

HOW EFFECTIVE A WEAPON IS THE NEW EPL IN CHINA'S "WAR AGAINST POLLUTION"?: THE PAST TRIUMPHS AND FUTURE CHALLENGES OF ENVIRONMENTAL PUBLIC INTEREST LITIGATION

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I. INTRODUCTION

It is a familiar image: a thick haze of grey smog engulfing Beijing as masked citizens rush to work. It is no secret that the People's Republic of China (PRC) has a severe pollution problem. According to the World Health Organization, China is the world's deadliest country in terms of outdoor air pollution.¹ In 2015, air pollution was reportedly responsible for killing 4,000 people a day in China, amounting to a staggering 1.6

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1. Adam Vaughan, *China Tops WHO List for Deadly Outdoor Air Pollution*, GUARDIAN (Sept. 27, 2016), <https://www.theguardian.com/environment/2016/sep/27/more-than-million-died-due-air-pollution-china-one-year>.

million pollution-attributed deaths per year.² Another recent study found that ninety-two percent of China's population experienced at least 120 hours of unhealthy air from April 2014 to August 2015.³ It is thus no surprise that seventy-six percent of people in China deem air pollution a "big problem" according to a 2015 Pew Research global survey.⁴

In response to the increasing concern over hazardous air quality, the Chinese government has repeatedly declared a "war against pollution."⁵ One such declaration came from Premier Li Keqiang at the opening of the annual meeting of parliament in March 2014,⁶ a month after Western headlines had declared, "China's toxic air pollution resembles nuclear winter."⁷ In his speech, Li outlined a series of measures the government would pursue to improve air quality and combat smog, which Li described as "nature's red-light warning against inefficient and blind development."⁸ Craig Hart, an expert on Chinese environmental policy and Associate Professor at China's Renmin University, described Li's publicly broadcasted speech as "an acknowledgement at the highest level that there is a crisis."⁹ In the month following Li's declaration, China's legislature, the Standing Committee of the National

2. Alex Morales, *China Air Pollution Kills 4,000 People a Day: Researchers*, BLOOMBERG (Aug. 13, 2015), <http://www.bloomberg.com/news/articles/2015-08-13/china-air-pollution-kills-4-000-people-a-day-researchers>.

3. *Id.*

4. George Gao, *As Smog Hangs Over Beijing, Chinese Cite Air Pollution as Major Concern*, PEW RES. CTR. (Dec. 10, 2015), <http://www.pewresearch.org/fact-tank/2015/12/10/as-smog-hangs-over-beijing-chinese-cite-air-pollution-as-major-concern>. Additionally, thirty-five percent surveyed regard air pollution as a "very big problem," and forty-one percent regard it as a "moderately big problem." *Id.*

5. *What Is China Doing to Tackle Its Air Pollution?*, BBC NEWS (Jan. 20, 2016), <http://www.bbc.com/news/world-asia-china-35351597>.

6. *China to 'Declare War' on Pollution, Premier Says*, REUTERS (Mar. 4, 2014), <http://www.reuters.com/article/us-china-parliament-pollution-idUSBREA2405W20140305>.

7. *See, e.g., Jonathan Kaiman, China's Toxic Air Pollution Resembles Nuclear Winter, Say Scientists*, GUARDIAN (Feb. 25, 2014), <https://www.theguardian.com/world/2014/feb/25/china-toxic-air-pollution-nuclear-winter-scientists>; Hannah Beech, *China's Smog Is So Bad They're Now Calling It a 'Nuclear Winter,'* TIME (Feb. 26, 2014), <http://time.com/9802/beijing-air-pollution-nuclear-winter/>.

8. *China to 'Declare War' on Pollution, Premier Says*, *supra* note 6.

9. *Id.*

People's Congress ("NPC Standing Committee" or NPCSC), adopted significant amendments to the Environmental Protection Law (EPL).¹⁰ The amended EPL provisions subsequently became effective on January 1, 2015.¹¹

Following the enactment of the new EPL, the PRC took additional steps to address pollution. For example, the NPC Standing Committee revised the *Law on the Prevention and Control of Air Pollution of the People's Republic of China* in August 2015,¹² and the Communist Party's Central Committee and the State Council published the *Integrated Reform Plan for Promoting Ecological Progress* in September 2015.¹³ In addition, in 2016, the PRC ratified the Paris Agreement,¹⁴ which requires that China "cut carbon emissions by 60-65% per unit of GDP by 2030, compared with 2005 levels, and boost its use of non-fossil fuels so they accoun[t] for 20% of its energy consumption."¹⁵ While these events are important developments in China's overarching approach to combating environmental degradation and therefore worth mentioning, this paper will

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

11. Zhong Hua Ren Min Gong He Guo Huan Jing Bao Hu Fa (中华人民共和国环境保护法) [Environmental Protection Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, revised by the Standing Comm. Nat'l People's Cong., Apr. 24, 2014, effective Jan. 1, 2015) [hereinafter Revised EPL], <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=223979> (China).

12. Mingqing You, *Annual Review of Chinese Environmental Law Developments: 2015*, 46 ENVTL. L. REP. 10386, 10389 (2016).

13. See Andrew Shepherd, *The Perilous Hunt for APEC Blue: The Difficulties of Implementing Effective Environmental Regulations in China*, 6 ARIZ. J. ENVTL. L. & POL'Y 595, 596-97 (2016) (citing Press Release, Communist Party of China Cent. Comm. & State Council, Full Text: Integrated Reform Plan for Promoting Ecological Progress (Sept. 22, 2015), http://english.gov.cn/policies/latest_releases/2015/09/22/content_281475195492066.htm).

14. *Paris Agreement- Status of Ratification*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE http://unfccc.int/paris_agreement/items/9444.php (last visited Nov. 8, 2017) (noting ratification by China on Sept. 3, 2016).

15. Tom Phillips, *China Ratifies Paris Climate Change Agreement Ahead of G20*, GUARDIAN (Sep. 3, 2016), <https://www.theguardian.com/world/2016/sep/03/china-ratifies-paris-climate-change-agreement>; see also Paris Agreement, Dec. 12, 2015, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf (entered into force Nov. 4, 2016).

focus narrowly on the impact of environmental public interest litigation under the revised EPL.

In general, the EPL is a series of provisions “developed for the purposes of protecting and improving environment, preventing and controlling pollution and other public nuisances, safeguarding public health, promoting ecological civilization, and enhancing sustainable economic and social development.”¹⁶ This Note will focus primarily on Articles 53 and 58 of the EPL which provide the foundation for public interest litigation. Article 53 of the new EPL states, “Citizens, legal persons and other *organizations* shall have the right to obtain environmental information, participate and supervise the activities of environment protection in accordance with the law.”¹⁷ The EPL notably empowers organizations to bring suits, thereby “opening the door to public interest litigation.”¹⁸ Although China has permitted private plaintiffs to bring pollution-related tort claims since 1986, NGOs have faced difficulty bringing such suits until Article 58 of the revised EPL gave them a direct path to do so.¹⁹ In addition, shortly after the revised EPL was enacted, China’s Supreme People’s Court (SPC) issued a judicial interpretation, consisting of thirty-five separate articles, that addressed environmental civil public interest litigation.²⁰ In general, the articles “clarified which organizations

16. Revised EPL, *supra* note 11, art. 1. Please note that throughout this Note, some translations of foreign sources may differ slightly when they are quoted in different sources.

17. *Id.* art. 53 (emphasis added).

18. 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, 2015), <http://www.bdlaw.com/news-1863.html>.

19. *See id.*; *see also* Zhong Hua Ren Min Gong He Guo Ming Fa Tong Ze (中华人民共和国民法通则) [General Principles of the Civil Law of the People’s Republic of China] (promulgated by the Sixth Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 124, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm (China) (“Any person who pollutes the environment and causes damages to others in violation of State provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.”)

20. Zui Gao Ren Min Fa Yuan Guan Yu Shen Li Huan Jing Min Shi Gong Yi Su Gong An Jian Shi Yong Fa Lv Re Gan Wen Ti De Jie Shi (最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释) [Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Inter-

may file public interest lawsuits and under what conditions, prescribed which courts have jurisdiction, addressed liability standards and the burden of proof, and set forth the remedies that a court may order.”²¹ One especially important judicial interpretation was the *Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigation*, which specified that “Article 58 provides jurisdiction not only for past and ongoing harm, but also for ‘imminent’ future harm.”²²

In addressing environmental public interest litigation under the revised EPL, this Note will first look at the Nanping case, the first environmental public interest case in China, and describe how it shaped environmental public interest litigation. Second, it will outline current challenges facing environmental public interest litigation in China. Third, this Note will discuss additional innovations, namely environmental courts and the Supreme People’s Procuratorate (SPP) pilot program, that may help environmental public interest litigation become more successful in the future. The overarching intent of this Note is to identify the trials, triumphs, and challenges of environmental public interest litigation in order to understand what needs to be done, so organizations in China can use environmental public interest litigation as a more effective tool in combating pollution and environmental degradation.

II. THE NANPING CASE: AN EXCITING START UNDER THE NEW EPL

The Nanping case was the first environmental public interest trial under the amended EPL law.²³ The Nanping case was brought by two NGOs, Friends of Nature (FON) and Fujian Green Home, against four defendants who were in-

est Litigation] (promulgated by Sup. People’s Ct., Jan. 6, 2015, effective Jan. 7, 2015) [hereinafter SPC Interpretation], <http://en.pkulaw.cn/display.aspx?cgid=240914&lib=law> (China).

21. Sulaiman Kenyatta, *Citizen Suits: A Watershed Moment In Environmental Litigation?*, CHINA BUS. REV. (May 13, 2016), <http://www.chinabusinessreview.com/citizen-suits-a-watershed-moment-in-environmental-litigation/>.

22. 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, 10858 (2015) (citing SPC Interpretation, *supra* note 20).

23. *Id.* at 10855.

volved in illegal mining activities.²⁴ Between 2008 and 2011, the defendants illegally quarried stone, dumped waste material, built roads, and damaged local forests, in direct violation of orders from the Ministry of Land and Resources.²⁵ The defendants neglected to obtain the necessary permits and ignored “repeated requests by local authorities to cease operations.”²⁶ After a Fujian court sentenced three of the defendants to prison for “the illegal appropriation of agricultural land,” the NGOs filed a separate claim in the Nanping Intermediate People’s Court on December 21, 2014 seeking “cleanup and restoration” of the mining site.²⁷ The lawsuit “ask[ed] the courts to order the plaintiffs to remove quarrying equipment and waste material, and to restore the forest to its original state.”²⁸ The court accepted the case on January 1, 2015; notably, the same day the revised EPL took effect.²⁹ On October 29, 2015, the court ruled in favor of the plaintiffs and “held the defendants liable for damaging 1.89 hectares of forestry land.”³⁰ Not only was Nanping a landmark case because it marked the success of the first environmental public interest case under the amended EPL, but also because it answered a number of questions of first impression.

First, the Nanping decision signified that the new EPL applied retroactively.³¹ Even though the illegal mining operations were conducted between 2008 and 2010, years before the amended EPL became effective on January 1, 2015, the court nonetheless applied the EPL to the Nanping case. This decision established that the EPL had authority over acts of environmental degradation that occurred before the EPL was

24. *Friends of Nature v. Xie Zhijin*, Min Min Zhong Zi Di 2060 (Higher People’s Ct. of Fujian Province Dec. 14, 2015).

25. Zhang Chun, *China Court Rules in Favour of First Public Interest Environmental Lawsuit*, CHINADIALOGUE (Nov. 11, 2015), <https://www.chinadialogue.net/article/show/single/en/8291-China-court-rules-in-favour-of-first-public-interest-environmental-lawsuit>.

26. Kenyatta, *supra* note 21.

27. Chun, *supra* note 25; *see also* *Friends of Nature v. Xie Zhijin*, Nan Min Chu Zi Di. 38 (Nanping Interm. People’s Ct. Oct. 29, 2015).

28. Chun, *supra* note 25.

29. *See* Lin & Tuholske, *supra* note 22, at 10855.

30. Kenyatta, *supra* note 21; *see also* *Friends of Nature v. Xie Zhijin*, Nan Min Chu Zi Di 38 (Nanping Interm. People’s Ct. Oct. 29, 2015).

31. *See* Shepherd, *supra* note 13, at 613–14.

promulgated, thereby broadening the scope of the EPL's application.

Second, the Nanping ruling was notable because of both the breadth of relief granted and the large monetary penalties imposed by the court.³² The Nanping case set a new precedent for what would be deemed "reasonable" relief in environmental public interest suits.³³ The court provided the following remedies:

(1) the four defendants should clear all obstacles within five months, reforest the land according to applicable technical standards for reforestation, and care for the reforested land for three years after the date when the reforested trees pass inspection by the competent administrative agency; (2) to pay RMB 1101900 Yuan (around US \$17,000) if they fail to carry out the first requirement; (3) to pay RMB 1270000 Yuan (around US \$204,000) for losses of ecological services between the dates of disruption and recovery of the ecosystem; and (4) to pay court expenses, plaintiffs' attorney fees, and other direct expenses.³⁴

The "court expenses, plaintiffs' attorney fees, and other direct expenses" awarded by the court amounted to over \$27,000; this included "the plaintiff's expert consultation fees for assessing damages (6,000 yuan, \$968), attorneys fees (121,461 yuan, \$19,590), and litigation costs (38,702 yuan, \$6,450)."³⁵

These penalties suggested to citizens that the PRC took environmental public interest cases seriously. Indeed, both the breadth of the relief and the amount of the damages awarded generated public discussion. For example, Wang Canfa, a professor at the China University of Politics and Law and founder of the Center of Legal Assistance for Pollution Victims, noted that in the Nanping case, "the presiding judge demanded envi-

32. Bourdeau & Schulson, *supra* note 18.

33. *Id.*

34. You, *supra* note 12, at 10393 (citing *Friends of Nature v. Xie Zhijin*, Nan Min Chu Zi Di 38 (Nanping Interm. People's Ct. Oct. 29, 2015)).

35. Yanmei Lin & Jack Tuholske, *Green NGOs Win China's First Environmental Public Interest Litigation: The Nanping Case*, 45 ENVTL L. REP. 11102, 11102 (2015) (referencing *Friends of Nature v. Xie Zhijin*, Nan Min Chu Zi Di 38 (Nanping Interm. People's Ct. Oct. 29, 2015)).

ronmental restoration from polluters, whereas penalties under previous laws punished the act of pollution itself.”³⁶ In addition, Ge Feng, director of the legal and policy department at Friends of Nature, commented that the fines and awards granted in the Nanping case were higher than those given in past cases, which Feng believed to be “important for cash-strapped NGOs.”³⁷

Third, the Nanping decision indicated that the SPC’s judicial interpretation could be considered retroactively.³⁸ To resolve whether “actual damages for the permanent loss of the trees” should be awarded to the plaintiffs, the court looked to Article 21 of the SPC’s judicial interpretation of the new EPL, which states, “Where plaintiff requests defendant to afford damage of interim losses of service functions during the recovery of ecological environment, people’s courts should support it according to law.”³⁹ The court consequently dismissed the plaintiff’s claim of 1.39 million yuan (US \$224,194) for actual damages because the revised EPL only authorized recovery for “interim losses of service functions during the recovery of ecological environment.”⁴⁰ Based on the SPC’s judicial interpretation, only “the local collective that had use rights to the forest” could claim actual damages for the loss of trees, not FON or Fujian Green Home.⁴¹ However, since the mining started years before the SPC’s interpretation became effective on January 7, 2015, there was a question as to whether the SPC’s interpretation should apply to the Nanping case.⁴² The court nonetheless found that “the judicial interpretation applied because

36. Zhang Chun, *NGOs Win China’s First Public Interest Environmental Lawsuit*, DIPLOMAT (Nov. 14, 2015) <http://thediplomat.com/2015/11/ngos-win-chinas-first-public-interest-environmental-lawsuit>.

37. *Id.*

38. To clarify, this point refers to the retroactive application of the SPC’s judicial interpretation of the revised EPL, whereas the first point referred to the retroactive application of the revised EPL itself.

39. Lin & Tuholske, *supra* note 35, at 11102 n.3 (referencing SPC Interpretation, *supra* note 20) (citing *Friends of Nature v. Xie Zhijin*, Nan Min Chu Zi Di 38 (Nanping Interm. People’s Ct. Oct. 29, 2015)).

40. Kenyatta, *supra* note 21 (referencing *Friends of Nature v. Xie Zhijin*, Nan Min Chu Zi Di 38 (Nanping Interm. People’s Ct. Oct. 29, 2015)).

41. Lin & Tuholske, *supra* note 35, at 11102 (citing *Friends of Nature v. Xie Zhijin*, Nan Min Chu Zi Di 38 (Nanping Interm. People’s Ct. Oct. 29, 2015)).

42. *Id.*

there was no clear rule denying liability on this matter when the defendants' actions occurred."⁴³

Lastly, the Nanping decision expanded the understanding of who has standing in these types of cases. The court had to determine whether the NGOs had standing because Article 58 of the amended EPL states, in pertinent part:

For activities that cause environmental pollution, ecological damage and public interest harm, social organizations that meet the following conditions may file litigation to the people's courts:

(1) Have their registration at the civil affair departments of people's governments at or above municipal level with sub-districts in accordance with the law;

(2) Specialize in environmental protection public interest activities for consecutive five years or more, and have no law violation records.⁴⁴

Thus, an issue of standing arose because one of the plaintiff NGOs, FON, had not been registered for the necessary five years when the claim was originally filed on December 4, 2014.⁴⁵ The court nonetheless found standing because FON had been "engaged in environmental protection public interest activities prior to registering, and it met the five-year registration requirement during the adjudication of this case."⁴⁶ This finding was an important aspect of the Nanping decision because it reflected that the court was willing to be flexible to accommodate valid claims. Furthermore, since "organizations often re-register due to changes in name or management," legal experts suggested that "waiving this technicality [or interpreting it flexibly] w[ould] allow many more groups to bring cases."⁴⁷

Essentially, the Nanping case set the tenor for how environmental public interest cases under the new EPL would be addressed. The case clarified that both the EPL and the SPC's judicial interpretations could be applied retroactively, ex-

43. *Id.*

44. Revised EPL, *supra* note 11, art. 58.

45. Lin & Tuholske, *supra* note 35, at 11102.

46. *Id.* (referencing *Friends of Nature v. Xie Zhijin*, Nan Min Chu Zi Di 38 (Nanping Interm. People's Ct. Oct. 29, 2015)).

47. Chun, *supra* note 36.

panded on the understanding of who has standing in environmental cases, and set a new precedent for what type of relief is reasonable in environmental public interest suits. Overall, it suggested to the public that protecting health and environmental integrity was a priority and acted as a warning to companies that breaking environmental laws would not be tolerated.

III. SLOW PROGRESS: CHALLENGES TO THE SUCCESS OF ENVIRONMENTAL PUBLIC INTEREST LITIGATION IN CHINA

The positive outcome achieved in the Nanping case marked an exciting introduction to environmental public interest litigation under the new EPL. However, since the Nanping case, environmental public interest litigation has been less successful than many had hoped. Numerous challenges have arisen that have impeded the success of environmental public interest litigation. Current challenges include: (i) costs associated with bringing such litigation, (ii) government-led clampdown on NGOs, (iii) lack of accessible and accurate information, (iv) China's decentralized structure and absence of uniform enforcement, (v) cautious courts, and (vi) economic slowdown. In addition, the new U.S. administration under President Trump may pose a future challenge to the success of environmental public interest litigation in China.

A. Cost

The financial burden of bringing environmental public interest litigation has decreased the effectiveness of such litigation in China by straining the ability of NGOs to pursue lawsuits.⁴⁸ The high cost associated with bringing an environmental public interest suit is attributable to multiple factors. First, the NGO must pay the high legal fees associated with bringing a case.⁴⁹ Second, a lack of environmental lawyers, or personnel

48. See Olivia Boyd, *Civil Society Needed to Enforce Environmental Law*, CHINADIALOGUE (Oct. 20, 2016), <https://www.chinadialogue.net/article/show/single/en/9324-Civil-society-needed-to-enforce-environmental-law> (noting that early evidence suggests that "NGOs are struggling with the financial burden of court cases").

49. Zhang Chun, *Environmental Law Blunted by Crippling Court Cost*, CHINADIALOGUE (Aug. 22, 2016), <https://www.chinadialogue.net/article/show/single/en/9203-Environmental-law-blunted-by-crippling-court-cost>.

experienced with environmental law, drives costs up further.⁵⁰ Third, “[c]ourts often require plaintiffs to hire independent bodies to help appraise the monetary value of the environmental damage claimed.”⁵¹ For example, a July 2016 environmental public interest lawsuit launched by All China Environment Federation (ACEF) against glass-making firm Zhenhua Ltd cost the NGO “at least 500,000 yuan (USD \$75,000) in legal expenses and consultancy fees.”⁵² Lastly, strict government regulations on fundraising curtail the ability of NGOs to raise the capital to fund more environmental public interest cases.⁵³ These factors “make it hard for anyone but the richest outfits to bring actions.”⁵⁴ Unfortunately, there are not many NGOs that have both an interest in pursuing environmental public interest claims and the financial capacity to do so.

B. *Government-led Clampdown on NGOs*

The government-led clampdown on NGOs has also hampered the effectiveness of environmental public interest litigation. Under the Communist regime, the PRC has consistently “suppressed the growth of any form of organization other than the party itself,” such as NGOs.⁵⁵ Recently, however, this suppression has reportedly gotten worse; commentators suggest that “[i]n the past five years, the screws have been tightened further on . . . these and other groups.” NGOs are thus forced to fight against what a “consistency of evidence show[s] [is] a country that is cracking down, closing up, and lashing out in ways different from its course in the previous 30-plus years.”⁵⁶

50. See Te-Ping Chen, *Environmental Trial Tests Beijing's Nerve on Pollution*, WALL ST. J. (May 18, 2015), <http://www.wsj.com/articles/environmental-trial-kicks-off-in-china-1431939272> (noting that “lack of experienced legal personnel” was a “hurdle” for nonprofit groups).

51. *Id.*

52. Boyd, *supra* note 48; see also Chun, *supra* note 49 (“The outcome . . . highlighted the financial difficulty of prosecuting big, industrial firms, which has led to a rising number of NGOs opting not to pursue legal action.”).

53. See Chen, *supra* note 50 (“Bringing a case can rack up thousands of dollars in legal bills—a challenge in a climate in which nonprofits’ ability to raise funds is already strictly curtailed.”).

54. Boyd, *supra* note 48.

55. James Fallows, *China's Great Leap Backward*, ATLANTIC (Dec. 2016), <https://www.theatlantic.com/magazine/archive/2016/12/chinas-great-leap-backward/505817/>.

56. *Id.*

The increasingly tense and repressive sociopolitical atmosphere in China might be responsible for deterring NGOs from pursuing environmental public interest litigation more aggressively. For one, the legal professionals needed to execute the environmental public interest cases may be discouraged from doing so given that “[m]any of the country’s . . . public-interest lawyers are now in jail.”⁵⁷ In addition, “environmental organizers,” who play an integral role in gathering information and coordinating environmental efforts that lay the groundwork for environmental public interest litigation, have similarly been imprisoned.⁵⁸ For example, members of the Transition Institute (TI), a liberal Beijing-based think tank, were arrested and charged with “picking quarrels and provoking troubles” based on their public interest work, which included researching the environmental impact of the extensive Three Gorges Dam project on the Yangtze River.⁵⁹ Both the founder and manager of TI were incarcerated in 2014 for publishing and lecturing on subjects that included environmental protection and law reform; the lawyer hired to represent TI’s founder was also subsequently detained.⁶⁰ These punishments were inflicted even though TI “advocated neither radical change nor revolution”⁶¹ and “avoided street activism.”⁶²

The air of hostility towards NGOs is reflected in recent Chinese legislation aimed at governing NGO activity, such as the controversial *Law on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China* (“Foreign NGO Law”), which was passed by the NPC on April 28, 2016.⁶³ The Foreign NGO Law went into effect on January 1,

57. *Id.*

58. *Id.*

59. Andrew Jacobs & Chris Buckley, *In China, Civic Groups’ Freedom, and Followers, Are Vanishing*, N.Y. TIMES (Feb. 26, 2015), http://www.nytimes.com/2015/02/27/world/asia/in-china-civic-groups-freedom-and-followers-are-vanishing.html?_r=1.

60. *Id.*

61. Patricia Adams, *China Must Free These Activists and Restore Confidence in Their Country*, HUFFINGTON POST (July 16, 2015), http://www.huffingtonpost.ca/patricia-adams/china-must-free-activists_b_7804592.html.

62. Jacobs & Buckley, *supra* note 59.

63. Zhong Hua Ren Min Gong He Guo Jin Wai Fei Zheng Fu Zu Zhi Jin Nei Huo Dong Guan Li Fa (中华人民共和国境外非政府组织境内活动管理法) [Law of the People’s Republic of China on Administration of Activities of Overseas Nongovernmen-

2017, exactly two years after the revised EPL went into effect.⁶⁴ The Foreign NGO Law stipulates that foreign NGOs may “engage in undertakings of benefit to the public in the areas of the economy, education, science, culture, health, sports and environmental protection, as well as in the areas of poverty and disaster relief.”⁶⁵ However, these entities, among other activities specified in Article 5, “shall not threaten China’s national reunification and security or ethnic unity, nor harm China’s national and social interests or the legitimate rights and interests of citizens, legal persons and other organizations.”⁶⁶ Foreign NGOs are also restricted in their ability to raise funds in China and must follow guidelines regarding reporting their activity and membership.⁶⁷ In addition, the new law requires foreign NGOs to undergo a double approval system: organizations must both (1) “find an official Chinese sponsor” and (2) “register with the police.”⁶⁸ Those that are unable to do so or fail to receive official approval are forced to cease operation in China.⁶⁹ The law’s requirement that foreign NGOs “register with the Ministry of Public Security and allow the police to scrutinize all aspects of their operations, including finances, at any time” has been deemed “draconian” given its intrusive nature.⁷⁰ In addition, the law provides that any employee of a foreign NGO can be “interrogated at any

tal Organizations in the Mainland of China] (promulgated by the Standing Comm. of the Twelfth Nat’l People’s Cong., Apr. 28, 2016, effective Jan. 1, 2017) [hereinafter Foreign NGO Law], <http://www.mps.gov.cn/n2254314/n2254409/n4904353/c5548987/content.html> (China); see also Han Kun Law Offices, *Highlights of the Foreign NGO Management Law*, LEXOLOGY (May 2, 2016), <http://www.lexology.com/library/detail.aspx?g=4a11a9b5-29e5-40a1-9df2-45740d232a67>.

64. Han Kun Law Offices, *supra* note 63.

65. Foreign NGO Law, *supra* note 63, art. 3.

66. *Id.* art. 5; see also Christopher Mirasola, *Understanding China’s Foreign NGO Activities Law*, LAWFARE (May 16, 2016), <https://www.lawfareblog.com/understanding-chinas-foreign-ngo-activities-law>.

67. Mirasola, *supra* note 66; see also Foreign NGO Law, *supra* note 63, arts. 12, 19.

68. Edward Wong, *Clampdown in China Restricts 7,000 Foreign Organizations*, N.Y. TIMES (Apr. 28, 2016), <http://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html> (discussing implications of Foreign NGO Law, *supra* note 63).

69. *Id.*

70. *Id.*; see also Foreign NGO Law, *supra* note 63, art. 6.

time,” thereby increasing the vulnerability of foreign NGO members.⁷¹

Over 7,000 foreign NGOs are allegedly subject to the law’s stringent restrictions, including those working on environmental issues,⁷² such as Greenpeace East Asia, the International Union for Conservation of Nature and Natural Resources, The Nature Conservancy, the World Wide Fund for Nature (WWF), and the International Fund for China’s Environment.⁷³ Even before the Foreign NGO Law was enacted, there was widespread concern that Chinese organizations would not want to take the risk of sponsoring foreign NGOs, which would force unsponsored foreign NGOs to shut down.⁷⁴ In addition, it was suspected that “[m]any groups will probably curtail or eliminate programs deemed politically sensitive, such as training lawyers, in order to remain.”⁷⁵ Although the Foreign NGO Law has only been in effect since January 1, 2017, evidence suggests that these initial fears have come to fruition. Only two months after China enacted the Foreign NGO Law, it was reported that the law was “already heavily impacting and hindering operations by NGOs in the country.”⁷⁶ By June, it was re-

71. Wong, *supra* note 68; *see also* Foreign NGO Law, *supra* note 63, art. 41 (“Where public security organs discover behavior they suspect violates the provisions of this Law in the course of performing oversight and supervision, they may adopt the following measures in accordance with the law:

- (1) Interview the chief representative and other representatives of the representative office of an overseas NGO;
- (2) Enter the premises or site of the activities of the overseas NGO in the mainland of China to carry out an inspection;
- (3) Question organizations and individuals related to the incident being investigated and require them to clarify matters related to the incident being investigated;
- (4) Consult and copy documents and materials relevant to the incident being investigated and seal up for safekeeping documents or materials that could otherwise be moved, destroyed, concealed or altered;
- (5) Shut down premises and facilities, or seize property, suspected of involvement in illegal activities.”).

72. Wong, *supra* note 68.

73. *NGO Directory*, CHINA DEV. BRIEF, <http://chinadevelopmentbrief.cn/directory/> (last visited Mar. 1, 2018).

74. *Id.*

75. *Id.*

76. Bertram Lang & Kristin Shi-Kupfer, *Overseas NGOs in China: Left in Legal Limbo*, DIPLOMAT (Mar. 4, 2017), <http://thediplomat.com/2017/03/overseas-ngos-in-china-left-in-legal-limbo/>.

ported that “[s]ome [NGOs] ha[d] frozen all their work on the mainland and some ha[d] retreated from it,” while others attempted to continue operating either under a “temporary fix” or simply until the government shut them down.⁷⁷

The Foreign NGO Law has thus stifled organizations whose activism, research, data, fundraising, and training could have otherwise supported environmental public interest cases. For example, the law has forced one environmental NGO from the United States to cease all activity in China and focus solely on attempting to register.⁷⁸ In addition, as a result of the Foreign NGO Law, the American Bar Association (ABA), whose work “helped train mainland lawyers to advocate citizens’ rights and the rule of law since 2004,” relocated from Beijing to Hong Kong.⁷⁹ Indeed, it has been reported that “[o]nly about 1 percent of the foreign NGOs believed to be operating in mainland China have registered” pursuant to the foreign NGO Law’s requirements, with the majority of those being chambers of commerce or trade associations.⁸⁰ Although the WWF is one example of a foreign environmental NGO that was able to successfully register—likely due to the size and prestige of the organization—many other NGOs that may have otherwise been able to help facilitate environmental public interest litigation have not been as fortunate. It is too early to know exactly what the long-term ramifications of the Foreign NGO Law will be; however, the current evidence suggests that the law will have a negative impact on the use of environmental public interest litigation in China and worsen the country’s environmental degradation problem.

On April 28, 2016, the Obama White House issued a statement on the Foreign NGO Law, expressing “dee[p] concern” that the new legislation “w[ould] further narrow space for civil society in China and constrain contact between indi-

77. Nectar Gan, *Why Foreign NGOs Are Struggling with New Chinese Law*, SOUTH CHINA MORNING POST (Jun. 13, 2017), <http://www.scmp.com/news/china/policies-politics/article/2097923/why-foreign-ngos-are-struggling-new-chinese-law>. The programme director of an affected NGO admitted that “the law is like a knife hanging above our neck.” *Id.*

78. *See id.* The environmental NGO in question requested to be anonymous because it was still in the process of applying for registration.

79. *Id.*

80. *Id.*

viduals and organizations in the United States and China.”⁸¹ Similarly, three Special Rapporteurs of the U.N. Office of the High Commissioner for Human Rights called on the PRC to repeal the law, and expressed their fear that the “excessively broad and vague provisions” and extensive “administrative discretion” could be “wielded as tools to intimidate, even suppress, dissenting views and opinions.”⁸² The joint statement further expressed concern that the law could have a “detrimental impact on the existence and operations of domestic NGOs that cooperate with foreign NGOs and/or are dependent of funding from them.”⁸³ As the aforementioned statements reflect, concern for the negative potential impact of the Foreign NGO Law extends beyond China’s borders.

During these “perilous days for independent civic groups,” NGOs may be deterred from pursuing environmental public interest litigation.⁸⁴ Although at first glance the revised EPL appears to empower NGOs to file environmental public interest claims, NGOs are understandably wary of “China’s ill-defined, shifting margins of official tolerance” and the possibility that a public trial may draw excessive attention to the NGO that could ultimately lead to the suppression of the NGO’s activity.⁸⁵

C. Access to Information

To substantiate an environmental public interest case, accurate and up-to-date information is essential. Therefore, impeded access to information and unreliable information may be two issues that contribute to the stalled success of environmental public interest litigation in China.⁸⁶

81. Press Release, The White House: Office of the Press Sec’y, Statement by NSC Spokesperson Ned Price on China’s Foreign NGO Management Law (Apr. 28, 2016), <https://www.whitehouse.gov/the-press-office/2016/04/28/statement-nsc-spokesperson-ned-price-chinas-foreign-ngo-management-law>.

82. U.N. Office of the High Comm’r for Human Rights, China: Newly Adopted Foreign NGO Law Should Be Repealed, UN Experts Urge (May 3, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19921&LangID=E>.

83. *Id.*

84. Jacobs & Buckley, *supra* note 59.

85. *Id.*

86. See Shepherd, *supra* note 13, at 605–09 (discussing the incentives local officials have to modify data and the government’s lack of capacity to sufficiently check information accuracy).

First, there are barriers to accessing information in China. The government does not publish comprehensive data on the status of environmental integrity in the country. For example, the Ministry of Environmental Protection website fails to provide historical air quality data; the Ministry only releases hourly readings and thus the data must be painstakingly compiled “hour by hour” to get a broader picture.⁸⁷ Not only has the government failed to adequately compile and openly share environmental data with the public, it has also actively impeded independent parties from collecting their own information. Recently, it was reported that many prominent “environmental organizers” are currently in jail.⁸⁸ This situation has undoubtedly contributed to the difficulty of NGOs to obtain the information and evidence necessary to support environmental public interest cases.

Second, many question the quality and validity of the environmental information that is disclosed. Accordingly, because much of the “data is self-reported,” when “a local official seeking promotion is expected to both improve the economy and improve the environment, it is not difficult to imagine a scenario where that official reports faulty data.”⁸⁹ In fact, “[o]ne study done by Professors Dalia Ghanem and Junjie Zhang showed that when air pollution levels are just over the cutoff point to be considered a ‘blue sky day’ . . . , there was evidence of data manipulation.”⁹⁰ One factor that reduces the quality of information is the decentralized system through which environmental data is collected. The national government relies on self-reported information from municipal and provincial governments, but “lacks the capacity” to verify this submitted data.⁹¹ For example, “[in] 2014, while there were 3,000 local environmental protection bureaus, there were only 400 employees at the Ministry of Environmental Protection to review

87. Didi Kirsten Tatlow, *China Air Quality Study Has Good News and Bad News*, N.Y. TIMES (Mar. 30, 2016), <http://www.nytimes.com/2016/03/31/world/asia/china-air-pollution-beijing-shanghai-guangzhou.html>.

88. Fallows, *supra* note 55.

89. Shepherd, *supra* note 13, at 608.

90. *Id.* (citing at Dalia Ghanem & Junjie Zhang, ‘Effortless Perfection:’ *Do Chinese Cities Manipulate Air Pollution Data?*, 68 J. ENVTL. ECON. & MGMT. 203, 222 (2014)).

91. Shepherd, *supra* note 13, at 608.

the submitted data.”⁹² Apart from the concern of an understaffed central agency, the local bureaus have an incentive to submit inaccurate data because they lack independence. Essentially, the bureaus are motivated to modify and underreport data because they are “both funded and staffed by municipal governments.”⁹³ The bureaus have thus been criticized for being merely “an arm of the government they are tasked with regulating.”⁹⁴

In fact, a 2013 study that evaluated whether city-reported air pollution data had been manipulated found “[a] large discontinuity indicat[ing] that manipulation occurs” and “confirmed heterogeneous manipulation behavior.”⁹⁵ However, a 2016 independent study on air pollution data was more optimistic. Although the 2016 study was limited in scope to five cities, it found similarities that suggested the Chinese air quality data was generally trustworthy.⁹⁶ That being said, the 2016 report nonetheless noted “significant data problems on the Chinese side” and recommended “improving data collection and publication.”⁹⁷ If China were to heed this recommendation and improve the accuracy and availability of environmental information, it would give NGOs more material with which to build cases and stronger evidence to support their claims, thereby making public interest litigation more effective.

92. *Id.* at 608–09.

93. *Id.* at 609.

94. *Id.*

95. Dalia Ghanem & Junjie Zhang, ‘Effortless Perfection:’ Do Chinese Cities Manipulate Air Pollution Data?, 68 J. ENVTL. ECON. & MGMT. 203, 223 (2013).

96. Tatlow, *supra* note 87 (citing BEIJING DA XUE GUANGHUA GUANLI XUEYUAN (北京大学光华管理学院) [GUANGHUA SCH. OF MGMT.], KONGQI ZILIANG PINGGU BAOGAO (ER): ZHONGGUO WU CHENGSHI KONGQI WURAN ZHUANGKUANG ZHI TONGJIXUE FENGXI (空气质量评估报告(二):中国五城市空气污染状况之统计学分析) [AIR QUALITY ASSESSMENT REPORT (2): A STATISTICAL ANALYSIS OF AIR POLLUTION IN FIVE CHINESE CITIES] (2016), http://www.stat-center.pku.edu.cn/Stat/Uploads/Files/%5B20160321_1126%5DAir%20Quality%20Assessment%20Report%20For%20Five%20Cities.pdf).

97. *Id.*

D. *PRC's Decentralized System Causes a Lack of Unified Enforcement*

Another challenge facing environmental public interest litigation is China's decentralized governance structure.⁹⁸ The EPL is enforced at the local level by city environmental protection bureaus, which results in a "wide range of enforcement standards across the country."⁹⁹ While the central government oversees local enforcement vis-à-vis the Ministry of Environmental Protection (MEP), as previously noted, constrained resources limit the effectiveness of the MEP's administrative endeavors.¹⁰⁰ For example, China's MEP only has 300 employees, while MEP's counterpart in the United States, the Environmental Protection Agency (EPA), has a staff of 17,000.¹⁰¹

Due to this decentralized structure, there has been a lack of uniformity regarding environmental public interest litigation. Typically, environmental public interest cases fare best in "[e]nvironmental courts in economically developed areas," and worse in remote areas of China.¹⁰² Indeed, NGOs report that it is more difficult to get environmental public interest cases heard in central and western China.¹⁰³ For example, Ma Yong from the China Biodiversity Conservation and Green Development Foundation, a Chinese NGO, reported that "most of the unsuccessful cases it has taken were in relatively remote Inner Mongolia and Ningxia, including eight lawsuits related to pollution in the Tengger Desert."¹⁰⁴ The fact that cases in western and central China have to fight harder "just to get their day in court" may reflect the prioritization of industrial growth over environmental protection by local governments in those areas.¹⁰⁵ This is supported by the "prevailing trend of shifting polluting industries towards the west," and corre-

98. Daniel Carpenter-Gold, *Castles Made of Sand: Public-Interest Litigation and China's New Environmental Protection Law*, 39 HARV. ENVTL. L. REV. 241, 243 (2016) ("The judiciary's limited independence has made environmental governance dependent on the overall governance structure, which was greatly affected by the country's decentralization in the 1980s and 1990s.").

99. *What Is China Doing to Tackle Its Air Pollution?*, *supra* note 5.

100. Kenyatta, *supra* note 21.

101. *Id.* Note that estimates of MEP employees vary among sources.

102. Chun, *supra* note 25.

103. *Id.*

104. *Id.*

105. *Id.*

sponding reports that “some western and central cities are rather lax in giving approvals for industrial projects.”¹⁰⁶ This trend of companies shifting to areas where courts tolerate their environmentally destructive conduct demonstrates why a lack of uniform enforcement is so problematic; the ultimate goal of environmental regulation should be to minimize environmental harm nationwide, not merely condense it into certain areas. Local judicial inaction may incentivize companies to continue breaking environmental laws, since companies that do not face the threat of having to pay large sums of compensation from environmental public interest litigation are more likely to engage in environmentally degrading activity based on a cost-benefit analysis.¹⁰⁷

China’s decentralized governance structure has allowed a disparity to form in how courts respond to environmental public interest litigation, which has in turn carved out areas where unlawful environmental degradation is allowed, if not encouraged. China must address this issue so that environmentally destructive activity decreases, rather than just relocates. To make environmental public interest litigation a more effective tool nationwide, Chinese officials must act to facilitate uniformity. For example, the resources allotted to the MEP could be increased so that it is able to provide stronger central oversight; or, alternatively, the number of environmental courts could be expanded and introduced into new areas of the country.

E. *Cautious Courts*

A related issue is cautious courts that are slow to take on environmental public interest cases. Chinese courts are reportedly “mostly taking a cautious approach” to environmental public interest cases for two main reasons: (1) handling public interest cases is unchartered territory for many courts, and (2)

106. Li Jing, *Where in China Can You Find the Worst Air Pollution? You Might Be Surprised*, SOUTH CHINA MORNING POST (Apr. 20, 2016), <http://www.scmp.com/news/china/policies-politics/article/1937381/where-china-can-you-find-worst-air-pollution-you-might>.

107. Zhang Chun, *China’s Polluters Hit with Biggest-Ever Fines*, CHINA DIALOGUE (June 6, 2015), <https://www.chinadialogue.net/blog/7643-China-s-polluters-hit-with-biggest-ever-fines/en>.

courts may suffer from a lack of judicial independence.¹⁰⁸ As a result, cautious courts may refuse to hear environmental public interest cases or may deliver inadequate resolutions. When this happens, companies realize there is little risk of having to pay high levels of compensation from environmental public interest litigation. Without this financial deterrent, companies are more inclined to break environmental laws because doing so is less expensive than obeying them.¹⁰⁹ In fact, some firms have already reportedly “crunch[ed] the numbers” and consciously decided to continue taking environmentally degrading risks because they are confident that they will not be judicially penalized for doing so.¹¹⁰

Additionally, courts that are unfamiliar with public interest cases may be more hesitant to take on environmental public interest cases because they are “unsure how to handle them or how to reach a verdict.”¹¹¹ Professor Wang Canfa reports that “there is a general lack of environmental awareness and relevant experience within the judicial community.”¹¹² In fact, the majority of judges reportedly fail to possess the “technical knowledge” to properly adjudicate environmental public interest cases.¹¹³ The general lack of experience when it comes to environmental public interest litigation has resulted in cautious courts that are ambivalent about wading into the uncharted territory of environmental public interest cases.

Furthermore, courts may suffer from a lack of judicial independence that forces them to act cautiously regarding environmental public interest cases. In China, courts are “subservien[t] to the governments at their equivalent level” according to “both the statutes dictating the composition of the courts and the Constitution itself.”¹¹⁴ Influence over courts

108. Chun, *supra* note 25 (citing specifically Ma Yong, Secretary of the China Biodiversity Conservation and Green Development Foundation).

109. *See* Chun, *supra* note 107 (discussing how some firms consult with the Institute for Public and Environmental Affairs but nonetheless decide it is cheaper to break the law because bringing public interest litigation is so difficult).

110. *Id.*

111. Chun, *supra* note 25.

112. Shepherd, *supra* note 13, at 615 (quoting Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggest Reforms*, VT. J. ENV'T. L. 158, 168 (2007)).

113. *Id.*

114. Carpenter-Gold, *supra* note 98, at 246.

can be exerted indirectly, as “[j]udges can be appointed or removed at any time by the people’s congresses at their level,” and the local governments decide the court budgets.¹¹⁵ Therefore, “[i]f courts are no more than arms of the local governments, and local governments have little incentive to enforce the law,” the effectiveness of environmental litigation is hampered.¹¹⁶ The courts face pressure from both government and business interests to either not take on potentially disruptive environmental public interest cases, or to rule in a certain manner when these cases are heard.¹¹⁷ For example, Professor Susan Whiting observed that “when local cadres, motivated by financial interests and career interests, become party to land disputes, the role of local courts in resolving such disputes appears to be weakened.”¹¹⁸

The courts are cognizant that environmental public interest cases may “cause trouble for the local government” and harm industrial growth, and these external considerations consequently may make courts hesitant to hear environmental public interest litigation.¹¹⁹ This lack of judicial independence is reflected in one case where a Chinese court “awarded significantly lower damages because the enterprises being sued were ‘key’ enterprises.”¹²⁰ This issue ties back to the problem of China’s decentralized system, as courts are often entrenched in local interests. It thus becomes more difficult for courts to isolate the facts and law involved in a case from political and business considerations. This entwinement of interests leads courts to act more cautiously when deciding whether to hear environmental public interest cases.¹²¹

115. *Id.*

116. *Id.* at 250.

117. *See id.* at 246 (noting the “high level of control that political figures exert over the decisions of Chinese courts”).

118. Shepherd, *supra* note 13, at 615 (quoting BORIS KOZOLCHYK, *COMPARATIVE COMMERCIAL CONTRACTS* 701 (2014)).

119. Chun, *supra* note 25.

120. Shepherd, *supra* note 13, at 615 (citing Elizabeth Economy, *Environmental Enforcement in China*, in *CHINA’S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT* 108, 110 (Kristen A. Day ed., 2005)).

121. Carpenter-Gold, *supra* note 98, at 243.

F. *Economic Slowdown*

China's recent economic slowdown may further shift priorities away from environmental progress and undermine environmental public interest litigation. Using environmental public interest litigation as a tool to push environmental compliance and improve environmental integrity requires government support; however, that support may be withdrawn if the government feels environmental reform undermines economic growth. In 2015, the official growth rate in China fell to 6.9%, the lowest it has been since 1990;¹²² this slump continued into 2016, as China's 2016 third quarter growth rate was 6.7%.¹²³ In addition, it has been observed that the official growth figure may not be entirely representative of the economic reality nationwide. Mun Ho, an economist at the Harvard University's Harvard-China Project who specializes in Chinese environmental policies, noted that "[i]n some places—in the 'rust belts'—growth has really decelerated, perhaps even to 2%."¹²⁴ Other negative indicators of economic slowdown in China include the fact that "imports in January 2016 fell by 18.8% compared to the same month in 2015, and exports fell by 11.2%," while "the Shanghai Stock Exchange Composite Index fell from 3,296 to 2,688 between January 1 and January 31, 2016."¹²⁵

As a result of this economic slowdown, China may be forced to "scale back its existing regulatory structure, postpone its reform plans, or both."¹²⁶ Agencies such as the MEP could be given even less funding, and the creation and support of environmental courts could be reduced. While these possibilities would indubitably hamper environmental public interest litigation, the effect of economic downturn on local governments would likely have an even more pronounced impact.

122. Shepherd, *supra* note 13, at 616.

123. *The Philippines Just Posted the Fastest Q3 Growth Rate in Asia*, FORTUNE MAG. (Nov. 17, 2016), <http://fortune.com/2016/11/17/philippines-q3-growth-rate-asia/>. Recently, China's economic growth has returned to strong levels, e.g. Keith Bradsher, *China's Economic Growth Looks Strong. Maybe Too Strong*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/business/china-gdp-economy-growth.html>, but the specter of an economic slowdown still remains.

124. *What Is China Doing to Tackle Its Air Pollution?*, *supra* note 5.

125. Shepherd, *supra* note 13, at 617.

126. *Id.* at 616.

Over the last three decades, other than maintaining security, economic growth has been the main criteria for the promotion of government officials; thus, a nationwide economic malaise would only intensify the pressure on local governments to evidence economic productivity.¹²⁷ With job security on the line, local government and judicial officials would likely be less receptive to environmental public interest litigation. Essentially, further economic slowdown in China may deter local courts from allowing environmental public interest cases to have their day in court out of concern that such litigation would negatively affect industry.

G. *Trump and Trouble on the Horizon?*

In addition to the aforementioned current challenges, future challenges to the effectiveness of environmental public interest litigation may arise under the Trump Administration. In recent years, the United States has been a source of pressure, competition, and collaboration for China in regards to environmental issues.¹²⁸ However, the new administration under President Trump does not prioritize environmental issues. Trump has referred to the EPA as “a disgrace” and vowed to get rid of the department if elected.¹²⁹ Additionally, Trump has announced that the United States would withdraw from the landmark Paris Agreement¹³⁰ and has threatened to halt the United States’ fiscal support of international climate action.¹³¹ The President has made it clear to the world that envi-

127. *What Is China Doing to Tackle Its Air Pollution?*, *supra* note 5.

128. For example, during the Obama Administration, there was speculation that the Clean Power Plan could help pressure China to take similar measures to combat its carbon emission problem. Bryan Walsh, *New Obama Climate Regulations Could Help U.S. Pressure China*, TIME (Jun. 2, 2014), <http://time.com/2809129/climate-regulations-obama-china-epa/>. Indeed, Christiana Figueres, the U.N.’s top climate official, stated, “I fully expect action by the United States to spur others in taking concrete action.” *Id.*

129. See Matt McGrath, *Trump’s Environmental Plans Could Spark Opposition*, BBC NEWS (Dec. 1, 2016), <http://www.bbc.com/news/science-environment-38163639>.

130. Robinson Meyer, *Trump and the Paris Agreement: What Just Happened?*, ATLANTIC (Aug. 4, 2017), <https://www.theatlantic.com/science/archive/2017/08/trump-and-the-paris-agreement-what-just-happened/536040/>.

131. See *id.*; see also Matt McGrath, *Countries Unite to Defy Trump Climate Threat*, BBC NEWS (Nov. 17, 2016), <http://www.bbc.com/news/science-environment-38021673>.

ronmental issues will not be a priority under his administration. Against this background, China may feel less pressure from the United States to prioritize combating air pollution and improving environmental integrity.

In addition, the new U.S. administration may be less likely to collaborate with China to tackle difficult environmental problems. It has previously been said that “[t]he two countries’ cooperation on climate and energy is the main thing that gives the rest of the world even faint hope of progress.”¹³² Indeed, such collaboration between the United States and China was credited with being “essential to reaching the Paris accord on greenhouse gases” in 2015, as well as instrumental to the formation of “the equally important Kigali agreement to ban the very damaging HFC (hydrofluorocarbon) refrigerant chemicals” in 2016.¹³³ However, such future collaboration is unlikely given the aforementioned de-prioritization of environmental issues and President Trump’s generally negative attitude towards China. In fact, in a 2012 tweet, Trump wrote that “[t]he concept of global warming was created by and for the Chinese.”¹³⁴ Additionally, on January 18, 2016, President Trump further stated that climate change “is done for the benefit of China, because China does not do anything to help climate change.”¹³⁵ The President’s hostile attitude towards China is further reflected in his appointment of *Death by China* author Peter Navarro to head the White House National Trade Council¹³⁶ and of Robert Lightizer, who has advocated for a “much

132. Fallows, *supra* note 55.

133. *Id.*

134. Donald Trump (@realDonaldTrump), TWITTER (Nov. 6, 2012, 11:15 AM), <https://twitter.com/realdonaldtrump/status/265895292191248385?lang=EN>; see also Darren Samuelsohn, *Fact: Trump Claimed Climate Change is a Hoax Created by China*, POLITICO (Sept. 26, 2016), <http://www.politico.com/blogs/2016-presidential-debate-fact-check/2016/09/fact-trump-claimed-climate-change-is-a-hoax-created-by-china-228711>.

135. Lindsay Dodgson, *The Biggest Threat to Earth Has Been Dismissed by Trump as a Chinese Hoax*, BUS. INSIDER (Nov. 11, 2016), <http://www.businessinsider.com/donald-trump-climate-change-chinese-hoax-2016-11>.

136. Navarro has used inflammatory language to support his hawkish attitude towards China, which recently led a December 2016 editorial in the state-run China Daily to accuse Navarro of “anti-China alarmism.” Assoc. Press, *Chinese State Newspaper Accuses Navarro of Anti-China Bias*, BLOOMBERG (Dec. 23, 2016), <https://www.bloomberg.com/news/articles/2016-12-23/chinese-state-newspaper-accuses-navarro-of-anti-china-bias>. Navarro’s view of China has been summarized as follows: “The Chinese government is a despi-

more aggressive approach in dealing with China,” as chief trade negotiator.¹³⁷ Trump’s accusatory discourse towards China does not lay a promising foundation for U.S.-China collaboration regarding future environmental endeavors. In fact, in response to the then President-elect’s conduct, on January 5, 2017, Chinese state media threatened the United States with “big sticks” if Trump further strained ties between the two countries.¹³⁸

Neither China nor the Trump administration has given the public reason to expect a fruitful and collaborative partnership on environmental issues between the two hegemons. However, given the unpredictability of the President’s course of action, it is unclear how this tense dynamic will ultimately play out in regards to environmental issues.¹³⁹ While it is unlikely that the new U.S. administration’s policies will substantially alter China’s environmental endeavors—including its approach to environmental public interest litigation¹⁴⁰—President Trump’s past comments seem to indicate his Administration will be less concerned with engaging in cooperative efforts on environmental policy. However, following Trump’s announcement that the United States would with-

cable, parasitic, brutal, brass-knuckled, crass, callous, amoral, ruthless and totally totalitarian imperialist power that reigns over the world’s leading cancer factory, its most prolific propaganda mill and the biggest police state and prison on the face of the earth.” Tom Phillips, *‘Brutal, Amoral, Ruthless, Cheating’: How Trump’s New Trade Tsar Sees China*, GUARDIAN (Dec. 22, 2016), <https://www.theguardian.com/world/2016/dec/22/brutal-amoral-ruthless-cheating-trumps-trade-industrial-peter-navarro-views-on-china>.

137. Adam K. Raymond, *China Warns Trump About Its ‘Big Stick’*, N.Y. MAG. (Jan. 5, 2016), <http://nymag.com/daily/intelligencer/2017/01/china-warns-trump-about-its-big-sticks.html>.

138. *Id.*; see also *China Media Warn Trump of ‘Big Sticks’ If He Seeks Trade War*, BLOOMBERG (Jan. 5, 2016), <https://www.bloomberg.com/news/articles/2017-01-05/chinese-media-say-big-sticks-await-trump-if-he-seeks-trade-war>.

139. Indeed, “Trump is a giant question mark on the world stage.” *Trump’s Foreign Policy Challenges Include Russia, China, North Korea*, NBC NEWS (Jan. 2, 2016), <http://www.nbcnews.com/news/world/trump-s-foreign-policy-challenges-include-russia-china-north-korea-n698196>.

140. As the Marrakech Action Proclamation reflects, there is a “global consensus” on environmental issues such as climate change that may be a stronger force of influence on China’s environmental policies than the unconventional positions taken by President-elect Trump. See Matt McGrath, *Countries Unite to Defy Trump Climate Threat*, BBC NEWS (Nov. 17, 2016), <http://www.bbc.com/news/science-environment-38021673>.

draw from the Paris Agreement, China has stepped up and reaffirmed its commitment to the climate agreement.¹⁴¹ In fact, China has formed an alliance with the European Union to create a practical plan outlining how to “limit global warming to well below 2C (3.6F)” per their pledges in the Paris Agreement.¹⁴² However, it is still too early to know the impact, if any, the Trump presidency will ultimately have on China’s environmental protection efforts.

IV. PROMISING DEVELOPMENTS: FUTURE ENVIRONMENTAL SUCCESS IN CHINA?

Despite the numerous challenges, readers can remain optimistic that environmental public interest litigation will continue to be an important tool in combating China’s air pollution problem and improving the nation’s environmental integrity. The establishment of both environmental courts and the Supreme People’s Procuratorate (SPP) pilot program reflect that the introduction of environmental public interest litigation has been a significant development in encouraging further action. Both the environmental courts and the pilot program have advantages that may help balance out the previously described challenges facing NGO-initiated environmental public interest litigation. Thus, environmental courts, the SPP pilot program, and environmental public interest litigation are three tools that, working together, may foster a pathway for China to achieve success in environmental efforts.

First, the introduction of environmental courts has had an impact on the number of environmental cases heard and the quality of the decisions rendered. For example, prior to the introduction of environmental courts, “the relevant divisions of the Qingzhen courts only handled seven environmental cases in 2006,” however, “[w]ithin one year of the establish-

141. Somini Sengupta et al., *As Trump Exits Paris Agreement, Other Nations Are Defiant*, N.Y. TIMES (June 1, 2016), <https://www.nytimes.com/2017/06/01/world/europe/climate-paris-agreement-trump-china.html?mcubz=3>.

142. Daniel Boffey & Arthur Nelson, *China and EU Strengthen Promise to Paris Deal with US Poised to Step Away*, GUARDIAN (June 1, 2017), <https://www.theguardian.com/environment/2017/may/31/china-eu-climate-lead-paris-agreement> (noting how a joint EU-China statement prepared before an EU-China summit in Brussels in June detailed how the countries “intend to make real the promises they made when they agreed to limit global warming to well below 2C (3.6F).”).

ment of the environmental court, 110 cases were filed.”¹⁴³ The specialized nature of environmental courts helps resolve the problem of local courts that are often tentative to hear environmental public interest litigation because the judges lack the technical knowledge or experience to adjudicate the cases. Environmental courts are specifically designed to embrace environmental cases, which makes them more efficient and better able to impose comprehensive remedies. For example, “[a] number of cases in the environmental courts have led to actions that prevented pollution, rather than only compensating for past harms.”¹⁴⁴ In the Tianfeng Chemical Factory case,¹⁴⁵ an environmental court was able to deliver an injunction against a polluter following a public interest lawsuit.¹⁴⁶ Similarly, the Qingzhen Land and Resources Management Bureau case “helped spur the defendant agency to perform its duty to properly manage a water source protection area, a duty the agency had failed to perform for fifteen years.”¹⁴⁷ The latter example also shows how environmental courts can help address the issue of China’s decentralized system, though the concerns expressed previously about courts functioning as extensions of local governments may still remain. Seemingly, the establishment of more environmental courts would help facilitate the effective implementation of environmental public interest litigation by remedying the issue of cautious, inexperienced courts.

Second, the recently developed SPP pilot program is another promising development that will help China towards its environmental protection goals.¹⁴⁸ Although the pilot pro-

143. Alex L. Wang & Jie Gao, *Environmental Courts and the Development of Environmental Public Interest Litigation in China*, 3 J. CT. INNOVATION 37, 48 (2010).

144. *Id.* at 49.

145. Guiyang Two Lakes and One Reservoir Mgmt. Bureau v. Guizhou Tianfeng Chem. Ltd. (Qingzhen Env'tl Ct., Dec. 27, 2007) (China). The Qingzhen Court ultimately granted an injunction that required the defendant, a fertilizer manufacturer, to cease its improper waste disposal that was responsible for contaminating a local source of drinking water, and to clean up any existing waste. Wang & Gao, *supra* note 143, at 43.

146. Wang & Gao, *supra* note 143, at 49.

147. *Id.*

148. See *The Role of Public Interest Litigation in Enforcing Environmental Law in China*, D'ANDREA & PARTNERS (Sep. 27, 2016), <http://www.dandreapartners.com/the-role-of-public-interest-litigation-in-enforcing-environmental-law-in->

gram does not rely on NGOs, it seems to be a natural extension of the advocacy strategy that is at the heart of the NGO-led approach to environmental public interest litigation under the revised EPL. The SPP pilot program empowers procuratorates to initiate both civil and administrative lawsuits for the public interest, with a focus on initiating public interest litigation within the context of ecological, environmental and resource protection.¹⁴⁹ In civil lawsuits the defendants may be “polluters and disrupters of natural resources,” while in administrative lawsuits the defendants may be “administrative agencies and statutorily authorized organizations.”¹⁵⁰ The pilot program is intended, among other things, to “enhance and expedite public interest claims,” and enable local officials in select provinces to address allegedly illegal and environmentally degrading activities.¹⁵¹ The program was authorized by the NPCSC in July 2015 and is currently in place in the following thirteen provincial administrative regions: Beijing, Inner Mongolia, Jilin, Jiangsu, Anhui, Fujian, Shandong, Hubei, Guangdong, Guizhou, Yunnan, Shaanxi, and Gansu.¹⁵²

The pilot program has thus far been labeled a success. Over 7,886 cases have been handled through the SPP program as of May 2017, of which 934 resulted in a lawsuit.¹⁵³ Another positive sign is that of the 222 cases that were ruled on by a court, all were won by the prosecutors.¹⁵⁴ One example of the

china/ (referring to the SPP pilot program as “[o]ne of the most significant developments” in the context of China’s modern environmental protection endeavors).

149. You, *supra* note 12, at 10391; *see also* Zui Gao Ren Min Jian Cha Yuan Guan Yu Jian Cha Ji Guan Ti Qi Gong Yi Su Gong Shi Dian Gong Zuo Qing Kuang De Zhong Qi Bao Gao (最高人民法院关于检察机关提起公益诉讼试点工作情况的中期报告) [Supreme People’s Procuratorate on Procuratorial Organs Litigation Pilot Project Interim Report] (promulgated by the Standing Comm. of the Twelfth Nat’l People’s Cong., Nov. 6, 2016), http://www.npc.gov.cn/npc/xinwen/2016-11/05/content_2001150.htm (China).

150. You, *supra* note 12, at 10392.

151. Bourdeau & Schulson, *supra* note 18.

152. *See* Zhang Yan, *Public Interest Lawsuit Plan Tested*, CHINA DAILY (Jan. 7, 2016), http://www.chinadailyasia.com/nation/2016-01/07/content_15368884.html.

153. Cao Yin, *Greater Public Interest Role Proposed For Prosecutors*, CHINA DAILY (June 23, 2016), http://europe.chinadaily.com.cn/china/2017-06/23/content_29856006.htm.

154. *Id.*

program's success comes from the Jiangyuan District of Baishan City, where the local procuratorate responded to citizen reports that the local hospital was improperly discharging untreated medical sewage.¹⁵⁵ After launching an investigation, the procuratorate filed a lawsuit which, in July 2016, led the court to demand both the immediate termination of the pollution and the installation of adequate sewage treatment within three months.¹⁵⁶

While the SPP pilot program fulfills a similar function as NGO-driven environmental public interest litigation under the revised EPL, there are key advantages and disadvantages to the pilot program. One advantage is that procuratorates bringing public interest cases are exempted from paying litigation fees.¹⁵⁷ The high cost of a trial is one burden that impedes individuals from pursuing private environmental tort claims and, as discussed earlier, can hamper NGOs from pursuing environmental public interest cases.¹⁵⁸ In addition, under the pilot program the defendant has no right to file a counterclaim where the procuratorate initiates public interest civil litigation.¹⁵⁹ On the other hand, the pilot program affords less autonomy than environmental public interest litigation. Whereas NGOs are theoretically entitled to pursue any environmental public interest case they want under the EPL, when procuratorates wish to initiate public interest litigation through the program, they are required to "first report up through the levels to the Supreme People's Procuratorate for

155. *The Role of Public Interest Litigation in Enforcing Environmental Law in China*, *supra* note 148.

156. *Id.*

157. Zui Gao Ren Ming Fa Yuan Fa Yuan Guan Yu Ying Fa "Ren Min Fa Yuan Sheng Li Ren Min Jian Cha Yuan Ti Qi Gong Yi Gong An Jian Shi Dian Gogn Zuo Shi Shi Ban Fa" De Tong Zhi (最高人民法院关于印发《人民法院审理人民检察院提起公益诉讼案件试点工作实施办法》的通知) [Supreme People's Court Notice on Releasing "Implementation Measures for Pilots on People's Courts Hearing Public Interest Lawsuits Initiated By People's Procuratorates"] (promulgated by Sup. People's Ct., Feb. 25, 2016, effective Mar. 1, 2016), art. 22 [hereinafter Implementation Measures Notice], <http://www.chinacourt.org/law/detail/2016/02/id/148645.shtml> (China).

158. *See supra* Part III.A.

159. Implementation Measures Notice, *supra* note 157, art. 6.

review and approval.”¹⁶⁰ Furthermore, the plan specifies that procuratorate action should be “prudent” and “careful,” and that “the unity of legal and social effects” should be ensured.¹⁶¹ The procuratorate must also “pay attention to publicity” and “create a positive public opinion.”¹⁶² Thus, procuratorates in the pilot program have to balance a number of interests and act more delicately than NGOs operating under the revised EPL.

The thorough procedures and multifaceted interests at play in the pilot program suggest that environmental change achieved through the program would be more gradual and tempered than the change NGO-initiated public interest litigation might produce. Given these respective advantages and disadvantages, both the SPP pilot program and NGO-led environmental public interest litigation have important roles to fill in helping China reach its environmental protection goals. Ideally, these two forms of resolving public interest cases will work together to provide a more comprehensive means of tackling environmental issues and engendering positive change.

V. CONCLUSION

While the Nanping case exemplified the positive impact that environmental public interest litigation can produce under China’s new EPL, various challenges have since impeded environmental public interest litigation from being used to its full potential. As this Note has described, these challenges include: (i) costs associated with bringing environmental public interest suits, (ii) government-led clampdown on NGOs, (iii) lack of accessible and accurate information, (iv) China’s decentralized system and an absence of unified enforcement, (v) cautious courts, and (vi) economic slowdown. While these challenges have already limited the effectiveness of environmental public interest litigation, future challenges, such as those that stem from uncertain U.S.-China relations

160. Shou Quan Fa Bu: Jian Cha Ji Guan Ti Qi Gong Yi Su Song Yi Ge Shi Dian Fang An (检察机关提起公益诉讼改革试点方案) [Authorization Release: Procuratorial Organs Litigation Reform Pilot Program], XINHUA NEWS AGENCY (July 2, 2015, 10:00 AM), http://www.xinhuanet.com/legal/2015-07/02/c_1115792543.htm.

161. *Id.*

162. *Id.*

under a Trump Administration, may be on the horizon. That being said, environmental courts and the pilot SPP program are positive indicators that China is taking steps to create a more comprehensive system for resolving environmental public interest cases. Hopefully clarifying the challenges facing environmental litigation will lead to additional innovations, solutions, and successes. Although NGO-led environmental public interest litigation does not appear to be the secret key to winning China's "war on pollution," it serves an important function in improving China's air quality and general environmental integrity.