

# PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN CHINA: LESSONS LEARNED FROM THE U.S. EXPERIENCE

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## INTRODUCTION

The rapid pace of economic development in China, and the sheer size and density of China's population, have given rise to a myriad of environmental challenges. The World Bank has listed sixteen Chinese cities among the twenty cities with the worst air pollution in the world; a problem that may worsen with the exponential increase in the number of cars on the road.<sup>1</sup> Most rivers in urban areas are unsuitable for drinking or

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1. See, e.g., ImpactLab.com, The World's Top 20 Polluted Cities, <http://www.impactlab.com/modules.php?name=News&file=article&sid=8462> (last visited March 15, 2007) (citing the World Bank's determination and noting that in addition to China's coal burning power stations, increasing car ownership will continue to worsen air quality in these cities); see also Leta Hong Fincher, *Worldwatch Institute: 16 of World's 20 Most-polluted Cities in China*, VOA NEWS, <http://www.voanews.com/english/archive/2006-06/2006-0628voa36.cfm?CFID=36234535&CFTOKEN=81782323> (last visited Mar. 15, 2007) (stating that the Worldwatch Institute announcement that out of the twenty most polluted cities in the world, sixteen are located in China); Energy Information Administration, Department of

fishing.<sup>2</sup> The demands for drinking water in drought-stricken areas are spurring mega-water projects, and energy demand has led to the Three Gorges Dam, with more controversial hydroelectric projects in planning stages.<sup>3</sup>

In China, the reports of environmental disasters are growing in frequency, and when they occur, the consequences tend to be enormous, given the size of the impacted populations. Toxic pollution spills near highly populated cities have deprived millions of adequate water supplies for weeks, closing businesses and necessitating mass distribution of bottled water.<sup>4</sup> Flooding on the Yangtze River in 1998 killed more than 3,000 people and destroyed more than 5,000,000 homes.<sup>5</sup> The problems loom large.

In the last couple of decades, China has adopted numerous environmental laws, some applying generally to environmental matters and others dealing with particular environmental problems, such as water and

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Energy, China: Environmental Issues, <http://www.eia.doe.gov/emeu/cabs/chinaenv.html> (last visited Mar. 15, 2007) (World Health Organization noted in 1998 that seven of the ten most polluted cities in the world were located in China).

2. Louisa Lim, *China Warns of Water Pollution*, BBC NEWS, Mar. 23, 2005, <http://news.bbc.co.uk/1/hi/world/asia-pacific/4374383.stm> (noting that Beijing officials reported 70% of China's rivers and lakes were polluted and approximately 360 million people lacked access to safe drinking water); Yingling Liu, *China's Drinking Water Situation Grim; Heavy Pollution to Blame*, Aug. 3, 2006, WORLDWATCH INSTITUTE, <http://www.worldwatch.org/node/4423> (discussing the industrial pollution that threatens China's drinking water supply).

3. See generally ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGES TO CHINA'S FUTURE 205-07* (2004) [hereinafter ECONOMY] (providing a brief history of the Three Gorges Dam); see also STEPHANIE HEMELRYK DONALD & ROBERT BENEWICK, *THE STATE OF CHINA ATLAS: MAPPING THE WORLD'S FASTEST GROWING ECONOMY 87-93* (2005) (discussing the extensive demands on China's water resources and noting that the Three Gorges Dam project may not be sufficient to counter the increasing threat of flooding on the Yangtze River); Jim Yardley, *Seeking a Public Voice on China's Angry River*, N.Y. TIMES, Dec. 26, 2005, at A1 (comparing a proposed project to build an extensive dam projects on the Nu River in Yunnan Province with the already-constructed Three Gorges Dam); Eric W. Orts, *Environmental Law with Chinese Characteristics*, 11 WM. & MARY BILL RTS. J. 545, 549-52 (2003) [hereinafter Orts, *Chinese Characteristics*] (noting the Three Gorges Dam as a "leading contemporary example of the scale and seriousness of the environmental and cultural devastation that can result in the name of economic progress").

4. See, e.g., ECONOMY, *supra* note 2, at 1-7 (discussing various events that rendered drinking water supplies unfit for human consumption); UNITED NATIONS ENVIRONMENT PROGRAMME, *THE SONGHUA RIVER SPILL CHINA: FIELD MISSION REPORT 6-15* (2005), available at [www.unep.org/PDF/China\\_Songhua\\_River\\_Spill\\_draft\\_7\\_301205.pdf](http://www.unep.org/PDF/China_Songhua_River_Spill_draft_7_301205.pdf) (describing the November 2005 spill of over 100 tons of benzene into the Songhua River in Jilin Province and the monitoring and mitigation measures that followed); U. N. Env't. Programme, *Chinese River Contamination Resulting from a Petrochemical Explosion and Toxic Spill*, Nov. 24, 2005, [http://www.unep.org/PC/apell/disasters/china\\_harbin/info.htm](http://www.unep.org/PC/apell/disasters/china_harbin/info.htm) (reporting on the Songhua River spill and noting that authorities were providing water for affected cities, including Harbin).

5. ECONOMY, *supra* note 3, at 9.

air pollution.<sup>6</sup> China's State Environmental Protection Agency (SEPA) issues regulations and has investigation and enforcement powers.<sup>7</sup> At the provincial level, the Environmental Protection Bureaus exercise similar authority.<sup>8</sup> Yet, violations of environmental laws run rampant. The environmental agencies lack the resources, and sometimes the will, to exercise their investigation and enforcement authority to cabin in polluting industries that contribute to the local tax base.<sup>9</sup>

In China, there is a growing interest in using public interest environmental litigation to curtail pollution and depletion of natural resources, as well as to enhance compliance with environmental laws. Toward that end, Chinese lawyers and officials have sought to learn about United States (U.S.) public interest environmental litigation. This interest in exploring environmental litigation is occurring alongside China's movement toward a rule-of-law system. The Chinese constitution expressly articulates the rule of law, and China's entry into the World Trade Organization (WTO) carries explicit obligations to develop a certain degree of transparency and provide legal remedies, at least in the commercial context.<sup>10</sup> This evolution is in early stages, moving at a variable and

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6. See, e.g., State Env'tl. Prot. Admin. (SEPA), Environmental Laws, <http://english.sepa.gov.cn/zffg/index.htm> (providing links to Chinese environmental law); e.g., Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), available at [http://english.sepa.gov.cn/zffg/fl/198912/t19891226\\_49697.htm](http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm) (P.R.C.); e.g., Law on Prevention and Control of Water Pollution (promulgated by the President, May 11, 1984, effective Nov. 1, 1984, amended 1996) LAWINFOCHINA (last visited Mar. 15, 2007) (P.R.C.); see also Richard J. Ferris Jr. & Hongjun Zhang, *Reaching Out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime*, 11 WM. & MARY BILL RTS. J. 569, 581-84 (2003) [hereinafter Ferris & Zhang, *Reaching Out to the Rule of Law*] (noting that by 2003, China had adopted approximately twenty environmental statutes, forty regulations, and hundreds of standards and documents relating to environmental protection and management).

7. See, e.g., Ferris & Zhang, *Reaching out to the Rule of Law*, *supra* note 6, at 590-93 (discussing SEPA's environmental investigation enforcement mechanisms).

8. See *id.* at 595 (explaining how the provincial governors and municipal mayors appoint the directors of the Environmental Protection Bureaus, which do not always welcome outside "intervention by authorities such as SEPA").

9. See generally Richard J. Ferris, Jr. & Hongjun Zhang, *The Challenges of Reforming an Environmental Legal Culture: Assessing the Status Quo and Looking at Post-WTO Admission Challenges for the People's Republic of China*, 14 GEO. INT'L ENVTL. L. REV. 429, 434-36 (2002) (discussing environmental reform efforts in China); see also William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125, 142-43 (1997) (noting that the main source of revenue for local governments is industry).

10. E.g., Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 172-74 (2001) (discussing the effects of globalization on the economy and sovereignty of China, as a result of its decision to join international organizations such as the WTO); Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 128 (1999) (noting that the March 1999 Amendments to Article 5 of the

inconsistent pace, depending on the geography, the subject matter, and the point in time. For example, although the Civil Procedure Law directs judges to apply the law to the facts of the case, some decisions still appear to be result-oriented and announce conclusions without providing a legal basis.<sup>11</sup> And even obtaining judicial decisions, let alone other information about the progression of a lawsuit, often poses a difficult challenge.

This article offers the perspective of a U.S. environmental litigator, drawing from the U.S. experience, to provide strategies for overcoming barriers to effective citizen advocacy in China. The U.S. experience has not been a panacea, and the jurisprudential constructs that have proven effective in U.S. courts may flounder in other legal and political systems. Accordingly, this article offers an assessment of the efficacy of key U.S. trends over the last three decades, while recognizing that the nuances of the Chinese legal system and culture will dictate whether it would be efficacious to borrow or deviate from the United States' experiences.

This article addresses two areas of potential opportunity for greater citizen participation and enforcement in China. The first is broadening who has standing to bring lawsuits to compel compliance with environmental laws. Access to the courts has been essential in fostering litigation to prevent environmental harm in the United States. The second is ensuring effective interpretation and implementation of China's Environmental Impact Assessment Law (EIA Law).<sup>12</sup> The enactment of this law is a laudable achievement, marking a large step forward in enhancing public participation in environmental decision making, and ensuring consideration of environmental impacts. Such consideration will also continue to shape

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Constitution of the People's Republic of China included a statement that China "shall practice ruling the country according to law, and shall construct a socialist rule-of-law state."); Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 44-45 (2001) (explaining how China's promotion of "the rule of law" in Article 5 of the Chinese Constitution is closely linked to the WTO's requirement for a fair and impartial legal system).

11. Civil Procedure Law (promulgated by the President on Apr. 9, 1991, effective Apr. 9, 1991), art. 138, LAWINFOCHINA (last visited Mar. 15, 2007) (P.R.C.) (setting forth the requirements for judgment orders); see also ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 149 (3d ed. 2004).

There are several differences between Chinese court decisions and American common law, some observations include, "the typical judgment of a Chinese court is short and does not set out lines or steps of legal reasoning . . . the precise relationship between [statutory provisions] in their application to the case will not usually be discussed at length, [and] there is no established doctrine of precedent."

*Id.*

12. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), available at [http://www.sepa.gov.cn/law/law/200210/t20021028\\_84000.htm](http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm) (P.R.C.).

the development of decisions affecting the environment. This article attempts to draw from the U.S. experience, both successes and failures, as China addresses potential expansion of standing and implementation of the EIA Law. The article first compares U.S. and Chinese litigation to obtain compensation for harm from pollution. Next, it draws lessons from the standing jurisprudence, as it has evolved in the United States. And finally, this article reviews some strengths and pitfalls of implementing the use of environmental impact statements.

#### I. LITIGATION TO SEEK COMPENSATION FOR VICTIMS OF POLLUTION

Most environmental litigation in China seeks compensation for the harm caused by pollution to individuals, with the bulk of environmental cases concern noise and dust.<sup>13</sup> Such litigation is authorized by statutes that create a right to compensation for harm caused by pollution. For example, China's 1989 Environmental Protection Law provides: "A unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and to make compensation to the unit or individual that suffered direct losses."<sup>14</sup> If a dispute over compensation cannot be resolved, the injured party may sue for compensation, subject to a three-year statute of limitations.<sup>15</sup> However, the statute also provides a defense: "If environmental pollution losses result solely from irresistible natural disasters which cannot be averted even after the prompt adoption of reasonable measures, the party concerned shall be exempted from liability."<sup>16</sup> The 1984 water pollution law has the same liability provision, as the Environmental Protection Law, but provides additional defenses: "If the loss from water pollution is caused by a third party intentionally or negligently, the third party shall be liable to make compensation."<sup>17</sup> Also, "[i]f the loss from water pollution is caused due to the victim's own fault,

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13. Wang Canfa, Presentation at the International Workshop on Environmental Litigation and Public Interest Law Practice, sponsored by All China Lawyers' Association, National Judges College, China University of Politics and Law's Center for Legal Assistance to Pollution Victims, and the American Bar Association's Asia Law Initiative (Oct. 24, 2005).

14. Environmental Protection Law of the People's Republic of China (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 41, *available at* [http://english.sepa.gov.cn/zffg/fl/198912/t19891226\\_49697.htm](http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm) (P.R.C.).

15. *Id.* art. 42.

16. *Id.* art. 41.

17. Law on Prevention and Control of Water Pollution, art. 55 (promulgated by the President, May 11, 1984, effective Nov. 1, 1984, amended 1996) LAWINFOCHINA (last visited Mar. 15, 2007) (P.R.C.).

the pollutant discharging unit shall bear no liability for it.”<sup>18</sup>

In the United States, compensation cases would generally arise under the Anglo-American common law, which establishes reciprocal rights and duties. When one breaches such a duty in a manner that interferes with another’s rights, the victim must be “made whole,” generally through payment of compensation for the resulting harm.<sup>19</sup> For example, under the law of nuisance, if a farmer raises pigs in the city and causes noxious odors that interfere with others’ use and enjoyment of their property, the pig farmer would owe compensation to the city dwellers, and a court may order the pig farmer to stop causing the odorous intrusion.<sup>20</sup> As another example, under the common law of negligence, a person is negligent if he or she fails to exercise reasonable care, and that failure causes harm to people who are foreseeably at risk.<sup>21</sup> Negligence also forms the underpinnings for toxic tort litigation; the controlling standards of reasonable care have evolved over time as pollution control technologies become available and the public grows to believe that polluting conduct is unacceptable.<sup>22</sup> In a lawsuit under the U.S. common law, whether based on negligence or nuisance, the plaintiffs would need to prove a breach of a duty as a threshold issue.<sup>23</sup>

In contrast, Chinese law creates no-fault liability to compensate those harmed by pollution, eliminating the need to prove the existence and breach of a duty or some other form of fault. To be entitled to compensation, the

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18. *Id.*

19. See RESTATEMENT (SECOND) OF TORTS § 7 (1965) (defining “injury as the invasion of any legally protected interest of another); see also *Friends For All Children v. Lockheed Aircraft*, 746 F.2d 816, 826 (D.C. Cir. 1984) (“When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.”).

20. See, e.g., *Spur Industries v. Del. E. Webb Development Co.*, 494 P.2d 700, 706 (Ariz. 1972) (enjoining the operation of a feedlot operation because the court found that it was both a public and private nuisance for the residents of a nearby development community); see also WILLIAM H. RODGERS, ENVIRONMENTAL LAW 116–19 (2d ed. 1994) (discussing rights theories in the context of nuisance law, including “frictional minimization” and “non zero sum game”).

21. See, e.g., *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 347 (1st Cir.1980), *cert. denied*, 449 U.S. 1135 (1981) (holding that where conditions rendered plaintiff’s injury foreseeable, the defendant had a duty to exercise reasonable care to protect against dangerous conditions); see also JAMES A. HENDERSON, JR., RICHARD N. PEARSON & JOHN A. SILICIANO, THE TORTS PROCESS 175–76, 297–98, (5th ed. 1999) (discussing the standard of reasonable care and the importance of foreseeability in determining proximate cause).

22. See generally WILLIAM H. RODGERS, *supra* note 20, at 112 (noting that current environmental law is an “amalgam” of statutory and common law, and the impact of technology has shaped the doctrines in many areas of the law, including nuisance, negligence, trespass, and strict liability).

23. E.g., *Terrell v. Alabama Water Service Co.*, 15 So. 2d 727, 729 (Ala. 1943) (“Negligence and nuisance are distinct torts . . . [b]ut in either event there must be a breach of duty owing by defendant to plaintiff.”).

plaintiff bears the burden of proving the following two elements: 1) the defendant caused pollution; and 2) the plaintiff suffered harm that is associated with that type of pollution.<sup>24</sup> The burden then shifts to the defendant to prove that the plaintiff's injuries were caused by an act of nature, his or her own actions, a third party, or some other cause.<sup>25</sup>

Chinese law authorizes lawsuits seeking compensation for harm caused by pollution, but there are few other causes of action or available remedies.<sup>26</sup> The Center for Legal Assistance to Pollution Victims has brought numerous cases seeking redress on behalf of people who have been injured by pollution.<sup>27</sup> For example, it has sought damages for the following: 1) the loss of an orchard due to sulfur dioxide poisoning from a copper plant; 2) for noise and dust pollution from a coal plant operating just meters from residences; for the loss of duck eggs due to wastewater pollution; and 3) for a fish kill from industrial pollution discharges.<sup>28</sup> However, it is difficult to amass sufficient proof to prevail in environmental compensation cases; even when the plaintiffs prevail in court, they may encounter further obstacles when seeking to collect damage awards.<sup>29</sup>

The right to obtain compensation for injuries caused by environmental pollution is analogous to the U.S. common law right to be made whole from tortious or negligent conduct that causes environmental harm. While the films *A Civil Action*<sup>30</sup> and *Erin Brockovich*<sup>31</sup> have sensationalized toxic tort

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24. Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 41, available at [http://english.sepa.gov.cn/zffg/fl/198912/t19891226\\_49697.htm](http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm) (last visited Mar. 15, 2007) (P.R.C.); see also Yuhong Zhao, *Environmental Dispute Resolution in China*, 16 J. ENVTL. L. 157, 181–82 (2004) (discussing the burden of proof between the plaintiff and tortfeasors in environmental disputes).

25. See Zhao, *supra* note 24, at 181–82 (distinguishing the defendant's burden of proof in environmental disputes after the plaintiff has alleged harm and causation).

26. See Adam Briggs, Note: *China's Pollution Victims: Still Seeking a Dependable Remedy*, 18 GEO. INT'L ENVTL. L. REV. 305, 324–333 (2006) (discussing the multiple obstacles, including the lack of resources and legal uncertainty, facing Chinese pollution victims who pursue legal action).

27. See The Center for Legal Assistance to Pollution Victims (CLAPV), <http://www.clapv.org>. (last visited Mar. 15, 2007). CLAPV is a non-governmental organization established in October 1998 dedicated to improving enforcement of environmental laws. It provides legal representation to pollution victims, trains lawyers, judges, and enforcement personnel, and works to improve environmental laws and practices. It works in conjunction with the Environmental Law Clinic at the China University of Political Science and Law, and serves as both an educational institution and a public-interest legal services agency.

28. CLAPV, *Cases Year 1999 through 2000*, [http://www.clapv.org/new/show\\_en.php?id=17&catename=LAC](http://www.clapv.org/new/show_en.php?id=17&catename=LAC) (last visited Mar. 15, 2007).

29. See, e.g., Zhao, *supra* note 24, at 180–81 (citing lack of scientific knowledge, expertise and resources as obstacles that hinder plaintiffs' abilities in meeting their burden of proof in environmental disputes).

30. A film based on Jonathan Harr's 1995 book, bearing the same title and published by Vintage Books, that chronicled a real-life lawsuit, in which plaintiff families sought redress and compensation for pollution-related health effects. *A CIVIL ACTION*, (Touchstone Pictures 1998).

actions, the vast bulk of public interest environmental litigation in the United States focuses on prevention and cleanup, rather than after-the-fact compensation for individualized harm from pollution. Most of what is considered public interest environmental litigation in the U.S. falls in the category of administrative law, and seeks to prevent or minimize environmental harm upfront.<sup>32</sup>

Earth Day 1970 marked a shift away from pure common law toward statutory and administrative schemes for curtailing pollution and protecting natural resources in the United States. After millions of Americans took to the streets demanding greater environmental protection, Congress passed over two dozen environmental laws.<sup>33</sup> For these laws to spur effective citizen enforcement in the courts, however, the courthouse door had to be opened to environmental interests.

## II. BROADENING ACCESS TO COURTS TO PREVENT ENVIRONMENTAL HARM<sup>34</sup>

Liberalizing citizen standing was an essential prerequisite to the evolution of public interest environmental litigation in the United States. Under the common law, a person had to have a legal interest that was directly and adversely affected in order to go to court.<sup>35</sup> This requirement

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31. A film based upon the real-life battles led by a single mother and paralegal against a California power company suspected of polluting a city's water supply. ERIN BROCKOVICH, (Universal Studios 2000); see Kristy Sucato, *What's Wrong in Toms River?* N.Y. TIMES, Dec. 16, 2001, § NJ at 14 (making real life comparison to characters in both films).

32. See, e.g., Nicholas A. Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. L. REV. 387, 398 (2003) (noting that the administrative law "has been instrumental in the enforcement of environmental harms"); A. Dan Tarlock, *The Future of Environmental "Rule of Law" Litigation*, 19 PACE ENVTL. L. REV. 575, 597-98 (2002) (commenting that environmental law adds "another chapter" when reviewing delegated discretion in the context of administration law); Craig Anthony Arnold, *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake*, 4 WYO. L. REV. 1, 33 (2004) (noting that "environmental law is largely administrative").

33. See, e.g., Editorial, *Then/Now: Reflections on a Millennium: A New Way of Living With Nature*, N.Y. TIMES, Dec. 19, 1999, § 4, at 12 (noting the citizen uprising that led to the establishment of Earth Day in 1970, along with an increase in federal legislation relating to environmental protection); see also Jeffery G. Miller, *Theme and Variation in Statutory Preclusion Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement*, 29 HARV. ENVTL. L. REV. 1, 3 (2005) (discussing Congress' reaction to Earth Day and the public unrest over the "fragmented, state-led" environmental regulation leading up to 1970).

34. The standing sections II.A & C are drawn from the author's article, *Opening the Door to Public Interest Litigation in the United States*, which appeared in Issue No. 6 of WORLD ENVIRONMENT 22-24 (2006), available at <http://www.wanfangdata.com.cn/qikan/periodical/Articles/sjhj/sjhj2006/0606/0606mle.htm> (last visited Mar. 15, 2007).

35. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (noting that Article III standing



allowed people who had suffered financial, health, or property harm to utilize the courts and seek redress for their injuries. Under this approach, most environmental litigation fell into two categories. First, people sought financial compensation from wrongdoers who caused harm to their health or property.<sup>36</sup> Second, people went to court to stop nuisances that interfered with their enjoyment of their property, such as noxious odors or toxic spills.<sup>37</sup> The only people who could bring such cases were the individuals whose legal rights had been violated by the person being sued.<sup>38</sup>

Many environmental injuries are less direct or personal. For example, water pollution discharges may pollute a lake that is used but not owned by people in the community for fishing and recreation; commercial development may destroy pristine lands and lead to extinction of wildlife species. Oftentimes, individuals will be not able to demonstrate a directly affected legal interest that would have enabled them to establish standing under the common law.<sup>39</sup> The common law's expansion of standing to encompass other interests, such as use of natural areas, recreation, and interests in common resources, would be necessary to allow claims seeking redress for many types of environmental harms to be pursued in court.

In addition, much of environmental harm results from many actors. For example, multiple actors collectively pollute the air or water, use up natural resources by dewatering streams or logging forests in ways that have adverse spillover effects like landslides, flooding, or loss of biodiversity. When the "tragedy of the commons" is to blame, rather than a single identifiable actor, it is difficult to prove that a particular defendant is responsible for the harm. This also makes it difficult to win the types of cases that could be brought under the common law.<sup>40</sup> In such situations, it

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requires a plaintiff's interests to be directly and adversely affected in order to ensure that judicial "review will be sought in the hands of those who have a direct stake in the outcome"; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) ("The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.").

36. *See, e.g., Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 874-75 (N.Y. App. Div. 1970) (allowing defendant cement plant to avoid injunction of its operations by paying permanent damages to individual landowners for property damage due dust, dirt smoke and vibrations).

37. *See, e.g., Spur Industries v. Del. E. Webb Development Co.*, 494 P.2d 700, 705 (Ariz. 1972) (explaining the court's finding that a nearby feedlot constituted a nuisance to developer and residents of development community because of the odor and flies associated with extensive manure production).

38. *See, e.g., id.* (noting that "[t]here is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living," as previously advertised by the developer).

39. *See, e.g., Boomer*, 257 N.E.2d at 871 (noting that the disposition of private rights "may sometimes greatly affect public issues" but cautioning that this involves "a rare exercise of judicial power").

40. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1245 (1968)

is far more effective and cost-efficient to prevent pollution or depletion of natural resources in the long-run, rather than remediate such environmental harm after it occurs.<sup>41</sup> Shifting the focus of environmental litigation away from compensation for specific environmental injuries toward prevention required a broadening of the standing doctrine. This involved encompassing individuals who were less directly and personally impacted by environmental harm. Furthermore, this expansion occurred both through judicial decisions that broadened the interests giving rise to standing, as well as legislative authorization of citizen lawsuits to enforce environmental laws.

#### A. Judicial Expansion of Standing

In 1972, the U.S. Supreme Court broadened standing in *Sierra Club v. Morton*, a landmark case involving a challenge to the construction of a mega-ski resort on Mineral King Mountain, adjacent to Sequoia National Park.<sup>42</sup> Prior to this case, courts had required plaintiffs to have a direct and often economic or personal interest to have standing,<sup>43</sup> which is analogous to the direct interest requirement in many Chinese laws.<sup>44</sup> In *Sierra Club*, the Supreme Court broadened the type of interests that could give rise to standing beyond economic and personal interests.<sup>45</sup> It held that a party would have standing if its activities, past-times, or uses of the area would

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(explaining that pollution creates a tragedy of the commons; as humans put increasing amounts of waste into the environment, they decrease the quality and quantity of natural resources, such as air, water, and soil).

41. *See id.* at 1245–46 (proposing the use of “administrative law” and “corrective feedback” mechanisms in order to legislate temperance for better management of the commons).

42. *Sierra Club v. Morton*, 405 U.S. 727 (1972). This case eventually led to the Forest Service’s preparation of an environmental impact statement that revealed severe environmental impacts and recommended that the project be scaled back significantly. Due to these revelations and growing public opposition, the resort was never built, and the mountain area was added to the national park.

43. *See, e.g., Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 7 (1968) (determining that local utilities had standing to protect their economic interests against the Tennessee Valley Authority’s sale of electricity to local communities under the Tennessee Valley Act of 1933, as amended in 1959); *FCC v. Sander Bros. Radio Station*, 309 U.S. 642, 476–77 (1940) (ruling that economic injury to a competitor radio station was a relevant consideration in determining that the respondents had established standing under the Communications Act of 1934); *but see Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir.1965) (rejecting the argument that a party had to have an economic interest to participate in a hydroelectric license proceeding).

44. Administrative Procedure Law of the People’s Republic of China (promulgated by the President, Apr. 4, 1989, effective Oct. 1, 1990), art. 2, LAWINFOCHINA (last visited Mar. 15, 2007) (P.R.C.).

45. *Morton*, 405 U.S. at 734, 738–40 (noting also that pursuant to Administrative Procedure Act, 5 U.S.C. § 702, a party seeking judicial review under or, a member of an organization seeking review, “must allege facts to show that he himself is adversely affected” to establish standing).

be adversely affected by proposed development.<sup>46</sup> Thus, the Court added harm to aesthetic, environmental, and recreational interests to the types of injuries that could give rise to standing.<sup>47</sup>

The evolution of standing based on environmental harm was also an essential prerequisite to expanding citizen enforcement of environmental laws. Without such liberalized standing, there would be an imbalance in the courts. Based on their financial interests, industries would have standing to challenge more stringent regulation of their industries by the government, while people who are harmed by pollution would not be able to go to court to challenge weak government regulations. Nor would there be meaningful remedies for violations of environmental laws seeking to prevent environmental harm, particularly environmental harm that is caused by many actors over time. Liberalized standing rules have evened the playing field, thereby allowing citizen voices to be heard in court, and ensuring that environmental prevention laws will be heeded.

In *Sierra Club*, the Supreme Court addressed another key standing question—whether organizations have standing to bring environmental litigation.<sup>48</sup> The Sierra Club had sought standing based on its status as an established environmental organization.<sup>49</sup> The Court rejected that approach. While a dissenting opinion supported giving trees standing by allowing groups that protect forests to sue on their behalf,<sup>50</sup> the majority required a particularized injury.<sup>51</sup> Rather than have standing in its own right, organizations like the Sierra Club have standing to sue only on behalf of their members to promote their collective goals.<sup>52</sup> Interestingly, other countries, such as Greece, Brazil, and the Philippines, have allowed recognized organizations to enforce certain environmental laws, without the need to demonstrate an individualized injury or direct loss due to the violation.<sup>53</sup>

Under U.S. law, organizations may bring suits on behalf of their members provided that: (1) at least one member has standing; (2) the case is germane to the association's purposes; and (3) participation of individual

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46. *Id.* at 734.

47. *Id.*

48. *Id.* at 739–40.

49. *Id.* at 730.

50. *Id.* at 749, 752 (Douglas, J., dissenting); see also C. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS 10–23 (1974) (describing historical bases for standing to sue on behalf of the environment).

51. *Id.* at 734–735.

52. *Id.* at 739.

53. Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 ENVTL. LAW 321, 357–360, 366–79 (2001).

members is not necessary to obtain relief.<sup>54</sup> For example, the American Lung Association has frequently brought lawsuits seeking to compel EPA to issue standards restricting air pollution, and fishing groups have standing to challenge actions that degrade rivers that support fisheries.<sup>55</sup> However, such organizations would not be able to sue for money damages for the harm to a member's health or property because membership participation would be necessary to prove the person's injuries and the amount of compensation that should be paid.<sup>56</sup>

In practice, environmental organizations have brought litigation to obtain compliance with environmental laws, to stop pollution, or to restore the commons. Administrative law challenges to a discharge permit's compliance with the law are quite common, as are citizen suits to force enterprises to comply with their permits or to obtain restoration of areas harmed by illegal discharges.

In the 1990s, some cases established limitations on access to the courts for the type of administrative law and citizen suit cases typically pursued by environmental organizations.<sup>57</sup> The new constraints derived from unique features of Article III of the U.S. Constitution, which limit federal court jurisdiction to actual "Cases" or "Controversies,"<sup>58</sup> and the constitutional separation of powers doctrine. This doctrine separates the legislative, executive, and judicial functions into three separate branches of government

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54. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343–44 (1977) (discussing the requirements of organizational standing and holding that the Washington State Advertising Commission, as state agency could assert claims on behalf of its members).

55. *See generally* *Am. Lung Ass'n v. U.S. Envtl. Prot. Agency*, 134 F.3d 388 (D.C. Cir. 1998) (challenging EPA's failure to promulgate air pollution standard); *Safe Air for Everyone v. U.S. Envtl. Prot. Agency*, 475 F.3d 1096 (9th Cir. 2007) (challenging EPA's approval of a of an amendment to Idaho's State Implementation Plan, which farmers to burn plan debris that is leftover in the fields after harvesting); *see also* *Pacific Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1035–36 (9th Cir. 2001) (challenging four biological opinions that would have allowed twenty three timber sales in Southwest Oregon).

56. *Washington State Apple Advertising Comm'n*, 432 U.S. at 343.

57. *E.g.*, *Lujan v. Nat'l Wildlife Fed'n (Lujan I)*, 497 U.S. 871, 891 (1990) (holding that the Bureau of Land Management's Land Withdrawal Review Program was not a final agency action because NWF could not "seek *wholesale* improvement of this program by court decree" but rather had to "direct its attack against some particular 'agency action' that causes it harm"); *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 564, 568 (1992) (holding wildlife conservation organization claiming that a regulation under the Endangered Species Act should apply to federal agency action in foreign nations, lacked standing because members of the organization failed to establish an imminent injury and redressability).

58. U.S. CONST. art. III, § 2; *see also* *Massachusetts v. U.S. Envtl. Prot. Agency*, No. 05-1120, slip op. at 12–13 (Apr. 2, 2007) (explaining that standing constraints derive from constitutional limitation of federal court jurisdiction to "Cases" or "Controversies"); *see also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193–195 (1992) (describing a doctrinal shift by some jurists toward reading limitations on standing into constitutional provisions of separate of powers and Article III jurisdictional constraints on the courts).

with constraints on the extent to which courts can engage in policy-making functions.<sup>59</sup> Under these constitutional principles, some have argued that environmental organizations should lobby the legislature or petition executive branch agencies to take particular actions, rather than go to court to seek direct implementation or enforcement of environmental laws.<sup>60</sup> Government agencies have argued that general harm to the environment is too abstract or vague to present a case or controversy that could be decided by a court.<sup>61</sup> In one case, *Lujan v. National Wildlife Federation*, individuals who used lands “in the vicinity” of the areas newly opened up to mining were unable to show a concrete enough injury.<sup>62</sup> In another case, *Lujan v. Defenders of Wildlife*, the Court held that intent to return to a region at some time in the future was too remote to challenge a decision to fund construction of a dam in that area.<sup>63</sup>

These new restrictions on environmental standing threatened to turn the question of standing into a mini-lawsuit that had to be litigated before the plaintiff(s) could present the merits of their case to the court.<sup>64</sup> In response some courts required the plaintiff to offer substantial evidence of their interest and how it was harmed by the challenged action in an initial

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59. See, e.g., *Allen v. Wright*, 468 U.S. 737, 761 (1984) (explaining that the separation powers doctrine “counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties”).

60. See, e.g., *Massachusetts v. U.S. Envtl. Prot. Agency*, No. 05-1120, slip op. at 22 (Apr. 2, 2007) (Roberts, C.J., dissenting) (explaining that the proper place for petitioners to seek recourse for their “broad-ranging injury” is the legislative and executive branches, not the federal courts) (citing *Lujan II*, 504 U.S. at 576); *Lujan II*, 504 U.S. at 576 (explaining the function of the judicial branch “is, solely, to decide on the rights of individuals,” while “[v]indicating the public interest . . . is the function of Congress and the Chief Executive.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); but see Sunstein, *supra* note 58, at 221–22 (commenting that the citizen suit can still “do some good” by “serv[ing] as an effective if partial alternative to massive regulatory overhaul”); *Lujan I*, 497 U.S. at 891 (explaining that plaintiffs should bring their complaints to “the offices of the Department or the halls of Congress” rather than “seek wholesale improvement of this program by court decree”).

61. See, e.g., *Lujan II*, 504 U.S. 555 (1992) (upholding a joint regulation under the Endangered Species Act promulgated by the Secretary of the Interior and Secretary of Commerce because members of environmental organization did not establish that their injury was “actual or imminent” to meet Article III standing).

62. *Lujan I*, 497 U.S. at 886–87, 889 (1990).

63. *Lujan II*, 504 U.S. at 564 (1992).

64. See *id.* at 561.

This case explains that the standing rules “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.”

*Id.* (citing *Lujan I*, 497 U.S. at 883–89).

proceeding before evidence of the legal violation would be heard.<sup>65</sup> And sometimes the courts demanded more evidence than would be required to prove a violation of the underlying environmental law.<sup>66</sup>

The restrictions also had the effect of promoting prosecution of environmental claims in piecemeal fashion. For example, the *Lujan* cases sought to prevent environmental harm by challenging either the ‘wholesale’ withdrawal of public lands from protected status or the funding of large projects that threatened to wipe out endangered species.<sup>67</sup> By requiring the environmental organizations to wait until they had evidence that environmental harm to individuals was imminent or had occurred in a palpable way,<sup>68</sup> judicial review was not only delayed, but also was shifted away from the program as a whole to individual parcels of land or projects proceeding under the program.

Fortunately, in 2000 another Supreme Court case, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, established that environmental plaintiffs do not need to prove the merits of their claims in order to establish standing to bring the lawsuit.<sup>69</sup> In that case, a wastewater treatment plant discharged mercury in excess of amounts allowed in its National Pollution Discharge Elimination System (NPDES) permit.<sup>70</sup> The Court held that the plaintiffs did not have to prove that the discharges caused harmful pollution.<sup>71</sup> It was sufficient for them to show that the pollution prevented them from using the waters as they had done in the past and otherwise planned to do so in the future.<sup>72</sup> For example, an individual who refrains from engaging in activities, such as fishing, swimming, and boating, because of reasonable concerns about pollution discharges, has standing without needing to prove the discharges have, in fact, caused health or environmental harm.<sup>73</sup> This approach promotes the goals and

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65. See, e.g., Fla. Audubon Soc’y v. Bentsen, 94 F.3d 658, 666, 670–71 (D.C. Cir. 1996) (determining that plaintiffs’ claim that a federal tax credit for the fuel additive ethyl tertiary butyl ether would increase demand for ethanol and in turn increase agricultural pollution failed to establish “either an injury to their particularized interest or that defendant’s actions created a ‘substantial probability’ of this injury”) (quoting Kurtz v. Baker, 829 F.2d 1133, 1143–44 (D.C. Cir.1987)).

66. See, e.g., *id.* at 664–65 (requiring plaintiffs in procedural-rights cases to show that the agency violated a procedural requirement, as well as that agency action was “substantially likely” to result in a “demonstrable increase in risk to their particularized interest”).

67. *Lujan I*, 497 U.S. 871, 891 (1990); *Lujan II*, 504 U.S. 555, 568–69 (1992).

68. *Lujan I*, 497 U.S. at 891; *Lujan II*, 504 U.S. at 564.

69. *Friends of the Earth, Inc. v. Laidlaw Env’tl. Services (TOC), Inc.*, 528 U.S. 167 (2000).

70. *Id.* at 175–76.

71. *Id.* at 181.

72. *Id.* at 183–84.

73. See *id.* at 181–82 (referring to affidavits submitted by members of plaintiff environmental organization and noting that “[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff”).

structure of the Clean Water Act (CWA), which has a citizen suit provision that allows citizens to enforce the requirements to obtain and comply with water discharge permits.<sup>74</sup>

Three lessons can be learned from this U.S. experience. First, the U.S. courts wisely decided that environmental injuries should be on a par with economic and personal harm.<sup>75</sup> All of these types of injuries should be sufficient to allow injured parties to seek redress in the courts. A contrary approach would create an uneven playing field with polluters having access to courts to seek weaker environmental protections and victims of pollution left without judicial vehicles for challenging weak protections.

Second, the U.S. courts require environmental organizations to demonstrate that one or more of their members are injured sufficiently in their own right to bring the lawsuit.<sup>76</sup> Since requiring such an injury to an organizational member is a feature of U.S. constitutional limitations on the jurisdiction of the courts, there is no analytical or policy reason for extending it beyond U.S. borders. In fact, many states have adopted principles that allow organizations to bring lawsuits without demonstrating injury to one or more members,<sup>77</sup> and the U.S. constitutional limits on federal court jurisdiction does not bar such cases in state courts. Allowing organizations to bring environmental litigation avoids placing the burden of such litigation on individuals who often lack the resources and capacity to prosecute the case. A nongovernmental organization (NGO) that tracks environmental issues will have far greater knowledge and institutional capacity to develop an environmental prosecution. Moreover, to the extent that the injury to membership requirement limits the number of environmental cases, it is not clear if this requirement actually does so in the United States. In addition, there may be no need for such a limitation in China due to the limited number of environmental NGOs and the extensive prerequisites and government oversight of accreditation.<sup>78</sup>

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74. See 33 U.S.C. §§ 1365(a)(1)–(a)(2) (2000) (providing that “any citizen may commence a civil action . . . against any person including . . . the United States and any other government instrumentality or agency . . . for either violating an effluent standard or limitation or order, or for failure to “perform any act or duty under the CWA”).

75. *Friends of the Earth*, 528 U.S. at 180–84.

76. *Id.* at 181 (citing *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977)).

77. See, Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 863 (2001) (encouraging judges to state law to define injury when plaintiffs who are arguing a common injury do not have to “jeopardizing their public nuisance case, their ability to sue as an organization, or their right to bring a class action”).

78. See Pamela Howlett, *Striking the Right Balance: The Contrasting Ways in Which the United States and China Implement National Projects Affecting the Environment*, 12 *MO. ENVTL. L. & POL’Y REV.* 17, 39 (2004) (noting difficulties in obtaining NGO registration and that the need for

Third, some U.S. courts began to turn the proof of standing into a mini-trial of the merits, which imposed excessive burdens on the plaintiffs and the courts.<sup>79</sup> The Supreme Court wisely put an end to such burdensome standing requirements.<sup>80</sup> It undermines the credibility and strength of both the environmental laws and the legal system to prevent affected parties from having their day in court. Instead, the extent of injuries should be assessed as part of the merits and remedy, rather than to keep viable enforcement cases from being heard at all.

### *B. Legislative Expansion of Standing: Citizen Suits*

As previously mentioned, Earth Day spurred legislation aimed at improving air and water quality and preventing the spread of harmful toxic wastes. These prevention-oriented statutes follow a similar model that: 1) establishes minimum federal standards; 2) requires polluting facilities to obtain permits that incorporate and adapt these standards to the particular enterprise; and 3) authorizes governmental and citizen suits to enforce both the requirement to obtain a permit and compliance with the particular permit.<sup>81</sup> The CWA is illustrative.<sup>82</sup>

Images of Ohio's Cuyahoga River catching on fire due to oil pollution and newspaper headlines declaring that "Lake Erie is Dead"<sup>83</sup> spurred Congress to enact the Federal Water Pollution Control Act, commonly known as the CWA. Congress' goals in enacting this statute included reducing water pollution in order to, "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to attain "water quality which provides for the protection and propagation of fish,

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government sponsorship constrains NGO advocacy effectiveness); *see also* Orts, *Chinese Characteristics*, *supra* note 3, at 562–63 (2003) (recommending greater role of NGOs in China); C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 *YALE L. J. INT'L L.* 363, 376–79 (2000) (questioning the general independence of NGOs in light of the close relationship between many NGOs and the government).

79. *E.g.*, *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664–66, 670–71 (D.C. Cir. 1996).

80. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 181–82 (requiring plaintiffs to demonstrate injury only to themselves rather than the environment because the Court did not intend to "raise the standing hurdle higher than the necessary for achieving success on the merits in an action alleging noncompliance with a NPDES permit").

81. *E.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000); Resource Conservation & Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2000).

82. 33 U.S.C. §§ 1251–1387 (2000).

83. *See, e.g.*, Press Release, Great Lakes Fishery Committee, Lake Erie Committee, Phosphorus Targets Achieved in Lake Erie (Feb. 17, 1998) *available at* <http://www.glfsc.org/pressrel/prelccpos.htm> (last visited Mar. 15, 2007) (noting that "[b]y the late 1960s, Lake Erie was suffering from too much phosphorus and was labeled with headlines such as 'Lake Erie is Dead'").



shellfish, and wildlife . . . .”<sup>84</sup> Under the CWA, it is unlawful for any person to discharge a pollutant into navigable waters without a NPDES permit.<sup>85</sup> Congress designed the NPDES Permit Program to include federal Environmental Protection Agency (EPA) effluent limitations aimed at lowering point source pollution, through the use of the most advanced pollution control technology available.<sup>86</sup> The EPA generally establishes discharge standards for various industries based on available pollution control technology.<sup>87</sup> The CWA also requires permits to contain sufficient pollutant release limitations to allow the waterway receiving the pollutant to meet state water quality standards.<sup>88</sup>

The CWA also provides for citizen participation in EPA rulemaking proceedings to establish the best pollution control standards for particular industries.<sup>89</sup> In addition, citizens have the right to appeal permits to ensure compliance with the CWA and state water quality standards.<sup>90</sup> For example, appeals may raise issues such as whether the permit will protect designated uses such as fishing or drinking water, and whether the permit requires the best available technology for controlling certain sources of pollution.<sup>91</sup> Both challenges to EPA regulatory standards and to the

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84. 33 U.S.C. § 1251(a).

85. *See id.* § 1311(a) (“[T]he discharge of any pollutant by any person shall be unlawful” unless in compliance with a permit.); *id.* § 1342(a) (EPA “may, after opportunity for public hearing, issue a permit for the discharge of any pollutant . . . upon condition that such discharge will meet” CWA requirements.).

86. *Id.* § 1311(b)(1)(A)(i); *id.* § 1314(b); *id.* § 1342(a)(1).

87. *Id.* §§ 1311(b)–(e); *see also* E.I. Du Pont Nemours & Co. v. Train, 430 U.S. 112, 126–128 (1977) (holding that EPA has authority under § 1311 of the CWA to issue industry-wide regulations to limit discharges by existing plants).

88. *See id.* § 1313(c)(2)(A) (providing state water quality standards consist of three components: (1) the “designated uses” of the waters; (2) “water quality criteria” necessary to protect such uses; and (3) an “anti-degradation” requirement, prohibiting deterioration or degradation of surface waters from current conditions); *id.* § 1342(b) (noting that EPA can delegate permitting authority to states provided the states meet certain minimal standards and procedures); *see also* Water Quality Standards, 40 C.F.R. §§ 130.3 (2006) (explaining that a “water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses”).

89. *See id.* § 1314(b)(1)–(3) (providing factors and considerations that the EPA must take into account when consulting with federal and state agencies and other interested persons in determining effluent limitation regulations).

90. 33 U.S.C. § 1365(a)(1)–(2) (2000).

91. *Id.* § 1251(a); *id.* §§ 1311(b)(1)(A)(i), (b)(2)(A)(i), (b)(2)(B); *see also* Ass’n of Pacific Fisheries v. EPA, 615 F.2d 794, 805–806 (9th Cir. 1980) (holding that the EPA conducted a proper cost-benefit analysis of a proposed technology in determining the “best practicable control technology currently available” in effluent guidelines for the canned and preserved seafood processing industry); Natural Resources Defense Council v. U.S. Env’tl. Prot. Agency, 16 F.3d 1395, 1401 (4th Cir. 1993) (holding, in part, that EPA was accorded deference in determining that state water quality standards were scientifically defensible and protective of designated uses because EPA’s determination was

adequacy of particular permits are governed by U.S. administrative law and the ordinary principles of standing described above.

Of particular importance to public interest environmental litigation, the CWA authorizes citizen suits to compel dischargers to obtain permits and to enforce the conditions imposed through water discharge permits.<sup>92</sup> The citizen must provide notice to the alleged violator 60 days prior to filing a lawsuit in order to give the violator an opportunity to correct the violation.<sup>93</sup> The notice also provides the government enforcement body an opportunity to step in and prosecute the case.<sup>94</sup>

If the violation is not corrected and the government does not bring its own enforcement action, the citizen may sue to remedy the violation of the CWA.<sup>95</sup> In the lawsuit, the citizen must prove that the discharger did not have a valid permit or the discharger was in violation of the limits imposed by the permit.<sup>96</sup> The citizen need not prove that the discharge caused particular environmental harm on the theory that the government has already made findings of harm in establishing the pollution standard and issuing the discharge permit.<sup>97</sup> If the polluter believes the discharges are benign, its remedy is not to violate the permit at will, but rather to seek a change in either the pollution standards or the permit.<sup>98</sup> The violation could also consist of a failure to submit public reports of discharges, which are generally required by the permit.<sup>99</sup>

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“reasonable and [was] supported by substantial evidence in the administrative record”) (citing *Shanty Town Assocs. Ltd. v. U.S. Envtl. Prot. Agency*, 843 F.2d 782, 790 (4th Cir. 1988)).

92. 33 U.S.C. §§ 1365(a)(1)–(2); *see also* § 1365(g) (defining “citizen” as “a person or persons having an interest which is or may be adversely affected”).

93. *Id.* § 1365(b)(1)(A).

94. *Id.* § 1365(b)(1)(B); *see also* *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 175 (2000) (“[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the [CWA] and thus . . . render unnecessary a citizen suit.”) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)).

95. 33 U.S.C. §§ 1365(a)(1)–(2), 1365(b)(2) (2000).

96. *Id.* §§ 1365(a)(1)–(2); *see, e.g.*, *Friends of the Earth*, 528 U.S. at 176 (noting the lower court’s finding that the defendant had violated the mercury limits in its permit 489 times between 1987 and 1995).

97. *E.g.*, *Friends of the Earth*, 528 U.S. at 176, 181 (referring to the record of defendant’s violations and the plaintiffs burden demonstrating injury to satisfy standing under Article III).

98. *See* *United States v. Weitzenhoff*, 35 F.3d 1275, 1284–1285 (9th Cir. 1994) (holding that the EPA must show that the defendant knowingly discharged pollutants, and not that defendant knew he was violating a statute or a permit).

99. *E.g.*, Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §§ 11021–11023 (2005) (establishing affirmative duty to make available to the public material safety data sheets, hazardous chemical inventories, and toxic chemical releases). The discharge reports are admissible as evidence of, and often conclusively prove, permit violations. *See also* *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000) (involving a CWA enforcement action, in which EPA sought to impose civil penalties and injunctive relief, claiming

While a governmental enforcement action can seek criminal penalties, citizen suits are limited to civil remedies.<sup>100</sup> Within this constraint, however, the range of remedies is quite broad. First, the court may order the polluter to pay civil fines of up to \$32,500 for each day the law or permit is being violated.<sup>101</sup> These fines must be paid to the U.S. Treasury, not the party bringing the citizen suit.<sup>102</sup> Rarely do courts order payment of the maximum penalties. Instead, they balance the severity of the violation, the impact of the pollution, the need for deterrence, and the extent to which corrective actions have already been undertaken in determining the amount of civil penalties to levy.<sup>103</sup> Second, the court may enjoin future violations of the permit and may order the polluter to remedy harm caused by the past violations.<sup>104</sup> Often such remedies call for restoration of the riparian or wetland environment where the violation occurred.<sup>105</sup> Finally, the court may award the citizen its costs of bringing the lawsuit, including its attorneys' fees and the costs of expert witnesses.<sup>106</sup>

Citizen suits are designed to increase society's enforcement capabilities

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that the defendant violated effluent limit violations, submitted false and late reports, and destroyed records).

100. *E.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 58–59 (1987) (noting that in addition to issuing compliance orders, “the Administrator may bring enforcement actions to recover civil penalties for wholly past violations” but “citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation”).

101. Penalty Adjustment Table, 40 C.F.R. § 19.4 (2006).

102. *See Pub. Int. Research Group v. Duffryn Terminals, Inc.*, 913 F.2d 64, 82 (3d Cir. 1990) (noting the consistent case law supporting that “penalties in citizen suits under the Act must be paid to the Treasury.”); S. REP. NO. 92-414 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3744 (referring to citizen suits and noting “that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant”).

103. 33 U.S.C. § 1319(a) (2000); *e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 87 (2d Cir. 2006)

This case noted that federal courts have broad discretion in setting civil penalties under § 1319(d) of the CWA, including “(1) the seriousness of the violations; (2) the economic benefit resulting from the violation; (3) any history of violations; (4) good-faith efforts to comply with applicable requirements; (5) the economic impact of the penalty on the violator; and (6) other matters as justice may require.”

*Id.* (citing *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 551 n.7 (5th Cir. 1996)).

104. *E.g.*, *Gwaltney*, 484 U.S. at 58–59 (1987).

105. *E.g.*, *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003) (holding that the trial court did not abuse its discretion in issuing a remediation order because it adequately considered factors including “maximal environmental benefit,” overall practicality, and congruity between “the degree and kind of harm” that the court intends to remediate); *United States v. Pozgai*, 999 F.2d 719, 736 (3d Cir. 1993) (upholding the lower court's restoration order in light of defendant's repeated acts of noncompliance); *United States v. Weisman*, 489 F. Supp. 1331, 1342–43 (M.D. Fla. 1980) (determining that a restoration order was appropriate in part because the plan would “undo the defendants' environmental alterations to the wetland and to restore the area”).

106. 33 U.S.C. § 1365(d) (2000).

beyond those funded by the taxpayers. The theory is that people who are directly impacted by pollution will have an incentive to act as “private attorneys general” and bring actions to prevent it or clean it up.<sup>107</sup> Since the private parties and attorneys are, in essence, doing the government’s work, Congress did not believe they should have to bear the costs of successful litigation.<sup>108</sup> Accordingly, where a citizen suit is successful in promoting the Act’s purposes, the polluter must pay the cost of the enforcement action. The fee-shifting provisions of the CWA and other environmental statutes have helped fund public interest litigation and establish the expertise and capacity to bring such litigation on a regular basis.<sup>109</sup>

*C. The Type of Harm that Must be Proven to Have Standing Varies Depending on the Nature of the Legal Claim*

Standing is often discussed as a monolithic concept, with the implication that once an entity has standing to bring one type of environmental claim, it could also bring other types of claims and seek additional remedies. In reality, U.S. courts require litigants to establish standing when they assert each claim, and the type of harm and causation that plaintiffs must prove varies, depending on the nature of the legal claim and the relief the party is seeking.

The following list presents a continuum: starting with the least harm required for lawsuits seeking compliance with informational or public participation rights on one end of the continuum, and concluding with the highest burden for lawsuits seeking compensation for personal harm from pollution at the other end.

- If the plaintiff is seeking to exercise a public right to gain access to information or to participate in a public process, the burden is minimal since the right attaches to all

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107. See, e.g., *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1, 13–17 (1981) (discussing Congress’ intent to allow citizens to act as “private attorneys general” under the CWA).

108. See 33 U.C.S. § 1365(d) (2000) (allowing the court to award litigations costs, including “reasonable attorney and expert witness fees”).

109. See CONF. REP. NO. 91-1783, (1970) as reprinted in 1970 U.S.C.C.A.N. 5374, 5388 (discussing the Senate’s amendment providing the courts with discretionary power “to grant reasonable attorney and expert witness fees”); see also Michael Wieteck, Comment, *True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney’s Fees into the Minnesota Environmental Rights Act*, 14 MO. ENVTL. L. & POL’Y REV. 147, 168–169 (2006) (noting that provisions such as § 7604(d) of the Clean Air Act award reasonable attorney and expert witness fees has encouraged public interest litigation).

interested members of the public.<sup>110</sup>

- To seek an adequate environmental impact statement, the plaintiff would not need to prove that the underlying project *will* cause harm, but merely that the plaintiff would be affected by the project and that there is sufficient evidence to potential harm to warrant an analysis in an environmental impact statement.<sup>111</sup>
- To enforce a zoning standard, the plaintiff may need to be impacted by the project, but need not prove that the project will cause particular harm if the zoning standard is violated because the legislative body already made that judgment.<sup>112</sup>
- To require adherence to a permit or regulatory standard, the plaintiff need not prove that violation of the standard will cause personal injury, since the permit or standard embodies a judgment that the enterprise must abide by the limit.<sup>113</sup>
- To obtain compensation from harm from pollution, the plaintiff would need to be the person harmed by the pollution.<sup>114</sup>

Accordingly, a litigant need not show that he or she suffered extensive harm in order to pursue compliance with procedural requirements mandating public access to certain information or public participation in

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110. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 20–24 (1998) (holding that voters who were denied information regarding campaign donors satisfied the “injury in fact” requirement of standing because the Federal Election Campaign Act required public disclosure).

111. *See* *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 572 n.7 (1992) (explaining that a plaintiff asserting a procedural right, “to protect his concrete interests can assert the right without meeting all the normal [standing] standards for redressability and immediacy”).

112. *See, e.g.*, *Guillot v. Brooks*, 26–544 (La. App. 2 Cir. 3/1/95); 651 So.2d 345, 349 (holding plaintiffs had standing to file suit to enforce ordinance against air traffic from nearby airfield that “spooked horses” and “scared” children because of additional testimony that the price of plaintiffs’ property had likely diminished in value); *see also* *Pinewoods Associates v. W.R. Gibson Dev.*, 837 S.W.2d 8, 13 (Mo. App. 1992) (noting the rule that adjoining or confronting property owners do not have to prove special damages to enjoin violations of the zoning ordinance).

113. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC) Inc.*, 528 U.S. 167, 181–185 (2000) (holding affidavits from members of plaintiff environmental organization established a sufficient injury in fact to their aesthetic and recreational interests in a nearby river).

114. *E.g.*, *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 312 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985) (denying injunctive relief to enjoin chemical plant that was responsible for groundwater contamination because the plaintiff did not suffer a harm sufficiently distinct from the general public); *see also* RESTATEMENT (SECOND) OF TORTS (1971) § 821C (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”).

government decision-making. Since the legislature has required dissemination of information or public participation, those rights attach to all interested members of the public and a specific interest in the matter is generally all that must be shown.<sup>115</sup> The Supreme Court has specifically held that broad standing rules apply to lawsuits seeking preparation of an adequate environmental impact assessment before embarking on a project. To bring such a case, a plaintiff organization must show only that it or its members may be affected by the environmental impacts of the underlying project.<sup>116</sup> The plaintiff need not show that providing the information or preparing the assessment would necessarily lead to a different outcome.<sup>117</sup> Congress has already made the judgment that federal agencies must abide by these procedural obligations and that doing so will lead to better informed or more environmentally-sound decisions.<sup>118</sup> By enforcing the law's informational requirements, the courts are furthering Congress' design and are allowing citizens to enforce requirements imposed for both their benefit and the benefit of common resources.

Toward the middle of the standing continuum, a lawsuit seeking to enforce a permit requires a showing that the permit violation affects his or her behavior, as illustrated in the *Friends of the Earth*<sup>119</sup> case in part III. A. of this article. There is no need, however, to prove that the discharges have caused or will cause harm to the environment since the legislature or regulators made that judgment when they established the standards incorporated into the permit.<sup>120</sup> And in such a case, it may be possible to obtain a remedy that requires the clean-up of illegally polluted sites.<sup>121</sup> Administrative law suits challenging the adequacy of an individual permit because, for example, the permit omits mandatory pollution control standards, call for a similar showing.<sup>122</sup> However, cases challenging

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115. *E.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–451 (1989) (noting that “when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent Federal Advisory Committee Act allows constitutes a sufficiently distinct injury to provide standing to sue”).

116. *See Lujan II*, 504 U.S. at 572 n.7 (distinguishing the standing requirement for plaintiffs asserting procedural versus private rights).

117. *See id.* at 573 n.8 (noting, however, that the a plaintiff asserting a procedural right still must possess a “threatened concrete interest”).

118. National Environmental Policy Act, 42 U.S.C. § 4331 (2003) (listing several policy considerations within NEPA).

119. *Friends of the Earth Friends of the Earth, Inc. v. Laidlaw Env'tl. Services (TOC) Inc.*, 528 U.S. 167 (2000).

120. *Id.* at 181–82 (2000).

121. *Id.* at 184–85.

122. *E.g.*, *Friends of the Earth v. U.S. Env'tl. Prot. Agency*, 446 F.3d 140, 148 (D.C. Cir. 2006) (remanding EPA's approval of water standards for the Anacostia River that flows through Washington, D.C.).

broader government actions may need to wait until some harm from the program can be demonstrated at a project level and the challenge can target the particular project.<sup>123</sup>

At the heavier burden end of the standing continuum, lie compensation cases. In order to seek compensation from a polluter for harm caused by pollution, the plaintiff must be among those harmed by the pollution.<sup>124</sup> Even after liberalized standing in the prevention and cleanup context, U.S. law still requires those who seek money damages to have a legally protected interest, in property or their individual health and well-being, in order to seek compensation.<sup>125</sup>

As China grapples with how to expand standing, the various types of injuries and claims should be considered in terms of which interests should suffice to bring which claims. In addition, the impact of citizen standing should be assessed. Individuals directly harmed by pollution may have the motivation to seek compensation in their own right, although there certainly are financial, evidentiary, and political obstacles to pursuing compensation. In contrast, citizens generally lack comparable financial incentives to seek compliance with the EIA law or environmental standards. Inadequate financial resources, corruption, and an unwillingness to confront local businesses may prevent governmental bodies from enforcing environmental laws against local enterprises that contribute to the local economy and wield political power. In light of these realities, society may benefit by empowering citizens to serve as private prosecutors to enforce environmental laws.

### III. ENVIRONMENTAL IMPACT ASSESSMENTS

In 2003, China enacted a law requiring environmental impact assessments (EIAs) for all major construction projects.<sup>126</sup> This requirement

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123. *E.g.*, *Lujan v. Nat'l Wildlife Fed'n (Lujan I)*, 497 U.S. 871, 890–91 n.9 (1990) (ruling that the Bureau of Land Management's "land withdrawal review program" was not specific enough to constitute an "identifiable 'final agency action' for purposes of the APA").

124. *See supra* note 111 and accompanying text.

125. *E.g.*, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738–739 (1998) (noting that if plaintiffs were objecting to a final decision by the Forest Service to close off a specific area to off-road vehicles, then the plaintiffs could assert an imminent concrete injury in their "interest in the use of off-road vehicles in that area"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (explaining that in order to satisfy the injury in fact requirement of standing, plaintiffs must suffer an invasion of a "legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural" or "hypothetical").

126. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 16, available at [http://www.sepa.gov.cn/law/law/200210/t20021028\\_84000.htm](http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm) (P.C.R.).

is not limited to governmental actions, but extends to private actions.<sup>127</sup> The basic EIA requirements are similar to the mandates established by the U.S. National Environmental Policy Act (“NEPA”).<sup>128</sup>

However, one major difference is that NEPA applies only to major federal actions, but covers actions of all types, while China’s EIA law applies to all major construction projects, even those that lack a major federal role.<sup>129</sup> Another difference is that a key remedy under the Chinese EIA law is to fine and reprimand people who do not discharge their EIA duties.<sup>130</sup> In contrast, U.S. NEPA requirements are enforced through the APA, which authorizes courts to set aside decisions based on a failure to prepare an adequate environmental impact statement, to remand the decision to the agency, and to prevent implementation of the action before fully NEPA compliance occurs.<sup>131</sup> The U.S. courts do not, however, enforce NEPA by punishing individual civil servants who violate its terms. SEPA has the authority to stop construction projects that are proceeding without environmental impact assessments,<sup>132</sup> much like U.S. courts’ authority under the Administrative Procedure Act (APA).<sup>133</sup> In the absence of citizen standing to enforce the China’s EIA Law, the public may not be able to enforce the public participation rights created by the law or prevent environmental harmful behavior occurring without compliance with the EIA requirement.

NEPA has been called the U.S. “Environmental Bill of Rights,”<sup>134</sup> and

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127. *Id.*

128. 42 U.S.C. §§ 4321–4370f (2000).

129. *Compare id.* §4332(2)(C) (requiring an EIS to accompany reports for proposed “legislation and other major Federal actions significantly affecting the human environment) with Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 16, available at [http://www.sepa.gov.cn/law/law/200210/t20021028\\_84000.htm](http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm) (P.C.R.) (requiring some form of environmental impact assessment for construction projects for all construction projects depending on whether the project will impose “significant,” “mild,” or “minimal impact on the environment”).

130. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 31, available at [http://www.sepa.gov.cn/law/law/200210/t20021028\\_84000.htm](http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm) (P.C.R.).

131. 5 U.S.C. § 706 (2000) (stating, in part, that the “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law,” as well as those that are “without observance of procedure required by law”).

132. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), arts. 7, 8, 9, available at [http://www.sepa.gov.cn/law/law/200210/t20021028\\_84000.htm](http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm) (P.C.R.) (noting that the preparation of EIA must submitted for agency approval and setting forth specific EAI requirements for applicants to use in environmental reports).

133. 5 U.S.C. §§ 551–8008 (2000).

134. Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).



indeed, the implementing regulations call it “our basic national charter for protection of the environment.”<sup>135</sup> It requires every federal agency to prepare an environmental impact statement for every major federal action “significantly affecting the human environment.”<sup>136</sup> This requirement gives effect to the adage “look before you leap.” Federal agencies must prepare environmental impact statements early enough in the process to prevent irreversible commitments of resources and to avoid rationalizing decisions already made.<sup>137</sup> An environmental impact statement is designed to serve two purposes: (1) to infuse environmental considerations into decision-making by informing the decision-makers of the proposal’s environmental effects and the effects of viable alternatives; and (2) to involve the public in the assessment of environmental impacts and to disclose those impacts fully and fairly to the public.<sup>138</sup>

As China implements its EIA law, two lessons could be learned from the U.S. experience. First, in the early years after passage of NEPA, many agencies viewed the requirement to prepare an environmental impact statement to be discretionary.<sup>139</sup> It took a series of court decisions to confirm the mandatory nature of the requirements of the law.<sup>140</sup> The application of NEPA to all major federal actions was essential to closing loopholes under which agencies could pick and choose when to prepare an environmental impact statement.

Some of NEPA’s greatest successes have occurred when an environmental impact statement that was not necessarily welcomed by the agency caused the agency to reverse course.

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135. 40 C.F.R. § 1500.1(a) (2006).

136. 42 U.S.C. § 4332(2)(C) (2006); *see also* Hanly v. Mitchell, 460 F.2d 640, 647–48 (2d Cir. 1972) (noting that the court must perform a factual inquiry in deciding whether an federal action was “major” in terms of cost and planning, and also whether it significantly affected the quality of the human environment).

137. *See* 42 U.S.C. § 4332(2)(C)(v) (2000) (requiring “any irreversible and irretrievable commitments of resources” involved in a proposed federal action); *see* 40 C.F.R. § 1502.5 (2006)

This regulation requires agencies to begin preparing “an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal . . . so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made . . . .”

*Id.*

138. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

139. *See* Nicholas C. Yost, *NEPA’s Promise—Partially Fulfilled*, 20 ENVTL. L. 533, 546 (1990) (providing an overview of the judicial interpretation of NEPA prior to 1990). The author of this article was the general counsel of the Council Environmental Quality who had lead responsibility for drafting the NEPA implementing regulations).

140. *Id.* at 545–46 (discussing *Methow Valley*, 490 U.S. 332 (1989) and *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989)).

- A 1997 environmental impact statement revealed that a proposed new hydropower dam would undermine government efforts to restore salmon to the river. The Federal Energy Regulatory Commission decided not to license the new dam and it has since removed a defunct dam that was blocking salmon access to many miles of productive river habitat. Salmon are now rebounding in that river.<sup>141</sup>
- In the Pacific Northwest, environmentalists, timber workers, and local communities submitted comments on a draft environmental impact statement that presented an alternative in to extensive logging of old-growth forests that would thin younger tree stands, yet produce the same amount of timber. The Forest Service adopted the citizen alternative, and the logging proceeded with full support of all the players who had previously been fighting each other and the government over logging policies on the forest.<sup>142</sup>
- In the 1990s, an environmental impact statement documented new technologies that could produce tritium for nuclear warheads. The environmental impact statement led the Department of Energy to cancel plans to build new expensive nuclear reactors. Then Secretary of Energy, Admiral James Watkins, testified before Congress and concluded, “Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country.”<sup>143</sup>

In none of these situations did the agency envision that it would abandon or significantly modify the proposed project at the outset, yet when faced with an objective presentation of the environmental impacts, that

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141. See R.G. DREHER, NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT 5 (2005), available at [https://141.161.16.100/gelpi/current\\_research/documents/NEPAUnderSiegeFinal.pdf](https://141.161.16.100/gelpi/current_research/documents/NEPAUnderSiegeFinal.pdf) (explaining that Federal Energy Regulatory Commission denied the permit in part because of the strong comments from federal and state fishery managers, and the Penobscot Indian Nation opposing the issuance of the license).

142. For an informed discussion on NEPA case law prior to 1990, see Yost, *supra* note 139, at 546 (providing an overview of the judicial interpretation of NEPA). The author of this article was the general counsel of the Council Environmental Quality who had lead responsibility for drafting the NEPA implementing regulations.

143. *Id.*

option became compelling.

Second, the U.S. Supreme Court weakened NEPA through judicial interpretation in ways that many believe are at odds with congressional intent. While NEPA injects environmental impact considerations into government decision-making, the Supreme Court has limited the agencies' obligation to taking a "hard look" at the environmental consequences.<sup>144</sup> As one opinion summarized, "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of action to be taken.'"<sup>145</sup> NEPA does not fulfill the congressional intent behind it, or the policy goal of reducing harmful pollution by allowing agencies to consider environmental destructive alternatives without employing the mitigation identified as necessary in the environmental impact statement.<sup>146</sup> Judicially divorcing NEPA from any mandate to adopt environmentally-sound decisions has fed into attacks on NEPA in recent years from the regulated industry and federal agencies who complain that NEPA is a bureaucratic, paper-pushing exercise that burdens agencies without environmental benefits.<sup>147</sup>

Even under these weakening judicial interpretations, NEPA has had powerful impacts on agency decision-making in two ways. First, an objective analysis of a project's environmental impacts often has a salutary effect, compelling the decision makers to select environmentally-defensible courses of action. Second, the environmental impact statement creates a record that federal agencies cannot disregard under administrative law principles. While an agency may have discretion to decide what projects to pursue, it cannot act contrary to the evidence before it, which includes the

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144. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976) ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" (quoting *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97-98 (1983)).

145. *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)). The dissent in *Stryker's Bay* objected to converting judicial review into "the essentially mindless task of determining whether an agency 'considered' environmental factors" and ultimately allowing the agency to ignore them. *Id.* at 231 (Marshall, J., dissenting).

146. See Yost, *supra* note 139, at 545-46 (discussing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)).

147. See generally NEPA TASK FORCE, MODERNIZING NEPA IMPLEMENTATION: REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY (2003), available at <http://www.nepa.gov/ntf/report/frontmats.pdf> (providing recommendations for improving the effectiveness and the efficiency of the NEPA process based responses from more than 650 individuals representing federal, state, and local governments, tribes, organizations, and the general public).

evidence embodied in an environmental impact statement.

An EIA could have a similar impact under the Chinese law. First, under China's Administrative Procedure Law, a court will uphold an administrative act if the evidence for it is conclusive, the application of law and regulations is correct, and the legal procedure has been followed.<sup>148</sup> Conversely, a court can cancel in whole or in part or direct the defendant to make a new administrative act if the court finds inadequate evidence, erroneous application of the law or regulations, violation of legal procedure, the act exceeded authority, or abuse of power.<sup>149</sup> It appears that the EIA process will be combined with hearings on administrative approvals. The EIA, therefore, affords a public opportunity to provide evidence to be considered in the administrative action and that may provide a record on which administrative approvals must be based.

Second, China's EIA law directs construction units to "implement countermeasures and steps for environmental protection raised in the environmental impact report."<sup>150</sup> This language in the EIA law suggests that measures identified in the EIA to mitigate environmental harm must be implemented. In other words, the plain language of China's EIA law does not relegate EIAs to mere disclosure and "consideration" of environmental impacts, but envisions implementation of environmentally-protective measures as a result of the EIA.

#### CONCLUSION

Up until now, environmental litigation in China has primarily sought compensation for people who have been harmed by pollution. Such litigation can promote justice for the injured and hold polluters accountable for illegal and irresponsible conduct. It can also force polluters to internalize costs of polluting and can have a deterrent effect by exposing the wrongdoing and exacting a price for it.

In the United States, the expansion of citizen standing and the implementation of NEPA have provided more effective and direct mechanisms to prevent pollution and deter polluters from violating environmental standards. EIAs compel objective disclosure and

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148. Administrative Procedure Law (promulgated by the President, Apr. 4, 1989, effective Oct. 1, 1990), art. 54, LAWINFOCHINA (last visited Mar. 15, 2007) (P.R.C.).

149. 5 U.S.C. § 706 (2000).

150. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 26 available at [http://www.sepa.gov.cn/law/law/200210/st20021028\\_84000.htm](http://www.sepa.gov.cn/law/law/200210/st20021028_84000.htm) (P.R.C.); see also *id.*, art. 27 (requiring a post-EIA assessment of conditions that are inconsistent with EIA and potentially adoption of corrective measures).

consideration of the environment in critical decisions. They give the public information and a forum to advocate for integration of environmental impacts into decision-making early in the process, and before the harm is done. Citizen standing has enabled the public to enforce environmental laws. It has expanded the nation's enforcement capacity beyond governmental officials, who lack the resources or the political will to proceed, by empowering those most impacted by the pollution to take action to prevent the harm.