

ISSUE BRIEF

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ENVIRONMENTAL PUBLIC INTEREST LITIGATION IN CHINA

The 2012 revision to Article 55 of the Civil Procedure Law (CPL)ⁱ effective January 2013, allowed relevant bodies and organizations to represent the public interest in court lawsuits to address environmental pollution. 2014-2015 has been marked by further major legal and institutional developments towards the establishment of an Environmental Public Interest Litigation (EPIL) System in China.

Towards the establishment of an EPIL System in China: progress and opportunities

The **Environmental Protection Law (EPL)**ⁱⁱ, amended on 24 April 2014 – for the first time in 25 years - introduces significant improvements, which became effective in January, 2015. These include:

- ✓ Environmental impact assessment requirement for development plans and construction projects (Article 19);
- ✓ Environmental protection targets as part of the performance evaluation system for local governments and departments with environmental supervision responsibilities (Article 26);
- ✓ Enhanced transparency, environmental information disclosure and public participation (Articles 53 to 57);
- ✓ Explicit reference to “social organizations” as eligible entities to file environmental lawsuits on behalf of the public as well as the establishment of eligibility criteria (Article 58);
- ✓ Strengthened legal liability of polluters, including:
 - The penalty may include cumulative daily fines, replacing the previous one-off fee system (Article 59);
 - Detention of up to 15 days for individuals subject to direct liabilities (Article 63);
 - Strengthened supervision of higher levels people’s governments and competent environmental protection departments over lower levels with regard to the enforcement of administrative sanctions (Article 67).

To complement the amended law, the *Supreme People’s Court (SPC)* issued an **Interpretation on Several Issues Regarding the Application of Law in Environmental Public Interest Civil Litigation**ⁱⁱⁱ.

The Interpretation, passed on 8 December 2014 and effective on 7 January 2015, provides further important guidance regarding EPIL:

- ✓ *The scope of social organizations eligible for EPIL is expanded.*

Article 58 of the EPL qualifies social organizations which have their registration at the civil affairs departments of people’s governments at or above municipal level with sub-districts, specialize in environmental protection public interest activities for five consecutive years or more and have no law violation records.

The SPC Interpretation further clarifies and adopts a broader definition of “social organizations” (Article 2 to 5) to accommodate additional types of approved non-profit groups in the future^{iv}.

- ✓ *The scope of cases qualifying for EPIL is also expanded.*

The court has the obligation to hear cases not only when actions polluting the environment or disrupting the ecology have already harmed public interest, but also when such actions have a significant risk of harming the public interest, providing certain further provisions of the Civil Procedure Law are met (Article 1).

- ✓ *The responsible jurisdiction to hear EPIL cases is clarified.*

In order to address the reluctance of some local courts to hear cases against polluting firms that are often substantial contributors to court funding through tax payments, the Interpretation provides that social organizations may seek a court outside the locality of the polluter. Social organizations are also allowed to sue polluters outside of their own locality (Articles 6 and 7).

- ✓ *The burden of proof on the plaintiff is potentially eased.*

If the defendant refuses to provide environmental information requested by the plaintiff, the court may presume that the plaintiff’s assertions in relation to that information have been established. When considered necessary, the court can investigate and gather evidence on its own (Article 13).

In cases where the plaintiff bears the burden of proof on a specialized issue that is essential to the public interest, the court may retain a qualified expert to conduct the appraisal (Article 14).

- ✓ *Litigation costs may be lowered for the plaintiff* (Articles 22, 24 and 33) *and undue influence on plaintiffs is reduced* (Articles 16, 17 and 27).

In addition, ***Institutional measures*** have also been taken to support the implementation of the amended EPL.

In July 2014, the SPC announced the establishment of an *Environment and Resource Tribunal*^l, which is expected to guide the work of the 134 environmental courts set up in 16 provincial-level administrative regions across the country since 2007.

Following the Fourth Plenum Decision of the Chinese Communist Party Central Committee in October 2014, the *Supreme People's Procuratorate* is currently exploring the establishment of a system to allow procuratorates to file environmental lawsuits on behalf of the public^{vi}.

On 26 December 2014, the SPC, Ministry of Civil Affairs and Ministry of Environmental Protection issued a *Notice on Implementing EPICL*^{vii} to strengthen the coordination^{viii} among people's courts, civil affairs offices and environmental protection bureaus in this regard.

The current practice of EPIL in China: remaining challenges and future prospects

In spite of significant progress towards the establishment of an EPIL system in China, the current practice reveals a number of persistent challenges standing in the way of an effective and efficient implementation of the legal and institutional framework. In spite of the existence of over 100 environmental courts, reports show relatively few cases to date.

Three major hurdles

- *Weak capacity of NGOs to handle EPIL cases*^{ix}

Although the number of environmental NGOs qualifying under Article 58 of the amended EPL is estimated to be between 300 and 700 (according to different sources), experts consider that around 10 NGOs have the actual technical, financial, human and managerial capacity to handle EPIL cases.

- *Local protectionism and vested economic interests*^x

As substantial contributors to local employment and taxes, including court funding, polluting firms are sometimes protected by local officials, who may exercise undue influence over the plaintiffs as well as place pressure on the courts not to hear the cases.

- *Extreme complexity of assessing damages*^{xi}

It is in practice very difficult for courts to find certified experts to assess damages, especially when it comes to air pollution and harm to human health. As a consequence, courts often refuse to hear cases to avoid the difficulties and risks of having to carry out the assessment themselves.

Other significant challenges

- Tighter political control and scrutiny over NGOs
- Weak environmental legal awareness of some of the judicial personnel and environmental protection authorities
- Courts' performance indicators based on cases completed, disincentivizing judges to accept new and complicated cases^{xii}

- Insufficient coordination among courts and environmental protection bureaus
- Collusion among police, procuratorates and courts to discourage cases
- Inconsistencies with some related laws and regulations such as NGO registration rules^{xiii}
- Absence of similar provisions for public interest administrative litigation in the amended Administrative Procedure Law
- Lack of clarity over victims and lawyers' compensation possibilities and mechanisms

The way forward

In light of the remaining challenges, the following considerations may provide directions for the further development of EPIL in China:

- ✓ Pursue awareness-raising and capacity development initiatives for NGOs, judicial and administrative personnel
- ✓ Intensify legal and institutional reforms towards the prevention of administrative interference in judicial proceedings
- ✓ Where damage to the environment or human, animal or plant life is hard to evaluate, assess the costs of company operations and the money saved from polluting as a basis for court damages judgment
- ✓ Reform courts' performance indicators system
- ✓ Strengthen coordination among courts and environmental protection bureaus
- ✓ Improve consistency among related laws and regulations
- ✓ Conduct pro-active policy advocacy for the inclusion of PIL in the Administrative Procedure Law
- ✓ Establish a sustainable compensation mechanism for victims and public interest lawyers
- ✓ Promote further efforts towards enhanced transparency, environmental information disclosure and public participation

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^l <http://www.inchinalaw.com/wp-content/uploads/2013/09/PRC-Civil-Procedure-Law-2012.pdf>

ⁱⁱ <https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf>

ⁱⁱⁱ <http://court.gov.cn/fabu-xiangqing-13025.html>

^{iv} <http://www.court.gov.cn/zixun-zhuanti-aHR0cDovL3d3dy5jaGluYWNvdXJ0Lm9yZy9hcnRyY2xIL3N1YmplY3RkZXRhWwvvaWQvTXpBd05FakpNNEFCQUEIM0QM0Quc2h0bWw.html>

^v <http://www.court.gov.cn/zixun-xiangqing-6512.html>

^{vi} http://www.spp.gov.cn/llyj/201504/t20150427_96204.shtml

^{vii} <http://court.gov.cn/fabu-xiangqing-13026.html>

^{viii} “最高法院发布环境公益诉讼司法解释”, *公益时报*, 2015-01-15

^{ix} Zhang Yu, “New law allows NGOs to pursue legal action against environmental offenders”, *Global Times*, 2015-1-19

^x Liu Qin, “China's top court may lean on local government to enforce environmental law”, *chinadialogue*, 2015-02-11

^{xi} Xia Jun, “China's courts fail the environment”, *chinadialogue*, 2012-01-16

^{xii} Susan Finder, “Supreme People's Court overhauls judicial performance indicators”, *Supreme People's Court Monitor*, 2014-12-27

^{xiii} 王灿发 & 程多威 (2014), “新《环境保护法》下环境公益诉讼面临的困境及其破解”, *法律适用*, (8), 46-51.