

# China's Revision to the Environmental Protection Law: Challenges to Public Interest Litigation and Solutions for Increasing Public Participation and Transparency

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## I. Introduction

Headlines that read “China’s toxic air pollution resembles nuclear winter” paint a terrifying but accurate picture of the extent of China’s current environmental catastrophe.<sup>1</sup> A 2011 study from the Massachusetts Institute of Technology indicated that air pollution would cost China up to \$112 billion in labor and healthcare costs.<sup>2</sup> Coal production is the main cause of China’s air pollution problems and has made China the largest emitter of greenhouse gases since 2007.<sup>3</sup> In addition, based on a 2012 Asian Development Bank report, less than 1% of China’s 500 largest cities met the World Health Organization’s air quality standards.<sup>4</sup>

Water depletion and pollution are considered by some to be the nation’s worst environmental hazards.<sup>5</sup> Overuse, contamination, and waste have caused severe water shortages and industry pollution; lack of waste removal and proper processing have also exacerbated the already limited water supply.<sup>6</sup> Even China’s Vice Minister of Environmental Protection Wu Xiaoping has warned that water quality in five of China’s nine bays was “extremely poor.”<sup>7</sup> However, China currently

only spends a meager 1.3% of its gross domestic product on environmental protection when experts say as much as 2.2% is needed to combat the effects of environmental degradation.<sup>8</sup> There has also been a wide array of public health problems associated with China’s pollution problems, including over 1.2 million premature deaths in China in 2010, a proliferation of respiratory, cardiovascular, and cerebrovascular diseases, and a steep rise in other acute and chronic conditions.<sup>9</sup> In fact, environmental protests could fall within the sphere of concern over threats to China’s domestic security.<sup>10</sup> As a result of lax environmental regulation, China is quickly losing control of an ever-worsening problem.

Fearful of the potential consequences, China’s leaders promised to “respond positively” to public concerns on environmental issues and revised China’s Environmental Protection Law (“EPL”)<sup>11</sup> as a means of confronting these problems.<sup>12</sup> China’s EPL, formally enacted in 1989, outlines the main environmental legislative framework that governs the nation.<sup>13</sup> Numerous other environmental laws and regulations have also been passed as a result of the enactment of

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1. Jonathan Kaiman, *China’s Toxic Air Pollution Resembles Nuclear Winter*, *Say Scientists*, THE GUARDIAN (Feb. 25, 2014), <http://www.theguardian.com/world/2014/feb/25/china-toxic-air-pollution-nuclear-winter-scientists>.  
 2. Kira Matus et al., *Health Damages from Air Pollution in China*, 22 GLOBAL ENVTL. CHANGE 55, 61 (2012).  
 3. BEINA XU, COUNCIL ON FOREIGN RELATIONS, CHINA’S ENVIRONMENTAL CRISIS (Apr. 25, 2014).  
 4. ASIAN DEV. BANK, TOWARD AN ENVIRONMENTALLY SUSTAINABLE FUTURE: COUNTRY ENVIRONMENTAL ANALYSIS OF THE PEOPLE’S REPUBLIC OF CHINA 55 (May 28, 2012).  
 5. XU, *supra* note 3.  
 6. *Id.*  
 7. *Pollution Alarm for China’s Rivers, Seas*, CHINA DAILY (June 5, 2012), [http://europe.chinadaily.com.cn/china/2012-06/05/content\\_15476526.htm](http://europe.chinadaily.com.cn/china/2012-06/05/content_15476526.htm).

8. Elizabeth Economy, *China Wakes Up to Its Environmental Catastrophe*, BUSINESSWEEK (Mar. 13, 2014), <http://www.businessweek.com/articles/2014-03-13/china-wakes-up-to-its-environmental-catastrophe#p1>.  
 9. XU, *supra* note 3.  
 10. *Id.*  
 11. See Zhonghua Renmin Gongheguo Huanjing Baohufa (中华人民共和国环境保护法 (主席令第九号)) [Environmental Protection Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 24, 2014, effective Jan. 1, 2015) (P.R.C.), available at [http://www.gov.cn/zhengce/2014-04/25/content\\_2666434.htm](http://www.gov.cn/zhengce/2014-04/25/content_2666434.htm); see also Zhonghua Renmin Gongheguo Huanjing Baohufa (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, effective Dec. 26, 1989) (P.R.C.), available at [http://www.gov.cn/ziliao/fbg/2005-08/05/content\\_20923.htm](http://www.gov.cn/ziliao/fbg/2005-08/05/content_20923.htm).  
 12. *China to Enhance Environmental Protection Legislation*, XINHUANET (Mar. 4, 2013), [http://news.xinhuanet.com/english/china/2013-03/04/c\\_132206837.htm](http://news.xinhuanet.com/english/china/2013-03/04/c_132206837.htm).  
 13. Guizhen He et al., *Revising China’s Environmental Law*, 341 SCIENCE 133 (2013).

the EPL, but early discussions on revising the EPL itself only began in early 1995.<sup>14</sup>

The process of revising the EPL culminated in the first official amendment to the law since its enactment on April 24, 2014.<sup>15</sup> The process formally began in January 2011 when China's main legislative body, the National People's Congress ("NPC"),<sup>16</sup> commissioned the Ministry of Environmental Protection ("MEP") to prepare a ministerial recommended draft of China's EPL.<sup>17</sup> This marked the beginning of China's first attempt to draft an amendment to the original EPL.<sup>18</sup>

When the MEP completed the first proposed draft, the Chinese public was divided in its opinion of the draft. Part of the public felt that the revision was unnecessary due to the multitude of environmental laws enacted after the EPL.<sup>19</sup> Conversely, others felt that the EPL should be revised because its primary purpose was to act as an "umbrella" law under which all other laws would be enacted, but it had become outdated and unrepresentative of the more recent environmental laws.<sup>20</sup> Nevertheless, criticism of the first draft amendment was widespread because it failed to address the issue of public participation in environmental regulatory affairs.<sup>21</sup>

The second draft of the amendment faced similar criticism when it restricted the right to file a public interest lawsuit to a single government-affiliated organization—the All-China Environment Federation ("ACEF").<sup>22</sup> This second draft of the amendment would prevent other nonprofit organizations and nongovernmental organizations ("NGOs") from filing public interest lawsuits against the government.<sup>23</sup>

The third round of drafting was completed by the end of October 2013, and the amendment was changed to allow

a certain number of "relevant organizations" the right to file class-action public interest lawsuits.<sup>24</sup> The amendment, however, conditioned this right on four criteria that must be met by the plaintiff. In particular, the plaintiff must (1) be a national organization, (2) be registered with the Ministry of Civil Affairs ("Civil Ministry"), (3) have been continuously active for at least five years, and (4) have "good standing."<sup>25</sup> The added criteria in the third draft amendment stirred extensive debate, and many speculated that the EPL would undergo a fourth draft.<sup>26</sup>

The NPC Standing Committee enacted the new EPL after a fourth round of drafts on April 24, 2014.<sup>27</sup> The newly amended EPL stated that organizations which satisfied two new criteria could file public interest lawsuits.<sup>28</sup> Only organizations that were registered at or above a city-level government affairs office *and* for a period of at least five years could file these lawsuits.<sup>29</sup> Even though the new EPL is certainly an improvement upon the third draft amendment, it still arbitrarily narrows the pool of litigants to the detriment of the public.

On the other hand, some may argue that the Chinese government is acting rationally by trying to limit public interest litigation. For many policy reasons, China would not want courts to be flooded with lawsuits that may not be legitimate. Other countries around the world, such as the United Kingdom, Canada, and Germany also limit class-action public interest lawsuits.<sup>30</sup> Moreover, some view excessive litigation to be counterproductive and representative of a "litigation culture" that is negatively viewed around the world and oftentimes also attributed to what occurs in the United States.<sup>31</sup> Nevertheless, China has still taken steps to codify class-action lawsuits in its Civil Procedure Law ("CPL").<sup>32</sup>

The new EPL remains overly restrictive of the public's right to bring environmental litigation in Chinese courts, which limits public participation and transparency. Since "fewer than [1%] of environmental disputes have been settled through judicial

14. Nengye Liu, *Country Report: The People's Republic of China: Criticism Levelled at China's Revised Environmental Protection Law*, 2013 IUCN ACAD. ENVTL. L. J. 124, 124 (2013).

15. See Xu Chao & Ren Zhongyuan, *Environmental Protection, Degraded*, CAIXIN (Dec. 8, 2011), <http://english.caixin.com/2011-12-08/100336049.html>; see also Liu Jianqiang, *China's New Environmental Law Looks Good on Paper*, CHINADIALOGUE (Apr. 4, 2014), <https://www.chinadialogue.net/blog/6937-China-s-new-environmental-law-looks-good-on-paper/en>.

16. The NPC has the power to amend the Constitution and enact and amend basic laws governing criminal offenses, civil affairs, state organs, and other matters. See *Functions and Powers of the National People's Congress*, NAT'L PEOPLE'S CONGRESS PEOPLE'S REPUBLIC CHINA (Mar. 2, 2014, 1:00 PM), [http://www.npc.gov.cn/englishnpc/Organization/2007-11/15/content\\_1373013.htm](http://www.npc.gov.cn/englishnpc/Organization/2007-11/15/content_1373013.htm). The NPC Standing Committee enacts and amends all laws except laws that should be enacted and amended by the NPC. When the NPC is not in session, its Standing Committee may partially supplement and amend laws it enacted, provided that the changes do not contravene the laws' basic principles. The Standing Committee also has the power to interpret the Constitution and other laws. See *id.* When the NPC is not in session, the Standing Committee examines and approves proposals for making partial adjustments to the plan for national economic and social development or to the central budget that become necessary in the course of their implementation.

17. Xu & Ren, *supra* note 15.

18. *Id.*

19. Liu, *supra* note 14, at 130.

20. *Id.* at 125, 130.

21. *Id.* at 130.

22. Michael Standaert, *China's Proposed Revisions to Environmental Protection Law Draw Mixed Reviews*, 36 INT'L ENV'T REP. 1063 (July 31, 2013).

23. *Id.* The second draft amendment was released by the NPC Standing Committee on July 17, 2013 and open for public comment until August 18, 2013.

24. Harry Du & Thomas McGinn, *China: Who Can Initiate Class-Action Lawsuits Under the Draft of the Environmental Protection Law*, MONDAQ (Nov. 26, 2013), <http://www.mondaq.com/x/277388/Class+Actions/Who+can+initiate+classaction+lawsuit+s+under+the+draft+Environmental+Protection+Law>.

25. *Id.*

26. *Id.*

27. Lynia Lau, *China's Newly Revised Environmental Protection Law*, LEXOLOGY (May 16, 2014), <http://www.lexology.com/library/detail.aspx?g=8b5b0dcb-3358-47b3-a876-84166d9e2ba2>.

28. Laney Zhang, *China: Environmental Protection Law Revised*, LIBR. CONGRESS (June 6, 2014), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_1205404014\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205404014_text).

29. *Id.*

30. Du & McGinn, *supra* note 24.

31. *Id.*

32. Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China] [hereinafter CPL]; see also 1991 Zhonghua Renmin Gongheguo Fagui Huibian [Collected Laws and Regulations of the People's Republic of China] 9 [hereinafter Fagui Huibian]. See also Richard Wigley, *China: China's Civil Procedure Law Reported to Be Amended to Broaden Definition of Types of Litigants Allowed to File Class-Action Lawsuits*, MONDAQ, <http://www.mondaq.com/x/196828/Class+Actions/Chinas+Civil+Procedure+Law+Reported+to+be+Amended+to+Broaden+Definition+of+Types+of+Litigants+Allowed+to+File+Classaction+Lawsuits> (last updated Sept. 16, 2012).

channels since 1996, while the number of environment-related ‘mass incidents,’ involving displays of public outrage . . . grew by an average [29%] from 1996 to 2013, the EPL must address the lack of judicial enforcement of environmental problems.<sup>33</sup> In light of the limiting criteria in the third draft amendment, as well as the newly amended EPL, this Note proposes to further revise article 58, which covers public interest litigation, of the new EPL in four ways: (1) eliminate the requirement that only organizations registered at the city level or above can file public interest lawsuits and allow all registered organizations at whichever level, including all local subsidiaries of national organizations,<sup>34</sup> the opportunity to bring such actions as well; (2) eliminate the five-year requirement for agencies that want to file public interest lawsuits; (3) eliminate the requirement that suits can only be filed against polluters instead of government authorities; and (4) legally institute a court-sponsored forum for all currently unregistered organizations and members of the public to present information to the ACEF and request the organization to take their case to court.

The public forum would allow unregistered NGOs and members of the public to engage in discussion with the ACEF, all while providing China’s Environmental Courts with an opportunity to preside over the forum sessions. The more public the support for a given issue, the more pressure would be exerted on the ACEF to file a case before the court. This forum provision should be included as an added legal requirement.

This Note will also address the amendment process of the EPL and criticisms that it currently faces as a newly enacted law. Part II will discuss the background of the EPL and the amendment process that culminated in the newly enacted EPL by the NPC Standing Committee. This section will also analyze the controversial public interest issues behind the second and third draft amendments in more detail to pinpoint the provisions that should be further revised in the new EPL. Part III will address the deficiencies present in the current environmental legal system that is tasked with resolving disputes. Specifically, this Note will review the role of the Environmental Courts and the current drafts of the EPL and the CPL. Part IV will discuss the proposed solutions offered above and argue that the implementation of an Environmental Court-sponsored forum will address the current issues of the EPL. This section will also discuss the advantages of having the court-sponsored forum, which provides a transparent venue for encouraging public participation without burdening government resources with excessive litigation. Part IV will also identify and respond to the potential arguments against the solutions proposed. Part V will conclude with the observation that the benefits of instituting such a forum will outweigh the costs.

This Note ultimately demonstrates that the solutions presented in Part IV both take into account and address each of

the major issues that have been the focus of the EPL amendment process—lack of public participation, need for transparency, and lack of sufficiently severe penalties for violators of the EPL.

## II. Background on China’s EPL Amendment Process

### A. China’s Environmental Protection Law

China’s EPL defines the principles and goals governing environmental protection and the nation’s use of natural resources, as well as the prevention and control of environmental pollution.<sup>35</sup> In the decade following promulgation of the EPL, China attempted to strengthen environmental legislation by enacting and amending many other environmental laws and regulations.<sup>36</sup> However, as a result of these new laws and regulations, the environmental regulatory framework became rife with inconsistencies, which were heightened by further inconsistent enforcement across the country.<sup>37</sup> Recognizing this problem, and to incorporate environmental protection into national policy development, China upgraded the State Environmental Protection Administration, founded in 1982 as the National Environmental Protection Agency, to the MEP.<sup>38</sup> Finally, China formally began the process of revising the overarching EPL to address regulatory inconsistencies.

### B. First Draft Amendment to the EPL

Since enacting the original EPL as its overarching environmental law,<sup>39</sup> China has suffered from numerous environmental disasters, resulting in calls from both its citizens and the international community to strengthen environmental protection laws. Since the EPL lacked enforcement power, the NPC hoped to revise the law to deal with these and other deficiencies.<sup>40</sup> However, it was not until 2011, after years of proposals starting in 1995, that the NPC Standing Committee formally started the process of amending the EPL.<sup>41</sup>

From 1995 to 2011, the NPC received seventy-eight proposals calling for an amendment to the EPL.<sup>42</sup> The MEP made an initial proposal to amend the EPL in 2011.<sup>43</sup> How-

35. *China’s History of Environmental Protection*, ERM FOUND. (Mar. 2, 2014 1:30 PM), <http://www.erm.com/en/Analysis-and-Insight/ERM-Publications/Publications-Archive-2009---2010/Chinas-History-of-Environmental-Protection/>. The Law established a legal basis for environmental protection and served four major functions: (1) creation of environmental protection institutions; (2) defining environmental liability and setting up the Pollution Charging System; (3) putting forward the mandate of environmental impact assessment practices; and (4) establishing of the “Three Synchronies” system, which requires that the design, construction and operation of the main body of a project be accompanied by the design, construction and operation of appropriate pollution treatment facilities.

36. *Id.*

37. *Id.*

38. *Id.*

39. He et al., *supra* note 13.

40. *Id.*

41. Liu, *supra* note 14, at 125.

42. *Id.*

43. Lau, *supra* note 27. Over the last two decades, there have been numerous other environmental laws that have been enacted as a result of the passage

33. Li Jing, *Green Law Change Would Limit Lawsuits: Draft Amendment Would Prevent Civil Groups Taking on Polluters in the Courts, Lawyers Says, While NGO Calls Legal Curbs Discriminatory*, S. CHINA MORNING POST (June 27, 2013), <http://www.scmp.com/news/china/article/1269766/green-law-change-would-limit-lawsuits>.

34. Subsidiaries in this context refer to local divisions of national organizations and do not refer to the corporate definition of the word, subsidiary.

ever, the MEP's amendments were considered too ambitious, and they were initially rejected.<sup>44</sup> As a result, the National Development and Reform Commission ("NDRC") and the Environment Protection and Resources Conservation Committee ("EPRCC") of the NPC Standing Committee assumed the drafting responsibility.<sup>45</sup> On August 31, 2012, the NPC Standing Committee released the first public draft version of the EPL.<sup>46</sup> The amendments focused on issues such as government responsibility, environmental standards, environmental protection planning, environmental impact assessments, and pollution prevention and control across different administrative areas.<sup>47</sup>

The first proposed set of revisions to the EPL comprised seven chapters and forty-seven articles.<sup>48</sup> Of key import to the first draft was article 19, a new article which established a regulatory framework for the discharge of pollutants across the country.<sup>49</sup> However, the MEP was not given the authority to regulate the amount of pollutants allowed to be discharged under article 19.<sup>50</sup> The authority, instead, was given to the NDRC, where final approval was to be given by the State Council.<sup>51</sup> The MEP would potentially have a voice in the process, but it did not have the authority to set the quota of pollutants that could be discharged

in each province.<sup>52</sup> This part of the first draft amendments was considered controversial for limiting the extent of the MEP's authority.<sup>53</sup>

Most of the first draft amendments were criticized heavily by the public for "being too mild and lacking fundamental changes and improvements."<sup>54</sup> This was publicly confirmed by the Standing Committee when it released a statement that the "intention of introducing the new EPL [was] not to comprehensively amend the EPL" but instead to only write in limited revisions.<sup>55</sup> Consequently, environmental law scholars, NGOs, and the MEP severely criticized the first draft amendment.<sup>56</sup>

In particular, NGOs criticized the first draft for not including public participation beyond public access to environmental information.<sup>57</sup> The first draft amendment did not address public interest litigation regarding environmental issues, though the CPL had already established that public interest litigation could occur under prescribed rules.<sup>58</sup> After the first draft amendment was released for public comment on August 31, 2012, the NPC received 11,748 comments from 9572 citizens within one month.<sup>59</sup> These comments were mostly critical of the first draft amendment and spurred the drafting of a second set of amendments.<sup>60</sup>

### C. Second Draft Amendment to the EPL

The critical comments of the first draft amendment to the EPL prompted the drafting of a second set of amendments, which was prepared by the EPRCC.<sup>61</sup> This version was also criticized for severely limiting the power of the MEP and ignoring major revision requests, such as including basic principles of environmental protection, defining public environmental rights, and arranging environmental coordination across administrative regions.<sup>62</sup> The MEP subsequently issued its Comments and Suggestions on the Draft EPL Revision, which contained thirty-four separate criticisms of the second draft amendment of the EPL.<sup>63</sup> Afterwards, the NPC Law Committee was assigned the role of resolving the issues and providing a revised version that would pass a NPC Standing Commission vote.<sup>64</sup>

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of the EPL. The Marine Environment Protection Law, Water Law, Air Pollution Prevention and Control Law, Water Pollution Prevention and Control Law, Noise Pollution Prevention and Control Law, Promotion of Recycling Economy Law, and the Environment Impact Assessment Law are examples of laws that have been passed since 1989's EPL was ratified. *Id.*; see also Zhonghua Renmin Gongheguo Huanjing Baohufa Xiuzhengan (Caoan) (中华人民共和国环境保护法修正案(草案)) [Draft Amendment to the Environmental Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 30, 2012) (P.R.C.), available at [http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2012-08/31/content\\_1735713.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2012-08/31/content_1735713.htm).

44. Lau, *supra* note 27.

45. *Id.* The NDRC is a management agency under the State Council that formulates strategies of national economic and social development, annual plans, medium and long-term development plans, coordinates economic and social development, researches, and makes recommendations on the employment of various economic instruments and policies to the National People's Congress on behalf of the State Council. See *Main Functions of the NDRC*, NAT'L DEV. & REFORM COMMISSION PEOPLE'S REPUBLIC CHINA (Oct. 12, 2014, 6:30 PM), <http://en.ndrc.gov.cn/mfndrc/>. The MEP implements national policies and plans for environmental protection, drafts laws and regulations, and formulates administrative rules and regulations for environmental protection. See *Mission*, MINISTRY ENVTL. PROTECTION PEOPLE'S REPUBLIC CHINA (Feb. 2, 2014, 6:30 PM), [http://english.mep.gov.cn/About\\_SEPA/Mission/200803/t20080318\\_119444.htm](http://english.mep.gov.cn/About_SEPA/Mission/200803/t20080318_119444.htm).

46. Lau, *supra* note 27.

47. Liu, *supra* note 14, at 130.

48. *Id.* at 125. The seven chapters included (1) General Principles, (2) Environmental Management, (3) The Protection and Improvement of the Environment, (4) Prevention and Control of Pollution and other Hazards, (5) Supervision and Inspection, (6) Liabilities, and (7) Miscellaneous. The second and fifth chapters are new. *Id.*

49. *Id.* at 127.

50. *Id.*

51. *Id.* The State Council is the highest executive organ of State power and of State administration and carries out the regulations and laws implemented by the NPC. The State Council is composed of a premier, vice-premiers, State councilors, ministers in charge of ministries and commissions, the auditor-general, and the secretary-general. The premier of the State Council is nominated by the president, reviewed by the NPC, and appointed and removed by the president. The State Council follows the system of premier responsibility in work while various ministries and commissions under the State Council follow the system of ministerial responsibility. See *The State Council*, CENT. PEOPLE'S GOV'T PEOPLE'S REPUBLIC CHINA (Feb. 2, 2014, 6:30 PM), [http://english1.english.gov.cn/2013-03/15/content\\_2354765.htm](http://english1.english.gov.cn/2013-03/15/content_2354765.htm).

52. Liu, *supra* note 14, at 127.

53. *Id.* at 130.

54. Wang Yiqin, *Steps Forward, and a Step Backward: A Revision of the Draft Amendment to the Environmental Protection Law Has Aroused a Heated Outcry From the Public*, CHINA.ORG (Aug. 16, 2013), [http://www.china.org.cn/opinion/2013-08/16/content\\_29736577.htm](http://www.china.org.cn/opinion/2013-08/16/content_29736577.htm).

55. Liu, *supra* note 14, at 130.

56. *Id.*

57. *Id.*

58. *Id.*

59. Wang, *supra* note 54.

60. *Id.*; see also Zhonghua Renmin Gongheguo Huanjing Baohufa Xiuzhengan (Caoan Erci Shenyigao Tiaowen) (中华人民共和国环境保护法修正案(草案二次审议稿 条文)) [Second Draft Amendment to the Environmental Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 17, 2013) (P.R.C.), available at [http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2013-07/17/content\\_1801189.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2013-07/17/content_1801189.htm).

61. Lei Zhang et al., *Power Politics in the Revision of China's Environmental Protection Law*, 22 ENVTL. POL. 1029, 1030-33 (2013).

62. *Id.*

63. *Id.*

64. *Id.* at 1034.

After a consultation process, the NPC Law Committee proposed the second revision with fifty-nine articles.<sup>65</sup> The second revision introduced for the first time some of the most significant changes to the environmental law such as including “protecting the environment” as a State policy.<sup>66</sup> The second draft also strengthened the regulations that covered the government’s environmental protection responsibilities, particularly supervision and accountability.<sup>67</sup>

More notably, the second draft included the disclosure of environmental information as a requirement and public participation as a goal in a separate article for the first time.<sup>68</sup> Among the many significant changes presented in the second draft amendment was the proposed limit on public interest litigation in article 48.<sup>69</sup> Article 48 proposed reserving the right to file environmental public interest lawsuits exclusively to the ACEF, a MEP-affiliated and government-organized NGO.<sup>70</sup> This proposal caused uproar and significant controversy since the law would directly empower only a single organization as the sole vehicle for the public’s interests.<sup>71</sup>

This controversial limitation would prevent many environmental cases from being brought before a court. For example, in 2011, Friends of Nature successfully filed a public interest environmental lawsuit in Yunnan.<sup>72</sup> If the proposed amendment were to pass a vote by the Standing Committee, these types of cases would no longer be allowed by the newly-revised EPL.<sup>73</sup> However, at the same time, other portions of the second draft amendment regarding public disclosure of environmental violations, public participation in impact assessments, and penalties for polluters improved transparency and enforcement.<sup>74</sup> Thus, article 48 would not only limit public exposure of environmental issues, but also detract from the other significant improvements made to the original EPL and the first draft amendment.

Thus, the second draft amendment’s most notable change was granting the right to file public interest lawsuits solely to the ACEF.<sup>75</sup> The ACEF is a nationwide, membership-based non-profit organization that is affiliated with the Chinese government.<sup>76</sup> The ACEF helps the government achieve

environmental objectives on a local and national scale.<sup>77</sup> The ACEF receives support from the MEP, and a large portion of ACEF’s members include entrepreneurs and companies that have contributed to the environmental degradation that China currently faces.<sup>78</sup> Additionally, some fear that the ACEF’s high membership fees attract wealthy businessmen and will, therefore, cause the organization to refrain from filing lawsuits against the large companies that are currently members.<sup>79</sup>

Recognizing these concerns, the ACEF’s Vice-Chairperson and Secretary-General Zeng Xiaodong stated that his organization would be dedicated to working with other nonprofit organizations, NGOs, social organizations, and “plans to develop an environmental public interest law firm and related organizations which will carry out environmental monitoring, pollution damage assessment, and arbitration.”<sup>80</sup> Although this did little to assuage fears of governmental involvement in the right to file public interest lawsuits, the ACEF has shown apparent interest in working with the other organizations and the greater public to better protect the environment.

#### D. Third Draft Amendment to the EPL

Following comments on the second draft amendment, the NPC Standing Committee finalized a third draft amendment<sup>81</sup> on October 22, 2013, which proposed changes to the public interest litigation criterion once again.<sup>82</sup> The third draft amendment stipulated that national environmental organizations that have registered with the Civil Ministry for five years running and are deemed to have a good reputation will be allowed to file lawsuits for the public interest.<sup>83</sup> This draft amendment has been viewed once again as insufficient by the larger environmental law community given that it still unnecessarily limits the right of organizations to file public interest lawsuits.<sup>84</sup> The third draft amendment was criticized more heavily for limiting the number of organizations eligible to file public interest lawsuits even more so than the second draft amendment.<sup>85</sup> This is because the ACEF has many provincial-level subsidiaries, which could all potentially file lawsuits under the second draft amendment but not the third draft amendment.<sup>86</sup> By some estimates, there were only thirteen organizations that

65. *Id.*

66. Wang, *supra* note 54.

67. *Id.*

68. *Id.*

69. *Id.*

70. Amanda Brown-Inz, *View From the Media: Controversy Over the Environmental Public Interest Lawsuit*, CHINADEVELOPMENTBRIEF.COM (July 16, 2013), <http://www.chinadevelopmentbrief.cn/?p=2201>. Government-organized NGOs are common in China because of the lack of a strong civil society.

71. Wang, *supra* note 54.

72. Standaert, *supra* note 22; Zhang Chun, *Amending Environmental Protection Law a Backward Step. Say NGOs*, CHINADIALOGUE (June 28, 2013), <https://www.chinadialogue.net/blog/6162-Amending-environmental-protection-law-a-backward-step-say-NGOs/en>.

73. Standaert, *supra* note 22.

74. *Id.*

75. Zhonghua Renmin Gongheguo Huanjing Baohufa Xiuzhengan (Caoan Erci Shenyigao Tiaowen) (中华人民共和国环境保护法修正案(草案二次审议稿 条文)) [Second Draft Amendment to the Environmental Protection Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 17, 2013) (P.R.C.), *available at* [http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2013-07/17/content\\_1801189.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2013-07/17/content_1801189.htm).

76. *Introduction*, ALL-CHINA ENV’T FED’N (Feb. 1, 2014, 6:30 PM), <http://www.acef.com.cn/en/aboutacef/2013/1216/1004.html>.

77. *Id.*

78. Brown-Inz, *supra* note 70.

79. *Id.*

80. *Id.*

81. Zhonghua Renmin Gongheguo Huanjing Baohufa Xiuzhengan Caoan Disanci Tiqingshenyi Kuoda Tiqi Huanjing Gongyi Susong Zhuti Fanwei (中华人民共和国环境保护法修正案草案第三次提请审议稿 扩大提起环境公益诉讼主体范围) [Third Draft Amendment to the Environmental Protection Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 22, 2013) (P.R.C.), *available at* [http://www.npc.gov.cn/huiyi/lfzt/hjbh-fxzaca/2013-10/22/content\\_1811307.htm](http://www.npc.gov.cn/huiyi/lfzt/hjbh-fxzaca/2013-10/22/content_1811307.htm).

82. *Id.*

83. Zhao Yinan & Wu Wencong, *Change to Law May Make It Easier to Sue Polluters*, CHINA DAILY (Oct. 22, 2013), [http://usa.chinadaily.com.cn/china/2013-10/22/content\\_17049251.htm](http://usa.chinadaily.com.cn/china/2013-10/22/content_17049251.htm).

84. *Id.*

85. *Id.*

86. *Id.*

met the requirements listed in the third draft amendment at the time it was released to the public.<sup>87</sup> In addition, most experts agreed that, if the amendment were to become the final EPL, there would be concern over how organizations could satisfy the “good reputation” requirement.<sup>88</sup>

The fate of the EPL remained uncertain when the NPC Standing Committee passed up the opportunity to vote on the third draft amendment.<sup>89</sup> Because laws are normally voted on after three readings, the EPL's amendment process had gone through more scrutiny than anticipated.<sup>90</sup> Legislators at the bimonthly session of the NPC Standing Committee did not vote because they felt that stricter regulations needed to be added to the amendment.<sup>91</sup> A prominent legislator, Wu Xiaoling, commented that the EPL should allow other nonprofit organizations the right to file public interest lawsuits so that the “public's appeal for a better environment [could] be addressed through [the] rule of law.”<sup>92</sup> Even though the newly enacted EPL does grant other organizations the right to file public interest lawsuits, there are still unnecessary limitations that should be stricken from the law.

Ultimately, China's third draft amendment to the EPL completely eliminated the original restrictions on the right to file public interest lawsuits reserved solely for the ACEF. Instead, the NPC Standing Committee attempted to revise the law with the intent to grant this right to more claimants.<sup>93</sup> However, because many of the criteria required for an organization to bring such actions were ambiguous, this revision failed to placate many critics.<sup>94</sup>

### E. Analysis of China's Newly Enacted EPL

The NPC Standing Committee convened its bimonthly session on April 22, 2014 and subsequently ratified a fourth version as the new EPL on April 24, 2014.<sup>95</sup> The new EPL will take effect on January 1, 2015, and has seventy articles, a significant expansion of the 1989 EPL, which only contained forty-seven articles.<sup>96</sup>

The new EPL comprised a new set of requirements for litigants intending to sue on behalf of the public interest.

Some of these requirements are similar to those laid out in the third draft amendment. Under the new EPL, article 58 serves as the specific provision that sets forth rules regarding public interest litigation.<sup>97</sup> Article 58 proscribes that only social organizations that satisfy the following two requirements may file lawsuits with the courts against acts that pollute the environment, cause ecological damage, or harm the public interest:

- (1) Be registered with a government civil affairs department at or above the level of a city with districts;
- (2) Be engaged specifically in public service activities in environmental protection for five consecutive years without any record of violation of laws.<sup>98</sup>

Article 58 also states that public interest litigants may not file suits to seek economic benefits.<sup>99</sup> Thus, article 58 of the new EPL is still arbitrary and needlessly restrictive. The NPC Standing Committee should consider further revisions to the final EPL so that more qualified organizations have a right to file public interest lawsuits.

## III. Environmental Class-Action Public Interest Lawsuits and Their Importance in Addressing China's Environmental Problems

### A. China's Civil Procedure Law and Class-Action Lawsuits

The current landscape regarding class-action public interest lawsuits has changed dramatically since the rise in environmental disputes and the establishment of Environmental Courts to adjudicate them. Although the law on class-action lawsuits has been codified in China's CPL, it is not clear how those provisions will be applied to the environmental cases that come through China's Environmental Courts.

Enacted in 1991, China's CPL explicitly allows class-action lawsuits and multi-plaintiff groups to bring suits seeking compensation for harm from pollution.<sup>100</sup> Thus, China has had a history of allowing multiple plaintiffs and unidentified individuals to be grouped together in a lawsuit.<sup>101</sup> Even though China's CPL officially allows for class-action lawsuits, the success rate and frequency of use are not thoroughly understood.<sup>102</sup> However, the rise in class-action lawsuits has shown that the use of courts to solve disputes is becoming more and more common.<sup>103</sup>

87. *Id.*

88. *Id.* The Chinese translation of “standing” and “reputation” is interchangeable and the use of “reputation” in this sentence refers to standing in other references.

89. See *Environmental Protection Amendment Not Put to Vote*, CHINA DAILY (Oct. 26, 2013), [http://usa.chinadaily.com.cn/business/2013-10/26/content\\_17060370.htm](http://usa.chinadaily.com.cn/business/2013-10/26/content_17060370.htm).

90. See *China to Improve Environmental Protection Legislation*, XINHUANET (Mar. 4, 2013), [http://news.xinhuanet.com/english/special/2014-03/04/c\\_133159290.htm](http://news.xinhuanet.com/english/special/2014-03/04/c_133159290.htm).

91. See *Environmental Protection Amendment Not Put to Vote*, *supra* note 89.

92. *Id.*

93. Du & McGinn, *supra* note 24.

94. Zhao & Wu, *supra* note 83.

95. Li Yang, *Environmental Protection Law Must Respect People's Rights*, CHINA DAILY (Apr. 30, 2014), [http://www.chinadaily.com.cn/opinion/2014-04/30/content\\_17475441.htm](http://www.chinadaily.com.cn/opinion/2014-04/30/content_17475441.htm); see also *NPC Begins Fourth Review on Environmental Protection Law*, XINHUANET (Apr. 22, 2014), [http://news.xinhuanet.com/english/video/2014-04/22/c\\_133280565.htm](http://news.xinhuanet.com/english/video/2014-04/22/c_133280565.htm).

96. Edward Wong, *China's Legislature Votes to Toughen Environmental Protection Law*, N.Y. TIMES (Apr. 24, 2014), [http://www.nytimes.com/2014/04/25/world/asia/chinas-legislature-votes-to-toughen-environmental-protection-law.html?\\_r=0](http://www.nytimes.com/2014/04/25/world/asia/chinas-legislature-votes-to-toughen-environmental-protection-law.html?_r=0).

97. Zhonghua Renmin Gongheguo Huanjing Baohufa (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., Apr. 24, 2014, effective Jan. 1, 2015) (P.R.C.), available at [http://www.gov.cn/zhengce/2014-04/25/content\\_2666434.htm](http://www.gov.cn/zhengce/2014-04/25/content_2666434.htm).

98. *Id.*; see also Zhang, *supra* note 28.

99. *Id.*

100. *Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1523–41 (1998).

101. *Id.*

102. *Id.*

103. *Id.* at 1524.

There are two distinct benefits that class-action lawsuits can offer to plaintiffs. One is the economic feasibility of pooling resources together to hire lawyers who can effectively litigate their collective cause. The other benefit is offering plaintiffs that would otherwise face limited success in their individual capacities an opportunity to sue government departments and state-owned enterprises.<sup>104</sup> However, the reason why China has endorsed the use of class-action lawsuits has been unclear.<sup>105</sup> Some speculate that China has been trying to reduce the burden on peasants and improve environmental protection at the same time by supporting class-action lawsuits.<sup>106</sup> Yet, China's court system and lack of resources make it increasingly difficult to handle both the procedure and substance of large-scale class-action lawsuits, which should actually diminish the government's incentive to support these types of lawsuits.<sup>107</sup>

In addition, because the CPL limits the right to file public interest lawsuits to legally stipulated bodies and related organizations without further explanation as to what entities qualify, the ambiguities have allowed courts to continually restrict these types of lawsuits.<sup>108</sup> When the second draft amendment of the EPL stated that only the ACEF could file public interest lawsuits, the public was concerned that it had violated the legal principles of the revised CPL by further restricting the right to file lawsuits to a single organization without defining the scope and conditions of that right.<sup>109</sup> Some even stated that the proposed EPL has made a "joke" of the CPL.<sup>110</sup> Even though the new EPL does define the scope and conditions of that right, it still arbitrarily limits the number of legally stipulated organizations because the CPL allows far more organizations to bring environmental class-action lawsuits. Nevertheless, in allowing class-action lawsuits under the CPL, China at least intended for litigants to pursue class-action public interest lawsuits, including those concerning environmental issues.

## B. Environmental Courts and the Rise of Public Interest Lawsuits

In addition to the rise of class-action lawsuits, China has also shown interest in expanding the role of Environmental Courts in adjudicating environmental lawsuits.<sup>111</sup> Since 2007, China has established over seventy Environmental Courts across the nation to adjudicate environmental claims.<sup>112</sup>

104. *Id.* at 1532.

105. *Id.*

106. *Id.* at 1533.

107. *Id.*

108. Jianqiang Liu, *New Environmental Protection Law Would Exacerbate Pollution in China*, CHINADIALOGUE (Feb. 7, 2013), <https://www.chinadialogue.net/blog/6171-New-environmental-protection-law-would-exacerbate-pollution-in-China/en>.

109. *Id.*

110. *Id.*

111. Alex L. Wang & Jie Gao, *Environmental Courts and the Development of Environmental Public Interest Litigation in China*, 3 J. CT. INNOVATION 37, 38 (2010).

112. Hu Yongqi & Wu Wencong, *A Bumpy Road for Environmental Courts*, CHINA DAILY (Oct. 30, 2013), [http://www.chinadailyasia.com/news/2013-10/31/content\\_15095656.html](http://www.chinadailyasia.com/news/2013-10/31/content_15095656.html).

Some of these Environmental Courts, notably the Guiyang and Wuxi Courts, have established local procedures on how to handle such public interest lawsuits.<sup>113</sup> For example, article 23 of the Guiyang Municipal regulations stipulates that environmental authorities and environmental NGOs have standing to bring public interest lawsuits before the Guiyang Environmental Court.<sup>114</sup> This is significant given that this is the first local procedural law that permits such broad standing for environmental public interest lawsuits.<sup>115</sup> The Wuxi Environmental Court has established similar procedures by providing standing to NGOs as well.<sup>116</sup> In addition, Wuxi's Environmental Court also implements plaintiff-favorable litigation fee rules.<sup>117</sup>

One difficulty that Environmental Courts have repeatedly faced is their fluctuating caseload.<sup>118</sup> Most of China's Environmental Courts have struggled to find enough cases to justify their existence.<sup>119</sup> Indeed, there is a concern that the presence of Environmental Courts will be purely for show.<sup>120</sup> In addition, because all Environmental Courts are subject to their own rules, which are oftentimes decided by the Intermediate Level People's Courts, they lack centralized rulemaking that standardizes all adjudications over public interest lawsuits.<sup>121</sup> Most Environmental Courts have some sort of procedure regarding standing, but it is important to note that standardized rulemaking in the form of an amended EPL could help solidify the rules of these specialized courts and cement their status as neutral and fair venues to hear disputes regarding environmental issues.

## C. Example of a Public Interest Lawsuit

Although China has a history of allowing class-action lawsuits and public interest lawsuits, there has been only one widely reported case in recent years where a court adjudicated an environmental class-action public interest lawsuit filed by an NGO.<sup>122</sup> In September 2011, the NGOs, Friends of Nature and Green Volunteer Union, filed a lawsuit against two companies in Qujing, which were stockpiling toxic chromium slag that polluted the water supply as well as poisoned livestock.<sup>123</sup> The Environmental Court of the Intermediate People's Court of Qujing accepted this

113. Wang & Gao, *supra* note 111, at 45–46.

114. *Id.* at 45.

115. *Id.*

116. *Id.* at 46.

117. *Id.*

118. *Id.* at 48.

119. Rachel E. Stern, *Poor Rural Residents in China Seen as Easy Target for Environmental Lawsuits*, CHINADIALOGUE (Apr. 24, 2013), <https://www.chinadialogue.net/article/show/single/en/5937-Poor-rural-residents-in-China-seen-as-easy-target-for-environmental-lawsuits>.

120. Wang & Gao, *supra* note 111, at 48.

121. *Id.* at 44. Environmental Courts in China are part of a four-level court system that includes Basic Courts, Intermediate Courts, Provincial High Courts, and the Supreme People's Court. These courts are essentially described as "judicial bodies established for the adjudication of environmental protection cases in China," and they make up certain environmental divisions within Intermediate People's Courts and separate tribunals at the Basic Court level. *Id.* at 39.

122. Wang Hairong, *No Easy Justice: Legal Barriers Hinder Class Actions in Environmental Courts*, BEIJING REV. (Aug. 2, 2012), [http://www.bjreview.com.cn/nation/txt/2012-07/30/content\\_472096.htm](http://www.bjreview.com.cn/nation/txt/2012-07/30/content_472096.htm).

123. *Id.*

case and was the first court to accept a public interest lawsuit from an organization that was not affiliated with the government.<sup>124</sup> As was noted above, China has generally been hesitant to allow all NGOs the right to file public interest lawsuits. Since the amendment process began for the new EPL, the right to file these types of lawsuits has been continuously subject to restrictions, thereby making this case all the more noteworthy.

However, there are at least some advantages to allowing government-affiliated organizations to file cases on behalf of the public.<sup>125</sup> Yang Yang, a program officer with the Friends of Nature, indicated that one advantage to having a government-affiliated organization file the case is that the plaintiffs can cite to government-controlled information, to which these organizations can have access.<sup>126</sup> Yang even stated that Friends of Nature was fortunate to have been accepted as one of the “social organizations” that is currently allowed to file environmental public interest lawsuits given that certain proposed amendments to the CPL have tried to further limit the number of organizations able to file class-action lawsuits.<sup>127</sup> Even though the Friends of Nature case sets a landmark precedent for increased involvement of NGOs and other organizations in trying to protect the environment through the rule of law, there are many signs that the Chinese government intends to continue restricting which organizations may file such lawsuits in the future. As indicated above, this intent has been evident in the EPL’s amendment process.

#### IV. Proposed Solution to Deficiencies in the New EPL

##### A. Revise the New EPL and Eliminate Ambiguities

##### 1. Eliminate the Requirement That Only Organizations Registered at the City Level or Above Can File Public Interest Lawsuits

As noted above, the new EPL’s requirements for filing a public interest lawsuit have generated concerns among NGOs and the general public. The first requirement has not received much attention; however, it does limit the ability of local chapters registered below the city level to file public interest lawsuits.<sup>128</sup> Thus, hypothetically, even the ACEF’s numerous local-level subsidiaries that are not registered at or above the city level could not file lawsuits under the new EPL. Implementing this requirement would also severely reduce public participation because the public can no longer rely on their local NGOs, which are likely closer and more knowledgeable about local environmental issues, to file lawsuits on their behalf. By eliminating this requirement, there would be greater representation

of China’s local environmental interests in Environmental Courts, and local chapters of national organizations would afford Chinese citizens greater access to the courts. In addition, a general requirement that the organization be registered at some level of government will adequately ensure that the organization is engaged in legitimate activities.<sup>129</sup>

While registration has caused problems in the past for many organizations due to bureaucracy,<sup>130</sup> China has revised administrative regulations regarding the registration of NGOs by the Civil Ministry.<sup>131</sup> Since July 4, 2011, NGOs have not been required to seek government departmental permission in order to register with the Civil Ministry.<sup>132</sup> In fact, in 2013, the Civil Ministry even relaxed requirements for foreign NGOs to register in China.<sup>133</sup> Therefore, NGOs only require approval through the registration process. The streamlined registration process, along with current trends toward a direct registration system both locally and nationally in China, will allow organizations to better comply with the new EPL when it comes into effect in 2015.<sup>134</sup> Thus, a general registration requirement already takes into account the key concerns of the government in ensuring that the relevant organization is legitimate and makes the requirement that the organization be specifically registered at the city level or above arbitrary and unnecessary.

Additionally, it is still unclear what “city level” means.<sup>135</sup> The requirement that only registered organizations above the city level can litigate public interest lawsuits will bar litigation for a large number of NGOs registered at the local level and as enterprises.<sup>136</sup> In China, a “city” could effectively apply to four different levels of government, including at the provincial, local, prefectural, or county levels.<sup>137</sup> Without further a definition of what “city level” registration encompasses, the new EPL is ambiguous and runs the risk of having many organizations confused as to whether they are eligible to file public interest lawsuits. The NPC Standing Committee should set forth clearer guidelines and amend the new EPL to state that all registered organizations, at any local government level, will be allowed to file public interest lawsuits.

124. *Id.*  
125. *Debate on Class-Action Plan*, CHINA.ORG (Dec. 1, 2011), [http://www.china.org.cn/china/2011-12/01/content\\_24049728.htm](http://www.china.org.cn/china/2011-12/01/content_24049728.htm).

126. *Id.*

127. *Id.*

128. Lau, *supra* note 27.

129. CHIEN-CHUNG HUANG ET AL., CHINA’S NONPROFIT SECTOR: PROGRESSES AND CHALLENGES (Oct. 1, 2013). China’s Civil Ministry primarily registers and manages public charity, social welfare, and social service organizations. The Civil Ministry also now recently registers NGOs. A large problem with China’s registration process results from the Civil Ministry’s use of a dual-oversight system. An organization that is able to register with the Civil Ministry must find a government department to grant them permission. The second part of this oversight contains even more stringent requirements that involve strict license checks and registration requirements that make it difficult for NGOs to successfully register with the Civil Ministry. In addition, the Civil Ministry highly regulates what types of organizations can be registered and this includes an analysis into the goals of the organization within its specific categories. *Id.* at 60–63.

130. *Id.*

131. *China to Ease NGO Registration Policy*, CHINA DAILY (July 11, 2011), [http://www.chinadaily.com.cn/china/2011-07/11/content\\_12878662.htm](http://www.chinadaily.com.cn/china/2011-07/11/content_12878662.htm).

132. *Id.*

133. He Dan, *New Rules for NGOs to Improve Operations*, CHINA DAILY (Apr. 17, 2013), [http://www.chinadaily.com.cn/china/2013-04/17/content\\_16413055.htm](http://www.chinadaily.com.cn/china/2013-04/17/content_16413055.htm).

134. HUANG ET AL., *supra* note 129, at 62.

135. Lau, *supra* note 27.

136. *Id.*

137. *Id.*

## 2. Eliminate the Five-Year Requirement

In addition, the requirement that NGOs engage in environmental protection activities for at least five years is unnecessary. Once an organization has been registered with the government, it has undergone the requisite review process and had its purpose deemed to be in line with the public interest. An arbitrary five-year requirement on engaging in environmental activities will severely restrict the number of organizations that may file public interest lawsuits. It also unfairly attributes the importance of longevity to the ability of filing successful environmental class-action public interest lawsuits.

This five-year requirement represents the government's unwillingness to allow all registered organizations to have the right to file these types of lawsuits. Although the NPC Standing Committee has made significant changes since the first draft of the EPL, it has not provided a reason for arbitrarily limiting the number of organizations that have a right to file public interest lawsuits. The NPC Standing Committee should provide an explanation so that the public is aware of the government's reasoning behind each limitation. If the NPC Standing Committee is transparent as to its motivations, the public will more likely support the new EPL. Ultimately, the five-year requirement does not reflect whether an organization is legitimate or equipped to file public interest lawsuits. Again, any concerns over whether an organization serves the public interest can be accounted for in the registration process. Therefore, the five-year requirement should be eliminated.

## 3. Eliminate the Requirement That Lawsuits Can Only Be Filed Against Polluters Instead of Government Authorities

As noted above, article 58 in the EPL allows lawsuits against pollution, ecological damage, and other "acts" that harm the public interest. Implicit in this and in other provisions of the new EPL is the fact that litigants can only sue the polluters and not the government authorities who permit these acts.<sup>138</sup> The new EPL makes no mention of any other entities against which lawsuits can be filed.<sup>139</sup> This makes it impossible for public interest litigants to hold government authorities accountable for failures to enforce the EPL or any other environmental law.<sup>140</sup> Since the goal of the newly revised EPL has been to improve public participation and transparency, it would be logical to allow litigants the opportunity to sue local authorities who oftentimes implicitly support the actions of polluters.<sup>141</sup> In the interest of transparency, the government should not be exempt from lawsuits where it has actively supported and endorsed activities by polluting entities.

138. *Id.*

139. *Id.*

140. *Id.*

141. Tseming Yang, *The 2014 Revisions of China's Environmental Protection Law*, SWISS RE CENTRE GLOBAL DIALOGUE (Oct. 16, 2014), [http://cgd.swissre.com/features/The\\_2014\\_Revisions\\_of\\_Chinas\\_Environmental\\_Protection\\_Law.html](http://cgd.swissre.com/features/The_2014_Revisions_of_Chinas_Environmental_Protection_Law.html).

## 4. Allow ACEF to File Lawsuits on Behalf of Organizations That Are Not Registered With the Civil Ministry

The ACEF is still one of the most important environmental organizations, and, given that it has filed public interest lawsuits before, unregistered organizations and members of the public should be able to file cases with the ACEF and request that the ACEF bring those cases before the Environmental Courts. The ACEF has lodged numerous lawsuits against polluters on behalf of victims and won several of them.<sup>142</sup> The ACEF's expertise and abundant resources could provide an incentive for unregistered organizations to request the help of the ACEF rather than register at the city level or above and, presumably, wait for five years before being able to bring such actions themselves. Therefore, the EPL should also explicitly provide for a transparent venue in which these organizations can submit their cases to the ACEF.

### B. Establish an Environmental Court-Sponsored Forum

Allowing Environmental Courts to sponsor a forum for unregistered organizations and members of the public to submit requests or voice complaints to the ACEF will encourage public participation, increase transparency, and provide a deterrent against polluters.<sup>143</sup> These three goals were listed as essential targets for the third amendment, and this Note argues that a court-sponsored forum would present the best solution for environmental protection.<sup>144</sup> Despite the fact that the NPC has already passed the new EPL, it should still further amend the current law so that unregistered NGOs and other members of the public are given a voice in the process.

Even though the ACEF is considered by some as a competent government-affiliated organization, others call into question the ACEF's neutrality as it ultimately receives government funding. As a result, some doubt "[the] ACEF's ability to place the needs of the public before those of the government or enterprise."<sup>145</sup> Recent scandals involving government-affiliated organizations such as the Chinese Red Cross and the China Charity Aid Foundation have also led to criticism of any increased power being granted to the ACEF.<sup>146</sup> Although this criticism may not be well-founded, providing a neutral venue within the Environmental Courts for unregistered organizations and members of the public to pitch their public interest lawsuit claims to the ACEF should address these concerns while still preserving the ACEF's authority.

The NPC should amend the new EPL and include a mandatory provision that stipulates that every unregistered organization or member of the public that wishes to file a public interest lawsuit must file through the ACEF, which would

142. Li, *supra* note 33.

143. Du & McGinn, *supra* note 24.

144. *Id.*

145. Brown-Inz, *supra* note 70.

146. *Id.*

then decide whether to bring a case before an Environmental Court. In addition, the amendment to the EPL should mandate that the ACEF conduct town hall-style hearings before an Environmental Court where unregistered organizations and members of the public can bring forth cases, requesting the ACEF to file on their behalf. These two provisions would work together to ensure that both Environmental Court judges and the ACEF are present, so that unregistered organizations and members of the public are able to voice their complaints in a neutral venue.

The paramount goal of the court-sponsored forum would be to provide a means for unregistered NGOs and other organizations, as well as members of the public, to present significant environmental public interest issues and cases. Even a retired MEP official told state media last year that “the number of environment-related ‘mass incidents’ . . . grew by an average 29% from 1996 to 2013.”<sup>147</sup> This venue would provide relevant organizations and the public a channel for voicing their complaints, which could possibly help prevent mass rioting and social unrest.

Many have speculated that the reason why the government has continued to restrict the right to file public interest lawsuits is because the government is wary of grassroots NGOs successfully handling public interest environmental lawsuits.<sup>148</sup> Even though the benefits are clear, policymakers within the NPC have expressed concern over allowing too many organizations to have the right to file public interest lawsuits.<sup>149</sup> Most of these government officials believe that this would open the gates too wide and lead to an explosion of public interest lawsuits, which would be undertaken by groups without adequate funding or expertise.<sup>150</sup> However, the nonbinding court forum proposal would not allow unregistered organizations or members of the public to file cases in court on their own, but permit them to bring their cases before the ACEF and an Environmental Court in a neutral venue. Since the ACEF is well-funded and has considerable expertise in filing lawsuits, there would be less concern that it would choose to file frivolous lawsuits or be ill-equipped to effectively bring a particular case.

Additionally, this forum would be able to combine the interests of the Environmental Courts as well as the MEP and the ACEF into one venue. Because Environmental Courts often have fluctuating caseloads, their role in this forum would be to observe the current cases that are being considered by the ACEF, which can only add to the courts’ experience and expertise.<sup>151</sup> In fact, most of the cases that have gone before Environmental Courts are small petty crimes including accidental fire setting or illegal logging.<sup>152</sup> Environmental Courts pursue cases involving ordinary people more often than cases against major polluters such as enterprises and large companies.<sup>153</sup> Since these Courts lack

the experience in handling large class-action suits, they can learn about key environmental issues affecting certain sectors of the population at these forums. In this forum, the Environmental Courts would not only learn about the major polluting incidents that are occurring, but would also indirectly signify their important role in the environmental regulatory system, as well as the significance of the EPL and the rule of law.

At the same time, the MEP and ACEF maintain their interest in controlling a major portion of the cases that can be filed in Environmental Courts. Notably, the ACEF still retains control over whether to file cases brought by unregistered organizations or members of the public. Thus, by utilizing this court forum, the government still maintains considerable authority over which large class-action public interest lawsuits become litigated, while the public gains from the added transparency and opportunities for participation. The MEP has struggled to regain its lost legitimacy, so allowing their subsidiary—the ACEF—to have control over a large portion of the cases that may be filed in Environmental Courts strengthens their position and authority.<sup>154</sup>

The court-sponsored forum would be the appropriate forum to engage the public, increase transparency, and begin the process of subjecting major polluters to the rule of law. The public’s participation in these forums either directly or through their representative unregistered organizations provide an outlet for their current frustrations with environmental degradation. The flow of information directly from the public to the Environmental Court would also give the courts a chance to hear firsthand the major environmental problems that are affecting people in their jurisdiction. Lastly, the increased publicity could also indirectly affect decisions made against major polluters and pressure the ACEF to accept the legitimate cases being proposed by the public. These goals can only be achieved through a neutral forum where the public and the Environmental Courts participate freely and willingly. This venue offers incentives for the government, the judiciary, and the public to engage in dialogue, protect the environment, and legitimize the newly amended EPL.

### C. Overall Implications of Requiring a Court-Sponsored Forum

Although there are many distinct advantages for including a forum as a mandatory provision within the newly amended EPL, there are also issues relating to confidentiality and plausibility that may hamper its development and support. There could be concerns that major polluters could attend the forum and gain valuable data from these hearings and affect the ultimate outcome of certain cases. This concern is not likely to hamper the effectiveness of this forum in the long run because unregistered organizations are unlikely to showcase their court strategies or present all the evidence that it needs to win a case before the Environmental Court.

147. Li, *supra* note 28.

148. *Id.*

149. Brown-Inz, *supra* note 70.

150. *Id.*

151. Stern, *supra* note 119.

152. *Id.*

153. *Id.*

154. Brown-Inz, *supra* note 70.

The forum is designed to only include nonconfidential and general information so that the ACEF and the Environmental Court can understand current environmental issues and evaluate potential lawsuits. If confidential information were to be presented in the forum setting, the Court could ask all visitors not associated with the unregistered organization and the ACEF to leave the court until that specific information is finished being presented. Once the ACEF assumes a particular case, the discussions would no longer be conducted through this public forum. The initial proceedings before this forum would only further deter major polluters from violating the terms of the EPL and warn them of impending class-action public interest lawsuits.

Since the first draft amendment of the EPL, the NPC has demonstrated its intent to better provide for public participation and transparency.<sup>155</sup> Therefore, establishing the forum described above would be in line with those objectives. This forum is thus a unique opportunity for the government to address the public's concerns without unduly hampering its interests at the same time.

Hypothetically, if the NPC Standing Committee were to implement this mandatory court forum into the EPL, it would institute them at every Environmental Court that currently exists. In China, judges often assume roles that go beyond adjudicating cases.<sup>156</sup> In fact, judges need to carry out many duties in addition to trials, including reconciling disputes and entering residential communities to liaise with ordinary people.<sup>157</sup> In addition, the frequency with which these forums are held can be decided by each Environmental Court. The NPC could avoid backlash over instituting mandatory forums by allowing each jurisdiction to decide the logistics and administration of these forums as long as they meet certain baseline standards. Compliance with these baseline standards could be enforced by the MEP. Overall, the forum would significantly improve the legitimacy of China's court system, the development of the rule of law, and the overall environmental regulatory landscape.

## V. Conclusion

The goal in amending the decades-old EPL has been to provide an effective legal means to protect China's deteriorating

environment, and allowing public participation is necessary to achieve that goal. Since the NPC Standing Committee has already ratified the new EPL, it needs to thoroughly address the ambiguities and arbitrary restrictions it has placed on public participation through subsequent amendments. Thus far, the NPC has not been able to effectively address the fears and concerns of the public regarding damage to the environment. Since the government has indicated its desire to stem the steady but increasing frequency of "mass incidents" that occur as a result of environmental degradation and lack of legal redress, it should promote transparency and public participation when addressing the nation's environmental issues.<sup>158</sup>

Although amending the EPL will not fully resolve the public's concerns, the NPC should start by addressing the deficiencies shown in the draft amendments. First, eliminating the requirement that only organizations registered at or above the city level allows the public to pursue their cases through local organizations that are knowledgeable of the issues affecting the area, which may not be registered at or above the city level. Second, if the NPC were to eliminate the five-year requirement, it would demonstrate to the public that it is committed to public participation and not arbitrarily limiting the number the organizations that may possess the right to sue on the public's behalf. Third, the NPC should eliminate the requirement that lawsuits can only be filed against polluters rather than government authorities. These three proposed changes will further improve the EPL.

To supplement these changes, the NPC Standing Committee should institute an Environmental Court-sponsored forum to provide the public with a means of having their voices heard. These proposed solutions should also be implemented in the form of an amendment to the newly enacted EPL. The NPC Standing Committee should take into account the issues presented in this Note and begin the process of further revising the EPL if it is to start transparently and effectively tackling China's environmental issues.

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155. Yang, *supra* note 141.

156. Zhang Yiwei, *Judges on the Run*, GLOBAL TIMES (Feb. 11, 2014), [http://www.globaltimes.cn/content/841844.shtml#.UxOBkYW\\_9Fs](http://www.globaltimes.cn/content/841844.shtml#.UxOBkYW_9Fs).

157. *Id.*

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158. Li, *supra* note 28.