC's Civil EPIL Interpretation,⁶⁸⁵ two kinds of conditions on the standing of the plaintiff can be seen: positive conditions and negative conditions.⁶⁸⁶ The positive conditions are a. whether the ENGO meets the registration level requirements and b. whether the plaintiff NGO has been involved or engaged in EPIL actions continuously for five years. The negative condition is that the plaintiff NGO has no record of illegal activity for five consecutive years.

The registration requirements thus could be analyzed in three aspects. The plaintiff may be an organization who has legally registered in the Civil Affairs Bureau at or above the level of a districted city. Moreover, Article 3 of the SPC's Civil EPIL Interpretation clarified the phrase "at or above the level of a districted city" in detail. For instance, the eligible ENGOs must be registered at a civil affairs bureau at the municipal, prefectural city, provincial city district, or county level and above. This is the first positive condition of the plaintiff ENGO's registration requirements.

<https://www.chinacourt.org/law/detail/2014/12/id/148057.shtml> or http://www.mee.gov.cn/gkml/hbb/gwy/201501/t20150112_294084.htm.

⁶⁸⁵ Environmental Protection Law, *supra* note 13; and SPC's Civil EPIL Interpretation, *supra* note 658, art. 29.

⁶⁸⁶ HUANJING GONGYISUSONG SHIANSHIFA (环境公益诉讼实案释法) [EPIL EXPLANATION BY CASES], 8-9 (Zhu Xiao 竺效 ed. 2018)

The second positive condition is that the qualified ENGO has been involved or engaged in conservation, public interest activities continuously for five years. The Interpretation further sets a standard in Article 4 that “The public interest involved in the lawsuit filed by an ENGO shall be related to its missions and business scope.”⁶⁸⁷ The mission and the business scope are always on ENGOs’ registration certificates or annual reports, which are admissible as proof in courts.

The sole negative condition on ENGO standing is the requirement that the ENGO has not broken the law. In the SPC’s Civil EPIL Interpretation, “Where no administrative or criminal punishment is imposed on a social organization due to any violation of law or regulation in its business activities within five years before filing a lawsuit,” it may be determined there is “no record of violations of laws” as prescribed in Article 58 of the Environmental Protection Law from Article 5 of the SPC’s Civil EPIL Interpretation.⁶⁸⁸

Therefore, ENGOs’ standing in EPIL actions had been entirely altered since the legislation. For instance, before the new Environmental Protection Law, in 2013, ACEF filed an environmental public interest lawsuit, *ACEF v. Hainan Luoniushan Pig Breeding Co., Ltd. and Hainan Tiangong Biological Engineering Company*.⁶⁸⁹ The case, which was based on the long-term discharge of untreated sewage, which severely damaged the local ecological environment, and the downstream national mangrove forest protection area, was dismissed.⁶⁹⁰ According to ACEF’s investigation, Hainan Luoniushan Pig Breeding Co., Ltd. and Hainan Tiangong Biological Engineering

⁶⁸⁷ SPC’s Civil EPIL Interpretation, *supra* note 658, art. 4.

⁶⁸⁸ *Id.* art 5; Environmental Protection Law, *supra* note 13, art. 58.

⁶⁸⁹ ACEF’s 2013 Environmental Protection Rights Key Work and Results 中华环保联合会环境维权 2013 年重点工作及成效, ACEF (Feb. 28, 2014), <http://www.acef.com.cn/zhuantilanmu/2013hjwqtbh/huiyinarong/2014/0228/12457.html>

⁶⁹⁰ *Id.*

Company discharged wastewater exceeding required standards through pits without any anti-seepage measures, polluting the water of Luoniu River, resulting in large-scale Mangroves dying in Hainan Dong Zhai Gang National Nature Reserve.⁶⁹¹ On June 21, 2013, the Haikou Intermediate People's Court accepted the environmental civil public interest litigation case, *ACEF v. Hainan Luoniushan Pig Breeding Co., Ltd. and Hainan Tiangong Biological Engineering Company*.⁶⁹² However, Haikou Intermediate People's Court dismissed the lawsuit in August 2013. The court's reason for dismissal was "because the current law has not stipulated the standing of ACEF, and ACEF is not eligible as a plaintiff in civil public interest litigation."⁶⁹³ On December 16, 2013, after ACEF appealed, the High People's Court of Hainan Province maintained the original ruling on the final decision.⁶⁹⁴ The plaintiff in a public interest lawsuit was statutory, and only "an authority and a relevant organization prescribed by law" were eligible to sue. Regardless of the authority or the relevant organization, they must be authorized by statute before suing.⁶⁹⁵ In short, the court held that ACEF did not have the standing to file this EPIL case.⁶⁹⁶ The focus of the dispute was whether the standing of the plaintiff of EPIL had been legally authorized.

At the time of Hainan Province High People's Court's ruling, the Environmental Protection Law 2015 had not been promulgated. The Civil Procedure Law was the only legislative basis for environmental civil public interest litigation, but only a prescribed "authority or relevant

⁶⁹¹ *Id.*

⁶⁹² *Id.*

⁶⁹³ *Id.*

⁶⁹⁴ Zhonghua Huanbao Lianhehui Su Hainan Luoniushan Zhongzhuyuzhong 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. Hainan Luoniushan Pig Breeding Co., Ltd. and Hainan Tiangong Biological Engineering Company*] Dec. 16, 2013 (Hainan High. People's Ct. Dec. 16, 2013).

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.*

organization” would meet the requirements above.⁶⁹⁷ So the point is whether ACEF is a relevant organization as prescribed by law or not. Due to the Civil Procedure Law 2013 amendment did not further clarify the “relevant organization as prescribed by law,” and no other laws or regulations addressed this matter in 2013. Therefore, the court denied ACEF’s standing in this environmental civil public interest litigation because the laws lacked definite articles.⁶⁹⁸

In 2015, with the promulgation of Article 58 of the Environmental Protection Law, the “relevant organizations prescribed by law” clearly stipulated the standing of ENGOs in environmental civil public interest litigation.⁶⁹⁹ Thus, the courts could no longer deny the ENGOs because of no regulation on standing.

The second adjudication of ENGO standing occurred in the case: *Friends of Nature and Fujian Green Home Environment-Friendly Center v. Xie, Ni, Zheng, and Li*.⁷⁰⁰ This case was for the illegal occupation of forest land for mining, which caused ecological damage. At the end of July 2008, the defendants, Xie, Ni, Zheng, and Li, quarried stones in Hulu Mountain, Yanping District, Nanping City, Fujian Province.⁷⁰¹ They stripped the soil and dumped wasted rock down the mountains without obtaining any-permits to occupy the forest land until 2010. The defendants hired excavators to open the road at the mine slope to expand the area of the mine mouth after the

⁶⁹⁷ Civil Procedure Law 2013, *supra* note 620, art. 55.

⁶⁹⁸ Zhonghua Huanbao Lianhui Su Hainan Luoniushan Zhongzhuyuzhong 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. Hainan Luoniushan Pig Breeding Co., Ltd. and Hainan Tiangong Biological Engineering Company] Dec. 16, 2013 (Hainan High. People’s Ct. Dec. 16, 2013).

⁶⁹⁹ Environmental Protection Law, *supra* note 13.

⁷⁰⁰ Beijingshi Chaoyangqu Ziranzhijie Huanjing Yanjiusuo, Fujiansheng Lùjiayuan Huanjingyouhao Zhongxin Su Xie Zhijin deng Siren Pohuailindi Minshi Gongyisusongan (北京市朝阳区自然之友环境研究所、福建绿家园诉谢知锦等四人破坏林地民事公益诉讼案) [Fon, Fujian Green Home Environment Friendly Center v. Xie Zhijin], Oct. 29, 2015, Dec. 18, 2015 (Nanping Interm. People’s Ct. Oct. 29, 2015, Fujian High People’s Ct. Dec. 18, 2015).

⁷⁰¹ *Id.*

Land and Resources Bureau (now known as Natural Resources Bureau) issued injunctions in June 2011.⁷⁰² The expert reports confirmed that the three defendants, Xie, Ni, and Zheng, had quarried and destroyed 18,890.6 m² (4.67 acres) of forest land.⁷⁰³ In December 2014, the plaintiffs, Friends of Nature (FON) and Fujian Green Home Environment-Friendly Center (Green Home), filed a public interest lawsuit in Nanping Intermediate People's Court, Fujian Province. The Nanping Intermediate People's Court officially accepted the case on January 1, 2015, and the first judgment was made on October 29.⁷⁰⁴ In the first trial, the defendant argued that the plaintiff FON had been registered for less than five years, so it did not have standing as a plaintiff in environmental civil public interest litigation. However, this argument was not accepted by the court. On November 10, three of the four defendants appealed.⁷⁰⁵

On December 18, 2015, the Fujian High People's Court issued a second-trial judgment and upheld the prior ruling. It also ruled that FON was qualified in EPIL based on clear facts and proper applicable laws.⁷⁰⁶ The court's ruling focused on how to determine the starting point of "involved in environmental protection public interest activities continuously for five years."⁷⁰⁷ According to the court, the starting point of "involved or engaged in environmental protection public interest activities continuously for five years" should be the time when the actual activity was started, not the registration time.⁷⁰⁸ According to article 58 of Environmental Protection Law: "the plaintiff

⁷⁰² *Id.*

⁷⁰³ *Id.*

⁷⁰⁴ *Id.*; and Zhu, *supra* note 686, at 11-12.

⁷⁰⁵ *Id.*

⁷⁰⁶ *Id.*

⁷⁰⁷ Zhu, *supra* note 686, at 12.

⁷⁰⁸ Beijingshi Chaoyangqu Ziranzhiyou Huanjing Yanjiusuo, Fujiansheng Lùjiayuan Huanjingyouthao Zhongxin Su Xie Zhijin deng Siren Pohuailindi Minshi Gongyisusongan (北京市朝阳区自然之友环境研究所、福建绿家园诉谢

ENGO is registered with a civil affairs bureau at a municipal-level city or above, and the ENGO has been involved or engaged in environmental protection public interest activities continuously for five years.”⁷⁰⁹ And “continuously for five years” only applied to the second condition, which was that “the NGO has been involved or engaged in environmental protection and public interest activities.” It should not be understood that the plaintiff must have been existent for more than five consecutive years from the date of registration to the date of bringing the lawsuit. In this case, the registration date of FON was June 18, 2010, and the date of the registration certificate of the private non-enterprise unit was September 27, 2013. Moreover, the date of filing this case was January 1, 2015.⁷¹⁰ Although the registration date and the date of the certificate of FON were less than five years from the filing date of this case, FON’s predecessor, the Green Branch of the Chinese Academy of Culture, was established as early as June of 1993 and began to engage in environmental public interest activities since then.⁷¹¹ There had been more than five years from 1993 to filing this case. Therefore, the court determined that FON had been involved or engaged in environmental protection, public interest activities continuously for five years.⁷¹² For those reasons, both the two-level courts reasoned that the starting point should be the time when actual activity was started.⁷¹³ FON had been engaged in environmental protection activities before and

知锦等四人破坏林地民事公益诉讼案) [Fon, Fujian Green Home Environment Friendly Center v. Xie Zhijin], Oct. 29, 2015, Dec. 18, 2015 (Nanping Interm. People’s Ct. Oct. 29, 2015, Fujian High People’s Ct. Dec. 18, 2015).

⁷⁰⁹ Environmental Protection Law, *supra* note 13.

⁷¹⁰ Beijingshi Chaoyangqu Ziranzhiyou Huanjing Yanjiusuo, Fujiansheng Lùjiayuan Huanjingyouhao Zhongxin Su Xie Zhijin deng Siren Pohuailindi Minshi Gongyisusongan (北京市朝阳区自然之友环境研究所、福建绿家园诉谢知锦等四人破坏林地民事公益诉讼案) [Fon, Fujian Green Home Environment Friendly Center v. Xie Zhijin], Oct. 29, 2015, Dec. 18, 2015 (Nanping Interm. People’s Ct. Oct. 29, 2015, Fujian High People’s Ct. Dec. 18, 2015).

⁷¹¹ *Id.*

⁷¹² *Id.*

⁷¹³ *Id.*

after its private non-enterprise unit registration and without any illegal record.⁷¹⁴ Therefore, FON has standing in this case.⁷¹⁵

However, some ENGOs have not been accepted after 2015 because of the conflicting legislation. In fact, not all environmental laws were revised to issue like the Environmental Protection Law. The Marine Environment Protection Law was one of the typical examples of a law that was not revised after 2015. The case of *Dalian Environmental Protection Volunteer Association v. Dalian China National Petroleum Corporation (CNPC) International Storage and Transportation Co., Ltd.*⁷¹⁶ was a case that addressed standing under this law.

On July 16, 2010, the crude oil storage pipeline of Dalian China National Petroleum Corporation (CNPC) International Storage and Transportation Co., Ltd. exploded, causing a fire and causing a large crude oil spill.⁷¹⁷ According to the official reports, the oil spill amounted to more than 1,500 tons, causing 430 km² of sea surface pollution, of which 12 km² were heavily polluted sea areas, and the average polluted sea area was 52 km².⁷¹⁸ On June 5, 2015, the Dalian Environmental Protection Volunteer Association filed an EPIL case to the Dalian Maritime Court for the marine environmental pollution and loss of ecological resources caused by the oil spill. The association claimed damages of ¥645 million (\$92 million). On June 18, 2015, Dalian Maritime Court dismissed the Dalian Environmental Protection Volunteer Association. The court held that

⁷¹⁴ *Id.*

⁷¹⁵ Zhu, *supra* note 686, at 13.

⁷¹⁶ Gao Shengke (高胜科), CNPC invests 200 million yuan to build special marine ecological fund, pays for Dalian oil spill accident 中石油拟出 2 亿元 为 5 年前溢油事故埋单, CAIJING (June 25, 2015), https://news.caijingmobile.com/article/detail/197034?source_id=40.

⁷¹⁷ *Id.*

⁷¹⁸ *Id.*

the association was an ENGO, not a government agency, as the association did not have the standing to file a marine pollution public interest lawsuit according to the Marine Environmental Protection Law 1999 amendment,⁷¹⁹ which provides: “For any damages caused to marine ecosystems, marine aquatic resources or marine protected areas that result in heavy losses to the State, the interested department empowered by the provisions of this Law to conduct marine environment supervision and control shall, on behalf of the State, claim compensation to those held responsible for the damages.”⁷²⁰ According to the court, this article was directed only to the loss of state interest and not protecting the public interest. The association claimed that the court should apply the Environmental Protection Law 2015 according to the “new law is superior to the old law” principle in Article 83 in Law on Legislation.⁷²¹ The Dalian Maritime Court ultimately did not accept the case.⁷²²

When Dalian Environmental Protection Volunteers Association was preparing to appeal to the Liaoning High People’s Court, they received a coordination notice from the court and the municipal government. After many discussions and negotiations with Dalian Maritime Court, Dalian Environmental Protection Bureau, and CNPC, CNPC agreed to invest ¥200 million

⁷¹⁹ Marine Environment Protection Law of the People’s Republic of China 中华人民共和国海洋环境保护法 (adopted at the 24th Meeting of the Standing Comm. of the Fifth National People’s Cong. on Aug. 23, 1982; revised at the 13th Meeting of the Standing Comm. of the Ninth Nat’l People’s Cong. on Dec. 25, 1999 and promulgated by Order No.26 of the President of the People’s Republic of China on Dec. 25, 1999), CLI.1.24094(EN) (Lawinfochina).

⁷²⁰ *Id.*

⁷²¹ Legislation Law of the People’s Republic of China 中华人民共和国立法法 (adopted at the third Session of the Ninth Nat’l People’s Cong. on Mar. 15, 2000 and promulgated by Order No. 31 of the President of the People’s Republic of China on Mar. 15, 2000) CLI.1.26942(EN) (LawinfoChina). (Amended in 2018).

⁷²² Gao, *supra* note 716.

(\$28.5 million) to establish a special fund with public supervision. A prerequisite was that the association no longer appeal.⁷²³

Due to the Marine Environmental Protection Law, as one kind of environmental legislation, has not been revised in its 2016 amendments to be consistent with the Environmental Protection Law's provisions, omitting the EPIL provisions,⁷²⁴ four ENGO EPIL cases were thus had not been accepted for lack of standings.⁷²⁵

3.3.3 Pleading Claims

ENGOS are allowed to select six kinds of pleading claims in EPILs according to various types of liability categories recognized in the tort law in China.⁷²⁶ Six kinds of claims in the EPIL system are cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration

⁷²³ Zhu, *supra* note 686.

⁷²⁴ Marine Environment Protection Law of the People's Republic of China 中华人民共和国海洋环境保护法 (Adopted at the 24th Session of the Standing Comm. of the Fifth Nat'l People's Cong. on Aug. 23, 1982; revised at the 13th Session of the Standing Comm. of the Ninth Nat'l People's Cong. on Dec. 25, 1999; amended in accordance with the Decision on Amending Seven Laws Including the Marine Environment Protection Law of the People's Republic of China at the Sixth Session of the Standing Comm. of the Twentieth Nat'l People's Cong. on Dec. 28, 2013; and amended for the second time in accordance with the Decision of the Standing Comm. of the Nat'l People's Cong. on Amending the Marine Environment Protection Law of the People's Republic of China adopted at the 24th Session of the Standing Comm. of the Twelfth Nat'l People's Cong. on Nov. 7, 2016; amended for the third time in accordance with the Decision of the Standing Comm. of the Nat'l People's Cong. on Amending Eleven Laws including the Accounting Law of the People's Republic of China, as adopted at the 30th Session of the Standing Comm. of the Twelfth Nat'l People's Cong. of the People's Republic of China on Nov. 4, 2017), CLI.1.304315(EN) (Lawinfochina).

⁷²⁵ CBCGDF, CBCGDF Attended 2019 Annual Meeting of the Marine Environmental Law Commission (海洋生态环境保护与环境公益诉讼|马勇参加海洋环境法专委会 2019 年会), June 23, 2019. In the report, there were only the four dismissal case numbers, no case names. <http://www.cbcdgdf.org/NewsShow/4854/9016.html> The author found two cases dismissal decisions. FON Su Rongchengweibo Yuye Ltd. (自然之友诉荣成伟伯渔业) [FON v. Rongchengweibo Yuye Ltd.] Sept. 20, 2018 (Qingdao Interm. People's Ct, Shandong High People's Ct. Sept. 20, 2018, Sup People's Ct. Feb. 13, 2020); Chongqing Liangjiang Zhiyuanfuwu Zhongxin, Guangdongsheng Huanjingbaohu Jijinhui Su Guangdong Shijiqingshan Niede Youxiangongsi, Yangjiang Yichuan Jinshukeji Youxiangongsi, and Guangdong Guangqing Jinshu keji Youxiangongsi (重庆两江志愿服务发展中心, 广东省环境保护基金会诉广东世纪青山镍业有限公司, 阳江翌川金属科技有限公司, 广东广青金属科技有限公司)[Chongqing Liangjiang Voluntary Service Center, Guangdong Province Environmental Protection Foundation v. Guangdong Shijiqingshan Niede Youxiangongsi, Yangjiang Yichuan Jinshukeji Youxiangongsi, and Guangdong Guangqing Jinshu keji Youxiangongsi] (Guangdong Maoming Interm. People's Ct. July 31, 2017). <http://www.liangjiang.org.cn/uploadfile/2017/0911/20170911101507464.pdf>

⁷²⁶ Civil Code, *supra* note 657.

to the original state, compensation for losses, and apology.⁷²⁷ These six claims could be classified into three types, which are preventive claims, restorative claims, and compensatory claims.⁷²⁸ Cessation of the tortious act, removal of obstruction, and elimination of danger are precautionary claims. Restoration to the original state is the restorative claim. And compensation for losses and apologies are compensatory claims.⁷²⁹

The preventive claims are the primary method of asserting environmental responsibility in EPIL actions against private sectors and are asserted to prevent the occurrence of future environmental damages. Compared with claims seeking environmental restoration after the actual damage and those seeking compensation for losses, preventive claims are more effective for environmental protection.⁷³⁰ According to article 19 in the SPC's Civil EPIL Interpretation, the content of preventive claims includes two aspects: the first is behavioral claims or behavioral liabilities.⁷³¹ The claim seeking cessation of the tortious act is mainly to stop the defendant from continuing to carry out some infringement or tortious act to prevent the consequences of the infringement from expanding. This liability claim is conditional on the infringement being ongoing or continuing. The removal of the obstruction claim means that the acts carried out by the defendant hindered the realization of social and public interests, and the plaintiff may request the violators to remove the obstacles to the public interests. The elimination of the danger claim refers to an act of the defendant having a major risk of harming the social public interest to pollute the environment

⁷²⁷ *Id.*

⁷²⁸ Zhu, *supra* note 686, at 57.

⁷²⁹ *Id.*

⁷³⁰ *Id.* at 61; and SPC's Civil EPIL Interpretation, *supra* note 658.

⁷³¹ SPC's Civil EPIL Interpretation, *supra* note 658.

and destroy the ecology. The plaintiff has the right to request the defendant to take effective measures to eliminate this threat.

The second kind of preventive claim includes cost claims or cost responsibility. The plaintiff may claim the defendant to compensate the plaintiff for the expenses incurred by the plaintiff in taking reasonable precautionary and disposal measures to cease the tortious act, remove the obstruction, and eliminate the danger taken by the plaintiff. The above-mentioned costs include but are not limited to emergency disposal costs.⁷³²

The expenses also may include the costs incurred for preventing non-emergency emissions from damaging the environment, as well as the costs of cleaning up and disposing of pollutants after the environmental damage occurs. Some scholars and the SPC's staff pointed out that the cleaning up and disposal of pollutants are mainly preventive measures rather than restorative measures to the original state.⁷³³

The case of *ACEF and Guiyang Public Environmental Education Center v. Dingpa Paper Mill of Wudang District, Guiyang City*,⁷³⁴ was a case that included the claims for the cessation of the tortious act and elimination of danger, these preventive claims. Since 2003, the Dingpa paper mill of Wudang District, Guiyang City, had secretly discharged production wastewater into the

⁷³² Zhu, *supra* note 686, at 61-62.

⁷³³ Xi, *supra* note 607, at 237-239; Zhu, *supra* note 686, at 62-65.

⁷³⁴ Zhonghua Huanbao Lianhehui, Guiyang Gongzhong Huanjingjiaoyuzhongxin Su Guiyangshi Wudangqu Dingpa Zaozhichang Shuiwuran zerenjiufenan (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) [ACEF and Guiyang Public Environmental Education Center v. Dingpa Paper Mill of Wudang District, Guiyang City] Nine Model Trial Cases Involving Environmental Resources Published by the Sup. People's Ct., 2014 SUP. PEOPLE'S CT. GAZ. 11 [217] (China) CLI.C.2991069(EN) (Lawinfochina) <https://www.chinacourt.org/article/detail/2014/07/id/1329697.shtml>.

Nanming River and had excess air emissions from the boilers.⁷³⁵ These violations had been punished by the local environmental protection bureau on many occasions. However, the paper mill still evaded supervision by secretly discharging sewage into the Nanming River at night. ACEF and the Guiyang Public Environmental Education Center filed a lawsuit, seeking relief requiring the Dingpa Paper Mill to stop the sewage discharge immediately, eliminate the danger, and pay the plaintiffs' reasonable expenses.⁷³⁶

The Qingzhen People's court held that the discharge permit obtained by Dingpa Paper Mill stated that the pollutants it could discharge only included sulfur dioxide and soot, but not sewage. However, Dingpa Paper Mill stored sewage in the daytime and secretly discharged it at night. The discharged industrial sewage exceeded the standards, and the sewage went through some karst caves to the Nanming River.⁷³⁷ Dingpa Paper Mill thus polluted the Nanming River and severely harmed the public interest in protecting the environment. Thus, the paper mill was liable for the civil torts' obligations. The Qingzhen People's Court ruled in January 2011, ordering the Dingpa Paper Mill to stop the discharge of sewage into the Nanming River immediately. The court also ordered the mill to eliminate the harm caused to the Nanming River. At the same time, the court ordered the violator to pay the attorney fees, plaintiffs' other reasonable expenses, and the testing and expert reports expenses.⁷³⁸

⁷³⁵ *Id.*

⁷³⁶ *Id.*

⁷³⁷ *Id.*

⁷³⁸ *Id.*

In this case, the plaintiffs asserted preventive claims that the defendant should be ordered to stop the tortious act and eliminate the danger. The court ultimately accepted both claims. Although the judgment, in this case, was made before the SPC's Civil EPIL Interpretation was adopted, it reflected the application of the SPC preventive litigation claims and the burden of proof.⁷³⁹ The case was selected as number one of the Nine Model Cases involving Environmental Resources Issued by the Supreme People's Court as its example.⁷⁴⁰ The court applied the cessation of the tortious act tort correctly. Cessation of the tortious act seeks mainly to stop the defendant from continuing to violate and to prevent the consequences of the violation from expanding. This claim or liability is conditional on the violation being ongoing or continuing. In this case, the defendant secretly discharged at night to escape detection, and this conduct was still in progress at the time of litigation. Therefore, the violator, the paper mill, was responsible for stopping the sewage discharge. In addition, this case applied the claim of elimination of danger correctly. Elimination of danger refers to using common sense and experience to determine the status of polluters with a high probability of causing specific harm to the public interest and environment.⁷⁴¹ Although the defendant temporarily stopped the sewage discharge, the sewage treatment equipment had not been installed, and the sewage discharge permit had not been obtained. The real danger to the environment still existed. Therefore, the court accepted the claims of the elimination of danger.⁷⁴²

⁷³⁹ *Id.*

⁷⁴⁰ *Id.* and Zhu, *supra* note 686, at 62-63.

⁷⁴¹ *Id.* and XI, *supra* note 607, at 272.

⁷⁴² *Id.*

According to Article 20 in the SPC's Civil EPIL Interpretation, restoration to the original state is the restorative claim. Restoration to the original state refers to the claim seeking that the violator restores the environment to its original state if the act of polluting the environment, destroying the ecology, or the pollution has the potential risk of damaging the public interest.⁷⁴³ The claim of restoration to the original state consists of three aspects. The plaintiff requests the restoration to the original state after the defendant damaged the ecological environment. If complete restoration is impossible, the people's court may permit adopting alternative restoration methods as the plaintiff's claim. The plaintiff might claim that the defendant shall restore the ecological environment or the payment to another qualified restoration institution if the defendant fails to perform the restoration obligation. Alternatively, the court "may directly render a judgment that the defendant shall assume the expenses for restoring the ecological environment."⁷⁴⁴ The expenses for restoring include the expenses for preparing and implementing the restoration plan, monitoring, and supervision, among others. These aspects proposed a viable correction method of the claims and judgment.⁷⁴⁵

The case of *Friends of Nature and Fujian Green Home Environment-Friendly Center v. Xie, Ni, Zheng, and Li*⁷⁴⁶ was a case that included the claims for restoration to the original state, the restorative claim. This case was for the illegal occupation of forest land for mining, which caused

⁷⁴³ XI, *supra* note 607, at 290.

⁷⁴⁴ SPC's Civil EPIL Interpretation, *supra* note 658.

⁷⁴⁵ *Id.* and XI, *supra* note 607, at 297.

⁷⁴⁶ Beijingshi Chaoyangqu Ziranzhiyou Huanjing Yanjiusuo, Fujiansheng Lùjiayuan Huanjingyouthao Zhongxin Su Xie Zhijin deng Siren Pohuailindi Minshi Gongyisusongan (北京市朝阳区自然之友环境研究所、福建绿家园诉谢知锦等四人破坏林地民事公益诉讼案) [FON, Fujian Green Home Environment Friendly Center v. Xie Zhijin], Oct. 29, 2015, Dec. 18, 2015 (Nanping Interm. People's Ct. Oct. 29, 2015, Fujian High People's Ct. Dec. 18, 2015).

ecological damage. The plaintiff requested that the four defendants be ordered to restore the forest land vegetation within a specified period and pay compensation of ¥1.34 million for the loss of ecological and environmental service functions. If the forest land vegetation cannot be restored in time, the suit asserted that 1.1 million yuan should be paid to restore the ecological environment. The plaintiffs also claimed reimbursement of their evaluation fees, attorneys' fees, and other reasonable expenses incurred for litigation.⁷⁴⁷ The court ordered Xie and the other three violators to restore the destroyed 28.33 acres of woodland function within five months from the effective date of the judgment, to replant the trees on the forest land, and to nurture and manage for three years. The court ordered them to jointly compensate the ecological environment restoration cost of more than ¥1.1 million, also pay the evaluation fees, attorneys' fees, and other reasonable expenses incurred for litigation in the amount of ¥165,000. However, the court ordered the defendants to jointly pay ¥1.27 million in compensation for the ecological environment service function loss, which was not the amount claimed. The Fujian High People's Court ruling was upheld on appeal.⁷⁴⁸

This case was the first EPIL after the new Environmental Protection Law was adopted in 2015.⁷⁴⁹ The court not only confirmed the standing of the two ENGOs but also focused on the restoration of the environment according to the EPIL statutes. In this case, the court ordered the defendant to replant trees to restore the forest and ordered the defendant to manage the restoration

⁷⁴⁷ *Id.* and Zuigao Renminfayuan 12yue 29ri Fabu Huanjingqinquan Dianxinganli (最高人民法院 12 月 29 日发布环境侵权典型案例) [The SPC released a typical case of environmental infringement on December 29] SPC (Dec. 29, 2015), <http://www.court.gov.cn/zixun-xiangqing-16396.html>.

⁷⁴⁸ *Id.*

⁷⁴⁹ *Id.*

for three years.⁷⁵⁰ It was typical that the decision clearly supported the claim for the loss of service function during the period from the damage of the ecological environment to the restoration of the original state, which increased the illegal harm of ecological destruction.⁷⁵¹

The case also illustrated the provision of the claim of compensation for losses according to the SPC's Civil EPIL Interpretation Article 21. The case also was the precedent of the Plan for the Pilot Reform of the Ecological Environment Damage Compensation System (2015) and 2017 Version.⁷⁵² The loss of service function, during the period from the damage to the ecological environment to the date of restoration to its original state, has been incorporated in these two pilot plans, in order to guide the application of restoration claims.⁷⁵³

3.3.4 Expert Report

In the Civil Procedure Law, “a party may hire an expert to offer a report or an opinion on the specific issue.”⁷⁵⁴ The expert might be called to testify in court because of the report. Due to the complexity and technicality of environmental cases, the SPC's Civil EPIL Interpretation has refined the system of the expert reports and the rules for experts' appearance in court.⁷⁵⁵ Article 15 reads, “A party applies for notifying an expert to appear in court as they offer a report or an opinion. The report or opinion may regard the casual relationship, the methods of restoring the environment, the expenses for restoring the ecological environment, and the loss of service

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.*

⁷⁵² Pilot Reform of the Ecological Environment Damage Compensation System; Pilot Reform of the Ecological Environment Damage Compensation System (2017), *supra* note 7.

⁷⁵³ Zhu, *supra* note 686, at 69.

⁷⁵⁴ Civil Procedure Law 2017, *supra* note 664, art. 76-79.

⁷⁵⁵ SPC's Civil EPIL Interpretation, *supra* note 658.

functions from the period when the ecological environment is damaged to the restoration. The cross-examined expert reports may be taken as the basis for determining facts.”⁷⁵⁶ Generally, both parties are allowed to submit expert reports and call one or two experts to be cross-examined in court. The experts must be professionals who had sufficient professional technical experience and professional ability in related professional technical. For instance, experts who have obtained relevant practice certificates or scientific research results would be qualified.⁷⁵⁷

The case of the *Environmental Protection Association of Taizhou City, Jiangsu Province v. Taixing Jinhui Chemical Engineering Co., Ltd., et al.* was a case that was adjudicated based on expert testimony and an expert report.⁷⁵⁸ From January 2012 to February 2013, defendant Taixing Jinhui Chemical Engineering Co., Ltd. (referred to as “Jinhui Company”) and five other enterprises delivered a total of over 25,000 tons of hazardous waste hydrochloric acid and wasted sulfuric acid generated in production processes to waste disposal companies, without the qualification for disposal of hazardous wastes, at a price ranging from ¥20-¥100 per ton. The hazardous wastes were secretly discharged into the Rutai canal of the Taixing City and Gumagan river of Gaogang District, Taizhou City, causing severe water pollution. The Environmental Protection Association of Taizhou City requested the six defendant enterprises pay an environmental restoration fee of ¥160 million and an expert and evaluation fee of ¥100,000.⁷⁵⁹ “The restoration costs, in this

⁷⁵⁶ *Id.*

⁷⁵⁷ *Id.* & Zhu, *supra* note 686, at 92-93.

⁷⁵⁸ Taizhoushi Huanbaolianhehui Su Taixing Jinhui Huagong Youxiangongsi deng (泰州市环保联合会与泰兴锦汇化工有限公司等环境污染侵权赔偿纠纷案) [Environmental Protection Association of Taizhou City, Jiangsu Province v. Taixing Jinhui Chemical Engineering Co., Ltd., et al.] No.1 of Ten Model Cases regarding EPILs Published by the Sup. People’s Ct., 2016 Sup. People’s Ct. Gaz. Issue 5,2016

⁷⁵⁹ *Id.*

case, was the highest amount in EPIL cases so far.”⁷⁶⁰ The Association hired professor He at Nanjing University of Science and Technology to provide a report. Professor He said in court that it was difficult to calculate the cost of actual rivers’ physical restoration expense. However, Professor He testified that the restoration could use the Virtual Disposal Cost Approach.⁷⁶¹ The approach could be used when the restoration project cannot be fully recovered the environment, the restoration cost is far higher than its benefits, or there has no restoration indicator.⁷⁶²

The court first confirmed the standing of the Environmental Protection Association of Taizhou City and determined the six defendants had subjective intentions to dispose of hazardous waste illegally. The court decided that defendants must undertake responsibility for compensation for environmental pollution restoration.⁷⁶³ The court finally combined the expert report and the experts’ cross-examination to determine the cost of environmental restoration and ordered the six defendants to pay a total of about ¥160 million to compensate for restoration costs.⁷⁶⁴

3.3.5 Fees

The fees or the costs of ENGO EPIL discussed in this section refer to the costs incurred due to litigation. These fees do not include a claim for compensation by the defendant of the plaintiff

⁷⁶⁰ *Id.* and Renmin Fayuan Bao Gaige Kaifang 40 Zhounian Tekan, Dianxinganli Taizhou Tianjia Huanjing Gongyisusong An (人民法院报改革开放 40 周年特刊, 典型案例泰州天价环境公益诉讼案) [The People’s Court Daily Released The 14th of Twenty-One Typical Cases Celebrating the 40th Anniversary of Reform And Opening Up: Taizhou “Sky Price” EPIL] THE PEOPLE’S COURT DAILY, Dec. 18, 2018, at 29, 21st Special Edition. http://rmfyb.chinacourt.org/paper/html/2018-12/18/content_146970.htm.

⁷⁶¹ *Id.*

⁷⁶² Chinese Academy of Environmental Planning (CAEP) (生态环境部环境规划院), Recommended Methods of Environmental Damage Assessment and Evaluation (Second Edition) (环境损害鉴定评估推荐方法 (第 II 版)), 2014, <http://www.mee.gov.cn/gkml/hbb/bgt/201411/W020141105395741560668.pdf>. Also see Explanation on the Application Situations and Calculation Approaches of the Virtual Disposal Cost Approach (关于虚拟治理成本法适用情形与计算方法的说明) <http://www.mee.gov.cn/gkml/hbb/bgt/201709/W020170928498164923852.pdf>

⁷⁶³ *Id.*

⁷⁶⁴ *Id.*

ENGO but are three kinds of fees: litigation costs, attorney fees, and expert fees. Article 22 of the SPC's Civil EPIL Interpretation reads, "Where the plaintiff requests the defendant to assume the expert report fee (inspection and identification expense), reasonable attorney fee and other reasonable expenses for litigation, the people's court may support such a request under the law."⁷⁶⁵

In China, a party pays litigation costs (known as acceptance fees) in a civil or administrative case (such as a government agency compliance case). Costs are established according to the Measures on the Payment of Litigation Costs.⁷⁶⁶ There are five kinds of costs, and EPIL applies the cost schedule associated with a property case instead of a non-property case, intellectual property case, labor dispute case, or administrative case (government agency compliance case).⁷⁶⁷ In addition, "the case acceptance fee shall be prepaid by the plaintiff or the appellant."⁷⁶⁸ As the plaintiff in an EPIL action, an ENGO is often unable to pay the case acceptance fee, as the amount of compensation for EPIL is often considerable. The case acceptance fee is usually proportional to the amount of compensation claimed.⁷⁶⁹ Thus, in the SPC's Civil EPIL Interpretation, Article 33 reads, "If it is indeed difficult for the plaintiff to pay any litigation expenses, the plaintiff could make payment postponement after their application and the court's authorization."⁷⁷⁰

In practice, the plaintiff always claims that the defendant should pay the acceptance fees, which are decided by courts, depending on the circumstances. For instance, in *CBCGDF v. Sun*

⁷⁶⁵ Zhu, *supra* note 686, at 94; SPC's Civil EPIL Interpretation, *supra* note 658.

⁷⁶⁶ Measures for the Payment of Litigation Costs, (诉讼费用交纳办法) (adopted at the 159th executive meeting of the State Council on Dec. 8, 2006, are hereby promulgated, and shall come into force on Apr. 1, 2007), CLI.2.82815(EN) (Lawinfochina); SPC, Notice of the Sup. People's Ct. on the Application of the Measures for Paying Litigation Costs, (No. 16 [2007] of the Sup. People's Ct., Apr. 20, 2017), CLI.3.94882(EN) (Lawinfochina).

⁷⁶⁷ *Id.*

⁷⁶⁸ *Id.*

⁷⁶⁹ *Id.* and Zhu, *supra* note 686, at 94.

⁷⁷⁰ SPC's Civil EPIL Interpretation, *supra* note 658.

Hu, Zhang Jingmin, Liu Xiaohua, Shi Cuiying, and Shi Yuqin,⁷⁷¹ the five defendants were engaged in pickling and oxidation processing in the Fengrun manufacturing plant of Zhang Wulou Village, Fengcheng Town, Feng County.⁷⁷² They directly discharged twenty-eight tons of waste liquid into the canal outside their factory without environmental protection measures, which caused severe water pollution. CBCGDF filed an EPIL case to the Xuzhou Intermediate Court to order the violators to cease the violations, restore the environment, and pay the plaintiff's attorney fees and the acceptance fees.⁷⁷³ The parties settled after negotiations sponsored by the judges. Ultimately, the defendant paid half of the acceptance fee of ¥243, or ¥121.5.⁷⁷⁴

In the case of *FON, CBCGDF v. Jiangsu Changlong Chemical Co., Ltd., Changzhou Changyu Chemical Co., Ltd., and Jiangsu Huada Chemical Group Co., Ltd.*,⁷⁷⁵ Jiangsu Changlong Chemical Co., Ltd., Changzhou Changyu Chemical Co., Ltd., and Huada Chemical Group Co., Ltd, three defendants severely polluted their factory site and the surrounding environment during the production, disposal, and management of hazardous waste.⁷⁷⁶ Due to the three defendants had not repaired the site after vacating the site, FON and CBCGDF thus sued the three violators for

⁷⁷¹ CBCGDF Su Sun Hu, Zhang Jingmin, Liu Xiaohua, Shi Cuiying, and Shi Yuqin (中国生物多样性保护与绿色发展基金会诉孙虎等环境污染公益诉讼案) [CBCGDF v. Sun Hu, Zhang Jingmin, Liu Xiaohua, Shi Cuiying, and Shi Yuqin] June 27, 2016 (Xuzhou Interm. Ct. June 27, 2016)

⁷⁷² *Id.*

⁷⁷³ *Id.*

⁷⁷⁴ *Id.*

⁷⁷⁵ *Ziranzhiyou, Zhongguo Shengwuduoyangxingbaohu yu Lvsefazhanjijinhui Su Jiangsu Changlong Huagongyouxiangongsi, Changzhoushi Changyu Huagongyouxiangongsi, and Jiangsu Huadahuagongjiguan Youxiangongsi* (北京市朝阳区自然之友环境研究所、中国生物多样性保护与绿色发展基金会诉江苏常隆化工有限公司、常州市常宇化工有限公司、江苏华达化工集团有限公司) [FON, CBCGDF v. Jiangsu Changlong Chemical Co., Ltd., Changzhou Changyu Chemical Co., Ltd., Jiangsu Huada Chemical Group Co., Ltd] Jan. 25, 2017; Dec. 26, 2018 (Changzhou Interm. People's Ct. Jan. 25, 2017; Jiangsu High People's Ct. Dec. 26, 2018).

⁷⁷⁶ *Id.*

restoration and compensation in Changzhou Intermediate Court. The court dismissed the plaintiffs' claims and ordered the case acceptance fee of ¥ 1,891,800 should be paid by the plaintiffs.⁷⁷⁷

The attorney's fees statutes in ENGO EPIL is in the SPC's Civil EPIL Interpretation, which reads, "the court may support that the defendant pays the reasonable attorney fees, inspection and identification expenses, and reasonable expenses for litigation as the plaintiff's request."⁷⁷⁸ There is no uniform standard for attorney fees and different approaches to determining attorney's fees in practice. The practice has divided into having the parties negotiate to determine the attorney fees or that the court determines the attorney fees based on the circumstances of the case.⁷⁷⁹ Initially, the court determines an amount for fees based on the invoices for attorney fees, the attorney's representation agreement, and the guidance on attorney fees provided by the plaintiff. Thereafter, the court determines the amount of attorney's fees based on its discretion and documents.

The expert report fee is another kind of the cost of the plaintiff, which also could be recovered from the defendant. In China, the courts prefer to entrust qualified identified institutions for the expert reports, rather than allow parties to hire experts to provide reports.⁷⁸⁰ There are fifty-eight identified institutions and hundreds of experts so far. These identified experts and certified institutions are public on line to provide services.⁷⁸¹ In practice, there are two ways to determine the evaluation fee for ENGO EPIL. The first approach is to determine fees based on the evaluation

⁷⁷⁷ *Id.*

⁷⁷⁸ SPC's Civil EPIL Interpretation, *supra* note 658.

⁷⁷⁹ *Id.*

⁷⁸⁰ SPC's Civil EPIL Interpretation, *supra* note 658.

⁷⁸¹ Guojia Sifa Jianding Mingluwang (国家司法鉴定名录网) [National Judicial Identification Directory] SFJD <http://www.sfdml.com/web/tosousuo> (Last visited Apr. 25, 2021).

fee list provided by the institutions. The second approach is to determine fees based on the relevant guidance on price and the amount of the appraisal by courts.⁷⁸²

For instance, in the case of “*Chongqing Green Volunteers Union v. Jianshi Huangchangping Mining Co., Ltd.*,”⁷⁸³ Chongqing Green Volunteers Union sought to have the mining company not only restore and apologize but also to pay the expert evaluation fee. The mining company appealed and specifically mentioned that there was no hearing on the expert evaluation in the first trial.⁷⁸⁴ Then the expert and evaluation report were cross-examined and displayed at the appeal court. The appeal court confirmed the evaluation report and the fee. Finally, the appeal court upheld the decision that the defendant had to pay the evaluation fee immediately.⁷⁸⁵ In practice, the evaluation fee is always determined based on actual expenses incurred if there is no list or invoice. Only with the support documents, such as the costs of equipment usage and the salary rate, and the time of the experts, can the expert evaluation fees be determined.⁷⁸⁶

3.3.6 Jurisdiction Over EPIL

The SPC’s Civil EPIL Interpretation addresses the EPIL jurisdiction provisions. They consist of three aspects: centralized jurisdiction, territorial jurisdiction, and jurisdiction by order.⁷⁸⁷ The general jurisdiction provision is that “An EPIL shall be under the jurisdiction of the people’s court

⁷⁸² Zhu, *supra* note 686, at 102.

⁷⁸³ Chongqing Green Volunteers Union Su Jianshi Huangchangping Kuangye Co., Ltd. (重庆市绿色志愿者联合会诉恩施自治州建始磷厂坪矿业有限责任公司水污染责任民事公益诉讼案) [Chongqing Green Volunteers Union v. Jianshi Huangchangping Mining Co., Ltd.] Jan. 14, 2016, Sept. 13, 2016 (Chongqing Wanzhou District People’s Ct. Jan. 14, 2016; Chongqing Second Interm. People’s Ct. Sept. 13, 2016) No. 4 of Ten Model Cases regarding EPILs Published by the Sup. People’s Ct., No. 134 Guiding case, Dec. 16, 2019 http://rmfyb.chinacourt.org/paper/html/2020-01/16/content_164467.htm?div=-1, <http://www.court.gov.cn/shenpan-xiangqing-216961.html>.

⁷⁸⁴ *Id.*

⁷⁸⁵ *Id.*

⁷⁸⁶ *Id.*; Zhu, *supra* note 686, at 104-105.

⁷⁸⁷ SPC’s Civil EPIL Interpretation, *supra* note 658.

at or above the intermediate level at the place where the conduct that pollutes the environment and damages the ecology takes place, the place where the damage occurs or the place of domicile of the defendant as the court of the first instance.”⁷⁸⁸ The high people’s courts also can designate some intermediate people’s courts to accept EPILs as the court of the first instance after the approval of the Supreme People’s Court.⁷⁸⁹

The intermediate people’s court may also report to the high people’s court for approval to designate the basic people’s court to have the jurisdiction of the first instance for trial.⁷⁹⁰ In addition, the people’s court that first docket the case shall have jurisdiction when the same plaintiff or different plaintiffs file an environmental civil public interest litigation concerning the same pollution conduct that is the subject of cases in two or more people’s courts having jurisdiction.⁷⁹¹

For example, the Intermediate People’s Court of Zhengzhou City was designated to exclusively accept all significant pollution cases in the eastern region along the Yellow River since the river flows through Zhengzhou City.⁷⁹² Also, in September 2016, the High People’s Courts of Beijing, Tianjin, and Hebei signed *the Framework Agreement on Collaboration in Environmental and Resources Adjudication*. They established a leading collaboration group to jointly explore and improve the mechanism for hearing environmental and resources cases.⁷⁹³

⁷⁸⁸ *Id.*

⁷⁸⁹ *Id.*

⁷⁹⁰ *Id.*

⁷⁹¹ *Id.*

⁷⁹² THE SUP. PEOPLE’S CT. OF THE PEOPLE’S REPUBLIC OF CHINA (最高人民法院), *supra* note 120, at 67-68.

⁷⁹³ *Id.* at 70.

3.3.7 Chinese Amicus Curiae

The Chinese amicus curiae (supporting system) aims to collect opinions of various agencies and organizations in pending cases, as mentioned. The Chinese amicus curiae system was established in 1982 Civil Procedure Law generally.

Article 13 If the civil rights and interests of the state, a collective or an individual have been infringed, a state organ, public organization, enterprise, or institution may support the injured unit or individual to initiate legal action in a people's court.⁷⁹⁴

Although it was established earlier, the agencies and organizations were rarely involved in the practice before 2015.⁷⁹⁵ This SPC's Civil EPIL Interpretation detailed Chinese amicus curiae participation, encouraging procuratorates, organizations, and enterprises to participate in supporting environmental public interest lawsuits.

Since the adoption of the new Environmental Protection Law and the SPC's Civil EPIL Interpretation, a typical ENGO, the Center for Legal Assistance to Pollution Victims (CLAPV, also known as Environmental and resource law research and service center in the China University of Political Science and Law) played the role of amicus curiae in many EPIL cases. CLAPV is an unregistered environmental organization.⁷⁹⁶ CLAPV at the China University of Political Science and Law is a legal-aid office, training center. It was founded as the environmental law clinic program in China university of Political Science and Law on campus without any NGO's registration with Civil Affairs Bureaus. Although CLAPV is an ENGO but only approved by the China University of Political Science and Law and filed by the Ministry of Justice, CLAPV legally acted as amicus curiae in many EPIL cases in the past years, besides providing *pro bono* in

⁷⁹⁴ Civil Procedure Law of the People's Republic of China (For Trial Implementation), *supra* note 680.

⁷⁹⁵ XI, *supra* note 607, at 155.

⁷⁹⁶ CLAPV, *supra* note 636.

environmental tort cases. At CLAPV, there are four to six full-time attorneys to work on clinical cases and EPIL cases. Also, more than twenty volunteer attorneys nationwide have worked in CLAPV for more than two years every cycle on environmental cases.⁷⁹⁷ CLAPV cooperated with FON by filing briefs in several cases as amicus curiae in the cases of FON, Fujian Green Home Environment-Friendly Center v. Xie Zhijin,⁷⁹⁸ FON, CBCGDF v. Jiangsu Changlong Chemical Co., Ltd., Changzhou Changyu Chemical Co., Ltd., Huada Chemical Group Co., Ltd.⁷⁹⁹ FON, Guangdongsheng Environmental Protection Foundation v. Guangdong Nanling Forest Scenic Spot Management Co., Ltd., Shenzhen East Sunshine Industrial Development Co., Ltd.,⁸⁰⁰ and FON v. China National Petroleum Corporation Jilin Petrochemical Branch.⁸⁰¹

In addition, CLPAV provided substantial support to many ENGOs for their extensive experience. The attorneys at CLAPV shared experiences with the ENGOs on the EPIL cases' selection.⁸⁰² They identified four factors for evaluating a public interest case. The first factor is

⁷⁹⁷ *Id.*

⁷⁹⁸ Beijingshi Chaoyangqu Ziranzhiyou Huanjing Yanjiusuo, Fujiansheng Lùjiayuan Huanjingyouthao Zhongxin Su Xie Zhijin deng Siren Pohuailindi Minshi Gongyisusongan (北京市朝阳区自然之友环境研究所、福建绿家园诉谢知锦等四人破坏林地民事公益诉讼案) [Fon, Fujian Green Home Environment Friendly Center v. Xie Zhijin], Oct. 29, 2015, Dec. 18, 2015 (Nanping Interm. People's Ct. Oct. 29, 2015, Fujian High People's Ct. Dec. 18, 2015).

⁷⁹⁹ Ziranzhiyou, Zhongguo Shengwuduoyangxingbaohu yu Lvsefazhanjijinhui Su Jiangsu Changlong Huagongyouxiangongsi, Changzhoushi Changyu Huagongyouxiangongsi, and Jiangsu Huadahuagongjiguan Youxiangongsi (北京市朝阳区自然之友环境研究所、中国生物多样性保护与绿色发展基金会诉江苏常隆化工有限公司、常州市常宇化工有限公司、江苏华达化工集团有限公司) [FON, CBCGDF v. Jiangsu Changlong Chemical Co., Ltd., Changzhou Changyu Chemical Co., Ltd., Jiangsu Huada Chemical Group Co., Ltd] Jan. 25, 2017; Dec. 26, 2018 (Changzhou Interm. People's Ct. Jan. 25, 2017; Jiangsu High People's Ct. Dec. 26, 2018).

⁸⁰⁰ FON, Guangdongsheng Environmental Protection Foundation Su Guangdong Nanling Senlin Jingqu GuanliYouxianongsi (北京市朝阳区自然之友环境研究所等诉广东南岭森林景区管理有限公司等环境污染责任纠纷案) [FON, Guangdongsheng Environmental Protection Foundation v. Guangdong Nanling Forest Scenic Spot Management Co., Ltd., Shenzhen East Sunshine Industrial Development Co., Ltd] Feb. 20, 2017 (Qingyuan Interm. People's Ct. Feb. 20, 2017)

⁸⁰¹ FON Su Zhongguoshiyoutianranqi Gufen Youxiangongsi Jilin Fengongsi (北京市朝阳区自然之友环境研究所与中国石油天然气股份有限公司吉林石化分公司) [FON v.CNPC Jilin Petrochemical Branch] Dec.13, 2018 (Jilin Interm. People's Ct. Dec. 13, 2018)

⁸⁰² Liu Xiang (刘湘) Huanjing Gongyi Susong de Xuanan Biaozhun (环境公益诉讼的选案标准) [Selection Criteria

whether the violation has damaged the public interest or has a significant risk. For instance, the violations may have occurred in nature reserves, drinking water source protection areas, or ecologically sensitive and vulnerable areas. Alternatively, the pollution may affect rare, threatened, and endangered animals and plants or biodiversity. The second factor is whether there is a need for litigation. For example, the violation could be solved by administrative means. Alternatively, the potential litigation may achieve environmental restoration by the defendant. In addition, the case may influence legislation, environmental agencies' enforcement, or policymaking. The third factor is an analysis of litigation risk. The fourth factor is the cost estimates.⁸⁰³ These four aspects of the evaluation are essential for an ENGO environmental public interest case. In practice, the attorney and ENGOs' staff could analyze these aspects during their meeting to decide.

Not only CLAPV, procuratorates, environmental agencies, law firms, and ENGOs joined the EPILs in the past few years as the role of *amicus curiae*.⁸⁰⁴ They all gave their support and help to the plaintiffs based on their work to encourage them to act in the time-consuming trials.

3.3.8 Settlements

Generally, EPIL case settlements are reached via various methods, such as judge's judgment, settlement agreement, judge's dismissal, and plaintiff's withdrawal.⁸⁰⁵

for EPIL] *in* REVIEW OF PUBLIC INTEREST LITIGATION IN ENVIRONMENT PROTECTION IN 2015, Li Dun (李楦) et al. eds., at 308-309.

⁸⁰³ *Id.*

⁸⁰⁴ Chongqing Green Volunteers Union Su Jianshi Huangchangping Kuangye Co., Ltd. (重庆市绿色志愿者联合会诉恩施自治州建始磷厂坪矿业有限责任公司水污染责任民事公益诉讼案) [Chongqing Green Volunteers Union v. Jianshi Huangchangping Mining Co., Ltd.] Jan. 14, 2016, Sept. 13, 2016 (Chongqing Wanzhou District People's Ct. Jan. 14, 2016; Chongqing Second Interim. People's Ct. Sept. 13, 2016); Fujian Green Home Environment-Friendly Center v. Lan, July 6, 2015 (Changting People's Ct. July 6, 2015).

⁸⁰⁵ Zhu, *supra* note 686, at 117-118. Xi ed. *Supra* note 111, at 346-350.

“An EPIL judgment could be transferred for enforcement if the compulsory enforcement is required in a judgment.”⁸⁰⁶ In addition, the *res judicata* of an EPIL judgment would be admitted in a possible tort case with the same facts if the *res judicata* supports the injured party.⁸⁰⁷

There are two kinds of settlement agreements in China: a mediation agreement but hosted by a judge and a settlement agreement reached by parties themselves. In either case, where there is a settlement agreement in an EPIL case, the court shall announce the content of the agreement to the public in no less than thirty days.⁸⁰⁸ “After the expiration of the announcement period, if the court deems upon examination that the content of the mediation agreement or settlement agreement does not damage the public interest, it shall issue a mediation paper. The mediation paper shall state the claim, basic case facts, and the content of the agreement, and shall be disclosed.”⁸⁰⁹ Theoretically, once the court accepts an EPIL lawsuit, all procedures are disclosed, no matter the judgment or the mediation paper. The judge’s dismissal is always decided based on the Civil Procedure Law.⁸¹⁰

In terms of the plaintiff’s withdrawal, only where enforcement by the environmental agencies asserts the plaintiffs’ claims’ will the plaintiff’s withdrawal be approved by the court. The court will not grant the withdrawal for any other reasons.⁸¹¹ The right of action in the EPIL case is not a disposition right, as the public interest cannot be disposed of. Unless the public interest has been

⁸⁰⁶ SPC’s Civil EPIL Interpretation, *supra* note 658.

⁸⁰⁷ *Id.*

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.*

⁸¹⁰ Civil Procedure Law 2017, *supra* note 664; Zhu, *supra* note 686, at 118.

⁸¹¹ SPC’s Civil EPIL Interpretation, *supra* note 658; Xi, *supra* note 607, at 358-372.

accomplished, it should not be allowed to withdraw.⁸¹² This provision prevents plaintiffs ENGO from trading privately with violators, thereby harming the public interest in the environment.⁸¹³

In the context of reform and opening up, China's environmental protection legislation, administration, judiciary, and NGOs' growth have developed ambitiously and slowly. Especially after implementing the Environmental Protection Law 2015, EPIL regulations and practices have been clarified. Since the cases widely included many environmental realms, the EPIL system showed a positive trend of blossoming nationwide.

Firstly, not only the legislation and regulations were promoted and perfected in environmental protection, but also the judicial capacity of the court has improved significantly.

Furthermore, ENGOs also completed the transition before and after implementing the new environmental protection law on EPIL works. With the cooperation of domestic and foreign NGOs, ENGOs significantly improved their capabilities in the fields of violation investigations, claims designing, and collaboration with co-plaintiffs and attorneys. This approach is necessary for ENGOs to file EPIL to accomplish their missions to protect the environment inwardly. Nevertheless, the restrictions on ENGO standing, legal inconsistency, unsteady source collection continue to frustrate ENGOs' willingness to file EPIL cases and efficacy of EPIL actions.

Chinese ENGO EPIL is a kind of imported mutation of the American citizen-suit archetype. The citizen-suit system has been developed for five decades accumulated many extensive experiences. China, on the other side, officially enacted and practiced its ENGO EPIL for only five

⁸¹² XI, *supra* note 607, at 376.

⁸¹³ *Id.*; SPC's Civil EPIL Interpretation, *supra* note 658.

years, constructed basic regulations, specialized courts, and regular procedures. Although there are many ineradicable institutional and systematical differences between these two countries, comparing two similar systems would improve EPIL's revision and efficiency. The following chapter will contrast and analyze several indicators between the U.S. citizen suit and ENGO EPIL in China.

Chapter 4 Comparative Study between Citizen Suit in the United States and ENGO Environmental Public Interest Litigation (EPIL) in China

Before the EPIL was officially legislated in China, plenty of comparative research, information, and news had been published because the U.S. citizen suit was an original and effective environmental law enforcement tool and model to improve comprehensive environmental governance, as well as a successful enforcement model that has been studied.⁸¹⁴ The Chinese ENGOs, scholars, and judges had studied and attempted to practice private environmental enforcement following the U.S. citizen-suit archetype around 2010.⁸¹⁵ Several pioneering ENGOs also took the initiative to advocate the legislation and practice in pilot provinces to realize private environmental enforcement, as the comparative research and the US ENGOs' experiences suggested. Hence, the Chinese ENGOs and researchers had studied and considered the U.S. citizen suit to be an attractive legal importation leading to the revision and development to create a Chinese-style citizen suit mechanism,⁸¹⁶ a kind of legal transplantation.⁸¹⁷ Based on the development of the Chinese environmental legislation, administration, and

⁸¹⁴ CHINA ACADEMIC JOURNALS (CNKI), <https://kns.cnki.net/kns8/defaultresult/index> (last visited Mar. 9, 2021) (Searching in search bar “美国” “环境” “公民诉讼” (“the United States” “environmental” “Citizen Suit” in Chinese), then choose 2001 to 2015, and selecting most related papers and books, then counting 137 articles in total.) (Based on the statistics from China Academic Journals database, 137 Chinese articles mentioned or deeply analyzed the U.S. citizen suit published before Jan.1, 2015 when the Environmental Protection Law adopted. These studies include books, degree theses, conference papers, and periodical academic articles.)

⁸¹⁵ See also Wang, *supra* note 18, at 150.

⁸¹⁶ See generally CHEN, *supra* note 16; See Wang & Zhang, *supra* note 37; Gong, *supra* note 32; Cao Mingde (曹明德), Zhongmei Huanjing Gongyisusong Bijiao Yanjiu (中美环境公益诉讼比较研究) [Environment Public Interest Litigation: From the Perspective of Comparative Law] Bijiaofa Yanjiu (比较法研究) [J. OF COMPAR. L.], Vol.4 (2017). (Several typical and insightful studies emerged before and after the adaption of the EPIL system in the Environmental Protection Law.)

⁸¹⁷ ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW, 21 (1993). (Legal transplants— “the moving of a rule or a system of law from one country to another, or from one people to another-have been common since the earliest recorded history.” The most common change in legal transplant is borrowing, which satisfied that the laws are commonly inspired by foreign experience.)

adjudication, the Chinese EPIL mechanism eventually became a typical private enforcement tool officially. Nevertheless, the Chinese EPIL practice, especially the ENGO EPIL mechanism, has been on a bumpy and slow ride, albeit developing rapidly in the past five years.

Due to the different political systems and social development stages, the Chinese EPIL system has been designed with many different features than the U.S. citizen suit, divided into three kinds: Differences in theories, differences in statutes, and ENGOs practice differences. At present, it is imperative to carefully scrutinize those provisions and practices by comparing them to the U.S. citizen-suit system so that those rules in China can be appropriately revised and implemented. As a mature and developed archetype, the U.S. citizen suit includes special provisions to supplement governmental enforcement, such as standing, pre-suit notice, and diligent prosecution condition provisions. However, some Chinese ENGO EPIL provisions are utterly distinct from the U.S. citizen-suit, resulting from the different environmental governance development, civil society histories, as well as legal and political system structures. In this background, Chinese ENGOs are authorized to file lawsuits against private violators, called civil EPIL actions.⁸¹⁸ Chinese procuratorates were not only authorized to enforce private violators' compliance for the public interest, same as the ENGO EPIL cases but also to force environmental agencies to perform their duties. This kind of government agency compliance is called environmental administrative public interest litigation.⁸¹⁹ Thus, the two distinct functions of the U.S. citizen-suit enforcement are

⁸¹⁸ SPC's Civil EPIL Interpretation, *supra* note 658.

⁸¹⁹ See Decision of the Standing Committee of the National People's Congress on Authorizing the Supreme People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Actions in Certain Areas 全国人民代表大会常务委员会关于授权最高人民检察院在部分地区开展公益诉讼试点工作的决定 (adopted at the 15th session of the Standing Comm. of the Twelfth Nat'l People's Cong., July 1, 2015), CLI.1.250522(EN) (Lawinfochina); See Plan

divided between ENGOs and procuratorates in China. Both types of procuratorial EPIL mechanisms deliver the private enforcement and supervision function through the statutes and practices. At the same time, ENGO EPIL actions are regarded as half of the private enforcement mechanism after the revision of the archetype, the U.S. citizen-suit mechanism.

Although the Chinese ENGO EPIL system has been adopted only for five years, it is timely and essential to review the historic U.S. citizen-enforcement system as the archetype of the Chinese ENGO EPIL, from the aspects of origins, theories, and the explicit procedures, in order to examine the Chinese ENGO EPIL's implementation challenges. This chapter will compare the details of each aspect of the two systems, as well as recognize the advantages and disadvantages of Chinese alterations. The suggestions will be based on these comparisons.

4.1 Theories Comparison

4.1.1 Origins Comparisons

After the explicit illustrations in the above-mentioned two chapters, the U.S. citizen suit and China's ENGO EPIL originated in two distinct backgrounds of environmental norms and administrative development.

The U.S. citizen suit was initially adopted at the state level in the Michigan Environmental Protection Act in 1969 based on Professor Joseph Sax's research.⁸²⁰ The federal citizen-suit

for the Pilot Project of Reform of Instituting Public Interest Litigations by the Procuratorial Organs 检察机关提起公益诉讼改革试点方案 (Sup. People's Procuratorate, July 2, 2015), CLI.1.250627(EN) (Lawinfochina). (The definition has been come out officially from the Decision and the Plan from 2015).

⁸²⁰ See generally MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS Ch. 1 (1991). (For a history of the origins of the environmental citizen suit in the Michigan Environmental Protection Act.)

system was first adopted in the Clean Air Act in 1970.⁸²¹ Then major environmental statutes that included citizen-suit provisions were successively adopted and systematized since the early 1970s because of the law revision and establishment.⁸²² In the executive branch, the U.S. Environmental Protection Agency (EPA) was founded in 1970 to drive environmental administration forward in the whole country. In this background, the purpose of the environmental citizen-suit enforcement was to foster and optimize public supervision in environmental governance by direct and indirect enforcement measures. The objects of the enforcement consist of both the violators and environmental agencies. Therefore, a comprehensive supplementary enforcement mechanism, the citizen suit system, was thus established in the US federal and states environmental governance.

In addition, distinctive economic and social development contributed to the origins of citizen suit and the EPIL in the two countries. The US advanced environmental administration and enforcement were impelled by its economic surge after WWII, with the approaching environmental awareness and the environmental movements. The US innovatively set up and improved federal and state environmental governance, including the citizen-suit system.

In contrast, China's economic growth was lagging until the "Opening and Reforming" in the late 1970s, let alone the strategy for environmental governance and sustainable awareness. Having known that ecological environmental protection is a long-term task together with economic growth, instead of squandering the environment and natural resources, the development of ecological

⁸²¹ Clean Air Act Amendments of 1970, Pub. L. No. 91-604 § 304(a), 84 Stat. 1706 (1970).

⁸²² EPA was formed in 1970 as an agency to implement and enforce the environmental requirements in 1970, and environmental regulations were gradually enacted since then, too. *See* general Kepner, W. EPA and a Brief History of Environmental Law in the United States. International Visitor Leadership Program (IVLP), Las Vegas, NV, June 15, 2016. https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=319430.

civilization was first launched in the report to the Eighteenth National Congress of the CPC in 2012. One of the principles was “to establish a sound framework of institutions concerning ecological progress to achieve a long-term mechanism to ensure the progression of ecological civilization.”⁸²³ So, environmental laws and regulations were to be issued and to be rigorously enforced because of the increasing environmental violations and health crises in the whole country.⁸²⁴ Fortunately, the central government and the party guidance have constantly emphasized the ecological civilization since 2012 and put forward to “improve the system for developing an ecological civilization and promoting the harmonious coexistence between human and nature” in the Fourth Plenary Session of the 19th Central Committee of the CPC in 2019.⁸²⁵ Thus, the U.S. citizen suit is the best example and reference for the Chinese legislature and activists to emulate based on the past explorations since the 2010s.

Therefore, China’s ENGO EPIL was tentatively practiced in some pilot provinces based on their local regulations and then first officially established in the Environmental Protection Law 2015, when the environmental governance had taken initial shape.⁸²⁶ Chinese environmental government agencies, legislation, and adjudication systems were gradually completed in the past

⁸²³ See Hu Jintao, *supra* note 5.

⁸²⁴ State Council (国务院), Zhonggongzhongyang Guowuyuan Guanyu Jiakuai Tuijin Shengtaiwenmingjianshe de Yijian (中共中央、国务院关于加快推进生态文明建设的意见) [Opinions of the CPC Central Committee and the State Council on Accelerating the Ecological Civilization Construction] (promulgated by the State Council, Apr. 25, 2015, effective Apr. 25, 2015), CLI.5.247761(EN) (Lawinfochina).

⁸²⁵ Zhonggongzhongyang Guanyu Jianchihe Wanshan Zhongguoteseshehuizhuyizhidu, Tuijin Guojiazhilitixihe Zhilinenqixiandaihua Ruogan Zhongdawenti de Jueding (中共中央关于坚持和完善中国特色社会主义制度 推进国家治理体系和治理能力现代化若干重大问题的决定) The Decision of the CPC Central Committee on Major Issues Concerning Upholding and Improving the System of Socialism with Chinese Characteristics and Advancing the Modernization of China’s System and Capacity for Governance, (Deliberated and Adopted at the Fourth Plenary Session of the 19th Central Committee of the CPC, Oct. 30, 2019), CLI.16.337093 (Lawinfochina).
http://www.china.org.cn/chinese/2019-12/24/content_75545229.htm

⁸²⁶ Environmental Protection Law, *supra* note 13, art. 58.

three decades until the establishment of the Ministry of Ecology and Environment (MEE) and its well-equipped local branches around the country.⁸²⁷ The environmental legal system had been established ambitiously and slowly polished in various realms.⁸²⁸ The specialized environmental adjudication that contains civil, administrative, and criminal proceedings were explored nationwide to construct comprehensive “two in one” or “three in one” models to concentrate on the environmental actions.⁸²⁹ These accomplishments had contributed to a relatively mature and enforceable environmental governance system, as well as the public’s conservation awareness.

Different origins of the citizen suit and its counterpart in China mirrored the differing economic and social development stages in the two countries, but more importantly, reflected their different roadmaps of environmental governance. For instance, Chinese ENGOs are immature and incapable of undertaking the massive and influential movements necessary to advocate for effective rulemaking, although they had engaged in many local pilot environmental actions before the domestic legislation. The Chinese ENGO EPIL system’s time and forms of establishment were mainly driven and authored by the Chinese legislatures and central authority instead of ENGOs. For example, the Legislative Work Plans for the Standing Committee of the National People’s Congress (NPC) and State Council are issued annually, which scheduled the legislation works of the Standing Committee of NPC and State Council.⁸³⁰ Although each legislative work always

⁸²⁷ Xu Lingui, Lyu Qiuping, Chen Yongrong, *Xinhua Headlines: China Unveils Cabinet Restructuring Plan*, XINHUA NEWS (Mar. 14, 2018),

http://www.xinhuanet.com/english/2018-03/13/c_137036855.htm

⁸²⁸ See State Council, *supra* note 639.

⁸²⁹ THE SUP. PEOPLE’S CT. OF THE PEOPLE’S REPUBLIC OF CHINA (最高人民法院), *supra* note 120, at 70.

⁸³⁰ NPC, *China’s Top Legislature Schedules Standing Committee Session*, NPC (Sept. 30, 2020) <http://www.npc.gov.cn/englishnpc/c23934/202009/30225fab17bc46ac8d50013f80870e43.shtml>

welcomed public advice through various methods, the Legislative Work Plans never asked for public advice before its launch. Therefore, Chinese individuals and ENGOs hardly influenced the central government's legislative plan, same as the establishment of the ENGO EPIL into the Civil Procedure Law⁸³¹ and the Environmental Protection Law.⁸³²

The differences of the origins reflected the different political system structures: democracy in the United States and centralized authority in China being the inherent distinction. Fortunately, environmental governance, as a late and rising issue for every country and area to cope with the price of industrial development, needs each body to mutually learn and co-explore to improve the best practices everywhere on the globe. Specifically, it is requisite for the young ENGO EPIL to continually research and learn from the advanced US archetype.

4.1.2 Theories Comparisons

The citizen-suit system aims to enforce against violators to compel compliance, as well as oversee the governmental administration of environmental requirements and detect potential laxity in enforcement. According to *Alyeska Pipeline Service Co. v. Wilderness Society*, the main function of a private attorney general emphasized “to call public officials to account and to insist that they enforce the law.”⁸³³ Essentially, this private enforcement allows private sectors, such as ENGOs and individuals, to enforce laws, which can be considered as a privatization of public laws or privatizing regulatory enforcement.⁸³⁴ Thus, private attorney's general theory carrying out

⁸³¹ Civil Procedure Law 2013, *supra* note 620.

⁸³² Environmental Protection Law, *supra* note 13.

⁸³³ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240,267, 95 S. Ct. 1612 (1975).

⁸³⁴ Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 Buff. L. Rev. 833, 837-838 (1985).

environmental enforcement was adopted as the overall theory of the US environmental citizen-suit mechanism. Private enforcement filled the gap between resources and administrative responsibilities and enhanced environmental regulations in the 1970s' environmental decade.⁸³⁵ The citizen suit is a theoretically appropriate tool to surmount the potential governance barriers, such as budget risks, supplement to complicated private remedies, and judicial review systems.⁸³⁶

The private enforcement of environmental protection measures in fact has deep roots in English law. One very early example was that any person or public official was allowed to complain following one of the first major water pollution statutes enacted by the English Parliament during the reign of King Richard II in 1388.⁸³⁷ Additionally, one common law form of private enforcement was called the *qui tam* action, which allowed informants to sue the violator "if the government fails to act on the information" given against them.⁸³⁸

Therefore, private enforcement stemmed from people's awareness of the government's limitations and the social needs to more fully protect public interests. In enacting § 304 of the 1970 Amendments of Clean Air Act, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests."⁸³⁹ This description reflects Congress's recognition that "citizens can be

⁸³⁵ *Id.*

⁸³⁶ *Id.* at 838-839.

⁸³⁷ Barton H. Thompson Jr., *The Continuing Innovations of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 195-196 (2000); The Statute of 12 Rich. II, 12 Rich. 2, ch. 13. (1338) (Eng.), cited in *Boyer & Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 947-948 (1985) (Containing a short history of the historical interplay between public and private enforcement).

⁸³⁸ *Id.* at 196.

⁸³⁹ *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.”⁸⁴⁰ Thus, the amendments were “designed to provide a procedure permitting any citizen to bring an action directly against polluters violating the performance standards and emission restrictions imposed under the law or against the Administrator grounded on his failure to discharge his duty to enforce the statute against polluters.”⁸⁴¹ The hearings on the Clean Air Act Amendments of 1977 then emphasized that citizen-suit system was to supplement government enforcement in the case of possible government laxity, and it was observed that any person who sued under Section 304 “would be performing a public service.”⁸⁴² Therefore, the key purpose of private enforcement is that when the government is unable or unwilling to enforce against violations, it allows private individuals to replace the government to enforce the statutes. This essence completely illustrates the citizen-suit archetype within the whole legal system, and all the citizen-suit imitators should be optimized to achieve this pivotal requirement when implemented or enforced.

In addition, the citizen suit aims to protect public interest ultimately, but private interest damage is one of the elements established by the standing requirements. The standing rules were settled such that damage should be “at an irreducible minimum,” and the constitutional requisites under Article III for the existence of standing are that the plaintiff must personally have: 1) suffered

⁸⁴⁰ Senate Debate on S. 4358, Sept. 21, 1970, *reprinted in* A Legislative History, at 280 (remarks of Senator Muskie); *See* S. Rep. No. 1196, at 36-38, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 436-439.

⁸⁴¹ *Nat. Res. Def. Council, Inc. v. Train*, 166 U.S. App. D.C. 312, 510 F.2d 692, 700 (1975); S. Comm. on Pub. Works, Environmental Policy Division of the Congressional Research Service, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, Vol. I at 436-439 (1974).

⁸⁴² *Clean Air Act Amendments of 1977: Hearing Before the Subcomm. on Environmental Pollution of the Comm. on Environment and Public Works, United States Senate, 95th Cong. 1st Session*, 337(1977).

some actual or threatened injury; 2) that injury can fairly be traced to the challenged action of the defendant; and 3) that the injury is likely to be redressed by a favorable decision.⁸⁴³ Thus, citizen suits can only be brought by those who prove that their personal interests have been harmed by the alleged illegal acts to prove that their own interests are damaged, not just the public interest.⁸⁴⁴ In other words, proving that it is personal interests rather than that are harmed is key to acquiring standing in a case. In summary, the citizen suit system has the attributes of private remedies but is based on the public welfare purposes of strengthening environmental preservation, as the defendant obeys the statutes and orders.

A citizen suit is not only a public interest lawsuit that is initiated with the protection of private interests and objectively beneficial to environmental protection but also a private interest lawsuit that fully protects the plaintiff in order to protect the public interest. Moreover, public and private interests are mutually binding: on the one hand, the realization of the environmental public interest through citizen enforcement is limited to actions that supplement public law enforcement and restore the damaged environmental public law order without involving others. These actions can be initiated only on the victims' "injury in fact" grounds.⁸⁴⁵ On the other hand, the private interests protected by citizen enforcement are confined to the scope of the public environmental law order and objectively promote supplementary law enforcement to achieve the purpose of protecting the environment and public interest.

⁸⁴³ See *Lujan v. Defs. of Wildlife*, 504 US 555, 560–61 (1992); US CONST. art. III.

⁸⁴⁴ *Sierra Club v. Morton*, 405 US 727 (1972).

⁸⁴⁵ *Id.* at 734-735.

In contrast, China's counterpart is opposite to the citizen-suit model in the United States as the ENGO EPIL has been "making private laws public" tendency.⁸⁴⁶ The Interpretation of the Supreme People's Court (SPC) on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations and other EPIL provisions aim to protect the public interest of the environment and to grant the plaintiff some privileges that only the subjects of public power have while providing private law remedies of the Tort Law.⁸⁴⁷ China's judicial interpretation is also an effective reference, regarded as binding laws to "improve the certainty and uniformity of laws in China."⁸⁴⁸ This situation arises not only because of a misunderstanding of the American citizen-suit experience but also because of certain characteristics of Chinese legal theory.

In terms of the first reason, although the research into the citizen-suit system in Chinese by Chinese researchers has been quite plentiful, most of the research still been premised on two misunderstandings of the citizen suit. The major one was that the research preferred to focus on the plaintiff's standing and ignored other major vital provisions, choosing instead to emphasize the broad statement that "anyone can sue" in the citizen-suit provisions.⁸⁴⁹ With the lack of comprehensive research into the restrictive conditions in the U.S. citizen suit, Chinese scholars and the public expected that the court must accept everyone to file EPIL lawsuits, and the broad scope of standing was regarded as the core feature of EPIL and a private environmental remedy.

⁸⁴⁶ Gong, *supra* note 32, at 116.

⁸⁴⁷ SPC's Civil EPIL Interpretation, *supra* note 658.

⁸⁴⁸ Jianhong Liu, *Judicial Interpretation in China*, in THE INDIAN YEARBOOK OF COMPARATIVE LAW 2018, 213, (Singh M., Kumar N. ed., 2018).

⁸⁴⁹ See e.g., CHEN, *supra* note 16, at 24-25.

However, the ideal “anyone-can-sue” standing has been challenging to realize, and the need for a compromise has widely encouraged immature and scattered ENGOs, as public representatives, to become the plaintiffs in EPIL actions. The second misunderstanding concerns the statement of “civil action” in the citizen suit since studies on the U.S. citizen suit have not been systematic or detailed. The understanding has misrepresented public interest litigations as purely private lawsuits in the context of the Chinese legal system. Additionally, although it is generally understood that citizen-suit enforcement, one with the private violator as the defendant and the government agency as the defendant, mainstream opinions still corresponded to the former type of public interest litigation in China. Thus, those studies have not fully addressed and comprehended the nature of public law litigation.⁸⁵⁰

Regarding Chinese legal theory characteristics, the second reason mentioned above, several public resources theories involved in the adoption of the EPIL system miscomprehended the U.S. citizen suit model.⁸⁵¹ In China’s Constitution, various kinds of environment realms were defined as public resources.⁸⁵² However, fundamental concepts have not been elaborated clearly and demarcated in law and other norms. For instance, the terms of the social interest, public interest, and national interest, and the concepts between private rights and public rights were only listed without any explanations.⁸⁵³ Moreover, researchers were accustomed to understanding and analyzing public issues based on the Civil Laws jurisprudence because the civil laws have been

⁸⁵⁰ Gong, *supra* note 32, at 117-118.

⁸⁵¹ *Id.*, at 117.

⁸⁵² XIANFA art.9, § 1 (2018) (China).

⁸⁵³ *Id.*

regarded and publicized as the applicable and fundamental legislation to cope with most disputes. A new kind of litigation must be recognized and directly classified in the Chinese legal system, particularly in one applicable civil law before the Civil-Code era.⁸⁵⁴ Most environmental liabilities were regulated in the Tort Law, so the EPIL was applied to the Tort Law by rote.⁸⁵⁵ This situation results from judges and researchers' admiration of civil law countries, as well as from the insufficient research and application of the Constitution and administrative laws in China.⁸⁵⁶ The Civil Code was adopted in January 2021 as the first code in China and came into effect, in which the part addressing liability for environmental pollution and ecological damage is in Chapter VII. In general, the Civil Code absorbs the environmental tort liabilities part of the previous Tort Law into seven articles in Chapter VII, as well as demonstrates the principle or general rule of conservation of the resources and the protection of the environment in civil activities at the beginning of the code.⁸⁵⁷

According to China's Constitution, all natural resources, including mineral resources, waters, forests, mountains, grasslands, unclaimed land, mudflats, and other natural resources, are owned

⁸⁵⁴ Qinquanzeren Fa, (中华人民共和国侵权责任法) [Tort Law of the People's Republic of China] (adopted at the 12th session of the Standing Comm. of the Eleventh Nat'l People's Cong., Dec. 26, 2009) art. 65 (providing "Where any harm is caused by environmental pollution, the polluter shall assume the tort liability.") Civil Code, *supra* note 657, (Tort Law had been revised by the Civil Code, bk. 7 Tort Liability, art. 1229, providing "Where any harm is caused to another person by environmental pollution or ecological damage, the tortfeasor shall assume the tort liability.").

⁸⁵⁵ *Id.* Chapter VIII Liability for Environmental Pollution in the Tort Law before, and in bk. 7, Chapter VII Liability for Environmental Pollution and Ecological Damage in the Civil Code since 2021.

⁸⁵⁶ See general Xie Honefei (谢鸿飞), Zhongguo Minfadian de Xianfa Gongneng—Chaoyue Xianfa Shishifa yu Minfa Diguo Zhuyi, (中国民法典的宪法功能——超越宪法施行法与民法帝国主义) [The Constitutional Function of Chinese Civil Code—Beyond constitutional enforcement law and civil law imperialism] Guojia Jianchaguan Xueyuan Xuebao (国家检察官学院学报) [J. OF NAT'L PROSECUTORS COLL.] Vol. 24, No.6, Nov. 2016.

(Since the influence of Civil Law system from the early times, the thinking of civil law once dominated the research of legal theory. And the Administrative Litigation Law and Administrative regulations were established in 1980s to 1990s.); Administrative Litigation Law, *supra* note 664.

⁸⁵⁷ Civil Code, *supra* note 657.

by the state.⁸⁵⁸ The following explanation is unclear: “that is, by the whole people, except for the forests, mountains, grasslands, unclaimed land and mudflats that are owned by collectives as prescribed by law.”⁸⁵⁹ China’s Property Law provisions also provides that the State Council shall operate the state-owned properties on behalf of the state. The holder enjoys the rights of direct control over a particular property, including ownership, usufructuary right, and real rights for security.⁸⁶⁰ According to those articles, environmental pollution and ecological damages have been considered civil torts against state-owned property, which is no different from property torts between private parties according to the tort law procedures. However, environmental resources still have several unique additional attributes; for example, intangible environmental resources are for public interests, and the beneficiaries are broad, general, and non-specific.⁸⁶¹ These characteristics lead to special procedures specifically designed in the EPIL system, such as the elements of recognition, liabilities, the burden of proof, and the costs.

Due to the influence of the above factors and the stimulus of endless environmental incidents, the “making private laws public” of China’s EPIL occurred, demonstrated in two aspects. Firstly, the direct purpose of China’s ENGO civil EPIL system has been to protect the public interest. Some provisions, especially in the SPC’s Civil EPIL Interpretation, perceptibly incline to ENGOs and seem to support the ENGOs right to sue. Additionally, China’s EPIL is acknowledged as a kind of environmental tort remedy in essence, but a special one. Each EPIL case can be filed by a

⁸⁵⁸ XIANFA art.9, § 1 (2018) (China).

⁸⁵⁹ *Id.*

⁸⁶⁰ Civil Code, *supra* note 657, art. 114-117, art. 246- 247.

⁸⁶¹ *Id.*

public interest agent against environmental damages for compensation liability to protect the ecological environment, this particular property.⁸⁶² The SPC's Civil EPIL Interpretation and Environmental Torts Interpretation endorse this conclusion.⁸⁶³ The SPC's Environmental Torts Interpretation provides that this interpretation shall apply to the trial of civil cases on damage caused by pollution and ecological destruction, with the exception of civil EPIL actions about which there are different provisions in any law or judicial interpretation in Article 18.

Therefore, China's EPIL is acknowledged as a particular environmental tort remedy, which has nothing to do with public laws, regardless of whether the provisions of the causes of actions or the types of responsibilities. China's EPIL actions' commencement mainly depends on whether the actions are considered to violate the environmental public interest rather than on whether a behavior violates any laws. In fact, it is challenging for judges to directly confirm whether an act damages the public, while an act that breaches the laws or not could be available to find.

4.1.3 Interests Pursued

Different substantive interests are required to invoke the U.S. citizen suit mechanism and Chinese ENGO EPIL actions.

The U.S. citizen suit system was designed to provide a procedure permitting any citizen to bring an action directly against polluters violating the performance standards and emission

⁸⁶² SPC's Civil EPIL Interpretation, *supra* note 658.

⁸⁶³ Zuigao Renmin Fayuan Guanyu Shenli Huanjing Qinquanzerenjiufen Anjian Shiyong Falü Ruoganwen de Jieshi (最高人民法院关于审理环境侵权责任纠纷案件适用法律若干问题的解释) Interpretation of the Sup. People's Ct. of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts (adopted at the 1644th Session of the Judicial Comm. of the Sup. People's Ct. on Feb. 9, 2015, Interpretation No. 12 [2015], SPC) CLI3.249359(EN) (Lawinfochina), art. 18; *See also* SPC's Civil EPIL Interpretation, *supra* note 658, art. 10. (Two SPC's EPIL Interpretations distinct their kinds of cases.)

restrictions imposed under the law or against the Administrator or government agencies grounded on his failure to discharge his duty to enforce the statute against polluters in the U.S. citizen-suit mechanism.⁸⁶⁴ That is, two kinds of citizen suit mechanisms are ultimately designed to protect the public interest. However, from the aspect of the plaintiffs' standing's affirmation, the injury-in-fact is the primary feature, which must establish that the defendant's violation led to the plaintiff suffering some tangible injuries. The harm to personal and property rights, these torts, and damage to less tangible aesthetic and recreational interests are all recognized as environmental injuries. As held in *Sierra Club v. Morton*, the Supreme Court's seminal decision, environmental injury is not limited to injury to pecuniary or property interest, but also included interference with the aesthetic, conservation, and recreational non-economic values,⁸⁶⁵ such as "the desire to use or observe an animal species."⁸⁶⁶ Nevertheless, from the perspective of remedies, the citizen suit promotes the public interest. The U.S. citizen suit aims to restore the infringed public law order, which may achieve by injunctions to cease the violations or the civil penalties. Notably, the U.S. citizen suit does not provide for private compensation.⁸⁶⁷ The Supreme Court explained that "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under "the statute" under MPRSA and FWPCA,⁸⁶⁸ and then the Supreme Court

⁸⁶⁴ S. REP. NO. 1196, 91ST CONG., 2D SESS., 36-39 (1970), *reprinted in* ENVIRONMENTAL POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, Vol. I at 436-439, 264-465 (1974); H.R. Rep. No. 1783, 91st Cong., 2d Sess., 55-56 (1970) (Conference Report), *reprinted in* Nat. Res. Def. Council v. Train, 166 U.S. App. D.C. 312, 510 F.2d 692,700 (1974).

⁸⁶⁵ See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

⁸⁶⁶ *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992); *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581-1582 (9th Cir. 1993).

⁸⁶⁷ *Middlesex Cnty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 15-17 (1981).

⁸⁶⁸ *Id.*, at 14.

quoted and affirmed that it was also applied under the RCRA and CERCLA.⁸⁶⁹ Costs of removal or restoring environmental resources are provided to governmental plaintiffs under CERCLA and several removal provisions, such as the general statutes of CERCLA §§ 111(a)(3), (b),⁸⁷⁰ the statute of oil spill liability trust fund in Oil Spill Act of 1990,⁸⁷¹ and the costs-of-removal statute of the CWA § 311(f)(4).⁸⁷² Therefore, environmental injuries, including injury to pecuniary or property interest and the aesthetic, conservation, and recreation interest, are all deemed as the conditions of initiation of the U.S. citizen suits, but personal interest and recovery cost are excluded in citizen-suit statutes.

Meanwhile, although China's EPIL actions pursue the conservation of environmental public interest, the theory of tort leads to the compensation assessed against violators for the ecological and environmental removal and recovery in each lawsuit. China's ENGO EPIL aims only to protect the general public interest, providing "public interest" language while prohibiting claims for "private injury-in-fact" and the goal of plaintiffs' economic benefits' as the basis of the lawsuits. China's ENGO EPIL system provides to claim for public-interest conservation because of the pollutions and destructions, including compensation of environmental removal and recovery. Such compensation awards are always deposited to an account for future environmental restoration.

Moreover, the conditions for the initiation of ENGO public interest litigation are plain: the

⁸⁶⁹ *Meghrig v. KfC W.*, 516 U.S. 479, 488, 116 S. Ct. 1251, 1256 (1996) ("...as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under" the statute.")

⁸⁷⁰ CERCLA §§ 111(a)(3), (b), U.S.C. §§ 42 9611(a)(3), (b) (2018).

⁸⁷¹ Oil Spill Act of 1990 §§ 2002(b), 1006(f), 33 U.S.C. §§ 2702(b), 2706 (2018).

⁸⁷² CWA § 311(f)(4), 33 U.S.C. § 1321(f)(4) (2018).

violation harms the public interest, similar to the recreational, environmental, and aesthetic interests recognized in the U.S., and the plaintiff is prohibited from making profits from each action.⁸⁷³ It has been posited that from the point of view of litigation claims and legal responsibilities, the so-called social public interest that received relief is actually equivalent to the state's "civil rights" to "state-owned" environmental resources.⁸⁷⁴ Thus, the claims are remedies in tort cases such as "restoration to the original state" and "compensation for losses."⁸⁷⁵

Not only does the law stipulate that the conditions for the initiation of litigation are "damage to the public interest" and compensation of the environmental restoration, but also the relevant judicial interpretation clearly excludes a remedy for the plaintiff's private interests. The SPC's Civil EPIL Interpretation also explicitly excludes the remedy of the plaintiff's private interests and stipulates that the private person and property interest should be compensated in another lawsuit.⁸⁷⁶ That is, Chinese lawmakers intended to authorize additional judicial remedies for private parties suing for their compensation under the Tort Law and the Civil Code, similar to the US practice.

4.1.4 Relationship Between the Private Enforcement and Public Enforcement in Two Countries

Each of the U.S. citizen suit and the Chinese EPIL system has been defined as one kind of

⁸⁷³ Environmental Protection Law, *supra* note 13, art. 58 (providing "A social organization may not seek any economic benefit from an action instituted by it.")

⁸⁷⁴ Gong, *supra* note 32, at 111.

⁸⁷⁵ SPC's Civil EPIL Interpretation, *supra* note 658, art. 18 (For any conduct that pollutes the environment and damages the ecology,... the plaintiff may request the defendant to assume the civil liabilities including but not limited to the cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration to the original state, compensation for losses, and apology.)

⁸⁷⁶ SPC's Civil EPIL Interpretation, *supra* note 658, art. 10 § 3 (providing where a citizen, legal person or any other organization applies for participating in the proceedings on the ground of its or his personal or property damage, it or he shall be informed to file a separate lawsuit.)

environmental governance approach in their own countries not only to supplement the public enforcement but also to oversee the insufficient and lax governmental performance.⁸⁷⁷

The U.S. citizen suit adheres to the targets of legislation and practice to supplement possible lax agency enforcement.⁸⁷⁸ The U.S. citizen suit plays a supplementary enforcement function, like a subrogee, which is not parallel to the governmental administrations. Private enforcement can be commenced when the government does not perform its administrative responsibilities. This replacement relationship can be summarized and demonstrated from the pre-suit notice requirement and the diligent prosecution bar these two pre-suit conditions. During the precedent notice period, if the violators or the government environmental protection agencies take measures to correct the illegal acts so that they no longer exist, the citizen-suit procedure would therefore be precluded.⁸⁷⁹ Violators face the same kinds of enforcement: injunctions, penalties, which will not add or reduce any liabilities when any citizen enforces them. Almost all the Acts provide the violators' responsibilities. There has been hardly any contradiction in obligations arising between the public and private enforcement in one piece of legislation. Violators will not have to take more responsibilities when they are subject to enforcement in a citizen suit. Moreover, a settlement agreement or the SEPs may mitigate the violator's punishment. Although the agreements and the

⁸⁷⁷ Mahfuzul Haque, *Environmental Governance*. In GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE 1 (Ali Farazmand Living Ed. June 2017). (Environmental Governance: Environmental governance comprises of rules, practices, policies, and institutions that shape how humans interact with the environment. It is a process that links and harmonizes policies, institutions, procedures, tools, and information to allow participants (public and private sector, NGOs, local communities) to manage conflicts, seek points of consensus, make fundamental decisions, and be accountable for their actions.)

⁸⁷⁸ *Clean Air Act Amendments of 1977: Hearing Before the Subcomm. on Environmental Pollution of the Comm. on Environment and Public Works, United States Senate, 95th Cong. 1st Session, 337(1977).*

⁸⁷⁹ MILLER & ENV'T L. INST., *supra* note 9, at 43.

SEPs in the U.S. citizen suit seem to be less rigorous, the agreement and the SEPs still achieve the environmental protection goals in each area, avoiding drawn-out trials and litigation costs.

Meanwhile, Chinese researchers rarely emphasized the supplementary nature of the EPIL system because of the separate provisions of comprehensive environmental responsibilities, environmental civil liabilities, administrative liabilities, and criminal liabilities had been provided in the Tort Law, the Criminal Law, and environmental-related laws. This legislation situation led to some qualified ENGOs being selected to re-open previously terminated cases, in which no environmental compensation and restoration liabilities to the violators. None of the regulations, laws and judicial interpretations had contemplated either environmental compensation and restoration remedies.⁸⁸⁰ For example, the purpose of the Tort Law or Tort Liability Chapter is to protect the legitimate rights and interests of parties in a civil legal relationship.⁸⁸¹ However, Civil Code recently added restoration provisions generally.⁸⁸²

Additionally, restoration and compensation are not regarded as protecting citizens' privately owned property and rights of the person in the Criminal Law.⁸⁸³ After the ENGO EPIL authorized

⁸⁸⁰ For example, in *FON v. Xie*, the violators were punished according to the Criminal Law, but the environmental restoration was still existing, and they should pay for the restoration. The case of the Environmental Protection Association of Taizhou City, Jiangsu Province v. Taixing Jinhui Chemical Engineering Co., Ltd., et al. The violators were enforced by the administrations to cease the acts but did not restore the environment.

⁸⁸¹ Civil Code, *supra* note 657, art. 1164-1165 (providing in order to protect the legitimate rights and interests of parties in civil law relationships, clarify the tort liability, prevent and punish tortious conduct, and promote the social harmony and stability, this Law is formulated; (providing those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law.) (Revised by the in the bk. 7 Tort Liability in the Civil Code, providing "This Book regulates civil relations arising from infringement on civil rights and interests." "One who is at fault for infringement upon a civil right or interest of another person, causing harm, shall be subject to the tort liability.")

⁸⁸² *Id.* art. 1234 (providing where a violation of the provisions issued by the state causes harm to the ecology and environment, and the ecology and environment are capable of remediation, the authority specified by the state or the organization specified by law shall have the right to require the tortfeasor to assume the liability for remediation within a reasonable time limit.)

⁸⁸³ Criminal Law of the People's Republic of China 中华人民共和国刑法 (adopted by the Second Session of the

qualified ENGOs to sue for environmental restoration and compensation, the developing ENGOs preferred to select terminated cases after tort or criminal remedies, as the violation facts were published or could be accessed by applications. Some research criticized this re-opening of the former case for restoration and compensation because the EPIL plaintiff repeated the facts and wasted judicial resources rather than administrative enforcement.⁸⁸⁴ However, this opinion was incorrect in theory comprehension and practice. Although the plaintiffs researched the same facts of the cases, the remedies are different and supplementary. Criminal and tort provisions concentrate on the person or legal person, instead of the environment itself, as the Environmental Protection Law and the SPC's Civil EPIL Interpretation provided a legal basis for pursuing environmental restoration and compensation. These two categories of laws are not overlapping. Moreover, administrative agencies have hardly ever enforced restoration action or compensation for restoration instead of ordering violators to correct illegal violations or issue penalties into a governmental treasury account.⁸⁸⁵ Therefore, administrative enforcement has not been utilized for

Fifth Nat'l People's Cong., by July 1, 1979 and amended by the Fifth Session of the Eighth Nat'l People's Cong., Mar. 14, 1997. According to the NPC Standing Comm. Decision Concerning Punishment of Criminal Offenses Involving Fraudulent Purchase on Dec. 29, 1998, Amendment to the Criminal Law of the People's Republic of China on Dec. 25, 1999, Amendment (II) to the Criminal Law of the People's Republic of China on Aug. 31, 2001, Amendment (III) to the Criminal Law of the People's Republic of China on Dec. 29, 2001; Amendment (IV) to the Criminal Law of the People's Republic of China on Dec. 28, 2002, Amendment (V) to the Criminal Law of the People's Republic of China on Feb. 28, 2005, Amendment (VI) to the Criminal Law of the People's Republic of China on June 29, 2006, Amendment (VII) to the Criminal Law of the People's Republic of China on Feb. 28, 2009, Decision of the Standing Comm. of the Nat'l People's Cong., by Amending Some Laws on Aug. 27, 2009, Amendment (VIII) to the Criminal Law of the People's Republic of China on Feb. 25, 2011, Amendment (IX) to the Criminal Law of the People's Republic of China on Aug. 9, 2015, Amendment (X) to the Criminal Law of the People's Republic of China on Nov. 4, 2017, and Amendment (XI) to the Criminal Law of the People's Republic of China on Dec. 26, 2020), CLI.1.349391(EN) (Lawinfochina) art. 2 (providing the tasks of the PRC Criminal Law are to use punishment struggle against all criminal acts to defend national security, the political power of the people's democratic dictatorship, and the socialist system; to protect state-owned property and property collectively owned by the laboring masses; to protect citizens' privately owned property; to protect citizens' right of the person, democratic rights, and other rights; to maintain social and economic order; and to safeguard the smooth progress of the cause of socialist construction.)

⁸⁸⁴ Gong, *supra* note 32, at 121.

⁸⁸⁵ Environmental Protection Law, *supra* note 13, art. 59, § 1 (providing where any enterprise, public institution, or

environmental restoration. In this situation, pioneer qualified ENGOs researched numerous environmental criminal cases, civil cases, and administrative enforcement cases to acquire and select appropriate cases to attempt to file with full factual support, as the civil judgment, criminal judgment, and administrative enforcement decisions had elaborated the full facts and evidence.

4.1.5 Terms Comparisons

The term “citizen suit” was firstly provided in the Michigan Environmental Protection Act, which was created based on Professor Joseph L. Sax’s draft of the bill in 1968.⁸⁸⁶ The federal Clean Air Act⁸⁸⁷ and other acts then followed the Michigan Environmental Protection Act in 1970 to establish a citizen-suit system.⁸⁸⁸ The term is plain and apparent to authorize citizens to participate in the enforcement of pollution control standards and regulations against environmentally harmful activities, based on the intention and idea of Sax.⁸⁸⁹ With the development and adoption of subsequent citizen-suit provisions, citizen enforcement became a manifest supplement to governmental enforcement. Qualified plaintiffs are authorized to force government agencies to appropriately fulfill their responsibilities.⁸⁹⁰

The Chinese legislature did not duplicate the term “citizen suit” into China’s counterpart legislation, rather than naming it as environmental civil public interest litigation (EPIL) in

other business is fined and ordered to make correction for illegally discharging pollutants but refuses to make correction, the administrative agency legally making the punishment decision may impose continuous fines on it in the amount of the original fine for each day from the next day after it is ordered to make correction.)

⁸⁸⁶ Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years’ Experience under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974).

⁸⁸⁷ Pub. L. No. 91-604, §12 (a) 84 Stat. 1706 (1970) (codified as amended at 42 U.S.C. § 7604 (2018)).

⁸⁸⁸ Sax & DiMento, *supra* note 886, at 1.

⁸⁸⁹ *Id.*

⁸⁹⁰ S. REP. No. 91-1196, 91st Cong., 2d Sess. 36-37 (1970) “NATIONAL AIR QUALITY STANDARDS act of 1970,” US Congressional Serial Set (1970).

legislation.⁸⁹¹ Citizens are always allowed to sue in U.S. citizen suits, while citizens are not allowed to file the cases in the Chinese EPIL actions.⁸⁹² Different plaintiffs' provisions result in two very different models for litigation. Moreover, in China, EPIL consists of so-called civil EPIL and administrative EPIL, but the latter does not provide for or officially allow ENGOs' filing.⁸⁹³

The two subclassifications (civil and administrative) are not accurate and violate jurisprudence.⁸⁹⁴ Civil actions are between two equal private parties, according to the Civil Code. But ENGOs represent the public interest to initiate the EPIL cases against the polluters, the private parties. ENGOs and private parties are not equal. Thus, ENGO EPIL cases should not be defined as civil litigations; at least, the name should not consist of the word "civil." Moreover, administrative cases in China are known as government agency compliance cases, in which private parties compel the administrations to be law-abiding, according to the Administrative Litigation Law. Currently, Chinese procuratorates are authorized to bring up environmental administrative public interest litigations.⁸⁹⁵ However, the procuratorates and government agencies both represent the public interest. So, this term is also imprecise to describe the nature of administrative litigations.

This author calls environmental enforcement litigation by non-governmental actors ENGO EPIL, a concise and precise way of indicating that ENGOs represent the public interest, paralleling

⁸⁹¹ SPC's Civil EPIL Interpretation, *supra* note 658.

⁸⁹² Environmental Protection Law, *supra* note 13, art. 58 (Providing that the plaintiff should be a social organization that has been legally registered with the civil affairs department of the People's government at or above the level of a districted city. So, the citizens are excluded when environmental public interest litigation's commencement.)

⁸⁹³ Civil Procedure Law 2017, *supra* note 664, art. 55; Administrative Litigation Law. *supra* note 664, art. 25.

⁸⁹⁴ See generally Hou, *supra* note 31, at 46-47.

⁸⁹⁵ Administrative Litigation Law, *supra* note 664, art. 25.

the citizen suit in the United States.

4.2 Statutory Differences

Due to the differences between theories of the U.S. citizen suit and Chinese ENGO EPIL, as well as the misunderstandings of the U.S. citizen-suit provision, Chinese ENGO EPIL statutes have been legislated differently from their U.S. prototype.

4.2.1 Legislative Forms and Applicable Purviews

The U.S. citizen-suit provisions have been adopted in twenty-two acts and used language nearly identical to the CWA Section 505(a)'s.⁸⁹⁶ Every citizen-enforcement case is able to apply the particular provisions directly. However, several vital laws, such as the National Environmental Policy Act (NEPA),⁸⁹⁷ the Migratory Bird Treaty Act of 1918 (MBTA),⁸⁹⁸ and the Federal Insecticide and Fungicide, and Rodenticide Act (FIFRA), have not included citizen-suit provisions.⁸⁹⁹ In addition, the U.S. citizen-suit provisions always enumerate the applicable statutory authorizations and jurisdictions clearly in each legislation. For instance, the citizen-enforcement applicable actions differ between the Clean Water Act and the Clean Air Act: the Clean Water Act establishes the basic norms for regulating pollutants into the U.S. Waters, and quality standards for surface waters,⁹⁰⁰ while the Clean Air Act regulates air emissions, and authorizes the EPA to establish the relevant standards.⁹⁰¹ Thus, environmental statutes regulate

⁸⁹⁶ *Gwaltney v. Chesapeake Bay Found.*, 484 US 49, 50-51 (1987).

⁸⁹⁷ National Environmental Policy Act § 2, 42 U.S.C. § 4321(2018).

⁸⁹⁸ Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 (2018).

⁸⁹⁹ Federal Insecticide, Fungicide, and Rodenticide Act § 2, 7 U.S.C. § 136 (2018).

⁹⁰⁰ Summary of the Clean Water Act, EPA, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (Last visited Apr. 25, 2021).

⁹⁰¹ Summary of the Clean Air Act, EPA, <https://www.epa.gov/laws-regulations/summary-clean-air-act> (Last visited

their own citizen-suit provisions to clearly regulate and guide the actions in practice.

In contrast, China's ENGO EPIL provisions have been regulated in three legislations generally: the Civil Procedure Law 2013⁹⁰² and the 2017,⁹⁰³ the Environmental Protection Law 2015,⁹⁰⁴ and the Interpretation of the SPC on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations in 2015.⁹⁰⁵

The Civil Procedure Law 2013 initiated ENGO environmental public interest litigation, but in one sentence without details to apply to any case.⁹⁰⁶ The 2017 Amendment of Civil procedure law retained this article as a reference for essential civil procedure legislation.⁹⁰⁷ However, this procedure law is too overly broad and vague to apply in any case separately.

The Environmental Protection Law 2015 provided specific ENGO EPIL causes of action and defined the appropriate plaintiffs with several conditions.⁹⁰⁸ Qualified ENGOs can file EPIL actions under the Environmental Protection Law 2015. This was the first and fundamental ENGO EPIL statute in China, and 2015 was called the "first year of the EPIL."⁹⁰⁹

Apr. 25, 2021).

⁹⁰² Civil Procedure Law 2013, *supra* note 620, art. 55.

⁹⁰³ Civil Procedure Law 2017, *supra* note 664, art. 76-79.

⁹⁰⁴ Environmental Protection Law, *supra* note 13.

⁹⁰⁵ Civil Procedure Law 2013, *supra* note 620, art. 55.

⁹⁰⁶ *Id.* art. 55 (providing "for conduct that pollutes the environment, infringes upon the lawful rights and interests of vast consumers or otherwise damage the public interest, a governmental authority or relevant organization as prescribed by law may institute an action in a People's court.")

⁹⁰⁷ Civil Procedure Law 2017, *supra* note 664, art. 55.

⁹⁰⁸ Environmental Protection Law, *supra* note 13, art. 58 (providing the courts shall accept the cases: for an act polluting environment or causing ecological damage in violation of public interest, a social organization which satisfies the following conditions may institute an action in a People's court. And it also regulates the standing provisions: (1) It has been legally registered with the civil affairs department of the People's government at or above the level of a districted city. (2) It has specially engaged in environmental protection for the public good for five consecutive years or more without any recorded violation of law. A social organization may not seek any economic benefit from an action instituted by it.")

⁹⁰⁹ Ye Lefeng (叶乐峰) *Huanjinggongyisong Weihe Yuleng* (环境公益诉讼为何“遇冷”) [*Why EPIL is cold*]

The more detailed ENGO EPIL provisions had been provided in the SPC's Civil EPIL Interpretation in 2015, also known as Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations.⁹¹⁰ This interpretation generally defines authorized ENGOs' type and specific procedural provisions to apply as the laws.⁹¹¹

However, many doubts and discussions have been frequently raised, whether the interpretations could be applied directly in each case since some interpretations are enacted as laws without any upper law basis.⁹¹² That is, the judicial interpretations are no longer interpreting the laws but making laws. However, Chinese judicial interpretations are still applied in practice for decades as a customary adjudication method.⁹¹³ This author only mentions this discussion here and still regards the SPC's Civil EPIL Interpretation as an enforceable rule of decision, which can be directly cited in practice.

In summary, unlike the U.S. citizen suit, Chinese ENGO EPIL provisions are prescribed in

Guangming Ribao (光明日报) GUANGMING DAILY 06, (Jan. 24, 2017).

https://news.gmw.cn/2017-01/24/content_23565373.htm.

⁹¹⁰ SPC's Civil EPIL Interpretation, *supra* note 658.

⁹¹¹ In China, In the process of applying the law, the interpretation of the law by the Supreme People's Court and the Supreme People's Procuratorate is called judicial interpretation. The "Resolution on Strengthening the Work of Legal Interpretation" stipulates that all issues related to the specific application of laws and decrees in the judicial work of the court or the procuratorate's procuratorial work shall be interpreted by the Supreme People's Court and the Supreme People's Procuratorate. If the interpretations of the two courts differ in principle, they shall be reported and decided by the Standing Comm. of the Nat'l People's Cong.. The "People's Court Organization Law" was passed in 1979 and revised in 1983 also made similar provisions.

⁹¹² Wang Cheng (王成), Zuigaofayuan Sifajieshi Xiaoli Yanjiu (最高法院司法解释效力研究) [Research on the Effectiveness of Judicial Interpretation of the Sup. People's Ct.] *Zhongwai Faxue* 中外法学 [PEKING U. L. J.], Vol.28, No.1 (2016) at 264.

⁹¹³ *Id.*

several general environmental relevant laws and the SPC's Civil EPIL Interpretation, rather than being introduced in each environmental-related law.

4.2.2 Plaintiff Provisions

In terms of the plaintiff-provisions in both the U.S. citizen suit and ENGO EPIL in China, two aspects must be mentioned: the scope of permissible plaintiffs and their standing. The plaintiffs' scope regulates what types of legal entities can have the right to sue. The second question addresses, beyond the plaintiff's scope, what other conditions have to be met to become a qualified plaintiff. The two litigation systems present huge differences. The plaintiffs' scope was broad in the U.S. citizen suit, but some restrictive conditions exist, while the plaintiffs' scope is narrow and lacks any standing-conditions when ENGOs plan to file the cases in ENGO EPIL in China.

Most U.S. citizen-suit provisions authorize "any person" or "any citizen" to be the plaintiff. The terms "any person" and "any citizen" have been clearly defined in each act, and the scope of the plaintiff is broad in general. For instance, the Clean Air Act provided that "the term 'person' includes an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof."⁹¹⁴ The Clean Water Act defined the plaintiff as a citizen, meaning "a person or persons having an interest which is or may be adversely affected."⁹¹⁵ Other acts' citizen-suit provisions, such as the RCRA⁹¹⁶ and the ESA, similarly followed "person"

⁹¹⁴ Clean Air Act §§ 302(e), 304(a), 42 U.S.C. §7602(e); § 7604(a) (2018).

⁹¹⁵ Clean Water Act §§ 505 (a), 505 (g), 33 U.S.C. § 1365(a); § 1365 (g) (2018).

⁹¹⁶ RCRA §§ 1004(15), 7002(a), 42 U.S.C. § 6903(15); § 6972(a) (2018).

to define their qualifications.⁹¹⁷ Notably, the EPA, as a federal agency, is not allowed to enforce provisions of certain RCRA subchapters, such as the § 4005 ban on open dumping in the RCRA's subchapter IV of Chapter 50.⁹¹⁸ Essentially, officials should diligently enforce their duties when probable citizen suits were related to their omission or laxity by ENGOs, individuals, or private companies. These private sectors have been authorized to sue under citizen suit sections in many acts to supplementary the daily environmental administrations.

In contrast, the plaintiffs' scope in EPIL is too narrow and excludes individuals, regional government agencies, and companies, according to the Environmental Protection Law in China.⁹¹⁹ Only qualified organizations are allowed to sue, while individuals are not allowed to be plaintiffs in any EPIL cases. The qualifications are that plaintiff ENGOs must be registered with civil affairs agencies at or above the districted city level and must be engaged in environmental protection for public interest for five consecutive years without any recorded violation of laws.⁹²⁰ Statistically, according to the Social Organizations Administration, more than 700 ENGOs were qualified ENGOs in China.⁹²¹ ENGOs may collect case reports and information from any individual who believes that a case should be filed whether the person is a member of the ENGOs or not. However, the possible remedies are only for the environment instead of indemnity for any individual.

⁹¹⁷ Endangered Species Act, §§ 3(13), 11(g)(1), 16 U.S.C. § 1532(13); § 1540(g)(1) (2018).

⁹¹⁸ 42 U.S.C. Ch. 50, Subch. IV.

⁹¹⁹ Environmental Protection Law, *supra* note 13, art.58.

⁹²⁰ *Id.* at art. 58. (In details, (1) the level of registration (It has been legally registered with the civil affairs department of the people's government at or above the level of a districted city.) (2) Specialized in environmental issues for five years; (3) two prohibitions on violation-of-law records, and (It has specially engaged in environmental protection for the public good for five consecutive years or more without any recorded violation of law).

⁹²¹ Wang Yijun (王亦君), *More than 700 Social Organizations Can Sue EPIL (700 多个社会组织可以提起环境民事公益诉讼)* THE CHINA YOUTH DAILY 中国青年报 08 (Jan. 14, 2015).
http://zqb.cyol.com/html/2015-01/14/nw.D110000zgqnb_20150114_5-08.htm.

Several substantive standing requirements must be satisfied for permissible citizen-suit plaintiffs in the US. On the contrary, the standing of China's ENGO EPIL is conditioned on the ENGOs' own definitions instead of the direct interests relating to the cases.

When anyone intends to commence a citizen suit, its standing has been restricted by some conditions based on the U.S. Constitution as interpreted by the Supreme Court. Concretely speaking, a proper plaintiff must present the three conditions to satisfy Article III's standing requirements: injury-in-fact, causation, and redressability.⁹²² Moreover, many ENGOs filed the most citizen suits, but the ENGOs cannot file the cases based on their general interest.⁹²³ Such ENGOs must be membership organizations, and at least one member's interests must be affected when the ENGOs file the citizen suits.⁹²⁴ Another limitation is mootness; that is, a citizen will not file a suit if the violator comes into compliance.⁹²⁵ For example, a consent decree may be issued to allow the EPA to address the civil penalties by the court, which resolves all of the Clean Water Act violations. The citizen suit becomes moot when the violators undertake the measures to deliver the consent decree.⁹²⁶ Thus, although the scope of the plaintiff is broad in the U.S. citizen suits, many restrictions and conditions need to be satisfied.

On the contrary, there is no similar requirement in the provisions of China's ENGO EPIL

⁹²² Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 US 167, 180-181 (2000). (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

⁹²³ Sierra Club v. Morton, 405 US 727 (1972).

⁹²⁴ *Id.*

⁹²⁵ Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 US 167, 173, 120 S. Ct. 693, 700 (2000).

⁹²⁶ Env't. Conservation Org. v. City of Dall., 529 F.3d 519, 531 (5th Cir. 2008).

system. The direct interests in the cases in ENGO EPIL in China are not mentioned in public interest cases but only in tort cases. Moreover, ENGOs cannot seek any economic benefit from their EPIL cases.⁹²⁷ Those three formal requirements of the ENGOs do not stipulate any substantive relationship between the plaintiffs and the cases. It reveals that the courts must accept the cases if the plaintiff-ENGOs satisfied those general conditions.⁹²⁸ The SPC's Civil EPIL Interpretation provides a substantial condition of the plaintiff: the social organization's tenets and main business scope must be to protect the environment and the public interest.⁹²⁹ It seems like this article is a substantial review of the standing as a restrictive interpretation of Article 50 in the Environmental Protection Law.⁹³⁰ However, there is doubt whether this interpretation should be regarded as a restrictive interpretation since the lack of an upper law basis.⁹³¹ This doubt echoed questions about the Chinese judicial interpretation's force of law and its direct application. In practice, the SPC's Civil EPIL Interpretation has been applied in every case since the interpretation obtains the force of law (*Legis interpretatio legis vim obtinet*).⁹³²

In practice, this condition is not strictly followed by the courts. For instance, it is not uncommon that the cases accepted by the court to not be directly related to the ENGOs' tenets and

⁹²⁷ Environmental Protection Law, *supra* note 13, art. 58.

⁹²⁸ *Id.* § 2 (provides "A People's court shall, according to the law, accept an action instituted by a social organization that satisfies the provision of the preceding paragraph.")

⁹²⁹ SPC's Civil EPIL Interpretation, *supra* note 658, art. 4. (Where a social organization's tenets and main business scope specified in its articles of association are to maintain the public interest and it engages in public environmental protection activities, it may be determined as "specially engages in public environmental protection activities" prescribed in Article 58 of The Environmental Protection Law, The public interest involved in the lawsuit filed by a social organization shall be related to its tenets and business scope.)

⁹³⁰ Restrictive Interpretation. An interpretation that is bound by a principle or principles existing outside the interpreted text. Also termed *restricted interpretation*; *limited interpretation*; *interpretatio limitata*. *Restrictive Interpretation* BLACK'S LAW DICTIONARY (9th ed. 2009).

⁹³¹ Gong, *supra* note 32, at 107.

⁹³² *Legis interpretatio legis vim obtinet*, BLACK'S LAW DICTIONARY, (9th ed. 2009).

main business scope. Several ENGOs brought up a wide range of cases in past years. For instance, China Biodiversity Conservation and Green Development Foundation (CBCGDF) filed several cases in various environmental matters, including cases of toxic playground runways in the kindergartens,⁹³³ mangroves protection in Hainan,⁹³⁴ air pollution,⁹³⁵ endangered plant protection (*Acer pentaphyllum*),⁹³⁶ and protection of cultural relics.⁹³⁷ Most of the cases had been accepted and decided by the courts. However, one of the water pollution cases was denied in the trial of the first instance and trial of the second instance since the CBCGDF's business scope was so broad that it did not concentrate on water environmental protection.⁹³⁸ The SPC finally reversed and remanded to the appeals court (Intermediate People's Court of Zhongwei City of Ningxia Hui Autonomous Region), and the case was selected as one of the Guiding Cases.⁹³⁹ Because the SPC

⁹³³ Yu Yingbo (余瀛波) Dupaodao Changqicunzai Bingfeirending Wujukeyi (“毒跑道”长期存在并非认定无据可依) [The Toxic Plastic Runways are Stilling Being Used on Campus. Schools and Education Authorities Did Little but Watching] The Legal Daily, Apr. 21, 2017.

http://www.legaldaily.com.cn/index/content/2017-04/21/content_7118695.htm?node=20908 (CBCGDF filed against Beijing Chaoyang District Liu Shikun Wanxiangxintian Youeryuan in 2016 and settled in 2017.)

⁹³⁴ CBCGDF Su Hainan Mangrove Tourism Co., Ltd. (2015). Settled in 2017. CBDGDF, The Representatives Attended International Workshop on Ecological Civilization and Global Environmental Governance. <http://www.cbcdgdf.org/NewsShow/4855/10290.html>

⁹³⁵ CBCGDF Su Volkswagen AG (2015). CBCGDF <http://www.cbcdgdf.org/NewsShow/4857/3103.html>.

⁹³⁶ Li Lin (李林) CBCGDF Su Yalong River Hydropower Development Co., Ltd. (中国“绿发会”提起首例保护濒危植物公益诉讼) [CBCGDF Filed the First Endangered Plant Environmental Public Interest Litigation] Zhongguo Qingnianbao, THE CHINA YOUTH DAILY 中国青年报 04 (Sept. 18, 2015).

http://zqb.cyol.com/html/2015-09/18/nw.D110000zgqnb_20150918_1-04.htm

⁹³⁷ Sun Ying (孙莹), Zhengzhou Zhongyuan Shouli Woguo Shouge Zhendui Renwen Yiji Wenwu Baohu de Gongyisusong (郑州中院受理我国首个针对人文遗迹(文物)保护的公益诉讼) [Zhengzhou Intermediate People's Court Accepts China's First Public Interest Lawsuit Against the Protection of Cultural Relics] CRN (Oct. 18, 2015. 9:17). (The defendant was the Xiawo Town Government.)

http://china.cnr.cn/ygxw/20151018/t20151018_520182511.shtml

⁹³⁸ CBCGDF, (The CBCGDF's business scope was to mobilize the whole society to care for and support the protection of biodiversity and green development, safeguard public environmental rights and interests, and assist the government to protect national strategic resources, promote ecological progress and harmonious coexistence between man and nature, and build a beautiful homeland for mankind.) CBCGDF, <http://www.cbcdgdf.org/NewsShow/4846/7.html> (Last visited Apr. 25, 2021).

⁹³⁹ China Biodiversity Conservation and Green Development Foundation Su Ningxia Ruitai Science and Technology Co., Ltd. (中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案) [China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd.] China Judgements Online, Guiding Case No. 75: China Biodiversity Conservation and Green Development

held whether the tenets and business scope of an ENGO included safeguarding the environmental public interests should be judged based on their content other than merely according to the literal expression. The work content was within the scope of protecting various natural elements impacting the survival and development of humankind and those subject to artificial modification. Thus, all environmental matters, including cultural relics, natural reserves, cities, and villages, have been acknowledged as the EPIL system's objects.⁹⁴⁰ Moreover, the SPC ruled that "if the environmental matter had certain relevance with the environmental elements or the ecological system under the protection of the ENGO, the ENGO has the standing in this case."⁹⁴¹ This rule then guides other ENGO's prosecutions.

Therefore, the plaintiff rules of ENGO EPIL in China are quite characteristic of loose enrollment but strict acceptance. Although the scope is limited and standing requirements are loose, as long as the formal requirements are satisfied, there are almost no prosecution restrictions.

4.2.3 Differences in Defendant Provisions

The U.S. citizen-suit provisions authorize that any person can be a defendant so long as they violated statutory requirements. The defendants may include any State or federal government agencies permitted by the eleventh amendment to the Constitution when they are alleged to violate

Foundation v. Ningxia Ruitai Science and Technology Co., Ltd. 指导案例 75 号：中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案 (Issued on Dec. 28, 2016 as deliberated and adopted by the Judicial Comm. of the Sup. People's Ct.) CLI.C.8726840(EN) (Lawinfochina).

⁹⁴⁰ *Id.*; Environmental Protections Law, *supra* note 13, art. 2.

⁹⁴¹ China Biodiversity Conservation and Green Development Foundation Su Ningxia Ruitai Science and Technology Co., Ltd. (中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案) [China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd.] Guiding Case No. 75, Guiding Case No. 75: China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd.

any standards or fail to perform any act and duties.⁹⁴² Any person who has violated administrative orders is also provided in each act as the potential defendant.⁹⁴³ The defendant-provisions illustrate that the government agencies and the Administrators may be accused of violations in private enforcement cases.⁹⁴⁴ This establishment explicitly authorized and emphasized that the target of citizen enforcement was to enforce against private entities and compel governmental entities to comply with the requirements that benefit public health and the environment. The general scope of defendants in statutes includes federal entities in the Safe Drinking Water Act (SDWA) § 1401(a) and Clean Air Act § 302 (e)2. The 1977 amendment of the CAA added federal entities in its §§ 118, 302, and 304 (e).⁹⁴⁵ Clean Water Act also provides that the defendants could be “(i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution.”⁹⁴⁶ Nevertheless, the Supreme Court held that this provision did not subject US government agencies to civil penalties.⁹⁴⁷ In the *U.S. Department of Energy v. Ohio*, the Court held that RCRA’s remedial scheme did not waive the governmental immunity from punitive fines imposed by state law.⁹⁴⁸ Then Congress amended the

⁹⁴² TSCA §20(a), 15 U.S.C. § 2619 (a) (2018); CWA § 505(a), 33 U.S. C. § 1365 (a) (2018); CAA §304, 42 U.S.C. § 7604(2018).

⁹⁴³ CAA §304, 42 U.S.C. § 7604 (2018).

⁹⁴⁴ For instance, *Nat. Res. Def. Council v. Train*, 166 U.S. App. D.C. 312, 510 F.2d 692 (1974) (The NRDC brought this action to against the EPA and its Administrator Russell E. Train, seeking to compel the publication of effluent limitation guidelines under the section 304(b) (1) (A) of the Federal Water Pollution Control Amendments of 1972.); *Friends of Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976) (Several environmental groups challenges an order of the US District Court, which Denied their application for an injunction to restrain state and city officials “from increasing transit fares and to order enforcement of anti-pollution provisions of a transportation control plan approved under the Clean Air Act Amendments of 1970.”)

⁹⁴⁵ Pub. L. 95-95, § 118, 302, and 304, 91 Stat.685 (1977) (Codified as amended at 42 U.S.C. § 7148 (2018). (On the whole, the amendment of 1977 CAA required that the definition of “person” included federal entities, and federal installations should also comply to the state and local air pollution requirements.)

⁹⁴⁶ CWA § 505(a)(1), 33 U.S.C., § 1365(a)(1) (2018).

⁹⁴⁷ *Dep’t of Energy v. Ohio*, 503 U.S. 607, 611, 112 S. Ct. 1627 (1992).

⁹⁴⁸ *Id.* at 627-628.

RCRA's correlated provision to waive sovereign immunity for "all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations."⁹⁴⁹

There is no explicit defendant-provision in each EPIL norm in China instead of the precise causes of action provisions. All the litigations are divided into three types: civil actions are between the equal parties, such as the private sectors or individuals,⁹⁵⁰ criminal cases are prosecuted for criminal actions,⁹⁵¹ and administrative cases (known as government agency compliance cases) are filed against administrators by the private sectors and individuals.⁹⁵² ENGO EPIL has been acknowledged as civil EPIL cases in practice. ENGOs thus are only authorized to prosecute private sector entities in EPIL actions rather than suing both administrations and private actors. The private

⁹⁴⁹ Pub. L. 102-386, 106 Stat. 1505 (Oct. 6, 1992); *Abreu v. United States*, 468 F.3d 20, 32 (1st Cir. 2006).

⁹⁵⁰ Civil Procedure Law 2017, *supra* note 664, art. 48 (providing citizens, legal persons and other organizations may act as the parties to civil actions.)

⁹⁵¹ Criminal Procedure Law of the People's Republic of China 中华人民共和国刑事诉讼法 (adopted at the 2nd Session of the Fifth Nat'l People's Cong., July 1, 1979; amended for the first time in accordance with the Decision on Amending the Criminal Procedure Law of the People's Republic of China adopted at the 4th Session of the Eighth Nat'l People's Cong., Mar. 17, 1996; amended for the second time in accordance with the Decision on Amending the Criminal Procedure Law of the People's Republic of China adopted at the 5th Session of the Eleventh Nat'l People's Cong., Mar. 14, 2012; and amended for the third time in accordance with the Decision to Amend the Criminal Procedure Law of the People's Republic of China adopted at the 6th Session of the Standing Comm. of the Thirteenth Nat'l People's Cong., Oct. 26, 2018), P.R.C. LAWS. CLI.1.324538(EN) (Lawinfochina) (The purpose is to ensure correct enforcement of the Criminal Law, punish crimes, protect the people, protect national security and public security, and maintain the order of socialist society. Public security authorities are responsible for criminal investigation, detention, execution of arrest warrants, and interrogation in criminal cases. People's Procuratorates are responsible for procuratorial supervision, approval of arrests, investigation of cases directly accepted by procuratorial authorities, and initiation of public prosecution.)

⁹⁵² Administrative Litigation Law, *supra* note 664. (The law is to ensure the impartial and timely trial of administrative cases by the people's courts, settle administrative disputes, protect the lawful rights and interests of citizens, legal persons, and other organizations, and oversee administrative agencies' exercise of power according to the law. A citizen a legal person, or other organization who thought the administrative action infringes them, they have the right to file a complaint to the court.)

sectors included individuals,⁹⁵³ private companies,⁹⁵⁴ and a university as a public institution.⁹⁵⁵ However, the courts dismissed the cases in which government agencies were the defendants, according to the Environmental Protection Law and the SPC's Civil EPIL Interpretation. The Administrative Litigation Law was amended only to authorize procuratorates to sue in government agency compliance cases, called administrative EPIL in China.⁹⁵⁶ Moreover, a working guide document to all the courts also clearly provides that courts do not accept cases filed by ENGOs against administrative conduct.⁹⁵⁷ Therefore, although the Chinese ENGO EPIL has been adapted from the U.S. citizen suit, it lacks the function of overseeing government agencies because

⁹⁵³ Beijingshi Chaoyangqu Ziranzhijou Huanjing Yanjiusuo, Fujiansheng Lùjiayuan Huanjingyouthao Zhongxin Su Xiezhijin deng Siren Pohuailindi Minshi Gongyisusongan (北京市朝阳区自然之友环境研究所、福建绿家园诉谢知锦等四人破坏林地民事公益诉讼案) [Fon, Fujian Green Home Environment Friendly Center v. Xie Zhijin], Oct. 29, 2015, Dec. 18, 2015 (Nanping Interm. People's Ct. Oct. 29, 2015, Fujian High People's Ct. Dec. 18, 2015).

⁹⁵⁴ Friends of Nature Environmental Research Institute in Chaoyang District, Beijing Municipality and All-China Environment Federation v. PetroChina Co. Limited and Jilin Oilfield Branch of PetroChina Co. Limited (case of public interest litigation against environmental pollution) (北京市朝阳区自然之友环境研究所、中华环保联合会与中国石油天然气股份有限公司、中国石油天然气股份有限公司吉林油田分公司环境污染公益诉讼案) 2019 SUP. PEOPLE'S GAZ. ISSUE 4 (Sup. People's Ct. 2018) (China); China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd.] China Judgements Online, Guiding Case No. 75: China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd. 指导案例 75 号: 中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案 (Issued on Dec. 28, 2016 as deliberated and adopted by the Judicial Comm. of the Sup. People's Ct.) CLIC.8726840(EN) (Lawinfochina).

⁹⁵⁵ Guiyang Public Environmental Education Center Su Guizhou Sanyuan Industrial Co., Guizhou Guijian Hengda Concrete Co., Ltd., and Guizhou University (贵阳公众环境教育中心诉贵州三元实业公司、贵州贵建恒大混凝土有限公司、贵州大学) Guiyang Public Environmental Education Center v. Guizhou Sanyuan Industrial Co., Guizhou Guijian Hengda Concrete Co., Ltd., Guizhou University, Feb. 3, 2016. (Qingzhen People's Ct. Feb. 3, 2016). <http://www.guizhoucourt.cn/jxjs/2644.jhtml>.

⁹⁵⁶ Administrative Litigation Law, *supra* note 664, art. 25.

⁹⁵⁷ Working Rules of the Sup. People's Ct. on the Trial of Environmental Public Interest Lawsuits (for Trial Implementation) 最高人民法院关于审理环境公益诉讼案件的工作规范（试行）(adopted by the SPC on Apr. 1, 2017), CLIC.3.317234(EN) (Lawinfochina), art. 8 (providing [Not Falling into the Scope of Civil Environmental Public Interest Lawsuits to Be Accepted by the People's Courts] Lawsuits filed by social organizations against the administrative conduct of administrative authorities and organizations authorized by the laws, regulations and rules, or lawsuits that are filed not directly against administrative conduct, but whose claims shall be based on the prerequisite whether the administrative conduct is examined by the people's courts to be lawful do not fall into the scope of civil environmental public interest lawsuits to be accepted by the people's courts.)

government agencies are prosecuted by procuratorates only in the administrative EPIL actions.⁹⁵⁸

4.2.4 Differences of Causes of Action

Since each legislation included its own citizen-suit provisions, the U.S. citizen suits thus are brought against specific environmental violations, which are stipulated in the citizen-suit provisions. For instance, the Clean Water Act's citizen-suit provisions elaborated on the types of violations that may be alleged,⁹⁵⁹ as did the Clean Air Act.⁹⁶⁰ Likewise, the Endangered Species Act provides a relatively broad range of the cause of action.

As for the system of judicial review, the judicial review of administrative legislation, such as the formulation of administrative regulations and directives, must not be based on the citizen-suit provisions of the environmental protection law instead of judicial-review provisions. In addition to *Chevron* doctrine, the APA statutes provide the exercise of judicial review apply "except to the extent that statutes preclude judicial review."⁹⁶¹ In practice, ENGOs also filed judicial review cases under the CAA § 307 and CWA § 509. Although judicial review and citizen suit are different in various aspects, ENGOs' actions led to the boost of EPG's enforcement and ruling process.

Comparatively, the cause of action in the ENGO EPIL in China was defined generally and broadly: all kinds of pollution and ecological damages acts that may harm the public interest can be prosecuted.⁹⁶² The causes of action have not provided any statutes on environmental elements,

⁹⁵⁸ Administrative Litigation Law, *supra* note 664, art. 25.

⁹⁵⁹ Clean Water Act § 505(a)(1), 33 U.S.C. §1365(a)(1) (2018).

⁹⁶⁰ Clean Air Act §§ 304(a)(1), (3), 42 U.S.C. §§ 7604(a)(1), (3) (2018).

⁹⁶¹ Administrative Procedure Act (APA), 5 U.S.C. 701 (2018).

⁹⁶² Environmental Protection Law, *supra* note 13, art. 58. § 1, For an act polluting environment or causing ecological damage in violation of public interest, a social organization which satisfies the following conditions may institute an action in a people's court.

much less the actions' illegality is not defined as a mandatory condition.⁹⁶³

As for regulation review in China, the Administrative Litigation Law provides that the courts shall not accept complaints against administrative regulations and rules or decisions and orders with generally binding force developed and rendered by administrative agencies.⁹⁶⁴ The absence of authorization to review illegitimate legislation, regulations, and orders has been noted and criticized in previous studies since the illegitimate norms widely damage the public interest and the ability to influence more extensive legal actions and administrative enforcement.⁹⁶⁵ The efficiencies of environmental governance, including enforcement and administrations, should not only count on reviewing the specific administrative actions but refuse to review abstract administrative regulations, policies, and norms that could influence wide and nonspecific realms. Theoretically, environmental administrations' effectiveness would be pushed and powerfully enhanced, resulting from ENGOs, and other kinds of plaintiffs can be authorized to initiate legal reviews of administrative regulations, norms, and policies after the authorization of judicial review.

4.2.5 The Timing

The U.S. citizen suit described the violations that have to exist presently, and continuous or intermittent violations are subject to enforcement, as "any person who is alleged to be in violation

⁹⁶³ See Gong, *supra* note 32, at 108.

⁹⁶⁴ The Administrative Litigation Law, *supra* note 664, art. 13.

⁹⁶⁵ Han Chengjun (韩成军), Yifazhiguo Shiyexia Chouxixiang Xingzheng Xingwei de Jiancah Jiandu (依法治国视野下抽象行政行为的检察监督) [The Procuratorial Supervision of Abstract Administrative Acts from the Perspective of Rule of Law], Vol. 3, HENAN SOC. SCI. 河南社会科学, 38, 43 (2015); Pan Jianfeng (潘剑锋), Zheng Hanbo (郑含博), Xingzheng Gongyisusong Zhidu Mudi de Jianshi (行政公益诉讼制度目的检视) [Review of the Purpose of Administrative Public Interest Litigation System], Vol.2, J. OF NAT'L PROSECUTORS COLLEGE, 国家检察官学院学报, 21, 35 (2020).

of ” an emission standard of limitations.⁹⁶⁶ The cases *NRDC v. Southwest Marine, Inc.*⁹⁶⁷ and *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, held that “to prevail at trial, a citizen-plaintiff must prove that ongoing violations actually have occurred. ‘[A] citizen plaintiff may prove ongoing violations’ either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.”⁹⁶⁸ Therefore, the Supreme Court held that CWA Section 505(a) did not confer federal jurisdiction over citizen suits for wholly past violations.⁹⁶⁹ Furthermore, the Supreme Court held that the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) did not permit citizen suits for past violations, as a continuing violation is a constitutional standing requirement.⁹⁷⁰ The “redressability comprises the core of Article III’s case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.”⁹⁷¹

There is no provision for the limitation of ENGO EPIL based on overlapping government prosecution in China. ENGOs have filed many lawsuits against completely terminated illegal acts that had already been criminally prosecuted. For example, *CBCGDF v. Ruitai Science and Technology Co., Ltd* was a case in which Ruitai and seven other companies discharged sewage exceeding regulatory standards to an evaporation pond, severely damaging the already fragile

⁹⁶⁶ Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (2018).

⁹⁶⁷ *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000).

⁹⁶⁸ *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988)).

⁹⁶⁹ 484 U. S. 56-63 (1987).

⁹⁷⁰ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 92, 118 S. Ct. 1003 (1998).

⁹⁷¹ *Id.* at 104; also *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990).

ecological system of the Tengger Desert. At the time of action in 2016, the remediation had not been completed yet, without any compensation and restoration.⁹⁷² Theoretically, the violations in those cases had long ceased as a result of public authorities' enforcement, and the violations would no longer recur for an extended period. Thus, some researchers concluded that China's legislature did not emphasize the relationship between continuing violations and citizen suit limitations.⁹⁷³ However, ENGOs established that those violations had not been fully prosecuted, including compensating and restoring the environment according to the torts laws so that they could still prosecute EPIL lawsuits after the Environmental Protection Law 2014 revision has been adopted. Before establishing the EPIL system in China, the violations had been only litigated in separate administrative or criminal cases where there were no concrete claimants for any compensation and restoration. Therefore, ENGO EPIL was designed as a roadmap to assert the significant environmental compensation and restoration liabilities under the Chinese legal system background to deal with prior environmental violations and ecological damages.

In addition, the SPC's Civil EPIL Interpretation provides that a violation may be prosecuted before the violation occurs. That is, if a prospective violation has a significant risk of damaging the public interest, ENGOs may commence EPIL actions for injunctive relief.⁹⁷⁴ For example, the

⁹⁷² China Biodiversity Conservation and Green Development Foundation Su Ningxia Ruitai Science and Technology Co., Ltd. (中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案) [China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd.] China Judgements Online, Guiding Case No. 75: China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd. 指导案例 75 号: 中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案 (Issued on Dec. 28, 2016 as deliberated and adopted by the Judicial Comm. of the Sup. People's Ct.) CLI.C.8726840(EN) (Lawinfochina).

⁹⁷³ Gong, *supra* note 32, at 109.

⁹⁷⁴ SPC's Civil EPIL Interpretation, *supra* note 658, art. 18.

FON, Shan Shui Conservation Center, and Wild China Film filed a lawsuit against the China Hydropower Engineering Consulting Group at the Kunming Intermediate People's Court to halt the ¥ 3.7 billion (\$532 million) construction of the hydropower plant on the Jiasa River. The construction would submerge the last major habitat of the green peafowl (*pavo muticus*), a kind of native peafowl in southeast China. Until the prosecution, the green peafowl numbered only five hundred, and the International Union for Conservation of Nature (IUCN) Red List of Threatened Species listed it as endangered in 2009 as “the bird saw a rapid population decline.”⁹⁷⁵

In March 2020, the Kunming Intermediate People's Court issued a first-instance judgment demanding the construction work on the dam be stopped, as the court confirmed that the construction area is the habitat of the green peafowls.⁹⁷⁶ Once that hydropower station floods the habitat, the damage to the peafowls will be irreversible. That is, the construction of the hydropower station posed a significant risk to the green peafowls and another species: *Chen cycads*.⁹⁷⁷ The court ruled that follow-up treatment for the station would be determined by authorities based on a post-environmental impact assessment, meeting the Ministry of Ecology and Environment (MEE) requirements, and a report of potential improvement steps should be done. The construction has been temporarily suspended but still threatens green peafowls' last largest and most intact habitat. So the FON and other co-plaintiffs had appealed to the Higher Court of Yunnan Province and was

⁹⁷⁵ Li Yunqi, *Green Peafowl's Last Habitat vs. 3.7-billion-yuan Dam*, CGTN, Mar. 20, 2020 <https://news.cgtn.com/news/2020-03-21/Green-peafowl-s-last-habitat-vs-3-7-billion-yuan-dam-P2bT7sSi5i/index.html> (Last visited Apr. 25, 2021).

⁹⁷⁶ *Ziranzhiyou su Zhongguo Shuidian Guwen Jituan Xinping Kaifa Youxiangongsi* (自然之友诉中国水电顾问集团新平开发有限公司、中国电建集团昆明勘测设计研究院有限公司) [FON v. Hydro China Consulting Group Xinping Development Co. Ltd. and Kunming Engineering Corporation Ltd.] Mar. 30, 2020 (Kunming Interm. People's Ct. Mar. 20, 2020) Dec. 31, 2020 (Yunnan High People's Ct. Dec. 31, 2020)

⁹⁷⁷ *Id.*

rejected.⁹⁷⁸ This case was called “the first preventive or precautionary EPIL for protecting endangered species” in China.⁹⁷⁹ As a pioneer, the FON filed several preventive EPIL cases in the past five years.⁹⁸⁰ Although most of those cases were rejected by the courts, as it is difficult to confirm if the possible action may pose a “significant risk” to the environment, this kind of action was predicted as a tendency in environmental oversight.⁹⁸¹ “Prevention is better than cure” is also valid and applicable to environmental litigations in the Chinese legal context.

4.2.6 Pre-suit Conditions

In the United States, three procedural conditions are prerequisites to commence citizen suits: advance notice to the defendant and the government agencies by the plaintiff; the absence of governmental diligence prosecution; and the existence of a continuing violation. These conditions are interlinked and logical. Almost all the citizen-suit provisions provide that no action may be commenced as absent compliance with the pre-suit conditions. A typical rule of advance notice is in Clean Water Act § 505(b)(1)(A), which provides that no action may be commenced “(1) prior

⁹⁷⁸ *Id.*

⁹⁷⁹ Qie Jianrong (郄建荣), *Shouli Yeshengdongwu Baohu Yufangxing Huanjing Gongyisusong* (首例野生动物保护预防性环境公益诉讼一审判决出炉环保组织向生态环境部申请撤销环评批复) [The First Instance Trial of the First Preventive Environmental Public Interest Lawsuit for Wildlife Protection is Released--ENGOS Apply to the MEE to Cancel the EIA Approval] THE LEGAL DAILY, 法制网 (Apr. 30, 2020). http://www.legaldaily.com.cn/zfzz/content/2020-04/03/content_8161603.htm. (Last visited Apr. 25, 2021).

⁹⁸⁰ FON, *Ziranzhiyou Su Zhongshiyong Yunnan Lianyoxiangmu Huanjing Gongyisusong An* (自然之友诉中石油云南炼油项目环境公益诉讼案--自然之友首提起预防性公益诉讼) [Friends of Nature to Sue PetroChina Yunnan Oil Refining Project EPIL Case—FON First Filed Preventive Public Interest Litigation] FON, (May 12, 2017). http://www.fon.org.cn/index.php?option=com_k2&view=item&id=10522:2017-05-12-08-14-21&Itemid=111

⁹⁸¹ See Dimitri De Boer, *China Should Allow Lawsuits before Environmentally Risky Projects Begin*, CHINA DIALOGUE, (Feb. 10, 2020). <https://chinadialogue.net/en/business/11846-china-should-allow-lawsuits-before-environmentally-risky-projects-begin/>; See Yu Wenxuan (于文轩), Mou Tong (牟桐), Lun Huanjing Minshi Susongzhong “Zhongdafengxian” de Sifarending (论环境民事诉讼中“重大风险”的司法认定) [On the Judicial Determination of “Significant Risks” in Environmental Civil Litigation], *Falü Shiyong* (法律适用) [NAT. JUDGES COLLEGE L. J.] Vol. 14, 2019, at 32. (Expressing that environmental harm would be prevented from occurring, and it could cope with many disputes with the improving system and procedures in practice.)

to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order.”⁹⁸²

Most waiting periods are sixty days provided in various acts,⁹⁸³ except for the ninety-day waiting period in some RCRA cases.⁹⁸⁴ Regardless of how many days the waiting period is, the purpose behind the advance notice is to encourage government agencies’ enforcement. Citizen suits have been described as a pragmatic “instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts.”⁹⁸⁵

Moreover, if the administrator or state has commenced diligently prosecuting an enforcement action, the violation has been remedied, or the violation otherwise no longer exists, the citizen suit will not be allowed to commence.⁹⁸⁶

These preconditions for the U.S. citizen suit indicate that public enforcement and administrative enforcement are recognized as the first priority for environmental enforcement. The Supreme Court also held that the sixty-day notice provision “is a mandatory, not optional,

⁹⁸² Clean Water Act § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (2018).

⁹⁸³ See Clean Air Act § 304(b), 42 U.S.C. § 7604(b) (2018); CERCLA § 310(d)(1), 42 U.S.C. 9659(d)(1) (2018); TSCA § 20(b)(1)(A), 15 U.S.C. 2619(b)(1)(A) (2018); SDWA §1449(b), 42 U.S.C. § 300j-8(b) (2018); RCRA § 7002(b)(1), 42 U.S.C. 6972(b)(1) (2018) (sixty-day period in the RCRA is for regulatory enforcement as the violation of the provisions).

⁹⁸⁴ See RCRA § 7002(b)(2), 42 U.S.C. 6972(b)(2) (2018) (ninety-day period is for the imminent and substantial endangerment to health or the environment in (a)(1)(B))

⁹⁸⁵ S. Rep. No. 1196, 91st Cong., 2d Sess., 36 (1970), *reprinted in* Environmental Policy Division of the Congressional Research Service, A Legislative History of the Clean Air Amendments of 1970, Vol. I at 36-39 (1974); *reprinted in* Nat. Res. Def. Council v. Train, 166 U.S. App. D.C. 312, 510 F.2d 692, 723 (1974). As the remarks of Senator Muski at Senate Debate on S. 4358, Sept. 2970.

⁹⁸⁶ Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2018).

condition precedent for suit.”⁹⁸⁷

In China, there is no such condition in the ENGO EPIL statutes, and the plaintiff does not need to notify anyone or any authority before filing a lawsuit. The SPC’s Civil EPIL Interpretation provides that only the court has the responsibility to notify the relevant authorities, “the agencies assuming environmental protection supervision and administration responsible for the defendant’s conduct,” after accepting the ENGO environmental public interest case.⁹⁸⁸ This procedure confirms that the case information should be provided to the relevant officials, but only after the case has been accepted. The obligation to issue the notice is upon the court instead of the plaintiff. That is, diligent enforcement was not a barrier or a pre-suit prerequisite when filing an ENGO EPIL lawsuit in practice. The legislatures thus ignored and abandoned some essential features when they imported the U.S. citizen suit system to establish the ENGO EPIL system.

4.2.7 Intervention

The U.S. citizen-suit provisions regulate intervention, authorizing the EPA administrator to intervene if the administrator was not a party in that case. To protect the interests of the United States, the plaintiff “shall serve a copy of the complaint on the Attorney General and the Administrator.”⁹⁸⁹ They also have to send any proposed consent judgment to the Department of Justice forty-five days prior to entry in court.⁹⁹⁰ Additionally, the Attorney General may intervene

⁹⁸⁷ Hallstrom v. Tillamook Cty., 493 US 20, 23-26, (1989); Oscar Mayer & Co. v. Evans, 441 US 750, 755, 99 S. Ct. 2066 (1979); Wash. Trout v. McCain Foods, 45 F.3d 1351, 1354-1355 (9th Cir. 1995) (The holding on RCRA’s requirement was applicable to the notice requirements under the CWA.) The notice requirements are widely used.

⁹⁸⁸ SPC’s Civil EPIL Interpretation, *supra* note 658. (providing art. 12. The people’s court shall, within ten days after accepting an environmental civil public interest litigation, inform the department assuming environmental protection supervision and administration functions responsible for the defendant’s conduct.)

⁹⁸⁹ The typical provisions are CWA § 505(c)(2), 33 U.S.C. § 1365 (c) (2); CAA § 304(c)(2), 42 U.S.C. § 7604(c)(2) (2018).

⁹⁹⁰ *Id.*

on behalf of the United States at the Secretary's request in an Endangered Species Act case if the United States is not a party.⁹⁹¹

No similar intervention provision has been included in China's ENGO-EPIL legislation. However, the idea of public interest protection has been detailed in several articles. According to the SPC's Civil EPIL Interpretation, the court shall notify the administration about the violation after the court accepts the case.⁹⁹² An agreement proposed by two parties shall be reviewed only by the court, and if the court deems the content of the agreement does not damage the public interest, the court then issues and discloses a mediation paper.⁹⁹³ Moreover, if the plaintiff insufficiently claimed in a lawsuit, the court has to explain to the plaintiff to modify the claims with all the environmental public interests.⁹⁹⁴ In short, although these provisions had been adopted to embody the idea of intervening for the public interest, the court's supervisory functions are increased to the point they may intervene with judicial impartiality. Additionally, although the procuratorate has been authorized to file public interest litigation if no ENGO brought up an EPIL case for the same violations,⁹⁹⁵ it cannot be defined as contemplating intervention but as an

⁹⁹¹ ESA §11 (g)(3)(B), 16 U.S.C. § 1540 (g)(3)(B) (2018).

⁹⁹² SPC's Civil EPIL Interpretation, *supra* note 658, art. 2 (providing "the people's court shall, within ten days after accepting an environmental civil public interest litigation, inform the department assuming environmental protection supervision and administration functions responsible for the defendant's conduct.")

⁹⁹³ *Id.*, (art. 25, Where the parties to an environmental civil public interest litigation reach a mediation agreement or a settlement agreement by themselves, the people's court shall announce the content of the agreement for no less than 30 days. After the expiration of the announcement period, if the people's court deems upon examination that the content of the mediation agreement or settlement agreement does not damage the public interest, it shall issue a mediation paper. If the parties apply for withdrawing the case on the ground of reaching a settlement agreement, the people's court shall not grant such an application. The mediation paper shall state the claim, basic case facts and the content of the agreement, and shall be disclosed.)

⁹⁹⁴ *Id.*, art. 9 (providing where the people's court deems that the claim filed by the plaintiff is insufficient to protect the public interest, it may explain to the plaintiff to modify its claim or increase such claims as ceasing the tortious act and restoring to the original state.

⁹⁹⁵ Civil Procedure Law 2017, *supra* note 664, art. 55 (providing that "Where the People's procuratorate finds in the

alternative prosecution or supplementary prosecution.

4.2.8 Amicus Curiae and Public Interest Litigation Supporter

The phrase amicus curiae means: “friend of the court” in Latin,⁹⁹⁶ indicates that a person is not a party to a lawsuit but has petitioned the court or is requested by the court to file a brief in the action as their strong interest in the subject matter.⁹⁹⁷ Amicus curiae’s participation has occurred from time “immemorial in the Common Law of England” and is a product of the Roman custom of collecting advice and suggestions.⁹⁹⁸ “An amicus curiae cannot manage the case nor appeal from a judgment,”⁹⁹⁹ but they can offer information to the court on some matter of law to inform the decision. Many kinds of people can be amici curiae, but professionals are preferred, such as Attorney Generals,¹⁰⁰⁰ law school professors,¹⁰⁰¹ attorneys,¹⁰⁰² and NGO staff.¹⁰⁰³ Thus, “there is a very little general discussion of the status, rights obligations, and limitations of amicus curiae.”¹⁰⁰⁴ Notably, many law schools disclosed their amicus briefs on the website, as the law schools and their law clinics, are experienced and professional in various fields, such as Yale Law School, Harvard Law School, Stanford Law School, Columbia Law School, Berkeley Law School,

performance of functions any conduct that undermines the protection of the ecological environment and resources, infringes upon consumers’ lawful rights and interests in the field of food and drug safety or any other conduct that damages social interest, it may file a lawsuit with the People’s court if there is no authority or organization prescribed in the preceding paragraph or the authority or organization prescribed in the preceding paragraph does not file a lawsuit. If the authority or organization prescribed in the preceding paragraph files a lawsuit, the People’s procuratorate may support the filing of a lawsuit.”)

⁹⁹⁶ Amicus Curiae, ENCYCLOPEDIA BRITANNICA, Apr. 13, 2018. <https://www.britannica.com/topic/amicus-curiae>

⁹⁹⁷ *Amicus Curiae*, BLACKS’ LAW DICTIONARY (9th ed. 2009)

⁹⁹⁸ *Casey v. Male*, 63 N.J. Super. 255, 258 (Super. Ct. 1960).

⁹⁹⁹ *Givens v. Goldstein*, 52 A.2d 725, 726; *See also* 2 Am. Jur. § 7, at 682, and 3 C.J.S. § 3(8), at 1051, *reprinted in* *Goldberg v. Mahoney*, Civil No. 3904., 1962 US Dist. LEXIS 4406 (E.D. Tenn. July 19, 1962).

¹⁰⁰⁰ *Am. Canoe Ass’n v. Attalla*, 363 F.3d 1085 (11th Cir. 2004).

¹⁰⁰¹ *Env’t Tex. Citizen Lobby v. ExxonMobil Corp.*, 968 F.3d 357 (5th Cir. 2020).

¹⁰⁰² *Id.*

¹⁰⁰³ *Id.*

¹⁰⁰⁴ *Casey v. Male*, 63 N.J. Super. 255, 258 (Super. Ct. 1960).

and Boston College Law School.¹⁰⁰⁵ Vermont Law School also listed all amicus briefs of the environmental lawsuits on its website.¹⁰⁰⁶ Most law schools' amicus briefs are submitted by professors and the intern-students in legal clinics, which deserves to be applied widely. These hands-on experiences influence court decisions, advance legal theory, and impel and offer participation in litigations.

China's EPIL also provides a similar system to the amicus curiae participation. It regulated that procuratorates, environmental government agencies, ENGOs, and other institutes may adhere to ENGOs in filing EPIL cases by providing consulting opinions and assisting investigations.¹⁰⁰⁷ Although the 1982 Civil Procedure Law established the Chinese amicus curiae (supporting system), participation was rare for the first three decades.¹⁰⁰⁸ In fact, environmental cases are sometimes so complicated that many ENGOs cannot prepare and commence the cases themselves.¹⁰⁰⁹ The

¹⁰⁰⁵ Yale Law School, Amicus Briefs, YALE <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/ethics-bureau/amicus-briefs/>; Harvard Law School, Amicus Briefs, <https://clinics.law.harvard.edu/cji/amicus-briefs/>; Stanford Law School, Amicus Briefs, <https://law.stanford.edu/juelsgaard-intellectual-property-and-innovation-clinic/amicus-briefs/>; Columbia Law School, Professors' Amicus Curiae Briefs Shape the Law, <https://www.law.columbia.edu/news/archive/professors-amicus-curiae-briefs-shape-law-0>; Berkeley Law School, Amicus Briefs, <https://www.law.berkeley.edu/research/california-constitution-center/amicus-briefs/> and Boston College Law School, Amicus Brief Clinic, <https://www.bc.edu/bc-web/schools/law/academics-faculty/experiential-learning/clinics/amicus-brief.html> (Last visited Apr. 25, 2021).

¹⁰⁰⁶ Vermont Law School, Amicus Briefs.

<https://www.vermontlaw.edu/academics/clinics-and-externships/ENRLC/amicus-briefs> (Last visited Apr. 25, 2021).

¹⁰⁰⁷ SPC's Civil EPIL Interpretation, *supra* note 658, art. 11 (providing "A procuratorial organ, the department assuming environmental protection supervision and administration functions or any other authority, social organization, or enterprise or public institution may, in accordance with the provisions of Article 15 of the Civil Procedure Law, support a social organization in legally filing an environmental civil public interest litigation by such means as providing legal consulting, submitting written opinions and assisting investigation and gathering of evidence.")

¹⁰⁰⁸ XI, *supra* note 607, at 155 (2015); CHANG YI (常怡) MINSHI SUSONGFA XUE (民事诉讼法学) [CIVIL PROCEDURE LAW] 79 (1999).

¹⁰⁰⁹ See All-China Environment Federation, NRDC (Natural Resources Defense Council) "The Role of Environmental NGOs in Environmental Public Interest Litigation: Research Report" Jan. 2014. <http://nrdc.cn/Public/uploads/2016-12-02/584164402a261.pdf> (Most ENGOs staff is volunteers focusing on legal issues and lacking environmental law professionals.)

legislature eventually activated and emphasized this existing amicus-curiae provision in SPC's Civil EPIL Interpretation to encourage plaintiffs' backup during proceedings. After five years of ENGO EPIL practice, one of the organizations, the Center for Legal Assistance to Pollution Victims (CLAPV), an unregistered ENGO, actively played the role of amicus curiae.¹⁰¹⁰ CLAPV (also known as Environmental and Resource Law Research and Service Center in the China University of Political Science and Law) is a legal-aid office and a training center at the University. The CLAPV supported the FON and other incapable ENGOs in many EPIL actions, inspiring and impelling many other potential amici curiae to provide advice, submit written opinions, assist in investigations and evidence collection. In addition, public opinions may help avoid juridical corruption, as officials' opinions, like amicus briefs, can be submitted to the court rather than secretly transmitted to judges.¹⁰¹¹ Comparatively, the CLAPV rarely displayed their amicus briefs but only the attorney's assistances' pictures on their website. These detailed experiences should thoroughly demonstrate the amicus' supporting undertakings and guide precedents in practice to promote the detailed regulations of Chinese amicus curiae.¹⁰¹²

4.2.9 Remedies

The U.S. citizen suit authorizes two major remedies: injunctive relief and civil penalties. But, in fact, most cases are settled through consent decrees. A typical and unique feature of these

¹⁰¹⁰ CLAPV, *Center for Legal Assistance to Pollution Victims or CLAPV* (CLAPV 污染受害者法律帮助中心 as also known as Environmental and resource law research and service center in China university of political science and law) at the China University of Political Science and Law is a legal-aid office, training center, and one of the most effective non-registered environmental social organization in China. CUPL.EDU.CN (Sept. 19, 2016). http://wrzx.wz.dlszywz.net.cn/vip_wrzx.html, <http://msjifxy.cupl.edu.cn/info/1030/3039.htm>.

¹⁰¹¹ Liu Renwen (刘仁文), Chen Yanru (陈妍茹), *Fatingzhiyou: Sifa Xina Minyi de Haobangshou* (法庭之友: 司法吸纳民意的好帮手) [*Amicus Curiae: A Good Helper or The Judiciary to Attract Public Opinion*] IOLAW (Mar. 23, 2015). <http://www.iolaw.org.cn/showArticle.aspx?id=4322>

¹⁰¹² XI, *supra* note 607, at 163-164.

consent decrees is the Supplemental Environmental Project, the SEP.

An injunction is an essential and primary remedy to citizen-suit enforcement; the provisions authorize to compel compliance with the environmental standards or orders that defendants are accused of violating.¹⁰¹³ The importance of injunction relief is recognized by the courts and “is necessary for the proper implementation of the statutes.” Prohibitory injunctions and affirmative (mandatory) injunctions are two typical types of injunctions.¹⁰¹⁴ To win injunctive relief, the plaintiff has the burden of demonstrating that there is no plain, adequate, and complete remedy in law and that an irreparable injury will result unless the relief is granted.¹⁰¹⁵ The Supreme Court has ruled against the automatic issuance of injunctions against violations and has declined to issue immediate and automatic injunctions.¹⁰¹⁶ Nevertheless, injunctive relief has been regarded as an essential remedy in citizen suits. Both prohibitory and mandatory injunctions may adequately be issued under the RCRA.¹⁰¹⁷ In particular, a private citizen suing under RCRA § 6972(a)(1)(B) could seek a mandatory injunction, which can order a responsible party to act by attending to the cleanup and proper disposal of waste.¹⁰¹⁸ Comparing the two, one sees that “mandatory injunctions are more burdensome than prohibitory injunctions; they require plaintiffs to demonstrate entitlement to the injunction by heavy and compelling evidence.”¹⁰¹⁹

¹⁰¹³ CWA § 505(a), 33 U.S.C. § 1365(a) (2018).

¹⁰¹⁴ MILLER & ENV'T L. INST., *supra* note 9, at 76; *Injunction*, BLACK'S LAW DICTIONARY, (9th ed. 2009).

¹⁰¹⁵ *Ashkenazi v. US Attorney Gen. of the United States*, 246 F. Supp. 2d 1,3 (D.D.C. 2003); Edward Lloyd, *Citizen Suits and Defenses Against Them*, ALI-ABA Course of Study Materials, Environmental Litigation, June 2008, at 847.

¹⁰¹⁶ *Id.*; *Injunction*, BLACK'S LAW DICTIONARY, (9th ed. 2009); *Weinberger v. Romero-Barcelo*, 456 US 305, 317-318 (1982).

¹⁰¹⁷ RCRA 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

¹⁰¹⁸ *Meghrig v. Kfc W.*, 516 U.S. 479, 481, 116 S. Ct. 1251, 1253 (1996).

¹⁰¹⁹ *See SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991); *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1171 (D. Wyo. 1998).

The civil penalty is another form of remedy form in a citizen suit. With the exception of the Endangered Species Act, the citizen-suit provisions in most acts provide that the court is authorized to “apply any appropriate civil penalties.”¹⁰²⁰ In the Clean Water Act and the RCRA, the amount and conditions of the civil penalties are also provided and applied to their citizen-suit provisions.¹⁰²¹ Penalties under these sections have to be paid to the US Treasury instead of the enforcers.¹⁰²² The Clean Water Act also prescribes that courts have to consider the seriousness of the violations, the economic benefit from the violations, and any history of the violations, any good-faith efforts of the defendant to comply with the applicable requirements, the economic impact of the penalty on the violator, and other such matters as justice may require when courts were setting civil penalties.¹⁰²³ The CAA also provided similar standards, in which the penalties under that Act shall be used for particular purposes¹⁰²⁴ and “shall be deposited in a special fund in the U.S. Treasury for licensing and other services.” Expenditures from the fund need to be administered appropriately, such as financing air compliance and enforcement activities.¹⁰²⁵

¹⁰²⁰ 33 U.S.C. § 1365 (a) (2018); 42 U.S.C. § 7604 (a) (2018); 42 U.S.C. § 6972 (a).

¹⁰²¹ Clean Water Act §§ 505(a), 309(d), 33 U.S.C. §§ 1365(a), 1319(d) (2018) (providing a civil penalty not to exceed \$25,000 per day for each violation. RCRA §§ 7002, 3008(g), 42 U.S.C. §§ 6972, 6928 (g) (any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.)

¹⁰²² 31 U.S.C. § 3302(b) (2018) (providing an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.); Clean Air Act § 304, 42 U.S.C. § 7604(g)(1) (2018) (“Penalties received under subsection (a) shall be deposited in a special fund in the United States Treasury for licensing.”); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 US 1, 14 n 25; 3, n 4. (“Under the FWPCA, civil penalties, payable to the Government, also may be ordered by the court. § 505 (a), 33 U.S.C. § 1365 (a).” *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 1984 US Dist. LEXIS 17134 (D.R.I. Apr. 30, 1984) (“While civil penalties may be assessed as provided for in 33 U.S.C. § 1319(d), such penalties are payable to the government, not to the plaintiffs.”) *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1151 (E.D. Pa. 1982) (The statute by its own terms, restricts the right to collect civil penalties to the Department of Environmental Resources.)

¹⁰²³ CWA § 309(d), 33 U.S.C. § 1319 (d) (2018).

¹⁰²⁴ CAA § 113(e)(1), 42 U.S.C. § 7413 (e)(1) (2018).

¹⁰²⁵ CAA § 304(g), 42 U.S.C. § 7604 (g) (2018).

Therefore, the civil penalties under citizen-suit provisions are restricted by conditions in each law, such as the regulated violators, the amount of penalties, and the consideration for penalty calculation. As for other monetary liabilities, neither compensation to the plaintiff nor compensation for ecological environmental damage falls within the citizen-suit remedies' scope.

Most environmental citizen suits are resolved through settlement agreements, which need to be approved before an entry of consent decree by the courts. That is, settlement agreements are by nature contracts between parties based on statutes and their own interests. Consent decrees are formal and effective settlements that occur after the court's entry.¹⁰²⁶ Three requirements are applied in processing the approval and entry of consent decrees:¹⁰²⁷ "(1) the result of good faith bargaining rather than collusion;¹⁰²⁸ (2) fair, just, and equitable;¹⁰²⁹ and (3) in the case of a suit enforcing a statute, including a citizen suit, consistent with the statute being enforced."¹⁰³⁰ Therefore, each consent decree, as an enforceable judicial decree of the U.S. citizen suit, ought to be examined by courts based on its good faith, equitability, and legitimacy to ensure the consistent and substantial protection of public interest.¹⁰³¹

¹⁰²⁶ MILLER & ENV'T L. INST., *supra* note 9, at 89.

¹⁰²⁷ *Id.*

¹⁰²⁸ *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 551 (6th Cir. 1982).

¹⁰²⁹ *Id.* at 552 (6th Cir. 1982) ("Second, the court must consider whether the decree is fair and reasonable to non-minorities who may be affected by it."); *Citizens for a Better Env't v. Gorsuch*, 231 U.S. App. D.C. 79, 718 F.2d 1117, 1126 (1983) ("The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.")

¹⁰³⁰ *Citizens for a Better Env't v. Gorsuch*, 231 U.S. App. D.C. 79, 718 F.2d 1117, 1125 (1983) (The statement that a district court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," 364 U.S. at 651, "the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement.")

¹⁰³¹ *Citizens for a Better Env't v. Gorsuch*, 231 U.S. App. D.C. 79, 718 F.2d 1117, 1126 (1983) ("prior to approving a consent decree a court must satisfy itself of the settlement's 'overall fairness to beneficiaries and consistency with the public interest' " *United States v. Trucking Employers, Inc.*, 182 U.S. App. D.C. 315, 561 F.2d 313, 317 (D.C. Cir.

As a typical kind of consent decrees, supplemental environmental projects (SEPs) have been applied and developed over the years. SEPs generally apply the EPA settlement policy reflected in the 2015 Update to the 1998 US Environmental Protection Agency Supplemental Environmental Projects.¹⁰³² SEPs are not penalties and are always lower amounts and less stigmatizing than penalties. In a word, defendants often prefer to conduct a SEP, avoiding a long, drawn-out penalty trial.¹⁰³³ However, several disadvantages to such projects also exist. The penalties may not exactly equal the cost of the SEPs, which may be more than the penalties. Due to the complications and potential difficulties in projects, the work may not make the process as planned.¹⁰³⁴ Significantly, SEPs have been accepted where the parties agreed that the alleged violator would fund projects related to the violation, which triggered the suit instead of letting the money disappear into a general fund as penalties.¹⁰³⁵ By implementing SEPs, the parties agree that the violator funds a SEP to improve the environment in the area where the alleged violation occurred.

In China, the remedies of ENGO EPIL are not provided separately but use the remedies of the Tort Law automatically, which embodies the legislatures' private law thinking. Thus, the tort statutes¹⁰³⁶ and the SPC's Civil EPIL Interpretation have been regarded as two applicable laws

1977), quoting *United States v. Allegheny-Ludlum Industries*, 517 F.2d 826, 850 (5th Cir. 1975).

¹⁰³² US ENV'T. PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY: 2015 UPDATE (Mar. 10, 2015), <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>

¹⁰³³ Joel M. Gross, *supra* note 72, at 133-134.

¹⁰³⁴ *Id.* at 134.

¹⁰³⁵ Michael P. Stevens, Supplemental Environmental Projects to Settle Citizen Suits Under the Clean Water Act, 1995 Georgia Water Resources Conference [106] 349, Apr. 1995.

<https://smartech.gatech.edu/bitstream/handle/1853/44072/StevensM-95.pdf?sequence=1&isAllowed=y>

¹⁰³⁶ Civil Code, *supra* note 657, (providing the Tort Liability Chapter has been provided in the Civil Code, bk. 7, since 2021.)

when considering the remedies in each environmental public interest lawsuit.¹⁰³⁷ The SPC's Civil EPIL Interpretation aimed to interpret the remedies' provisions by concentrating on public interest remedies. According to the SPC's Civil EPIL Interpretation Article 18, "the plaintiff may request the defendant to assume the civil liabilities including but not limited to the cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration to the original state, compensation for losses, and apology."¹⁰³⁸ These remedies were designed as the logical order of "damaging-elimination-compensation," the logic of civil law.¹⁰³⁹ Moreover, Articles 19 to 24 of the SPC's Civil EPIL Interpretation regulate the contents and procedures of each kind of remedy, adding some specialized situations in environmental public interest lawsuits. For instance, plaintiffs are authorized to request that the defendant pay the expenses incurred for taking reasonable prevention and disposal measures to cease the tortious act, remove the obstruction, and eliminate the danger.¹⁰⁴⁰ The restoration-consists of restoring the ecological environment to the state and functions before the damage occurs and the service function restoration (expenses for the loss of service functions during the period from the damage to the ecological environment to the restoration thereof).¹⁰⁴¹ Alternative restoration methods may be allowed when the complete restoration cannot be accomplished.¹⁰⁴² The remedy of restoration can be adopted to require the

¹⁰³⁷ SPC's Civil EPIL Interpretation, *supra* note 658.

¹⁰³⁸ SPC's Civil EPIL Interpretation, *supra* note 658, art. 18 (providing for any conduct that pollutes the environment and damages the ecology, which has damaged the public interest or has the major risk of damaging the public interest, the plaintiff may request the defendant to assume the civil liabilities including but not limited to the cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration to the original state, compensation for losses, and apology.)

¹⁰³⁹ Gong, *supra* note 32, at 110.

¹⁰⁴⁰ SPC's Civil EPIL Interpretation, *supra* note 658, art. 19.

¹⁰⁴¹ *Id.*, art. 20, 21.

¹⁰⁴² *Id.*, art. 20.

defendant to restore the environment compensate for the cost of environmental restoration.

Several acceptable compensation usages have been explored thus far. Firstly, fiscal accounts have been established to compensate for ecological damages, which are managed and operated by government agencies. For instance, Kunming City, Shaoxing City, Wuxi City, and Taizhou City were the first cities to adopt their policies to operate such funds: The Interim Measures of Kunming City for the Administration of Special Funds for EPIL Relief,¹⁰⁴³ the Interim Measures of Wuxi City for the Administration of Environmental Protection Fund,¹⁰⁴⁴ the Interim Measures of Shaoxing City for Administration of Compensation for Ecological Environmental Damage,¹⁰⁴⁵ and the Interim Measures of Taizhou City for the Administration of EPIL Funds.¹⁰⁴⁶

For example, the Interim Measures of Kunming City for the Administration of Special Funds for EPIL Relief established a special account for EPIL relief to solve the shortage of EPIL and environmental restoration funds.¹⁰⁴⁷ The Interim Measures of Shaoxing City for Administration of Compensation for Ecological Environmental Damage requests to implement special account storage and special account management for ecological environment damage compensation. The

¹⁰⁴³ Kunmingshi Huanjing Gongyisusongjiuji Zhuanxiangzijin Guanli Zanxingbanfa (昆明市环境公益诉讼救济专项资金管理暂行办法) [Interim Measures of Kunming City for the Administration of Special Funds for EPIL Relief], (adopted at Kunming City Government on Sept. 14, 2010).

¹⁰⁴⁴ Wuxishi Huanbao Gongyijin Guanli Zanxingbanfa (无锡市环保公益金管理暂行办法) [the Interim Measures of Wuxi City for the Administration of Environmental Protection Fund], (adopted at The Wuxi Intermediate People's Court on Dec. 24, 2012.)

¹⁰⁴⁵ Shaoxingshi Shengtaihuanjing Sunhaipeichangjin Guanli Zanxingbanfa, (绍兴市生态环境损害赔偿金管理暂行办法) (绍市环发(2015) 52 号) [The Interim Measures of Shaoxing City for Administration of Compensation for Ecological Environmental Damage], (adopted at Shaoxing City Environmental Protection Bureau and Shaoxing City Finance Bureau in Aug.2015.)

¹⁰⁴⁶ Taizhou City Huanjinggongyisusong Zijinguanli Zanxingbanfa (泰州市环境公益诉讼资金管理暂行办法) [The Interim Measures of Taizhou City for the Administration of EPIL Funds], Adopted at Taizhou City Government on Mar. 17, 2016. http://www.taizhou.gov.cn/art/2016/4/29/art_28806_3.html

¹⁰⁴⁷ The Interim Measures of Shaoxing City for Administration of Compensation for Ecological Environmental Damage, *supra* note 1045.

Shaoxing Environmental Protection Bureau has set up a special account for eco-environmental damage compensation under its unified fiscal account to implement special funds for exclusive use and unified accounting. The Finance Bureau provides corresponding bills for fund collection. The Environmental Protection Bureau is responsible for collecting, managing, and distributing compensation for ecological damage, and the Municipal Finance Bureau is responsible for the supervision of revenue and expenditure.¹⁰⁴⁸

The second type of compensation operation is foundations. Foundation is the nonprofit legal person that donates property for public welfare undertakings, according to the Regulation on Foundation Administration.¹⁰⁴⁹ In the practice of the EPIL system, some national public fundraising foundations have tried to manage and use the compensation funds of environmental public interest litigation. For instance, the CBCGDF cooperated with the Qingzhen People's Court to establish a special fund for ecological environment restoration in Guizhou Province in 2016. The special fund is used for EPILs' compensation in Guizhou Province's EPIL actions, judged by the Qingzhen People's Court.¹⁰⁵⁰ One of the cases' compensation funds had been operated so that the sewage treatment project contemplated in the agreement of CBCGDF's case.¹⁰⁵¹

¹⁰⁴⁸ *Id.*

¹⁰⁴⁹ Jijinhui Guanli Tiaoli (基金会管理条例)The Regulation on Foundation Administration, (adopted at the 38th executive meeting of the State Council on Feb. 4, 2004, is hereby promulgated, and shall be implemented as of June 1, 2004, Mar. 8, 2004), CLI.2.52033(EN) (Lawinfochina).

¹⁰⁵⁰ CBCGDF Special Fund in Guizhou Province, 2016. <http://www.cbcgdf.org/FundShow/0/2/9.html>; See Ma Rongzhen (马荣真), Ge Feng (葛枫), & Lin Yanmei (林燕梅), Huanjing Gongyi Susong Peichangjin Congnalai? Zenmeguan? 环境公益诉讼赔偿金从哪来? 怎么管? [Where does the compensation for EPIL come from? How to manage?] ZHONGGUO HUANJING (中国环境) [CHINA ENV'T.] 2017/1-2, 2017. <http://www.zhhjw.org/a/qkzz/zzml/20170102/fmbd/2017/0220/6308.html>.

¹⁰⁵¹ *Id.*

The third explorative method of compensation operation is to set up charitable trusts, which are similar to charitable lead trusts. A charitable trust is “An irrevocable trust made in favor of a charity and allowing the charity to receive income from the trust property for a specified period.”¹⁰⁵² The ENGO FON and the defendant Hyundai Motor (China) Investment Co., Ltd. agreed in a settlement that the defendant shall contribute ¥ 1.2 million to set up a charitable trust, Chang’an International Trust, for the atmospheric environment protection.¹⁰⁵³ This case was the first compensation trust for an EPIL case, thus marking a historic breakthrough in managing the compensation in similar cases in China.¹⁰⁵⁴

Since compensation funds, including the settlement amount, donations, and the trust interest, are determined in the courts’ judgments most special funds are managed and supervised by the governments and lack public supervision, and it is difficult for governments and ENGOs to use such funds for restoration in EPIL’s enforcement.¹⁰⁵⁵ The trust companies are capable of managing the compensation, and the decision-making committee and the supervisor can ensure professional operation and adequate supervision but need more appropriate regulations.

In addition, although the injunctive relief provisions have not been enacted in the EPIL system, China’s Civil Procedure Law already provides the primary provision, called preservation.¹⁰⁵⁶ It

¹⁰⁵² *Charitable Lead Trust*, BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁰⁵³ *Ziranzhiyou Su Xiandaiqiche Zhongguo Touzi Youxiangongsi Daqiwan Zeren Jiufen An* (北京市朝阳区自然之友环境研究所诉现代汽车（中国）投资有限公司大气污染责任纠纷案) [Case of Friends of Nature Environmental Research Institute in Chaoyang District, Beijing Municipality v. Hyundai Motor Group (China) Ltd. for dispute over air pollution liability], 2020 SUP. PEOPLE’S CT. REPORT. (Beijing Fourth Interm. People’s Ct. May 21, 2019) CLI3.342053(EN) (Lawinfochina) <http://www.court.gov.cn/zixun-xiangqing-228361.html>.

¹⁰⁵⁴ *Id.* One of the Selected Reasons.

¹⁰⁵⁵ Ma, Ge, & Lin, *supra* note 1050; based on the author’s working experiences.

¹⁰⁵⁶ Civil Procedure Law, *supra* note 664, art. 100.

prescribes that if a party caused any damage to the opposing party's property, upon the owner's application, the court issues a ruling on preserving the injured party's property, ordering, and the court will order certain conduct of the party or prohibit the party from certain conduct.¹⁰⁵⁷ However, the provision has not clearly been authorized in the EPIL mechanism, and only one case tentatively has cited this fundamental statute for ceasing and controlling air pollution in Beijing.¹⁰⁵⁸

Finally, when the parties reach a mediation agreement or a settlement agreement by themselves, the court has to announce the agreement's content within thirty days. Moreover, if the content of the mediation agreement or settlement agreement does not damage the public interest, the court shall issue a mediation paper. If the parties apply to withdraw the case on the grounds of reaching a settlement agreement, the court shall not grant such an application.¹⁰⁵⁹

Thus, China's ENGO EPIL system, along with procuratorial EPIL and the compensation system for damage to the ecological environment, provides claims for public-interest conservation, including compensation for environmental removal and recovery. The compensation is always reimbursed to a particular account for environmental restoration in the future. Meanwhile, the U.S. citizen suits always achieve the reliefs according to the particular activity involved, including penalties and compliance relief according to the consent decrees or judgments. The costs of removal and recovery are provided according to other statutes instead of the citizen-suit provisions.

¹⁰⁵⁷ *Id.*

¹⁰⁵⁸ Beijingshi Disi Renminjianchayuan Su Beijing Duocailianyi Guoji Gangjiegou Gongcheng Youxiangongsi (北京市第四人民检察院诉北京多彩联艺国际钢结构工程有限公司), [The Fourth People's Procuratorate of BeijingBeijing Su Beijing Duocailianyi International Steel Engineering Co., Ltd.] 2017 BEIJING FOURTH INTERM. PEOPLE'S CT. June 5, 2018

¹⁰⁵⁹ SPC's Civil EPIL Interpretation, *supra* note 658, art. 25.

Although personal and property rights in ENGO EPIL cases and citizen-suit actions are excluded from being pursued in the two countries, both proceedings are for the public interest.

4.2.10 Fee-Shifting

Due to the complexity and expense of environmental litigations, the U.S. citizen-suit provisions provide that the cost of litigation, “including reasonable attorney and expert witness fees,” partly alleviates the burden of attorney fees when ENGOs initiate enforcement.¹⁰⁶⁰ Most statutes for fee awards to the “prevailing or substantially prevailing party,”¹⁰⁶¹ except the relevant provisions of the Endangered Species Act, Toxic Substances Control Act, and Safe Drinking Water Act.¹⁰⁶² Additionally, the cost can also be awarded to any prevailing party, as determined as appropriate by the court.¹⁰⁶³ In practice, only plaintiffs are typically awarded this expense recovery, and those provisions were comprehended that fees are shifted “in only one direction” since Congress’s purpose with the provisions was to encourage plaintiffs and their attorneys to file claims for the public interest.¹⁰⁶⁴

A Supreme Court case demonstrating circumstances in which a prevailing defendant should

¹⁰⁶⁰ Walter B. Russell II. & Paul Thomas Gregory, *Awards of Attorney’s Fees in Environmental Litigation: Citizen Suits and the Appropriate Standard*, 18 GA. L. REV. 307, 326-327 (1984). Mark Tannahill, Comment, *Fee-Shifting Provisions and the Clean Air Act: Should Financially-Motivated Plaintiffs be Barred from Recovering Fees*, 49 SANTA CLARA L. REV. 863, 863-864(2009).

¹⁰⁶¹ For instance, Clean Air Act § 304(d), 42 U.S.C. § 7604(d) (2018); Clean Water Act § 505(d), 33 U.S.C. § 1365(d) (2018); RCRA § 7002(e), 42 U.S.C. § 6972(e) (2018); CERCLA § 310(f), 42 U.S.C. § 9659(f) (2018); Endangered Species Act §11(g)(4), 16 U.S.C. § 1540(g)(4) (2018); Safe Drinking Water Act § 1449 (d), 42 U.S.C. §300j-8(d) (2018); EPCRA §326(f), 42 U.S.C. § 11046(f) (2018); Toxic Substances Control Act § 20(c)(2), 15 U.S.C. §2619 (c) (2018).

¹⁰⁶² Endangered Species Act §11(g)(4), 16 U.S.C. § 1540(g)(4) (2018); Safe Drinking Water Act § 1449 (d), 42 U.S.C. §300j-8(d) (2018); Toxic Substances Control Act § 20(c)(2), 15 U.S.C. §2619 (c) (2018) (All citizen-suit provisions in these four acts omits the phrase “prevailing or substantially prevailing party”).

¹⁰⁶³ CAA 304(d), 42 U.S.C. § 7604 (d) (2018).

¹⁰⁶⁴ Bruce Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government-Subsidized Litigation*, 47 LAW & CONTEMP. PROBS. 211, 213-214 (1984).

be awarded attorney fees under similar employment law provisions is *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, decided in 1978.¹⁰⁶⁵ The Supreme Court held that “prevailing defendants may be awarded attorney and expert fees if the plaintiffs’ claims were ‘frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so,’” applying Title VII of the Civil Rights Act of 1964.¹⁰⁶⁶ In *Sierra Club v. Energy Future Holdings Corp. et al.* in 2014, the court applied the *Christiansburg* Standard to justify attorneys’ fees for the defendant.¹⁰⁶⁷ The court ruled in favor of the defendants, as they were no particular matter violations at one of the defendants’ power plants; they were the prevailing party and motioned the court to recoup their attorneys’ fees.¹⁰⁶⁸ The court found that the *Christiansburg Standard* had been met, as the defendants provided detailed numbers of hours billed and billing rates but did not render any plaintiffs alleged “unreasonable” evidence.¹⁰⁶⁹ Additionally, the experts’ efforts were reasonable to defend against the plaintiffs’ claims, so the awarding costs were also warranted.¹⁰⁷⁰ Thus the defendants’ expert-witness fees and lawsuit costs recovered more than six million dollars from Sierra Club.¹⁰⁷¹ Therefore, there it is possible that plaintiffs undertake the defendant’s expense either based on the fee-shifting provisions or based on

¹⁰⁶⁵ *Christiansburg Garment Co. v. Equal Emp’t Opportunity Comm’n*, 434 U.S. 412, 423 (1978).

¹⁰⁶⁶ *Id.* at 423, (1978); and Civil Rights Act § 706(k), 42 U.S.C.S. § 2000e-5(k) (2018).
 (k)Attorney’s fee; liability of Commission and United States for costs. In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

¹⁰⁶⁷ *Sierra Club v. Energy Future Holdings Corp.*, Civil Action No. W-12-CV-108, 2014 U.S. Dist. LEXIS 185296, at *15 (W.D. Tex. Aug. 29, 2014)).

¹⁰⁶⁸ *Id.* at *5, *17.

¹⁰⁶⁹ *Id.* at *18.

¹⁰⁷⁰ *Id.* at *20-21.

¹⁰⁷¹ *Id.* at *21.

precedents.

In China, the Environmental Protection Law has not enacted any fee-shifting statutes, while the SPC's Civil EPIL Interpretation provides that the plaintiff can request that only the defendant reimburse them for their plaintiff's expert expenses, reasonable attorney fees, and other reasonable expenses for litigation.¹⁰⁷² Compared with the U.S. citizen-suit provisions, the Chinese judicial interpretation thus authorizes only that defendants pay the plaintiff's expenses, not vice versa.

4.3 ENGOs' Differences

According to the research, NGOs are the product of voluntary impulses, religious feelings, and traditional customs. These are the resources of NGOs, and Carnegie's charitable attitude and actions influenced many wealthy circles.¹⁰⁷³ He distributed almost all his wealth to establish many institutes, including more than two thousand libraries by the early 20th century. He was recognized as the father of modern philanthropy, which enduringly influences other millionaires and the public.¹⁰⁷⁴ Moreover, ENGOs play a significant role in commencing U.S. citizen suits and ENGO environmental public interest litigations in China. The different situations of the ENGOs in the

¹⁰⁷² SPC's Civil EPIL Interpretation, *supra* note 658, art. 22 (providing "Where the plaintiff requests the defendant to assume the inspection and identification expenses, reasonable attorney fee and other reasonable expenses for litigation, the people's court may support such a request in accordance with law.")

¹⁰⁷³ See Jia Xijin (贾西津), *Weishenme Fada Guojia NGO Yefada? (为什么发达国家 NGO 也发达?) [Why are NGOs in developed countries also developed?]* Yanhuang Chunqiu, 炎黄春秋 Vol. 2, 89-93 (2016); ANDREW CARNEGIE, GOSPEL OF WEALTH, Two Articles Originally Published in The North American Review June 1889 & Dec. 1889, at 9. (Carnegie mentioned three modes of wealth's distribution, and only one of them can be used for great fortunes. Some property would be passed through and gathered for public purpose in his ideal imagination.)

¹⁰⁷⁴ See Andrew Carnegie, Andrew Carnegie's Story, <https://www.carnegie.org/interactives/foundersstory/#/> (Last visited Mar.3, 2021.)

two countries resulted in distinct ENGOS' survival and litigation development. The researchers rarely deeply prob the reasons for Chinese ENGOS' lack of capacity, instead merely assuming the situation.¹⁰⁷⁵ Although the ENGOS' development stage and social backgrounds cannot be parallel, the narrowing circumstance, cumbersome norms, and ENGOS' customary practice can still illustrate major gaps and the insufficient capacities of Chinese ENGOS to file EPIL actions.

4.3.1 Operations Differences

Although the procedures of registration of ENGOS are complicated, the benefits and operation guidelines are distinct. As distinct from China's ENGOS, the US ENGOS' registration is based on well-defined criteria for tax exemptions, and they do not have to satisfy any obscure political requirements or encounter registration challenges, which reflected an increasingly strict attitude of the civil society in China.¹⁰⁷⁶

In the United States, there are concrete and complicated steps to found an NGO and getting registered.¹⁰⁷⁷ Except for the tax exemption regulations, each state establishes its requirements of NGOs' foundation and registration.¹⁰⁷⁸ Take New York State for instance, the requirements are

¹⁰⁷⁵ Zhang, Huang, Peng, and Deng, *supra* note 40, at 185-187. (The report in this Green Book directly stated without any reference and research: The lack of social organization capabilities is reflected in many aspects such as environmental protection expertise, legal talents, and financial guarantees. For example, the staff are mostly volunteers, and there are neither environmental protection professionals nor full-time personnel engaged in legal services. And because ENGO has no fixed funding source, the organization is small and it is difficult to raise funds, and its own living conditions are worrying. As a result, unable to initiate environmental public interest litigation) (Similar assertions have been made in other articles as well.)

¹⁰⁷⁶ See HUANG XIAOYONG (黄晓勇), CAI LIQIANG (蔡礼强), HE HUI (何辉), AND XU TONGWU (徐彤武), ZHONGGUO SHEHUI ZUZHI BAOGAO (2019) (中国社会组织报告 (2019)) [REPORT ON SOCIAL ORGANIZATION IN CHINA (2019)] (2019). (The report directly admitted and concluded that the policy tone and policy environment are strict, and advice that social organizations should enhance capacities and credits according to the laws and regulations).

¹⁰⁷⁷ Starting a Nonprofit Organization, USA.Gov, Apr. 9, 2019, <https://www.usa.gov/start-nonprofit>.

¹⁰⁷⁸ IRS, State Links for Exempt Organizations, ("State government websites with useful information for tax-exempt organizations, including registration requirements for charities, taxation, information for employers, and more.") Apr. 21, 2020, <https://www.irs.gov/charities-non-profits/state-links>; New York State Office of the Attorney General, Charities, https://www.charitiesnys.com/charities_new.html

all listed on the website of the Office of the Attorney General, and the registration can be completed online according to detailed guidelines.¹⁰⁷⁹ Some documents also can be submitted annually online.¹⁰⁸⁰ After the registration at both the state and federal level, the ENGOs will enjoy a significant benefit, the tax exemption. According to the Internal Revenue Services (IRS), five categories of NGOs are recognized and offered different tax benefits with conditional requirements.¹⁰⁸¹ No matter what kind of social organization, the US Code provides concrete tax exemption requirements.¹⁰⁸² Qualified ENGOs and their donors receive tax-exempt treatment and tax-deductible contributions, respectively.¹⁰⁸³ Thus, these tangible benefits attract more donors to support ENGOs. In addition, the federal government offers ENGOs some organizational operations grants.¹⁰⁸⁴ In summary, the procedures for registration, tax incentive, and granting application are all detailed and establish straightforward approaches to start and operate an ENGO in the United States. These convenient guidelines mirrored the US advanced administrative system and promoted the creation of nonprofits and their participation in various missions.

In contrast, each Chinese social organization has been required to find a competent business

¹⁰⁷⁹ *Id.*

¹⁰⁸⁰ New York State Office of the Attorney General, Charities Annual Filing (CHAR500).

https://www.charitiesnys.com/annual_filing.html

¹⁰⁸¹ Starting a Nonprofit Organization, USA.Gov, Apr. 9, 2019, <https://www.usa.gov/start-nonprofit>. (USA. Gov introduces five kinds of organizations: Charitable or religious organizations, Social welfare organizations, Labor and agricultural organizations, Business leagues, and Veterans organizations. However, the IRS websites categorized five kinds of nonprofits are charitable organizations, churches and religious organizations, private foundations, political organizations, and other nonprofits. IRS, Exempt Organization Types, <https://www.irs.gov/charities-non-profits/exempt-organization-types>)

¹⁰⁸² 26 U.S.C § 501 (2018).

¹⁰⁸³ IRS, Charitable Contribution Deductions, Nov. 2, 2020.

<https://www.irs.gov/charities-non-profits/charitable-organizations/charitable-contribution-deductions>

¹⁰⁸⁴ Starting a Nonprofit Organization, *supra* note 1081; Federal Grants Website, <https://www.grants.gov/web/grants/home.html>

unit or identify a sponsored government agency as a parent before registration. The competent business units are authorized to guide the NGOs' work as the agencies and NGOs work in the related or same realms.¹⁰⁸⁵ Moreover, NGOs cannot be registered online. The staff needs to prepare and print all the required materials to go to the social organization service offices of the Ministry of Civil Affairs or local Civil Affairs Bureaus in person to finish the registration.¹⁰⁸⁶

Furthermore, party branches (party organizations) are encouraged to establish representation within Chinese NGOs.¹⁰⁸⁷ The branches promote publicity, implements the party's guidelines and policies, support the organizations, and supervise the organizations to adhere to the laws and political policies. Moreover, the party branches strengthen the members' capacities to keep the party branches leading the consolidation of spiritual civilization and ideological and political work.¹⁰⁸⁸ This form was borrowed from the administrative agencies, public institutions (like universities and hospitals), and state-owned enterprises, including party representatives. Notably, this project planned to expand the party's influence in the social organizations, enhance the public mass foundation, and consolidate its governing foundation.¹⁰⁸⁹ More than ninety million party

¹⁰⁸⁵ Ministry of Civil Affairs, Registration of Social Association, <http://www.mca.gov.cn/article/fw/xzsp/shht/cldj/bszn/>; Ministry of Civil Affairs, Registration of Foundation, <http://www.mca.gov.cn/article/fw/xzsp/jjh/cldj/bszn/>; Ministry of Civil Affairs, Registration of Private Non-enterprise Unit, <http://www.mca.gov.cn/article/fw/xzsp/mbfqy/cldj/bszn/>

¹⁰⁸⁶ *Id.*; Shanghai Civil Affairs Bureau, Social Associations Registration, <http://zwtdt.sh.gov.cn/govPortals/bsfw/item/73b4d33e-ce09-48c1-ae6a-06264a1cfc7b>.

¹⁰⁸⁷ See Zhonggong Zhongyang Bangongting Yinfa Guanyu Jiaqiang Shehuiquzhi Dangdejianshegongzuo de Yijian (Shixing) (中共中央办公厅印发关于加强社会组织党的建设工作的意见(试行)) [Opinions of the General Office of the CPC Central Comm. on Strengthening Party Organizations Building Work in Social Organizations (for Trial Implementation)] (adopted at the General Office of the CPC Central Comm. on Sept. 29, 2015.) CLI.16.257713 (Lawinfochina) <http://cpc.people.com.cn/n/2015/0928/c64387-27643931.html>

¹⁰⁸⁸ *Id.*

¹⁰⁸⁹ *Id.*

members were selected out of prominent people working in various industries so that this party system presents a powerful system of advantages in China.¹⁰⁹⁰ However, if both the party system and competent business unit supervise the organizations' work and campaign regularly, the NGOs, especially the grass-root ENGOs, will be subject to too much oversight rather than perform inclusive and wide advocacy.¹⁰⁹¹ Although the party branch-establishment project is not mandatory in every social organization and ENGO, social-organization development is leaning towards strict supervision and gradually tightened control.¹⁰⁹²

In addition, the grass-root organizations rarely applied for guaranteed governmental grants, while the GONGOs are unique organizations created and sponsored by the agencies and receiving a steady flow of resources. The GONGOs aim to assist and participate in sponsored-administrations actions. Among these GONGOs, only a few proactive ENGOs brought up EPIL

¹⁰⁹⁰ Xinhua Net (新华社), Zuixin Shuzi! Zhongguogongchandang Dangyuan Zongshu Wei 9191.4 Wanming (最新数字! 中国共产党党员总数为 9191.4 万名) [The latest figures! The total number of members of the Communist Party of China is 91.914 million], XINHUA NET (June 30, 2020), http://www.xinhuanet.com/politics/2020-06/30/c_1126178260.htm (Last visited Aug. 31, 2020).

¹⁰⁹¹ Although the FON had not establish a party branch, the competent business bureau always contacted the FON when it prepared to bring up some influence and complicated cases, not for guiding, but for advising to cease the actions.

¹⁰⁹² HUANG, CAI, HE, AND XU, *supra* note 1076. (The report on social organization in China concluded that the policy tone and policy environment are strict because of the various supervisions); *See*, Minzhengbu, Jiaqiang Shehuizuzhijianguan Fangfan he Chuzhi Feifajizi (加强社会组织监管 防范和处置非法集资) [Ministry of Civil Affairs, Strengthen supervision of social organizations to prevent and deal with illegal fund-raising] Aug. 20, 2018, http://www.moe.gov.cn/s78/A05/s7655/ztzl_xcjcxcjy_cycl/201808/t20180820_345625.html (The article precisely illustrates the Social Organization Administration of Ministry of Civil Affairs prioritize to strictly supervise the staff, the resources, and the property of the organizations); *See* Minzhengbubangongting Guanyu Tiaozheng Youhua Youguan Jianguancuoshi Zhichi Quanguoxing Shehuizuzhi Youxiaoyingduiyiqing Pingwenjiankangyunxing de Tongzhi (民政部办公厅关于调整优化有关监管措施支持全国性社会组织有效应对疫情平稳健康运行的通知) [Notice of the General Office of the Ministry of Civil Affairs on Adjusting and Optimizing Relevant Regulatory Measures to Support National Social Organizations in Effectively Responding to the Epidemic, Running Smoothly and Healthily] Apr. 2, 2020. CLI.4.341226 (Lawinfochina) http://www.gov.cn/zhengce/zhengceku/2020-04/03/content_5498541.htm. (The notice announced eleven preferential notices, such as postponing the annual inspect, arranging the service forms prefer to online service. In fact, the twelfth emphasized that the administrations in each level must strengthen law enforcement and deal with each case strictly according to the law.)

actions, such as the CBCGDF and the ACEF.¹⁰⁹³ Therefore, although the GONGOs optimize their resources to commence the EPIL cases, their actions are limited and supervised by the sponsoring agencies.¹⁰⁹⁴ Technically, a kind of Purchase of Service Contracting (POSC) Project had been pervasive since 2000, in which ENGOs have been encouraged to work with the governments to promote environmental protection according to the policies issued by the Ministry of Finance, Ministry of Civil Affairs, and the State Council.¹⁰⁹⁵ However, litigation costs cannot be reimbursed from the POSC projects, as the government only grants funding for elementary education programs, and nonrestricted grants do not exist.¹⁰⁹⁶ International NGOs and foundations have also granted restricted dollars for environmental protection programs but not for

¹⁰⁹³ Their typical cases: CBCGDF Su Sun Hu, Zhang Jingmin, Liu Xiaohua, Shi Cuiying, and Shi Yuqin (中国生物多样性保护与绿色发展基金会诉孙虎等环境污染公益诉讼案) [CBCGDF v. Sun Hu, Zhang Jingmin, Liu Xiaohua, Shi Cuiying, and Shi Yuqin] June 27, 2016 (Xuzhou Interim Ct. June 27, 2016); Zhonghua Huanbao Lianhehui, Guiyang Gongzhong Huanjingjiaoyuzhongxin Su Guiyangshi Wudangqu Dingpa Zaozhichang Shuiwuran zerenjiufenan (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) [ACEF and Guiyang Public Environmental Education Center v. Dingpa Paper Mill of Wudang District, Guiyang City] Nine Model Trial Cases Involving Environmental Resources Published by the Sup. People's Ct., 2014 SUP. PEOPLE'S CT. GAZ. 11 [217] (China) CLI.C.2991069(EN) (Lawinfochina). <https://www.chinacourt.org/article/detail/2014/07/id/1329697.shtml>; No. 3 of Ten Model Cases regarding Environmental Public Interest Litigations Published by the Sup. People's Ct.: All-China Environment Federation v. Shandong Dezhou Jinghua Group Zhenhua Co., Ltd. (Civil public interest litigation regarding air pollution) 最高法发布十起环境公益诉讼典型案例之三: 中华环保联合会诉山东德州晶华集团振华有限公司大气污染民事公益诉讼案 CLI.C.8913082(EN) (Lawinfochina).

¹⁰⁹⁴ Liu, *supra* note 45, at 84, 95.

¹⁰⁹⁵ Guowuyuanbangongting Guanyu Zhengfuxiang Shehuililiang Goumaifuwu de Zhidaoyijian (国务院办公厅关于政府向社会力量购买服务的指导意见) [Guiding Opinions of the General Office of the State Council on Government Purchase of Services from Non-Governmental Organizations] Sept. 26, 2013. CLI.2.210888 (Lawinfochina). http://www.gov.cn/jzwk/2013-09/30/content_2498186.htm; Caizhengbu, Minzhengbu Guanyu Tongguo Zhengfugoumaifuwu Zhichi Shehuizuzhi Peiyufazhan de Zhidaoyijian, (财政部、民政部关于通过政府购买服务支持社会组织培育发展的指导意见)[Ministry of Finance, Ministry of Civil Affairs, Guiding Opinion of the Ministry of Finance and Ministry of Civil Affairs on Supporting the Cultivation and Development of Social Organizations through Governmental Purchase of Service Contracting (POSC)] CLI.4.287693 (Lawinfochina) Projects. Dec. 1, 2016. <http://www.mca.gov.cn/article/xw/tzgg/201612/20161215002821.shtml>

¹⁰⁹⁶ Weng Shihong (翁士洪), Zhengfuxiang Shehuizuzhi Goumai Gonggongfuwu de Jianguanjizhi Yanjiu (政府向社会组织购买公共服务的监管机制研究) [Empirical Study on Regulation Mechanism of Purchase of Service Contracting], Beijing Hangkong Hangtian Daxue Xuebao, Shehui Kexue Ban (北京航空航天大学学报, 社会科学版) [J. OF BEIJING U. OF AERONAUTICS AND ASTRONAUTICS SOCIAL SCI. EDITION], no.30(4) 2017, at 23-32. <http://html.rhhz.net/BJHKHTDXXBSKB/20170405.htm#top>

litigation either.¹⁰⁹⁷ Under these circumstances, the grass-roots advocacy-oriented ENGOs, such as the FON, collaborated with Alibaba Foundation and JD.com, Inc foundation to fund primary litigation costs, including investigation and evidence costs.¹⁰⁹⁸

Two events illustrated a trend of improved ENGO fundraising. Tencent's 99 Giving Day (99 Charity Day) campaign was established in 2015 as a charity festival, with more than a thousand NGOs and fifty-eight million participants at the most recent event held September 7-9th, in each year until 2020. Thousands of companies committed to making matching grants with each donation. ENGOs displayed their projects and campaigned online to attract participants to donate regularly.¹⁰⁹⁹ Since then, ENGOs have experienced huge donations increase from ¥ 128 million to ¥ 2.32 billion in the past five years; Tencent and its 99 Giving Day campaign have gradually promoted and developed a national culture of goodwill and philanthropy.¹¹⁰⁰ FON, Fujian Green Home Environment-Friendly Center, and other ENGOs participated in the festival and displayed their conservation projects to an increasing number of donors. Particularly, FON's Conservation

¹⁰⁹⁷ Based on this author's work experiences (NRDC Beijing Office granted FON's attorney fellowship over five years, ABA Beijing Office granted the cost of seminars and workshops to the FON since 2013 to 2016. The FON avoided to use dollars from the international organizations on the litigation.)

¹⁰⁹⁸ Alibaba Foundation, Construction of civil action network and support system for environmental public interest litigation, 环境公益诉讼民间行动网络及支持体系建设, Dec. 30, 2014. <http://www.alijinhui.org/content/12761>; Wang Erde (王尔德), Alibaba Foundation: In the Next Five Years, 300 Million Will be Invested in ENGOs (阿里巴巴公益基金会: 未来5年出资3亿资助环保公益组织), 21st Century Business Herald, Apr. 8, 2017. <https://m.21jingji.com/article/20170408/herald/12b96ab801519fa42dddf66b8576f54.html>

FON, Thanks to JD.com Charity and JD.com Crowdfunding for Their Funds to the FON 感谢京东公益与京东众筹对自然之友的支持, May 15, 2017.

http://www.fon.org.cn/index.php?option=com_k2&view=item&id=10444:2017-05-12-08-13-24&Itemid=111

¹⁰⁹⁹ Tencent, 2020 Tencent 99 Giving Day Broke Record for Charity Donation (2020年99公益日创30亿善款记录) Sept. 10, 2020, <https://www.tencent.com/zh-cn/articles/2201081.html>; Cision, PR Newswire, 2020 99 Giving Day Breaks Record for China Internet Charity Platform by Tencent, Sept. 10, 2020.

<https://www.prnewswire.com/news-releases/2020-99-giving-day-breaks-record-for-china-internet-charity-platform-by-tencent-301127178.html>

¹¹⁰⁰ *Id.*

with Legal Actions project gained nearly ¥ 180,000.¹¹⁰¹

In addition, Chinese ENGOs imitated advanced American donation strategies to reach the fundraising goals, including eye-catching signs seeking donations, email subscriptions, and targeted recommendations to family and friends of supporters. The most successful strategies attracted recurring donations, such as monthly. These unrestricted funds are essential to the NGOs' survival and operation.¹¹⁰² Notably, the FON had established a monthly donation program since 2016, and more than four thousand donors have donated ¥ 1.2 million (\$170,000) to maintain the FON's several projects and operations so far.¹¹⁰³ One of the FON's staff takes charge of fundraising by learning from the experiences and strategies of the NRDC, the Sierra Club, and the Wilderness Society to fill the gap to create a fundraising working system. Moreover, Alibaba's Alipay platform also can collect donations for each NGOs' program. The Alipay has credit and influence, attracting and helping more ENGOs initiate donation projects on the platform.¹¹⁰⁴

¹¹⁰¹ FON, Tencent 99 Giving Day Appreciations: Every Step of Conservation is Inseparable from You, 99 公益日答谢 | 守护大自然的每一步都离不开你们, FON (Sept. 12, 2020),

http://www.fon.org.cn/index.php?option=com_k2&view=item&id=14252:99&Itemid=216

¹¹⁰² Erica Waasdorp, Monthly Giving Is Unrestricted Money, NONPROFITPRO (Feb. 17, 2020),

<https://www.nonprofitpro.com/post/monthly-giving-is-unrestricted-money/>; Will Kenton, Unrestricted Cash, May 9, 2018, <https://www.investopedia.com/terms/u/unrestricted-cash.asp> (Unrestricted money is the money that without any particular use, and can use for any purpose.) <https://www.investopedia.com/terms/u/unrestricted-cash.asp>; Lou Pengbo (娄蓬勃) 全球 1/3 公益机构或将在一年内关闭, 需非限定资金支持 [Survey: One-third of Global Public Interest Organizations May Close Within a Year, Requiring Unrestricted Financial Support]

CHINADEVELOPMENTBRIEF (July 17, 2020), <http://www.chinadevelopmentbrief.org.cn/news-24449.html>.

¹¹⁰³ FON, Donation—Becoming the Partners of the Nature (慈善募集, 做大自然的合伙人) FON (May 2019), http://www.fon.org.cn/index.php?option=com_k2&view=itemlist&layout=category&Itemid=126

¹¹⁰⁴ UNFCCC, Alipay Ant Forest: Using Digital Technologies to Scale up Climate Action, China, <https://unfccc.int/climate-action/momentum-for-change/planetary-health/alipay-ant-forest>; NASA Earth Observatory, Human Activity in China and India Dominates the Greening of Earth, NASA Study Shows, NASA (Feb. 11, 2019), <https://www.nasa.gov/feature/ames/human-activity-in-china-and-india-dominates-the-greening-of-earth-nasa-study-shows;UNEP>, (Chinese initiative Ant Forest wins UN Champions of the Earth award, Sept. 19, 2019. (Alipay's Ant Forest project launched on the Alipay platform and rewards the users with green energy points when they reduce their emission, riding bikes, walking, and purchasing online. The green energy points plant a virtual tree on the app, "which Alipay matches by planting a real tree or protecting a conservation area, in partnership with local NGOs." 100 million

Nevertheless, some Chinese ENGOs' strategy was insufficiently attractive to use crowdfunding for each case. As for GONGOs, the CBCGDF mistakenly called for acceptance-fee crowdfunding through three unqualified platforms after the Changzhou Intermediate Court had dismissed the plaintiffs' claims in the case of *FON, CBCGDF v. Jiangsu Changlong Chemical Co., Ltd., Changzhou Changyu Chemical Co., Ltd., and Jiangsu Huada Chemical Group Co., Ltd.*¹¹⁰⁵ The CBCGDF ignored civil procedure requirements and failed to perfect the appeal but collected the first instance trial's acceptance cost. Technically, the SPC's Civil EPIL Interpretation allows ENGOs to apply for the payment postponement, and two plaintiffs filed the application forms when they brought up the case.¹¹⁰⁶ The appellant may settle the acceptance cost with the appellate court in practice. Thus, it was utterly untrue and irresponsible for the CBCGDF to assert that the court suppressed the ENGOs through high litigation costs. CBCGDF illegally raised money and resulted in many problems and mistrust of all ENGOs and private enforcement. Although crowdfunding has been pervasive in this smartphone era, ENGOs professionals still need to

real trees had been planted in the northwestern, and NASA reported that the world is greener, especially in China. The project won UN Champions of the World.)

¹¹⁰⁵ Ziranzhiyou, Zhongguo Shengwuduoyangxingbaohu yu Lüsefazhanjijinhui Su Jiangsu Changlong Huagongyouxiangongsi, Changzhoushi Changyu Huagongyouxiangongsi, and Jiangsu Huadahuagongjiguan Youxiangongsi (北京市朝阳区自然之友环境研究所、中国生物多样性保护与绿色发展基金会诉江苏常隆化工有限公司、常州市常宇化工有限公司、江苏华达化工集团有限公司) [FON, CBCGDF v. Jiangsu Changlong Chemical Co., Ltd., Changzhou Changyu Chemical Co., Ltd., Jiangsu Huada Chemical Group Co., Ltd] Jan. 25, 2017, (Changzhou Interm. People's Ct. Jan. 25, 2017) Ye Quan (叶泉), 常州毒地案, 诉讼费不是问题 [The Legal Cost in the Changzhou Case, is not an issue.] XINHUA NET. 新华社(Feb. 8, 2017), http://www.xinhuanet.com/legal/2017-02/08/c_129470509.htm; (Qie Jianrong) 郚建荣 常州法院回应“天价公益诉讼案” [Changzhou Court Responds to “High-priced Public Interest Litigation”], Legal Daily, <https://www.chinacourt.org/article/detail/2017/02/id/2540864.shtml>. (Li Yukun) 李云坤, 被判“天价诉讼费”公益组织发起募捐 [One ENGO Convicted of “Expensive Litigation Fees” Initiates Cross-fund Raising] Beijing News, http://www.fon.org.cn/index.php?option=com_k2&view=item&id=11405:2017-05-12-10-24-19&Itemid=121.

¹¹⁰⁶ SPC's Civil EPIL Interpretation, *supra* note 658, art 23.

prioritize transparency and legitimacy in private enforcement. Good faith and reputation are still essential for the slow-growing NGOs in the Chinese social situation and public opinion.

Last but not least, Chinese tax incentive provisions of public interest social organizations are too complicated to provide benefits, which are not as direct and plain as the US tax exemptions. The qualified nonprofit incomes may be exempt from tax, such as the donations, interest income, and other income determined by the government agencies.¹¹⁰⁷ The condition of the NGO-tax exemption consists of two parts: the determination of the eligibility of NGOs for tax exemption and the pre-tax deduction of public welfare donations. The tax exemption eligibility of a nonprofit organization requires certain conditions. It must be a registered legal nonprofit organization engaged in public welfare activities. The salaries have to be controlled not to exceed two times the average wages of the same industry in the same regions. The eligibility needs to be redetermined and approved by the local administration every five years.¹¹⁰⁸ Based on this author's interviews, only the FON acquired eligibility after over five years of application.¹¹⁰⁹ In terms of the pre-tax deduction of public welfare donations, donations to qualified organizations may be deducted in

¹¹⁰⁷ See Notice of the Ministry of Finance and the State Administration of Taxation on Issues concerning the Administration of the Determination of the Eligibility of Non-profit Organizations for Tax Exemption 财政部、税务总局关于非营利组织免税资格认定管理有关问题的通知(adopted by Ministry of Finance, State Taxation Administration on Jan. 1, 2018), CLI.4.310510(EN) (Lawinfochina); Enterprise Income Tax Law of the People's Republic of China 中华人民共和国企业所得税法 (adopted at the 5th Session of the 10th Nat'l People's Cong. of the People's Republic of China, Mar. 16, 2007, and amended in accordance with the Decision of the Standing Comm. of the Nat'l People's Cong., on Amending the Enterprise Income Tax Law of the People's Republic of China (2017) as adopted at the 26th session of the Standing Comm. of the Twelfth Nat'l People's Cong. of the People's Republic of China, Feb. 24, 2017), CLI.1.291045(EN) (Lawinfochina), art. 26; Regulation on the Implementation of the Enterprise Income Tax Law of the People's Republic of China 中华人民共和国企业所得税法实施条例 (adopted by the State Council at the 197th executive meeting on Nov. 28, 2007 and is hereby promulgated for effect as of Jan. 1, 2008), art. 84. CLI.2.100121(EN) (Lawinfochina).

¹¹⁰⁸ *Id.*

¹¹⁰⁹ Telephone Interview with Li Xiang, Operation Director of the FON (Nov. 5, 2020). (In Nov. 2020, the FON the eligibility of non-profit organizations for tax exemption but not approved of pre-tax deduction of public welfare donations.)

calculating the amount of taxable income in accordance with the provisions of tax laws for three years nationwide. The lists of NGOs qualified for pre-tax deduction of public welfare donations are based on the joint determination by the finance, taxation, and civil affairs departments of every level.¹¹¹⁰ This author's investigation revealed that FON had not been qualified yet, and all the non-private enterprises have not been qualified.¹¹¹¹ In summary, both criteria for determining the eligibility of NGOs for tax exemption and the pre-tax deduction of public welfare donations provided are over-restrictive, leading to great financial pressure and complicated and cumbersome tax incentive applications, which adversely affect NGOs' actions.

4.3.2 Attorney and Professionals Differences

As described, many US ENGOs were established in the 1960s and 1970s, and EDF, the Sierra Club, these early legal and policy advocacy ENGOs were devoted to citizen enforcement. The NRDC was another renowned lawyer-scientist-staffed organization founded in 1971, in which attorneys and environmental professionals provided a firm assurance of citizen oversight so that many seminal cases were filed to promote the policies and acts of the historic environmental moment. The NRDC, the EDF, the Sierra Club, and the FOE and their staff attorneys sought and accomplished optimization of the U.S. citizen-suit to oversee the government agencies and violators. With the case victories, violations ceased, and even the laws were revised, the public awareness of the environmental movements' efforts increased. Earth Justice was created as a Sierra

¹¹¹⁰ Announcement of the Ministry of Finance, the State Taxation Administration and the Ministry of Civil Affairs on Matters Concerning the Pre-tax Deduction of Public Welfare Donations 财政部、税务总局、民政部关于公益性捐赠税前扣除有关事项的公告, Jan. 1, 2020. CLI.4.342454(EN) (Lawinfochina).

¹¹¹¹ Telephone Interview with Li Xiang, *supra* note 1109.

Club litigation spin-off so as to advance environmental legal work, which proved the classic concept of Adam Smith, the division of labor leads to an increase in productivity.¹¹¹² Not only the national influenced ENGOs advanced citizen enforcement, regional ENGOs also collaborated with law school clinics to take action. Significantly, the Hudson Riverkeeper organization helped create and collaborated with the Pace Law School environmental litigation clinic to address the New York region's conservation for three decades.¹¹¹³

The emergence of environmental law professionals and scientists was instrumental to the development of environmental administration, legal education, and attorneys' training. Besides previous descriptions of environmental public enforcement and movements, American attorneys' social status has been high and fundamental since the country's founding. Many founding fathers who signed the Declaration of Independence and created the United States Constitution were attorneys.¹¹¹⁴ The American legal system was reinforced by the law school's socialization, embedding both professionalism and an adversarial legal culture, which triggered law graduates who staffed ENGOs to demonstrate professionalism.¹¹¹⁵ Additionally, most plaintiffs' attorneys are awarded attorney fees based on fee-shifting provisions, which motivates plaintiffs' attorneys.

In addition, the experts are hired without any restrictions. The courts decide whether to admit

¹¹¹² ADAM SMITH, THE WEALTH OF NATIONS (AN INQUIRY INTO THE NATURE & CAUSES OF THE WEALTH OF NATIONS), ch.1 (1776). <https://www.marxists.org/reference/archive/smith-adam/works/wealth-of-nations/book01/ch01.htm>

¹¹¹³ CRONIN & KENNEDY, *supra* note 301, at 119.

¹¹¹⁴ See JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION, (1893); National Archives, America's Founding Documents; <https://www.archives.gov/founding-docs> National Archives, Meet the Framers of the Constitution, <https://www.archives.gov/founding-docs/founding-fathers>

¹¹¹⁵ See ROY STUCKEY, BEST PRACTICE FOR LEGAL EDUCATION (2007); and See Nelson Cooley Miller, Cynthia M. Ward, The Role of Law Schools in Shaping Culturally Competent Lawyers. https://www.researchgate.net/publication/228260584_The_Role_of_Law_Schools_in_Shaping_Culturally_Competent_Lawyers/citation/download

the expert testimony on a case-by-case basis, no matter which institution the expert is associated with. For instance, in *Maine. People's Alliance v. Holtrachem Mfg. Co.*¹¹¹⁶ and *Maine. People's Alliance v. HoltraChem Manufacturing Co., LLC, and Mallinckrodt US LLC*,¹¹¹⁷ and Dr. Philippe Grandjean was a plaintiff's expert who provided credible testimony as an adjunct professor of environmental health in the School of Public Health at Harvard University. The district court held that damage from exposure to methylmercury is permanent in all populations, not only to the small children, as well as the "elevated body burdens of mercury may also present an imminent and substantial endangerment to the environment" in Maine based on the testimony by Dr. Philippe Grandjean and former EPA's studies.¹¹¹⁸ Even in the river-recovery trial after the panel's studies of mercury's recovery in 2014, both plaintiffs and defendants summarized the testimony of the thirty-six trial witnesses.¹¹¹⁹ Therefore, courts adapted expert witnesses only based on their testimony or reports instead of their institutions in U.S. citizen suits.

On the other hand, Chinese environmental law education and research was initiated since the foundation of the Research Institute of Environmental Law (RIEL) of Wuhan University in June 1981.¹¹²⁰ Almost all the environmental law graduates went to work in government agencies or

¹¹¹⁶ *Me. People's All. v. Holtrachem Mfg. Co., L.L.C.*, 211 F. Supp. 2d 237, (D. Me. 2002). (In 1986, the Mallinckrodt's plant continued release of mercury, so that the EPA filed an administrative RCRA against Hanlin, the plant owner from 1982-1994. Defendant HoltraChem Manufacturing Co., LLC. ("HoltraChem") owned and operated the plant from 1994 until the plant ceased operation in Sept. 2000.)

¹¹¹⁷ *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277 (1st Cir. 2006). (Mallinckrodt owned the chlor-alkali plant from 1967 to 1982.)

¹¹¹⁸ *Me. People's All. v. Holtrachem Mfg. Co., L.L.C.*, 211 F. Supp. 2d 237, 245, 256 (D. Me. 2002).

¹¹¹⁹ NRDC, Mallinckrodt Case Documents, Appendix A: Witness Summaries Submitted by the Plaintiff, and Defendants. <https://www.nrdc.org/resources/mallinckrodt-case-documents>; <https://www.nrdc.org/sites/default/files/appendix-a-plaintiff-witness-summaries-mallin-20140828.pdf>; <https://www.nrdc.org/sites/default/files/appendix-a-defendants-witness-summaries-mallin-20140918.pdf>

¹¹²⁰ The Research Institute of Environmental Law (RIEL) of Wuhan University, About us, WHU.EDU <http://en.riel.whu.edu.cn/list/48.html>

law schools instead of working in ENGOS in early time because Chinese ENGOS developed more slowly on environmental governance. No ENGO like the NRDC or EDF was founded by lawyers and environmental scientists, although the FON established the Department of Environmental Law and Policy Advocacy in 2014 with just two full-time staff attorneys. Based on research by Beijing Normal University, a table of EPIL full-time staff in seven ENGOS shows that the FON had filed forty cases by twelve professional staff, and the rest of the staff numbers are under ten cases.¹¹²¹ Thus, ENGO EPIL cases must be filed by hiring attorneys in law firms. Although most environmental lawyers are located in Beijing, big law firms rarely collaborated with the advocacy ENGOS without any preliminary payment from the ENGOS or provided representation *pro bono publico* to enhance their charitable reputations.¹¹²² Since these firms worked on environmental compliance, it is challenging to represent the brand new EPIL actions. Notably, the CLAPV's environmental lawyers collaborated with the FON to work on case selection and initiation. However, no more than four full-time two-year circle volunteer environmental attorneys could only engage in limited EPIL lawsuits.¹¹²³ Most ENGOS lack the in-house attorney and enough funds to hire lawyers to pursue EPIL cases.

¹¹²¹ Liu, *supra* note 45, at 89-90.

¹¹²² Notice of Beijing Municipal Commission of Development and Reform and Beijing Municipal Bureau of Justice on Issuing the Government-guided Price Rates of Beijing Municipality for Lawyers' Litigation Agency Fees (for Trial Implementation) and the Implementation Measures of Beijing Municipality for the Administration of Lawyer's Fees (for Trial Implementation) 北京市发展和改革委员会、北京市司法局关于印发《北京市律师诉讼代理服务收费政府指导价标准（试行）》、《北京市律师服务收费管理实施办法（试行）》的通知 (adopted by Beijing Municipal Commission of Development and Reform and Beijing Municipal Bureau of Justice on May 5, 2010), CLI.12.415962(EN) (Lawinfochina). (Charging in portion to the value of subject matter, if the value of subject matter is more than ¥1 million to ¥10 million, 4%. The value of the environmental violation or damages are always high, the Changzhou solid waste case was determined the value to ¥300 million.)

¹¹²³ Based on this author's work experience in the FON.

In the meantime, China's limited supply of environmental attorneys may seek excessive profits instead of environmental conservation and the public interest by representing and even directing ENGOs to commence cases and reach immediate agreements as mercenary attorneys.¹¹²⁴ Some attorneys and settled cases have occurred since the statutes of deterrence of mercenary actions have not been regulated, nor have the cases been judged. For example, one ENGO called Jinhuaishi Lüse Shengtai Wenhua Fuwu Zhongxin (ZLSWFZ) has withdrawn nine EPIL cases within three months, represented by the same attorney.¹¹²⁵ However, the Civil EPIL Interpretation provides that any courts should not grant the parties' withdrawing application based on their settlement agreement unless the government agencies carried out their responsibilities till all plaintiffs' claims have been delivered.¹¹²⁶ That is, during the period of the agreement to the court's ruling decision, the government agencies must carry out their duties to ensure the environmental conservation had been reached for the public interest. However, no evidence or announcement issued by the government agencies to declare the public interest of this ENGO's cases had been realized in the past years. The Beijing Fourth Intermediate Court recently disclosed an agreement between this ZLSWFZ and Veolia Co. (China), including the plaintiff's attorney fee ¥ 100,000 but lacked any receipts.¹¹²⁷ The court agreement welcomed public opinions but no information about

¹¹²⁴ Based on this author's work experience in the FON; phone interview with Wei Zhe, Project Manager in Litigation Department at ACEF (All-China Environment Federation) Jan. 29, 2021.

¹¹²⁵ Tian Yan Cha (天眼查) (Searching in search bar, 金华市绿色生态文化服务中心, Jinhuaishi Lüse Shengtai Wenhua Fuwu Zhongxin in Chinese, this ENGOs' litigation latest information has been listed, including the judgment and withdrawal. Nine withdrawal cases have been listed on the website from Dec. 2020 to Feb. 2021.) <https://www.tianyancha.com/company/3095020152> (Last visited Mar. 9, 2021)

¹¹²⁶ SPC's Civil EPIL Interpretation, *supra* note 658, art. 25 to art. 26.

¹¹²⁷ The People's Court Announcement (人民法院公告网), Plaintiff, Jinhuaishi Lüse Shengtai Wenhua Fuwu Zhongxin (原告: 金华市绿色生态文化服务中心), Beijing Fourth Intermediate People's Court (北京市第四中级人民法院), Announcement (公告), the attachment of the announcement can be downloaded on this website. <https://rmfygg.court.gov.cn/web/rmfportal/noticedetail?paramStr=1520> (Last visited Mar. 9, 2021)

the government agency's performance. The court will issue a mediation paper based on the agreement if no harm to the public interest during the thirty-day announcement.¹¹²⁸

In terms of expert evidence, Chinese officials define the investigation and identification report with the term "judicial identification" or "judicial authentication."¹¹²⁹ After the Standing Committee's Notice, the SPC, Supreme People's Procuratorates, and the Ministry of Justice concentrated on regulating a list of the institutes capable of identifying all kinds of environmental damages and authorized the MEE to register and administer institutions.¹¹³⁰ The qualified environmental judicial identification institutes number fifty-eight, and most were the MEE's affiliates. The rates are more expensive than any expert's testimony. These unjust and burdensome regulations defeated the unsupported and weak ENGOs litigation efforts.¹¹³¹ The government-approved identification report would be regarded as a final decision in each case, which perversely encourages the parties to use a listed identification institute at all costs.¹¹³² The high costs prevent

¹¹²⁸ SPC's Civil EPIL Interpretation, *supra* note 658, art. 25.

¹¹²⁹ Decision of the Standing Committee of the National People's Congress on the Administration of Forensic Identification and Evaluation (2015Amendment) 全国人大常委会关于司法鉴定管理问题的决定(2015 修正) (adopted by the Standing Comm. of the Nat'l People's Cong., Apr. 24, 2015), CLI.1.252619(EN) (Lawinfochina), art. 1. (The term "judicial authentication" refers to the activities that authenticators identify, make judgments and offer expertise on the special issues involved in litigation by using scientific technologies or special knowledge. And the purpose of this decision was to strengthen the administration of authenticators and authentication institutions.)

¹¹³⁰ Notice by the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Justice of Incorporating the Judicial Identification of Environmental Damage into the Scope of Unified Registration Administration 最高人民法院、最高人民检察院、司法部关于将环境损害司法鉴定纳入统一登记管理范围的通知 (adopted by the Sup. People's Ct., the Sup. People's Procuratorate, and the Ministry of Justice on Dec. 21, 2015), CLI.3.332185(EN) (Lawinfochina); Notice of the Ministry of Justice and the Ministry of Environmental Protection on Regulating the Administration of the Judicial Identification of Environmental Damages 司法部、环境保护部关于规范环境损害司法鉴定管理工作的通知 (adopted by the Ministry of Justice, and MEE on Dec. 21, 2015), CLI.4.285867(EN) (Lawinfochina).

¹¹³¹ See Ma Yong (马勇), Cong Gongyisong Shijiao Kan Woguo Huanjing Sunhai Sifa Jianding (从公益诉讼视角看我国环境损害司法鉴定) [Forensic Appraisal of Environmental Damage from the Perspective of Public Interest Litigation in China] *Zhongguo Sifa Jianding* (中国司法鉴定) [CHINESE J. OF FORENSIC SCI.] Vol. 1 2016, at 9.

¹¹³² The regulations pointed and spoke highly of the identification institutions to aim to let the judges accept the reports completely.

small but passionate ENGOs from enforcing. Such that FON had been trapped by unaffordable judicial expertise fees in several cases, let alone other immature grassroots ENGOs.¹¹³³ Moreover, the government agencies ignored those illegitimate regulations and their effects to enfranchise another plaintiff in EPIL cases-- the procuratorates -- judicial organs of the government, who would not be charged the judicial expertise fees before the courts' judgment.¹¹³⁴ The regulations embodied procuratorates' privileges, but they are clearly unfair to the ENGOs. Therefore, narrowing attitudes and inappropriate regulations affected qualified ENGOs' commencement.

In summary, the U.S. citizen suit and the ENGO EPIL in China are similar, which has consistency in granting ENGOs the right to sue in the judicial proceedings to protect the public interest. However, apart from being relatively close in terms of the broadness of the defendant's scope, there are considerable differences in the Chinese legal transplantations of specific systems and ENGOs' practices in the two countries. The objective and subjective reasons both are obvious and prominent. Firstly, China's EPIL lacks the precise understanding of the U.S. citizen suits theory and provisions, and the core features are absent, including efficient pre-suit procedures and proper remedies to lag the enforcement. It also depends too much on the civil law spirits to apply the Tort Law in the public interest lawsuits. The booming EPIL actions in courts turned against the Chinese traditional spirit of avoiding lawsuits by initiating the concept of preventing litigations

¹¹³³ FON v. Yunnan Luliang Chemical Industry Co., Ltd, Qujing Interim Ct. 2020, <https://rmfygg.court.gov.cn/web/rmfportal/noticedetail?paramStr=1121>; Zhong Jingwen, Litigation over Chromium Slag Pollution Ends after Ten Years of Proceedings, Aug. 13, 2020. (The judicial expertise fee was ¥10 million (\$1,538,000), was a huge cost to a Chinese ENGO.) <https://chinadevelopmentbrief.cn/reports/case-of-chromium-slag-pollution-ends-after-ten-years-proceedings/>

¹¹³⁴ Notice of the General Office of the Ministry of Justice on Further Effectively Conducting the Work Concerning the Administration of the Judicial Expertise of Environmental Damage 司法部办公厅关于进一步做好环境损害司法鉴定管理有关工作的通知 (adopted by Ministry of Justice on May 24, 2019), CLI.4.332870(EN) (Lawinfochina).

and settling disputes out of courts, says, “saving the judicial resources has been widely concerning before lawsuits.”¹¹³⁵ Furthermore, under the closing social contest, the tendency of the “nationalization” of EPIL’s mechanism with statutory privileges also exacerbated ENGOs’ situations to realize the public participation in China’s environmental governance.¹¹³⁶ Some suggestions would be proposed based on the aftermentioned comparison and analysis.

¹¹³⁵ See Nicholas Lassi, A Confucian Theory of Crime, (Jan. 2018) (unpublished Ph. D. Dissertation, University of North Dakota) (on file with Library, University of North Dakota) Theses and Dissertations. 2263. at 340-343. <https://commons.und.edu/theses/2263> (Confucius made this famous statement regarding the importance of minimizing the role of the legal system within society, “At hearing legal proceedings I am no different from anybody else, but what is surely necessary is to bring it about that there is no litigation.” (听讼，吾犹人也，必也使无讼乎。)) Another sage in ancient China, Lao Tzu concurred with the Confucian position on regarding the avoidance of the legal system. In the Tao Te Ching, many sentences were like “Because he does not strive, no one finds it possible to strive with him.” (以其不争，故天下莫能与之争。)) “with all the doing in the way of the sage he does not strive.” (圣人之道，为而不争。)) “Man takes his law from the Earth; the Earth takes its law from Heaven; Heaven takes its law from the Tao. The law of the Tao is its being what it is.” (人法地、地法天、天法道、道法自然。)) These mottos both spoke highly of “avoiding lawsuits.”

¹¹³⁶ Chen Hangping (陈杭平) & Zhou Hanjun (周晗隼), Gongyisusong “Guojiahua” de Fansi (公益诉讼 “国家化” 的反思, [Reflection on the Nationalization of Public Interest Litigation] Beifang Faxue (北方法学) [N. LEGAL SCI.] Vol. 13, Issue 78, 70, 70 (2019). (The procuratorial EPIL and the compensation system have resulted in not only an illogical enforcement-oversight system but also a growing nationalization tendency of the EPIL system. The concept of nationalization was felicitously initiated and published in 2019, as the procuratorates and administrative agencies had filed numerous cases statutorily to thrash ENGOs to become the major plaintiffs in EPIL cases over five years.)

Chapter 5 Recommendations for Environmental Public Interest Litigation System in China

As discussed above, China's ENGO EPIL system is acknowledged as an essential enforcement tool to supplement environmental enforcement but need to solve many emerged issues. China has constructed a complete system, including environmental legislation, administrative governance, and environmental judicial mechanisms, consistent with its mature industrial system and public environmental awareness. Thus, for the future establishment of an impeccable EPIL system, especially the ENGO EPIL system, a focal point is how to thoroughly understand and adapt the U.S. best practices of the environmental citizen enforcement and their evolution in order to amend legislation and policies: to establish an EPIL legal system from the aspects after rectifying the misunderstandings of the citizen suit, legislating an Environmental Public Interest Relief Law, revising some provisions, and encouraging ENGOs and attorneys' actions.

The U.S. citizen-suit system has been developed over five decades and has made extraordinary institutional achievements to redress two kinds of statutory transgressions -- by violators and government agencies -- in service of the public interest. Citizen-suit enforcement started with relatively simple actions seeking penalties and injunctions for permit violations, which have promoted permit-compliance early on.¹¹³⁷ Citizen-suits increasingly have been diverted to various and complicated actions more recently, such as stormwater discharges under the CWA, waste site remediation under the RCRA, and mercury removal.¹¹³⁸ The U.S. ENGOs and environmental

¹¹³⁷ Karl S. Coplan, *supra* note 428, at 296.

¹¹³⁸ *See Id.*; *See Penn. Env't v. PPG Indus., Inc.*, 127 F. Supp. 3d 336 (W.D. Pa. 2015) (citizen suit under RCRA); *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083 (9th Cir. 2017) (citizen suit for stormwater discharge and onsite waste disposal under RCRA); *Me. People's All. v. Holtrachem Mfg. Co., L.L.C.*, 211 F. Supp. 2d 237, (D. Me. 2002) (citizen suit for cleanup of the mercury in the river).

attorneys have also been cultivated and improved through the cumulative experience of numerous lawsuits and campaigns, as well as increasing hands-on experiences.

Chinese ENGOs have also struggled to file several enforcement actions against private violators and some state-own-enterprises, including huge emitters, such as the China National Petro Corp (CNPC), and the Zhenhua Corp. Ltd.¹¹³⁹ ENGO enforcement suits have thus stirred up limited attention and influence over the past five years. Besides seeing the possibility of injunctive relief, Chinese ENGOs have attempted to claim the removal or restoration as well as their compensation for damage to the ecological environment, according to the Polluter-Pays Principle¹¹⁴⁰ in practice. Therefore, the EPIL has been deemed as a significant legal breakthrough in the efficient and comprehensive realization of environmental conservation in China.

However, as EPIL cases rapidly increased in China, the EPIL's incomplete and flawed theoretical basis and the tendency towards EPIL's nationalization are likely to disrupt the anticipated benefits of private environmental enforcement. As a result, China would be prudent to revise its environmental laws to establish an improved EPIL substantive and procedural legal system. Such a revised system would more thoroughly undertake the responsibilities of complementing and overseeing governmental agencies' performance and private environmental

¹¹³⁹ Beijingshi Chaoyangqu Ziranzhijie Huanjing Yanjiusuo & Zhonghua Huanbao Lianhehui Su Zhongguoshiyou Tianranqi Gufenyouxiangongsi Jiqi Jilinfengongsi Huanjing Gongyisong An(北京市朝阳区自然之友环境研究所、中华环保联合会与中国石油天然气股份有限公司、中国石油天然气股份有限公司吉林油田分公司环境污染公益诉讼案) [Friends of Nature Environmental Research Institute in Chaoyang District, Beijing Municipality and All-China Environment Federation v. PetroChina Co. Limited and Jilin Oilfield Branch of PetroChina Co. Limited (case of public interest litigation against environmental pollution)], 2019 SUP. PEOPLE'S GAZ. ISSUE 4(Sup. People's Ct. 2018) (China); No. 3 of Ten Model Cases regarding Environmental Public Interest Litigations Published by the Sup. People's Ct.: All-China Environment Federation v. Shandong Dezhou Jinghua Group Zhenhua Co., Ltd. (Civil public interest litigation regarding air pollution) 最高法发布十起环境公益诉讼典型案例之三：中华环保联合会诉山东德州晶华集团振华有限公司大气污染民事公益诉讼案 [CLI Code] CLI.C.8913082(EN) (Lawinfochina).

¹¹⁴⁰ Environmental Protection Law, *supra* note 13.

compliance. The advanced experience of the United States presents a pragmatic model to build a scientific and sound EPIL system. Hence, this chapter has two categories of recommendations for the future development of the EPIL in China: 1) to consistently establish and improve an environmental public interest legal system, and 2) to promote the ENGOs' capabilities to validly and effectively participate in ENGO EPIL cases.

5.1 Legislation and Policy Recommendations

5.1.1 Rectifying the Misunderstandings of the Environmental Public Interest Legal System

a. Prioritizing and Enhancing Administrative Enforcement

It is crucial for policymakers and legislatures to recognize and ensure that the Chinese ENGO EPIL system is a supplementary kind enforcement through public participation to achieve environmental justice, as the environmental administrative enforcement mechanism is the primary and practical approach to conserve the environment under the Chinese Constitution¹¹⁴¹ and the Environmental Protection Law.¹¹⁴² Thus, administrative enforcement actions should be prioritized as the fundamental and dominant approaches in practice. The environmental government agencies at all levels should enhance their enforcement and deterrence skills and efficacy while avoiding counting on supplementary judicial approaches, such as actions seeking injunction and compensation for damage to the ecological environment system. The EPIL system authorizes

¹¹⁴¹ XIANFA art. 26, § 1 (2018) (China), (The state protects and improves the environment in which people live and the ecological environment.) CLI.1.311950(EN) (Lawinfochina).

¹¹⁴² Environmental Protection Law, *supra* note 13, art. 6, § 2, (The local people's governments at all levels shall be responsible for the environmental quality within their respective administrative regions; art. 10, the environmental protection administrative department of the State Council shall generally supervise and administer the national environmental protection work, while the environmental protection administrative departments of the local people's governments at and above the county level shall generally supervise and administer the environmental protection work within their respective administrative regions.)

provincial and prefecture city governments to commence negotiations and lawsuits to require compensation for damages to the environment.¹¹⁴³ The functions of this redundant EPIL system have wasted and weakened the governmental responsibilities, as these functions can be undertaken by ENGO EPIL lawsuits.¹¹⁴⁴ Under the statutes in question, local government agencies have focused on claiming compensation instead of pursuing diligent administrative enforcement, which is a waste of judicial resources and serves only to amplify their political posturing and publicity. Although the newly established Civil Code provides general provisions of liabilities for environmental pollution and ecological damage, including environmental torts and ecological environment damages compensation liabilities,¹¹⁴⁵ it is imperative to separately provide explicit statutes enhancing private enforcement and authorizing cleanup of the contamination and damage to the ecological environment for the public health and interest.

In addition, technically, governmental agencies' performances should be subject to oversight, including by ENGOs and procuratorates.¹¹⁴⁶ For instance, qualified ENGOs should be authorized

¹¹⁴³ See Several Provisions of the Sup. People's Ct. on the Trial of Cases on Compensation for Damage to the Ecological Environment (for Trial Implementation) 最高人民法院关于审理生态环境损害赔偿案件的若干规定（试行）（Interpretation No. 8 [2019], adopted at the 1,769th session of the Judicial Comm. of the Sup. People's Ct. on May 20, 2019, came into force on June 5, 2019), CLI.3.332884(EN) (Lawinfochina). (Hereinafter Compensation for the Ecological Environment Damages Interpretation). (The compensation for damage to ecological environment system was newly-created but a controversial kind of EPIL system, provided that provincial and prefecture city governments were authorized to file lawsuits against private sectors who damaged the ecological environment for the failure to reach a consensus through consultation since 2015. A party policy established this system, and before the Civil Code's provisions, a judicial interpretation ensured its force of law.)

¹¹⁴⁴ SPC's Civil EPIL Interpretation, *supra* note 658, art. 2; art. 24 (qualified social organizations can litigate under the Environmental Protection Law and this interpretation. The expenses for restoring the ecological environment, the loss of service functions from the period when the ecological environment is damaged to the restoration thereof and other expenses that shall be assumed by the defendant according to the judgment rendered by the people's court shall be used to restore the damaged ecological environment.)

¹¹⁴⁵ Civil Code, *supra* note 657, Ch. VII Liability for Environmental Pollution and Ecological Damage.

¹¹⁴⁶ Environmental Protection Law, *supra* note 13, art. 53. (providing that all-level environmental protection administrations shall disclose information and improve the procedures for public participation by citizens legal persons, and other organizations. Public participation and legal supervision); Interpretation of the Sup. People's Ct. and the

to oversee the process of the removal and restoration actions, including the compensation actions to avoid fraud and breaching the environmental public interest principles, which would be realized by enlarging the realm of causes of action to optimize the supervision rights.

Therefore, the EPIL system, as an embodiment of public-awareness and a complementary measure of governmental enforcement, should be comprehensively and legally spurred and encouraged in a context of greater openness and inclusiveness, including the government agencies' responsibilities and private sectors' compliance. In this background, environmental government agencies would be subjected to systematic statutes and numerous lawsuits, becoming increasingly proactive and efficient by pragmatic public participation and social supervision.

b. Reducing Direct Application of Tort Law Principles

Based on the correct understanding of the two countries' origins and theories, it is necessary to modify several Chinese judicial interpretations to limit the interpretation of the EPIL provisions of the Environmental Protection Law. The existing so-called "social public interest" is an ambiguous concept under Chinese laws and studies, regarded as a kind of state's civil rights to state-owned environmental resources, applying tort theory.¹¹⁴⁷ Practically, formulation and

Sup. People's Procuratorate on Several Issues concerning the Application of Law for Cases regarding Procuratorial Public Interest Litigation 最高人民法院、最高人民检察院关于检察公益诉讼案件适用法律若干问题的解释 (Interpretation No. 6 [2018] of the Sup. People's Ct., as adopted at the 1,734th Session of the Judicial Comm. of the Sup. People's Ct. on Feb. 23, 2018 and the 73rd Session of the Twelfth Procuratorial Comm. of the Sup. People's Procuratorate on Feb. 11, 2018 and forcing on Mar. 2, 2018) art. 2 (providing that the main tasks of procuratorates for initiating EPIL cases are to achieve legal supervision, to protect public interest, to urge eligible administrations to exercise and promote law-based administration and strict their enforcement.) CLI.3.310730(EN) (Lawinfochina).

¹¹⁴⁷ Gong Gu (巩固), Huanjing Minshi Gonyisusong Xingzhi Dingwei Xingsi (环境民事公益诉讼性质定位省思) [Reflection on the Nature of Civil Environmental Public Interest Litigation], Faxue Yanjiu (法学研究) [CHINESE J. OF L.], Vol. 3, 127, 143 (2019). (Violating the laws should be identified as cause of actions, instead of torts.)

adjudication of EPIL proceedings have to refer to tort rules and extensive interpretations that have been widely and frequently applied in the past years.

The EPIL's nature is recognized as a complementary tool of governmental enforcement; accordingly, the elements of the EPIL actions should be objective regulatory standards in various laws, rather than whether the actions damage the public interest determined by judges according to the abstract concept in the Environmental Protection Law and the interpretational rubrics. Although regulatory standards in each act were theoretically appropriate to guide environmental compliance during the administrative enforcement, as well as judgments in courts, regulatory standards have not been identified as elements of Chinese environmental violations and compliance standards by mainstream theories and practice. Thus, the EPIL specialized rules would define and prioritize the condition of "violating the laws" as regulatory standards, similar to the U.S. citizen-suit provisions. Judges thereafter would no longer "explain to plaintiffs to revise their claims" when judges deem the original claims were "insufficient to protect the public interest," an ambiguous and unachievable pleading standard.¹¹⁴⁸

In summary, comparing China's EPIL system and the U.S. citizen-suit enforcement, these two similar enforcement systems exhibit huge variations that make them unlikely partners, resulting from inaccurate translation as well as lacking the necessary landscape of legislation and applicable laws in China. China's priority should be to revise legislation to construct a logical and applicable mechanism rather than promulgating and revising extensive and irreconcilable interpretations.

¹¹⁴⁸ SPC's Civil EPIL Interpretation, *supra* note 658, art. 9.

Although distinct social systems and economic development stages exist in the two countries, the private enforcement system should provide for effective enforcement, according to explicit and comprehensive statutes. A sound EPIL system established by legislation would fulfill the promises to fundamentally incorporate and structure a private enforcement mechanism.

5.1.2 Establishing Sound Environmental Public Interest Legal System

a. Establishing a Specialized Legislation: Environmental Public Interest Relief Law

In terms of Establishing an Environmental Public Interest Relief Law, although the most meticulous and rigorous approaches would be for legislatures when revising each environmental law, interpretation, and other norms, this approach would be time-consuming complicated to amend the laws in sequence to keep pace with the rapid development of the EPIL practices in China. The Chinese National People's Congress should adopt a specific comprehensive EPIL law, named Environmental Public Interest Relief Law, composed of the EPIL provisions and environment recovery provisions. The EPIL parts would comprise provisions authorizing enforcement measures against administrative agencies and private sectors, adding ENGOs' standing. Moreover, this specialized Environmental Public Interest Relief Law should expect to include cleanup-compensation provisions to supplement regular administrative enforcement.

b. Authorizing ENGOs to File Administrative EPIL Cases

Although the term of administrative EPIL is problematic and debatable, as representatives of individual citizens, ENGOs should be authorized to file lawsuits against government agencies for their lax enforcement or failure to carry out their primary responsibilities because only extensive and unlimited public oversight will curb probable covering-up and corruption. Thus, the appointed

official litigator, the Chinese procuratorates, are not independent of the correlated governments, who failed to file against the government agencies' probable violation appropriately and forcefully.

The EPIL actions against government agencies are significant deterrence to Chinese traditional all-inclusive governance mechanisms to compel the primary environmental administrative enforcement under supervision. Authorizing both ENGOS' standing to file against government agencies' noncompliance would alter the current trend towards increasing the nationalization of the EPIL system and raising sweeping social awareness.¹¹⁴⁹ China should diversify participants to allow greater enforcement against government agencies to ensure carrying out administrative responsibilities.

Moreover, Chinese ENGOS and official procuratorates should coordinate to enforce against major polluters in practice as only ENGOS' pleadings on such cases have rarely been accepted and well enforced.¹¹⁵⁰ It is challenging to sufficiently strengthen ENGOS' capabilities quickly, so balancing enforcement authorization would encourage these two types of plaintiffs to cooperate in enforcement, acknowledging that ENGOS have deeply employed in one environmental realm, and other litigants may accumulate pragmatic judicial and litigation experiences. More impartial and encouraging attitudes and provisions would counter the trend of declining acceptance and weakening tendency of ENGOS' enforcement. Gradually, Chinese ENGOS would become more effective and proficient in private enforcement, following the advanced and developed U.S. ENGOS, such as NRDC and Sierra Club.

¹¹⁴⁹ Chen & Zhou, *supra* note 1136, at 70.

¹¹⁵⁰ Based on this author's work experience.

c. Accepting Each ENGO EPIL Case

The case docket registration system should be modified to enlarge and broaden ENGOs' standing to require acceptance and docketing of all ENGO-EPIL actions, rather than reporting to the SPC level by level to decide whether or not to accept the ENGO-EPIL cases.¹¹⁵¹ Recently, cases that the court did not intend to accept should be reported to higher courts to be decided in China.¹¹⁵² However, only two procedures need the SPC's approval: one is the procedure for reviewing death sentences,¹¹⁵³ and the other is confirmation of ENGO-EPIL cases docketing.¹¹⁵⁴ ENGO-EPIL cases should be docketed under the regulations instead of this burdensome and unwritten approval process.¹¹⁵⁵ The lower-level courts should improve and unify the understandings of EPIL systems to accept cases instead of transfer of responsibilities as many ENGO actions still have been dismissed for lack of standing, which the higher courts then decided after the ENGOs' appeals, in the fifth year of the EPIL enforcement.¹¹⁵⁶ With the normalized case-

¹¹⁵¹ SPC, Notice of the Sup. People's Ct. on Issuing the Opinions on Promoting the Reform of the Registration System for Case Docket by the People's Courts, *supra* note 643. (There is no provisions on whether the EPIL cases should be docketed directly in the Opinion, but in practice, when ENGOs filed an EPIL case, the court must report to the SPC level by level to confirm whether the case should be accepted.)

¹¹⁵² Personal communications with Judge Huang Cheng at Chongqing High People's Court, in Oct. 25, 2018 and July 22, 2019.

¹¹⁵³ Criminal Procedure Law of the People's Republic of China, *supra* note 951, art. 247 (providing that where a defendant is sentenced to death penalty by an intermediate people's court as a court of first instance but does not appeal, the sentence shall be reviewed by a high people's court and submitted to the Supreme People's Court for approval.)

¹¹⁵⁴ Based on this author's work experience. However, the rules of accepting ENGO-EPIL cases haven't been disclosed but exist in practice.

¹¹⁵⁵ Based on this author's work experience; personal communications with Judge Huang Cheng at Chongqing High People's Court, in Oct. 25, 2018 and July 22, 2019.

¹¹⁵⁶ FON Su Jiangxi Puhu Ditan Huanbao Gufenyouxian Gongsi (自然之友诉鄱湖低碳环保股份有限公司) [FON v. Jiangxi Puhu Low Carbon Environmental Protection Co., Ltd.] China Judgements Online, (Jiangxi Nanchang Interm. People's Ct. July 25, 2019) (Jiangxi High People's Ct. Aug. 28, 2019) (This case filed by FON, and the Nanchang Intermediate People's Court did not accept the case because FON did not have the standing. FON appealed the case to the Jiangxi High People's Court, the higher court then ruled that FON had the standing and should be accepted by the previous court, the Nanchang Intermediate Court.); Zhongguo Shengwu Duoyangxing Baohu yu Lüse Fazhan Jijinhui Su Ningxia Ruitai Keji Gufenyouxian Gongsi (中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案) [China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd.] China Judgements Online, Guiding Case No. 75: China

acceptance procedures, increasing ENGO-EPIL case acceptance might prompt ENGOs to engage more in litigation based on their accumulated research and campaign experiences.

In summary, establishing a sound EPIL system that consists of advanced legal structures, corrections of existing obstacles, and drawing on relevant U.S. experiences would stimulate Chinese ENGOs to effectively commence EPIL enforcement cases while augmenting their litigation skills. Only in this way can government agencies undertake the primary administrative enforcement responsibilities rather than excluding public supervision when seeking judicial relief to cater to political missions and public relations.

5.1.3 Revising the Laws and Regulations

Despite the established EPIL mechanisms in China, its environmental compliance would benefit from subsuming numerous efficient and valid U.S. citizen-suit provisions into the envisioned Environmental Public Interest Relief Law. Several noteworthy procedures are the best examples.

Technically, various kinds of environmental realm's EPIL remedies should be listed or legislated clearly. At present, the Environmental Protection Law and the interpretations lack precise categories of environmental matters in each act instead of effective general EPIL

Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Co., Ltd. 指导案例 75 号: 中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案 (Issued on Dec. 28, 2016 as deliberated and adopted by the Judicial Comm. of the Supreme People's Court) (This case was filed to the Intermediate People's Court of Zhongwei City of Ningxia that the action instituted by the CBCGDF should not be accepted because the CBCGDF was not qualified. Then the CBCGDF appealed this case to the Ningxia Higher Court. But the Higher court dismissed the appeal and affirm the original filing. The CBCGDF filed an application for retrial with the Supreme People's Court. In Jan. 2016, the SPC finally ruled that this case should be accepted by the Intermediate Court of Zhongwei City, the first court.) CLI.C.8726840(EN) (Lawinfochina). http://fggi9979c516bea6498b89be4eb02f86e266spvn96fx0un5q6kku.ffiz.res.gxlib.org.cn/en_case/a25051f3312b07f32bbeae0fab52280f7a5c168198a0349bdfb.html

statutes.¹¹⁵⁷ Explicit statutes would direct the plaintiffs' enforcement categories and functional elements, like the U.S. citizen-enforcement provisions in the environmental acts. Alternatively, it would be time-saving and efficient to approve a list of various environmental media to allow definite enforcement categories in EPIL actions within the effective Environmental Protection Law.

Moreover, the U.S. citizen-suit pre-suit notice procedure should be replicated in the expected Environmental Public Interest Relief Law, prompting the related agencies' diligent enforcement during the period, no matter if the defendants are the private sectors or government agencies. If the violation terminated as a result of the agency's diligently commenced timely prosecution, the ENGO lawsuit would not be filed.¹¹⁵⁸ This prerequisite precedent procedure will comprehensively reinforce the primary environmental agencies' enforcement skills.

The injunctive relief procedure should also be precisely regulated in the Environmental Public Interest Relief Law, including the two categories of injunctions are mandatory injunction and prohibitory injunction.¹¹⁵⁹ Even though a general preservation statute has been legislated, the recent misunderstandings of the EPIL injunction's scope should be modified as they drafted the prohibitory injunction and omitted the mandatory injunction.¹¹⁶⁰ In view of the reasons for the

¹¹⁵⁷ Environmental Protection Law, *supra* note 13, art. 58 For an act polluting environment or causing ecological damage in violation of public interest, a social organization which satisfies the following conditions may institute an action in a people's court:....

¹¹⁵⁸ The SPC's Civil EPIL Interpretation, *supra* note 658, art. 12. The people's court shall, within ten days after accepting an environmental civil public interest litigation, inform the department assuming environmental protection supervision and administration functions responsible for the defendant's conduct.

¹¹⁵⁹ *Mandatory injunction*, an injunction that orders an affirmative act or mandates a specified course of conduct. - Also termed affirmative injunction; prohibitory injunction. An injunction that forbids or restrains an act. - This is the most common type of injunction. BLACK'S LAW DICTIONARY, 9th Ed. (2009).

¹¹⁶⁰ SPC, Tao Kaiyuan Attended the Expert Demonstration Meeting on Judicial Interpretation of the Environmental Protection Prohibitory Injunction, Emphasizing the Function of Prevention and Relief, and Safeguarding Environmental Rights and Interests in Accordance with the Law (陶凯元出席环境保护禁止令司法解释专家论证会强调发挥预防救济功能,依法维护环境权益) Dec. 3, 2020. (SPC's news demonstrated the misunderstanding and partial understanding of injunction.) <http://www.court.gov.cn/zixun-xiangqing-276931.html>

English-Chinese translation,¹¹⁶¹ this inaccurate understanding should be corrected to emphasize that the injunction measures must include both mandatory and prohibitory injunction instead of prohibiting injunction only. An appropriate example of citizen-suit provisions under RCRA is that both prohibitory and mandatory injunctions are properly issued under the RCRA.¹¹⁶² A private citizen suing under RCRA could seek a mandatory injunction, which can order a responsible party to act by attending to the cleanup and proper disposal of waste.¹¹⁶³

Moreover, due to the EIS is an essential project prior to construction, ENGOs should be able to optimize the preventive EPIL actions to avoid risks to the environment and public health in the actions or construction planning phases, similar to the U.S. NEPA's review doctrine.¹¹⁶⁴

In addition, the forensic identification institutions' supervisor, the Ministry of Justice, should revise its policy to grant the reimbursability of forensic fees' benefits for all the litigants equally, including both procuratorates and qualified ENGOs.¹¹⁶⁵ As for the severe contaminated pollution and ecological destruction sites, statistics should be compiled and cataloged, and the Chinese Academy of Environmental Planning (CAEP) could be authorized to clean up such sites under an anticipated Chinese cleanup system. The CAEP, an MEE's well-equipped affiliate government-sponsored public institution, has actively conducted many forensic identifications in EPIL cases, published environmental forensic identification guidance, and designed and conducted forensic

¹¹⁶¹ Injunctive Relief should be 禁制令 in Chinese; while prohibitory injunction should be 禁止令 in Chinese. Two Chinese words pronunciations are very similar.

¹¹⁶² RCRA 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

¹¹⁶³ *Meghrig v. Kfc W.*, 516 U.S. 479, 481, 116 S. Ct. 1251, 1253 (1996).

¹¹⁶⁴ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq., (2018).

¹¹⁶⁵ Ministry of Justice, *supra* note 1134.

identification seminars to various parties in EPIL cases, including judges.¹¹⁶⁶ Therefore, the CAEP can be authorized to host and guide the remediation of severe pollution and environmental destruction in a probable anticipated Chinese cleanup process, including listing and restoring, like Like the National Contingency Plan in the U.S.¹¹⁶⁷ Depending on the degree of contamination and destruction, the CAEP and the provincial identification institutions can act in various site remediation programs. In this way, trust funds or specialized central government financial accounts may become compensation for operators to use the funds orderly for the cleanup cost, which avoids chaotic and inconsistent operation *status quo*. In the long run, a separate compensation system for damage to the ecologic environment and pollutions should be established, regarded as the next step of private enforcement in an open and inclusive social circumstance.

Finally, the ENGO-EPIL settlement statutes should be revised to mandate sufficient disclosure and public oversight to avoid private deals and corrupt settlements without adequate supervision. As currently written, the EPIL requires that courts must announce the content of each settlement agreement reached between ENGOs and private companies, as well as providing that courts should not allow ENGOs to withdraw their cases and issue a mediation paper after they settled unless the court deems the agreement satisfies the public interest.¹¹⁶⁸ However, some ENGOs' attorneys used to extort the polluters through withdrawing EPIL cases as judgments always ruin the companies'

¹¹⁶⁶ CAEP, Meeting on Compensation for Damage to Ecological Environment and Forensic Identification Held in Beijing (生态环境损害赔偿与鉴定评估研讨会在北京顺利召开), Dec. 17, 2020.

http://www.caep.org.cn/sy/hjfxysjhdpgyjzx/zxdt_21732/202012/t20201217_813710.shtml ("On December 10, 2020, the Ecological Environment Damage Compensation and Appraisal Evaluation Seminar was successfully held in Beijing, from the Ministry of Ecology and Environment, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Justice, the Ministry of Finance, the Ministry of Rural Agriculture, and the National Forestry and Grass Administration. More than 120 experts participated in the seminar.")

¹¹⁶⁷ CERCLA §105, 42 U.S.C. 9605 (2018).

¹¹⁶⁸ SPC's Civil EPIL Interpretation, *supra* note 658, art. 25.

reputation. Then they reached agreements to earn attorney fees without any receipts to close the cases quickly. They not only misguide the ENGOs to pretend to pursue claims and settle only for personal profit but also breaching public interest and professional responsibility. Therefore, ENGO and attorneys' compliance is fundamental to ensure the EPIL's effectiveness, enhancing civil society's currently weak influence on environmental governance.

5.2 Recommendations for the Chinese ENGOs

For Chinese ENGOs and lawyers, the ENGO EPIL has been authorized to allow the public to reinforce environmental governance via private enforcement. Thus, it is imperative that they timely optimize and sharpen their legal skills and resources to improve enforcement and reverse the EPIL's trend towards exclusive national government enforcement.

Firstly, each ENGO must start to keep an active culture of engaging in EPIL cases as a co-plaintiff or *amicus curiae*. Various capacity-building approaches for ENGOs are feasible, not only through workshops and courses but also through case participation. The immersive experience of lawsuits would prompt increased efforts by ENGOs to enhance their strategies and skills. In addition, the increasing professionalism of ENGOs may be nurtured by environmental attorneys and law school clinics. The environmental lawyers and law clinics could progressively zero in on environmental litigations and EPIL actions, following several examples of cooperation between several ENGOs with the law clinics programs in Anhui University, Renmin University, and China University of Political Science and Law. The researchers, attorneys, and students also have chances to access the actual cases, correlating theory with practice and surmounting the hurdles of practical

EPIL-cases obstacles. These approaches should form the basis of legislative EPIL reform proposals. Together with these collaborations and real case experience, ENGOs would make some progress on the ground, but more should be done in the future.

Furthermore, ENGOs have to raise money strategically for operations and actions. Basically, ENGOs must conscientiously seek and apply the tax benefits qualification to realize the tax exemption. The qualified ENGOs that file EPIL actions may attempt monthly donation subscriptions to receive stable resources for general operating costs. Recently, only a few grassroots ENGOs had endeavored to collaborate with public-raising foundations to regularly solicit donations. The U.S. ENGOs' fundraising experiences can be systematically imported as Chinese ENGOs still need to acquire stable and abundant resources to provide competitive remuneration to hire capable and preeminent expertise and engage in EPIL lawsuits. Thus, increasing lawsuits aligned with relevant campaigns may give rise to dramatic public attention. Only in this way can ENGOs expand talents and strengthen skills to draw confidence and earn more respect to counterbalance ambitious industry development.

Last but not least, ENGOs and attorneys must comply with laws in their daily operations and litigation proceedings, and in particular, avoid receiving property for economic benefits because they are supposed to be altruists. Breaching the laws to earn windfall benefits by dropping lawsuits reduces the deterrent effect of enforcement on violators, defeating the public interest, and sully the reputation and evolving standing of all ENGOs in the current Chinese society. As for scattered and vulnerable ENGOs and environmental lawyers, their actions influence environmental law education and NGOs' nationwide development. Any mercenary attorneys and litigants who ignore

environmental conservation should be considered and reviewed according to future explicit statutes and probable judgments. They not only misguide the ENGOs to pretend to pursue claims and settle only for personal profit but also breaching public interest and professional responsibility. Therefore, ENGOs and attorneys must avoid any illegal collusion for EPIL's effectiveness and enhancing civil society's currently weak influence on environmental governance.

Chapter 6 Conclusion

The Chinese ENGO environmental public interest litigation (EPIL) system has been explored, legislated, and developed after learning from the U.S. citizen-suit enforcement in the past decade. In the post-2015 Environmental Protection Law, private environmental enforcement and public awareness have made significant breakthroughs as the EPIL cases increased. However, some obstacles, the misunderstandings of the theory and omissions of the core features of the EPIL's archetype, the U.S. citizen suit, as well as the increasingly strict policy tone and policy environment to Chinese ENGOs, and ENGOs' inappropriate capabilities¹¹⁶⁹ are emerged recently. These obstacles have resulted in many lags and inefficiency of the ENGO EPIL system.

Since the U.S. environmental citizen-suit enforcement has been developed as a complement to environmental governance over five decades, while the U.S. ENGOs have also strived to achieve environmental justice embedded through the system of environmental governance. Compared to this compelling archetype, it is imperative that the Chinese EPIL system be correctly and thoroughly reconsidered and revised by comparing it to the citizen-suit model. This dissertation proposes pertinent recommendations to address problems to redirect an EPIL system in China, such as rectifying EPIL's misunderstandings, legislating an Environmental Public Interest Relief Law, and revising effective provisions. Chinese ENGOs and attorneys' actions should also be encouraged, and more ethical compliance should be regulated and reviewed clearly and strictly.

Numerous efforts have made progress and achieve an “ecological civilization” construction

¹¹⁶⁹ See HUANG, CAI, HE, & XU, *supra* note 1076. (The report directly admitted and concluded that the policy tone and policy environment are strict, and advice that social organizations should enhance capacities and credits according to the laws and regulations).

in China in the past decade.¹¹⁷⁰ However, as the more developed industrial system has been operating, increasing energy and ecological conservation obstacles occurred. Therefore, ecological and environmental governance should be continuously strengthened, guiding the improvement of legislation, governmental management, comprehensive adjudication, and public awareness in an increasingly open and inclusive social context. The Chinese ENGO-EPIL mechanism can advocate the primary governance, including implementation and enforcement, after importing the advanced U.S. citizen-suit enforcement experiences. It is urgent and imperative to review the theory and practical challenges to raise concrete and pragmatic suggestions on revision. All these suggestions are to systematically deliver and regulate environmental actions for public interest and to achieve Chinese ecological civilization and civil society in the near future.

¹¹⁷⁰ Xi Jinping (习近平), Address at the 19th Nat'l Cong. of the Communist Party of China, Juesheng Quanmian Jiancheng Xiaokangshehui Duoquxinshidai Zhongguoteseshehuizhuyi Weidashengli (决胜全面建成小康社会夺取新时代中国特色社会主义伟大胜利) [Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era], XIN HUA NEWS (Oct. 18, 2017), http://www.xinhuanet.com/english/special/2017-11/03/c_136725942.htm; http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf