

Vindicating Public Environmental Interest: Defining the Role of
Environmental Public Interest Litigation in China

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Abstract

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Chinese environmental public interest litigation has assumed increasing attention and significance in recent years. By simply granting standing to public authorities and environmental groups to challenge “acts of polluting or damaging the environment that have harmed the public interest,” the amended Civil Procedure Law of 2012 and Environmental Protection Law of 2014 created an amorphous and ambiguous liability regime. In particular, the central questions about the permissible causes of action and remedies under this new framework remain unanswered. Western observers simply view environmental public interest litigation as the Chinese equivalent of the U.S.’s citizen suit, which provides private parties an avenue for enforcing existing environmental

requirements. Some Chinese scholars examine environmental public interest litigation from a citizen suit perspective while others consider environmental public interest litigation as a tort liability regime, but many struggle to reconcile how the public interest nature can exist within the characteristically private nature of traditional tort claims. Surprisingly, scholars have failed to notice and discuss these two discourses as two competing models for environmental public interest litigation, let alone which discourse is a superior model.

The goal of this dissertation is to explore the fundamental theoretical justification of the emerging environmental public interest litigation by evaluating these discourses. This dissertation first critiques the reflexive acceptance of the citizen suit model. It concludes that while citizen suits may address the failure of governmental enforcement due to a lack of will or resources, it would be politically difficult to implement the idea of private enforcement of regulatory laws in China. Also, the role of citizen suit-style environmental public interest litigation will be greatly diminished due to inherent limitations of existing Chinese environmental laws.

This dissertation then introduces public nuisance law as a path forward in reconciling the struggles of the tort discourse. It demonstrates that by operating like public nuisance law, environmental public interest litigation in theory could overcome the limitations of the citizen suit model by encompassing a wide range of harms resulting from or left uncured by weak environmental regulation and enforcement. It further demonstrates how environmental public interest litigation has been used by litigators as a broad and flexible tool in practice. Ultimately, this dissertation argues that the emerging environmental public interest litigation should be embraced as a public nuisance-style

framework that stands as an independent tool to vindicate public environmental interests when statutory laws have been inadequate to prevent or redress harm.

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ACRONYMS

APL	Administrative Procedure Law
APPCL	Air Pollution Prevention and Control Law
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CPL	Civil Procedure Law
EPA	Environmental Protection Agency
EPB	Environmental Protection Bureau
EPCRA	Emergency Planning and Community Right-to-Know Act
EPIL	Environmental Public Interest Litigation
EPL	Environmental Protection Law
ESA	Endangered Species Act
MEE	Ministry of Ecology and Environment
MEPL	Marine Environmental Protection Law
NPC	National People's Congress
SPC	Supreme People's Court
SWPPCL	Solid Waste Pollution Prevention and Control Law
TEC	Total Emission Control of Major Pollutants Discharges
WPPCL	Water Pollution Prevention and Control Law

DEDICATION

To my parents,

Shucui Chu and Yuanhua Fan

my husband,

Chao Tan

and my daughter,

Xiuyi Tan

INTRODUCTION

In the 2000s, policy entrepreneurs from various fields began to call for establishing environmental public interest litigation (EPIL) in China.¹ Proposals on EPIL have mostly focused on liberalizing the restrictive standing rule contained in the Civil Procedure Law. Before the Civil Procedure Law was amended in 2012, a plaintiff was required to have a “direct interest in the case” to bring a civil suit.² The proposal for creating EPIL has gradually gained widespread support. In 2005, the central government of China for the first time put forward the idea of “studying and setting up environmental civil and administrative public litigation systems” and “promoting environmental public interest litigation.”³

While the national legislature has been slow to make any progress, local environmental courts that began to flourish since the late 2007 have taken innovative measures to implement the concept of public interest litigation. In particular, environmental

¹ Early scholarship proposing to establish environmental public interest litigation (EPIL) in China is voluminous. One important work is a book edited by Bie Tao, an official of the then State Environmental Protection Administration. *See Huanjing Gongyi Susong (环境公益诉讼)* [ENVIRONMENTAL PUBLIC INTEREST LITIGATION], (Bie Tao (别涛) ed., 2007). In February 2005, Mr. Liang Congjie, the founder of China’s first registered environmental group Friends of Nature, submitted a proposal on EPIL to the Tenth National Committee of the Chinese People’s Political Consultative conference. Wan E’xiang, a vice-president of China’s Supreme People’s Court, published an article in 2009 calling for establishing EPIL in China. For English translation of these two documents, see Liang Congjie, *Proposal on Setting Up and Perfecting an Environmental Public Interest Litigation System as Soon as Possible*, 43 CHINESE L. & GOV’T 27–9 (2010); Wan E’Xiang, *Establishing an Environmental Public Interest Litigation System and Promoting the Building of an Ecological Civilization*, 43 CHINESE L. & GOV’T 30–40 (2010).

² *Minshi Susong Fa (民事诉讼法)* [Civil Procedure Law] (promulgated by Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Oct. 28, 2007), art. 108, 1991 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.

³ *See Guowuyuan Guanyu Luoshi Kexue Fazhan Guan Jiaqiang Huanjing Baohu de Jueding (国务院关于落实科学发展观加强环境保护的决定)* [State Council Decision on the Implementation of Scientific Development and Strengthening of Environmental Protection] (promulgated by St. Council, Dec. 3, 2005), art. 27, 2005 ST. COUNCIL GAZ.

courts in Guiyang, Wuxi, and a few cities in Yunnan Province have been the most prominent in developing extensive legal basis for the courts to accept public interest cases.⁴

The Standing Committee of the National People's Congress (NPC) finally passed an amendment to the Civil Procedure Law on August 31, 2012, which authorizes “government organs and relevant organizations prescribed by law” to bring suit against “acts of polluting the environment or infringing upon consumers' rights and interests that have harmed the public interest.”⁵ The Civil Procedure Law as amended in 2012 (2012 CPL) can be regarded as a milestone in the development of Chinese EPIL, while it is not clear who actually has standing to bring a lawsuit and what qualify as “acts of polluting the environment that have harmed the public interest.”

On April 24, 2014, the Environmental Protection Law was amended to allow social organizations to bring suit on behalf of the public interest if they: (1) are registered with the civil affairs department at or above the municipal/district levels; and (2) have specialized in environmental protection for five consecutive years or more and have no law violation records.⁶ In addition to clarifying requirements that social organizations should satisfy to have standing, the new Environmental Protection Law (2014 EPL) extends the scope of EPIL framework by authorizing suit against “acts of polluting or damaging the environment that have harmed the public interest.”⁷

⁴ For an assessment of the development of environmental courts in China, see Alex L. Wang, *Environmental Courts and Public Interest Litigation in China*, 43 CHINESE L. & GOV'T 4–17 (2010).

⁵ Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Aug. 31, 2012), art. 55, 1991 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

⁶ Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, amended Apr. 24, 2014, effective Jan. 1, 2015) art. 58, 1989 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. [hereinafter 2014 EPL].

⁷ *Id.* at art. 58.

The latest amendment to the 2012 CPL passed on June 27, 2017 explicitly authorizes the procuratorate to initiate civil suits against acts that have harmed the public interest by damaging the environment and natural resources or infringing upon consumers' rights and interests related to food and drug safety, provided that there are no eligible "government organs and relevant organizations prescribed by law" or relevant organs and social organizations fail to bring a suit.⁸

The EPIL system established by these legal developments essentially liberalizes the traditional "direct interest" standing rule. Qualified plaintiffs, including environmental groups, administrative agencies,⁹ and the procuratorate, need only show that there has been a harm to public interest, not a harm to an individualized property or economic interest, to have standing to sue.

In the course of opening up standing and creating this new category of public interest litigation, however, the broad and ambiguous language of the laws created a number of unanswered questions about the permissible scope and purpose of EPIL. In particular, it is unclear what causes of action and remedies this newly created framework would support.

It seems that two different discourses on the fundamental nature of EPIL have arisen in the existing literature. Believing that the U.S. citizen suit provisions inspired the creation of EPIL, one discourse simply treats EPIL as the Chinese equivalent of the citizen

⁸ Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended June 27, 2017), art. 55(2), 1991 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. [hereinafter 2017 CPL].

⁹ For the discussion about the standing of administrative agencies, see *infra* notes 42, 508–510 and accompanying text.

suit, which enables private citizens and groups to directly enforce statutory requirements when agencies are unable or unwilling to enforce.¹⁰

The other discourse, which primarily exists in Chinese academic community, places the roots of EPIL in tort law. However, there is a debate within the tort discourse about how the public interest nature can fit with traditional Chinese tort law characterized by private nature.¹¹ The tort discourse was adopted by the Supreme People's Court (SPC) in its judicial interpretation regarding EPIL. To provide guidance for court and other legal actors to implement EPIL, the SPC issued a judicial interpretation on January 6, 2015 (2015 EPIL Interpretation) that extended remedies provided by the Tort Law to EPIL lawsuits.¹² Unfortunately, the 2015 EPIL interpretation did not settle the dispute within the tort discourse.¹³ Moreover, given that judicial interpretations in China are not part of the formal law,¹⁴ the fundamental nature of EPIL is still an open question.

Scholars generally have neglected the coexistence of the citizen suit and tort law as two different discourses on EPIL, suggesting that fundamental questions about the role and scope of this emerging framework remain unresolved. Should EPIL be viewed simply as an avenue for enforcing existing environmental laws? Or, should EPIL be embraced as a broader tool that turns only on the showing of environmental harm irrespective of existing

¹⁰ See *infra* Chapter 1, Section A.

¹¹ See *infra* Chapter 1, Section B.

¹² See Guanyu Shenli Huanjing Minshi Gongyi Susong Anjian Shiyong Falv Ruogan Wenti de Jieshi (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) [Interpretation on Certain Issues Concerning Application of the Law in Adjudicating Civil Environmental Public Interest Litigation Cases] (promulgated by the Supreme People's Ct., Jan. 6, 2015, effective Jan. 7, 2015), arts. 19–21 [hereinafter 2015 EPIL Interpretation]. For how each type of remedies provided by the Tort Law would apply in EPIL, see *infra* notes 77–80.

¹³ See *infra* notes 83 and accompanying text.

¹⁴ For the status of judicial interpretations in China, see *infra* notes 81–82 and accompanying text.

statutory requirements? The answers to these questions, which strike at the underlying purpose of EPIL, will help inform EPIL's scope and offer a path forward to scholars who struggle with the proper role of EPIL.

This dissertation aims to explore the fundamental theoretical justifications of the emerging EPIL by examining the two simultaneous, and sometimes competing, discourses among scholars. The major research question that this dissertation sets out to answer is: *What is the potential scope and appropriate role of Chinese EPIL in redressing public harm resulting from pollution and other environmental hazards?*

This dissertation first critiques the reflexive acceptance of the U.S. citizen suit model. It suggests that while adopting citizen suit-like EPIL might help strengthen environmental enforcement undermined by agencies' lack of will or resources, it would be politically difficult to implement the idea of private enforcement of regulatory laws in China. Moreover, the significant limitations and gaps within existing environmental laws will greatly diminish the role of citizen suit-like EPIL.

This dissertation then introduces U.S. public nuisance law as a path forward in reconciling the struggles that Chinese scholars have had with conceptualizing EPIL as a tort-based liability (given their presumption that tort must necessarily be rooted in private interests). By investigating the distinctions, benefits, and limitations of citizen suits as compared to public nuisance claims, this dissertation concludes that public nuisance law serves as an appropriate theoretical model for shaping the role and scope of the emerging EPIL.

Finally, an empirical examination of the landmark litigations shows that the role of EPIL in practice is more aligned with the public nuisance model: EPIL has provided a broad and flexible remedy for a wide range of environmental problems especially those that existing environmental laws failed to address. The central argument of this dissertation is that the emerging EPIL should be embraced as a public nuisance-style framework that can step into the gap when weak regulation or government enforcement has failed to prevent or redress public environmental harm.

Significance of this Dissertation

While the 2012 CPL and 2014 EPL resolved the issue of standing in EPIL suit, they left the central question of when an act can give rise to liability unanswered. Although there is extensive literature on various issues related to Chinese EPIL as discussed in Chapter 1, commentators have criticized that most of these studies are “repetitive” and “of poor quality.”¹⁵ This dissertation is the first to identify the U.S. citizen suit and tort law as two competing discourses that implicate fundamental nature of the newly established EPIL. Accordingly, this dissertation provides first in-depth examination of the theoretical justifications of the emerging EPIL by evaluating these two alternative discourses.

In exploring appropriate scope and role of Chinese EPIL, this dissertation provides first critical examination of the popular citizen suit discourse. Unlike existing scholarship

¹⁵ Hou Jiaru (侯佳儒), *Huanjing Gongyi Susong de Meiguo Lanben Yu Zhongguo Jiejian* (环境公益诉讼的美国蓝本与中国借鉴) [*U.S. Citizen Suits as a Model for Chinese Environmental Public Interest Litigation*], *Jiaoda Faxue* (交大法学) [SJTU L. REV.] 39, 40 (2015).

that automatically applies a U.S. citizen suit-perspective to analyze Chinese EPIL, this dissertation critically evaluates the extent to which the citizen suit model will be compatible with and effective under Chinese legal system.

This dissertation is the first to propose U.S. public nuisance law as a path forward in not only reconciling the struggles of the tort discourse but also conceptualizing the proper role of the emerging EPIL. Due to conceptual difficulties in applying tort remedies—which have traditionally been used to protect private interest in China—to public interest lawsuits, the tort discourse on EPIL has been underdeveloped and underexamined. By introducing the U.S. public nuisance doctrine and examining its distinctions with the citizen suit model, this dissertation helps scholars and policy makers imagine how a tort-based cause of action may play a more effective role in addressing public environmental harm as compared to a citizen suit model in China.

This dissertation is also the first to empirically examine court cases for the purpose of exploring the appropriate theoretical justifications of EPIL. Different from current empirical analyses that are usually descriptive in nature,¹⁶ this dissertation seeks to unearth the common thread in landmark lawsuits: do they generally correspond to a deliberately theorized purpose? Specifically, this dissertation examines whether it is the citizen suit model, or the public nuisance model, that can offer better justifications for the cases that have been brought.

Admittedly, the strength of EPIL, whether conceived as a citizen suit model or tort-based public nuisance model, depends on the willingness and abilities of courts to entertain

¹⁶ See *infra* notes 45–46.

lawsuits brought by plaintiffs. In that way, it is a contingent resource. However, while the effectiveness of EPIL may ultimately depend on political and cultural support and the commitment and power of the judiciary, examining those variables that favor or disfavor the success of EPIL is beyond the scope of this dissertation. Rather this dissertation takes seriously the legislature's desire to open a new avenue for environmental plaintiffs to combat environmental harms. With that opportunity now available, this dissertation seeks to foster the success of that opportunity. In particular, this dissertation recognizes that since EPIL is still an ambiguous framework, it is imperative to clarify the foundational theoretical justification of this new regime. By addressing the fundamental questions about the appropriate scope and role of EPIL that scholars have not yet begun to tackle, this dissertation will make significant contribution to the theory and practice of Chinese EPIL. For actors in the policy arena, it is important for them to reach consensus on the appropriate theoretical basis of EPIL in order to formulate suitable legal rules and policies. Practitioners can also benefit from a better understanding of the theoretical underpinning of this emerging regime, because whether EPIL is viewed as a U.S.-style citizen suit or as a tort-based framework will fundamentally shape the sort of environmental public interest cases that can be brought in China.

Scope of this Dissertation

Scholars usually classify EPIL into two categories: (1) civil EPIL against polluters whose polluting activities have harmed the public interest; (2) administrative EPIL against

administrative agencies whose acts have led to harm to the public environmental interest.¹⁷ Similar to the pre-2012 Civil Procedure Law, the Administrative Procedure Law (APL) has traditionally required a plaintiff to show that he is “a regulated party” or has a “direct interest in the administrative act” being challenged.¹⁸ The defining feature for both civil and administrative EPIL proposed by scholars is that plaintiffs should be allowed to bring lawsuit in the public interest without showing a “direct interest” in the case.

This dissertation only addresses civil EPIL because it was not until recently that the amended APL opened the door for administrative EPIL brought by the procuratorate. Despite remarkable progresses in establishing civil EPIL, the Chinese government has taken a cautious approach to authorizing administrative EPIL where government departments are the parties being sued. On July 1, 2015, the Standing Committee of the NPC authorized the Supreme People’s Procuratorate to launch a two-year public interest litigation pilot project in 13 provincial-level jurisdictions.¹⁹ This pilot project empowers the procuratorate to initiate civil and administrative public interest lawsuits in certain areas including the area of ecological environment and resources protection.²⁰

¹⁷ See, e.g., Bie Tao (别涛), *Zhongguo de Huanjing Gongyi Susong Jiqi Lifa Shexiang* (中国的环境公益诉讼及其立法设想) [*Chinese Environmental Public Interest Litigation and Legislative Proposals*], in *Huanjing Gongyi Suong* (环境公益诉讼) [ENVIRONMENTAL PUBLIC INTEREST LITIGATION] 1, 1–2 (Bie Tao (别涛) ed., 2007).

¹⁸ *Xingzheng Susong Fa* (行政诉讼法) [Administrative Procedure Law] (promulgated by Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990, amended Nov. 1, 2014), art. 25(1), 1989 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.

¹⁹ *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Shouquan Zuigao Renmin Jianchayuan zai Bufen Diqu Kaizhan Gongyi Susong Shidian Gongzuo de Jueding* (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) [Standing Committee of the National People’s Congress Decision on Authorizing the Supreme People’s Procuratorate to Pilot Public Interest Litigation in Certain Regions] (promulgated by the Standing Comm. Nat’l People’s Cong., Jul. 1, 2015), http://www.gov.cn/xinwen/2015-07/01/content_2888125.htm.

²⁰ *Id.*

The administrative EPIL was officially created by the amendment to the APL passed by the NPC on June 27, 2018. The new APL authorizes the procuratorate to sue administrative agencies who have harmed the national or public interest because of abuse of power or nonfeasance in relation to the ecological environment and resources protection, food and drug safety, protection of state assets, and transfer of state-owned land use rights.²¹

While there is also an increased academic interest in administrative EPIL in recent years, this dissertation limits its scope to civil EPIL against parties that polluting or damaging the environment. One important reason is that the theoretical basis for administrative EPIL and civil EPIL are quite different, so dealing with these two different regimes at the same time will make this study less coherent and manageable. Also, as administrative EPIL was only established recently, the time frame is relatively too short to observe any stable patterns in litigation practice. Due to the scope of this dissertation, the term environmental public interest litigation, or EPIL, refers to civil environmental public interest litigation throughout this dissertation unless specified otherwise.

Research Method

Comparative Analysis of Chinese EPIL and U.S. Legal Institutions

²¹ Xingzheng Susong Fa (行政诉讼法) [Administrative Procedure Law] (promulgated by Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990, amended Jun. 27, 2017), art. 25(4), 1989 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. [hereinafter 2017 APL].

One important purpose of carrying out comparative research of foreign law is to modernize and improve one's legal system at home.²² With the desire to solve the problem that both government regulation and traditional private litigation are insufficient to prevent or redress environmental harm suffered by the general public, Chinese policy entrepreneurs have looked for institutions in other legal systems that deal with the same or similar problem.²³ Finding that the U.S. citizen suit provisions seem to provide an effective solution to the problem concerned by allowing ordinary citizens to bring actions against polluters, scholars have actively advocated to establish a similar public interest litigation system in China. As a result, it is not surprising that after the establishment of EPIL, many scholars naturally treat Chinese EPIL as functionally equivalent to the U.S. citizen suit. However, due to incomplete understanding of the theoretical basis of the U.S. citizen suit, the socio-legal context where it operates and its interrelationships with other legal institutions, the superficial comparison of the Chinese EPIL and U.S. citizen suit often lead to misleading conclusions and policy recommendations.

While EPIL, inspired by the U.S. citizen suit, liberalizes traditional "direct interest" standing requirements, it is still an ambiguous and evolving regime. Following the functionalist method, this dissertation expands the search for "functional equivalents" of Chinese EPIL.²⁴ It identifies that in addition to the citizen suit, U.S. public nuisance law

²² Esin Orucu, *Methodological Aspects of Comparative Law*, 8 EUR. J.L. REFORM 29, 31 (2006).

²³ This approach to comparative law can be described as problem-solving approach, in which "the question to be answered is: 'How is a specific social or legal problem, encountered both in society A and society B resolved?' that is, 'Which legal or other institutions are developed to cope with this problem?'" *Id.* at 33.

²⁴ In the functional approach the question to be answered is "which institution in system B performs an equivalent function to the one under survey in system A?" In other words, comparative scholars "seek for institutions performing the same role or solving the same problem, in other words, having 'functional comparability.'" The problem-solving approach and functional approach are two sides of the same coin, because both approaches embrace the same assumptions that "there are shared problems or needs in all the societies, that they are met somewhere in each society and that the means of solving these problems may be different in different societies but are comparable as their functions are equivalent." *Id.*

performs a similar function to Chinese EPIL in terms of allowing certain parties to bring lawsuits on behalf of the public interest. However, the citizen suit and public nuisance law protect public environmental interest in a different way because of their different theoretical justifications. By examining in-depth the distinctions of the citizen suit and public nuisance law and the broad institutional landscape in which they operate, and by evaluating the benefits and limitations of reforming current EPIL based on these two “functional equivalents” respectively, this dissertation aims to provide valuable insights into which direction the law of EPIL should go in the future.

Comparative analysis involves data collection for relevant Chinese and U.S. legal institutions. For the purpose of this dissertation, study of the U.S. citizen suit and public nuisance law focuses more on the legal doctrines reflected “on the book.” Therefore, data is collected primarily by reviewing legislations, case law, treaties, law review articles, legislative histories and other relevant material. Research of Chinese EPIL combines theoretical and empirical elements. A multitude of primary material (statutes, regulations, legislative histories, Supreme Court interpretations, court decisions, policy documents, etc.) and secondary sources (scholarly books, law review articles, research reports, etc.) are analyzed.

Qualitative Empirical Research of EPIL Cases

Despite many unanswered questions about the scope and role of EPIL, there is a growing body of lawsuits brought by qualified plaintiffs under this young framework. In order to test the explanatory power of the U.S. citizen suit and public nuisance law and explore how practitioners have understood and contested key issues in litigation, this

dissertation collects and analyzes landmark cases filed under the fledgling EPIL framework in recent years.

According to the official data provided by the SPC, as of June 2017, environmental groups and prosecutors have brought 232 lawsuits in total and 87 of them have been decided by courts (see Figure 1 and Figure 2). However, only a limited number of court opinions were published despite increased transparency of the judiciary in China. Available court cases are collected from various sources such as commercial databases,²⁵ websites and publications of courts at different levels, environmental groups' websites/publications, academic books and articles, and media reports.

It should be noted that this project does not seek to offer a full picture of the living law in a society. The context within which these lawsuits were litigated or the dynamics behind formal judicial opinions is beyond the scope of this study. Therefore, qualitative document analysis is limited to judicial opinions, legal briefs where available, and other textual sources that provide relevant information about EPIL cases.

²⁵ For example, the case database of Beida Fabao (北大法宝) [pkulaw.cn] includes over 26 million judicial opinions and is one of the most comprehensive databases for searching judicial cases in China.

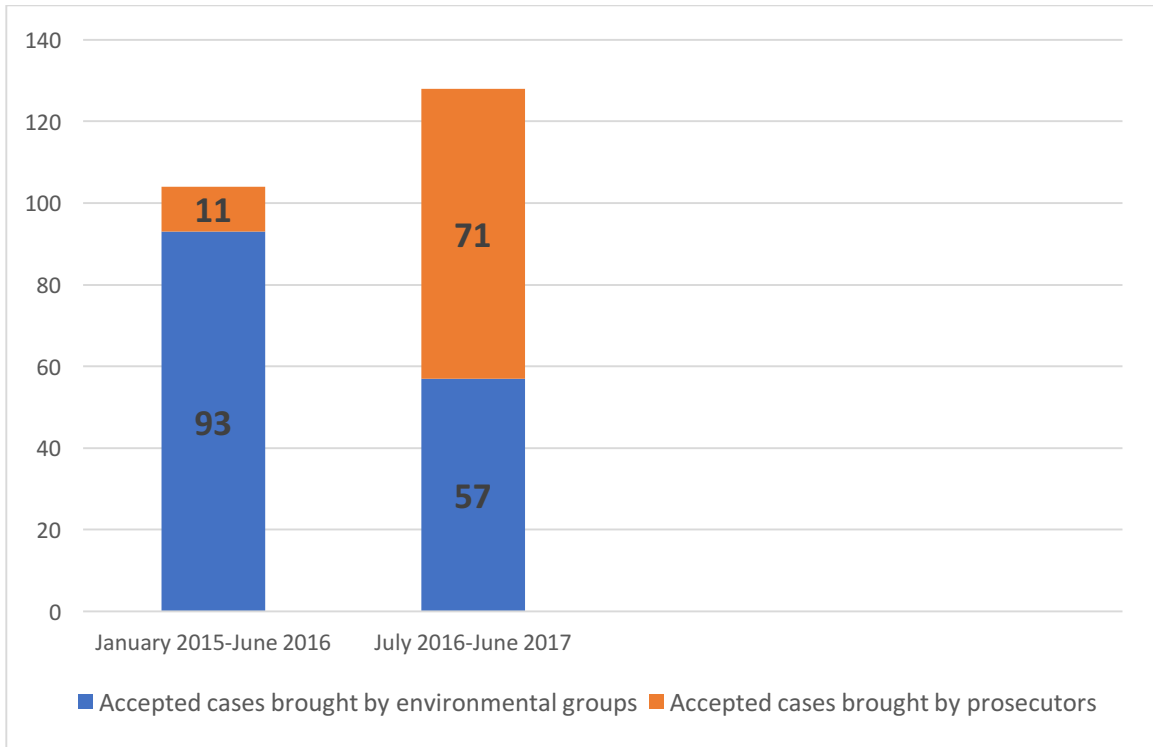


Figure 1. Accepted EPIL cases by plaintiff type between January 2015 and June 2017²⁶

²⁶ See Zuigao Renmin Fayuan (最高人民法院) [Supreme People's Court], Zhongguo Huanjing Ziyuan Shenpan (中国环境资源审判) [WHITE PAPER ON CHINA'S ENVIRONMENTAL RESOURCE TRIAL] (2016).

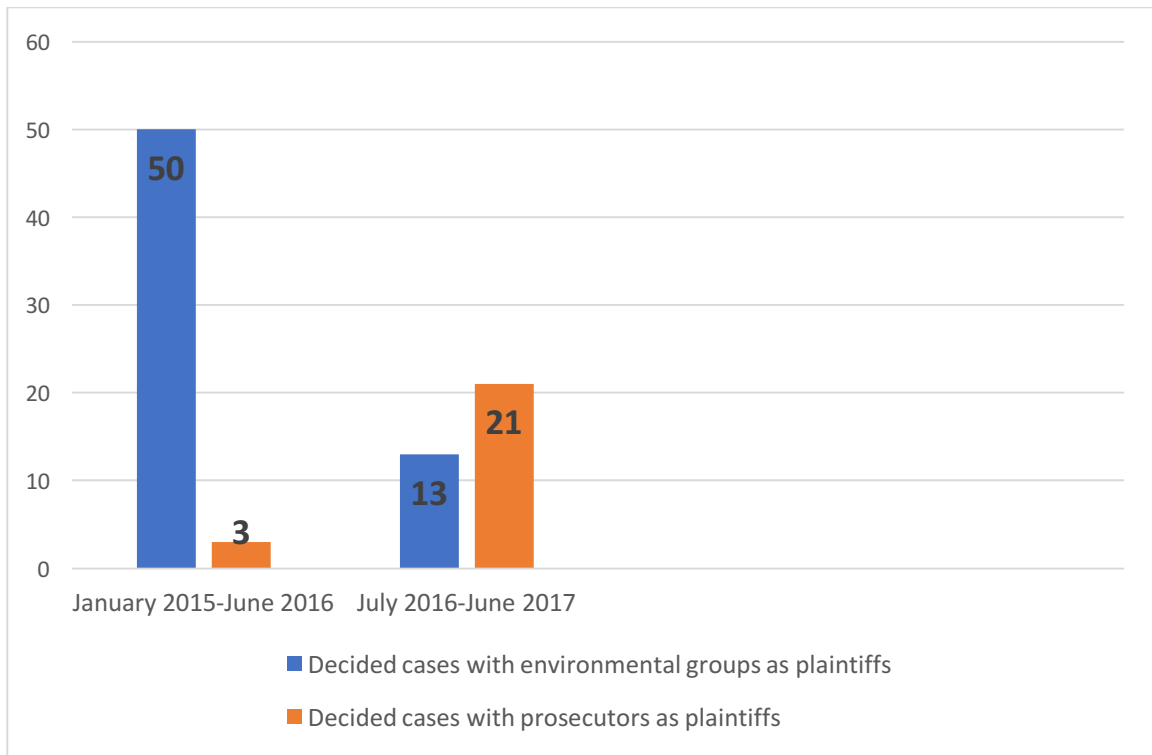


Figure 2. Decided EPIL Cases by plaintiff type between January 2015 and June 2017²⁷

Organization of this Dissertation

In search of the appropriate scope and role of EPIL, the remaining part of this dissertation is divided into five chapters.

Chapter 1 offers a review of existing literature covering various issues related to EPIL. The focus is to identify two competing discourses that provide different fundamental theoretical justifications for the emerging EPIL—one frames EPIL as a model of the U.S.

²⁷ See Zuigao Renmin Fayuan (最高人民法院) [Supreme People's Court], *Zhongguo Huanjing Ziyuan Shenpan* (中国环境资源审判) [WHITE PAPER ON CHINA'S ENVIRONMENTAL RESOURCE TRIAL] (2017).

citizen suit while the other treats EPIL as a tort-based framework. This chapter also discusses how the SPC's 2015 EPIL Interpretation has confusingly integrated certain elements of both the U.S. citizen suit and tort law discourse as well as the limitations of these two discourses.

Chapter 2 sets the stage for a critical evaluation of the citizen suit discourse by investigating in detail the functioning of citizen suit provisions contained in U.S. environmental statutes. Chapter 3 examines the benefits and limits of conceiving EPIL based on the U.S. citizen suit model. It explores various factors that have hindered effective environmental enforcement in China and evaluates what citizen suit-style EPIL can and cannot achieve in addressing these problems. It concludes that conceptualizing EPIL as a citizen suit-type framework will need to overcome significant political obstacles and will diminish the role of EPIL in China despite anticipated benefits.

In an effort to untangle the struggles of the tort discourse to adapt private tort remedies to public interest lawsuits, Chapter 4 turns to U.S. public nuisance law as a useful model for conceiving how a tort-based liability regime addressing public environmental harm might function. Drawing together Chapter 3 and the discussion on the U.S. public nuisance doctrine in this chapter, it evaluates which model, the citizen suit or public nuisance law, can serve as an appropriate framework for conceptualizing and shaping the emerging EPIL. It argues that a public nuisance-like framework could overcome the limitations of citizen suit-style EPIL by encompassing a wide range of environmental harms including harms that existing environmental laws fail to address.

Shifting attention to the litigation practice, Chapter 5 examines whether the landmark lawsuits that have been brought to date and the judicial responses to these suits serve a desirable and deliberately theorized purpose. Finding that the EPIL framework has been used by litigators as a broad and flexible tool to address various environmental harms rather than to simply enforce existing environmental requirements, this chapter offers compelling support for the usefulness of public nuisance law as a model for conceptualizing and reforming the fledgling EPIL in China.

Chapter 1 TWO COMPETING DISCOURSES ON CHINESE ENVIRONMENTAL PUBLIC INTEREST LITIGATION

Since the early 2000s, Chinese scholars began to discuss the necessity and possibility of establishing a public interest litigation system in the environmental protection area. EPIL is generally defined as a framework that allows certain parties without a “direct interest” to bring lawsuit against conduct that has harmed the public environmental interest.²⁸ As a liberal standing rule is the defining character of the proposed EPIL, studies in early days have focused on who should have standing to sue.²⁹ In particular, scholars

²⁸ See, e.g., Bie Tao (别涛), *Huanjing Gongyi Susong de Lifa Gouxiang* (环境公益诉讼的立法构想) [*Legislative Proposals on Environmental Public Interest Litigation*], *Huanjing Baohu* (环境保护) [ENVTL. PROT.] 23, 23–4 (2005); Wang Canfa (王灿发), *Zhongguo Huanjing Gongyi Susong de Zhuti Jiqi Zhengyi* (中国环境公益诉讼的主体及其争议) [*Qualified Plaintiffs of Chinese Environmental Public Interest Litigation and Related Controversies*], 18 *Guojia Jianchaguan Xueyuan Xuebao* (国家检察官学院学报) [J. NAT'L PROSECUTORS C.] 3, 3 (2010).

²⁹ See, e.g., Li Ainian (李爱年), *Zhongguo Huanjing Gongyi Susong de Lifa Xuanze* (中国环境公益诉讼的立法选择) [*Legislative Choice of Environmental Public Interest Litigation in China*], *Faxue Zazhi* (法学杂志) [L. SCI. MAGAZINE] 4 (2010); Li Jing (李劲), *Guowai Huanjing Gongyi Susong Zhuti Zige de Queding Jiqi Jiejian* (国外环境公益诉讼主体资格的确定及其借鉴) [*Lessons from the Determination of Qualified Plaintiffs in Environmental Public Interest Litigation in Foreign Countries*], *Faxue Zazhi* (法学杂志) [L. SCI. MAGAZINE] 90 (2011); Wang Canfa (王灿发), *Zhongguo Huanjing Gongyi Susong de Zhuti Jiqi Zhengyi* (中国环境公益诉讼的主体及其争议) [*Qualified Plaintiffs of Chinese Environmental Public Interest Litigation and Related Controversies*], 18 *Guojia Jianchaguan Xueyuan Xuebao* (国家检察官学院学报) [J. NAT'L PROSECUTORS C.] 3 (2010).

disagree on whether the law should grant standing to the procuratorate,³⁰ and among various parties who are eligible to sue, who should have priority to bring a suit.³¹

Early literature also discusses some specific issues about EPIL other than standing. For example, scholars are interested in what constitutes the “public interest,”³² what should be the standard of liability,³³ how to allocate the burden of proof in litigation,³⁴ what sort of relief should be available,³⁵ and how to create incentives for plaintiffs by shifting the litigation costs to defendants.³⁶ Despite a robust discussion on a variety of EPIL-related issues, observers have complained about the “surprisingly little clarity” on exactly what the prospective EPIL would entail.³⁷ Perhaps the only consensus was “some combination

³⁰ For scholarship supporting the standing of the procuratorate in EPIL suits, see, e.g., Bie Tao(别涛), *Jiancha Jiguan Nengfou Tiqi Huanjing Minshi Gongyi Susong* (检察机关能否提起环境民事公益诉讼) [*Whether the Procuratorate Can Bring Civil Environmental Public Interest Lawsuits*], *Renmin Jiancha* (人民检察) [PEOPLE'S PROCURATORIAL SEMIMONTHLY] 29 (2009); Cai Yanmin (蔡彦敏), *Zhongguo Huanjing Minshi Gongyi Susong de Jiancha Dandang* (中国环境民事公益诉讼的检察担当) [*The Procuratorate should be the Eligible Plaintiff to Bring Civil Environmental Public Interest Lawsuits in China*], 23 *Zhongwai Faxue* (中外法学) [PEKING U. L. J.] 161 (2011). For arguments against conferring standing to the procuratorate, see, e.g., Lv Zhongmei (吕忠梅), *Huanjing Gongyi Susong Bianxi* (环境公益诉讼辨析) [*Analysis of Environmental Public Interest Litigation*], *Fashang Yanjiu* (法商研究) [STUD. L. BUS.] 131, 133–34 (2008); Zhang Liming (章礼明), *Jiancha Jiguan Buyi Zuowei Huanjing Gongyi Susong de Yuangao* (检察机关不宜作为环境公益诉讼的原告) [*The Procuratorate is not the Appropriate Plaintiff in Environmental Public Interest Litigation*], *Faxue* (法学) [L. SCI.] 134 (2011).

³¹ See, e.g., Li Zhiping (李挚萍), *Zhongguo Huanjing Gongyi Susong Yuangao Zhuti de Youlie Fenxi he Shunxu Zuanze* (中国环境公益诉讼原告主体的优劣分析和顺序选择) [*Analysis of the Advantages and Disadvantages of Different Plaintiffs and the Priority to Bring Environmental Public Interest Lawsuits in China*], 28 *Hebei Faxue* (河北法学) [HEBEI L. SCI.] 21 (2010).

³² See, e.g., Wang Xiaogang (王小刚), *Lun Huanjing Gongyi Susong de Liyi he Quanli Jichu* (论环境公益诉讼的利益和权利基础) [*On the Fundamental Interests and Rights of Environmental Public Interest Litigation*], 41 *Zhejiang Daxue Xuebao* (Renwen Shehui Kexue Ban) (浙江大学学报(人文社会科学版)) [J. ZHEJIANG U. (HUMAN. & SOC. SCI.)] 50, 51–3 (2011).

³³ See, e.g., Wan E'Xiang, *supra* note 1, at 37.

³⁴ See, e.g., Liang Congjie, *supra* note 1, at 29; Wan E'Xiang, *supra* note 1, at 37.

³⁵ See, e.g., Liang Congjie, *supra* note 1, at 29; Ye Yongfei (叶勇飞), *Lun Huanjing Minshi Gongyi Susong* (论环境民事公益诉讼) [*On Environmental Public Interest Litigation*], *Zhongguo Faxue* (中国法学) [CHINA LEGAL SCI.] 105, 111 (2004).

³⁶ See, e.g., Wan E'Xiang, *supra* note 1, at 37; Ye Yongfei (叶勇飞), *supra* note 35.

³⁷ Alex L. Wang, *Environmental Courts and Public Interest Litigation in China*, 43 *CHINESE L. & GOV'T* 4, 7 (2010).

of the procuratorate, environmental bureaus, NGOs, and citizens should be allowed to initiate public interest environmental litigation.”³⁸

In establishing EPIL, the 2012 CPL and 2014 EPL allow qualified plaintiffs to challenge “acts of polluting or damaging the environment that have harmed the public interest.”³⁹ However, they provide little guidance on what constitutes an actionable harm. The broad language fails to define, for example, what qualifies as activities that could give rise to liability.

Instead of clarifying the central elements of the emerging EPIL, academic research following the establishment of EPIL continues to center on the issue of standing. For example, because the 2012 CPL simply confers standing to “government organs and relevant organizations prescribed by law,” many studies have tried to define the appropriate scope of eligible plaintiffs—in particular, whether “government organs prescribed by law” refer to the procuratorate, administrative agencies, or both.⁴⁰ After the standing of the procuratorate was confirmed by the 2017 amendment to the CPL,⁴¹ the focus of dispute shifted to whether administrative agencies (e.g., environmental agencies) should have standing to bring public interest lawsuits.⁴²

³⁸ Rachel E. Stern, *On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits*, 32 L. & POL’Y 79, 94 (2010).

³⁹ See *supra* notes 5–7 and accompanying text.

⁴⁰ See, e.g., Song Zongyu (宋宗宇) & Guo jinhu (郭金虎), *Kuozhan yu Xianzhi: Woguo Huanjing Minshi Gongyi Susong Yuangao Zige zhi Queli* (扩展与限制: 我国环境民事公益诉讼原告资格之确立) [*Expansion and Limitation: the Determination of Plaintiffs’ Standing in Civil Environmental Public Interest Litigation in China*], *Faxue Pinglun* (法学评论) [L. REV.] 61, 66 (2013); Xiao Jianguo (肖建国) & Huang Zhongshun (黄忠顺), *Huanjing Gongyi Susong Jiben Wenti Yanjiu* (环境公益诉讼基本问题研究) [*Study of the Basic Questions about Environmental Public Interest Litigation*], *Falv Shiyong* (法律适用) [J. L. APPLICATION] 8, 12–3 (2014).

⁴¹ See *supra* note 8.

⁴² Some scholars defend the standing of environmental protection agencies to bring EPIL suits. See, e.g., Cao Shuqing (曹树青), “Daiyu Xingzheng Zhize Lun” zhi Bian—Huanbao Xingzheng Bumen Huanjing Gongyi

In addition to the standing, the types of remedy available to plaintiffs in EPIL suits also attract considerable academic attention.⁴³ Scholars are particularly interested in the application of “restoration to the original status” and “damages,” two forms of remedy provided by the 2015 EPIL Interpretation issued by the SPC, in remediating ecological damage.⁴⁴ There are also a few empirical analyses of EPIL cases that either describe statistical characteristics of collected samples⁴⁵ or provide comments on individual cases.⁴⁶

Susong Yuangao Zige zhi Lunjian (“怠于行政职责论”之辩—环保行政部门环境公益诉讼原告资格之论见) [*Debate on “Agency Inaction”—Thoughts on the Standing of Environmental Protection Agencies in Environmental Public Interest Litigation*], Xueshujie (学术界) [ACAD.] 109 (2012). Other scholars, however, argue that environmental protection agencies should not be qualified plaintiffs in EPIL lawsuits. *See, e.g.*, Shen Shouwen (沈寿文), Huanjing Gongyi Susong Xingzheng Jiguan Yuangao Zige zhi Fansi—Jiyu Xianfa Yuanli de Fenxi (环境公益诉讼行政机关原告资格之反思—基于宪法原理的分析) [*Reflections on the Standing of Administrative Agencies in Environmental Public Interest Litigation—An Analysis based on Constitutional Principles*], Dangdai Faxue (当代法学) [CONTEMP. L. REV.] 61 (2013); Wang Xiaogang (王小刚), Weishenme Huanbaoju Buyi zuo Huanjing Gongyi Susong Yuangao? (为什么环保局不宜做环境公益诉讼原告?) [*Why are Environmental Protection Agencies not Appropriate Plaintiffs in Environmental Public Interest Litigation?*], Huanjing Baohu (环境保护) [ENVTL. PROT.] 54 (2010).

⁴³ *See, e.g.*, Lin Wenxue (林文学), Huanjing Minshi Gongyi Susong Zhengyi Wenti Tantaos (环境民事公益诉讼争议问题探讨) [*Discussion on the Controversial Issues in Civil Environmental Public Interest Litigation*], Falv Shiyong (法律适用) [J. L. APPLICATION] 43, 46–7 (2014); Zhang Hui (张辉), Lun Huanjing Minshi Gongyi Susong de Zeren Chengdan Fangshi (论环境民事公益诉讼的责任承担方式) [*On the Forms of Remedies in Civil Environmental Public Interest Litigation*], 29 Faxue Luntan (法学论坛) [LEGAL F.] 58 (2014).

⁴⁴ *See, e.g.*, Wang Lixin (王立新), et al., Huanjing Ziyuan Anjian Zhong Huifu Yuanzhuang de Zeren Fangshi (环境资源案件中恢复原状的责任方式) [*The Forms of Restoration to the Original Status in Environmental Cases*], Renmin Sifa (人民司法) [PEOPLE’S JUDICATURE] 9 (2015); Li Xingyu (李兴宇), Lun Woguo Huanjing Minshi Gongyi Susong Zhong de “Peichang Sunshi” (论我国环境民事公益诉讼中的“赔偿损失”) [*On “Damages” in Civil Environmental Public Interest Litigation in China*], Zhengzhi Yu Falv (政治与法律) [POL. SCI. & L] 15 (2016). For further discussion, see *infra* notes 72–76 and accompanying text.

⁴⁵ *See, e.g.*, Gong Gu (巩固), 2015 Nian Zhongguo Huanjing Minshi Gongyi Susong de Shizheng Fenxi (2015年中国环境民事公益诉讼的实证分析) [*Empirical Analysis of Chinese Civil Environmental Public Interest Litigation in 2015*], Faxue (法学) [L. SCI.] 16 (2016); Liu Hui (刘辉) & Jiang Xin (姜昕), Jiancha Jiguan Tiqi Minshi Gongyi Susong Shidian Qingkuang Shizheng Yanjiu (检察机关提起民事公益诉讼试点情况实证研究) [*Empirical Study of Implementation of the Pilot Program Authorizing the Procuratorate to Bring Civil Environmental Public Interest Litigation*], 25 Guojia Jianchaguan Xueyuan Xuebao (国家检察官学院学报) [J. NAT’L PROSECUTORS C.] 59 (2017).

⁴⁶ *See, e.g.*, Lv Zhongmei (吕忠梅), Huanjing Sifa Lixing Buneng Zhiyu Tianjia Peichang: Taizhou Huanjing Gongyi Susong An Pingxi (环境司法理性不能止于“天价”赔偿: 泰州环境公益诉讼案评析) [*Judicial Rationality Must Go Beyond the Sky High Damages: Comments on the Taizhou Case*], Zhongguo Faxue (中国法学) [CHINA LEGAL SCI.] 244 (2016).

The vibrant discussion post creation of EPIL does not provide a clearer picture of what this emerging system looks like or should look like. Despite the fragmentation and incoherence of existing literature, this dissertation has identified two discourses that present two different shapes the emerging EPIL may take—one is the U.S. citizen suit and the other one is tort liability. Sections A and B explore these two discourses respectively. Section C analyses the ambivalence reflected in the SPC’s 2015 EPIL Interpretation about the fundamental nature of EPIL, while Section D discusses how both the citizen suit discourse and tort law discourse have failed to define the contours of the emerging EPIL.

A. EPIL AS “CHINESE CITIZEN SUIT”

Citizen suit provisions under federal environmental statutes of the United States, which are known as “the most pervasive, prominent, and continuing innovation in the modern environmental era,”⁴⁷ enable private entities to bring actions to enjoin violations of regulatory requirements. These provisions are most frequently implemented when government authorities have failed to enforce environmental laws due to lack of will or resources.

The U.S. citizen suit, especially its liberal standing rule, has inspired policy entrepreneurs who had long been unsatisfied with the “direct interest” requirement in Chinese environmental litigation. Scholarship that introduces the U.S. environmental citizen suit as a model of public interest litigation had appeared since the beginning of this century. Because early studies on the U.S. citizen suit serve the purpose of “enlightenment,” most of them simply include descriptive analyses of the U.S. citizen suit and/or proposals

⁴⁷ Barton H. Jr. Thompson, *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 185 (2000).

to establish a similar system in China.⁴⁸ With the U.S. citizen suit gaining considerable influence in China, many Chinese judges, government officials, scholars, and lawyers even went to the United States to learn how the citizen suit can serve as a model for the prospective EPIL.⁴⁹

Since the concept of citizen suit is so influential throughout the development of Chinese EPIL, scholarship on the U.S. citizen suit continues to increase after the adoption of EPIL. Apart from providing a more detailed introduction to the U.S. citizen suit,⁵⁰ scholars begin to use U.S. citizen suit as a benchmark to examine the newly created EPIL. When comparing existing rules on EPIL with citizen suit provisions under the U.S. statutes,

⁴⁸ There is a great deal of literature discussing how China can learn from the U.S. citizen suit. See, e.g., Chang Jiwen (常纪文), *Woguo Huanjing Gongyi Susong Lifa Cunzai de Wenti Jiqi Duice—Meiguo Panli Fa de Xinjin Fazhan Jiqi Jingyan Jiejian* (我国环境公益诉讼立法存在的问题及其对策—美国判例法的新近发展及其经验借鉴) [*Problems in China's Legislation on Environmental Public Interest Litigation and Solutions—Recent Development of the U.S. Case Law and Lessons*], 29 *Xiandai Faxue* (现代法学) [MOD. L. SCI.] 103 (2007); Patti Goldman, *Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience*, 8 VT. J. ENVTL. L. 251 (2006); Li Jingyun (李静云), *Meiguo de Huanjing Gongyi Susong—Huanjing Gongmin Susong de Jiben Neirong Jieshao* (美国的环境公益诉讼—环境公民诉讼的基本内容介绍) [*U.S. Environmental Public Interest Litigation—An Introduction to the Environmental Citizen Suit*], in *Huanjing Gongyi Susong* (环境公益诉讼) [ENVIRONMENTAL PUBLIC INTEREST LITIGATION] 92 (Bie Tao (别涛) ed., 2007); Li Yanfang (李艳芳), *Meiguo de Gongmin Susong Zhidu Jiqi Qishi—Guanyu Jianli Woguo Gongyi Susong Zhidu de Jiejian Xing Sikao* (美国的公民诉讼制度及其启示—关于建立我国公益诉讼制度的借鉴性思考) [*Lessons from the U.S. Citizen Suits—Thoughts on the Creation of Environmental Public Interest Litigation in China*], *Zhongguo Renmin Daxue Xuebao* (中国人民大学学报) [J. RENMIN U. CHINA] 122 (2003); Qi Shujie (齐树洁), *Huanjing Gongyi Susong Yuangao Zige de Kuozhang* (环境公益诉讼原告资格的扩张) [*Expansion of Standing in Environmental Public Interest Litigation*], 22 *Faxue Luntan* (法学论坛) [LEGAL F.] 47 (2007).

⁴⁹ Jingjing Liu, *Environmental Justice with Chinese Characteristics: Recent Developments in Using Environmental Public Interest Litigation to Strengthen Access to Environmental Justice*, 7 FLA. A&M U. L. REV. 229, 243 n.79 (2015) (reporting that since 2007, many Chinese judges, government officials, scholars, and lawyers began to visit the U.S.-China Partnership for Environmental Law at Vermont Law School to learn about the U.S. citizen suit and explore how it could serve as a model for EPIL in China).

⁵⁰ See, e.g., Chen Dong (陈东), *Meiguo Huanjing Gongmin Susong Yanjiu* (美国环境公民诉讼研究) [STUDY ON THE U.S. ENVIRONMENTAL CITIZEN SUITS] (2014); Wang Xi (王曦) & Zhang Yan (张岩), *Lun Meiguo Huanjing Gongmin Susong Zhidu* (论美国环境公民诉讼制度) [*On the U.S. Environmental Citizen Suits*], *Jiaoda Faxue* (交大法学) [SJTU L. REV.] 27 (2015); Zhang Hui (张辉), *Meiguo Gongmin Susong zhi “Siren Jiancha Zongzhang Lilun” Jiexi* (美国公民诉讼之“私人检察总长理论”解析) [*Analysis of the “Private Attorney General” Theory in the U.S. Citizen Suit*], *Huanqiu Falv Pinglun* (环球法律评论) [GLOBAL L. REV.] 164 (2014).

scholars have noted some “deviations” of Chinese EPIL from the typical citizen suit. For example, citing the U.S. citizen suit provisions that generally allow “any person” to sue,⁵¹ scholars criticize that the 2012 CPL and 2014 EPL have unduly limited the scope of plaintiffs by only granting standing to certain qualified parties.⁵² Therefore, it is suggested that the law should expand standing to individual citizens and other entities.⁵³

Another “deviation” is the lack of the fee shifting rule characteristic of the U.S. citizen suit sections that allow courts to award costs of litigation to the prevailing party.⁵⁴ Arguing that the formidable litigation cost was one of the major contributors to the limited number of EPIL cases brought after the 2012 CPL took effect, scholars believe that adopting the U.S. style fee shifting provision would stimulate the filing of EPIL lawsuits.⁵⁵

For many scholars, the fatal “defect” of current EPIL framework as compared to the U.S. citizen suit is that a plaintiff is not required to notify the relevant agency before filing a lawsuit. Under the U.S. citizen suit provisions, a plaintiff must provide a notice to the enforcing agency and alleged violator usually sixty days before commencing an enforcement action, and a citizen suit would be barred by agency’s “diligent prosecution”

⁵¹ The standing doctrine in citizen suits is discussed in Chapter 2, Section B.

⁵² See, e.g., Zhang Hui (张辉), *Meiguo Huanjing Gongzhong Canyu Lilun Jiqi Dui Zhongguo de Qishi (美国环境公众参与理论及其对中国的启示)* [*The Theory of Environmental Public Participation in the United States and Its Lessons to China*], 37 *Xiandai Faxue (现代法学)* [MOD. L. SCI.] 148, 154 (2015).

⁵³ See, e.g., Yang Chuntao (杨春桃), *Huanjing Gongyi Sunhai de Falv Jiuji Xianzhuang Ji Duice Yanjiu (环境公益损害的法律救济现状及对策研究)* [*Research on Current Situation of Relief for Damage to Public Environmental Interest and Solutions*], 42 *Huanjing Baohu (环境保护)* [ENVTL. PROT.] 40, 42 (2014).

⁵⁴ This is the misunderstanding of the fee shifting rule in U.S. citizen suits by many Chinese scholars. In fact, U.S. citizen suit provisions allow courts to award litigation costs to any party where appropriate. See *infra* notes 123–124 and accompanying text.

⁵⁵ Chen Liang (陈亮), *Huanjing Gongyi Susong “Ling Shouan Lv” Zhi Fansi (环境公益诉讼“零受案率”之反思)* [*Reflections on the “Zero Acceptance Rate” for Environmental Public Interest Lawsuits*], *Faxue (法学)* [L. SCI.] 129, 133–34 (2013).

against the same violator.⁵⁶ Without such notice and bar mechanism in EPIL suits, scholars are concerned that a plaintiff may inappropriately invoke the judiciary to infringe upon the administrative agencies' primary responsibility for environmental law enforcement.⁵⁷ To ensure that public interest lawsuits supplement rather than replace or supplant government enforcement, scholars suggest that a similar pre-litigation notice requirement contained in the citizen suit provisions should be incorporated into the rules on EPIL.⁵⁸

Not only does the U.S. citizen suit provide a perspective for Chinese scholars to conceptualize the emerging EPIL, but it also becomes a handy reference for western observers to understand this new legal institution in China. For example, when the 2012 CPL officially created EPIL, it was interpreted by U.S. scholars as a sign of “moving

⁵⁶ See *infra* notes 105–107 for a discussion of the notice requirement and diligent prosecution preclusion in U.S. citizen suits.

⁵⁷ See, e.g., Gong Gu (巩固), *Datong Xiaoyi Yihuo Maohe Shenli? Zhongmei Huanjing Gongyi Susong 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 Look Like Twins: Comparative Research on Environmental Public Interest Litigation in China and U.S.*], *Bijiao Fa Yanjiu* (比较法研究) [*J. COMP. L.*] 105, 109, 123 (2017); Luo Li (罗丽), *Woguo Huanjing Gongyi Susong Zhidu de Jiangou Wenti Yu Jiejue Duice* (我国环境公益诉讼制度的建构问题与解决对策) [*The Problems in Establishing Environmental Public Interest Litigation and Solutions*], *Zhongguo Faxue* (中国法学) [*CHINA LEGAL SCI.*] 244, 253–54 (2017); Wang Mingyuan (王明远), *Lun Woguo Huanjing Gongyi Susong de Fazhan Fangxiang: Jiyu Xingzheng Quan yu Sifa Quan Guanxi Lilun de Fenxi* (论我国环境公益诉讼的发展方向: 基于行政权与司法权关系理论的分析) [*On the Future Development of Environmental Public Interest Litigation in China: Analysis Based on the Relationship Between Administrative Power and Judicial Power*], *Zhongguo Faxue* (中国法学) [*CHINA LEGAL SCI.*] 49, 55 (2016); Wang Xi (王曦), *Lun Huanjing Gongyi Susong Zhidu de Lifa Shunxu* (论环境公益诉讼制度的立法顺序) [*On the Sequence of Legislating on Environmental Public Interest Litigation*], 10 *Qinghua Faxue* (清华法学) [*TSINGHUA U. L. J.*] 101, 110–13 (2016).

⁵⁸ See, e.g., Du Qun (杜群) & Liang Chunyan (梁春艳), *Woguo Huanjing Gongyi Susong Danyi Moshi ji Bijiao Shiyu xia de Fansi* (我国环境公益诉讼单一模式及比较视域下的反思) [*Reflections on the Unitary Model of the Environmental Public Interest Litigation in China from a Comparative Perspective*], *Falv Shiyong* (法律适用) [*J. L. APPLICATION*] 46, 54 (2016); Hu Jing (胡静), *Huanbao Zuzhi Tiqi de Gongyi Susong Zhi Gongneng Dingwei—Jianping Woguo Huanjing Gongyi Susong de Sifa Jieshi* (环保组织提起的公益诉讼之功能定位—兼评我国环境公益诉讼的司法解释) [*Defining the Function of the Public Interest Lawsuits Brought by Environmental Groups—Comments on the Judicial Interpretation Concerning Environmental Public Interest Litigation*], *Faxue Pinglun* (法学评论) [*L. REV.*] 168, 176 (2016); Luo Li (罗丽), *supra* note 57, at 264-65; Wang Mingyuan (王明远), *supra* note 57, at 66-7.

toward express recognition of citizen suits against polluters” in China.⁵⁹ Nevertheless, they warned that citizen suits “are no panacea for chronic enforcement in light of the difficulty of proving violations in many cases” despite the relatively successful U.S. experience.⁶⁰ Following the adoption of the 2014 EPL, some analysts applauded “the advent of meaningful citizen suits in China” as “a watershed moment in Chinese environmental litigation, as was the case when citizen suit litigation was introduced into the United States decades ago.”⁶¹ The explicit or implicit treatment of EPIL as the equivalent of the citizen suit can also be found in other U.S. literature on EPIL.⁶²

B. EPIL AS A TORT-BASED REGIME

Alongside the citizen suit narrative of EPIL, the other main discourse in Chinese scholarship concerning EPIL is rooted in tort. The tort discourse on EPIL emerged following major pollution accidents in the first decade of this century. These incidents, for

⁵⁹ Robert V. Percival & Zhao Huiyu, *The Role of Civil Society in Environmental Governance in the United States and China*, 24 DUKE ENVTL. L. & POL’Y F. 141, 181 (2013).

⁶⁰ *Id.* at 182.

⁶¹ Karl Bourdeau & Dan Schulson, “*Citizen Suits*” *Under China’s Revised Environmental Protection Law: A Watershed Moment in Chinese Environmental Litigation?*, BEVERIDGE & DIAMOND, P.C. (Mar. 9, 2016), <http://www.bdlaw.com/news-1863.html>.

⁶² *See, e.g.*, Daniel Carpenter-Gold, *Castles Made of Sand: Public-Interest Litigation and China’s New Environmental Protection Law*, 39 HARV. ENVTL. L. REV. 241, 256–57 (2015) (commenting that EPIL can serve as a means for NGOs to “pull the fire alarm” by suing companies that are in violation of environmental regulations and comparing standing requirements under U.S. citizen suit provisions with standing requirements of EPIL).

example, the 2004 Tuo River pollution⁶³ and the 2005 Songhua River pollution accident,⁶⁴ intensified scholarly attention on the failure of existing law to remediate the disastrous ecological damage caused by pollution. One of these limitations lies in the tort law. While personal injury and property damage sustained from pollution typically support a tort-based cause of action, no one has standing to sue under tort law for ecological injuries suffered by the general public for the lack of a “direct interest.”⁶⁵

Environmental laws also fall short of providing an effective statutory remedy. Although environmental statutes generally impose administrative sanctions (e.g., fines) for polluters’ noncompliance with regulatory requirements, they do not explicitly empower public authorities to seek restoration or compensation for ecological damage as a consequence of pollution.⁶⁶ The only exception is the Marine Environmental Protection

⁶³ In early 2004, a factory of Sichuan Chemicals Group discharged huge amounts of unprocessed wastewater into the Tuo River, leading to a massive fish kill and water supply cutoff affecting millions of people downstream. The incident resulted in not only 300 million yuan (U.S. \$47,827,800) of economic losses but also significant ecological damage. It was estimated that at least five years were needed for restoring the damaged ecosystem of the river. Sichuan Chemicals Group was fined one million yuan (U.S. \$159,426) by the Department of Environmental Protection of Sichuan Province, which was the maximum penalty under applicable laws for causing pollution. In addition, the corporation compensated fishermen 8.2 million yuan (U.S. \$1,307,293) for losses they suffered, and paid another 3.5 million yuan (U.S. \$557,991) to the governments for recovering fish stocks in the river. *See* Xinhua News Agency, *Fishermen Compensated for Yangtze River Pollution*, CHINA.ORG.CN (May 27, 2004), <http://www.china.org.cn/english/environment/96676.htm>.

⁶⁴ In November 2005, an explosion at a chemical plant of the Jilin Petrochemical Corporation dumped about 100 tons of toxic waste into the nearby Songhua River, forcing cities along the river to cut water supplies to 3.8 million people for several days. Again, the State Environmental Protection Administration imposed the maximum penalty one million yuan (U.S. \$159,426) on the company for the massive pollution. *See* Xinhua News Agency, *PetroChina Branch Fined for Pollution*, CHINA DAILY, (Jan. 25, 2007), http://www.chinadaily.com.cn/china/2007-01/25/content_792982.htm.

⁶⁵ For example, following the Songhua River pollution incident, Professor Wang Jin from Peking University Law School brought an action with nature as joint-plaintiff to seek compensation of ten billion yuan for the cleanup and restoration of the Songhua River. However, the court did not accept this case. *See id.*

⁶⁶ *See, e.g.,* Zhu Xiao (竺效), Fansi Songhuajiang Shui Wuran Shigu Xingzheng Fakuan de Falv Ganga—Yi Shengtai Sunhai Tianbu Zerenzhi Wei Shijiao (反思松花江水污染事故行政处罚款的法律尴尬—以生态损害填补责任制为视角) [*Reflections on the Limitations of Administrative Penalties in Addressing the Songhua River Pollution Incident—From the Perspective of Liability for Ecological Damage*], Faxue (法学) [L. SCI.] 6 (2007).

Law, which expressly authorizes competent authorities to seek compensation when damage by pollution to the marine ecosystem, marine fishery resources, and marine protected areas has caused significant losses to the State.⁶⁷ Given these obstacles to recovering damages for ecological injuries under existing legal framework, scholars proposed to create a public interest litigation system, which would afford standing to certain parties to bring a tort action in the public interest, as a tool to hold polluters liable for ecological damage.⁶⁸

While liberalizing the restrictive standing in tort actions is widely accepted, scholars have grappled with other conceptual difficulties in stretching tort law to remedy ecological damage that implicates public interest. For example, many scholars insist that ecological damage is different from traditional types of damage (i.e., personal injury, property damage, and economic loss) and does not fit properly in the tort law system of China that has conventionally focused on private interest.⁶⁹ Some scholars, however, try to fit ecological damage within tort liability by resorting to the theory of public ownership of natural resources. According to these scholars, because many natural resources (e.g. mineral resources, waters, sea areas, forests, mountains, grasslands, wasteland, tidal flats,

⁶⁷ See Haiyang Huanjing Baohu Fa (海洋环境保护法) [Marine Environmental Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Apr. 1, 2000, amended Nov. 4, 2017), art. 89 (2), 1982 STANDING COMM. NAT'L PEOPLE CONG. GAZ. [hereinafter 2017 MEPL].

⁶⁸ See, e.g., Lv Zhongmei (吕忠梅), *supra* note 30, at 134-36; Wang Xiaogang (王小刚), *supra* note 32, at 54-6.

⁶⁹ See, e.g., Li Zhiping (李挚萍), Huanjing Xiufu de Sifa Cailiang (环境修复的司法裁量) [*Judicial Discretion on the Environmental Restoration*], 14 Zhongguo Dizhi Daxue Xuebao (Shehui Kexue Ban) (中国地质大学学报(社会科学版)) [J. CHINA U. GEOSCI. (SOC. SCI. ED.)] 20, 22 (2014); Xu Xiangmin (徐祥民), Huanjing Wuran Zeren Jiexi—Jiantan Qinquan Zeren Fa yu Huanjing Fa de Guanxi (环境污染责任解析—兼谈《侵权责任法》与环境法的关系) [*Analysis of the Liability for Environmental Pollution—Relationship Between the Tort Law and environmental laws*], Faxue Luntan (法学论坛) [LEGAL F.] 17 (2010); Zhang Zitai (张梓太) & Wang Lan (王岚), Woguo Ziran Ziyuan Shengtai Sunhai Sifa Jiuji de Buzu Ji Duice (我国自然资源生态损害私法救济的不足及对策) [*The Limitations of Private Law Relief for Injuries to Natural resources in China and Solutions*], Faxue Zazhi (法学杂志) [L. SCI. MAGAZINE] 56, 59 (2012).

and wildlife) are owned by the State or collectives under Chinese laws,⁷⁰ injury inflicted upon natural resources constitutes damage to the “property rights” of the State or collectives, which would grant standing to public authorities to seek compensation for natural resource damage under tort law.⁷¹

In addition to conceptual difficulties in fitting environmental damage with the tort law system, scholars are also concerned about the challenges of applying traditional tort remedies—in particular, “damages” and “restoration to the original status”⁷²—in the context of environmental damage. First, damages measured by the diminution in market value of the property (i.e., “damages”) usually fail to provide adequate compensation for the injured environment.⁷³ Second, applying “restoration to the original status” to remediate injured environment is both controversial and challenging.⁷⁴ Since “restoration

⁷⁰ See Xian Fa (宪法) [Constitution] (promulgated by Nat’l People’s Cong., Dec. 4, 1982, effective Dec. 4, 1982, amended Mar. 11, 2018) art. 9, 1982 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.; Wuquan Fa (物权法) [Property Law] (promulgated by Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) arts. 46–49, 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.

⁷¹ See, e.g., Li Chengliang (李承亮), *Qinquan Zeren Fa Shiye Zhong de Shengtai Sunhai* (侵权责任法视野中的生态损害) [*Ecological Injury from the Perspective of the Tort Law*], 32 *Xiandai Faxue* (现代法学) [MODERN L. SCI.] 63 (2010); Zhang Lu (张璐), *Lun Ziran Ziyuan Caichan Quanli Qinhai de Qinquan Zeren—Leixing Hua de Shijiao* (论自然资源财产权利侵害的侵权责任—类型化的视角) [*On the Tort Liability for Natural Resource Damage—A Perspective Based on the Classification of Natural Resources*], 15 *Zhongguo Dizhi Daxue Xuebao* (Shehui Kexue Ban) (中国地质大学学报(社会科学版)) [J. CHINA U. GEOSCI. (SOC. SCI. ED.)] 1 (2015); Zhang Zitai (张梓太) & Wang Lan (王岚), *supra* note 69.

⁷² The Tort Law provides for eight types of remedies: cessation of infringement, removal of obstruction, elimination of danger, return of property, restoration to the original status, damages, apology, and eliminations of consequences or restoration or reputation. *Qinquan Zeren Fa* (侵权责任法) [Tort Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective Jul. 1, 2010) art. 15, 2009 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. Among various remedies, “restoration to the original status” and “damages” are especially relevant for the purpose of seeking compensation for environmental damage.

⁷³ See, e.g., Li Chengliang (李承亮), *supra* note 71, at 68-9; Zhang Zitai (张梓太) & Wang Lan (王岚), *supra* note 69, at 57-8.

⁷⁴ Scholars point out that it is difficult to determine what is the “original status” of the injured environment, whether it is technically feasible and economically reasonable to restore the damaged environment, and what is the objective of restoration. See, e.g., Wang Lixin (王立新), et al., *supra* note 44, at 11-2; Hu Wei (胡卫), *Huanjing Wuran Qinquan yu Huifu Yuanzhuang de Tiaoshi* (环境污染侵权与恢复原状的调适) [*Torts of Environmental Pollution and Modification of the “Restoration to the Original Status”*], Lilun Jie (理论界)

to the original status” is traditionally applied to repair damaged property,⁷⁵ scholars generally agree that it is necessary to modify “restoration to the original status” to accommodate the unique characteristics of ecological injury.⁷⁶

The 2012 CPL and 2014 EPL do not explicitly state that EPIL is a framework premised on tort theory. Nor do they emphasize that EPIL can be used only to deal with ecological damage. However, the 2015 EPIL Interpretation issued by the SPC was an attempt to adapt remedies provided by tort law to specifically address ecological damage. According to the 2015 EPIL Interpretation, “cessation of infringement, removal of obstacle, elimination of danger” may be applied to prevent threatened environmental damage or avoid further damage.⁷⁷ If a plaintiff took reasonable measures to “cease infringement, remove obstacle, or eliminate danger,” he may bring claims for reimbursement of costs incurred.⁷⁸ Moreover, where a plaintiff requests “restoration to the original status,” the court may order the responsible party to restore the damaged environment to its “pre-injured condition and services” or pay costs of restoration if the defendant is unable or unwilling to perform restoration.⁷⁹ Finally, courts may award compensation for the interim losses of ecological services and functions during the recovery period if plaintiffs file a claim for “damages.”⁸⁰

[THEORY HORIZON] 111, 113–15 (2014); Zhang Hui (张辉), *On the Forms of Remedies*, *supra* note 43, at 64-6; Li Zhiping (李挚萍), *Judicial Discretion*, *supra* note 69, at 22-3.

⁷⁵ See Li Chengliang (李承亮), Sunhai Peichang Yu Minshi Zeren (损害赔偿与民事责任) [*Damages and Civil Liability*], *Faxue Yanjiu* (法学研究) [CHINESE J. L.] 135, 147 (2009).

⁷⁶ See, e.g., Wang Lixin (王立新), et al., *supra* note 44, at 12-3; Hu Wei (胡卫), *supra* note 74, at 115-20.

⁷⁷ 2015 EPIL Interpretation, *supra* note 12, at art. 19.

⁷⁸ *Id.*

⁷⁹ *Id.* at art. 20. According to Article 20, restoration costs include cost of designing and implementing restoration plans as well as cost of monitoring and supervising restoration projects.

⁸⁰ *Id.* at art. 21.

It should be noted that while the extensive judicial interpretations in China “play a crucial role in unifying the legal system and ensuring consistency in the application of law” by “address[ing] some ambiguities, gaps, and inconsistencies in legislation,”⁸¹ they do not have the status of formal law and are subject to amendment or abolishment if they are found to conflict with laws.⁸² Therefore, it is appropriate to consider the 2015 EPIL Interpretation as an alternative discourse rather than the most authoritative understanding of the law.

The SPC’s lead to embrace tort discourse in EPIL does not dispel the controversy over whether it is appropriate to stretch tort law remedies to address ecological damage. For example, given the conceptual distinctions between “restoration of the environment” and “restoration of the property” and practical difficulties in applying ecological restoration liability, many scholars still believe that an expanded interpretation of “restoration to the original status” is simply a legal expediency in providing relief for ecological damage. Instead of stretching traditional “restoration to the original status,” scholars propose that “restoration of the environment” be clearly recognized by environmental statutes as an independent statutory remedy for ecological damage.⁸³

⁸¹ Keith J. Hand, *Understanding China’s System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 139, 219–20 (2013).

⁸² To ensure that judicial interpretations do not exceed acceptable boundaries, the SPC judicial interpretations are subject to the review of the Standing Committee of the National People’s Congress. Judicial interpretations that are in conflict with laws may be amended or annulled. See *id.* at 139–216, for a discussion of how the national legislature exercises supervision over various sources of law, including SPC judicial interpretations, and addresses legislative conflicts through the filing and review system and other mechanisms.

⁸³ See, e.g., Lv Zhongmei (吕忠梅) & Dou Haiyang (窦海阳), *Xiufu Shengtai Huanjing Zeren de Shizheng Jixi (修复生态环境责任的实证解析) [Empirical Study of the Application of Liability for Ecological Restoration]*, *Faxue Yanjiu (法学研究) [CHINESE J. L.]* 125, 140–42 (2017); Sun Qian (孙茜), *Woguo Huanjing Gongyi Susong Zhidu de Sifa Shijian yu Fansi (我国环境公益诉讼制度的司法实践与反思) [Judicial Practice of Environmental Public Interest Litigation System and Reflections]*, *Falv Shiyong (法律适用) [J. L. APPLICATION]* 22, 26 (2016); Zhu Xiao (竺效), *Lun Huanjing Minshi Gongyi Susong Jiuji de Shiti Gongyi (论环境民事公益诉讼救济的实体公益) [On the Essence of the Public Interest Remediated by Civil Environmental Public Interest Litigation]*, *Zhongguo Renmin Daxue Xuebao (中国人民大学学报) [J. RENMIN U. CHINA]* 23, 28–30 (2016).

C. AMBIVALENCE OF THE 2015 EPIL INTERPRETATION

While the 2015 EPIL Interpretation largely adopts the tort discourse by extending tort remedies to EPIL lawsuits, a close examination reveals its ambivalence about the fundamental nature of EPIL. For example, the 2015 EPIL Interpretation requires the court to notify the agency that holds the regulatory power over the defendant's conduct within ten days after accepting a case.⁸⁴ This notice, as criticized by scholars, does not function the same way as the 60-day notice in U.S. citizen suits which provides agencies with an opportunity to block suit by initiating enforcement actions.⁸⁵ However, the 2015 EPIL Interpretation also provides that if a competent agency has performed its regulatory duty so that all the claims of the plaintiff become moot, the court should permit the withdrawal of the suit by the plaintiff.⁸⁶ These provisions seem to suggest that a defendant's conduct is always subject to the regulatory authority of some agencies, and an agency's enforcement action would render the plaintiff's claims moot in EPIL cases just like in citizen suits. These assumptions that derive from the U.S. citizen suit, as the following chapters will show, are incompatible with the tort discourse and have been invalidated by litigation practice.

In addition to the variant pre-suit notice requirement, the 2015 EPIL Interpretation also incorporates the attorneys fee rule included in the U.S. citizen suit provisions. According to the 2015 EPIL Interpretation, courts may allow for the recovery of costs of testing and appraisal, reasonable attorney fees, and other litigation costs to the prevailing party.⁸⁷ To provide additional incentives, the 2015 EPIL Interpretation even allows the use

⁸⁴ 2015 EPIL Interpretation, *supra* note 12, at art. 12.

⁸⁵ See *supra* notes 56–58 and accompanying text.

⁸⁶ 2015 EPIL Interpretation, *supra* note 12, at art. 26.

⁸⁷ *Id.* at art. 22.

of the special fund pooling ecological damages awards to help defray necessary expenses incurred by the losing plaintiffs (e.g., costs paid for collecting evidence, consulting experts, and conducting inspections and appraisals).⁸⁸ Upon application, courts may also waive or reduce the litigation fees the losing plaintiff must pay.⁸⁹ In the end, the confusing integration of both the tort remedies and certain elements of the U.S. citizen suit by the 2015 EPIL Interpretation suggests that the SPC lacks a clear and coherent theoretical perspective to shape the emerging EPIL.

D. LIMITATIONS OF EXISTING DISCOURSES ON EPIL

The fundamental limitation of existing literature is the lack of dialogue between the two competing discourses on EPIL. Neither the citizen suit discourse nor the tort law discourse discusses the existence of the other one, let alone the distinctions between these two discourses and which model is better. By incorporating certain elements of both discourses, the SPC's 2015 EPIL Interpretation simply obscures the appropriate theoretical foundation of EPIL. Apart from the ignorance of each other, both the citizen suit discourse and tort law discourse have their own limitations.

For scholars equipped with a citizen suit perspective, Chinese EPIL “is” or “should be” a type of the U.S. citizen suit. Few has systematically explored the theoretical foundation of the U.S. citizen suit and whether it would be possible and effective to transpose citizen suits into Chinese legal system. Perhaps one exception is a comparative study of the Chinese EPIL and U.S. citizen suit conducted by Professor Gong Gu. In his article, Professor Gong Gu analyses the great differences between the Chinese EPIL and

⁸⁸ *Id.* at art. 24.

⁸⁹ *Id.* at art. 33.

U.S. citizen suit in various aspects (e.g., the range of plaintiffs and defendants, the scope of actionable acts, the statute of limitations, the pre-litigation procedure, and the remedies).⁹⁰ He argues that current EPIL framework has led to problematic practice such as lawsuits were brought against same violators who have been punished by administrative agencies, and the “virtual treatment cost” was widely used to measure ecological damages.⁹¹

Given these shortcomings of EPIL in its practical application, Professor Gong Gu believes that the U.S. citizen suit, in which the causes of action, the standards of liability, and the forms of relief are expressly stipulated by statutes, is superior than Chinese EPIL framework that leaves unlimited discretion to judges to determine what is “public interest,” whether “public interest has been harmed,” and “how to protect the public interest.”⁹² Because of advantages of the U.S. citizen suit, he proposes to reform Chinese EPIL based on the citizen suit model.⁹³ Professor Gong Gu is right that the standards for determining “harm to the public interest” are too abstract and ambiguous to operationalize. In proposing to transplant the U.S. citizen suit, however, Professor Gong Gu fails to explore in-depth the benefits and limitations of adopting the citizen suit model in China, the obstacles to transforming current EPIL framework into a citizen suit-like one, and the possibility and prospect of shaping the emerging EPIL along another direction (i.e., the tort law discourse).

Owing to struggles of adapting tort law to remediate harm to the public interest, the tort discourse has been significantly underdeveloped. Furthermore, both the SPC’s 2015

⁹⁰ See Gong Gu (巩固), *Just Look Like Twins*, *supra* note 57, at 106-11.

⁹¹ *Id.* at 121-23. These criticisms are dealt with in *infra* chapter 5, Section A.

⁹² *Id.* at 123-24.

⁹³ *Id.* at 125.

EPIL interpretation and academic interests have unreasonably focused on the narrow issue of restoration liability in EPIL. In fact, the broad language of the laws enables EPIL to respond to a broad array of environment-related harms that include but are not confined to measurable ecological damage. By focusing so narrowly and intensively on the secondary issue of valuation of damages, scholars have missed broader issues that a tort-based EPIL framework should pay the utmost attention to. For example, what constitutes an actionable harm (a related issue is what is the nature and type of the harm)? When an environmental harm has injured the public interest as opposed to purely private interest? What type of remedies (i.e., injunctive relief and damages) is deemed appropriate in different circumstances? To tackle these seemingly central questions, we should first overcome conceptual difficulties to imagine how a tort-based framework addressing harm to the public interest might look like. We should also examine the benefits and limitations of a tort-based EPIL system, as compared to a citizen suit model, in supporting environmental protection efforts in China.

In conclusion, a foundational question should be examined if scholars and judges are to coherently tackle many of the unanswered questions about the young EPIL: whether EPIL should be reformed as a model of the U.S. citizen suit, which enables citizens to directly enforce regulatory requirements, or whether EPIL should be conceptualized as a tort-based framework that operates in tandem with existing environmental statutes. The answer to this question has implications for resolving many disputes related to EPIL. For instance, the response to the hotly debated issue about the scope of plaintiffs in EPIL—whether administrative agencies should have standing to bring EPIL lawsuits—depends on

which theoretical perspective we will choose to shape this framework.⁹⁴ To explore the appropriate theoretical justification of EPIL, the next two chapters examine the citizen suit approach to constructing current EPIL framework while Chapter 4 develops the tort discourse on EPIL by introducing U.S. public nuisance law as a useful reference.

⁹⁴ See *infra* notes 508–510 and accompanying text.

Chapter 2 CITIZEN SUIT AS EFFECTIVE SUPPLEMENT TO GOVERNMENT ENFORCEMENT

As demonstrated in Chapter 1, citizen suit discourse simply views EPIL as the Chinese equivalence of the U.S. citizen suit or proposes to reform current “deviant” EPIL framework based on the standard citizen suit model. To set the stage for critically evaluating this discourse in Chapter 3, this Chapter provides an overview of the purpose and operation of the U.S. citizen suit. In particular, it explores the perplexing standing rules governing citizen suits and the academic debate over the legitimacy and efficacy of citizen suits for the purpose of demonstrating the complex and unique dynamics of the U.S. citizen suit. This chapter concludes that despite criticisms citizen suits have played a critical role in vindicating a general public interest in environmental protection by goading government into more vigorous enforcement or providing alternative enforcement when government failed to enforce.

A. THE OUTLINE OF CITIZEN SUIT PROVISIONS

The first citizen suit provision appeared in Section 304 of the Clean Air Act as amended in 1970.⁹⁵ Since then, the U.S. Congress included citizen suit provisions in most of major federal environmental statutes.⁹⁶ Citizen suit provisions of other environmental

⁹⁵ 42 U.S.C. § 7604 (2012)

⁹⁶ *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365 (2012); Endangered Species Act, 16 U.S.C. § 1540(g) (2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2012); Toxic Substances Control Act, 15 U.S.C. § 2619 (2012); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (2012); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g) (2012); Deepwater Port Act, 33 U.S.C. § 1515 (2012); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (2012); Noise Control Act, 42 U.S.C. § 4911 (2012); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2012); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (2012). An exception is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (2012), which contains no citizen suit provisions.

statutes are analogous to that of the Clean Air Act, while they differ from statute to statute. Citizen suit provisions typically authorize “any person” to commence a civil action against “any person” alleged to be in violation of the laws. There are two different forms of citizen suits. First, citizens can bring a suit to force a party into compliance with statutory requirements when the agency has failed to prosecute the violator.⁹⁷ Second, citizens are entitled to compel the agency to perform a nondiscretionary duty under the statutes.⁹⁸ Because the scope of this dissertation is limited to civil EPIL lawsuits against harm-causing parties as authorized by the 2012 CPL and 2014 EPL, the discussion of U.S. citizen suits primarily involves the first type of suit—citizen enforcement actions against violating polluters.

Far from being a path-breaking innovation, a plethora of commentators consider the citizen suit as building on the Anglo-American tradition of allowing private citizens to enforce public rights.⁹⁹ One longstanding practice of private enforcement in the United States is the *qui tam* action, which authorizes private citizens to prosecute a violation in the name of the government in return for a share of penalties even though the plaintiff has no

⁹⁷ See, e.g., Clean Water Act, 33 U.S.C. § 1365(a)(1) (2012) (allowing for enforcement against violations of “an effluent standard or limitation” or “an order issued by the Administrator or a State with respect to such a standard or limitation.”); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(A) (2012) (authorizing enforcement against violations of “any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.”).

⁹⁸ See, e.g., Clean Air Act, 42 U.S.C. § 7604(a)(2) (2012); Clean Water Act, 33 U.S.C. § 1365(a)(2) (2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(2) (2012). For examples of nondiscretionary duties in such “action-forcing” citizen suits, see Roger A. Greenbaum & Anne S. Peterson, *The Clean Air Act Amendments of 1990: Citizen Suits and How They Work*, 2 FORDHAM ENVTL. L. REV. 79, 83 (1991).

⁹⁹ See, e.g., Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 168–79 (1992) (tracing English and early American practices that granted standing to strangers lacking a concrete or personal interest); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 946–57 (1985) (showing that citizen suits grew out of the history of private enforcement in Anglo-American legal law).

interest in the action.¹⁰⁰ However, unlike *qui tam* actions where plaintiffs seek to collect rewards promised by statutes, citizen suit provisions give plaintiffs a direct role in enforcing environmental laws.¹⁰¹ When citizen suit provisions were enacted in the 1970s, the then prevailing capture theory regarded agencies as “unduly sympathetic to the interests of the regulated industries for a variety of reasons, including the belief that there was often a serious imbalance of the interests represented in agency decision making.”¹⁰² Due to distrust of agencies’ ability or willingness to enforce statutory violations, Congress believed that citizen suits would “both goad the responsible agencies to more vigorous enforcement of the antipollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism.”¹⁰³ In citizen suits, private plaintiffs are empowered to act as private attorneys general—they step into the shoes of government to vindicate public interests when government fails to enforce a law because of lack of resources or lack of will.¹⁰⁴

While citizen suits are intended to be an important tool for enforcing environmental laws, Congress did not want citizen suits to supplant government enforcement actions and to burden the federal courts. Therefore, citizen enforcement is subject to several limitations. First, plaintiffs normally must give a 60-day notice to the federal government, the relevant

¹⁰⁰ See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1860 n.1 (2000) (discussing the *qui tam* provisions in 25 U.S.C. §§ 81, 201 (1994), and 35 U.S.C. § 292(b) (1994)). FCA, 31 U.S.C. § 3730(b)(1) (1994)). The most commonly used *qui tam* provision is that contained in the False Claims Act, which authorizes *qui tam* actions against claimants who have defrauded the federal government. See 31 U.S.C. § 3730(b)(1) (2012).

¹⁰¹ Thompson, *supra* note 47, at 197–98.

¹⁰² Boyer and Meidinger, *supra* note 99, at 843.

¹⁰³ *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 218 (3d Cir. 1979).

¹⁰⁴ See Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 ENVTL. L. REP. 10309, 10309 (1983). However, it seems that scholars have inconsistent characterization about citizen suits. See *infra* notes 188–195 and accompanying text.

state, and the alleged violator prior to filing suit.¹⁰⁵ The purpose of the 60-day notice is to give violators an opportunity to correct their violations and a last opportunity to relevant agencies to perform its enforcement roles.¹⁰⁶ Second, citizen enforcement actions are barred if regulatory authorities have commenced or are diligently prosecuting a civil action in a court to enforce compliance.¹⁰⁷ However, citizens giving notice could intervene as a matter of right in government enforcement actions commenced in a federal court.¹⁰⁸ Conversely, the enforcing agency may intervene by right in any citizen action where he is not a party.¹⁰⁹

Citizen plaintiffs may only enforce precise violations mentioned in the statutes, and the range of actionable violations varies under different statutes.¹¹⁰ For example, the citizen suit section of the Clean Air Act authorizes enforcement actions against violation of “an emission standard or limitation” and “an order issued by the Administrator or a State with respect to such a standard or limitation.”¹¹¹ The statute gives the phrase “emission standard or limitation” a broad definition¹¹² and judicial interpretation further broadens its coverage.¹¹³

¹⁰⁵ See, e.g., Clean Water Act, 33 U.S.C. § 1365(b)(1)(A) (2012); Clean Air Act, 42 U.S.C. § 7604(b)(1)(A) (2012).

¹⁰⁶ Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 ENVTL. L. REP. 10063, 10064 (1984).

¹⁰⁷ See, e.g., Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (2012); Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) (2012).

¹⁰⁸ See, e.g., Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (2012); Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) (2012).

¹⁰⁹ See, e.g., Clean Water Act, 33 U.S.C. § 1365(c)(2) (2012); Clean Air Act 42 U.S.C. § 7604(c)(2) (2012).

¹¹⁰ See Miller, *Private Enforcement I*, *supra* note 104, at 10319–21, for a survey of actionable violations encompassed by different statutes.

¹¹¹ Clean Air Act 42 U.S.C. § 7604(a)(1) (2012).

¹¹² See Clean Air Act 42 U.S.C. § 7604(f).

¹¹³ For a summary of various types of violations of “emission standard” and related case law, see Greenbaum and Peterson, *supra* note 98, at 86–7.

In addition to substantive discharge limitations, procedural requirements may be subject to citizen suits. For example, according to the courts' interpretation, if monitoring, reporting and recordkeeping requirements are expressly made conditions of a permit, violations of these procedural requirements constitute violations of "an effluent standard or limitation" as defined by the citizen suit provisions of the Clean Water Act.¹¹⁴ Another example of enforceable procedural requirement is the Emergency Planning and Community Right-to-Know Act (EPCRA), which allows for citizen suits against failure to report EPCRA information in a timely fashion.¹¹⁵

The primary remedy available in citizen enforcement actions is an injunction. The content of injunctions may be prohibitory (i.e., prohibit specific conduct) or mandatory (i.e., order positive action),¹¹⁶ and injunctions "can take a number of forms to reflect the equities of the case" such as requiring timetables of compliance to meet the violated requirements or issuing a shutdown order in certain occasions.¹¹⁷ Some statutes (e.g., Clean Water Act,¹¹⁸ Clean Air Act¹¹⁹ and Resource Conservation and Recovery Act¹²⁰) also authorize courts to assess penalties payable to the federal treasury. Under the Clean Water Act, for example, citizens can seek fines that can be up to \$25,000 per day for each violation.¹²¹

¹¹⁴ See *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988).

¹¹⁵ 42 U.S.C. § 11046(a)(1)(A) (2012).

¹¹⁶ See Miller, *Private Enforcement II*, *supra* note 106, at 10076 (discussing how the wording differences among various citizen suit provisions (e.g., "to restrain violations," "to enforce the statutes," "to compel compliance") may justify different types of injunction (i.e., mandatory or prohibitory), as well as the blurred distinctions between mandatory and prohibitory injunctions).

¹¹⁷ See Miller, *Private Enforcement II*, *supra* note 106, at 10078.

¹¹⁸ Clean Water Act, 33 U.S.C. § 1365(a)(2) (2012).

¹¹⁹ Clean Air Act, 42 U.S.C. § 7604(a)(3) (2012).

¹²⁰ Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(2) (2012).

¹²¹ 33 U.S.C. § 1319(d) (2012).

Citizen plaintiffs can also settle their suits. Consent decrees generally include elements such as a schedule for achieving compliance with the limitations allegedly violated, reporting requirements on compliance with the schedule, penalties payable to the general Treasury, payment of attorneys' fees and litigation costs, and supplemental environmental projects.¹²²

To encourage beneficial citizen suits, the citizen suit provisions reverse the American Rule under which each party should bear its own litigation expenses. In citizen suits, courts may award costs of litigation, including reasonable attorney and expert witness fees, to any party where appropriate.¹²³ While a prevailing or substantially prevailing plaintiff can almost always recover attorneys fee, a successful defendant may receive an attorneys fee award only when the court determines the suit is frivolous.¹²⁴

B. STANDING TO SUE UNDER CITIZEN SUIT PROVISIONS

While citizen suit provisions literally allow “any person”¹²⁵ or “any citizen”¹²⁶ to bring suit against any violator, courts nevertheless have imposed Article III limitation on citizen standing that requires federal courts to hear only “cases or controversies.”¹²⁷ According to the Supreme Court’s construction, the standing doctrine encompasses three elements: first, the plaintiff must show that he has suffered actual or threatened injury as a

¹²² Miller, *Private Enforcement II*, *supra* note 106, at 10080. *See also* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 356 (1990)(discussing four elements typically contained in settlements under the Clean Water Act).

¹²³ *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(d) (2012); Clean Air Act, 42 U.S.C. § 7604(d) (2012).

¹²⁴ Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 ENVTL. L. REP. 10407, 10413 (1984). *See* National Wildlife Federation v. Consumers Power Co., 729 F. Supp. 62, 64 (W.D. Mich. 1989) (stating that prevailing defendants are allowed to recover litigation costs only where the plaintiff’s claim is frivolous).

¹²⁵ *See, e.g.*, Clean Air Act 42 U.S.C. § 7604(a) (2012).

¹²⁶ *See* Clean Water Act 33 U.S.C. § 1365(a) (2012).

¹²⁷ U.S. CONST. art. III, § 2, cl. 1.

result of the challenged action (injury-in-fact); second, the injury can fairly be traceable to the challenged action (traceability); third, it is likely that the injury will be redressed by a favorable decision (redressability).¹²⁸

There are so many twists and turns in the Supreme Court's approaches to environmental citizen standing. In the landmark decision *Sierra Club v. Morton*,¹²⁹ the Supreme Court denied the Sierra Club's standing under the Administrative Procedure Act to challenge the Forest Service's approval of a recreational development in the Mineral King Valley. While rejecting the plaintiff's claimed standing solely based on a "special interest" in preserving wild places,¹³⁰ the Court made it clear that injuries to aesthetic and environmental interests that are widely shared would constitute "injury in fact."¹³¹ However, the Court emphasized that "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."¹³² Under this liberal view, a non-economic, environmental injury can satisfy the "injury in fact" requirement when properly pleaded.

The Court's subsequent decisions have followed the trend toward liberalizing standing requirements.¹³³ The liberalized law of standing was also incorporated into the

¹²⁸ *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (internal citations omitted).

¹²⁹ 405 U.S. 727 (1972).

¹³⁰ *Id.* at 730.

¹³¹ *Id.* at 734 ("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.").

¹³² *Id.* at 734-35.

¹³³ *See, e.g.*, *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-95 (1973) (granting standing to plaintiffs who claimed that the Interstate Commerce Commission's refusal to suspend a railroad rate increase would discourage the use of recycled materials and lead to increase in consumption of natural resources in areas which the plaintiffs used for hiking, fishing, and backpacking); *Save Our Wetlands Inc. v. Sands*, 711 F.2d 634, 640 (5th Cir. 1983) (finding standing to seek a completion of an

Clean Water Act,¹³⁴ which defined the citizen plaintiff as “a person or persons having an interest which is or may be adversely affected.”¹³⁵ In the 1990s, however, the Court began to adopt a more restrictive view of standing by requiring plaintiffs to make detailed showings of individualized, causal injury in order to establish standing. Such restrictive approach to standing is exemplified in *Lujan v. Defenders of Wildlife*,¹³⁶ which involved a challenge to the Secretary of the Interior’s regulation determining that Section 7(a)(2) of the Endangered Species Act (ESA) applies only to species and habitats within the United States or on the high seas.¹³⁷ The Court found that the plaintiffs lacked constitutional standing for their failure to allege any concrete injury. By stressing that a plaintiff must show an injury that is “concrete and particularized” and “actual or imminent, not ‘conjectural or hypothetical,’”¹³⁸ the Court set a stricter standards for plaintiffs to allege injury. Notably, the Court also rejected the argument that the plaintiffs suffered a “procedural injury” flowing from the Secretary’s failure to follow the consultative procedure as required by Section 7(a)(2) of the ESA, and that the citizen suit provision of the ESA made such injury justiciable despite plaintiffs’ inability to allege any discrete injury.¹³⁹ The Court reaffirmed the proposition that a plaintiff “claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking

environmental impacts statement about the consequences of the project despite “the *fact* of actual damage to the wetlands, fishing and aesthetics is somewhat speculative.”).

¹³⁴ See *National Sea Clammers Ass’n v. City of New York*, 616 F.2d 1222, 1226-27 (3d Cir. 1980).

¹³⁵ 33 U.S.C. § 1365(g) (2012).

¹³⁶ 504 U.S. 555 (1992).

¹³⁷ Section 7(a)(2) of the Endangered Species Act provides that “Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.” 16 U. S. C. § 1536(a)(2) (2012).

¹³⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹³⁹ *Id.* at 571-73.

relief that no more directly and tangibly benefit him than it does the public at large—does not state an Article III case or controversy.”¹⁴⁰ The Court’s opinion in *Defenders of Wildlife* thus emphasizes that a plaintiff bringing an environmental citizen suit must personally suffered a particularized injury caused by the challenged violation.

The redressability requirement was also relied upon by the Court to dismiss citizen suits. In *Steel Co. v. Citizens for a Better Environment*, the plaintiff group initiated an enforcement action under citizen suit provision of the EPCRA, alleging that the defendant had failed to provide required information under EPCRA in a timely manner.¹⁴¹ By the time the suit was filed, however, the defendant had come into compliance with the Act by bringing its reports up to date.¹⁴² The Court held that the plaintiff lacked standing to maintain the suit because none of the relief sought—a declaratory judgment, injunctive relief, civil penalties, and reimbursement of litigation costs and attorney fees—would redress the plaintiff’s alleged injury.¹⁴³ In particular, in denying standing for civil penalties to assess wholly past violations, the Court explained that the requested penalties, which were paid to the U.S. treasury rather than the plaintiff, would not redress the plaintiff’s injury.¹⁴⁴

The Supreme Court seemed to reverse the trend toward contracting citizen standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, where the defendant was accused of repeatedly discharging mercury into a river in violation of its permit.¹⁴⁵

¹⁴⁰ *Id.* at 573-74.

¹⁴¹ 523 U.S. 83, 86-8 (1998).

¹⁴² *Id.* at 88.

¹⁴³ *Id.* at 105-09.

¹⁴⁴ *Id.* at 106-07.

¹⁴⁵ 528 U.S. 167, 176 (2000).

First, the Court refashioned the concept of injury by holding that “[t]he relevant showing for purposes of Article III standing...is not injury to the environment but injury to the plaintiff.”¹⁴⁶ Therefore, despite the trial court’s finding that the defendant’s mercury discharge violations had not caused any harm to the environment, the Court held that plaintiffs sustained concrete and particularized injuries when they alleged that they had refrained from certain activities they did before (e.g., hiking, camping, picnicking along the river, or buying property on the river) because of a reasonable concern that the defendant’s discharges have harmed the environment.¹⁴⁷ The more expansive notion of injury lowered the standing barrier because environmental plaintiffs need only show personal injury (e.g., reasonable fear of using a natural resource due to defendant’s illegal discharge) instead of actual harm to the environment to satisfy standing requirement. Second, distinguishing *Laidlaw* from *Steel Co.*, the Court held that the plaintiffs had standing to seek civil penalties if the violation was *ongoing* at the time the suit was initiated, because “the civil penalties sought by [Friends of the Earth] carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [its] injuries by abating current violations and preventing future ones.”¹⁴⁸ As a result, after *Laidlaw* citizens would have standing to seek civil penalties if they can prove that the defendant was in violation on the date the suit was filed and there is some possibility of future violations.

Not only can individual citizens have standing to bring citizen suits, organizations or associations may sue on behalf of their members. In *Morton*, although the Supreme

¹⁴⁶ *Id.* at 181.

¹⁴⁷ *Id.* at 181-83.

¹⁴⁸ *Id.* at 187.

Court denied the Sierra Club standing who simply sued as an organization with “a special interest” in the conservation, the Court recognized that an organization may represent its members who have suffered an injury in a proceeding for judicial review.¹⁴⁹ In general, an organization has “representational standing” when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”¹⁵⁰ Under these standards, it is not very difficult for environmental groups to acquire standing by making careful allegations that their members live near or use the resources affected by the defendant’s actions.

It should be noted that the proof of “injury in fact” is for purposes of establishing standing. Once the court grants standing, the inquiry shifts to the merits of the case: whether the defendant violated relevant regulatory requirements. In fact, the stringent standing requirement before *Laidlaw* has been attacked by scholars: “Justice Scalia’s campaign to require more definitive demonstrations of *actual* or *imminent* harm as predicate for standing undermined the very purpose of environmental regulation—to require dischargers to adhere to standards designed to prevent harm before it occurs. Adopting standing rules that would preclude citizen suits until illegal discharges have resulted in actual or visible harm would be inconsistent with the purpose of citizen-suits provisions.”¹⁵¹ In this sense, groups and individuals suing under citizen suit provisions act as private attorneys general

¹⁴⁹ *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

¹⁵⁰ *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

¹⁵¹ Robert V. Percival & Joanna B. Goger, *Escaping the Common Law’s Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENVTL. L. & POL’Y F. 119, 148 (2001). See also Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433 (1988) (“Under this [private-law model of standing], a nineteenth century private right is a predicate for judicial intervention; as a result, courts may not redress the systemic or probabilistic harms that Congress intended regulatory schemes to prevent.”).

to “vindicat[e] the statutory rights of the community at large rather than the plaintiffs’ own economic losses.”¹⁵²

C. CONTROVERSY OVER THE LEGITIMACY AND EFFECTIVENESS OF CITIZEN SUITS

While citizen suit provisions have become “a central element of American environmental law,”¹⁵³ they spawned longstanding debate regarding the legitimacy and effectiveness of enforcement actions brought by citizen plaintiffs. This Part examines two leading disputes over environmental citizen suits: first, whether the broad environmental citizen suit provisions, and in particular, the citizen’s authority to pursue civil penalties, intrude upon the President’s power under Article II,¹⁵⁴ second, whether citizen participation in environmental law enforcement unduly interferes with the enforcement agenda of public agencies.

1. *Article II-Based Challenges*

Critics assert that because the filing of enforcement actions is an executive function that vested exclusively in the President under the Vesting Clause of Article II,¹⁵⁵ citizen suit provisions violate Article II and the separation of powers principle embodied in the

¹⁵² Miller, *Private Enforcement I*, *supra* note 104, at 10309.

¹⁵³ George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10028, 10028 (1999).

¹⁵⁴ While both citizen suits against government and citizen suits against private parties raise constitutional questions, the discussion focuses on the latter. For analyses of the distinction between citizen suits against private defendants and citizen suits against the government with regard to Article II concerns, see Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383, 388–92 (2001); Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131, 136–37 (1993).

¹⁵⁵ U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President.”).

Constitution by delegating enforcement power to private citizens.¹⁵⁶ Citizen suit provisions also run afoul of the Appointments Clause which governs the appointment of officers of the United States.¹⁵⁷ According to critics, citizen plaintiffs must be appointed in compliance with the Appointments Clause because they “exercise significant authority in pursuit of the public interest” characteristics of an officer, particularly when they seek civil penalties payable to the Treasury.¹⁵⁸ Since citizen plaintiffs constitute officers of the United States, this argument goes, Congress impermissibly aggrandizes power to itself by appointing those who exercise executive authority and insulating them from presidential control.¹⁵⁹

The most serious Article II challenge to citizen suits is based on the Take Care Clause, which requires that the President “take Care that the Laws be faithfully executed.”¹⁶⁰ Critics assert that congressional grant of prosecutorial power to private citizens undermines the President’s constitutional authority to faithfully execute the law by removing control and prosecutorial discretion from the President.¹⁶¹ Despite some limits on citizen litigation (e.g., notice requirement, diligent prosecution exception, the government’s right to intervene), the government has no power to control the initiation of a suit against an alleged violator, the scope of litigation conducted by a citizen plaintiff, and the termination of a citizen action once it has begun.¹⁶² Consequently, citizen suit

¹⁵⁶ See, e.g., Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 71–3 (1989); William H. Lewis Jr., *Environmentalists’ Authority to Sue Industry for Civil Penalties Is Unconstitutional Under the Separation of Powers Doctrine*, 16 ENVTL. L. REP. 10101, 10102–04 (1986).

¹⁵⁷ U.S. CONST. art. II, § 2, cl. 2 (authorizing the President, “with the Advice and Consent of the Senate,” to appoint “Officers of the United States” and authorizing Congress to vest the power to appoint “inferior Officers” in the President, the Courts, or the Heads of Departments).

¹⁵⁸ Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution’s Separation of Powers Principle*, 81 VA. L. REV. 1957, 1977 (1995).

¹⁵⁹ See *Id.* at 1975.

¹⁶⁰ U.S. CONST. art. II, § 3.

¹⁶¹ See Abell, *supra* note 158, at 1967–68.

¹⁶² *Id.* at 1971–72.

provisions fail the test laid down by the Supreme Court in *Morrison v. Olson* that a congressional grant of executive power to persons outside the Executive Branch must permit the Executive to retain “sufficient control” over the prosecutorial process.¹⁶³

The development of the unitary theory of executive power provides additional theoretical foundation for Article II-based challenges. The theory of the unitary executive “accords a single executive the responsibility to manifest ‘energy’ in execution of the laws passed by Congress.”¹⁶⁴ It suggests that all exercise of executive power be subject to sufficient supervision and control by the President particularly through the power to appoint and remove executive officials.¹⁶⁵ Building on the democratic accountability of a unitary executive, this theory argues that the President, rather than private parties who are not subject to the checks of the political process, should be accountable for redressing harms to the public.¹⁶⁶ Therefore, conferring upon private citizens the general power to vindicate rights shared by the public at large without allowing for sufficient executive control over the litigation will compromise “Article II’s establishment of a unitary executive.”¹⁶⁷

Defendants began to level Article II-based separation of powers challenges against environmental citizen suit provisions at federal district courts in the mid-1980s. However, the federal district courts generally upheld the constitutionality of citizen suit provisions.

¹⁶³ *Id.* at 1971; Cross, *supra* note 156, at 75.

¹⁶⁴ Harold J. Krent & Ethan G. Skenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1799 (1993).

¹⁶⁵ *Id.* See also Jeffrey G. Miller & Brooke S. Dorner, *The Constitutionality of Citizen Suit Provisions in Federal Environmental Statutes*, 27 J. ENVTL. L. & LITIG. 401, 411 (2012).

¹⁶⁶ Krent and Skenkman, *supra* note 164, at 1801–04.

¹⁶⁷ *Id.* at 1796. See also Cross, *supra* note 156, at 73-4 (“Vesting government enforcement authority in citizen plaintiffs also runs contrary to the constitutional scheme creating a unitary Executive who is accountable to the majority vote of the populace.”).

For example, several federal district courts denied the defendants' constitutional challenges to the Clean Water Act citizen suit provision on the basis that Congress has plenary authority to assign enforcement power to whomever it pleases¹⁶⁸ and that citizen enforcement actions, which are subject to the notice requirements and the government's right to displace and intervene, would not unduly interfere with executive enforcement.¹⁶⁹ The federal district courts also emphasized that the separation of powers principle applies only between branches of the federal government rather than between private persons and the Executive.¹⁷⁰ Similarly, the federal district courts upheld the constitutionality of EPCRA's citizen suit provisions against Article II challenges.¹⁷¹

The Supreme Court has not yet ruled directly on the constitutionality of citizen suits. However, it raised Article II concerns when interpreting Article III standing requirements in several decisions about environmental citizen suits. In its 1992 decision of *Defenders of Wildlife*, for example, the Court denied the plaintiff's asserted standing under the citizen suit provision of the ESA because "the injury-in-fact requirement [cannot be] satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental

¹⁶⁸ See, e.g., *Student Public Interest Research Group v. Monsanto Co*, 600 F. Supp. 1474, 1478 (D.N.J. 1985) ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress in creating these rights and obligations to determine, in addition, who may enforce them and in what manner") (quoting *Davis v. Passman*, 442 U.S. 228, 241 (1979));

¹⁶⁹ See, e.g., *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 625 (D. Md. 1987).

¹⁷⁰ See, e.g., *id.* at 625-26 (holding that the citizen suit provision of the Clean Water Act does not violate the constitutional principle of separation of powers because "[it] does not aggrandize the Legislative Branch at the expense of the Executive, and because Congress may determine who will enforce the statutory rights and obligations that it creates.").

¹⁷¹ See, e.g., *Delaware Valley Toxics Coal. v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1138 (E.D. Pa. 1993) (finding "citizen suits are not an unlawful delegation of executive power, since Congress in enacting the EPCRA did not grant to a person or persons under its control executive power" and "the executive branch retains the authority to commence action against alleged violators via the sixty day notice provision of the EPCRA.").

‘right’ to have the Executive observe the procedures required by law.”¹⁷² According to the Court, the injury-in-fact requirement has the separation-of-powers significance, because

[t]o permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed,” Art. II, § 3.¹⁷³

Article II issues have also arisen in citizen suits against nongovernmental violators other than the government. In *Steel Co.* where the plaintiff sought civil penalties for the defendant’s purely past violations, the Court emphasized that the civil penalties pursued by the plaintiff would not provide remediation of its own injury “but vindication of the rule of law—the ‘undifferentiated public interest’ in faithful execution of EPCRA.”¹⁷⁴ Justice Stevens in concurrence also noted that “[i]t could be argued that the Court’s decision is rooted in another separation of powers concern: that this citizen suit somehow interferes with the Executive’s power to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3.”¹⁷⁵

While the *Laidlaw* opinion appears to overrule *Steel Co.*’s rationale by holding that civil fines payable to the U.S. Treasury could redress a citizen plaintiff’s personal injury, the Article II concerns were raised again by Justice Kennedy, in his concurring opinion,

¹⁷² *Lujan*, 504 U.S. at 573.

¹⁷³ *Id.* at 577.

¹⁷⁴ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 106 (1998).

¹⁷⁵ *Id.* at 129 (Stevens, J., concurring). However, Justice Stevens concluded that the plaintiffs in this case did not merely possess the “‘undifferentiated public interest’ in seeing EPCRA enforced” but “alleged a sufficiently particularized injury.” *Id.*

and Justice Scalia and Justice Thomas, in Justice Scalia’s dissenting opinions. Justice Kennedy noted that “[d]ifficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.”¹⁷⁶

Justice Scalia criticized that “by giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an ‘undifferentiated public interest’ into an ‘individual right’ vindicable in the courts.”¹⁷⁷ While Justice Scalia acknowledged that the Article II issues had not been argued, he stressed that “Article II of the Constitution commits it to the President to ‘take Care that the Laws be faithfully executed,’ Art. II, §3, and provides specific methods by which all persons exercising significant executive power are to be appointed, Art. II, §2.”¹⁷⁸

Academic and judicial challenges to environmental citizen suits on the Article II grounds have been forcefully defended by scholars. Valuing the role of citizens as “private attorneys general” in enforcing federal environmental laws, supporters of universal citizen standing argue that neither the historical legal practice in England and the United States¹⁷⁹ nor the wording and history of the Constitution provides evidence that the President has a

¹⁷⁶ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring). Justices Scalia and Thomas in their dissenting opinion noted with approval Justice Kennedy’s Article II query. *See id.* at 209 (Scalia, J., dissenting).

¹⁷⁷ *Id.* at 204-05 (Scalia, J., dissenting).

¹⁷⁸ *Id.* at 209 (Scalia, J., dissenting).

¹⁷⁹ *See, e.g.,* Cleve, *supra* note 153, at 10029–34 (examining the history of citizen standing in English legal practice); Johnson, *supra* note 154, at 403–08 (introducing the long history of private enforcement of public rights in England and the United States); Sunstein, *What’s Standing*, *supra* note 99, at 168-79 (describing the English and early American practices of allowing suits initiated by strangers and the absence of any constitutional concern about these actions).

monopoly over implementation of federal laws.¹⁸⁰ The historical evidence also shows that a unitary executive perceived by the Framers did not “entail[] the...view that the President is in charge of all implementation of the laws.”¹⁸¹ To the contrary, private enforcement of public rights is an established tradition in American law. According to scholars, Congress has the authority to structure the implementation of law such as by creating parallel citizen enforcement actions, and such “checks on the President’s willingness to enforce particular laws” are hardly “an unconstitutional intrusion into the President's Article II authority.”¹⁸² Because citizen suit provisions do not directly give Congress, its members, or its subordinates the enforcing power, they do not violate the separation of powers principle by aggrandizing the power of the Congress.¹⁸³

Supporters also argue that in enacting citizen suit provisions, Congress did not “designate any particular person to any particular office” or “authorize any particular government official or entity to do so.”¹⁸⁴ Citizen plaintiffs are also not “officers” because they are not appointed or employed by the government and receive no federal pay for their services.¹⁸⁵ Therefore, citizen suits do not implicate the Appointments Clause of Article II. As the Appointment Clause does not apply to environmental citizen suit provisions, Congress did not displace the President’s appoint power in violation of the separation powers principle.

¹⁸⁰ See, e.g., Cleve, *supra* note 153, at 10035; Johnson, *supra* note 154, at 392-93.

¹⁸¹ Sunstein, *Article II*, *supra* note 154, at 135.

¹⁸² Cleve, *supra* note 153, at 10037. See also Miller & Dorner, *supra* note 165, at 452 (“Supplementing the executive’s civil enforcement capabilities with citizen suits is a far less drastic encroachment on the executive’s prosecutorial power than placing enforcement powers in independent agencies.”).

¹⁸³ See Cleve, *supra* note 153, at 10038; Miller & Dorner 2012 at 452.

¹⁸⁴ Miller & Dorner, *supra* note 165, at 435.

¹⁸⁵ *Id.*

While admitting that citizen enforcement actions may have some effect on the President's exercise of prosecutorial discretion, proponents of citizen suits argue that such impact is too minimal to interfere with the President's ability to faithfully execute the law under the Take Care Clause of Article II.¹⁸⁶ Contrary to the view of critics of citizen suits, supporters believe that federal environmental statutes provide numerous opportunities (e.g., diligently pursuing a civil action, moving to consolidate the citizen suit, intervening in the citizen suit by right, filing an *amicus* brief, reviewing any proposed and settlement and commenting on it or intervening to oppose it) to ensure that the President retain adequate control over citizen litigation.¹⁸⁷

The foregoing arguments suggest that citizen suit provisions do not violate Article II by allowing citizens to enforce federal environmental laws as private attorneys general. Other scholars, however, defend the constitutionality of citizen suits from the perspective that citizen plaintiffs are suing to redress an individuated injury instead of protecting the rights of the general public.¹⁸⁸ Despite frequent characterization of citizen suits as an enforcement mechanism and citizen plaintiffs as private attorneys general in legislative histories,¹⁸⁹ judicial opinions,¹⁹⁰ and scholarly work,¹⁹¹ these scholars contend that the "injury-in-fact requirement renders environmental citizen suits private causes of action."¹⁹²

¹⁸⁶ See *Id.* at 452; Johnson, *supra* note 154, at 398.

¹⁸⁷ See Miller & Dorner, *supra* note 165, at 454-56; Johnson, *supra* note 154, at 398-402.

¹⁸⁸ See, e.g., Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93 (2001); Johnson, *supra* note 154, at 409-20.

¹⁸⁹ See Craig, *supra* note 188, at 105-06 (illustrating how Congress has indicated in legislative history of citizen suit provisions that it considers citizen suits to be an enforcement mechanism).

¹⁹⁰ *Id.* at 98 n.27 (providing a list of court opinions describing citizen plaintiffs as private attorneys general).

¹⁹¹ See, e.g., James M. Hecker, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both*, 8 NAT. RESOURCES & ENV'T, Spring 1994, at 31, 31.

¹⁹² Craig, *supra* note 188, at 101.

In light of Supreme Court decisions, a citizen plaintiff sues “on his own behalf”¹⁹³ must demonstrate an injury in fact and the relief must be designed to redress the plaintiff’s individuated injury.¹⁹⁴ Therefore, citizen suits are now more analogous to “privately-bought public nuisance suits” than to governmental law enforcement that solely advances the public interest.¹⁹⁵

Standing requirements not only preserve the federal court’s legitimacy under Article III, according to this group of scholars, they also save citizen suit provisions from Article II-based attacks.¹⁹⁶ Because citizen suits are not “‘enforcement actions’ in any constitutionally relevant sense,” they cannot truly interfere with the Executive’s authority to faithfully execute the law.¹⁹⁷ Citizen plaintiffs are also not officers for purposes of the Appointments Clause since they do not exercise Executive authority.¹⁹⁸ Similarly, the criticisms of the unitary executive theory do not apply to citizen suits because citizen plaintiffs seeking remedy for an environmental violation that concretely and particularly injures them should not be held accountable to the public.¹⁹⁹

This line of argument, according to commentators, “turns the Scalia-developed Article III restrictions on citizen suit standing into a defense of citizen suits under Article II.”²⁰⁰ However, even though Article III imposes limits on citizen standing, citizen suits

¹⁹³ See, e.g., Clean Water Act, 33 U.S.C. § 1365(a) (2012); Clean Air Act, 42 U.S.C. § 7604(a) (2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (2012); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (2012).

¹⁹⁴ Johnson, *supra* note 154, at 387.

¹⁹⁵ Craig, *supra* note 188, at 165.

¹⁹⁶ *Id.* at 162.

¹⁹⁷ *Id.* at 171.

¹⁹⁸ *Id.*

¹⁹⁹ See Johnson, *supra* note 154, at 411.

²⁰⁰ Miller & Dorner, *supra* note 165, at 440.

still might be constitutionally problematic for critics if courts adopt a too lenient standing standard. After all, what upset Justice Scalia and others is that if “the Court makes the injury-in-fact requirement a sham,”²⁰¹ citizen plaintiffs will come to represent the general interest of the public instead of simply vindicating their personal injuries.

The distinct approaches to defending citizen suit provisions from Article II-based challenges reflect “inconsistent and incompatible rationales” underlying the citizen suit provisions.²⁰² The legislative ambiguities and judicial interpretations led to the ambivalent nature of citizen suits between private model and private attorneys general model,²⁰³ and “ambivalent status of citizen-plaintiffs between private citizen and public authority.”²⁰⁴ By insisting that “any person” bringing a citizen suit meet “irreducible constitutional minimum of standing,”²⁰⁵ the Supreme Court has avoided striking down environmental citizen suit provisions as unconstitutional. Nevertheless, there is no question that under current standing rules the injury citizen suits redress can be “of a type shared by a broad segment of the public”²⁰⁶ and citizen suits thus can “simultaneously promote the general public interest in compliance with federal law.”²⁰⁷

2. *Disruption of the Governmental Law Enforcement Authority*

Even if Congress did not impermissibly delegate executive enforcement power to citizen plaintiffs in enacting citizen suit provisions, numerous critics express deep concern

²⁰¹ *Friends of the Earth*, 528 U.S. at 201 (Justice Scalia, dissenting).

²⁰² Greve, *supra* note 122, at 367.

²⁰³ *See Id.* at 347-50.

²⁰⁴ *Id.* at 385.

²⁰⁵ *Lujan*, 504 U.S. at 560.

²⁰⁶ Johnson, *supra* note 154, at 418.

²⁰⁷ Craig, *supra* note 188, at 101. *See also* Boyer and Meidinger, *supra* note 99, at 836 (“Deterrence and determining the effective content of enforcement policy are the primary purposes of the current citizen suits; in many instances, there is no attempt to define or remedy private wrongs.”).

that citizen suits may interfere with established government enforcement policy and strategy.²⁰⁸ According to critics, the sixty-day notice requirement and diligent prosecution defense are “illusory controls on the initiation of citizen penalty suits with little, if any, real restriction of citizen prosecutorial discretion.”²⁰⁹ In the first instance, courts have consistently applied the sixty-day notice requirement flexibly “to avoid hindrance of citizen suits through excessive formalism,”²¹⁰ and thus it is not difficult for plaintiff to satisfy the notice requirement. In the second instance, the diligent prosecution defense is extremely narrow which generally requires the agency to “take formal enforcement action that would be beyond its normal approaches.”²¹¹ Many traditional agency enforcement, such as notices of violations, memoranda of understanding, and administrative consent orders, do not qualify for the “diligent prosecution” defense under some statutes.²¹²

More importantly, citizen suit provisions do not allow the agency to “preserve its discretion or a coherent enforcement scheme by terminating private actions.”²¹³ The only way for the agency to prevent a citizen suit is to initiate its own “diligent” enforcement proceeding. As a result, private parties may either bring or force the government into “pointless or counterproductive” enforcement actions.²¹⁴ Such overenforcement also presents the potential for inconsistent and unfair enforcement since self-appointed private

²⁰⁸ See, e.g., Cross, *supra* note 156, at 68-70; Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, 11 NAT. RESOURCES & ENV'T. 20, 23-5 (1997); Greve, *supra* note 122, at 375-76.

²⁰⁹ Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 395 (1988).

²¹⁰ *Proffitt v. Comm'rs Twp. of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985). See also *id.* at 395-396.

²¹¹ Macfarlane & Terry, *supra* note 208, at 22. See also Blomquist, *supra* note 209, at 396.

²¹² Macfarlane & Terry, *supra* note 208, at 22-3. See also Cross, *supra* note 156, at 61-3.

²¹³ Greve, *supra* note 122, at 375.

²¹⁴ Greve, *supra* note 122, at 376; See also Boyer and Meidinger, *supra* note 99, at 836 (“Diverting agency engineers, scientists and lawyers to private enforcement actions takes them away from working on the cases that the agency considers higher priority.”).

attorneys general “have their own agenda and may be unconcerned about the overall equity of enforcement decisions.”²¹⁵

Because an agency’s decision to take informal action or exercise of its prosecutorial discretion provides no defense against citizen suits, critics argue that citizen suits may threaten to undermine the cooperative relationships between the agency and regulated community.²¹⁶ For example, agencies typically set tough standards that even the company with best equipment cannot meet 100 percent of the time.²¹⁷ Many companies accept permit limits because they trust that agencies will exercise reasonable discretion in enforcing these requirements to avoid any inequity.²¹⁸ Citizen participation in enforcement, however, “sacrifices [the] goal of government-industry cooperation and the means of reliance/expectancy interests developed in the administrative process” and further lead to “greater transaction costs to both government and industry when attempting to reach agreement on permit standards of performance in the future.”²¹⁹

²¹⁵ Cross, *supra* note 156, at 65. *See also* Macfarlane & Terry, *supra* note 208, at 24 (“Paradoxically, the facilities most subject to citizen suits often are those that the agencies have made a conscious decision not to prosecute.”).

²¹⁶ *See, e.g.*, Boyer and Meidinger, *supra* note 99, at 959 (noting that regulated companies are concerned that “established relationships and understandings” will be undermined by private enforcement campaigns); Cross, *supra* note 156, at 66–70 (arguing that citizen suits may reduce compliance with environmental laws by destroying ongoing cooperative compliance and undermine the EPA’s enforcement and regulatory efforts).

²¹⁷ Macfarlane & Terry, *supra* note 208, at 24. *See also* Cross, *supra* note 156, at 65 (“For simplicity’s sake, the EPA has adopted effluent guidelines that are literally impossible to meet. These guidelines require 100% compliance, but can be achieved only 95-99% of the time.”).

²¹⁸ *See* Macfarlane & Terry, *supra* note 208, at 24. *See also* Cross, *supra* note 156, at 65 (“The EPA itself recognizes the potential unfairness of the [NPDES permit system], and has stressed that the agency will thoughtfully apply its enforcement discretion to avoid any inequity.”).

²¹⁹ Blomquist, *supra* note 209, at 411. *See also* Macfarlane & Terry, *supra* note 208, at 25 (“Because agencies cannot exercise discretion or flexibility unilaterally without exposing the permittee to a greater risk of citizens’ suits, standards need to be set at levels that can be achieved in the real world. Any discretion needs to be built directly into the requirements.”); Mark Siedenfeld & Janna Satz Nugent, *The Friendship of the People: Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 301 (2005) (noting that “one of the major impediments to the efforts of states and EPA to induce companies to implement self-audit program is the fear on the part of the companies that some overly zealous interest group will use the information they provide to sue them.”).

The pattern of citizen litigation has also led to skepticism over the motivation of private enforcers. Relying on a few early studies showing that a substantial number of citizen enforcement actions were filed by national and regional environmental groups against industrial violators of the Clean Water Act in the 1980s,²²⁰ critics assert that the enforcement priorities and strategies of environmental groups “[are] determined not, as intended, by public benefits but by private economic rewards.”²²¹ According to critics, the primary motivation of environmental groups in initiating citizen suits is to collect attorney fees or seek settlements that constitute direct transfer payments to environmental groups usually in the form of above-cost attorneys’ fees and credit projects.²²² This emphasis on financial rewards, therefore, has frustrated the policy goals that citizen suits are ostensibly intended to serve.²²³

For proponents of citizen suits, the danger that citizen suits will interfere with the established government enforcement policies may be exaggerated. As mentioned above,

²²⁰ See, e.g., ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES vi (1984)[hereinafter ELI STUDY] (finding that 214 out of 349 citizen suits filed between 1978 and 1984 were brought under the Clean Water Act, and 162 out of these 214 were brought during the environmental group’s enforcement campaign); Greve, *supra* note 122, at 353 (reporting that from May 1984 to September 1988, national or regional environmental organizations continued to account for approximately two-thirds of enforcement actions under the Clean Water Act).

²²¹ Greve, *supra* note 122, at 360. See also Krent and Skenkman, *supra* note 164, at 1808-09 (arguing that because private enforcers are not subject to political checks, they may bring citizen suits for self-interested reasons).

²²² Greve, *supra* note 122, at 356. See also Blomquist, *supra* note 209, at 415 (noting that citizen suits can provide for diversions of “penalty” recoveries to private environmental projects through settlements); Cross, *supra* note 156, at 70-1 (“Environmental groups bringing citizen suits have frequently been willing to settle their case in exchange for a ‘contribution’ to various environmental causes.”); Siedenfeld & Nugent, *supra* note 219, at 286 (arguing that “settlement negotiations can provide for environmental mitigation projects that essentially channel payments through third party service organization that may employ the services of the same individuals responsible for bringing suit in the first place.”). Justice Scalia raised similar concerns in the Article III context in his dissent in *Laidlaw. Friends of the Earth*, 528 U.S. at 209-10 (Scalia, I., dissenting) (“The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs’ choosing. Thus is a public fine diverted to a private interest.”) (internal citations omitted).

²²³ See Greve, *supra* note 122, at 342.

supporters contend that the coordination device provided in the citizen suit provisions minimizes the effect of citizen suits on the President's exercise of prosecutorial authority.²²⁴ In fact, supporters conclude that executive controls over citizen suits "are as great or greater than those over special prosecutions [in *Morrison v. Olson*] even though citizen suits are civil, thereby warranting less controls than special prosecutions that are criminal."²²⁵ Even some commentators admit that the notice and diligent prosecution exemption may be ineffectual in coordinating public and private enforcement,²²⁶ they nevertheless believe that agencies can determine what role private enforcement can play in particular regulatory programs "[b]y deciding how regulations will define compliance, what kinds of monitoring and reporting will be required, how compliance information will be gathered and disseminated, and what levels of noncompliance will be considered significant."²²⁷ In sum, there are a number of means for the government to protect its policy and strategy choices in dealing with citizen suits.

With respect to the view that citizen suits may lead to inefficient enforcement by undermining the prosecutorial discretion of the government, the first counterargument provided by supporters is that the consideration of economic efficiency should be made at the regulatory stage (e.g., Congress requires Environmental Protection Agency (EPA) to consider economic efficiency of effluent limitations on an industry-wide basis) rather than implementation stage.²²⁸ While agencies can exercise traditional prosecutorial discretion,

²²⁴ See *supra* note 187 and accompanying text.

²²⁵ Miller & Dorner, *supra* note 165, at 455.

²²⁶ See Boyer and Meidinger, *supra* note 99, at 897-907.

²²⁷ *Id.* at 958.

²²⁸ David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1623 (1995). See also Thompson, *supra* note 47, at 202-03 (contending that "Congress expressly precluded the EPA from considering economic costs when setting many of the major environmental

allowing “the use of selective, discretionary government enforcement [to achieve economic efficiency] shifts the power to establish legislative guidelines from Congress to prosecutors.”²²⁹ Moreover, economic considerations, as criticized by some scholars, “can often be proxies for political pressures rather than legitimate societal costs.”²³⁰ With regard to the possible interference with the informal understandings between regulators and regulated community, supporters of private enforcement propose that it may be alleviated by writing permits and consent orders to allow flexibility and innovation—such permits or consent orders reached after proper public notice and comment process will protect dischargers from unnecessary citizen suits.²³¹

Despite speculation on the excessive enforcement that citizen suits might create, critics cite few instances where citizen plaintiffs filed suits against trivial or other excusable violations.²³² Instead, empirical evidence shows that environmental plaintiffs have brought “a sizable number of worthwhile actions that public enforcers either purposefully or unintentionally failed to pursue.”²³³ In fact, when the government takes enforcement actions, it is not uncommon to issue consent orders “which enable violators to delay compliance and to avoid civil penalties for present and past violations,” and such consent

standards” and “it is difficult to argue that Congress did not want economics considered in setting standards but wanted it factored into the enforcement of those standards.”).

²²⁹ Hodas, *supra* note 228, at 1624.

²³⁰ Thompson, *supra* note 47, at 203. *See also* Hodas, *supra* note 228, at 1624 (“Congress intended to limit the ability of those in the regulated community to ‘capture’ their regulating agencies. Congress did not want the regulated community to use enforcement fora to debate, litigate or even raise economic efficiency issues that EPA had resolved in its regulations.”).

²³¹ Hodas, *supra* note 228, at 1623. *See also* Miller, *Private Enforcement III*, *supra* note 124, at 10428 (“The problem [of informal understandings] can be solved in future permit negotiations by making it a policy to put any assumptions or understandings on the record. If they cannot be put on the record, they are questionable anyway and should not be relied on.”).

²³² *See* Miller, *Private Enforcement III*, *supra* note 124, at 10427; Miller & Dorner, *supra* note 165, at 446.

²³³ Thompson, *supra* note 47, at 203.

orders “are often prompted by the state’s and polluter’s desire to preempt citizen suits.”²³⁴ Therefore, citizen suits can hardly interfere with the executive’s prosecutorial discretion and produce an unacceptable level of excessive enforcement when the government fail to enforce or take meaningful enforcement actions usually because of political consideration or a lack of resources.

While environmental plaintiffs do respond to financial incentives provided by citizen suit provisions, supporters believe that seeking economic rewards is by no means the dominant motivation. This is because environmental groups are constrained by their “long-term personal and institutional interests in the environmental policy arena,”²³⁵ and most of them are sensitive to the potential public costs of prosecuting a particular company.²³⁶ In fact, those prominent national and regional environmental groups which have accounted for the majority of citizen suits “are more likely to have a mainstream constituency and be responsive to broad public policy considerations.”²³⁷ Furthermore, the more recent studies find that citizen suits are no longer dominated by large, environmental organizations; instead, a majority of citizen enforcement cases were brought by small, local citizen plaintiffs and there has also been a considerable increase in the number of suits against public defendants.²³⁸ The change in the trend of citizen suits seems to debilitate the

²³⁴ Hodas, *supra* note 228, at 1662. In fact, in *Laidlaw*, the South Carolina Department of Health and Environmental Control (DHEC) acceded to Laidlaw’s request to file a lawsuit against the company in order to preclude citizen suit. Laidlaw then settled with the DHEC for \$100,000 in civil penalties and a promise to make “every effort” to comply with its permit obligations in the future. It then continued to violate the effluent limits in its permit, and FOE filed the citizen suit. See *Friends of the Earth*, 528 U.S. at 167.

²³⁵ Boyer and Meidinger, *supra* note 99, at 962.

²³⁶ Thompson, *supra* note 47, at 205.

²³⁷ *Id.*

²³⁸ Kristi M. Smith, *Who’s Suing Whom: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359, 385, 387 (2004) (examining the data of the period from 1995 to 2000 and showing that citizen suits are no longer dominated by large, environmental organizations. Instead, a majority of citizen enforcement cases

criticism that citizen suits are monopolized by a “cartel” of environmental groups driven by the motivation to seek significant financial rewards.

This Section examines the dispute over the legitimacy, effect and ethicality of citizen suits. As correctly commented by scholars, different assessments of private enforcement may reflect observers’ different beliefs about “the substantive desirability of the regulatory program and ...the program’s compliance history.”²³⁹ It is true that private enforcement actions have undermined executive control over the enforcement progress, and “making private enforcement successful requires coping with the problems of coordination, incentives and legitimacy.”²⁴⁰ However, the theoretical and empirical case for citizen suits are much stronger than those against it.²⁴¹ Congress and the EPA’s enforcement office also have repeatedly endorsed the effectiveness of citizen suits in spurring and supplementing government actions.²⁴² Over recent decades, Congress has consistently eliminated barriers and created incentives for private citizens to bring citizen

were brought by small, local citizen plaintiffs (173 out of 287) and suits against public defendants represented one-third of all citizen enforcement actions).

²³⁹ Boyer and Meidinger, *supra* note 99, at 961.

²⁴⁰ *Id.* at 964.

²⁴¹ *Id.* See also ELI STUDY, *supra* note 220, at V-5 (“Citizen suits are currently operating as Congress intended them: to provide (1) a goad to EPA efforts and (2) an alternative to government enforcement.”); Hodas, *supra* note 228, at 1561 (“[O]nly extensive use of citizen suits as private attorneys general can safeguard the enforcement system from collapse and prevent states from using lax environmental enforcement as an economic development tool.”).

²⁴² See, e.g., Environment & Natural Resources Policy Division, Cong. Research Serv., S. PRT. 100–144, A Legislative History of the Water Quality Act of 1987 1449 (1988) (“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.”); OFFICE OF ENFORCEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, 22E-2000, ENFORCEMENT IN THE 1990’S PROJECT: RECOMMENDATIONS OF THE ANALYTICAL WORKGROUPS 5–48 (1991) (“To the extent that citizen groups successfully undertake enforcement, a positive result has been achieved; namely, the availability of citizen suit remedies has served to leverage [EPA’s] scarce enforcement resources...to the extent that the regulated community views citizens enforcement as unpredictable, an even greater deterrent effect is achieved by the reality of active, broadly spread citizen suits enforcement.”).

suits.²⁴³ In sum, nowadays citizen suits not only play an active role in improving compliance with environmental laws but also generate other valuable advantages.²⁴⁴

²⁴³ For example, in the Clean Air Act amendments of 1990, Congress clarified that citizens could sue for past violations of emission standards if those violations have been repeated. *See* 42 U.S.C. § 7604(a)(1) (2012). This seems to overrule the precedent set in *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 484 U.S. 49 (1987), where the Court held that citizen plaintiffs could only bring a suit to enforce ongoing violations of Clean Water Act requirements.

²⁴⁴ *See, e.g.*, Thompson, *supra* note 47, at 198 (highlighting the unique advantages of the citizen suit in bringing competition to the business of environmental enforcement and promoting democratic goals).

Chapter 3 CITIZEN SUIT AS A NARROW CONCEPTION OF CHINESE ENVIRONMENTAL PUBLIC INTEREST LITIGATION

While ambiguities in legislation and the “injury in fact” requirement on standing to some extent obscure the nature of citizen suits, the principal purpose of citizen suits, as Congress envisioned, is to provide a goad to government enforcement or an alternative means of enforcement when government fails to exercise their enforcement responsibility. The U.S. citizen suit provisions are considered as a model of environmental public interest litigation right because in citizen enforcement actions “[g]reater deterrence [is] no longer a collateral benefit but became the primary benefit” and “[p]laintiffs would no longer be pursuing a private benefit but providing a public good.”²⁴⁵

This chapter examines the discourse that simply frames EPIL as a model of the U.S. citizen suit but fails to demonstrate the extent to which a citizen suit-like regime would be possible and effective in China. In doing so, Section A evaluates whether the benefits of the citizen suit as a goad or supplement to government enforcement may be extended to the Chinese context. Section B considers a variety of challenges and limitations that are likely to arise when adopting citizen suit-style EPIL in China.

A. BENEFITS OF ESTABLISHING CITIZEN SUIT-STYLE EPIL

The obstacles to effective government enforcement that citizen suits are intended to overcome, such as limited agency resources and political interference, are not unique to

²⁴⁵ *Id.*

the United States. In theory, countries who are seeking to strengthen public enforcement and improve compliance with the environmental laws can learn from the citizen suit model. In spite of considerable progress that China has made in enacting a wide range of environmental statutes, a conventional observation is that Chinese environmental laws “have proven little more than a paper tiger when it comes to the lived experience of its people.”²⁴⁶ While there has been a growth in government enforcement activities over the last two decades (See Table 1), environmental laws continue to be underenforced in China. It is reported that the compliance rate for industrial dischargers is only about 70 percent.²⁴⁷ Among a variety of factors that conspire to undermine the implementation of environmental laws in China, political pressure, resource shortages of environmental agencies, and capture-like risks are important contributing factors. This section analyzes in detail how the lack of political will or resources has hampered government enforcement of environmental laws in China, and how establishing citizen suit-style EPIL may help address these concerns.

²⁴⁶ Erin Ryan, *The Elaborate Paper Tiger: Environmental Enforcement and the Rule of Law in China* *Chinese Environmental Law*, 24 DUKE ENVTL. L. & POL’Y F. 183, 188 (2014). See also Alex L. Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARV. ENVTL. L. REV. 365, 367 (2013) (“Although China has constructed an expansive environmental law framework over the past 30 years, implementation of laws and regulations in practice has been notoriously weak.”).

²⁴⁷ 郚建荣 (Qie Jianrong), Huanbaobu Huojiang Jizhong Fabu Zhongdian Paiwu Danwei Huanjing Xinxi Qiye Paiwu Xinxi Nongxu Zuojia Ni Zuigao Fakuan Sanwan (环保部或将集中发布重点排污单位环境信息, 企业排污信息弄虚作假拟最高罚款 3 万) [*Ministry of Environmental Protection Will Release Environmental Information on Key Pollutant-Discharging Entities, Falsification of Discharging Data Will Face Penalties Up to 30,000 Yuan*], Fazhi Wang (法制网) [LEGALDAILY], (Aug. 27, 2017) http://www.legaldaily.com.cn/index/content/2017-08/27/content_7295381.htm.

Table 1. Development of Administrative Sanctions, Fines, and Relocations and Closures of Polluting Firms in China 1999-2016²⁴⁸

Year	1999	2000	2001	2002	2003	2004
Number of administrative sanctions	53,101	55,209	71,089	100,103	92,818	80,079
Fines (10,000 yuan) (U.S. \$1,447)	NA	NA	33,308	41,981	46,007	62,324
Number of relocations and closures	9,175	19,498	6,574	8,184	11,499	13,348
Year (continued)	2005	2006	2007	2008	2009	2010
Number of administrative sanctions	93,265	92,404	101,325	89,820	73,719	112,025
Fines (10,000 yuan) (U.S. \$1,447)	84,799	125,540	NA	NA	NA	NA
Number of relocations and closures	10,777	10,030	25,733	22,488	4,528	NA
Year (continued)	2011	2012	2013	2014	2015	2016
Number of administrative sanctions	119,333	117,308	139,059	97,084	102,084	124,706
Fines (10,000 yuan) (U.S. \$1,447)	NA	NA	NA	NA	NA	663,270
Number of relocations and closures	NA	NA	NA	NA	NA	NA

²⁴⁸ For enforcement data from 1996 to 2014, see Benjamin Van Rooij et al., *Centralizing Trends and Pollution Law Enforcement in China*, CHINA Q. 583, 591 (Table 1) (2017). For enforcement data from 2014 to 2016, see Zhongguo Huanjing Nianjian (2014-2017) (中国环境年鉴 (2014-2017)) [China Environment Yearbooks (2014-2017)].

1. *Countering Political Pressure in Environmental Enforcement*

The problems in the implementation of environmental laws in China should be understood in the context of “central-local” relations. The post-reform China has undergone a process of decentralizing major fiscal and administrative powers to subnational governments, which are responsible for managing public affairs, providing public services, and implementing laws and regulations within their jurisdictions. Under this decentralized structure of governance, environmental protection responsibilities are largely delegated to local governments at different levels in China.²⁴⁹ While the Ministry of Ecology and Environment (MEE) of the central government is tasked with formulating national environmental regulations and policies, issuing national environmental standards, overseeing the implementation of environmental laws, supervising and managing environmental protection at national level, and has limited enforcement power in certain circumstances,²⁵⁰ it is environmental protection bureaus (EPBs) at provincial level down to the levels of cities and counties that assume primary enforcement responsibility.

Marketization and decentralization reforms have given officials of the local governments the flexibility and incentives to grow their local economies rapidly over the past three decades. Nevertheless, the desire to generate new wealth, expand employment and compete with each other for economic development has also motivated local officials to sacrifice environmental protection when they conflict with the aim of economic growth. Like other local government agencies, EPBs are subject to the dual leadership of their

²⁴⁹ See 2014 EPL, *supra* note 6, at art. 6 (providing that local governments at various levels shall be responsible for the environmental quality of areas under their jurisdictions).

²⁵⁰ For responsibilities of Ministry of Ecology and Environment (MEE), see http://english.mee.gov.cn/About_MEE/Mandates/.

“vertical” superiors—the higher level EPBs, and their “horizontal” bosses—the local governments where they reside.²⁵¹ While the superior level EPBs provide inferior EPBs with guidance and policy directives, local governments of the same administrative level have a stronger influence on EPBs’ routine actions because they can exercise substantial control over EPBs’ budgetary funds and EPB director appointments.²⁵² Consequently, local EPBs tend to be “more beholden to local leaders than to their duty to pursue environmental protection goals.”²⁵³ Studies also have shown that local government leaders prefer to opt for EPB heads who can advance the locality’s overall development plan rather than the narrow interest of environmental protection.²⁵⁴ It is not uncommon that under the pressure and interference of local officials, EPBs have chosen to ignore violations of companies which were considered as important contributors of local GDPs. An extensive body of literature, therefore, has blamed local protectionism for the poor enforcement of environmental laws in China.²⁵⁵

²⁵¹ See, e.g., Abigail R. Jahiel, *The Organization of Environmental Protection in China* *China’s Environment*, CHINA Q. 757, 759 (1998).

²⁵² See, e.g., *id.*; XIAOYING MA & LEONARD ORTOLANO, ENVIRONMENTAL REGULATION IN CHINA: INSTITUTIONS, ENFORCEMENT, AND COMPLIANCE 154 (2000); CHARLES R. MCELWEE, ENVIRONMENTAL LAW IN CHINA: MITIGATING RISK AND ENSURING COMPLIANCE 115–16 (2011); OECD, ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA: AN ASSESSMENT OF CURRENT PRACTICES AND WAYS FORWARD 18 (2006).

²⁵³ Genia Kostka, *Barriers to the Implementation of Environmental Policies at the Local Level in China*, Policy Research Working Paper 7016, WORLD BANK 26 (2014).

²⁵⁴ See Genia Kostka, *Environmental Protection Bureau Leadership at the Provincial Level in China: Examining Diverging Career Backgrounds and Appointment Patterns*, 15 J. ENVTL. POL’Y & PLANNING 41, 45 (2013). See also Kostka, *Barriers*, *supra* note 253, at 16 (quoting a leading EPB official: “Environmental and energy targets are binding targets but they are not our ultimate targets. No leader will be promoted because of their better achievements in environmental protection and energy savings. GDP growth is still the target that we work hardest to achieve.”).

²⁵⁵ See, e.g., ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA’S FUTURE* (2004); MA AND ORTOLANO, *supra* note 252; MCELWEE, *supra* note 252; BENJAMIN VAN ROOIJ, *REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE AND ENFORCEMENT; THEORY AND CASES* (2006); OECD, ENVIRONMENTAL COMPLIANCE, *supra* note 252; Xin Qiu & Honglin Li, *China’s Environmental Super Ministry Reform: Background, Challenges, and the Future*, 39 ENVTL. L. REP. 10152 (2009); Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195 (2007).

It might not be fair, however, to blame local governments alone for the lax environmental enforcement on the ground. While deputizing the subnational governments to implement national environmental laws is a practical and invaluable institutional choice for a country as vast as China,²⁵⁶ establishing a decentralized system of environmental enforcement with insufficient central supervision also allows the central policy makers to shift blame to the local governments for environmental policy failures and maintain the legitimacy of the central state.²⁵⁷ Moreover, as many scholars have noted, the cadre evaluation system through which the central government exercises its control over and monitoring of local leaders have shaped the incentives of local governments.²⁵⁸ The cadre evaluation system sets a number of performance targets against which key local cadres are evaluated by the government at the level immediately above.²⁵⁹ The relative importance of different targets is made explicit by labeling as soft targets (*yiban zhibiao*), hard targets (*ying zhibiao*), or priority targets with veto power (*yipiao foujue*).²⁶⁰ For a long time, targets concerning economic growth and social stability had been given priority over environmental protection target: a failure to meet soft environmental targets would not get punished while failure to meet hard economic targets had consequences; conversely, achievement of environmental goals generally would not receive promotion and other

²⁵⁶ See Hodas, *supra* note 228, at 1571-72 (discussing the necessity and benefits of decentralizing enforcement responsibility to states in the United States).

²⁵⁷ See Ran Ran, *Understanding Blame Politics in China's Decentralized System of Environmental Governance: Actors, Strategies and Context*, CHINA Q. 634, 651 (2017).

²⁵⁸ See, e.g., Ran Ran, *Perverse Incentive Structure and Policy Implementation Gap in China's Local Environmental Politics*, 15 J. OF ENVTL. POL'Y 17, 22-24 (2013); Wang, *supra* note 246, at 386-90.

²⁵⁹ For example, the performance targets might concern economic development, maintaining social stability, development of education, science and technology, culture, health, and sports, environmental protection and population control, public security, and adherence to the Party's ideology. See Ran, *Perverse Incentive*, *supra* note 258, at 23.

²⁶⁰ Maria Edin, *State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective*, CHINA Q. 35, 39 (2003); Wang, *supra* note 246, at 380.

political rewards but successful fulfillment of economic targets would do.²⁶¹ Therefore, “decades of poor environmental enforcement have been, in significant part, the rational response to a different set of norms (cadre targets) [created by the central government] that de-prioritized environmental protection.”²⁶²

Over the last decade or more, especially under the President Xi Jinping’s leadership, the Chinese central government has taken a number of initiatives to curb the influence of local protectionism and strengthen the central government’s power in environmental enforcement and supervision. For example, several environmental targets for the first time were upgraded from “expected” (*yuqi xing*) targets into “binding” (*yueshu xing*) status in the 11th Five-Year Plan for Economic and Social Development (Five-Year Plan) (2006-2010) that provides “essential guidance on the direction of economic and social development” of the nation.²⁶³ These binding environmental targets were operationalized through incorporating them into the complex bureaucratic performance target and cadre evaluation system.²⁶⁴ The scope of binding environmental targets has been expanded since the 11th Five-Year Plan and there are a total of ten targets concerning resources and the environment designated as “binding” in the 13th Five-Year Plan (2016-2020).²⁶⁵ By

²⁶¹ See Ran, *Perverse Incentive*, *supra* note 258, at 23-4; Wang, *supra* note 246, at 386-87.

²⁶² Wang, *supra* note 246, at 371.

²⁶³ *Id.* at 399.

²⁶⁴ *Id.* See also Kostka, *Barriers*, *supra* note 253, at 8.

²⁶⁵ These ten targets include: arable land reserves, increase in land newly designated for construction, water use reduction per 10,000 yuan of GDP, energy consumption reduction per unit of GDP, nonfossil fuel as a percent of primary energy consumption, CO₂ emissions reduction per unit of GDP, forest growth (forest coverage, forest stock), air quality (days of good or excellent air quality in cities at and above the prefectural level, reduction in PM_{2.5} intensity in cities at and above the prefectural level missing the target), surface water quality (percentage of water bodies that meet or are greater than Grade III, percentage of water bodies that are worse than Grade V), reduction of emission of major pollutants (chemical oxygen demand (COD), ammonia nitrogen, sulfur dioxide (SO₂), nitrogen oxide). See Guomin Jingji He Shehui Fazhan Di Shisan Ge Wunian Guihua Gangyao (国民经济和社会发展第十三个五年规划纲要) [13th Five-Year Plan for National Economic and Social Development] (promulgated by Nat’l People’s Cong., Mar. 16, 2016), http://www.npc.gov.cn/wxzl/gongbao/2016-07/08/content_1993756.htm.

making binding environmental targets important criteria in cadre evaluation and promotion decisions, the central government intended to provide more incentives for local governments to fulfill its environmental mandates.

In addition to the elevation of environmental targets, in September 2016, the central government launched a pilot reform of establishing vertical management system for environmental monitoring, supervision, and enforcement within EPBs below the provincial level.²⁶⁶ According to the reform plan, the county level EPBs will become branches of municipal EPBs which will have direct control over the budget and leadership appointments of county branches.²⁶⁷ While municipal EPBs still need to report to the territorial governments, the provincial EPBs will play a dominant role in the dual leadership (e.g., nominate major leaders of municipal EPBs).²⁶⁸ Finally, the environmental monitoring and supervision responsibilities previously assumed by municipal and county level EPBs will be centralized to the provincial EPBs.²⁶⁹ The pilot reform has been implemented in a group of selected provinces over the past two years and is expected to expand to the whole nation by 2020.²⁷⁰

It is unclear whether these recent institutional improvements will provide sufficient incentives for local cadres to more faithfully implement national environmental mandates

²⁶⁶ See Guanyu Sheng Yixia Huanbao Jigou Jiance Jiancha Zhifa Chuizhi Guanli Zhidu Gaige Shidian Gongzuo de Zhidao Yijian (关于省以下环保机构监测监察执法垂直管理制度改革试点工作的指导意见) [Guidelines on the Pilot Reform of Establishing Vertical Management System for Environmental Monitoring, Inspection, and Enforcement Within Environmental Protection Agencies Below the Provincial Level] (promulgated by St. Council, Sept. 22, 2016), http://www.gov.cn/zhengce/2016-09/22/content_5110853.htm [hereinafter Guidelines on the Pilot Reform].

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

and spur vigorous enforcement at the local level. Scholars' research reveal that despite introduction of binding environmental targets, economic targets significantly outweigh environmental targets and local officials usually prioritize competing targets such as economic growth and employment targets when they face trade-offs.²⁷¹ Also, environmental cadre evaluation often encourages local governments to engage in data manipulation.²⁷² The effectiveness of the ongoing environmental vertical management reform remains to be seen, but commentators have warned that the selected centralization reform will be less effective if not supplemented with appropriate incentives and accountability mechanism.²⁷³

A recent round of central environmental inspections found that various forms of “local protectionism” conducted by the local governments (e.g., adopting “local policies” (*tu zhengce*) that explicitly require EPBs to tolerate first-time violators or impose only minimum fines, unduly interfering with the routine enforcement actions of local EPBs, or falsifying monitoring data) continued to hinder enforcement of environmental laws at the local level.²⁷⁴ Because one major purpose of U.S. citizen suits is to deal with agencies' reluctance to enforce due to political considerations, establishing citizen suit-style EPIL may help counterbalance negative influence of local protectionism in China. Compared with local EPBs, citizens and environmental groups are less likely to be deterred by

²⁷¹ See Kostka, *Barriers*, *supra* note 253, at 15-7; Ran, *Perverse Incentive*, *supra* note 258, at 25.

²⁷² See Ran, *Perverse Incentive*, *supra* note 258, at 25-6; Wang, *supra* note 246, at 417.

²⁷³ See Yun Ma, *Vertical Environmental Management: A Panacea to the Environmental Enforcement Gap in China?*, 1 CHINESE J. ENVTL L. 37 (2017).

²⁷⁴ See Cao Ying (曹滢), Wuran Xiangmu Weigui Shangma Difang “Tu Zhengce” bu Tuichu Zhongyang Huanbao Ducha Jiele Qi Shengshi Naxie “Tongdian” (污染项目违规上马、地方“土政策”不退出 中央环保督察揭了7省市哪些“痛点”?) [*Illegal Operation of Polluting Projects, the Continued existence of “Local Policies,” What Problems has the Central Environmental Inspection of Seven Provinces and Cities Revealed?*], Xinhua Wang (新华网) [XINHUA] (Aug. 1, 2017), http://www.xinhuanet.com/politics/2017-08/01/c_129669703.htm.

political pressures if an environmental violation is worth prosecuting. By filing notices to sue, citizen plaintiffs can bring attention to violations not addressed by administrative agencies and prompt them into action. If agencies fail to enforce, citizen plaintiffs can bring their own enforcement actions under a citizen suit-style framework. In fact, in a country still characterized by “fragmented authoritarianism,” the marginalized environmental bureaucracy often finds environmental groups a good ally in pursuing their policy goals and institutional mandates.²⁷⁵ Therefore, environmental plaintiffs’ mobilization, including bringing enforcement actions, may also help address some environmental violations that environmental agencies feel are difficult to enforce due to political interference.

2. *Compensating for Agencies’ Inadequate Resources*

In addition to local protectionism, the existing literature has identified insufficient institutional capacity and resources available to environmental agencies as another important hurdle to effective enforcement of environmental laws in China.²⁷⁶ The

²⁷⁵ “Fragmented authoritarianism” was a framework proposed by scholars to understand the policy making process in China. This model argues that fragmentation of authority encourages a search for consensus among various bureaucracies and focuses on the importance of bargaining and negotiation among bureaucracies—each with its own sense of mission and interest—in the policy making process in China. See Kenneth G. Lieberthal, *Introduction: The “Fragmented Authoritarianism” Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1, 6–12 (Kenneth G. Lieberthal & David M. Lampton eds., 1992). Andrew C. Mertha updates the “fragmented authoritarianism” framework by noting that the politics of hydropower in China has become increasingly pluralized, as actors and groups that were previously excluded from the policy making process—disgruntled officials, NGOs, and the media—have successfully entered the policy process by adopting strategies necessary to work within the constraints of the fragmented authoritarianism framework. In his study, Mertha also describes how environmental bureaus have formed coalitions with other policy entrepreneurs (e.g., environmental NGOs and the media) and sought their assistance to oppose certain hydropower projects. ANDREW C. MERTHA, *CHINA’S WATER WARRIORS: CITIZEN ACTION AND POLICY CHANGE* (2008).

²⁷⁶ See, e.g., ECONOMY, *supra* note 255, at 108–09; VAN ROOIJ, *supra* note 255, at 274–75; Kostka, *Barriers*, *supra* note 253, at 27–8; Wanxin Li & Krzysztof Michalak, *Environmental Compliance and Enforcement in China*, in GOVERNANCE, RISK, AND COMPLIANCE HANDBOOK: TECHNOLOGY, FINANCE, ENVIRONMENTAL, AND INTERNATIONAL GUIDANCE AND BEST PRACTICES 379, 385–86 (Anthony Tarantino ed., 2008); Guangdong Xu & Michael Faure, *Explaining the Failure of Environmental Law in China*, 29 COLUM. J. ASIAN L. 1, 47–8 (2016).

implementation capacity of both national and local environmental agencies had long been constrained by their inferior bureaucratic ranking within the political hierarchy.²⁷⁷ After decades of institutional developments,²⁷⁸ the then State Environmental Protection Administration was upgraded into the Ministry of Environmental Protection and acquired formal ministry status in March 2008. The Ministry of Environmental Protection was replaced by the MEE in March 2018 with its regulatory authorities being greatly expanded.²⁷⁹ The increase in the MEE's status and authority has filtered down and converted into increased authority for local EPBs. In spite of expansion of human and financial resources of MEE and its local branches over the last decade, the number of violations still overwhelm the enforcement capacity of both the central and local environmental agencies.

The total number of staff working at various levels of environmental protection agencies and their affiliated institutions increased from 121,049 in 1999 to 232,388 in 2015 in China (See Table 2). In 2015, there were 3,023 employees working at the MEE and public institutions (*shiye danwei*) directly under the MEE,²⁸⁰ and the annual budget for the MEE and its affiliated public institutions was 32.38 billion yuan (U.S. \$476 million).²⁸¹ As a comparison, its U.S. counterpart—the EPA—was staffed by 14,725²⁸² and the annual

²⁷⁷ See Jahiel, *supra* note 251, at 765-66.

²⁷⁸ See *id.* at 766-77 (tracing the institutional development of the environmental apparatus in China since the late 1970s).

²⁷⁹ See Paul A. Davies & Andrew Westgate, *China to Expand Environmental Regulatory Authority*, LATHAM & WATKINS LLP (Mar. 19, 2018), <https://www.globalelr.com/2018/03/china-to-expand-environmental-regulatory-authority/>.

²⁸⁰ See *Zhongguo Huanjing Nianjian 2015* (中国环境年鉴 2015) [China Environment Yearbooks 2015].

²⁸¹ See <http://gcs.mee.gov.cn/bmysgl/201504/P020150417699313492424.pdf> (Ministry of Ecology and Environment's 2015 Budget).

²⁸² See <https://www.epa.gov/planandbudget/budget> (EPA's Budget and Spending Over Years).

budget was U.S. \$7.89 billion in the same year.²⁸³ Local EPBs, especially those at the county level and in less developed regions, are generally understaffed and underfunded given their expanded environmental mandates and obligations in recent years.²⁸⁴ Even for EPBs in economically advanced localities which tend to have more staff and resources to fulfill their mandates, they often find it difficult to acquire necessary capacity to carry out their duties.²⁸⁵ For instance, Guangzhou, a capital city considered to be committed to environmental protection, has not yet established EPBs at the township level, leaving the vast majority of smaller enterprises and scattered sources of pollution unmonitored.²⁸⁶

Table 2. Number of Staff Working at Various Levels of Environmental Protection Agencies and Their Affiliated Institutions in China 1999-2015²⁸⁷

Year	Total	National & provincial level	Municipal level	County level	Township level
1999	121,049	10,683	32,200	74,943	3,223
2000	131,092	10,876	35,521	81,574	3,121
2001	142,766	11,203	38,072	89,316	4,175
2002	154,233	11,450	39,545	98,098	5,140
2003	156,542	11,966	39,960	99,892	4,724
2004	160,246	11,939	41,517	102,034	4,756

²⁸³ Office of the Chief Financial Officer, OFFICE OF THE CHIEF FINANCIAL OFFICER, U.S. ENVIRONMENTAL PROTECTION AGENCY, FY 2015 EPA BUDGET IN BRIEF 1 (2014).

²⁸⁴ See Benjamin Van Rooij & Carlos Wing-Hung Lo, *Fragile Convergence: Understanding Variation in the Enforcement of China's Industrial Pollution Law*, 32 L. & POL'Y 14, 27 (2010).

²⁸⁵ *Id.*

²⁸⁶ See Guangzhou Shi Huanjing Baohu Di Shisan Ge Wunian Guihua (广州市环境保护第十三个五年规划) [Guangzhou Municipality's 13th Five-Year Plan for Environmental Protection], <http://www.gz.gov.cn/gzgov/s2812/201612/467e946dfcb048c0a7bff56655808c60.shtml>.

²⁸⁷ Zhongguo Huanjing Nianjian (2000-2016) (中国环境年鉴 (2000-2016)) [China Environment Yearbooks (2000-2016)].

2005	166,774	13,068	42,880	106,339	4,487
2006	170,290	12,976	43,084	109,839	4,391
2007	176,988	13,113	40,154	118,751	4,970
2008	183,555	13,873	41,763	126,478	6,414
2009	188,991	14,336	41,763	126,478	6,414
2010	193,911	15,011	42,462	129,284	7,154
2011	201,161	16,110	45,019	132,596	7,436
2012	205,334	16,993	45,203	135,628	7,510
2013	212,048	17,681	47,016	137,099	10,252
2014	215,871	17,717	48,384	137,772	11,998
2015	232,388	18,853	49,973	146,696	16866

The principal responsibility for inspection and compliance monitoring lies with over 3,000 environmental inspection institutions with about 70,000 staff across the nation.²⁸⁸ Many municipal and county-level inspection institutions have been overwhelmed by the large number of violations.²⁸⁹ Because the nature of environmental inspection

²⁸⁸ See Zhang Ke (章轲), Tisheng Huanjing Zhifa Nengli Huanbaobu Jiang Tui Zhifa Renyuan Tongyi Zhuozhuang Peibei Yongche (提升环境执法能力, 环保部将推执法人员统一着装、配备用车) [*Improving Environmental Enforcement Capacity, the Ministry of Environmental Protection Will Make Efforts to Provide Uniforms and Vehicles for Environmental Enforcement Officers*], *Diyi Caijing* (第一财经) [YICA], (Apr. 21, 2017), https://www.yicai.com/news/5271188.html?_da0.3346835797765255.

²⁸⁹ See, e.g., Huo Guanchen (霍冠臣), Jiceng Huanjing Jiancha Gongzuo Yudao de Kunnan Ji Jianyi (基层环境监察工作遇到的困难及建议) [*Difficulties in Local Environmental Inspection Work and Suggestions*],

institutions is public institutions (*shiyè dānwèi*) affiliated with local EPBs rather than administrative agencies, they often lack independent bureaucratic status and sufficient funding to conduct compliance inspections and enforcing violations.²⁹⁰ Moreover, the salaries of local inspection units' staff are relatively lower and the career advancement opportunities are much limited compared with their peers in government agencies,²⁹¹ which has further led to chronic need of staff especially well-educated staff. It is estimated that only 20 percent of inspectors have the environment-related education background,²⁹² and a shortage of qualified staff has greatly undermined inspection and enforcement capacities of inspection units.²⁹³

In addition to human resources, many local EPBs and their inspection units are desperate for vehicles support and up-to-date monitoring equipment.²⁹⁴ In some localities, the lack of vehicles has significantly decreased the coverage and efficiency of compliance inspections.²⁹⁵ Shortages of advanced monitoring and testing equipment have limited EPBs'

Minxin (民心) (MINXIN MONTHLY) 28, 28 (2017) (complaining that in a prefecture-level city of Liaoning Province, there are only 79 inspectors responsible for monitoring compliance of over 800 regulated companies within its jurisdiction).

²⁹⁰ See Zhong Yongsen (钟永森), Jiceng Huanjing Zhifa Xiaoneng Xianzhuang Ji Tisheng Duice (基层环境监察执法效能现状及提升对策) [*Efficacy of Local Environmental Inspection and Enforcement and Proposals for Improvement*], Ditan Shijie (低碳世界) [LOW CARBON WORLD] 3, 3 (2015).

²⁹¹ Liu Xianchun (刘贤春), Jianzhao Chaizhao: Changtong Huanjing Jiancha Zuihou Yi Gongli (见招拆招: 畅通环境监察“最后一公里”) [*Overcoming Challenges: Clearing Obstructions on the “Last Kilometer” to Environmental Inspections*], Zhongguo Huanjing Jiancha (中国环境监察) [CHINA ENVTL. SUPERVISION] 25, 27 (2015) (mentioning that the average annual salary for environmental inspectors in a county is less than 40,000 yuan (U.S. \$5,765), which is about 30,000 (U.S. \$4,324) to 50,000 yuan (U.S. \$7,206) less than staff of other government agencies with the same rank).

²⁹² Zhang Li (张黎), Goujian Zhihui Zhifa Tianwang Jixu Jiayou Kuaipao (构建智慧执法天网急需加油快跑) [*Accelerating the Construction of Skynet for Law Enforcement*], Zhongguo Huanjing Bao (中国环境报) [CHINA ENVIRONMENTAL NEWS], Apr. 20, 2015, http://news.cenews.com.cn/html/2015-04/20/content_27118.htm.

²⁹³ See Xu & Faure, *supra* note 276, at 47; Zhong Yongsen (钟永森), *supra* note 290, at 3.

²⁹⁴ See Kostka, *Barriers*, *supra* note 253, at 28; Van Rooij & Lo, *supra* note 284, at 27.

²⁹⁵ See Liu Zhijie (刘之杰), Woguo Huanjing Jiancha Zhifa de Xianshi Kunjing Yu Duice Sikao (我国环境监察执法的现实困境与对策思考) [*Practical Difficulties in Chinese Environmental Inspection and Enforcement and Thoughts on Solutions*], 42 Huanjing Baohu (环境保护) [ENVTL. PROT.] 61, 62 (2014).

ability in ensuring that the regulated sources meet environmental regulatory requirements and responding to environmental threats during emergencies. While some developed regions began to introduce technological tools such as mobile data terminals, unmanned aerial vehicle, and remote sensing techniques to improve the efficiency and accuracy of enforcement activity, overall the application of modern technologies in enforcement of environmental laws is limited.²⁹⁶

Under the framework set forth in the vertical management reform of environmental monitoring, inspection and law enforcement functions of inspection units at county level will be incorporated into county branches of municipal EPBs.²⁹⁷ Funded by municipal EPBs, the new enforcement units of municipal EPBs and their county branches will obtain formal status as government enforcement agencies and will be equipped with necessary mobile devices and vehicles.²⁹⁸ Although the institutional capacity of local EPBs will be gradually strengthened with the unfolding implementation of the reform, it is never possible for environmental agencies to have sufficient resources to cope effectively with violations that inundate them. Therefore, establishing citizen suit-style EPIL would provide additional resources to detect and prosecute environmental violations. Citizens can help monitor companies' performance and detect environmental problems, overcoming both the practical difficulties and inadequate resources that agencies confront in identifying violations.²⁹⁹ While citizen plaintiffs are similarly constrained by limited resources, local citizens and groups are "in a better position than public authorities to assess the costs and

²⁹⁶ See Zhang Li (张黎), *supra* note 292.

²⁹⁷ See Guidelines on the Pilot Reform, *supra* note 266.

²⁹⁸ See *id.*

²⁹⁹ Thompson, *supra* note 47, at 192.

benefits of enforcement actions” since they are immediately affected by a specific environmental problem.³⁰⁰ When agencies lack resources to pursue certain violations, they can just allow citizen plaintiffs to take the lead in the enforcement actions initiated by citizens and focus their limited resources elsewhere.³⁰¹

3. *Correcting Excessive Cooperation between Regulatory Agencies and Regulated Companies*

Due to ambiguities in environmental laws, environmental agencies can exercise considerable discretionary power in interpreting and enforcing regulatory requirements. The wide discretion allows local EPBs to apply a “pragmatic” enforcement approach, “in which the choice of enforcement action has more to do with the particular case at hand than with a rigid attachment to a single approach, such as insisting on strict compliance with environmental rules.”³⁰² While the pragmatic approach seems to be a legitimate enforcement strategy, such pragmatism is often reflected in EPBs’ reliance on *guanxi*, or social connection, that pervades Chinese society. According to scholars, *guanxi* “has long been an element of Chinese life, is based on a blend of exchanges and mutual affection that create feelings of responsibility and obligation on the one hand and indebtedness on the other...In one of its simplest forms, *guanxi* is maintained by trading favors over long periods. These exchanges are often viewed as creating a resource that can be used to get things done.”³⁰³ Local EPBs tend to develop cooperative relationships with regulated

³⁰⁰ Adeeb Fadil, *Citizen Suits against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 24 (1985).

³⁰¹ See Thompson, *supra* note 47, at 200.

³⁰² MA AND ORTOLANO, *supra* note 252, at 128.

³⁰³ *Id.* at 82.

enterprises because they believe that maintaining harmonious *guanxi* with enterprises can make it easier to acquire information and enhance compliance.³⁰⁴

Although the pragmatic approach and *guanxi* practices sometimes have positive effect on enforcement, close contact between regulating agencies and regulated enterprises inevitably leads to favoritism or outright corruption.³⁰⁵ Studies show that firms have been able to circumvent regulation by employing *guanxi*,³⁰⁶ and that EPB staff almost never revoked discharge permits because of the concern that revoking a permit would seriously damage an EPB's relationship (*guanxi*) with an enterprise.³⁰⁷

Because of the pervasive *guanxi* practices that have undermined formal rules, "China's law enforcement institutions run a higher risk of capture-like and corruptive practices than similar Western institutions."³⁰⁸ The fear that the regulated industry may capture their regulators was one important driving force behind the creation of the U.S. citizen suit. Involving citizens and environmental groups in the enforcement process, therefore, may help address the capture-like risks existing in China's law enforcement. Where government agencies develop close relationships with regulated companies such that they are incentivized to overlook violations, citizen enforcement actions can correct such excessive cooperation by stimulating or supplementing agency enforcement.³⁰⁹ Moreover, citizen suits can deter future capture by "alter[ing] the incentives of regulated

³⁰⁴ See *id.* at 83, 121–122.

³⁰⁵ See VAN ROOIJ, *supra* note 255, at 371-72.

³⁰⁶ See MA AND ORTOLANO, *supra* note 252, at 84-5.

³⁰⁷ See *id.* at 126-27.

³⁰⁸ VAN ROOIJ, *supra* note 255, at 372.

³⁰⁹ Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 133 (2002).

firms and regulatory agencies in their interactions generally” and “prompting more aggressive enforcement action by enforcement agencies.”³¹⁰

In conclusion, the pathologies in the government enforcement of environmental laws in China—political and institutional constraints, resource shortages, and the risk of capture—provide initial justifications for involving private parties in environmental law enforcement. While currently citizens in China have the right to report instances of environmental violation to relevant government agencies,³¹¹ citizens have no recourse to other channels if agencies refuse to take any action to address the problem. Therefore, establishing a citizen suit-style framework would permit citizens to prod agencies into enforcement or initiate independent enforcement suits if agencies fail to take actions due to lack of will or resources. In addition to the benefit of helping strengthen China’s lax environmental enforcement, citizen suit-like EPIL will also promote democratic values and enhance legitimacy of the party-state by affording citizens broad opportunities to participate in the effort to abate pollution.³¹²

B. CHALLENGES AND LIMITATIONS OF ESTABLISHING CITIZEN SUIT- STYLE EPIL

While a citizen suit-like framework has the potential to help address government enforcement failures caused by lack of will or resources, few advocates have provided a thoughtful analysis of whether it is possible to import the U.S. citizen suit and how effective

³¹⁰ *Id.*

³¹¹ See 2014 EPL, *supra* note 6, at art. 57(1).

³¹² See Thompson, *supra* note 47, at 198 (“Citizen suits would also help democratize the administrative process by affording ‘citizens of the United States very broad opportunities to participate in the effort to prevent and abate air pollution.’ Citizen suits would both enable direct public participation and ‘give the public a problem-solving tool to protect and enhance air quality.’”).

it would be in China. The following Subsections examine challenges and limitations of adopting citizen suit-style EPIL in China. The first Subsection considers the political challenge of establishing a dual enforcement scheme under the current enforcement system of China. The second Subsection explores various inherent deficiencies of existing environmental laws that can significantly restrict the role of citizen suit-style EPIL.

1. *Political Challenges of Adopting Citizen Suit-Style EPIL*

As discussed above, the U.S. environmental citizen suit was grounded in historical precedent of American law.³¹³ While individual victims of illegal conduct can enforce their private rights in China, private enforcement of public purposes has never been a part of Chinese legal practice. Enlisting private parties in the enforcement of environmental laws, therefore, would require realignment of roles and powers in the existing enforcement system. First, the authority to enforce regulatory laws had traditionally been monopolized by public bureaucracies since China began to establish its modern legal system in the early 1980s. The power to enforce environmental laws is shared by administrative agencies and the procuratorate: environmental agencies (i.e., EPBs) take civil administrative actions against violators of environmental laws while the procuratorate addresses serious violations through criminal prosecutions.³¹⁴ Under a citizen suit-style EPIL, private parties

³¹³ See *supra* notes 99–101 and accompanying text.

³¹⁴ For the administrative enforcement power of environmental agencies, see 2014 EPL, *supra* note 6, at art. 10 (granting the power to supervise and manage environmental protection work to competent central and local environmental protection agencies); arts. 59–63 (providing for a range of administrative enforcement actions that environmental agencies can take against different violations). For the criminal enforcement power of the procuratorate, see Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by Nat'l People's Cong., Jul. 1, 1979, effective Jan. 1, 2013, amended Oct. 26, 2018), art. 3, 1979, STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (providing that the People's Procuratorate shall be responsible for initiating criminal prosecutions). For different types of environmental crimes and corresponding criminal sanctions, see Xingfa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Jul. 1, 1979, effective Oct. 1, 1997, amended Nov. 4, 2017), arts. 338–46, 1979 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

and environmental agencies will exercise concurrent civil enforcement authority. Even if the Article II-based separation of powers challenge to U.S. citizen suits is not likely to arise in the Chinese context,³¹⁵ the idea of private parties as alternative law enforcers will likely be too radical and thus meet strong resistance.

Second, adopting citizen suit-like EPIL entails significant change in the traditional role of Chinese courts. U.S. environmental statutes generally provide for two types of civil enforcement actions: (1) civil administrative actions taken by EPA (or a state), in which EPA can issue administrative compliance orders and assess administrative penalties; (2) civil judicial actions filed by the U.S. Department of Justice on behalf of EPA (or by the State's Attorneys General on behalf of the states), in which EPA can seek injunctive relief and higher civil penalties.³¹⁶ Unlike U.S. enforcement agencies which may choose to initiate civil administrative actions or file formal lawsuits in court to enforce environmental violations,³¹⁷ Chinese environmental agencies are only able to pursue administrative enforcement actions (e.g., issuing administrative orders or imposing administrative fines).³¹⁸ Environmental agencies usually lack coercive power to force violators to comply with their administrative orders. When persons or entities fail to comply with an administrative order or pay an administrative penalty, environmental agencies may seek court assistance in enforcing their administrative decisions by filing “non-litigation” administrative execution cases (*feisu xingzhen zhixing anjian*) under the Administrative

³¹⁵ See *supra* Chapter 2, Section C. 1.

³¹⁶ See, e.g., Clean Water Act, 33 U.S.C. § 1319 (a)-(g) (2012).

³¹⁷ Because trial are expensive and time-consuming, environmental agencies usually prosecute in the courts violations that are most egregious.

³¹⁸ See e.g., 2014 EPL, *supra* note 6, at arts. 59–63; Shui Wuran Fangzhi Fa (水污染防治法) [Water Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., May. 11, 1984, effective Jun. 1, 2008, amended June 27, 2017), arts. 81–95, 1984 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. [hereinafter 2017 WPPCL].

Procedure Law.³¹⁹ As such type of cases involve no trials, judicial review of administrative decisions is often limited to “documentary review.”³²⁰ If the legality of an administrative order is upheld, a court may use coercive measures to enforce the obligations contained in the administrative order. Therefore, courts in China are not involved in the primary enforcement decision-making and their role is limited to reviewing and enforcing administrative orders issued by agencies. This is different from the role of U.S. courts, which have the jurisdiction to determine whether a violation exists and to what extent to impose remedies.

In sum, Chinese scholars who conceive EPIL as similar to the citizen suit are right to point out that EPIL may intrude on agencies’ enforcement authority without the pre-suit notice requirement.³²¹ However, they fail to realize the more serious challenge presented by the very idea of enlisting private parties as enforcers: it will call for a radical reform in the current enforcement landscape by altering the established divisions of responsibility and power. Even in the U.S. where citizen suits have become an important enforcement mechanism, there are doubts that “private enforcement of regulatory laws is an anomalous, if not dangerous, deviation from established divisions of responsibility and power.”³²² Therefore, there are formidable obstacles to overcome if citizen enforcement is to become an accepted part of regulatory enforcement in China.

³¹⁹ See 2017 APL, *supra* note 21, at art. 97.

³²⁰ See Xuehua Zhang, Leonard Ortolano & Zhongmei Lu, *Agency Empowerment through the Administrative Litigation Law: Court Enforcement of Pollution Levies in Hubei Province*, CHINA Q. 307, 311 (2010).

³²¹ See *supra* notes 56–58 and accompanying text.

³²² Boyer and Meidinger, *supra* note 99, at 842.

2. *Inherent limitations of Environmental Laws that Undermines the Effectiveness of Citizen Suit-Style EPIL*

2.1 Inadequate Regulation and Weak Environmental Standards

Because citizen suit provisions authorize actions for violations of requirements of their respective statutes, the efficacy of citizen suits depends on the coverage and strength of existing environmental statutes. With the explosion of environmental legislation between 1970s and 1980s accompanied by broad authorization of citizen suits against a wide scope of actionable violations, citizens in the U.S. have acquired extensive enforcement authority and played a critical role in prompting agencies to implement the ambitious legislative directives. In the absence of far reaching and powerful statutory framework, it is doubtful that EPIL modeled on the citizen suit will function as a powerful enforcement mechanism in China as they do in the United States.

China has achieved tremendous progress in enacting a collection of wide-ranging environmental laws to govern pollution control and natural resources use since the late 1970s.³²³ Nevertheless, some key issue areas are not yet regulated. For example, the national legislature has not adopted legislation to address the management of toxic chemicals, light pollution, electromagnetic radiation pollution, heavy metal pollution, and persistent organic pollutants.³²⁴ Not until recently did the Standing Committee of the NPC

³²³ For a review of China's legislation on pollution control and natural resources conservation since the late 1970s, see Stefanie Beyer, Comment, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185, 191–200 (2006); Srinivasan, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 290–98 (2007).

³²⁴ Shi'er Wu Quanguo Huanjing Baohu Fagui He Huanjing Jingji Zhengce Jianshe Guihua (“十二五”全国环境保护法规和环境经济政策建设规划) [12th Five-Year Plan for National Environmental Protection Legislation and Environmental Economic Policies] (promulgated by Ministry of Env'tl. Prot., Nov. 1, 2011),

pass legislation to regulate nuclear safety³²⁵ and soil pollution.³²⁶ Moreover, the implementing regulations have never been promulgated for several important environmental laws such as the Solid Waste Pollution Prevention and Control Law (SWPPCL)³²⁷ and Noise Pollution Prevention and Control Law.³²⁸ Similarly, for a long time, there were no viable means to implement key regulatory programs established by environmental statutes (such as total emission control of major pollutants discharges policy, discharge permit system, and regional permit restrictions).³²⁹

Where an environmental concern is regulated by law, compliance with existing environmental standards is usually insufficient to achieve the goals of reducing pollution and improving the environment. For example, the current effluent standards in China suffer from several limitations. First, many important toxic pollutants are not controlled by the

<http://www.zhb.gov.cn/gkml/hbb/bwj/201111/W020111109379710352245.pdf> [hereinafter 12th Five-Year Plan for National Environmental Protection].

³²⁵ He Anquan Fa (核安全法) [Law on Nuclear Safety] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018) 2017 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

³²⁶ Turang Wuran Fangzhi Fa (土壤污染防治法) [Soil Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018, effective Jan. 1, 2019) 2018 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

³²⁷ Gutu Feiwu Wuran Huanjing Fangzhi Fa (固体废物污染环境防治法) [Solid Waste Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 30, 1995, effective Apr. 1, 2005, amended Nov. 7, 2016) 1995 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. [hereinafter 2016 SWPPCL].

³²⁸ Huanjing Zaosheng Wuran Fangzhi Fa (环境噪声污染防治法) [Noise Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 29, 1996, effective Mar. 1, 1997) 1996 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

³²⁹ 12th Five-Year Plan for National Environmental Protection, *supra* note 324. The Ministry of Environmental Protection issued administrative measures to implement the regional permit restriction system on December 18, 2015. *See* Jianshe Xiangmu Huanjing Yingxiang Quyu Xianpi Guanli Banfa (Shixing) (建设项目环境影响评价区域限批管理办法(试行)) [*Measures on Administration of Regional Restriction on Approval of Environmental Impact Assessment of Construction Projects (For Trial Implementation)*] (promulgated by the Ministry of Env'tl. Prot., Dec. 18, 2015, effective Jan. 1, 2016). On January 10, 2018, the Ministry of Environmental Protection released administrative rules to provide guidance for implementing the discharge permit system which had been introduced as early as the late 1980s. *See* Paiwu Xuke Guanli Banfa (Shixing) (排污许可管理办法(试行)) [*Measures on Administration of Discharge Permitting (For Trial Implementation)*] (promulgated by the Ministry of Env'tl. Prot., Jan. 10, 2018, effective Jan. 10, 2018). However, the administrative measures for these two systems are only under the trial implementation and many rules still need improvement in the future.

Integrated Wastewater Discharge Standard,³³⁰ which is a national effluent standard that applies to discharges of regulated water pollutants where there is no industrial discharge standard. There are only thirteen toxic pollutants regulated by China's Integrated Wastewater Discharge Standard while 126 substances have been designated as priority toxic pollutants by EPA under the Clean Water Act.³³¹

Second, for a long time, most of China's effluent standards only set limitations on the concentration rather than mass of a pollutant, which stimulated the use of dilution as a substitute for treatment.³³² Because there have been no effective mechanisms taking into consideration the impact of effluent on the quality of the receiving water, compliance with national uniform effluent limitations alone is often not sufficient to meet the water quality standards in the receiving water. As a comparison, the EPA of the United States generally prefers setting mass-based effluent limitations except in limited circumstances to prevent intentional dilution of wastewater.³³³ In addition, a permit writer must consider the impact of the proposed discharge on the quality of the receiving water when developing effluent limitations for a National Pollutant Discharge Elimination System permit. In cases where technology-based effluent limitations are found to be insufficient to achieve the applicable water quality standards, the Clean Water Act and its implementing regulations require

³³⁰ Wushui Zonghe Paifang Biaozhun (污水综合排放标准) [Integrated Wastewater Discharge Standard] (GB 8978-1996).

³³¹ See 40 C.F.R. § 423, app'endix A, (2018).

³³² See MA & ORTOLANO, *supra* note 252, at 19–20; OECD, CHINA IN THE GLOBAL ECONOMY: GOVERNANCE IN CHINA 503 (2005).

³³³ See WATER PERMITS DIVISION, OFFICE OF WASTEWATER MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT WRITERS' MANUAL 5–21 (2010).

development of water quality-based effluent limitations, which can impose additional or more stringent effluent limitations and conditions to protect water quality.³³⁴

Realizing the drawbacks of the concentration control strategy, the Chinese government has adopted some instruments to reduce increased level of pollution. For example, a “total emission control of major pollutants discharges” (TEC) policy that set fixed amounts of the total annual discharges of key pollutants began to be introduced during the 9th Five-Year Plan (1996-2000), representing a shift from reducing pollutant concentrations to reducing total pollution loads.³³⁵ Under the TEC scheme, the central government allocate the total amount of major pollutant discharge for each province, and provincial governments in turn assign the pollutant quotas to prefectures and cities within their jurisdictions.³³⁶ While certain sources may be required to meet more stringent discharge standards if compliance with national discharge limitations is insufficient to meet reduction targets, only a small number of major pollutants are targeted by the TEC policy,³³⁷ and the practical implementation of TEC measures are confined to areas that fail

³³⁴ See *id.* at 6-1.

³³⁵ See OECD, ENVIRONMENTAL COMPLIANCE, *supra* note 252, at 23. The total emission control of major pollutant discharges (TEC) policy was then incorporated into several environmental laws. See 2014 EPL, *supra* note 6, at art. 44; 2017 WPPCL, *supra* note 318, at art. 20; 2017 MEPL, *supra* note 67, at arts. 3, 11; Daqi Wuran Fangzhi Fa (大气污染防治法) [Air Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 5, 1987, amended Aug. 29, 2015, effective Jan. 1, 2016), arts. 21–22, 1987 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. [hereinafter 2015 APPCL].

³³⁶ See, e.g., 2014 EPL, *supra* note 6, at art. 44; 2017 WPPCL, *supra* note 318, at art. 20; 2015 APPCL, *supra* note 335, at art. 21.

³³⁷ The scope of major pollutants targeted by the TEC policy varies over time. For example, the TEC policy covered four major pollutants (chemical oxygen demand (COD), ammonia nitrogen, sulfur dioxide (SO₂), nitrogen oxide) during the 12th Five-Year Plan (2011-2015). During the 13th Five-Year Plan (2016-2020), volatile organic compounds was added to the list of major pollutants subject to the TEC policy.

to meet the ambient environmental quality standards or in special areas designated by the State Council.³³⁸

In addition to the TEC policy, China began to experiment with the discharge permit system in the late 1980s requiring enterprises to apply to EPBs for permits which set specific limits on the mass and concentration of pollutants in enterprises' emissions.³³⁹ As EPBs in writing permits were not required to set concentration limits that were as stringent as national effluent standards, the concentration limits specified in many permits were much lenient than those contained in effluent standards.³⁴⁰ Due to a lack of legislative support and consistency between the discharge permit system and other regulatory programs (e.g., discharge fee system), the experiment with discharge permit system has achieved moderate success over the last two decades or more.³⁴¹

Since 2016, the central government began to promote the establishment of a comprehensive discharge permit system as a key strategy to regulate discharges of industrial sources.³⁴² By the mid-August of 2018, the MEE has established guidelines for application and issuance of discharge permit for 34 industrial categories and issued 23,410 permits.³⁴³ While the ongoing reform of the discharge permit system is expected to

³³⁸ Dan Dudek et al., *Total Emission Control of Major Pollutants in China*, CHINA ENVTL. SERIES 43, 49 (2001).

³³⁹ See OECD, CHINA, *supra* note 332, at 503 (Box 17.3).

³⁴⁰ See *id.* at 513 (Box 17.6).

³⁴¹ See *id.* at 503 (Box 17.3), 513 (Box 17.6).

³⁴² On November 10, 2016, the State Council released its "Plan for Implementation of Pollutant Discharge Permit," which establishes guidelines and policy goals for implementing discharge permit system. See Kongzhi Wuranwu Paifang Xuke Shishi Fang'an (控制污染物排放许可制实施方案) [Plan for Implementation of Pollutant Discharge Permit] (promulgated by St. Council, Nov. 10, 2016), http://www.xinhuanet.com/politics/2016-11/21/c_1119957286.htm.

³⁴³ Guo Wei (郭薇) & Liu Xiaoxing (刘晓星), Qianghua Lifa Zhenghe Zhidu Tuidong Paiwu Xukezhi Quan Fugai (强化立法 整合制度 推动排污许可制全覆盖) [*Strengthening Legislation, Consolidating Institutions, Promoting Comprehensive Coverage of Pollutant Discharge Permit System*], *Zhongguo Huanjing Bao* (中

strengthen pollution control in China, it will be very challenging to develop industrial discharge guidelines and determine appropriate discharge limits in permits due to constraints of technical ability and financial resources of both the central and local environmental agencies.

The lack of regulation of certain environmental issues and inadequate discharge standards will significantly limit the scope of actionable violations in China. Where there is no regulation, there is no statutory basis for both government and citizen enforcement actions. The example of the effluent standards' shortcomings suggests that the level of pollution control in China is relatively weak so that compliance with existing discharge standards alone may still cause environmental harm. Although the TEC policy and the discharge permit system may allow regulating agencies to impose more stringent discharge limitations, they have not yet established discharge limitations as necessary to achieve quality goals of the ambient environment due to their respective weaknesses. In the case of inadequate regulation, citizens cannot bring enforcement actions against sources of pollution that meet regulatory requirements even though they have resulted in environmental harm.

2.2 Poor Enforceability of Legal Requirements

Chinese legislators has long been influenced by the principle that “something is better than nothing” and “general is better than specific.”³⁴⁴ As a result, the drafting of many environmental provisions follows the general style of Chinese legislation that is

国环境报) [CHINA ENVIRONMENTAL NEWS], Aug. 24, 2018, http://epaper.cenews.com.cn/html/2018-08/24/content_75640.htm.

³⁴⁴ Qiu & Li, *supra* note 255, at 10161.

characterized by the use of “highly general, often vague and aspirational language.”³⁴⁵ The generality and vagueness of legal rules makes it difficult to determine just what is prohibited and what is required.³⁴⁶ The frequent and ambiguous use of the words “should” “shall” “must” “should not” “shall not” “must not” “it is prohibited” illustrates “the difficulty of evaluating and determining the potential of China’s environmental statutes to direct specific behavior.”³⁴⁷ Meanwhile, the aspirational tone makes many environmental measures “seem more akin to policy statements than laws.”³⁴⁸ As observers commented, “actions are encouraged but rarely required and even where concrete duties are stated, only little guidance is provided on procedures and specific goals.”³⁴⁹

The vagueness of legislation can result in ambiguous and overlapping authority. Due to the breadth of environmental problems, the authority of environmental implementation is divided between environmental protection agencies and other departments and within the vertical structure of environmental agencies. Unfortunately, the horizontal division of authority among different agencies is often ambiguous, making it difficult to identify responsible agencies and their respective authorities in many areas of concern.³⁵⁰ Sometimes different agencies with conflicting mandates have overlapping authority over the same environmental issue but without a clear division of labor, “which

³⁴⁵ Beyer, *supra* note 323, at 205.

³⁴⁶ See William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China’s Environmental Dilemma*, 16 STAN. ENVTL. L. J. 125, 135 (1997).

³⁴⁷ Beyer, *supra* note 323, at 205-06. See also *id.* at 206 (observing that many of China’s implementing regulations are “just as general or even shorter itself. Typically, they merely duplicate the content of the national law and do not provide guidance specifically tailored at the particular targets, which leaves disproportionate interpretative discretion to sub-national officials.”).

³⁴⁸ Alford & Shen, *supra* note 346, at 135.

³⁴⁹ Beyer, *supra* note 323, at 205.

³⁵⁰ See, e.g., Qiu & Li, *supra* note 255, at 10161–62 (citing Article 10 of the Solid Waste Pollution Prevention and Control Law as an example of the law’s vagueness in identifying responsible departments and corresponding responsibilities in regulation of solid waste); Xu & Faure, *supra* note 276, at 32-3 (discussing the ambiguity and vagueness of Article 25 of the revised Environmental Protection Law).

in practice ultimately leads to a lack of accountability.”³⁵¹ The ambiguous allocation of authority within the vertical structure of environmental agencies similarly leads to confusion and inaction in the enforcement process.³⁵²

Apart from the vagueness and generality of the law, omission of liability provisions also undercuts the enforceability of China’s environmental laws. It is not uncommon that legislators failed to establish liability for violation of mandatory regulatory requirements in environmental statutes.³⁵³ For example, Article 20 of the SWPPCL prohibits open-air burning of straw in densely-populated areas, the areas surrounding airports, the vicinity of the main roads, and the areas delimited by the local governments.³⁵⁴ In Chapter 5 “Legal Liability” of the SWPPCL, however, there is no provision that imposes any liability for engaging in open-air burning of straw in violation of Article 20. As a result, relevant agencies has no authority to take any action to address violations despite prohibition of the law.

The generality and vagueness of legal requirements, the ambiguous allocation of authority, and the lack of liability for certain environmental violations have hampered government enforcement of environmental laws in China. Plaintiffs of citizen enforcement actions will also be perplexed by the vague legal requirements and the ambiguous and overlapping jurisdictional and/or subject matter authority. They will not know what the law exactly requires or prohibits and which agency has what kind of authority over a specific

³⁵¹ Ran, *Perverse Incentive*, *supra* note 258, at 32.

³⁵² See Qiu & Li, *supra* note 255, at 10160.

³⁵³ See Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 170 (2007) (observing that environmental laws “contain many general provisions with a few liability provisions” and “ignor[e] the needed procedural and implementation mechanisms.”).

³⁵⁴ 2016 SWPPCL, *supra* note 327, at art. 20(2).

environmental concern. Finally, private enforcers will be as helpless as government agencies when the law omitted to establish liability for violations of certain regulatory requirements.

2.3 Limited Deterrence of Statutory Penalties

The lenient sanctions for non-compliance is considered as an important contributor to the rampant environmental violations in China.³⁵⁵ In principle, environmental statutes authorize a range of administrative sanctions for violation including warning letters, fines, suspension of production, enterprise shutdown, suspension or revocation of permits, confiscation of illegal gains, and administrative detention.³⁵⁶ Although environmental agencies have authority to take actions such as issuing warning letters or imposing fines for modest violations, they cannot impose harsher punishments like suspension of operations and enterprise shutdown without approval of the relevant local governments.³⁵⁷ As discussed above, development-oriented local governments are often reluctant to shut down an enterprise. In practice, fines are the most frequently applied sanction in

³⁵⁵ See, e.g., Alford & Shen, *supra* note 346, at 137 (“Soft budgeting diminishes the effectiveness of today’s relatively modest effluent fees, which are estimated by some experts to be less than five percent of treatment costs, and fines for unlawful discharges, which also are thought to fall far below the cost of damage done.”); Beyer, *supra* note 323, at 207 (“Fees and fines are rarely determined authoritatively; instead, they are often negotiated and fall far below the cost of damage that the harmful activity has caused, as well as below expenses for pollution control facilities.”).

³⁵⁶ See Huanjing Xingzheng Chufa Banfa (环境行政处罚办法) [*Measures on Administrative Sanction for Environmental Violation*] (promulgated by Ministry of Env’tl. Prot., Jan. 19, 2010, effective Mar. 1, 2010), art. 10.

³⁵⁷ For example, the 2014 EPL authorizes environmental protection agencies to restrict or suspend production for rectification where a regulated entity discharges pollutants in excess of emission standards or the total emission control quota of major pollutants. However, environmental protection agencies must acquire approval by competent local governments to impose suspension of operation and shutdown. See 2014 EPL, *supra* note 6, at art. 60.

environmental enforcement, which account for over 60 percent of non-compliance responses.³⁵⁸

Environmental statutes used to authorize environmental agencies to only assess one-off fines, which were capped regardless of the severity of violations.³⁵⁹ There was also no requirement on the minimum sanction amounts, and the considerable discretion in assessing fines creates room for local protectionism. Penalties are usually lower than the cost of compliance. The average cost of environmental violation was estimated to generally be less than 10 percent of the cost of treatment.³⁶⁰ The unreasonableness of penalty amount has been brought back into the spotlight recently. It is reported that between 2013 and 2016 local EPBs of Sichuan, Guangdong, and Xiamen had imposed fines on five enterprises for non-compliance with effluent standards, with the amounts ranging from 0.8 yuan (U.S. \$0.12) to 550 yuan (U.S. \$80).³⁶¹ Ironically, the 0.8 yuan penalty is already the maximum amount allowable by the applicable statute.³⁶² Because of the surprisingly low penalties, polluters often find it cheaper and easier to pay fines than to install or operate pollution

³⁵⁸ OECD, ENVIRONMENTAL COMPLIANCE, *supra* note 252, at 27.

³⁵⁹ For example, the maximum fine for violating 2008 Water Pollution Prevention and Control Law and Solid Waste Pollution Prevention and Control Law is only one million yuan (U.S. \$159,426). *See* Shui Wuran Fangzhi Fa (水污染防治法) [Water Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., May. 11, 1984, amended Feb. 28, 2008, effective Jun. 1, 2008), art. 75 [hereinafter 2008 WPPCL]; 2016 SWPPCL, *supra* note 327, at arts. 78, 82.

³⁶⁰ Michael W. Vella & Lillian He, *China Begins Enforcing Newly Amended Environmental Protection Law*, JONES DAY, (Jan. 2016) http://www.jonesday.com/china-begins-enforcing-newly-amended-environmental-protection-law-01-21-2016/#_edn6.

³⁶¹ *See* Zhang Bei (张蓓), Shui Wuran Fangzhi Fa Xingui Yuandan Shixing Feishui Chaobiao Fa BaMao Deng Chaodi Fadan Cheng Lishi (水污染防治法新规元旦施行, 废水超标罚 8 毛等超低罚单成历史) [New Water Pollution Prevention and Control Law Took Effect in New Year's Day, the 0.8 Yuan Penalty for Non-Compliance with Effluent Standards Will Become History], Pengpai (澎湃) [THE PAPER], (Jan. 4, 2018), https://www.thepaper.cn/newsDetail_forward_1935929.

³⁶² *Id.* The calculation of fines was based on Article 74 of the 2008 Water Pollution Prevention and Control Law, which provided that environmental agencies can impose fines for violation of effluent standards that are between twice and five times pollution discharge fees. *See* 2008 WPPCL, *supra* note 359, at art. 74.

control facilities.³⁶³ Consequently, fines rarely function as a meaningful deterrence to noncompliance of environmental laws.

As an effort to limit bureaucratic discretion in assessing fines and raise the cost of violation, all major pollution control laws began to introduce minimum penalties since the 2000 amendment to the Air Pollution Prevention and Control Law. Meanwhile, the amounts of available penalty have been increased significantly. For example, the fines for non-compliance with effluent standards are between 100,000 yuan (U.S. \$14,560) and 1 million yuan (U.S. \$145,603) under the Water Pollution Prevention and Control Law which was revised in 2017.³⁶⁴ The most remarkable reform is the introduction of a new daily fines system by the 2014 EPL. Unlike the previous one-off fines, the daily fines system authorizes environmental agencies to assess extra fines that accumulate on a daily basis for certain illegal discharges until the enterprises rectify their violations.³⁶⁵

The introduction of daily fines is expected to add teeth to the “soft” environmental laws in China by greatly increasing the cost of violation. There has been a steady increase in the number of cases in which daily penalties were applied and in the total amounts of daily penalties assessed between 2015 and 2017 (See Table 3). However, the daily penalty cases just accounted for a small portion of all four types of enforcement actions that are

³⁶³ See Carpenter-Gold, *supra* note 62, at 257–58 (noting that the maximum fine that EPB can impose on the owner of a project for failure to go through the environmental impact assessment process is less than the cost of compliance by modifying the project); Sitaraman, *supra* note 323, at 312–13 (noting that “firms find it cheaper to pay fines because eighty percent of the fines are returned to them as subsidies to assist with pollution abatement; moreover, paying fines is easier than investing in expensive pollution control technologies.”).

³⁶⁴ See 2017 WPPCL, *supra* note 318, at art. 83.

³⁶⁵ 2014 EPL provides that where an entity or business operator is fined for the illegal discharge of pollutants and is ordered, but refused to make rectification, the administrative department may impose a fine equivalent to the original amount on a daily basis, starting on the second day after service of the rectification order. 2014 EPL, *supra* note 6, at art. 59. The daily fines system was also incorporated into 2017 WPPCL and 2015 APPCL. See 2017 WPPCL, *supra* note 318, at art. 96; 2015 APPCL, *supra* note 335, at art. 123.

newly authorized by 2014 EPL.³⁶⁶ Despite a few eye-catching cases where environmental agencies imposed tens of millions of daily fines on recalcitrant enterprises, the average fines for each daily penalty case was only about 800,000 yuan (U.S. \$116,482).³⁶⁷ Currently the daily fines have not become a powerful weapon to deter environmental wrongdoing due to limited scope of application³⁶⁸ and deficiencies in its implementation measures.³⁶⁹ Therefore, both government and citizen enforcement will continue to suffer from insufficient deterrence of low penalties during the process when the daily penalty rule is gaining ground in environmental laws.

³⁶⁶ 2014 EPL authorizes four new types of enforcement actions: daily penalties, restriction and suspension of operation for rectification, seizure of facilities and equipment, and administrative detention. *See* 2014 EPL, *supra* note 6, at arts. 25, 59, 60, 63. It is found that in all five types of enforcement actions (including the four new enforcement actions and the criminal enforcement actions), the daily penalties cases only accounted for 5% in 2016 and 3.03% in 2017. *See* Xin Huanjing Baohu Fa Sige Peitao Banfa Shishi Yu Shiyong Pinggu Baogao (2015-2017) (新《环境保护法》四个配套办法实施与适用评估报告(2015-2017)) [EVALUATION REPORT ON THE IMPLEMENTATION OF FOUR IMPLEMENTING MEASURES OF NEW ENVIRONMENTAL PROTECTION LAW (2015-2017)], 57–8, 126 (Zhu Xiao (竺效) ed., 2018).

³⁶⁷ Wang Wei (王玮), Anri Lianxu Chufa Banfa Yinglai Shouci Xiugai (按日连续处罚办法迎来首次修改) [*Measures on Implementing Daily Fines Will Face First Revision*], *Zhongguo Huanjing Bao* (中国环境报) [CHINA ENVIRONMENTAL NEWS], May. 22, 2017, http://49.5.6.212/html/2017-05/22/content_60266.htm.

³⁶⁸ Daily penalties can be imposed when the polluter was fined for one of the following illegal conduct and refused to comply with the compliance order:

- (1) discharge of pollutants exceeding national or local pollutant discharge standards, or total discharge control quota of key pollutants;
- (2) discharge of pollutants in ways intended to escape supervision, such as through underground pipelines, seepage wells, and seepage pits, through tampering and falsifying monitoring data, or through improper operation of a pollution prevention facility;
- (3) discharge of prohibited pollutants;
- (4) illegal dumping of hazardous waste; and
- (5) other illegal discharge of pollutants. *See* Huanjing Baohu Zhuguan Bumen Shishi An'ri Lianxu Chufa Banfa (环境保护主管部门实施按日连续处罚办法) [*Measures on Implementing Daily Penalties by Environmental Protection Departments*] (promulgated by the Ministry of Env'tl. Prot., Dec. 19, 2014, effective Jan. 1, 2015), art. 5.

³⁶⁹ *See* Wang Wei (王玮), *supra* note 367 (discussing difficulties in applying daily fines in practice).

Table 3. Application of Daily Fines by Environmental Protection Agencies 2015-2017³⁷⁰

Year	2015	2016	2017
Number of daily fines cases	715	974	1160
Total fines (10,000 yuan) (U.S. \$1,447)	56,954.41	84,820.73	111,419.9

In sum, as an answer to the untrustworthy and inefficient government enforcement, the U.S. citizen suit holds promise for strengthening China's weak environmental enforcement by prompting or supplementing government enforcement actions. However, adopting a citizen suit-style framework that allows private parties to directly enforce regulatory laws will face formidable barriers in China. Even if the political obstacles can be overcome, constructing EPIL based on the citizen suit model risks diminishing its role because of significant gaps in existing statutory framework. Chinese environmental laws suffer from lack of regulation on important issue areas and weak environmental standards, poor enforceability of legal requirements due to fragmented and ambiguous allocation of authority and vague legislation, and limited deterrence of statutory penalties. These inherent weaknesses can impede diligent government enforcement and citizen suits alike because citizen suits simply provide an alternative avenue for enforcing existing environmental requirements. On balance, establishing citizen suit-style EPIL will present serious political challenge and weaknesses that outweigh its theoretical benefits.

³⁷⁰ See Zhu Xiao (竺效), *supra* note 366, at 10, 57, 125.

Chapter 4 PUBLIC NUISANCE LAW AS A USEFUL MODEL FOR CONCEPTUALIZING CHINESE ENVIRONMENTAL PUBLIC INTEREST LITIGATION

By allowing private parties to enforce only specific violations of environmental laws, citizen suit-style EPIL will play a limited role due to the inherent limitations and gaps within China's existing legal framework. Would a tort-based framework provide a better alternative? Could EPIL grounded on tort principles play a more robust role in protecting the public interest than a citizen suit model? As Chinese scholars get stuck trying to reconcile the incongruity between Chinese traditional tort liability, characterized by its private nature, and EPIL, which is supposed to reflect the public interest, none have imagined what a reformed tort liability might look like. In fact, if we realize that EPIL, by giving standing to parties without a "direct interest," has already broken the link between personal interest and liability that is common in the paradigmatic structure of tort actions in China, we might be less bothered by other conceptual problems arising from extending tort liability to protect public interest. We can then move forward to think about the contours and the role of this reformed tort liability.

This dissertation is the first to propose that public nuisance law can provide a path forward in conceptualizing the role of EPIL and reconciling EPIL with the tort discourse. Unlike traditional tort law that focuses on discrete and individualized injuries, public nuisance law provides a tort-based cause of action to address harm to the public interest including harm to the public interest in a clean environment. Recognizing the difficulties in adapting tort law to public injuries, U.S. scholars are less bothered by the unique

characteristics of public nuisance law. While they may perceive it as an anomaly in tort law, U.S. scholars are more interested in exploiting public nuisance law's utility in practice.

To examine whether public nuisance law offers a preferable path forward in conceptualizing the role and scope of the emerging EPIL, Section A of this chapter explores the basic contours of public nuisance law with an emphasis on its gap-filling role in a modern era dominated by comprehensive environmental statutes. Section B engages in an in depth analysis of how the citizen suit and public nuisance law differ and which model can better inform our understanding of EPIL in China.

A. PUBLIC NUISANCE: A COMMON LAW REMEDY FOR HARM TO PUBLIC ENVIRONMENTAL INTEREST

1. *Overview of Public Nuisance Doctrine*

There are two types of common law nuisance causes of action—private nuisance and public nuisance. Private nuisance protects private individuals against nontrespassory invasion of their interests in the use and enjoyment of land,³⁷¹ while public nuisance provides redress for “an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all.”³⁷² The law of nuisance was described by Professor William Prosser as an “impenetrable jungle” and a “legal garbage can” full of “vagueness, uncertainty and confusion,” because the term nuisance “has meant

³⁷¹ RESTATEMENT (SECOND) OF TORTS § 821D (1979).

³⁷² WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72, at 566 (1st ed. 1941).

all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.”³⁷³

Public nuisance is particularly difficult to define. As commented by scholars, public nuisance law is “notoriously contingent and unsummarizable”³⁷⁴ and “no other tort is as vaguely defined or poorly understood as public nuisance.”³⁷⁵ Because of its “amorphous and mutable quality,”³⁷⁶ public nuisance doctrine has been applied to a variety of activities that allegedly caused injury to the general public. For example, courts found that “environmental harms including the discharge of untreated sewage, the maintenance of an automobile junkyard, the operation of a hog farm and sewage lagoon, and the storage of coal dust” constituted public nuisances.³⁷⁷ Courts also frequently provided remedies for conduct deemed to violate public morals (e.g., operation of bingo halls where bingo is played for money, providing nude exotic dancing).³⁷⁸ Still other bothersome activities can be held liable under public nuisance law such as “a street gang, a flea market with an ‘unsightly appearance,’ loud music, and anti-abortion protests that blocked access to an abortion clinic.”³⁷⁹

In the late twelfth century, nuisance law arose as a royal writ, the assize of nuisance, in England to provide “a remedy for the plaintiff who complained that he had been disseised of a right of way or other easement or that the defendant had otherwise done some

³⁷³ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984).

³⁷⁴ Louise A. Halper, *Untangling the Nuisance Knot*, 26 B. C. ENVTL. AFF. L. REV. 89, 90 (1998).

³⁷⁵ Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 774 (2003).

³⁷⁶ John Harleston & Kathleen M. Harleston, *The Suffolk Syndrome: A Case Study in Public Nuisance Law*, 40 S. C. L. REV. 379, 383 (1989).

³⁷⁷ Gifford, *supra* note 375, at 776.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

act of nuisance to his detriment.”³⁸⁰ At the time of Henry II, the majority of nuisances handled by royal courts were those affecting land either directly or indirectly.³⁸¹ During the thirteenth and fourteenth centuries, the common complaints, which would be considered as public nuisances in modern times, continued to be those involving “interference with the king’s real property rights, such as the obstruction of highways or diversion of watercourses.”³⁸² Courts also began to entertain claims that did not involve impairment of plaintiff’s interest in real property under the assize of nuisance (e.g., disturbance of a market franchise, interferences with profits a prende, tools, and offices in fee).³⁸³ In the late thirteenth century, Bracton for the first time identified these kinds of actions under the assize of nuisance as a distinguishable category in his Treatise—“*nocumentum iniuriosum propter communem et publicam utiliatem*”—a nuisance by reason of the common and public welfare.³⁸⁴

From the time of Henry II through the sixteenth century, nuisances that affecting the community in general, including those that did not involve real property in any manner, were handled by local criminal courts.³⁸⁵ The main business of these local criminal courts—variously known as the hundred courts, sheriff’s tourn, or court leet and later all were called “leets”—was public welfare offences, which “including blocking public

³⁸⁰ *Id.* at 792. Dean William L. Prosser contends that public nuisance and private nuisance are “two and only two kinds of nuisance, which are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in the common name, which naturally has led the courts to apply to the two some of the same substantive rules of law.” William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966). However, several studies suggest that public nuisance and private nuisance “began as a common writ, not two separate and distinct actions.” Gifford, *supra* note 375, at 794. *See also* J. R. Spencer, *Public Nuisance-A Critical Examination*, 48 CAMBRIDGE L.J. 55, 56–9 (1989). The description of public nuisance’s historical development in this subsection is primarily drawn from these two authors’ work.

³⁸¹ Gifford, *supra* note 375, at 792.

³⁸² *Id.* at 793.

³⁸³ *See id.*

³⁸⁴ *See id.* at 793; Spencer, *supra* note 380, at 58.

³⁸⁵ Gifford, *supra* note 375, at 795.

highways or fouling them through the dumping of garbage, pollution from noxious trades, and public morals offenses such as operating ‘bawdy-houses’ or disorderly ale houses.”³⁸⁶ When the King’s courts at Westminster began to supervise the jurisdiction of the leets in the seventeenth century, they required the person who prosecuted in the leet to state in his/her presentment (indictment) that the defendant’s conduct was “*ad commune nocumentum*”—a harm to the community at large.³⁸⁷ By the late sixteenth century, the courts leet were in decline and their jurisdiction over “common nuisances” was taken over by the justices of the peace.³⁸⁸

A public nuisance was considered as a criminal act of infringing upon the rights of the Crown in its inception and the remedy had been limited to abatement and criminal prosecution by the King’s justice.³⁸⁹ Therefore, it is generally believed that the authority to commence a public nuisance was derived from the sovereign’s police power, which is “an ancient and fundamental element of the government’s duty to protect its citizens.”³⁹⁰ In the late eighteenth and early nineteenth century, people began to seek injunctions, in the name

³⁸⁶ *Id.* See also Spencer, *supra* note 380, at 59-60.

³⁸⁷ Gifford, *supra* note 375, at 795. William Sheppard, a seventeenth century treatise writer, described the jurisdiction of the court leet under the heading of “common nuisance” including “matters affecting public highways and waterways; polluting the air ‘with houses of office, laying of garbage, carrion or the like, if it be near the common high way’; victuallers, butchers, bakers, cooks, brewers, maltsters and apothecaries who sell products unfit for human consumption; running ‘lewd ale-houses’; and subdividing houses in good neighborhoods ‘that become hurtful to the place by overpestring it with poor.’” See Spencer, *supra* note 380, at 60 (quoting WILLIAM SHEPPARD, *THE COURT-KEEPER’S GUIDE, OR A PLAIN AND FAMILIAR TREATISE NEEDFUL AND USEFUL FOR THE HELP OF MANY THAT ARE EMPLOYED IN THE KEEPING OF LAW-DAYS, OR COURTS BARON*, 5th ed., 1662 from *ROLLE’S ABRIDGMENT* 139 (1668)).

³⁸⁸ See Gifford, *supra* note 375, at 795; Spencer, *supra* note 380, at 60-1.

³⁸⁹ See *RESTATEMENT (SECOND) OF TORTS* § 821B cmt. a (1979); Prosser, *supra* note 380, at 998.

³⁹⁰ Harleston & Harleston, *supra* note 376, at 381. See also Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after Boomer*, 54 *ALB. L. REV.* 359, 362 (1990) (“In effect, authority for an action in public nuisance derived from what is now known as the sovereign’s police power and not from tort law.”); James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 *NAT. RESOURCES & ENV’T* 29, 29 (1990) (“At heart, then, public nuisance is not a tort; rather, when asserted by the sovereign, it is essentially an exercise of the police power to protect public health and safety.”).

of the Attorney-General, in the civil courts in cases of public nuisance.³⁹¹ By the end of the nineteenth century, injunctive relief in the civil courts have replaced prosecutions as the principal means of dealing with public nuisance.³⁹²

Private actions for the crime of public nuisance were historically disallowed since only the King could have a remedy for a crime of public nuisance.³⁹³ The origin of the breakaway from this position seems to be the oft-cited seminal King's Bench decision in 1535,³⁹⁴ where the anonymous plaintiff sued the defendant for damages resulting from the blocking of a public highway.³⁹⁵ The Chief Justice Baldwin, writing for the majority, held that the plaintiff had no cause of action because "it is a common nuisance to all the King's lieges" and "if one person shall have an action by this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case."³⁹⁶ However, Justice Fitzherbert dissented, contending that the plaintiff should have a cause of action because he "has suffered greater hurt or inconvenience than the generality have"³⁹⁷ and then discussed a hypothetical case about a person riding a horse.³⁹⁸ Justice Fitzherbert's

³⁹¹ See Spencer, *supra* note 380, at 66-9 (explaining how and why an injunction brought in the name of the Attorney-General in the civil courts became the usual method of repressing the crime of public nuisance in the late eighteenth and early nineteenth century).

³⁹² *Id.* at 70.

³⁹³ See Prosser, *supra* note 380, at 1004-05.

³⁹⁴ *Id.* at 1005. See also RESTATEMENT (SECOND) OF TORTS § 821C cmt. a (1979); W. PAGE KEETON ET AL., *supra* note 373, § 90, at 646 & n.37.

³⁹⁵ This case was recorded in the yearbooks in 1536 in fractured French and Latin. See Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1536). The facts and opinions of this case are drawn from Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 791-93 (2001).

³⁹⁶ Antolini, *supra* note 395, at 792.

³⁹⁷ *Id.*

³⁹⁸ Justice Fitzherbert stated: "If one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the highway, because I have suffered *more damage* than any other person. So here the plaintiff had *more convenience* by this highway than any other person had, and so when he is stopped he suffers more damage because he has to go to his close. Wherefore it seems to me that he shall have this action *pour ce special matiere*; but if he had not suffered *greater damage* than all other suffered, then he would not have the action." *Id.* at 792-93.

dictum based on the hypothetical horse was later construed as setting the rule that a private plaintiff may recover damages through public nuisance suits if he suffered some “special” or “particular” damage that is different from the general public.³⁹⁹

Early American law adopted the English law of public nuisance without significant change.⁴⁰⁰ American public nuisance cases in the early days fell into two categories: most public nuisance actions focused on the obstruction of public highways or navigable waterways while others involved minor invasions of public morals or public welfare.⁴⁰¹ Since industrialization began in the mid-nineteenth century, public nuisance claims had been filed to address new types of injuries such as water pollution and air pollution resulting from industrial operations.⁴⁰² Throughout the late nineteenth and early twentieth centuries, public nuisance law continued to play an important role since state legislatures “could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure or annoy the general public.”⁴⁰³ During this period, states began to enact broad public nuisance statutes that defined a public nuisance in general and vague terms, or declared a set of specific conduct or conditions to constitute public nuisances.⁴⁰⁴ With the advent of the New Deal, the role of public nuisance law greatly diminished because “the development of comprehensive statutory and regulatory schemes substituted

³⁹⁹ See Gifford, *supra* note 375, at 800; Prosser, *supra* note 380, at 1005-06; Spencer, *supra* note 380, at 74. While the conventional view is that the special injury suffered by a private plaintiff should be different in kind and not just in degree, Professor Antolini argues that subsequent cases and treatises have misinterpreted Justice Fitzherbert’s dissenting opinion. According to Professor Antolini, Fitzherbert argued that the plaintiff should have a private cause of action whenever he suffered a harm that was “greater” or “more” than other members of the public, not merely when the harm was “different in kind.” Antolini, *supra* note 395, at 793-96.

⁴⁰⁰ Gifford, *supra* note 375, at 800.

⁴⁰¹ See *id.* at 800-01.

⁴⁰² *Id.* at 802.

⁴⁰³ *Id.* at 804.

⁴⁰⁴ *Id.* See also RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979).

other means of regulation for many former targets of public nuisance prosecutions.”⁴⁰⁵ As a result, the first *Restatement of Torts* did not even mention public nuisance when it was published in 1939.⁴⁰⁶

During the drafting of the *Restatement (Second) of Torts* in the late 1960s, however, the environmental community sought to reform the restrictive public nuisance law in light of emerging federal standing law in administrative law litigation.⁴⁰⁷ First, members of the American Law Institute were not satisfied with the characterization of public nuisance as a criminal violation,⁴⁰⁸ because the criminal nature “would prevent the public nuisance doctrine from being applied to modern environmental problems [which usually do not constitute criminal violations of statutes].”⁴⁰⁹ Second, criticizing the traditional “special injury” rule as unduly restriction on private parties’ ability to seek redress for a public nuisance,⁴¹⁰ environmental advocates at the American Law Institute attempted to infuse newly developed federal standing law and the private attorney general concept into the Restatement’s formulation of the special injury, different-in-kind rule.⁴¹¹

⁴⁰⁵ Gifford, *supra* note 375, at 805-06.

⁴⁰⁶ *Id.* at 806.

⁴⁰⁷ See Antolini, *supra* note 395, at 828.

⁴⁰⁸ See *id.* at 838. As described above, public nuisance had been a crime against the Crown. See *supra* note 389. Dean William L. Prosser, the Reporter of the *Restatement (Second) of Torts*, reiterated in 1966 that “[a] public nuisance is a species of catch-all low-grade criminal offense.” Prosser, *supra* note 380, at 999. Tentative Draft No. 16 of the *Restatement (Second) of Torts* proposed to define a public nuisance as “a criminal interference with a right common to all members of the public.” See John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 *ECOLOGICAL L.Q.* 241, 242 (1972). Many scholars, however, disagree with this view. See, e.g., Abrams & Washington, *supra* note 390, at 365 (“[T]o the extent that public nuisance is still a crime, it is codified by statute and does not exist in the common law.”); Gifford, *supra* note 375, at 781 (contending that “Prosser’s historical claim probably is not correct, and courts clearly do not today accept his analysis that public nuisance is always a crime” though noting that “civil liability traditionally has been an incidental aspect of public nuisance.”).

⁴⁰⁹ Antolini, *supra* note 395, at 838 n. 422.

⁴¹⁰ For a list of literature criticizing the “special injury” rule, see *id.* at 760-61 n.8.

⁴¹¹ See *id.* at 838.

As a result of the environmental community's advocacy, the *Restatement (Second) of Torts* [hereinafter *Restatement*] ultimately dropped the concept of criminality.⁴¹² The *Restatement* defined a public nuisance as “an unreasonable interference with a right common to the general public,”⁴¹³ which “arguably goes far beyond the types of conduct previously recognized by the courts as tortious public nuisance.”⁴¹⁴ In particular, the *Restatement* noticed in the Comments that “[i]t no longer has significance in states where the general crime of public nuisance has ceased to exist”⁴¹⁵ and that there has been “a tendency... to treat significant interferences with recognized aesthetic values or established principles of conservation of natural resources as amounting to a public nuisance.”⁴¹⁶ Furthermore, while the *Restatement* maintained that private plaintiffs “must have suffered harm of a kind different from that suffered by other members of the public” to recover damages in public nuisance suits,⁴¹⁷ it broadened private parties' access to public nuisance by incorporating liberal standing principles in equitable suits. The *Restatement* suggested that a plaintiff who did not suffer special injury could have standing to bring abatement actions if they acted “as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.”⁴¹⁸ Although some scholars are optimistic about the transformation that the proposed liberalization of special injury rule would bring

⁴¹² Abrams & Washington, *supra* note 390, at 366.

⁴¹³ RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

⁴¹⁴ Gifford, *supra* note 375, at 809.

⁴¹⁵ RESTATEMENT (SECOND) OF TORTS § 821B cmt. d (1979).

⁴¹⁶ *Id.* § 821B cmt. e.

⁴¹⁷ *Id.* § 821C(1).

⁴¹⁸ *Id.* § 821C(2).

about,⁴¹⁹ others maintain that a more liberal standing doctrine “[has] utterly failed to penetrate the case law.”⁴²⁰

While the *Restatement’s* definition of public nuisance—“an unreasonable interference with a right common to the general public”—was very open-ended, some terms of limitations may be identified. First, the alleged injury or interference must affect a right “common to the general public.” As the *Restatement* states, “[a] public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.”⁴²¹ In addition, a public nuisance does not need to affect the entire community; the key inquiry is whether “the nuisance will interfere with those who come in contact with it in the exercise of a public right.”⁴²² Second, the interference with a public right must be “unreasonable.” In determining what constitutes an “unreasonable interference” with a public right, the *Restatement* directs courts to consider whether the conduct: (1) involves a significant interference with the public health, safety, peace, comfort, or convenience; (2) is proscribed by a statute, ordinance or administrative regulation; or (3) is of a continuing nature or has produced a permanent or long-lasting

⁴¹⁹ See, e.g., David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 *ECOLOGY L.Q.* 883, 886 (1989) (“By recommending that parties without special injuries be allowed to seek equitable relief...the *Restatement (Second)* invited a fundamental change in the law of public nuisance. In the past decade courts have begun to accept this invitation.”). Professor Hodas then discussed cases where courts have embraced liberal standing requirements to allow equitable actions by private parties acting as common law private attorneys general, class representatives and associations. See *id.* at 900–03.

⁴²⁰ Antolini, *supra* note 395, at 762.

⁴²¹ RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979).

⁴²² *Id.*

effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.⁴²³

The threshold question in determining liability in public nuisance suit is whether the alleged interference is substantial or significant.⁴²⁴ An interference will not be actionable if only “slight inconvenience or petty annoyance” is involved.⁴²⁵ The standard for determining the significant character is a “community standard”: the invasion is significant if “normal persons living in community would regard the invasion in question as definitely offensive, seriously annoying or intolerable.”⁴²⁶

According to section 822 of the *Restatement*, to be held liable for a public nuisance, a defendant’s invasion of a public right can be either “intentional and unreasonable” or “unintentional and otherwise actionable under the rules controlling liability for negligent, or reckless conduct, or for abnormally dangerous conditions or activities.”⁴²⁷ If the interference with the public right is intentional, “it must also be unreasonable” and this determination involves “the weighing of the gravity of the harm against the utility of the conduct.”⁴²⁸ Where the interference is unintentional, “the principles governing negligent or

⁴²³ *Id.* § 821B(2).

⁴²⁴ See Abrams & Washington, *supra* note 390, at 374; Antolini, *supra* note 395, at 771; Bryson & Macbeth, *supra* note 408, at 266. In its definition of public nuisance, however, the *Restatement (Second) of Torts* seemed to treat the substantiality or significance of the interference as an aspect of unreasonableness rather than a separate element. See Abrams & Washington, *supra* note 390, at 374 n. 97.

⁴²⁵ RESTATEMENT (SECOND) OF TORTS § 821F cmt. c (1979). See also W. PAGE KEETON ET AL., *supra* note 373, § 88, at 626 (“The law does not concern itself with trifles, or seek to remedy all the petty annoyances and disturbances of everyday life in a civilized community.”).

⁴²⁶ RESTATEMENT (SECOND) OF TORTS § 821F cmt. d (1979). See also Antolini, *supra* note 395, at 771-72.

⁴²⁷ RESTATEMENT (SECOND) OF TORTS § 822 (1979). See also *id.* § 821B cmt. e. While section 822 sets forth the general rule of liability for private nuisance, the comment of section 822 states that “[s]ubject to the exceptions created by ...statutes ...the tort law of public nuisance is consistent with this Section.” *Id.* § 822 cmt. a.

⁴²⁸ *Id.* § 821B cmt. e. Sections 826 through 831 provide guidance for determining the gravity of harm suffered by a plaintiff and utility of of a defendant’s conduct. See *id.* §§ 826-831.

reckless conduct, or abnormally dangerous activities all embody in some degree the concept of unreasonableness.”⁴²⁹

The requirement that the interference with a public right result from conduct that falls within one of the three categories set forth in section 822 of the *Restatement* is quite confusing and highly contested. Some scholars argue that the application of fault principles in public nuisance actions makes little sense, because public nuisance is generally defined “in terms of the offense resulting from an activity, rather than the activity itself” and “the concept of strict liability attaching to activities where a public right is invaded or threatened is embodied in a state’s police power to protect the health and safety of citizens.”⁴³⁰ Courts sometimes also imposed strict liability in public nuisance actions brought by governmental entities.⁴³¹ However, opponents of strict liability claim that referring to the harm or damages that the plaintiff complains instead of defendant’s conduct as public nuisance “overlook[s] the additional requirement that such harm ‘is tortious only if it falls into the usual categories of tort liability.’”⁴³² Therefore, those courts concluded erroneously that a

⁴²⁹ RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979).

⁴³⁰ Abrams & Washington, *supra* note 390, at 368-70. *See also* Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ENVTL. L. REP. 10292, 10292 (1986) (“When the sovereign litigates to abate a public nuisance, no tort-based proofs of defendant’s negligence or engaging in ultrahazardous activities are required. For a court to grant the equitable relief of abatement, the sovereign need only prove that a public nuisance exists and that defendant is responsible for it.”).

⁴³¹ *See, e.g.,* Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 414 (1974) (“The absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance.”); State v. Schenectady Chemicals, Inc., 117 Misc.2d 960, 970 (1983) (stating that “with respect to public nuisances... fault is not an issue, the inquiry being limited to whether the condition created, not the conduct creating it, is causing damage to the public.”); New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985) (holding that the defendant “is liable for maintenance of a public nuisance irrespective of negligence or fault.”); Wood v. Picillo, 443 A.2d 1244, 1247, 1249 (1982) (holding that “liability in nuisance is predicated upon unreasonable injury than upon unreasonable conduct” and that “negligence is not a necessary element of a nuisance case involving contamination of public or private waters by pollutants percolating through the soil and traveling underground routes.”).

⁴³² Gifford, *supra* note 375, at 780.

finding of public nuisance does not require that the defendant have engaged in conduct that is intentional and unreasonable or independently tortious.⁴³³

Remedies available for public nuisance actions include injunctions and damages. Private plaintiffs who have suffered special injury that is different in kind from that suffered by other members of the public (the special injury rule may be relaxed in equitable actions) may bring an action to abate a public nuisance or recover damages for the typical types of loss recognized in tort law as well as economic losses.⁴³⁴ Injunctions have been the traditional remedies for public nuisance claims brought by public authorities.⁴³⁵ Nevertheless, some courts have empowered public plaintiffs to seek recovery of damages for past environmental harm. For example, in *State Ex Rel. Dresser Industries, Inc. v. Ruddy*, the Supreme Court of Missouri ordered the trial court to determine whether the state is entitled to a “rejuvenating compensation” to repair past injuries to the waterways, the fish and wildlife in the streams, and the aesthetic, recreational and economic values caused by the rupture of a settling dam.⁴³⁶ The Court reasoned that parties who injured the

⁴³³ *Id.* at 812-13.

⁴³⁴ See W. PAGE KEETON ET AL., *supra* note 373, § 90, at 647-50, for a discussion of recoverable injuries in public nuisance actions.

⁴³⁵ See Abrams & Washington, *supra* note 390, at 379, 381 (noting that “the Restatement does not contemplate the possibility of a public entity seeking anything other than injunctive relief” and that “injunctions remain the practical and appropriate remedy for providing vindication of those public interest.”); Gifford, *supra* note 375, at 782 (“There is no historical evidence, however, that the state (or its predecessor under English law, the Crown) was ever able to sue for damages to the general public resulting from a public nuisance. The state’s remedies were restricted to prosecution or abatement, or both. Damages were reserved only for those individuals suffering special injuries. Support for this conclusion is found in Restatement (Second) of Torts section 821C, which specifically recognizes the right of public officials to seek injunctive relief to end a public nuisance, but says nothing about the state’s rights to recover damages for a public nuisance.”).

⁴³⁶ 592 S.W.2d 789, 793 (Mo. 1980).

public interest would escape liability if the state was limited to seeking injunctions and no private parties can prove a special injury.⁴³⁷

We may still get lost in the “impenetrable jungle” of public nuisance today. While the *Restatement* is helpful in laying out important rules regarding public nuisance law, it may “do very little to clarify the maze of confused problems which have plagued the courts in dealing with the basis on which liability will be imposed for the tort of public nuisance.”⁴³⁸ Because of its amorphous and open-ended nature, the ancient common law of public nuisance had been reinvigorated as an expansive cause of action in the past several decades to address various activities allegedly injurious to the public rights, ranging from environmental harms to damage arising from tobacco-related disease, firearm violence, and childhood lead poisoning.⁴³⁹

2. *Public Nuisance Law as Gap-Filler in an Age of Comprehensive Environmental Statutes*

Prior to the explosion of environmental legislation, the common law, especially nuisance law, was the primary tool to resolve environmental problems in the United States.⁴⁴⁰ Nuisance law was thus described as “the common law backbone of modern environmental and energy law.”⁴⁴¹ However, the common law causes of action were

⁴³⁷ *Id.* (“[A]bsent such recovery, those causing damage to a public interest suffer no penalty whatever if the “cause” has been corrected and no private individual can show a “special” damage; that abatement or injunctive relief in retrospect would be a moot issue and constitute no relief at all.”).

⁴³⁸ Bryson & Macbeth, *supra* note 408, at 265. *See also* Gifford, *supra* note 375, at 809 (“[S]ection 821B [of the *Restatement*] does not untangle the jungle of 900 years of confusion surrounding recovery for damages under public nuisance law. It serves instead as an invitation for judges and jurors to provide their own definitions of what constitutes ‘unreasonable interference’ and ‘a right common to the general public’ without the guidance generally provided by precedents.”).

⁴³⁹ *See* Gifford, *supra* note 375, at 753 (citing related cases).

⁴⁴⁰ ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 63 (6th ed. 2009).

⁴⁴¹ WILLIAM H. RODGERS, ENVIRONMENTAL LAW § 2.1, at 113 (2nd ed. 1994).

increasingly inadequate for addressing the more broad and complex environmental problems in modern industrialized society.⁴⁴² Dissatisfaction with common law remedy led to the adoption of the comprehensive environmental statutes in the 1960s and 1970s.⁴⁴³

The proliferation of comprehensive regulatory statutes seems to have diminished the role of public nuisance. At the federal level, despite the pronouncement in *Erie R. Co. v. Tompkins* that “[t]here is no federal general common law,”⁴⁴⁴ the Supreme Court had recognized a limited federal common law of public nuisance to deal with interstate pollution since the beginning of the last century.⁴⁴⁵ With the advent of comprehensive federal environmental statutes, however, courts confronted the question about the impact of regulatory law on common law actions.⁴⁴⁶ In *City of Milwaukee v. Illinois*, the Supreme Court held that the comprehensive nature of the Clean Water Act’s regulatory scheme had preempted the federal common law of nuisance applicable to interstate water pollution.⁴⁴⁷ The Court reaffirmed the preemptive effect of federal statutes in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, ruling that the federal common law of nuisance has been fully preempted by the Clean Water Act and the Marine Protection, Research, and Sanctuaries Act of 1972 in the area of ocean pollution.⁴⁴⁸

⁴⁴² See, e.g., Martin H. Belsky, *Environmental Policy Law in the 1980’s: Shifting Back the Burden of Proof*, 12 *ECOLOGY L.Q.* 1, 5–12 (1984) (exploring various obstacles that individuals would have to overcome to stop environmental damage under common law tort doctrines); Joel Franklin Brenner, *Nuisance Law and the Industrial Revolutions*, 3 *J. LEGAL STUD.* 403–434, 424–25 (1974) (describing two difficulties in dealing with industrial nuisances through private nuisance: first, courts are inefficient and insufficient to establish and enforce standards of allowable emission levels; second, it is extremely difficult for a plaintiff to trace the source of the offense in an industrialized society).

⁴⁴³ Belsky, *supra* note 442, at 14.

⁴⁴⁴ 304 U.S. 64, 78 (1938).

⁴⁴⁵ See, e.g., *Missouri v. Illinois*, 200 U.S. 496 (1906); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

⁴⁴⁶ ROBERT PERCIVAL ET AL., *supra* note 440, at 99.

⁴⁴⁷ 451 U.S. 304, 317 (1981).

⁴⁴⁸ 453 U.S. 1, 22 (1981).

While these decisions suggest that federal common law can be preempted by elaborate regulatory schemes, plaintiffs have invoked federal common law of public nuisance to redress problems that were not specifically addressed by existing legislation. For example, in *Michigan v. U.S. Army Corps of Engineers*, several states alleged that the U.S. Army Corps of Engineers had created a public nuisance by operating the Chicago Area Waterway System in a way that allowed the migration of two invasive species of Asian carp into Lake Michigan and the Great Lakes.⁴⁴⁹ While denying the injunctive relief sought by plaintiffs, the Court of Appeals for the Seventh Circuit affirmed the right of the states to bring a federal public nuisance action to address the threat of Asian carp by noting that “congressional efforts to curb the migration of invasive species, and of invasive carp in particular, have yet to reach the level of detail one sees in the air or water pollution schemes.”⁴⁵⁰

Disappointed by congressional and executive inaction on climate change, public and private plaintiffs have appealed to public nuisance doctrine to redress harm associated with climate change in recent years.⁴⁵¹ In the landmark *American Elec. Power Co., Inc. v. Connecticut*, the only case that made its way into the Supreme Court, eight states, New York City, and three land trusts filed federal common law claims against a number of major

⁴⁴⁹ 667 F.3d 765, 768 (7th Cir. 2011).

⁴⁵⁰ *Id.* at 778-79.

⁴⁵¹ *See, e.g.*, *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (the State of California seeking damages against various automakers for creating, and contributing to alleged public nuisance—global warming by producing vehicles that emit carbon dioxide); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (alleging the operation of oil and energy companies caused emission of greenhouse gases that contributed to global warming and added to ferocity of Hurricane Katrina under state public nuisance law); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (a coastal Eskimo village suing multiple oil and energy companies for contributing to global warming that in turn lead to massive coastal erosion and seeking damages for costs associated with relocation under a federal public nuisance claim).

power plants for their ongoing contributions to public nuisance of global warming.⁴⁵² The Court held the Clean Air Act and the EPA actions it authorizes displace plaintiffs' federal common law nuisance claims.⁴⁵³ Nevertheless, the Court endorsed the utility of federal common law by noting that "[e]nvironmental protection is ... an area 'within national legislative power' ... in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'"⁴⁵⁴ Moreover, the Court recognized that "public nuisance law, like common law generally, adapts to changing scientific and factual circumstances."⁴⁵⁵ Finally, noting that the issue of preemption of state common law has not been briefed or argued, the Court left open the question of whether plaintiffs may maintain a claim against greenhouse gas emitters under state common law of nuisance.⁴⁵⁶ While none of public nuisance suits addressing climate change were successful so far, these suits demonstrate that public nuisance law remains a flexible tool that can be invoked by creative plaintiffs to address emerging environmental problems in modern society.

While the federal common law of nuisance may play a restricted role amid comprehensive federal statutory laws, the story has been quite different at the state level. State common law, including public nuisance doctrine, is generally not preempted by either federal or state statutes.⁴⁵⁷ To the contrary, commentators have revealed the "tremendous vitality of public nuisance in modern times because of its great flexibility and

⁴⁵² 564 U.S. 410, 415 (2011).

⁴⁵³ *Id.* at 424.

⁴⁵⁴ *Id.* at 421.

⁴⁵⁵ *Id.* at 423.

⁴⁵⁶ *Id.* at 429 ("In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.").

⁴⁵⁷ Hodas, *supra* note 419, at 904. *See also* Sevinsky, *supra* note 390, at 30 ("A key difference [between federal common law and state common law] is that for the most part states did not allow the new statutes to displace their potent common-law heritage.").

adaptability.”⁴⁵⁸ Because “environmental statutes are never likely to form a seamless web of environmental protection and...national political shifts can poke huge holes in the web,”⁴⁵⁹ scholars argue that state public nuisance law can play an important role in filling the “inevitable interstices of an ever-expanding regulatory system” in a variety of ways.⁴⁶⁰

Public nuisance law can be useful for addressing environmental hazards not controlled by legislation (e.g. noise, odors, vibrations, and aesthetic harm) and combating pollutants not regulated by statutes.⁴⁶¹ For example, before the adoption of statutes specifically dealing with the disposal of hazardous waste and the remediation of old hazardous waste sites in the late 1970s and early 1980s, public nuisance law frequently offered the only means for public authorities to seek the cleanup of toxic dumps.⁴⁶² In particular, as the site of the famous dumpsite, Love Canal, New York State was at the forefront in relying on public nuisance theory to compel remediation of inactive hazardous waste sites in the 1980s.⁴⁶³

Public nuisance law can also provide a supplemental or alternative remedy “where the statutory avenues for redress are incomplete, weak, or under siege.”⁴⁶⁴ A good example is that even when the cleanup and restoration of hazardous waste sites has been covered by comprehensive legislation—Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁴⁶⁵ public nuisance law continues to be utilized to fill the gaps in

⁴⁵⁸ Abrams & Washington, *supra* note 390, at 391.

⁴⁵⁹ Antolini, *supra* note 395, at 775.

⁴⁶⁰ Sevinsky, *supra* note 390, at 29.

⁴⁶¹ See Bryson & Macbeth, *supra* note 408, at 278-80.

⁴⁶² See Abrams & Washington, *supra* note 390, at 392.

⁴⁶³ *Id.* at 392. See also Sevinsky, *supra* note 390, at 31.

⁴⁶⁴ Antolini, *supra* note 395, at 759.

⁴⁶⁵ 42 U.S.C. §§ 9601-9675 (2012).

statutory scheme.⁴⁶⁶ A major gap in CERCLA is that while both the federal and state governments may recover costs incurred in responding to a release or threatened release of a hazardous substance,⁴⁶⁷ CERCLA only authorizes the federal government to secure cleanup of a toxic site by responsible parties.⁴⁶⁸ In other words, states cannot bring a suit to compel responsible parties to clean up the site under CERCLA; they will have to clean up the sites when governmental resources become available and then file a claim in the court to recover response costs.⁴⁶⁹ Because of this shortcoming of CERCLA, states have relied upon state public nuisance law as a basis for injunctive relief while initiating cost recovery suits in federal courts under CERCLA.⁴⁷⁰ *New York v. Shore Realty Corp.*,⁴⁷¹ for example, is one of the few cases where the court discussed the “interplay” between CERCLA and the common law of public nuisance. While holding that CERCLA did not give states the authority to seek injunctive relief, the Court of Appeals for the Second Circuit nevertheless affirmed the district court’s decision to grant permanent injunction based on New York public nuisance law.⁴⁷²

In circumstances where a complying party is still considered as a source of pollution, public nuisance law can “impose stricter standards than are found in existing

⁴⁶⁶ See *Abrams & Washington*, *supra* note 390, at 395.

⁴⁶⁷ 42 U.S.C. § 9607(a) (2012).

⁴⁶⁸ See *id.* § 9606(a) (authorizing the federal government to take judicial or administrative action to abate “an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance.”); *id.* § 9604(a) (providing that whenever there is release or threat of release of a hazardous substance, pollutant or contaminant, the federal government is authorized to remove that substance or take other action consistent with the national contingency plan to protect the public).

⁴⁶⁹ See *Abrams & Washington*, *supra* note 390, at 396-97.

⁴⁷⁰ See *id.* at 396; *Sevinsky*, *supra* note 390, at 31 for a discussion of this point and relevant case law.

⁴⁷¹ 759 F.2d 1032 (2d Cir. 1985).

⁴⁷² *Id.* at 1037.

regulations.”⁴⁷³ For example, in *Neal v. Darby*, the plaintiffs, the Chester County and its county council members, brought a public nuisance claim against the defendant who had obtained both state and federal permits to operate a facility of reclaiming used paint and industrial solvents.⁴⁷⁴ While the facility had passed EPA inspections and the defendant argued that the trial judge did not give sufficient weight to its state and federal permits,⁴⁷⁵ the South Carolina Court of Appeals, citing *City of Milwaukee*, held that states may impose more stringent imitations on intrastate discharges through state nuisance law.⁴⁷⁶ The court of appeals ultimately found that the defendant’s landfill site constituted a public nuisance “by virtue of its location near residential areas and the primary water source as well as its influence on members of the public”⁴⁷⁷ and affirmed the trial court’s decision to permanently enjoined further disposal of hazardous chemical waste at the site.⁴⁷⁸

Not only can public nuisance law supplement or strengthen statutory remedies asserted by governments, public nuisance law can also provide an alternative cause of action for private parties when statutory claims fail. For example, in *Concerned Citizens of Bridesburg v. City of Philadelphia*, the plaintiffs, consisting of a nonprofit organization and a group of about 130 individuals, sought to enjoin malodorous emissions from a sewage treatment plant, claiming the emissions violated federal and state laws.⁴⁷⁹ While the court

⁴⁷³ Gwyn Goodson Timms, Note, *Statutorily Awarding Attorney’s Fees in Environmental Nuisance Suits: Jump Starting the Public Watchdog*, 65 S. CAL. L. REV. 1733, 1743 (1992).

⁴⁷⁴ 282 S.C. 277, 279-80 (S.C. Ct. App. 1984).

⁴⁷⁵ *Id.* at 282-83.

⁴⁷⁶ *Id.* at 285.

⁴⁷⁷ *Id.* at 286.

⁴⁷⁸ *Id.* at 279.

⁴⁷⁹ 643 F. Supp. 713, 714–15 (E.D. Pa. 1986).

found no actionable claim under federal and state environmental statutes, it found that the malodors constituted an enjoined public nuisance under state common law.⁴⁸⁰

In sum, instead of being preempted by environmental statutes, public nuisance law, especially the state common law of public nuisance, still plays an important gap-filling role in modern era. By allowing public and private plaintiffs to challenge almost anything that constitutes “an unreasonable interference” with a public right, public nuisance doctrine provides a powerful and flexible remedy where existing regulation or statutory remedy is insufficient to prevent or redress environmental harms.

3. *The Role of Environmental Statutes in Public Nuisance Actions*

Where an environmental concern is subject to government regulation, it is necessary to consider the effect of regulatory compliance and violation in a public nuisance claim. Compliance with applicable environmental statutes generally does not immunize an activity from public nuisance liability.⁴⁸¹ This is because environmental standards, which are the product of science and public policy and are established through resolution of competing values, are artificial and usually establish minimum standards of conduct.⁴⁸² Additionally, agencies might make mistakes in issuing permits to polluting corporations based on inaccurate or false information.

Courts had no difficulty in holding that an activity authorized by a regulatory agency can constitute a public nuisance. For example, in *Village of Wilsonville v. SCA*

⁴⁸⁰ *Id.* at 727-28.

⁴⁸¹ See Abrams & Washington, *supra* note 390, at 397; Hodas, *supra* note 419, at 905; Sevinsky, *supra* note 390, at 31.

⁴⁸² See Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *FORDHAM L. REV.* 737, 758 (2011).

Services, Inc., the court found a “dangerous probability” that alleged injury would occur due to the leaking of toxic substances and enjoined the operation of a hazardous waste landfill licensed by the state as a public nuisance.⁴⁸³ Rejecting the defendant’s assertion that the lower courts failed to give weight to the permits issued by Illinois Environmental Protection Agency, the court pointed out that the technical data relied upon by the agency in deciding to issue a permit were collected by the defendant, and the data had been proved to be inaccurate at trial.⁴⁸⁴ Similarly, in *Neal v. Darby*, finding the trial judge balanced the interests involved and gave insufficient weight to the state and federal permits held by the defendant company, the court of appeals upheld the trial court’s ruling that the landfill constituted a public nuisance.⁴⁸⁵

Although adhering to environmental regulations does not preclude a public nuisance claim, the opposite can be true: a violation of applicable statutes may support a public nuisance claim. Courts have recognized that an activity that violated relevant environmental statutes may constitute a nuisance per se under certain circumstances. For example, the court of *Shore Realty* held that Shore Realty’s continuing violations of state hazardous waste statutes constituted a nuisance per se.⁴⁸⁶ In *Erickson v. Sorensen*, the court suggested that nuisance per se exists when the conduct creating the nuisance is also specifically prohibited by statute.⁴⁸⁷

Drawing on the negligence per se doctrine, scholars suggest that if a statute creates a specific standard of conduct for the defendant to protect a plaintiff’s nuisance-type

⁴⁸³ 86 Ill. 2d 1, 25 (Il. 1981).

⁴⁸⁴ *Id.* at 27.

⁴⁸⁵ *Neal*, 282 S.C. at 318.

⁴⁸⁶ *Shore Realty*, 759 F.2d at 1051.

⁴⁸⁷ 877 P.2d 144 (Utah Ct. App. 1994).

interest, and the defendant has injured or threatened to injure the protected interest by violating the standard, a nuisance per se may be found by the court.⁴⁸⁸ For example, a violation of statutes that established effluent or emission limitations would constitute a public nuisance under the theory of nuisance per se.⁴⁸⁹ Of course, a plaintiff still has to prove injury and causation to establish liability.⁴⁹⁰ Yet the court need not consider the reasonableness of the defendant's conduct, because the statute has precluded "the weighing of the relative interests of the plaintiff and defendant"⁴⁹¹ and established "a conclusive presumption of unreasonableness."⁴⁹²

Public nuisance law continues to provide remedies for a variety of environmental ills "because of its nearly infinite flexibility and adaptability and its inherent capacity to fill gaps in statutory controls."⁴⁹³ The proliferation of environmental statutes does not eliminate the role of public nuisance law. Where public nuisance law operates in tandem with environmental laws, compliance with applicable environmental standards does not preclude public nuisance liability while violation of statutory requirements "simply provides additional grounds for proving the existence of public nuisances."⁴⁹⁴

B. THE PROMISE OF PUBLIC NUISANCE LAW IN SHAPING THE ROLE OF EPIL

1. *Distinctions Between Citizen Suits and Public Nuisance Actions*

⁴⁸⁸ See Harleston & Harleston, *supra* note 376, at 400-01.

⁴⁸⁹ *Id.* at 400. See also *Comet Delta, Inc. v. Pate Stevedoring Co. of Pascagoula*, 521 So. 2d 857, 860-61 (Miss. 1988) (implying that a violation of clean air standards would support a public nuisance suit).

⁴⁹⁰ Harleston & Harleston, *supra* note 376, at 401.

⁴⁹¹ *Erickson v. Sorensen*, 877 P.2d 144, 149 (Utah Ct. App. 1994).

⁴⁹² Harleston & Harleston, *supra* note 376, at 401.

⁴⁹³ *Id.* at 380.

⁴⁹⁴ *Id.* at 400

Citizen suits and public nuisance law provide two causes of action to protect public interest as compared to private interest. As discussed in Chapter 2, citizen suit provisions recognize that citizens have an interest in protecting an intangible environmental interest, and the use of citizen suits can benefit plaintiffs and the public by providing injunctive relief and deterring defendants from committing future violations.⁴⁹⁵ The use of public nuisance law accomplishes the objective of protecting the public environmental interest in a different way: public nuisance law allows governmental authorities and private parties to seek remedies where pollution has interfered with rights held in common by the public. Nevertheless, citizen suits and public nuisance law have different theoretical underpinnings, leading to different inquiries and outcomes when litigating under these two theories.

Citizen suits derive their theoretical validity from the violation of precautionary regulations that are suited to address systemic environmental harms and impose strict liability for noncompliance.⁴⁹⁶ Therefore, the scope of citizen suits is limited to specific violations defined by the underlying statutes. In citizen enforcement actions, the operative issue is whether an environmental standard has been violated irrespective of whether the conduct has caused an actual injury.⁴⁹⁷ Because one of the U.S. Congress's purposes in creating citizen suits is to provide an alternative mechanism of enforcement when government fails to enforce, the result of citizen enforcement is identical to government enforcement: injunctions that compel compliance and/or fines paid to the government.

⁴⁹⁵ See David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79, 85 (2004).

⁴⁹⁶ See Percival & Goger, *supra* note 151, at 129.

⁴⁹⁷ As this dissertation stressed earlier, the proof of “injury in fact” is for purposes of establishing standing and this requirement has been criticized by scholars. See *supra* note 151–152 and accompanying text.

Unlike citizen suits, public nuisance law derives its theoretical validity from tort law and the showing of environmental harm regardless of whether the conduct has been formally prescribed by statute. As an independently operating system, public nuisance law can not only provide a remedy for environmental harm caused by regulatory violations but also address harms occurred or left uncured due to limitations and gaps in existing regulatory schemes. The inquiry in public nuisance claims is whether substantial and unreasonable harm to a public right has been caused—an environmental standard may be factored into the determination of harm, but the existence of a regulation is not a determinative factor. Remedies available in public nuisance actions are also different from those in citizen suits: plaintiffs in public nuisance suits often seek abatement of environmental harms and/or damages, while citizen suit judgments result in injunctions and fines.⁴⁹⁸

From the perspective of litigation strategy, citizen suits and public nuisance actions each have their own advantages and disadvantages. Citizen suits typically focus on the issue of compliance and minimize factual disputes and evidentiary issues, while public nuisance cases are more fact intensive and complex, requiring proof of injury and causation.⁴⁹⁹ In the United States, liberal standing requirements and the opportunity to recover attorney's fees and costs make citizen suits more appealing to private plaintiffs, especially environmental groups who are willing to stand for the public interest but are restricted by scarce resources.⁵⁰⁰

⁴⁹⁸ For remedies in public nuisance actions, see *supra* notes 434–437 and accompanying text; for remedies in citizen suits, see *supra* notes 116–121 and accompanying text.

⁴⁹⁹ Antolini, *supra* note 395, at 883.

⁵⁰⁰ Antolini, *supra* note 395 at 882.

However, a major drawback to citizen suits is their rigidity: citizen suits are less flexible because they must be based on a specific area regulated by statutes,⁵⁰¹ and the violations need to take a form defined by particular statutory frameworks.⁵⁰² In contrast, a primary advantage of public nuisance suits is “a more direct focus on the merits” rather than “on procedure or violations of permits or standards.”⁵⁰³ Therefore, public nuisance law “boasts more flexibility” and may be adapted to a variety of environmental challenges that regulatory schemes fail to address.⁵⁰⁴ Furthermore, in public nuisance cases, courts may have “greater leeway in fashioning remedies for problems unanticipated by statutes,”⁵⁰⁵ including damages which are not recoverable in citizen suits. In short, where both public nuisance actions and citizen suits are available in the United States, plaintiffs can choose their cause of action in order to get the appropriate remedy.

2. *A Path Forward: Constructing Public Nuisance-Style EPIL*

After critiquing the citizen suit model that has been reflexively accepted by scholars, introducing public nuisance law to untangle the struggles of the tort discourse, and illustrating the distinctions between citizen suits and public nuisance law, we can now put all these pieces together to evaluate which model may serve as an appropriate framework for understanding the role of EPIL. As demonstrated in Chapter 3, EPIL operating like citizen suits would empower private parties to exercise concurrent law enforcement authority with administrative agencies, a radical proposal that will be difficult to implement

⁵⁰¹ Timms, *supra* note 473, at 1747.

⁵⁰² Miles Tolbert, *Comment, The Public as Plaintiff: Public Nuisance and Federal Citizen Suits in the Exxon Valdez Litigation*, 14 HARV. ENVTL. L. REV. 511, 526 (1990).

⁵⁰³ Antolini, *supra* note 395, at 774.

⁵⁰⁴ Tolbert, *supra* note 502, at 526.

⁵⁰⁵ Tolbert, *supra* note 502 at 527.

in China. Moreover, citizen suit-style EPIL would only play a modest role in redressing environmental harms due to inherent gaps in China's existing statutory framework for environmental regulations. These gaps mean that citizen suit-style EPIL cannot provide redress for environmental harms that are not subject to programmatic regulation or incurable by diligent government enforcement.

Alternatively, a public nuisance-type doctrine could fill these gaps: if EPIL is conceptualized as a public nuisance-like system, it would allow courts to provide remedies for a wide range of environmental harms regardless of whether a statute or regulation even exists. In other words, public nuisance-style EPIL can not only cover harms caused by regulatory violations but also remediate harms when there is no effective regulation or government enforcement.

From the standpoint of positive law, current EPIL in China is far from the typical citizen suit model as seen in the United States. First, compared with U.S. citizen suit provisions which are written into environmental statutes and specify actionable violations under each statute, the provisions of 2012 CPL and 2014 EPL establishing EPIL simply stipulate that qualified plaintiffs may challenge "acts of polluting or damaging the environment that have harmed the public interest." Moreover, an important difference exists in remedies: plaintiffs may seek civil penalties in citizen enforcement actions whereas penalties are not available in EPIL according to the SPC's 2015 EPIL Interpretation.⁵⁰⁶

⁵⁰⁶ According to the SPC, plaintiffs in EPIL can seek tort law remedies including cessation of infringement, removal of obstacle, elimination of danger, restoration to the original status, damages, and apologies. *See* 2015 EPIL Interpretation, *supra* note 12, at arts. 19–21. Therefore, statutory penalty is not one of the available remedies in EPIL suits.

By contrast, EPIL as articulated by current laws and a public nuisance framework share important characteristics in common: the amorphous and mutable nature of both EPIL and public nuisance law means that plaintiffs can challenge almost anything that constitutes a harm to the public interest. The resemblance between EPIL and public nuisance law is also seen in their available remedies. In addition to injunctive relief, plaintiffs in these two types of litigation can seek damages, instead of statutory penalties, for past injuries suffered by the public.

Because the 2012 CPL only grants standing to “government organs and relevant organizations prescribed by law” but fails to define who are “government organs prescribed by law,” there has been debate among Chinese scholars about whether administrative agencies have standing to bring EPIL lawsuits.⁵⁰⁷ In theory, the citizen suit model and public nuisance model will provide different answers to this question. Administrative agencies are not considered as proper plaintiffs in citizen suits because it is unreasonable for an agency to rely on citizen suits rather than its own more extensive statutory enforcement authority and the agency will also be disadvantaged by doing so.⁵⁰⁸ On the other hand, states and other public authorities are entitled to bring public nuisance claims when regulatory laws cannot provide an adequate remedy. In terms of the positive law on EPIL, despite the ambiguity of the 2012 CPL, the 2017 amendment to the CPL explicitly provides that the procuratorate can file EPIL suit if there are no eligible “government organs and relevant organizations prescribed by law” or eligible government organs and organizations fail to bring a suit.⁵⁰⁹ This provision seems to suggest that the procuratorate

⁵⁰⁷ See *supra* notes 40–42 and accompanying text.

⁵⁰⁸ Miller, *Private Enforcement I*, *supra* note 104, at 10134.

⁵⁰⁹ 2017 CPL, *supra* note 8, at art. 55(2).

is not the only type of “government organs prescribed by law.” In other words, administrative agencies should have standing to file EPIL suits. In practice, while the procuratorate and environmental groups have been at the forefront to bring EPIL cases, courts did accept EPIL suits initiated by administrative agencies.⁵¹⁰ Therefore, while the standing rule of EPIL is not identical to that of public nuisance law, both EPIL and public nuisance law empower governmental authorities to bring lawsuits to protect public interest, adding another crucial similarity between current EPIL and public nuisance law.

Admittedly, as an ancient common law cause of action, public nuisance law embodies some unique features such as evolving from a criminal writ into a civil tort cause of action over the centuries, emerging as a police power based remedy, and distinguishing between private action for a public nuisance and public action for a public nuisance. However, it is neither possible nor necessary to transplant the “authentic” public nuisance law. Since EPIL is a completely new creature that is not built on any historical legal precedent in China, it has the advantage of being able to incorporate useful elements from foreign legal institutions while developing its own unique rules that are compatible with domestic legal system.

Although current EPIL turned out to be an ambiguous framework largely due to lack of endogenous legal theories and comprehensive understanding of foreign legal institutions (i.e., the U.S. citizen suits), it has generated some unintended advantages over public nuisance law. For example, private plaintiffs can only bring public nuisance actions

⁵¹⁰ See, e.g., Kunming Sannong Nongmu Youxian Gongsidi Deng Yu Kunming Shi Huanjing Baohuju Huanjing Wuran Qinquan Jiufen Shangsu An (昆明三农农牧有限公司等与昆明市环境保护局环境污染侵权纠纷上诉案) [Kunming Sannong Nongmu Co., Ltd. et al. v. Env'tl. Prot. Bur. of Kunming], Higher People's Ct. of Yunnan Prov., May. 26, 2011, Second Instance No. 41 (2011) (Beida Fabao 北大法宝) [pkulaw.cn] (cleanup cost recovery claim filed by environmental protection agency).

to recover damages for the actual injuries they have suffered; they cannot seek damages for harm to the public interest (e.g., cleanup costs). The “special injury” rule’s restriction on the range of damage that private parties can recover has been criticized by scholars hoping to transform public nuisance into “a unique doctrine for the representation of the public interest in freedom from, or compensation for, injury done to the natural resources which the public holds in common.”⁵¹¹ According to these scholars, “there is little difference between a state attorney general suing for damages as trustee for the public interest and a class action or citizen suit. Thus, the concern. . . that polluters should not be permitted to avoid liability for contaminating natural resources on the basis of rigid adherence to a rule developed in 1536, should guide courts when damages are sought by private groups as trustees for the public. Indeed, by permitting private citizens to help police public nuisances, the courts would ease the burden on overworked attorneys general.”⁵¹² Unlike public nuisance law, private parties (environmental groups) and public authorities (administrative agencies and the procuratorate) have statutorily conferred standing to bring EPIL actions for both injunctions and damages. Since there is no distinction in private and public plaintiffs’ ability to seek damages, Chinese EPIL seems more accessible to environmental groups acting as the representative of the public interest.

If we are willing to accept a public nuisance framework as a path forward in reconciling the traditional tort discourse and conceptualizing the role of EPIL, we may begin to think about how public nuisance law can help us shape this reformed liability. While the law of liability and remedy in public nuisance is plagued by “conflicting sources

⁵¹¹ Bryson & Macbeth, *supra* note 408, at 281.

⁵¹² Hodas, *supra* note 419, at 899–900.

of authority, confusion in the language and reasoning of the cases, and often poor articulation of reasons which might be produced to justify or explain the decisions,⁵¹³ it can still provide useful guidance for reforming the young EPIL. For example, there is little clarity about the nature of harm that EPIL intends to redress—what particular thing is harmed (people, the environment, or both)? What specific type of harm (economic, physical, aesthetic, etc.) is caused? Many scholars and the SPC’s 2015 EPIL Interpretation seem to focus on the occurrence of actual or threatened damage to the environment, or ecological damage, as the only situation where public interest is harmed.⁵¹⁴ However, as the 2012 CPL and 2014 EPL do not expressly limit EPIL to cases that result in ecological damage,⁵¹⁵ it is unreasonable to limit the coverage of EPIL to ecological damage and exclude injury to public health, safety, and welfare caused by environmental problems, all of which fall within the scope of public nuisance law. In addition, because the laws do not provide guidance about what constitutes an actionable harm, the standards that are used in public nuisance suits for determining the “unreasonableness” of an interference,⁵¹⁶ with or without the aid of legislation,⁵¹⁷ can be useful for formulating relevant rules in EPIL suits. Similarly, public nuisance litigation has developed useful jurisprudence in deciding whether the interference has affected the public at large as opposed to particular individuals⁵¹⁸ and what type of remedies (i.e., injunctions or damages) are appropriate for

⁵¹³ Bryson & Macbeth, *supra* note 408, at 274.

⁵¹⁴ *See supra* notes 65–68, 77–80 and accompanying text.

⁵¹⁵ Because the 2012 CPL and 2014 EPL authorize public interest litigation against all “acts of polluting or damaging the environment that have harmed the public interest,” the application of EPIL should not be limited to ecological damage.

⁵¹⁶ *See supra* note 423 and accompanying text.

⁵¹⁷ *See supra* Chapter 4, Section A.3 for a discussion of how compliance with and violation of applicable environmental statutes may affect the court’s determination of “unreasonable interference.”

⁵¹⁸ *See supra* notes 421–422.

different types of injury. This jurisprudence can provide guidance to work out the key elements in the establishment of liability and determination of remedies in EPIL suits.

Chapter 5 EPIL IN ACTION: FILLING GAPS IN THE STATUTORY FRAMEWORK

Despite unanswered fundamental questions about the appropriate role and scope of EPIL in China, qualified plaintiffs have brought numerous lawsuits to test the boundaries of EPIL. While the discussion in Chapter 4 suggests that conceptualizing EPIL as a public nuisance-style framework could transform it into a powerful weapon to combat various environmental problems in China, we still need to test whether this framework fits with how EPIL suits have progressed in practice. This Chapter provides a preliminary examination of the recent litigation brought after the 2014 EPL took effect to explore how this new cause of action has been employed by practitioners. Analyses of landmark cases show that plaintiffs have successfully invoked EPIL to strengthen weak government enforcement, clean up or remediate the injured natural environment, addressing transboundary pollution disputes, and challenge development projects approved by the government. By closely examining these cases, this Chapter demonstrates that a public nuisance model, rather citizen suit model, provides a more convincing justification for analyzing these lawsuits' merits.

A. COMPLEMENTING LIMITED DETERRENCE OF GOVERNMENT ENFORCEMENT

Many cases brought under the emerging EPIL framework involved violations of applicable environmental requirements by defendants. In *All China Environmental*

Federation v. Jinghua Group Zhenhua Co., Ltd. (Zhenhua case),⁵¹⁹ the first air pollution case brought after the 2014 EPL took effect, the plaintiff alleged that the defendant caused serious air pollution by emitting air pollutants (including sulfur dioxide, nitrogen oxide, and fine particulate matter) repeatedly in excess of applicable emission standards.⁵²⁰ Before the suit was filed, the local EPB had taken multiple enforcement actions against the defendant and fined the company 200,000 yuan (U.S. \$ 31,000).⁵²¹ However, the penalty was not a sufficient deterrent to the defendant, who refused to come into compliance. The defendant's intransigence led the plaintiff, an environmental group, to try a different approach: the plaintiff brought an EPIL suit to abate the illegal emissions and recover damages for the injury to the air. Because the defendant had shut down the plant by the time the court decided the case, an injunction was unnecessary, and the court awarded 21,983,600 yuan (U.S. \$ 3.4 million) in damages which was put into a special account to fund projects for local air quality improvement.⁵²²

The similar fact pattern is found in another two air pollution cases brought by Friends of Nature, a leading environmental group in China. In one of these two EPIL suits, the defendant, Jinling Chemical Company Limited in Shandong Province, had been found continuous violation of emission standards since 2014.⁵²³ The defendant also violated

⁵¹⁹ *Zhonghua Huanbao Lianhehui Su Dezhou Jinghua Jituan Zhenhua Youxian Gongsi Daqi Huanjing Wuran Zeren Jiufen An* (中华环保联合会诉德州晶华集团振华有限公司大气环境污染责任纠纷案) [All China Env'tl. Fed'n v. Jinghua Group Zhenhua Co., Ltd.], Dezhou Intermediate People's Ct., July 18, 2016, First Instance No. 1 (2015) (Beida Fabao 北大法宝) [hereinafter *Zhenhua* First Instance Judgment].

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Beijing Shi Chaoyang Qu Ziran Zhiyou Huanjing Yanjiusuo Su Shandong Jinling Huagong Gufen Youxian Gongsi Daqi Wuran Minshi Gongyi Susong An* (北京市朝阳区自然之友环境研究所诉山东金岭化工股份有限公司大气污染民事公益诉讼案) [Friends of Nature v. Jinling Chem. Co., Ltd.]. This case is among the ten model EPIL lawsuits released by the SPC in 2017. See *Zuigao Renmin Fayuan Fabu Huanjing Gongyi Susong Dianxing Anli* (最高人民法院发布环境公益诉讼典型案例) [*The Supreme People's Court*

relevant environmental requirements by tampering with monitoring equipment, carrying out operation before pollution treatment facilities are checked and approved by environmental agencies.⁵²⁴ Environmental protection agencies at the county, municipal, and provincial level of Shandong Province imposed multiple administrative sanctions on the defendant for its violations between 2014 and 2015.⁵²⁵ Friends of Nature then filed an EPIL lawsuit requesting the defendant to correct excessive emissions and other environmental violations.⁵²⁶ In addition, the plaintiff asked the court to award compensation for damage caused to the air during the period from January 1, 2014 to the day when the defendant comes into compliance.⁵²⁷ Before the court decided the case, the parties reached a settlement in which the defendant agreed to pay 3 million yuan (U.S. \$430,645) for ecological damage.⁵²⁸

In the other case, a power plant of Jilin Petrochemical Company, a subsidiary of PetroChina Company Limited, was fined thirteen times for continuous emissions of air pollutants (including fumes, sulfur dioxide, and nitrogen oxide) in excess of permitted levels for a period of eighteen months.⁵²⁹ Among thirteen administrative penalties assessed by environmental agencies, eight were daily penalties and the total amount for thirteen

Released Model Environmental Public Interest Lawsuits], Xinhua Wang (新华网) [XINHUA], (Mar. 7, 2017), http://news.xinhuanet.com/legal/2017-03/07/c_129503217.htm [hereinafter *Model Environmental Public Interest Lawsuits*].

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ See Diao Fanzhao (刁凡超), *Zhongshiyou Jilin Shihua Yin Wuran Beisu, Biancheng “Guanting Zhuangzhi Dui Huanjing Shanghai Gengda”* (中石油吉林石化因污染被诉, 辩称“关停装置对环境伤害更大”) [*Jilin Petrochemical Company of Petro China was Sued for Pollution, Defending that “a Shutdown of Operation Will Cause More Serious Environmental Harm*], Pengpai (澎湃) [THE PAPER], (Nov. 11, 2016), https://www.thepaper.cn/newsDetail_forward_1563840.

penalties reached 18,700,000 yuan (U.S. \$2,68 million).⁵³⁰ Alleging that the defendant's continuous violation of emission limitations constituted harm to the public interest, Friends of Nature brought an EPIL suit to seek an injunction and damages for harm to the atmosphere.⁵³¹

In theory, the *Zhenhua* case, the two air pollution lawsuits brought by Friends of Nature, and many other cases alleging enterprises' violation of effluent/emission limitations,⁵³² may support both a citizen suit and a public nuisance claim; the determination is a matter of evidence and choice of litigation strategy.⁵³³ In fact, the presence of regulatory violations in these cases might have led to scholars' hasty conclusion that EPIL is a type of citizen suit, and that because the purpose of citizen suits is to spur or supplement government enforcement, the lack of pre-litigation notice and bar mechanism will inappropriately interfere with administrative agencies.⁵³⁴ Interestingly, the plaintiff in the *Zhenhua* case also made a claim for statutory daily fines alongside ecological damages,⁵³⁵ which was rejected by the court on the grounds that the daily fine is an

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² See, e.g., Guiyang Gongzhong Huanjing Jiaoyu Zhongxin Su Guizhou Kaiyang Qingli Tianmeng Huagong Youxian Gongsi Wuran Shuiti, Daqi An (贵阳公众环境教育中心诉贵州开阳青利天盟化工有限公司污染水体、大气案) [Guiyang Pub. Envtl. Educ. Ctr. v. Guizhou Kaiyang Qingli Tianmeng Chem. Co., Ltd.] (air and water pollution); Zhongguo Shengwu Duoyangxing Baohu Yu Lvse Fazhan Jijin Hui Su Hebei Daguangming Shiye Jituan Jiajing Boli Youxian Gongsi Daqi Wuran An (中国生物多样性保护与绿色发展基金会诉河北大光明实业集团嘉晶玻璃有限公司污染环境案) [China Biodiversity Conservation and Green Dev. Found. v. Daguangming Group Jiajing Glass Co., Ltd.] (air pollution). These two cases are recorded in a research report which compiles 44 EPIL cases brought by environmental groups in 2015. See Huanjing Gongyi Susong Guancha Baogao (环境公益诉讼观察报告) [REVIEW OF PUBLIC INTEREST LITIGATION IN ENVIRONMENTAL PROTECTION], (Li Dun (李楯) ed., 2016).

⁵³³ See *supra* notes 499–505 for a discussion of respective advantages and limitations of public nuisance actions and citizen suits.

⁵³⁴ See *supra* notes 56–58 and accompanying text.

⁵³⁵ The plaintiff required the defendant to pay 7,800,000 yuan (U.S. \$1,121,802) in penalties calculated on a daily basis for refusing to comply with emission standards after the EPB imposed sanctions. *Zhenhua* First Instance Judgment, *supra* note 519.

administrative penalty rather than a form of remedies provided by the 2015 EPIL Interpretation.⁵³⁶

In addition to the court's proposition that administrative remedies should be distinguished from remedies in EPIL, the citizen suit discourse is weakened by the important fact that administrative agencies have imposed penalties on polluters' violation in the *Zhenhua* case and other similar cases. If EPIL is conceptualized as a type of citizen suit, citizen enforcement lawsuits would be barred even though government enforcement actions turned out to be unsuccessful to bring the recalcitrant polluters into compliance. Even in situations where an agency has failed to enforce the law, the prospect of relying on citizen enforcement actions to supplement government enforcement in China is less promising because as discussed above, the penalties under environmental laws are too low to effectively bring violations into compliance.

Due to the limitations in the citizen suit model, an alternative framework for EPIL is needed. Only when EPIL functions as a tort-based system can it provide a vehicle for plaintiffs to seek abatement of environmental harm that was allowed to continue owing to ineffective government enforcement. Currently, the 2012 CPL, the 2014 EPL, and the 2015 EPIL Interpretation do not provide guidance for the courts to determine when an act has harmed the public interest.⁵³⁷ While the complaints of plaintiffs are generally not available

⁵³⁶ *Id.*

⁵³⁷ The 2012 CPL and 2014 EPL simply provide that plaintiffs can bring suits against "acts of polluting or damaging the environment that have harmed the public interest." In implementing EPIL, the 2015 EPIL Interpretation provides that lawsuits can be initiated against "acts of polluting or damaging the environment that have harmed the public interest or pose a significant risk of harming the public interest." 2015 EPIL Interpretation, *supra* note 12, at art. 1. However, the 2015 EPIL Interpretation does not provide any guidance on how to determine when acts of polluting or damaging the environment have harmed or pose a significant risk of harming the public interest.

to the public due to poor judicial transparency in China, the available information suggests that plaintiffs in many lawsuits generally focused on the proof of a defendant's violation of relevant environmental requirements but made little efforts to show the injury and causation. For example, the judgement of the *Zhenhua* case simply mentioned that the plaintiffs alleged that the defendant's illegal emissions "have caused serious air pollution and significantly affected the daily life of nearby residents."⁵³⁸ It seems that the plaintiff did not provide sufficient evidence for the relevant injuries caused by the defendant's illegal emissions. Courts also appeared to accept that the repeated or continuous violation of discharge limitations automatically constituted harm to the public interest.⁵³⁹ To some extent, the courts' treatment of regulatory violations plays a similar role in easing the plaintiffs' burden of proof as the nuisance per se doctrine does in public nuisance suits.⁵⁴⁰

A public nuisance-like framework may not only allow the lawsuits to proceed even though the administrative agencies have taken enforcement actions, but can also complement limited deterrence of government enforcement by allowing courts to award considerable damages. The 2015 EPIL Interpretation provides that when it is difficult or costly to determine the actual damages for ecological injury, the amounts that the defendants would have spent on pollution control to achieve compliance can be used as a proxy for ecological damages.⁵⁴¹ Relying upon this provision, courts have supported

⁵³⁸ *Zhenhua* First Instance Judgment, *supra* note 519.

⁵³⁹ *See id.*

⁵⁴⁰ *See supra* notes 486–492 and accompanying text for a discussion of nuisance per se doctrine.

⁵⁴¹ According to the 2015 EPIL Interpretation, where it is difficult or costly to determine the amount of damages for ecological injury, courts have discretion to assess restoration costs by taking into consideration opinions of relevant administrative agencies and experts, as well as the following factors:

- (1) Scope and extent of environmental pollution and destruction;
- (2) Scarcity of the ecological resources;
- (3) Difficulty of restoration;
- (4) Costs of operating pollution control facilities;

plaintiffs' requests for damages, sometimes in substantial amounts, in many illegal discharge cases.⁵⁴² Damages calculated by this convenient virtual treatment cost method serve as a stronger deterrence for polluters than low statutory penalties. However, while an injunction is an appropriate remedy for continuing pollution in public interest cases, the award of damages raises the issue of equity where it is difficult to define the affected area, quantify the injury directly caused by the defendant's discharge, and actually restore the injured environment (e.g., air pollution cases).⁵⁴³

B. SEEKING ECOLOGICAL DAMAGES UNRECOVERABLE UNDER EXISTING LAW

As mentioned in Section B of Chapter 1, except the Marine Environmental Protection Law, existing environmental laws do not provide a remedy for past ecological damage caused by pollution. As a result, establishing a public interest litigation system based on tort law has been proposed by scholars as a possible solution for the remediation of ecological damage.⁵⁴⁴ Because of this tort root, the 2015 EPIL Interpretation was designed to specially address ecological damage by expanding tort remedies. Following the initiative of the 2015 EPIL Interpretation, plaintiffs have brought lawsuits to pursue compensation for damage to the environment caused by pollution and other events.

(5) Economic benefits gained by the defendant;

(6) Fault on the defendant. 2015 EPIL Interpretation, *supra* note 12, at art. 23.

In practice, plaintiffs have frequently relied upon Article 23(4) to claim damages calculated by the “virtual cost of pollution treatment,” a method provided in Huanjing Sunhai Jianding Pinggu Tuijian Fangfa (II) (环境损害鉴定评估推荐方法(第 II 版)) [Recommended Methods of Assessing Environmental Damage (II)] (promulgated by the Ministry of Env'tl. Prot., Oct., 2014).

⁵⁴² For example, the damages of 21,983,600 yuan (U.S. \$ 3.4 million) in the *Zhenhua* case was calculated by the “virtual cost of pollution treatment” method. See *Zhenhua* First Instance Judgment, *supra* note 519.

⁵⁴³ For further discussion on this issue, see *infra* notes 629–631 and accompanying text.

⁵⁴⁴ See *supra* notes 65–68 and accompanying text.

As the first case heard after the 2014 EPIL took effect, *Friends of Nature et al. v. Xie Zhijin et al.* (*Nanping* case) filed at the Nanping Intermediate People’s Court in Fujian Province was famous for the broad scope of ecological damages awarded.⁵⁴⁵ In this case, two environmental groups alleged that the four individual defendants had engaged in mining activities without obtaining relevant permits, causing extensive damage to the area’s vegetation and ecological system.⁵⁴⁶ The plaintiffs filed the suit to seek restoration of the destroyed land and compensation for the loss of interim “ecological services.”⁵⁴⁷ The court held that the defendants’ illegal mining operations had caused ecological destruction and constituted harm to the public interest.⁵⁴⁸ Ruling in favor of the plaintiffs, the court ordered the defendants to restore the site by replanting trees, or pay 1.1 million yuan (U.S. \$180,000) for site remediation if they fail to perform the restoration.⁵⁴⁹ The court also ordered the defendants to pay 1.27 million yuan (U.S. \$200,000) for ecological interim losses during recovery.⁵⁵⁰ On appeal, the ruling of the trial court was upheld by both the higher People’s Court of Fujian Province⁵⁵¹ and the Supreme Court.⁵⁵² Because *Nanping* case is the first case where plaintiffs requested damages for ecological injuries, its ruling is seen as an important victory for environmental groups.

⁵⁴⁵ Beijing Shi Chaoyang Qu Ziran Zhiyou Huanjing Yanjiusuo Deng Su Xie Zhijin Deng Qinquan Zeren Jiufen An (北京市朝阳区自然之友环境研究所等诉谢知锦等侵权责任纠纷案) [*Friends of Nature et al. v. Xie Zhijin et al.*], Nanping Intermediate People’s Ct., Oct. 29, 2015, First Instance No. 38 (2015) (Beida Fabao 北大法宝) [pkulaw.cn].

⁵⁴⁶ The facts of this case are drawn from two scholars’ work that provides a detailed analysis of the *Nanping* case. Yanmei Lin & Jack Tuholske, *Field Notes from the Far East: China’s New Public Interest Environmental Protection Law in Action*, 45 ENVTL. L. REP. 10855, 10859 (2015).

⁵⁴⁷ *Id.*

⁵⁴⁸ Yanmei Lin & Jack Tuholske, *Green NGOs Win China’s First Environmental Public Interest Litigation: The Nanping Case*, 45 ENVTL. L. REP. 11102, 11102 (2015).

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

⁵⁵¹ See Higher People’s Court of Fujian Prov., Dec. 14, 2015, Second Instance No. 2060 (2015) (Beida Fabao 北大法宝) [pkulaw.cn].

⁵⁵² See Supreme People’s Court, Jan. 26, 2017, Retrial No. 1919 (2016) (Beida Fabao 北大法宝) [pkulaw.cn].

Another case that resulted in significant damages for ecological injury is the landmark *Taizhou Environmental Protection Association of Jiangsu Province v. Taixing Jinhui Chemical Company, et al.* (Taizhou case).⁵⁵³ In this case, the plaintiff group accused six companies of causing severe ecological damage to the Yangtze River Basin by illegally dumping thousands of tons of chemical waste (hydrochloric acid by-product) into two rivers in the Taizhou area.⁵⁵⁴ The court of first hearing found the defendants liable for the environmental damage resulting from their illegal disposal of acid waste and awarded plaintiffs 160,666,745 yuan (about U.S. \$26 million) in restoration costs,⁵⁵⁵ making this case famous for the “sky-high” award of damages.⁵⁵⁶ This case was also appealed to the Supreme Court, which upheld the lower courts’ rulings.⁵⁵⁷

In addition to environmental groups, the procuratorate also plays an active role in filing EPIL suits to recover ecological damages. For example, in *People’s Procuratorate of Wuxi, Jiangsu Province v. Yangpu District Administration of Afforestation and City Appearance, Shanghai, et al.* (Yangpu case),⁵⁵⁸ one of the defendants, Yangpu District

⁵⁵³ Jiangsu Sheng Taizhou Shi Huanbao Lianhehui Su Taixing Jinhui Huagong Youxian Gongsi Deng Shui Wuran Minshi Gongyi Susong An (江苏省泰州市环保联合会诉泰兴锦汇化工有限公司等水污染民事公益诉讼案) [Taizhou Env’tl. Prot. Ass’n of Jiangsu Prov. v. Taixing Jinhui Chem. Co., Ltd. et al.], Higher People’s Ct. of Jiangsu Prov., Dec. 29, 2014, Second Instance No. 00001 (2014) (Beida Fabao 北大法宝) [pkulaw.cn].

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

⁵⁵⁶ See Bie Tao (别涛), Huanjing Gongyi Susong de Chenggong Tansuo—Taizhou “Tianjia Huanjing Gongyi Susong An” Shimo Ji Pingxi (环境公益诉讼的成功探索—泰州“天价环境公益诉讼案”始末及评析) [Successful Experience of Environmental Public Interest Litigation—Analysis of the Taizhou “Sky High Award” Case], Zhongguo Huanjing Bao (中国环境报) [CHINA ENVIRONMENTAL NEWS], Jan. 14, 2015, http://epaper.cenews.com.cn/html/2015-01/14/content_23231.htm.

⁵⁵⁷ See Supreme People’s Court, Jan. 31, 2016, Retrial No. 1366 (2015) (Beida Fabao 北大法宝) [pkulaw.cn].

⁵⁵⁸ Gongyi Susongren Jiangsu Sheng Wuxi Shi Renmin Jianchayuan Su Shanghai Shi Yangpu Qu Lvhuahong Shirong Guanliju、Shanghai Yangpu Huanjing Fazhan Youxian Gongsi、Shanghai Chengdi Shiye Youxian Gongsi、Xu Guoqiang、Xu Biao、Cui Mingrong、Xu Jinfu Huanjing Minshi Gongyi Susong An (公益诉讼人江苏省无锡市人民检察院诉上海市杨浦区绿化和市容管理局、上海杨浦环境发展有限公司、上海呈迪实业有限公司、徐国强、徐彪、崔明荣、须金法环境民事公益诉讼案) [People’s Procuratorate

Administration of Afforestation and City Appearance, signed a contract with another defendant, Xu Guoqiang, for disposal of municipal solid waste.⁵⁵⁹ Beginning from the March of 2015, Xu Guoqiang arranged with Xu Biao for the transport for disposal of garbage, knowing that Xu Biao had not obtained permits for transporting and disposing of municipal solid waste.⁵⁶⁰ Xu Biao then arranged Cui Mingrong and Xu Jinfa to transport and dump garbage along the banks of a river in Wuxi, resulting in serious contamination at the site.⁵⁶¹ It was found that the dumped garbage contained toxic substances such as lead, cadmium, and hexavalent chromium.⁵⁶² When the incident occurred, the Huishan District government of Wuxi took emergency response actions to protect human health and the environment.⁵⁶³

After Xu Guoqiang, Xu Biao, Cui Mingrong, and Xu Jinfa were convicted of crime of environmental pollution and received jail sentences and criminal fines, the People's Procuratorate of Wuxi filed this EPIL suit asking the court to impose joint and several liability on these four private defendants and Yangpu District Administration of Afforestation and City Appearance of Shanghai for the cost of responding to the contamination incurred by the government, cost of developing the restoration plan, cost of environmental restoration, and cost of conducting continuous monitoring and supervision totaling 2,094,649.16 yuan (U.S. \$301,566).⁵⁶⁴ Because the defendants paid voluntarily

of Wuxi, Jiangsu Prov. v. Yangpu Dist. Admin. of Afforestation and City Appearance, Shanghai, et al.], Wuxi Intermediate People's Ct., May 27, 2017, First Instance No. 68 (2017) (Beida Fabao 北大法宝) [pkulaw.cn].

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

the requested costs before the court issued an opinion, the People's Procuratorate of Wuxi withdraw the case.⁵⁶⁵

The *Nanping* case, *Taizhou* case, and *Yangpu* case are representative of those lawsuits brought by public and private plaintiffs to secure the cleanup of toxic dump,⁵⁶⁶ contaminated soil,⁵⁶⁷ and polluted water bodies.⁵⁶⁸ It should be noted that plaintiffs did not bring these suits to enforce existing regulatory requirements that agencies failed to enforce. Instead, the fundamental purpose of these lawsuits, which practitioners may not have realized, is to provide remediation for the injured environment caused by illegal conduct when a statutory remedy is not yet available or weak. For example, in the *Nanping* case, the defendants violated the Forestry Law by conducting mining projects without obtaining the approval for the use of forest land.⁵⁶⁹ According to the implementing regulations of the Forestry Law, competent forestry authorities can impose administrative fines for parties

⁵⁶⁵ *Id.*

⁵⁶⁶ See Carpenter-Gold, *supra* note 62, at 262-63 (discussing cases involving site contamination due to illegal dumping of toxic chromium slag).

⁵⁶⁷ See, e.g., Zhongguo Shengwu Duoyangxing Baohu Yu Lvse Fazhan Jijinhui Su Ningxia Ruitai Keji Gufen Youxian Gongsi Deng Tenggeli Shamo Wuran Xilie Minshi Gongyi Susong An (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等腾格里沙漠污染系列民事公益诉讼案) [China Biodiversity Conservation and Green Dev. Found. v. Ningxia Ruitai Tech. Co., Ltd. et al. and a Series of Civil Public Interest Cases related to Tengger Desert Pollution] (desert pollution resulted from illegal discharge of waste water); Zhonghua Huanbao Lianhehui Su Jiangsu Jiangyin Changjing Liangping Shengzhu Zhuanye Hezuoshe Deng Yangzhi Wuran Minshi Gongyi Susong An (中华环保联合会诉江苏江阴长泾梁平生猪专业合作社等养殖污染民事公益诉讼案) [All China Env'tl. Fed. v. Changjing Liangping Pig Prof'l Coop.] (water and soil pollution caused by concentrated animal feed operation). See *Model Environmental Public Interest Lawsuits*, *supra* note 523.

⁵⁶⁸ See, e.g., Jiangsu Sheng Xuzhou Shi Renmin Jianchayuan Su Xuzhou Shi Hongshun Zaozhi Youxian Gongsi Shui Wuran Minshi Gongyi Susong An (江苏省徐州市人民检察院诉徐州市鸿顺造纸有限公司水污染民事公益诉讼案) [Xuzhou People's Procuratorate of Jiangsu Prov. v. Hongshun Paper Co., Ltd.] (river pollution caused by discharge of pollutants exceeding permissible concentration). See *id.*

⁵⁶⁹ The Forestry Law requires that a forest land use approval document be obtained from competent forestry authorities if prospecting, mining, and various construction projects need to occupy woodlands. See Senlin Fa (森林法) [Forestry Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 20, 1984, effective Jan. 1, 1985, amended Aug. 27, 2009), art. 18, 2009 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

who changed the use of forest land without a license.⁵⁷⁰ It seems that forestry agencies also have authority to order the violator to “restore the forest land to its original status,”⁵⁷¹ however, it is not clear what the objective of restoration is (e.g., how to define “original status”) and whether and how often this enforcement tool has been applied by agencies in practice. It can be said that both the Forestry Law and its implementing regulations do not expressly provide liability for the forest land damage resulting from defendants’ illegal mining activities.

Similarly, in the *Taizhou* case, the applicable Water Pollution Prevention and Control Law (WPPCL) authorizes EPBs to assess a penalty for discharging any oil, acid, or alkaline solution as well as highly toxic waste liquid into any water body and/or to issue an order requiring correction and cleanup within a specified time period.⁵⁷² Where a violator fails to clean up pollution, EPBs can perform the cleanup at the expense of the violator.⁵⁷³ Again, the content and the level of required cleanup are ambiguous and there is little guidance on the circumstances where an cleanup order can be issued.

The weakness of statutory remedy is more obvious in the *Yangpu* case. According to SWPPCL, EPBs only have authority to assess a penalty of up to 50,000 yuan (U.S. \$7,202) and issue a compliance order for illegal dumping and spreading of residential solid waste.⁵⁷⁴ While SWPPCL empowers EPBs to issue an order requiring correction within a specified time period when a generator treats, disposes of, or otherwise handles hazardous

⁵⁷⁰ Senlin Fa Shishi Tiaoli (森林法实施条例) [Regulations on the Implementation of the Forestry Law] (promulgated by the State Council, Jan. 29, 2000, effective Jan. 29, 2000, amended Mar. 19, 2018), art. 43 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.

⁵⁷¹ *Id.*

⁵⁷² 2017 WPPCL, *supra* note 318, at art. 85.

⁵⁷³ *Id.*

⁵⁷⁴ 2016 SWPPCL, *supra* note 327, at art. 74.

waste in violation of relevant legal requirements, and to perform the work required by the order and seek reimbursement from the generator of hazardous waste if a generator fails to comply with the administrative order,⁵⁷⁵ residential solid waste is excluded from the definition of hazardous waste.⁵⁷⁶ Therefore, EPBs have no authority under SWPPCL to either secure cleanup or recover response cost, restoration cost and other necessary costs incurred as a result of illegal dumping of residential solid waste.

The role of EPIL suits in these cases is quite similar to that of public nuisance law in the area of remediation of hazardous waste sites.⁵⁷⁷ EPIL provides a viable tool to secure the cleanup and restoration of the injured environment while China's legislature is working toward the enactment of new laws to address this area of environmental concern.⁵⁷⁸ Even with specific statutes in place in the future, a public nuisance-like framework still has the potential to fill inevitable gaps in legislation due to its sweeping scope and flexibility. In fact, when a statute provides a remedy for ecological damage, it is usually only applicable in particular situations that serve the purpose of the statute. For example, natural resource damages under CERCLA are only available when there has been a release of hazardous substances into the environment and are limited to resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" federal, state, or tribal

⁵⁷⁵ *Id.* at art. 55.

⁵⁷⁶ *See id.* at art. 88.

⁵⁷⁷ *See supra* notes 462–463.

⁵⁷⁸ For example, the State Council issued a reform plan in December 2015 empowering provincial governments in pilot regions to claim compensation for ecological damage under certain circumstances. *See* Shengtai Huanjing Sunhai Peichang Zhidu Gaige Shidian Fang'an (生态环境损害赔偿制度改革试点方案) [Pilot Reform Plan on the Ecological Damage Compensation System] (promulgated by St. Council, Dec. 3, 2015), http://www.gov.cn/zhengce/2015-12/03/content_5019585.htm. Based on the experience of the pilot reform, the State Council issued a policy directive on December 2017 expanding the ecological damage compensation system to the whole nation. *See* Shengtai Huanjing Sunhai Peichang Zhidu Gaige Fang'an (生态环境损害赔偿制度改革方案) [Reform Plan on the Ecological Damage Compensation System] (promulgated by St. Council, Dec. 17, 2017, effective Jan. 1, 2018), http://www.xinhuanet.com/2017-12/17/c_1122124171.htm.

governments.⁵⁷⁹ Unlike statutory remedies, the scope of EPIL is very broad—it can cover ecological damage caused not only by pollution but also by physical means and the injury does not need to occur within a specific boundary (e.g., the defendants in the *Nanping* case were held liable for damaging forestry caused by illegal mining operations). Therefore, EPIL will continue to play a useful gap-filling role whenever statutory remedies for ecological damage are not available or incomplete.

C. RESOLVING TRANSBOUNDARY POLLUTION THAT IS POORLY ADDRESSED BY LEGISLATION

Pollutants may travel across jurisdictional boundaries and cause pollution in localities situated far away from their sources. Because governments of different jurisdictions differ in their environmental standards and enforcement willingness, resources, and priorities, the prevention and resolution of transboundary pollution can be very challenging. The basic framework for preventing and addressing transboundary pollution in China is established by relevant provisions of EPL and several other environmental statutes. For identified key regions and river basins, the State shall establish coordination mechanisms for inter-jurisdictional joint prevention and control of pollution and implement unified planning, standards, monitoring, and prevention and control measures.⁵⁸⁰ Generally, the prevention and control of inter-jurisdictional pollution outside key regions and river basins will be resolved through negotiation between relevant local

⁵⁷⁹ 42 U.S.C. § 9601(16) (2012).

⁵⁸⁰ See 2014 EPL, *supra* note 6, at art. 20(1); 2017 WPPCL, *supra* note 318, at art. 13 (unified water quality standards for the entire watershed may be developed); 2017 WPPCL, *supra* note 318, at art. 16(1) (developing unified watershed pollution prevention and control planning for key rivers and lake identified by the State); 2015 APPCL, *supra* note 335, at Chapter 5 (establishing joint air pollution prevention and control mechanism for key regions).

governments or coordination by the government at a higher level.⁵⁸¹ Where there is a transboundary water pollution dispute, the primary avenue for resolving the dispute under WPPCL is also by negotiation between affected local governments or coordination by a higher-level government.⁵⁸² Chinese environmental laws do not allow local governments to sue each other for transboundary pollution or require that upstream/upwind jurisdictions incorporate the environmental standards of downstream/downwind jurisdictions.⁵⁸³

The non-mandatory negotiation and coordination procedure, which is subject to various limitations, is by no means an effective mechanism for resolving disputes over transboundary pollution.⁵⁸⁴ Due to a lack of meaningful regulation of transboundary pollution, plaintiffs have invoked EPIL to seek redress for transboundary pollution. In a recent EPIL suit involving transboundary pollution, the defendant is a pyrite processing plant located in Jianshi County of Hubei Province.⁵⁸⁵ On August 10, 2014, the plant discharged untreated waste water and tailings into a nearby karst depression.⁵⁸⁶ The waste water and tailings seeped through underground caves and eventually reached and

⁵⁸¹ See 2014 EPL, *supra* note 6, at art. 20(2); 2017 MEPL, *supra* note 67, at art. 9 (inter-jurisdictional ocean protection is resolved through negotiation between relevant local governments or coordination by a higher-level government).

⁵⁸² 2017 WPPCL, *supra* note 318, at art. 31

⁵⁸³ See Zachary Tyler, Note, *Transboundary Water Pollution in China—An Analysis of the Failure of the Legal Framework to Protect Downstream Jurisdictions*, 19 COLUM. J. ASIAN L. 572, 590 (2006).

⁵⁸⁴ See *id.* at 600-01 (arguing that “negotiation and conciliation cannot provide adequate solutions given China’s systemic problems with the decentralization of power and enforcement authority. As a forum for dispute resolution, negotiation too easily falls prey to institutional political pressures of the sort that need an overarching decision-maker to impose a binding decision. Absent that, local political pressures and the inequality of bargaining power between the parties will dominate the negotiation and conciliation process.”).

⁵⁸⁵ See Enshi Zizhi Zhou Jianshi Huang Changping Kuangye Youxian Zeren Gongsi Yu Chongqing Shi Lvse Zhiyuanzhe Lianhehui Huanjing Wuran Gongyi Susong Jiufen Shangsu An (恩施自治州建始磷厂坪矿业有限责任公司与重庆市绿色志愿者联合会环境污染公益诉讼纠纷上诉案) [Jianshi Huang Changping Mining Co., Ltd. v. Green Volunteer League of Chongqing], Second Intermediate People’s Court of Chongqing, Sept. 13, 2016, Second Instance No. 772 (2016) (Beida Fabao 北大法宝) [pkulaw.cn].

⁵⁸⁶ *Id.*

contaminated Qian Zhangyan reservoir, which is 2.6 kilometers away from the plant.⁵⁸⁷ Qian Zhangyan reservoir is located in Wushan county of Chongqing (one of the four municipalities directly under the Central Government) that borders Jianshi County.⁵⁸⁸ Because Qian Zhangyan reservoir is not only the source of drinking water of Wushan county but also located at the hinterland of the Three Gorges Dam, relevant authorities of Chongqing and Hubei Province immediately took emergency actions to respond to contamination, including providing emergency water supply for tens of thousands of residents affected by the incident.⁵⁸⁹ On September 4, 2014, pursuant to WPPCL and Hubei Province's Regulations on Water Pollution Prevention and Control, the Environmental Protection Department of Hubei Province imposed a penalty of 1,000,000 yuan (U.S. \$144,040) in total and ordered the plant to cease discharge of pollutants and take corrective actions within a specified time period.⁵⁹⁰ The plant paid the penalty, but did not take any corrective actions as required by the administrative order.⁵⁹¹

Green Volunteer League of Chongqing, a local environmental group of Chongqing, filed an EPIL suit in Wanzhou People's Court of Chongqing against the plant located in Hubei Province.⁵⁹² Rejecting the notion that the payment of administrative penalty by the defendant barred plaintiff's EPIL action, the court ruled that EPIL liability can operate in parallel with administrative and criminal liability.⁵⁹³ While the environmental impact assessment report for the plant had been approved by the competent EPB of Hubei Province,

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.*

⁵⁹² *Id.*

⁵⁹³ *Id.*

the court found that the original environmental impact assessment report failed to examine the anticipated environmental effects of the plant on Qian Zhangyan reservoir, which was designated as the source water protection area by the Chongqing government.⁵⁹⁴ Considering that the construction of the plant in karst area poses a significant risk of contamination and the plant's discharges have led to transboundary pollution, the court granted the plaintiff's request for "cessation of infringement" by issuing an injunction prohibiting the defendant from operating until the defendant has completed a new environmental impact assessment for the plant.⁵⁹⁵ Moreover, the court required the defendant to remediate existing contamination or pay 991,000 yuan (U.S. \$142,744) for ecological restoration if the defendant fails to perform the remediation.⁵⁹⁶ The defendant appealed the decision to the Second Intermediate People's Court of Chongqing, which upheld the trial court's ruling.⁵⁹⁷

This case illustrates how EPIL can be used to fill regulatory gaps in the field of transboundary pollution. Because environmental agencies only have territorial jurisdiction, the EPB of Wushan County has no power to enforce against a pollution source located outside its borders. While the environmental agency in source province imposed administrative sanction on the polluter, it was far from being a sufficient remedy for the damage suffered by Wushan County. In particular, the environmental agency of Hubei Province did not take any rigorous action to enforce its administrative order. Meanwhile,

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

it seems that the negotiation and coordination mechanism did not play a useful role in the resolution of this transboundary pollution dispute.

The EPIL suit brought by the plaintiff group, on the other hand, complement the weak statutory framework for transboundary pollution dispute with its expansive and flexible remedies. First, while the plant had stopped discharges of pollutants, the court of second instance held that suspension of operation is not adequate to prevent future pollution given that the defendant had not installed pollution treatment facilities by the time of suit and may resume operation at any time.⁵⁹⁸ Concerned about the potential environmental risk posed by the plant, the court of second instance affirmed the trial court's decision to impose stricter standard than required by the environmental agency of source province: the defendant is prohibited from operating until specific measures are taken to ensure that the operation will not threaten the environment.⁵⁹⁹

Second, while the plant is a lawful project approved by the competent agency, the court of second instance noted that the original environmental impact assessment report should have taken into consideration the plant's potential environmental impacts on Qian Zhangyan reservoir but failed to do so because the project and Qian Zhangyan reservoir are located in different jurisdictions.⁶⁰⁰ In order to ensure that the potential environmental impacts on Qian Zhangyan reservoir is examined and managed, the court of second instance agreed with the trial court that requiring the defendant to file a new environmental

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*

impact assessment report and acquire approval by competent agency is an appropriate way to achieve “cessation of infringement.”⁶⁰¹

Third, as discussed above, WPPCL does not explicitly deal with cleanup and restoration liability for water pollution,⁶⁰² therefore, it is difficult for environmental agencies in source and victim provinces to seek cleanup or recover restoration costs under WPPCL. Since contaminants in drinking water still pose a significant health risk, EPIL allowed the court to provide a supplemental remedy for past environmental injury by requiring the defendant to remediate polluted ground water and soil.

Public nuisance law has similar utility in addressing transboundary pollution disputes. Despite existence of federal regulatory programs regarding transboundary pollution in the United States,⁶⁰³ states have used the common law of public nuisance to seek remedy for transboundary pollution problems. While the comprehensive federal statutes broadly preempt the federal common law of nuisance for interstate water and air pollution,⁶⁰⁴ the Supreme Court’s ruling in *International Paper Co. v. Ouellette* suggests that the source state’s common law nuisance actions remained alive for interstate pollution.⁶⁰⁵ In light of the *Ouellette* decision, states have filed public nuisance actions to resolve transboundary environmental problems. For example, In *North Carolina ex rel.*

⁶⁰¹ *Id.*

⁶⁰² *See supra* notes 572–573 and accompanying text.

⁶⁰³ For example, the Clean Air Act’s “Good Neighbor” provision requires state implementation plans to prohibit in-state emissions that either “contribute significantly to nonattainment” or “interfere with maintenance” of national ambient air quality standards in another state. 42 U.S.C. §7410(a)(2)(D). The Act also authorizes states to petition EPA for a finding that emissions from “any major source or group of stationary sources” violate the Good Neighbor provision. *id.* § 7426(b).

⁶⁰⁴ *See supra* notes 447, 452–453 and accompanying text.

⁶⁰⁵ 479 U.S. 481, 497 (1987) (“The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.”).

Cooper v. Tennessee Valley Authority, the district court decided that emissions from four power plants operated by the Tennessee Valley Authority (TVA) in Tennessee and Alabama located within 100 miles of North Carolina created a public nuisance under the law of the source states.⁶⁰⁶ The district court ultimately imposed sulfur dioxide and nitrogen oxide emissions caps for each of the four plants and required TVA to install new pollution control systems at the four plants at an estimated costs of one billion dollars.⁶⁰⁷ While the Court of Appeals for the Fourth Circuit reversed the district court’s decision,⁶⁰⁸ there is no doubt that state public nuisance actions based on the law of source states, like EPIL suits, remain a viable approach to address transboundary pollution disputes.

D. CHALLENGING “LAWFUL PROJECTS” THREATENING HARM TO THE PUBLIC INTEREST

While the cases discussed in previous sections are concerned with either the continuous violation of regulatory requirements or the ecological injury caused by illegal conducts, the target of a recent lawsuit was a hydropower project that has been approved by the government. Alleging that the dam would destroy the critical habitat of an endangered green peacock (*Pavo muticus*), which was listed as a Grade One National Key Protected Species in China, an environmental group, Friends of Nature, brought a suit to enjoin construction of the dam.⁶⁰⁹ The plaintiff questioned the validity of the environmental impact statement for the project, alleging that the statement had failed to consider that the

⁶⁰⁶ 593 F. Supp.2d 812 (W.D.N.C. 2009).

⁶⁰⁷ *Id.* at 830–34.

⁶⁰⁸ North Carolina Ex Rel. *Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 302-07 (4th Cir. 2010) (ruling that the Clean Air Act has preempted state common law nuisance actions in spite of the Act’s savings clause).

⁶⁰⁹ See Zhou Tailai et al., *Protect Green Peacocks From Dam, Environmentalists Urge Court*, CAIXIN (Aug. 15, 2017), <http://www.caixinglobal.com/2017-08-15/101130883.html>.

dam would flood monsoon forest inhabited by the green peacock and several other species.⁶¹⁰ Before the plaintiff filed this case, another environmental group also filed a suit requesting that a hydropower company take appropriate measures to ensure that the development of hydropower projects would not destroy the habitat of an endangered plant, the acer pentaphyllum.⁶¹¹

These two pending cases would not be possible if EPIL is conceived as a citizen suit model. Because the purpose of citizen suits is to rectify noncompliance with statutory requirements, neither government agencies nor environmental groups can take enforcement actions against a legal project. However, by exploiting the broad frame of EPIL, plaintiffs were able to bring the companies to courts in spite of the fact that the projects had been licensed by the government agencies and were otherwise legal.

If citizen suits cannot provide an appropriate avenue for plaintiffs in these two cases, do they have additional tool to advance their agenda? In fact, had environmental plaintiffs in China, like their U.S. counterparts, had access to courts to challenge actions of administrative agencies, they would be able to seek judicial review of the agencies' approval of specific projects.⁶¹² For example, in the United States, the National Environmental Policy Act (NEPA) requires all federal agencies to prepare an environmental impact statement on major federal actions significantly affecting the quality

⁶¹⁰ *See id.*

⁶¹¹ *See* Li Lin (李林), Zhongguo “Lvfa hui” Tiqi Shouli Baohu Binwei Zhiwu Gongyi Susong (中国“绿发会”提起首例保护濒危植物公益诉讼) [*China Biodiversity Conservation and Green Development Foundation Initiated the First Public Interest Litigation to Safeguard the Endangered Plant*], Zhongguo Qingnian Bao (中国青年报) [CHINA YOUTH DAILY], Sept. 18, 2015, http://zqb.cyol.com/html/2015-09/18/nw.D110000zgqnb_20150918_1-04.htm.

⁶¹² The Administrative Procedure Law does not authorize citizens and organizations to challenge agency action in the public interest. *See supra* note 18–21 and accompanying text.

of the human environment.⁶¹³ With the liberalized standing doctrine, citizens and environmental organizations in the United States have routinely brought actions under the Administrative Procedure Act to halt projects where the environmental impact statements prepared by agencies were inadequate.⁶¹⁴

While NEPA provides an important avenue for environmental plaintiffs to challenge questionable projects, NEPA does have some drawbacks. As noted by scholars, the victory in NEPA litigation “is often likely to be only a temporary one” because over time agencies will “become more adept at preparing invulnerable statements” that satisfy the statutory requirements.⁶¹⁵ Eventually, NEPA is unlikely to allow environmental plaintiffs to “go beyond the procedural requirements of the impact statement to challenge the merits of the contested actions.”⁶¹⁶ The limitations of NEPA litigation can be overcome by public nuisance actions. Rather than attacking procedure or “technical violations,” a public nuisance action “focuses squarely on the merits and is brought directly against the source, not the government.”⁶¹⁷ As a result, public nuisance law provides plaintiffs with more leverage for challenging agencies’ substantive decisions.

It is desirable for China to move toward lifting the restriction on standing to pursue judicial review of agency actions. However, even if plaintiffs could seek judicial review in these two dam cases, it would be difficult for them to challenge the merits of the projects. Instead, by “direct[ing] [litigation] at the polluter himself rather than at the government

⁶¹³ See National Environmental Policy Act, 42 U.S.C. § 4332(C) (2012).

⁶¹⁴ See, e.g., *Dubois v. U.S. Dep’t of Agric., et al.*, 102 F.3d 1273, 1301 (1st Cir. 1996) (holding that the Forest Service violated NEPA in issuing a permit for the expanded ski resort because it failed to consider and evaluate the relative merits of reasonable alternatives in the environmental impact statement).

⁶¹⁵ Bryson & Macbeth, *supra* note 408, at 277.

⁶¹⁶ *Id.*

⁶¹⁷ Antolini, *supra* note 395, at 884.

which licenses, leases, sells to, or otherwise enables the environmental degradation,”⁶¹⁸ litigation under a public nuisance-like framework would provide a legitimate opportunity to second guess the agency’s authority.⁶¹⁹ In conclusion, a public nuisance-style EPIL would have unique advantages over citizen suits and judicial review when an activity is fully in compliance with environmental laws.

While the increased number of EPIL suits have swept to the forefront of national attention in recent years, few has examined these cases with a coherent theoretical perspective. This Chapter examines recent EPIL litigation with the purpose of discovering their common theoretical grounds. It finds that many lawsuits do not fit with the citizen suit model, which simply allows citizen plaintiffs to enforce existing environmental requirements. Instead, EPIL have been used by public and private plaintiffs to seek redress for various environmental harms where statutory remedies are unavailable or incomplete. The flexibility and gap-filling role of EPIL is quite similar to that of the U.S. public nuisance law discussed in Chapter 4.

On the one hand, the broad frame of EPIL allows plaintiffs to be very creative in seeking redress for environmental harms. On the other hand, the breadth and flexibility of EPIL framework can be both a strategic resource and a constraint for environmental plaintiffs. For instance, when running counter to prevailing power relationships, the broad and flexible nature of EPIL can be employed by courts as a strategy to avoid unwanted lawsuits.

⁶¹⁸ Bryson & Macbeth, *supra* note 408, at 278.

⁶¹⁹ See Abrams & Washington, *supra* note 390, at 397.

In this way, as mentioned earlier, the EPIL framework is better treated as a contingent resource, where the ideological and institutional limitations may prevent EPIL from promoting profound change in the environmental protection cause in China. In particular, it is a conventional view that Chinese courts, which are subject to external and internal constraints, enjoy limited autonomy and independence. However, using western-style judicial independence as a benchmark may neglect the strategic sophistication of Chinese courts and the dynamic complexity of judicial independence in China. In fact, the cases discussed in this Chapter show that many courts have had an appetite for EPIL suits despite structural constraints. In these landmark cases, courts have been willing to provide a remedy for a wide range of environmental harms by fashioning injunctive relief tailored to the circumstances and by awarding ecological damages calculated by the “virtual treatment cost” method. This judicial willingness to use EPIL’s power and embrace innovation is best illustrated by the courts’ willingness to second guess the merits of agency’s decisions by allowing suits against “lawful” projects to proceed. In sum, as evidenced from the analysis of EPIL suits in this Chapter, early signs are that the judiciary is utilizing the breadth and flexibility of the EPIL framework in a manner that matches up well with the theoretical promise of the public nuisance doctrine.

CONCLUSION

Chinese EPIL has attracted widespread attention in recent years. By simply allowing public authorities and environmental groups to bring a suit against “acts of polluting or damaging the environment that have harmed the public interest,” the 2012 CPL and 2014 EPL created an amorphous and ambiguous liability regime. There have been two alternative discourses on EPIL among scholars. Western observers conveniently view EPIL as something equivalent to the citizen suit that is familiar to them. They are less patient in understanding the essence of this emerging framework but more interested in drawing some profound implications from the establishment of EPIL and expressing their cautious optimism about the future of EPIL. For Chinese scholars, the influence of the citizen suit induced some to examine this newly created EPIL from a citizen suit perspective, while the ingrained tort law tradition led others to conceive EPIL, more or less uncomfortably, as an expanded tort liability. Unfortunately, few scholars have realized the differences between these two discourses on EPIL, let alone which model is better. For practitioners, this ambiguity leads to confusion regarding what kind of acts they can challenge and what sort of relief they can seek. In China, practitioners are testing the boundaries of the new liability regime of EPIL but doing so without knowing its core, putting them at a distinct disadvantage.

By evaluating the two discourses on EPIL, this dissertation provides the first in-depth exploration of the fundamental theoretical justification of the emerging EPIL. After examining the benefits and limits of viewing EPIL as a type of citizen suit and introducing public nuisance law as a path forward in reconciling the tort discourse, this dissertation

argues that EPIL should be embraced as a public nuisance-style framework that could provide a broad and flexible remedy when weak environmental regulation or enforcement is shown to be inadequate to protect the public from harm.

Admittedly, by allowing private parties to initiate enforcement actions, EPIL modeled on citizen suit may cure government enforcement failure due to political pressure, resource shortages, and capture-like risk. However, it will be politically challenging to import the dual enforcement mechanism in China. In addition, as citizen suits can only tackle specific violations defined by statutes, the role of citizen suit-like EPIL will be moderate because of significant gaps and limitations in existing environmental laws.

Instead of simply functioning as an alternative to government enforcement, public nuisance law serves as a complement to existing environmental laws by requiring only the showing of environmental harm. Therefore, EPIL operating like public nuisance law may encompass a wide range of harms especially when there is a lack of effective regulation or government enforcement. The persuasiveness of public nuisance law as a useful model for conceptualizing the role of EPIL is also strengthened by similarities between current EPIL and public nuisance law: Chinese EPIL is of an amorphous nature, encompasses public authorities as plaintiffs, and provides more flexible remedies, all hallmarks of public nuisance doctrine. Finally, by examining the landmark cases that have been brought to date, this dissertation finds that EPIL has been utilized as a broad tool to fill the myriad gaps in existing environmental laws in a variety of ways. In other words, litigation in practice has largely honored the theorized purpose of a public nuisance-like regime whereas using a citizen suit model alone to explain EPIL fails to justify many of the recent lawsuits.

This dissertation makes a strong theoretical and empirical case for using public nuisance law as a framework for conceptualizing and shaping the emerging EPIL in China. If we are willing to adopt a public nuisance perspective to examine EPIL litigation, we may find, however, that some lawsuits do not closely fit a public nuisance-like framework. Public nuisance law and environmental statutes are two independently operating systems. In an age of comprehensive environmental statutes, public nuisance law plays a role in filling various gaps in regulatory framework. Similarly, EPIL is also supposed to provide a complementary or alternative remedy where existing environmental legislation fails to provide an adequate remedy. In a few cases examined in Chapter 5, however, plaintiffs have brought EPIL suits when there seemed to be statutory remedies. For example, in the *Nanping* case and the *Taizhou* case, the competent agencies seemed to have authority to order the violators to clean up pollution, the very relief requested by plaintiffs.⁶²⁰

It is unclear why environmental harms in these cases could not be addressed by agencies with regulatory authority and enforcement power seeking statutory remedies. There might be some unknown obstacles that have prevented agencies from pursuing statutory remedies. If this is true, plaintiffs were justified to bring EPIL suits to seek relief. Nevertheless, it is worthwhile to investigate what are these obstacles and how to overcome them. It is also possible that because EPIL is gaining momentum in China, administrative agencies, the procuratorate, and environmental groups are enthusiastic about resolving environmental problems thorough filing EPIL suits. In this scenario, plaintiffs bringing EPIL suits are not justified to sidestep statutory schemes that address the alleged problems. In order to maintain the primacy of statutory remedies and avoid administrative agencies

⁶²⁰ See *supra* notes 571–573 and accompanying text.

from abdicating their responsibilities, courts in EPIL suits need to engage in an analysis of whether statutory laws can adequately remedy the specific type of environmental harm alleged in the case. If courts determine that the legislature has provided an adequate enforcement mechanism for addressing the type of environmental harm in question, courts should not allow an EPIL suit to proceed until plaintiffs, both public and private, have resorted to statutory remedies but still could not fully address the environmental harm occurred.

Besides the concern about the illegitimate preemption of statutory remedies by EPIL suits, the easy availability of ecological damages also raised the issue of appropriate type of remedy in EPIL suits. As noted earlier, the 2015 EPIL Interpretation was specially formulated to provide remedy for damage to the environment. The liability regime created by the 2015 EPIL Interpretation is quite similar to the liability system established under certain U.S. environmental statutes. For example, CERCLA establishes a comprehensive scheme for providing broad federal authority to respond promptly to releases or threatened releases of hazardous substances, and imposing liability upon responsible parties for costs of such response and natural resource damage resulting from releases.⁶²¹ CERCLA expands the scope of recovery by authorizing the federal government to respond to a release or substantial threat of a release of hazardous substances and recover response costs incurred.⁶²² Moreover, the natural resource damages provisions of CERCLA incorporated the goal of the common tort law “to make whole the injured plaintiff” but replaced “the

⁶²¹ 42 U.S.C. §§ 9601-9675 (2012).

⁶²² See Latham, Schwartz & Appel, *supra* note 482, at 756.

common-law damage theories of market valuation and least cost solutions” with a new statutory approach to damages—restoration of injured natural resources.⁶²³

To recover damages for injuries to natural resources, the designated trustees must be able to demonstrate an injury to the affected natural resources,⁶²⁴ determine that there is a pathway linking the release to the injury,⁶²⁵ quantify the effect of the release in terms of a reduction in natural resource services from the baseline condition,⁶²⁶ and once restoration is warranted, convert the proven injury into appropriate amount of damages. Under CERCLA and its regulations, damages include two components: (1) restoration costs—the costs to restore, rehabilitate the injured resources, or the costs to replace and/or acquire the equivalent of resources; and (2) compensable value—the value of services lost to the public for the time period from the release until the return of baseline level of resources/services.⁶²⁷ It seems that the 2015 EPIL Interpretation’s expansive construction of traditional tort remedies—“restoration to the original status” and “damages”—drew heavily on the CERCLA’s liability scheme for injury to natural resources.⁶²⁸

Because the process and capabilities for assessing natural resource damage in China lag far behind many developed countries, the 2015 EPIL Interpretation authorizes the use of cost that the defendants would have spent on pollution control to achieve compliance to measure damage to the environment when it is difficult or costly to determine the amount

⁶²³ VALERIE ANN LEE & P. J. BRIDGEN, *THE NATURAL RESOURCE DAMAGE ASSESSMENT DESKBOOK: A LEGAL AND TECHNICAL ANALYSIS* 9 (2002).

⁶²⁴ Injury is broadly defined as a measurable adverse change in the chemical or physical quality or the viability of a natural resource resulting directly or indirectly from exposure to a release of a hazardous substance. *See* 43 C.F.R. § 11.14 (v) (2017).

⁶²⁵ *See id.* § 11.63.

⁶²⁶ *See id.* § 11.70 (a).

⁶²⁷ *See id.* § 11.80 (b).

⁶²⁸ *See supra* notes 79–80 and accompanying text.

of damages.⁶²⁹ Relying on this technical expediency, plaintiff have successfully secured huge damages for ecological injury allegedly caused by defendants' excessive discharges without needing to prove the scope and extent of the harm, the causal link between the defendants' conduct and the harm, and the necessity of remediation. The underlying assumption is that as long as a defendant's discharge violated applicable emission/effluent standards, it must have caused an injury to the environment itself that requires compensation for, no matter whether it is possible to prove, quantify, and remediate the environmental injury and whether the alleged environmental problem has caused an actual injury to a person or property.

While environmental plaintiffs may favor such ecocentric theory of damages, it may be resisted by defendants. For instance, in the *Zhenhua* case, one defense raised by the defendant was that it was difficult to attribute air pollution to the defendant's emissions since there were so many sources that have contributed to air pollution.⁶³⁰ Similarly, the defendant in the air pollution case brought by Friends of Nature contended that local air quality data showed no injury to the atmosphere despite its excessive emissions, and therefore the plaintiff's claim for ecological damages is not supported by evidence and law.⁶³¹ Given these controversies, courts and stakeholders in academic and policy arenas may need to reexamine the advantages and disadvantages of measuring ecological damages by the virtual treatment cost method.

⁶²⁹ See *supra* notes 541 and accompanying text.

⁶³⁰ See *Zhenhua* First Instance Judgment, *supra* note 519.

⁶³¹ See Diao Fanzhao (刁凡超), *supra* note 529.

The foregoing discussion highlights the major research findings of this dissertation and calls attention to some EPIL litigation practices that might be potentially problematic. Having argued that a public nuisance model can better inform our understanding and reform of the emerging EPIL, however, it is necessary to point out that the differences between citizen suits and public nuisance actions might not be as vast as previously thought. Fundamentally, both citizen suits and public nuisance actions are intended to tackle diffuse environmental harms by inviting intervention by public-spirited citizens and governmental authorities as representatives of the public interest. Due to public nuisance actions' and citizen suits' different relationships with existing environmental laws, the choice of a citizen-suit framework versus a public nuisance framework varies with the development of environmental laws. The prominence of citizen suits and the modern use of public nuisance law as gap-filler in the United States illustrate how a mature legal system has captured the full breadth of broad-based environmental harms, while still leaving room to reform the "special injury" rule with public nuisance actions. Therefore, while this dissertation argues that current EPIL should be embraced as an independent tool to vindicate public environmental interest, in the future it is advisable for China to enact separate citizen suit provisions under individual environmental statutes which are becoming increasingly comprehensive and powerful.

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