

# CHINA’S PROCURATORATE IN ENVIRONMENTAL CIVIL ENFORCEMENT: PRACTICE, CHALLENGES & IMPLICATIONS FOR CHINA’S ENVIRONMENTAL GOVERNANCE

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## INTRODUCTION

In the past three decades, China’s miraculous economic growth and rapid development has produced severe environmental pollution and natural resource degradation. Take water pollution as an example. China’s Ministry of Environmental Protection’s 2010 Official Report on China’s Environment revealed that all seven major rivers in China suffer from

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moderate pollution.<sup>1</sup> The report also found that ten out of the twenty-six lakes and reservoirs under the central government's strict supervision have a water quality graded less than five,<sup>2</sup> the lowest national standard for water quality. This grade means the water is essentially unusable for any purpose. By 2011, there are still over 100 million people living in the countryside that have no access to clean drinking water.<sup>3</sup>

To address the alarming environmental problems in China, the Standing Committee of the National People's Congress adopted the Environmental Protection Law (for Trial Implementation) in 1979.<sup>4</sup> This was the basic framework law that signified the beginning of environmental legislation in modern China. The mid-1980s witnessed the early development of China's environmental legislations, but China's environmental regulatory framework started to expand at an unprecedented pace in the early 1990s. Since then, numerous environmental laws, regulations, rules, and standards have been enacted or amended every year.<sup>5</sup> However, these new laws have done little to improve China's environmental performance and the environmental quality continues to deteriorate because substantial gaps exist between law on the books and enforcement on the ground. Insufficient enforcement of environmental law, including lack of procuratorate involvement in civil judicial enforcement efforts, continues to be one of China's key challenges to environmental governance.

This article will first give an overview of China's procuratorate system, followed by a close examination of the procuratorate's role in environmental protection. Part III will discuss one specific environmental civil enforcement case brought by the procuratorate to illustrate some of the

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1. 2010 OFFICIAL REPORT ON CHINA'S ENVIRONMENT, MINISTRY OF ENVIRONMENTAL PROTECTION OF THE PEOPLE'S REPUBLIC OF CHINA (2011), [http://www.mep.gov.cn/pv\\_obj\\_cache/pv\\_obj\\_id\\_34FA1910C975D394AD2AED8FA02D5DA09D7C1200/filename/P020110603390794821945.pdf](http://www.mep.gov.cn/pv_obj_cache/pv_obj_id_34FA1910C975D394AD2AED8FA02D5DA09D7C1200/filename/P020110603390794821945.pdf).

2. *Id.* at 14.

3. Ke Zhang, *The Environmental and Ecological Price Behind Increase in Grain Production for Seven Consecutive Years*, CHINA BUSINESS NEWS, Dec. 24, 2010, <http://env.people.com.cn/GB/13570389.html>.

4. Environmental Protection Law of the People's Republic of China (for Trial Implementation) (promulgated by the Standing Comm. Of the Nat'l People's Cong., Sept.13,1979). In December 1989, the Environmental Protection Law was passed by the Standing Committee of the National People's Congress. Environmental Protection Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) PRC Presidential Decree (No. 22), 1989, (China). Currently it is under revision for the first time in more than 20 years.

5. Jingjing Liu & Adam Moser, *Environmental Law-China*, in THE ENCYCLOPEDIA OF SUSTAINABILITY VOL. 3: THE LAW AND POLITICS OF SUSTAINABILITY 220, 221 (Klaus Bosselmann, Daniel Fogel, & J.B. Ruhl eds., 2011).

unique issues related to procuratorial civil enforcement. The article will conclude with a brief analysis of the challenges the Chinese procuratorate faces when taking environmental civil enforcement actions. Despite the challenges, the procuratorate's activism in environmental civil enforcement will have positive implications upon China's environmental governance and rule of law development.

## I. OVERVIEW OF CHINA'S PROCURATORATE SYSTEM

Modern China is, in form, a unitary state, and all power flows from the central government in Beijing. However, the economic reform has brought significant decentralization of economic administration, and Beijing, in many cases, has not been able to effectively rein in local government power, leading to substantial de facto local government autonomy.<sup>6</sup> The modern Chinese government system has not adopted American-style ideas of separation of powers as a form of "checks and balances" between different branches of government. This is due to the belief that disagreements and conflicts between governmental branches should be minimized because efficiency prevails in a socialist state like China. Instead, China's central government more resembles the parliamentary systems common in Europe.<sup>7</sup>

The Chinese Constitution stipulates that all power in the People's Republic of China (the PRC) belongs to the people, and the National People's Congress (the NPC) and the local people's congresses at various levels are the organs through which the people exercise the state power.<sup>8</sup> The NPC enjoys extensive power to: amend the Constitution; enact basic laws governing criminal offences, civil affairs, the state organs and other matters; and elect the President of the nation, the Premier of the State Council, the Chairman of the Central Military Commission, the President of the Supreme People's Court, and the Prosecutor-General of the Supreme People's Procuratorate.<sup>9</sup> Despite having broad power, the NPC has a large number of delegates and meets only once a year for a few weeks, and this arrangement has essentially prevented the NPC from effectively exercising

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6. Donald C. Clarke, *The Chinese Legal System*, THE CHINESE LEGAL SYSTEM (July 4, 2005), <http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html>.

7. Jingjing Liu, *Overview of the Chinese Legal System*, ENVTL. L. REP. (forthcoming Oct. 2011).

8. XIANFA art. 2 (2004) (China).

9. XIANFA art. 62 (2004) (China).

its stipulated supreme power.<sup>10</sup> To ensure the proper functioning of the legislative branch, the Constitution establishes the Standing Committee of the NPC (the SCNPC) as a permanent body of the NPC.<sup>11</sup> The SCNPC enjoys broad power, including interpreting the Constitution and laws, as well as enacting and amending laws—with the exception of those which should be enacted by the NPC.<sup>12</sup> In the environmental field, the SCNPC and the Environment and Natural Resources Protection Committee of the NPC play an important role in making, revising, and interpreting environmental statutes, inspecting the implementation of environmental laws, as well as supervising the work of environmental protection agencies, the courts and the procuratorates.<sup>13</sup>

The State Council, considered China's executive branch, is designated by the Constitution as the highest organ of state administration.<sup>14</sup> The State Council has various ministries, commissions, and agencies under it, including the Ministry of Environmental Protection (China's equivalent of the Environmental Protection Agency in the U.S.) and the Ministry of Justice. The Ministry of Justice is responsible for administering prisons; supervising the People's Mediation Committees, the lawyer system and the notary system; managing legal education and training of judicial officials; and otherwise disseminating legal knowledge.<sup>15</sup>

The Chinese procuratorate system bears strong influence from Russia, but important differences exist. The Chinese procuratorate is tasked with conducting prosecution in criminal cases on behalf of the state and supervising the activities of public security agencies and courts, while Russia's procuratorate could extend supervision over the lower and intermediate executive organs. The Russian procuratorate is also highly centralized and free from all interference from local authorities, while Chinese procuratorate is under the dual leadership of both the superior procuratorate and the local people's congress and government.<sup>16</sup> Although Chinese procuratorates are under dual leadership, the local governments at

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10. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 115 (2008).

11. XIANFA art. 57 (2004) (China).

12. XIANFA art. 67 (2004) (China).

13. Jingjing Liu & Adam Moser, *supra* note 5, at 220.

14. XIANFA art. 85, § 3 (2004) (China).

15. Jingjing Liu, *Overview of the Chinese Legal System*, ENVTL. L. REP. (Oct. 2011). The Ministry of Justice is an essential component of China's judicial system. Although it shares a similar name with the Department of Justice (DOJ) in the U.S., the Supreme People's Procuratorate in China is considered the functional equivalent to the DOJ given both of them are the national prosecutorial agencies.

16. Zongling Shen, *The Role of Lawyers in Social Change: China*, 25 CASE W. RES. J. INT'L L. 163, 166 (1993).

the same level control the appointment and finance of the procuratorates; therefore, the superior procuratorate's leadership is actually rather weak.<sup>17</sup> Given the procuratorate's reliance on the local government at the same level, some argue that the procuratorate's environmental civil enforcement actions may still be subject to local protectionism.<sup>18</sup>

The procuratorate system has a structure similar to the courts. The Supreme People's Procuratorate sits at the top of the prosecutorial system and directs the work of the procuratorates at lower levels.<sup>19</sup> Under the Supreme People's Procuratorate, there are procuratorates at the provincial, municipal/prefectural, and district/county level. In addition to these general procuratorates, there are also specialized procuratorates, such as railway transportation and military procuratorates, established within the military system to ensure utmost confidentiality.

Within a procuratorate, there is one prosecutor-general and several deputy prosecutors-general as well as prosecutors. The prosecutor-general is in charge of his or her procuratorate. A prosecutorial committee should be established at a procuratorate at any level.<sup>20</sup> The prosecutorial committee shall comprise the prosecutor-general, deputy prosecutors-general, full time committee members and persons in charge of relevant internal organs of the procuratorate.<sup>21</sup> The prosecutorial committee discusses and decides important cases and other important issues. The prosecutorial committee's various functions include deliberating and deciding important issues concerning the implementation of national laws and policies, resolutions passed by the same-level people's congresses and their standing committees; and important, difficult and complicated cases.<sup>22</sup> The prosecutorial committee makes decisions by a majority vote,<sup>23</sup> and its decision is legally

17. JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 159 (2008).

18. Christine J. Lee, "Pollute First, Control Later" *No More: Combating Environmental Degradation in China Through an Approach Based in Public Interest Litigation and Public Participation*, 17 PAC. RIM L. & POL'Y J. 795, 815 (2008).

19. Organic Law of the People's Procuratorates of the People's Republic of China, art.10.

20. 中华人民共和国人民检察院组织法 [Organic Law of the People's Procuratorates of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Sept. 2, 1983, effective Sept. 2, 1983) PRC (No. 4) 1983, art. 3 (China); Organic Law of the People's Procuratorates of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Sept. 2, 1983, effective Sept. 2, 1983) PRC (No. 4) 1983, art. 3 (China).

21. (人民检察院检察委员会组织条例) [Organic Regulation of the Prosecutorial Committee of the People's Procuratorate] (promulgated by the Prosecutorial Comm. of the Supreme People's Procuratorate, Feb. 2, 2008, effective Feb 2, 2008), art. 2 (China); Organic Regulation of the Prosecutorial Committee of the People's Procuratorate (promulgated by the Prosecutorial Comm. of the Supreme People's Procuratorate, Feb. 2, 2008, effective Feb 2, 2008), art. 2 (China).

22. *Id.* at art. 4.

23. *Id.* at art. 11.

binding.<sup>24</sup> The prosecutorial committee's decision making process has met criticism. Criticism includes that the committee members are busy and sometimes have no time to review the entire case file; they often vote based on limited knowledge of the case, sometimes using just a report from the prosecutors. There is also criticism that committee members may lack substantive legal knowledge in some of the important, difficult, and complicated cases that come before them, and, therefore, cannot express their ideas effectively and vote in a meaningful way.<sup>25</sup>

China's procuratorate performs the following major functions:

1. Exercise procuratorial authority over treason, crimes that dismember the State and other major crimes that severely impede the unified enforcement of national policies, laws, decrees and administrative orders;
2. Investigate criminal cases handled directly by the procuratorate;
3. Review cases investigated by the police and determine whether to approve the arrest, to prosecute or to exempt from prosecution; and supervise the legality of the police's investigation activities;
4. Initiate prosecution of criminal cases, and supervise the legality of trials of criminal cases;;
5. Supervise the execution of criminal judgments , and the legality of prison, detention facility, and reform-through-labor institution activities; and
6. Supervise civil and administrative trials of courts.<sup>26</sup>

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24. *Id.* at art. 5.

25. Yajun Wang, *Research Report on the Performance of the Adjudicative Committee and the Prosecutorial Committee*, RD.BL.GOV.CN (Mar. 4, 2010, 9:05 AM), <http://rd.bl.gov.cn/show.asp?nid=46133>.

26. Organic Law of the People's Procuratorates of the People's Republic of China, art.5. 中华人民共和国民事诉讼法 [Civil Procedure Law of the People's Republic of China art. 14] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008); 中华人民共和国行政诉讼法 [Administrative Procedure Law of the People's Republic of China art. 10] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1989); Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective April 1, 2008) PRC Presidential Decree (No. 75) 2007, art. 14 (China); Administrative Procedure Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1989) art. 10 (China).

Unlike public prosecutors in Western legal systems, the Chinese procuratorate's functions are not confined to prosecutorial work.<sup>27</sup> Chinese procuratorates enjoy extensive power to not only conduct criminal investigations and prosecutions, but also exercise supervision of the police, prisons, and even the courts to ensure their activities conform to law. Chinese procuratorates' power to supervise criminal, civil, and administrative trials is, to a certain degree, unthinkable to American prosecutors and judges, given the country's adversarial trial model.

## II. CHINESE PROCURATORATE'S ROLE IN ENVIRONMENTAL PROTECTION

Within the environmental arena, the procuratorate is responsible for investigating and prosecuting environmental crimes, including those related to dereliction of environmental protection and supervision duties. The procuratorate also supervises the work of the environmental protection agencies and public security authorities relating to environmental crime. The 2010 Annual Work Report of the Supreme People's Procuratorate reports that the procuratorates cracked down on crimes related to damaging the environment and natural resources in 2009. The procuratorates prosecuted 15,137 people for illegal mining, illegal logging, or causing major environmental pollution accidents. The procuratorates also dealt with crimes involving dereliction of duties to protect energy resources and the ecological environment. The procuratorates investigated 2,966 dereliction of duty cases related to illegal approval of land taking and environmental supervision.<sup>28</sup> Although the 15,137 people prosecuted for environmental crimes accounted for only a fraction of the 1,134,380 people prosecuted for all types of crimes in 2009,<sup>29</sup> the number for environmental crime prosecutions will likely go up after an amendment to the Criminal Law lowering the threshold for prosecuting environmental crimes passed the SCNPC in February 2011.<sup>30</sup>

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27. Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT'L & COMP. L. 35, 52 (2007).

28. The 2010 annual work report of the Supreme People's Procuratorate.

29. *Id.* The small number of people prosecuted for environmental crimes to certain degree reflected a traditional notion in China that people should not be punished criminally for activities damaging the environment.

30. 中华人民共和国刑法修正案(八) [Eighth Amendment to the Criminal Law of the People's Republic of China] (promulgated by Standing Comm. of the Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011); Eighth Amendment to the Criminal Law of the People's Republic of China (promulgated by Standing Comm. of the Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011)

In addition to prosecuting environmental crimes and dealing with dereliction of environmental protection and supervision duties, the procuratorates play an active role in protecting the environment through non-criminal approaches. These include filing civil lawsuits affiliated with criminal prosecution, protesting against incorrect civil and administrative judgments, providing prosecutorial advice, supporting litigation, supervising and urging litigation, and bringing environmental civil enforcement litigation<sup>31</sup>.

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(China). On February 25th, 2011, the SCNPC passed the eighth amendment to the Criminal Law of the PRC. Before the eighth amendment, art.338 of the Criminal Law read as:

whoever releases, dumps, or disposes of radioactive wastes, wastes containing pathogen of contagious diseases, and toxic materials or other dangerous wastes into land, water, and the atmosphere in violation of state stipulations, causing major environmental pollution accidents that lead to heavy losses to public and private property, or grave consequences of personal deaths and injuries shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention, and may in addition or exclusively be sentenced to a fine; and in exceptionally serious consequences, not less than three years and not more than seven years of fixed-term imprisonment, and a fine.

*Id.* In the eighth amendment, Article 338 has been revised to:

whoever, in violation of the state provisions, discharges, dumps or disposes of any radioactive waste, any waste containing pathogens of any infectious disease, any poisonous substance or any other hazardous substance, which has caused serious environmental pollution, shall be sentenced to imprisonment of not more than three years or criminal detention and/or a fine; or if there are especially serious consequences, be sentenced to imprisonment of not less than three years but not more than seven years and a fine.

*Id.* In revised Article 338, “causing major environmental pollution accidents that lead to heavy losses to public and private property, or grave consequences of personal deaths and injuries” is no longer necessary for prosecuting environmental crimes, and as long as there is serious environmental pollution, it is sufficient to prosecute criminally.”

31. In China, the widely used terminology for describing non-criminal litigations brought against polluters or environmental agencies who do not perform their statutorily mandated obligations is “environmental public interest litigation.” If the defendants are not government agencies, then the lawsuits are called “civil environmental public interest litigation”; if the defendants are government agencies, then the lawsuits are called “administrative environmental public interest litigation.” To be more specific, civil environmental public interest litigation refers to civil lawsuits brought by environmental NGOs, environmental agencies, and the procuratorates against polluters for the interests of the public as compared to for the private interests in an environmental tort lawsuit. Civil environmental public interest litigation brought by the NGOs against the polluters shares some similarities as well as substantial differences with the “citizen suit” in the U.S, while civil environmental public interest litigation brought by the procuratorates against polluters is quite comparable to the civil enforcement action taken by the DOJ’s Environment and Natural Resources Division and the 94 U.S. attorneys offices located across the U.S., albeit with some important differences as well. For the purpose of writing this article, civil environmental public interest litigation brought by the procuratorates against polluters will be used interchangeably with environmental civil enforcement litigation.

### *A. Filing Civil Lawsuits Affiliated with Criminal Prosecution*

According to China's criminal procedure law, if state property or collective property is damaged due to criminal activities, then the procuratorate may file a civil lawsuit affiliated with criminal prosecution.<sup>32</sup> For example, Yuncheng Municipal People's Procuratorate of Shanxi Province brought a criminal prosecution against Junwu Yang, a paper mill owner, in 1998 for causing major environmental pollution accidents. At the same time, it brought an affiliated civil lawsuit against the defendant for causing pollution to public drinking water sources. The Yuncheng Municipal People's Court imposed a two-year fix-term imprisonment against the defendant and a criminal penalty of 50,000 RMB (around \$7,692). The court also ordered the defendant to pay 360,000 RMB (around \$55,385) to compensate the civil loss.<sup>33</sup>

In another case, five defendants dumped 6,500 tons of sludge from a wastewater treatment facility into Beijing's underground water source protection zone.<sup>34</sup> The sludge contained multiple heavy metals and high concentrations of pollutants, which caused serious pollution to the local air, soil, and underground water. The economic loss as a result of the pollution was assessed for over 100 million RMB (around 15 million USD). This was the first sludge pollution case in China, as well as the biggest underground water pollution case in Beijing. In addition to bringing criminal prosecution against the defendants for causing a major environmental pollution accident, Beijing Mentougou District People's Procuratorate brought an affiliated civil lawsuit requesting 80 million RMB (around 12 million USD) for civil compensation. This was the first time a procuratorate sued defendants for such a large amount of civil compensation in Beijing.

### *B. Protesting Against Incorrect Civil and Administrative Judgments*

As mentioned above, according to China's civil procedure law and administrative procedure law, the procuratorates have the right to exercise

32. 中华人民共和国刑事诉讼法(96修正) [Criminal Procedure Law of the People's Republic of China art. 77] (promulgated by Nat'l People's Cong., Mar. 17, 1996, effective Jan. 1, 1997); Criminal Procedure Law of the People's Republic of China art. 77 (promulgated by Nat'l People's Cong., Mar. 17, 1996, effective Jan. 1, 1997) (China).

33. *Urgent Need to Establish Environmental Public Prosecution System*, CHINA ENVTL NEWS, June 24, 2004, <http://news.sina.com.cn/c/2004-06-24/10132894930s.shtml>.

34. *An Analysis of Beijing Dumping of Toxic Sludge Case: Pollution Damage, Who Is in Charge?*, CHINA ENVTL NEWS, Nov. 18, 2010, [http://www.cenews.com.cn/xwzx/fz/qt/201011/t20101117\\_689431.html](http://www.cenews.com.cn/xwzx/fz/qt/201011/t20101117_689431.html). The following is a summary of this case.

legal supervision over the civil and administrative proceedings. If the Supreme People's Procuratorate discovers that a people's court made a legally effective civil judgment at any level, or if a people's procuratorate at a higher level discovers that a legally effective judgment made by a people's court at a lower level involves any statutorily provided circumstances, then the Supreme People's Procuratorate or the people's procuratorate at a higher level shall file a protest. If a local people's procuratorate at any level discovers that a legally effective judgment made by a people's court at the same level involves any statutorily provided circumstances, then the people's procuratorate shall ask its superior procuratorate to file a protest with the people's court at the same level.<sup>35</sup> The system of protest by the procuratorate was transplanted from the former Soviet system of civil process where the chief procurator may protest against unlawful or unjustified judgments regardless of whether he participated in adjudicating the case.<sup>36</sup> Statutorily provided circumstances usually include incorrect verification of facts, incorrect application of laws, and violation of due process.<sup>37</sup>

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35. 中华人民共和国民事诉讼法 [Civil Procedure Law of the People's Republic of China art. 187]; 中华人民共和国行政诉讼法 [Administrative Procedure Law of the People's Republic of China art. 64]. Civil Procedure Law of the People's Republic of China, art. 187; Administrative Procedure Law of the People's Republic of China, art. 64. Article 64 of the Administrative Procedure Law permits protest against incorrect administrative judgments.

36. Jianhua Zhang & Guangha Yu, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?* 13 J. TRANSNAT'L L. & POL'Y 393, 422 (2004).

37. 中华人民共和国民事诉讼法 [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective April 1, 2008) PRC Presidential Decree (No. 75) 2007, art. 179 (China); Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) PRC Presidential Decree (No. 75) 2007, art. 179 (China). Specific statutorily provided circumstances include:

- (1) There is new evidence which is conclusive enough to overrule the original judgment or ruling;
- (2) The main evidence used in the original judgment to find the facts was insufficient;
- (3) The main evidence used in the original judgment to find the facts was forged;
- (4) The main evidence used in the original judgment to find the facts was not cross-examined;
- (5) Any party to a lawsuit is unable to obtain the evidence necessary for adjudicating the case because of some realistic reasons and has applied to the people's court for investigation and collection of such evidence in writing, but the people's court fails to investigate and collect such evidence;
- (6) There was an error in the application of the law in the original judgment;
- (7) The jurisdiction was in violation of legal provisions and was improper;

Chinese procuratorates protested against 11,556 incorrect civil and administrative judgments in 2009, and 12,139 in 2010, respectively.<sup>38</sup> With the powers authorized by these two procedural laws, if a procuratorate discovers an incorrect civil or administrative judgment (e.g., a wrong decision on an environmental tort case or incorrect judicial review of an administrative action), then it can protest the judgment to the proper court, and the court will initiate the retrial process.<sup>39</sup> When the court hears the case protested by the procuratorate, it shall notify the procuratorate to send a prosecutor to attend the court hearing.<sup>40</sup>

### *C. Providing Prosecutorial Advice*

Prosecutorial advice is an important means employed by the procuratorate to promote correct implementation of law. During the process of enforcing the law and handling cases, the procuratorate exercises its legal supervisory authorities and advises relevant entities. The procuratorate advises entities to improve their bylaws and internal supervision, to correctly implement laws and regulations, and to prevent and reduce violations of the law.<sup>41</sup> The procuratorate may give prosecutorial advice to

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(8) The trial organization was unlawfully formed or the judges who should withdraw have not done so;

(9) The person incapable of action is not represented by a legal agent, or the party that should participate in the litigation failed to do so because of the reasons not attributable to himself or his legal agent;

(10) The party's right to debate was deprived of in violation of the law;

(11) The default judgment in the absence of the party was made whereas that party was not served with summons;

(12) Some claims were omitted or exceeded in the original judgment; or

(13) The legal document on which the original judgment was made is cancelled or revised.

*Id.* With respect to a violation of the legal procedure by a people's court that may have affected the correctness of the judgment of the case or the situation that judges involved themselves in any conduct of embezzlement, bribery, practicing favoritism for himself or relatives, or twisting the law in rendering judgment, the people's court shall retry the case.

38. Annual Work Reports of the Supreme People's Procuratorate for 2010 & 2011.

39. 中华人民共和国民事诉讼法 [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) PRC Presidential Decree (No. 75) 2007, Article 188 (China). See Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) PRC Presidential Decree (No. 75) 2007, art. 188 (China).

40. See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective April 1, 2008) PRC Presidential Decree (No. 75) 2007, art. 190 (China).

41. Work Procedures for the People's Procuratorate to Issue Prosecutorial Advice (for Trial Implementation) (2009), art.1.

the entities involved in cases handled by the procuratorate, relevant administrative agencies, and other relevant entities.<sup>42</sup>

A procuratorate may issue prosecutorial advice if it discovers:

1. Hidden risks of crime as a result of poor management, lack of sound bylaws, or failure to implement relevant bylaws;
2. Administrative agencies in charge of certain industries need to strengthen or improve the management and supervision of the industries or sectors;
3. Civil disputes are serious and may escalate into severe or mass incidents, and mediation needs to be strengthened to control the situation; and
4. It is necessary to improve the law enforcement work of the courts, the public security authorities, criminal punishment enforcement agencies, etc.<sup>43</sup>

Prosecutorial advice usually includes:

1. Explanation of the root cause of the problem or the reason for issuing the advice;
2. A description of the hidden risks or violation of the law that should be eliminated;
3. Proposed solutions to the problem;
4. The facts, laws, regulations and other provisions that the procuratorate relies upon to issue the advice; and
5. The time limit within which the advised entity shall send a written reply regarding the implementation of the advice.<sup>44</sup>

For example, in early 2004, Yanjiang District People's Procuratorate of Ziyang Municipality, Sichuan Province (Yanjiang Procuratorate) learned that many stone processing factories along the local Qingshui River basin in Yanjiang District discharged crushed stones and stone slurries directly to

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42. Work Procedures for the People's Procuratorate to Issue Prosecutorial Advice (for Trial Implementation) (2009), art.3.

43. Work Procedures for the People's Procuratorate to Issue Prosecutorial Advice (for Trial Implementation) (2009), art.5.

44. Work Procedures for the People's Procuratorate to Issue Prosecutorial Advice (for Trial Implementation) (2009), art.4.

the Qingshui River watershed.<sup>45</sup> This caused significant damage to the environment along the river and threatened the local water supply. Two-thousand residents living along the river had difficulty accessing clean water. Yanjiang Procuratorate contacted the local environmental protection bureau (EPB) and discovered that the EPB had previously issued administrative orders requiring these factories to stop production and rectify pollution activities. Many factories, however, turned a deaf ear to the EPB's orders because of the huge profits they could earn from direct discharge of pollutants to the river. In May, Yanjiang Procuratorate issued prosecutorial advice to eight major stone processing factories along the River, recommending these factories install or improve their pollution treatment facilities and clean up the river choked by pollutants. Yanjiang Procuratorate made it clear in its prosecutorial advice that if its recommendations went unheeded, it would bring civil enforcement lawsuits against these factories. The procuratorial advice received significant attention from these factories as well as the local government agencies in charge of supervising them. The factories either stopped production to install or improve pollution treatment facilities, or faced closure if they could not do so. The Qingshui River pollution was therefore managed and treated as a whole.

#### *D. Supporting Litigation*

Supporting litigation is an important principle of China's civil procedure law. If the civil rights and interests of the state, collective, or individual have been infringed upon, a state agency, public organization, enterprise, or institution may support the injured unit or individual to bring a lawsuit.<sup>46</sup> Sometimes, for certain reasons,<sup>47</sup> victims of a tortious action may not take the claim to court. In such cases, a procuratorate can step in to support victims to bring lawsuits to ensure justice is served. For example, in 2007, a cupboard factory in Nanhu District of Jiaying Municipality,

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45. Dehua Liu, Min Jiang & Mingsheng Qing, *Facing Lawsuits if No Cleanup Action is Taken! Prosecutorial Advice Gives Back a Clean Qingshui River*, PROCURATORIAL DAILY, May 11, 2005, <http://www.jrb.com/n1/jrb807/ca371535.htm>. The following is a summary of this case.

46. 中华人民共和国民事诉讼法 [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) PRC Presidential Decree (No. 75) 2007, art. 15 (China); Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) PRC Presidential Decree (No. 75) 2007, art. 15 (China).

47. Several reasons include: not being aware of the available remedies through litigation, lack of financial resources, and fear of the party conducting the tortious action, etc.

Zhejiang Province, discharged wastewater coming from the manufacturing process directly to a local river and caused massive death of fish raised by local farmers.<sup>48</sup> The factory also discharged large amounts of dusts and exhaust gases, which had serious environmental consequences for local residents. It turned out that this factory did not apply for any pollution discharge permit, nor did it install any basic wastewater treatment facility around the factory. Local residents made a complaint to the Nanhu District EPB, which ordered the factory to stop production in March 2008, complete the permit application procedures, and install a proper pollution control facility. Nanhu District EPB's order was ignored and the factory continued to manufacture cupboards without a permit and pollution control facility.

In July 2009, Nanhu District People's Procuratorate (Nanhu Procuratorate) and Nanhu District EPB jointly promulgated Provisions on Environmental Protection Public Interest Litigation. The Provisions stipulated that, in environmental pollution cases, the procuratorate could follow relevant civil procedure rules to support pollution victims to bring litigation, supervise and urge relevant government agencies or state-owned units to bring litigation, or bring its own civil enforcement litigation. According to the Provisions, Nanhu District EPB transferred the cupboard factory case to Nanhu Procuratorate in December 2009. The procuratorate initiated an investigation into this case immediately, and, based on the investigation and relevant laws, decided to support local residents to bring a lawsuit against this factory. During the process of collecting evidence, the prosecutor educated the factory owner on relevant laws and made him realize the illegality of the factory's pollution discharge activities. The factory owner therefore promised to dismantle all manufacturing equipment and relocate his factory by January 20, 2010—which he did. He also proposed compensation solutions to the satisfaction of local residents, and, therefore Zhejiang Province's first environmental public interest litigation supported by the procuratorate was properly settled.

### *E. Supervising and Urging Litigation*

When state-owned assets and public interests are infringed upon, if supervising agencies or state-owned units do not exercise, or keep a slack hand to exercise, their supervisory responsibilities, the procuratorate, as the state's highest organ for legal supervision, can supervise and urge relevant

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48. Yuehong Fan, Zhiwei Shen and Ye Ni, *Zhejiang Province's First Environmental Public Interest Litigation Supported by the Procuratorate is Settled* (Feb. 21, 2010, 4:19 PM), <http://chinacourt.org/html/article/201002/21/395966.shtml>. The following is a summary of this case.

agencies and state-owned units to fulfill their obligations and bring civil lawsuits to protect the legitimate interests of the state and the public.<sup>49</sup> In some areas, such as sale of the rights to use state-owned lands, sale of state-owned assets, and environmental protection, the interests of the state and the public are more susceptible to infringement. These are the areas where the procuratorate can help safeguard against loss of state-owned assets and damage to the environment.

#### *F. Bringing Environmental Civil Enforcement Litigation*

Among all available non-criminal approaches the procuratorates can employ to protect the environment, environmental civil enforcement litigation is the most direct and powerful. This has invited significant attention and heated debate.

As mentioned above, Chinese procuratorates, as the constitutionally designated state agency for legal supervision, enjoy extensive power to supervise the police, prisons, and even the courts to ensure their activities conform to law. However, they lack clear authority to bring civil enforcement lawsuits against violators.<sup>50</sup> According to China's civil procedure law, the plaintiff in a civil lawsuit must be a citizen, legal person, or an organization that has a direct interest with the case.<sup>51</sup> This essentially

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49. Baojin Huang & Xingping Lai, How to Regulate the Application of Supervising and Urging Litigation, PROCURATORIAL DAILY, AUG.28, 2009, [HTTP://WWW.JCRB.COM/XUESHU/ZXSD/200908/T20090828\\_256643.HTML](http://WWW.JCRB.COM/XUESHU/ZXSD/200908/T20090828_256643.HTML).

50. See Yanmin Cai, *The Procuratorate's Role in China's Civil Environmental Public Interest Litigation*, 1 PEKING UNIV. L.J. 161, 166 (2011). The PRC's first Organic Law of the People's Procuratorate in 1954 stipulated that the procuratorate has the authority to initiate or participate in litigations regarding important civil cases that involve the interests of the state and the people. In addition, in the 1979 draft of the Civil Procedure Law (for Trial Implementation), there were provisions regarding the procuratorate's participation in civil litigation. However, when the Civil Procedure Law (for Trial Implementation) was passed in 1982, such provisions were deleted due to the belief at that time that the procuratorate should focus on criminal work only.

51. Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) PRC PRESIDENTIAL DECREE (No. 75) 2007, art. 108 (China).

The following conditions must be met before a lawsuit is filed:

- (1)The plaintiff must be a citizen, legal person, or an organization having a direct interest with the case;
- (2)There must be a specific defendant;
- (3)There must be a concrete claim, a factual basis, and cause for the lawsuit; and
- (4)The lawsuit must be within the scope of civil lawsuits to be accepted by the people's courts and within the jurisdiction of the people's court to which the lawsuit is filed.

*Id.*

prevents all civil litigations brought on behalf of the public interest. When the Civil Procedure Law was revised in 2007 (after 16 years of operation),<sup>52</sup> there were proposals from legal experts, scholars, and judges calling for relaxing this strict standing requirement to allow for civil litigations brought on behalf of the public interest. Unfortunately, these proposals did not make it to the final amendment.<sup>53</sup> Earlier this year, another revision of the civil procedure law was included in the 2011 legislative plan of the SCNPC. Some legal scholars believe the focus of this second revision will be to enhance the protection of the parties' right to sue and address issues such as difficulty accessing the court and difficulty collecting relevant evidence, etcetera.<sup>54</sup> The latest draft amendment to the Civil Procedure Law included a provision that allows relevant agencies and social groups to bring lawsuits against activities that damage the public interest, such as environmental pollution,<sup>55</sup> so hope remains for relaxing the standing requirement to include public interest litigation in the new civil procedure law.

In addition, China's Environmental Protection Law stipulates that units and individuals shall have the obligation to protect the environment and the right to report on or file charges against units or individuals that cause pollution or damage to the environment.<sup>56</sup> However, these are general principles and procedures, lacking mechanisms to properly enforce them. Moreover, "report on" or "file charges against" refers more to internal supervision within government agencies, which is different from bringing environmental litigation, including public interest litigation, in court.<sup>57</sup>

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52. See Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) PRC PRESIDENTIAL DECREE (No. 75) 2007, Introduction (China). In 1982, the SCNPC enacted the Civil Procedure Law (for Trial Implementation). *Id.* In 1991, the NPC enacted the Civil Procedure Law, and, in 2007, the SCNPC enacted the first amendment to the Civil Procedure Law. *Id.*

53. The 2007 revision of the Civil Procedure Law focused on improving procedures related to enforcement as well as retrial of a case whose judgment is already legally effective, instead of a comprehensive revision of the entire law. This disappointed many scholars and legal experts who were looking for a more comprehensive revision of the law.

54. This opinion came from Weijian Tang, a law professor at Renmin University of China Law School and leading expert on Chinese civil procedure law. His remarks can be found at <http://news.hebei.com.cn/system/2011/06/14/011207817.shtml>.

55. Liping Chen, Draft Amendment to the Civil Procedure Law Includes Public Interest Litigation For the First Time, Oct.25, 2011, on the website of the National People's Congress, available at [http://www.npc.gov.cn/huiyi/cwh/1123/2011-10/25/content\\_1676092.htm](http://www.npc.gov.cn/huiyi/cwh/1123/2011-10/25/content_1676092.htm).

56. Environmental Protection Law of the People's Republic of China (promulgated by the Standing Comm. Of the Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) PRC PRESIDENTIAL DECREE (No. 22), 1989, art. 6 (China).

57. Shijun Zhang, Discussion of the System and Type of Qualified Plaintiffs in Environmental Public Interest Litigation in China, 3 J. OF JINAN UNIV. 79, 79 (2007).

Given the ambiguous legal authority to bring civil enforcement actions, except in cases of severe pollution (which may be criminally prosecuted), Chinese prosecutors rarely pursue civil prosecutions in environmental cases because they lack a formal civil judicial enforcement role. However, the legislative setback has never prevented efforts by the procuratorate to expand its functions to play a more active role in protecting the interests of the state and the public.<sup>58</sup> Since the 1990s, procuratorates in the provinces of Henan, Shanxi, Fujian, Shandong, Guizhou, Jiangsu, Zhejiang, Jiangxi, Sichuan, and Guangdong have brought civil litigations to protect state-owned assets, the environment, and the public interest.

Early experiments with bringing civil lawsuits by the procuratorate can be traced back to 1997. The Industrial and Commercial Bureau of Fangcheng County, Henan Province, sold a piece of state-owned property to an individual at a low price in violation of the law. In order to prevent divestment of state property, the Fangcheng County Procuratorate brought a lawsuit requesting that the Fangcheng County court declare the contract invalid. The court ruled in favor of the plaintiff and declared the sales contract between the industrial and commercial bureau and the private individual invalid.<sup>59</sup> The Fangcheng County Procuratorate's initiative received significant attention from the Supreme People's Procuratorate, and this case was rated as one of the "Eight Biggest Cases in Ten Years" in China's procuratorate system.<sup>60</sup>

Despite lack of clear authority under current Chinese law, several local procuratorates have initiated environmental civil enforcement cases since 2003 in maritime courts,<sup>61</sup> specialized environmental courts,<sup>62</sup> and even quite a few general courts.

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58. This is consistent with the trend of procuratorates' expansion of functions around the world.

59. Tao Bie, An Analysis of Environmental Public Welfare and Public Prosecution of Environmental Cases, Jan.10, 2008, Environmental Law Research Network, <http://jyw.znufe.edu.cn/hjfyjw/Article/2008-1/2008110142212860.html>.

60. *Id.*

61. See Liu, *supra* note 7, at 10888. Maritime courts are specialized courts hearing primarily maritime torts and contract disputes. In recent years, maritime courts were given additional jurisdiction over cases involving land-originated pollutants contaminating the ocean as well as navigable watersheds. It is advantageous for maritime courts to hear ocean and water pollution cases because their specialization in maritime cases has enabled them to accumulate significant experience in hearing ocean and watershed-related pollution cases. In addition, the funding structure of the maritime courts and the fact that their jurisdiction is not defined by administrative districts made the maritime courts relatively insulated from the local governments who can exert substantial influence on judicial independence.

62. See Jingjing Liu & Adam Moser, *supra* note 5, at 222. Since 2004, several environmental courts have been established in different cities and provinces across China. The establishment of these environmental courts helps streamline the process of hearing environmental cases, allows cases to be heard by judges with enhanced technical expertise, and expands the standing for plaintiffs to facilitate

### III. ANALYSIS OF ISSUES RELATED TO ENVIRONMENTAL CIVIL ENFORCEMENT ACTIONS TAKEN BY THE PROCURATORATE

This section will discuss a specific environmental civil enforcement case brought by a local procuratorate, and use it as an example to discuss some of the unique issues related to prosecutorial civil enforcement.

#### *A. The People's Procuratorate of Haizhu District of Guangzhou Municipality v. Zhongming CHEN*

Defendant Zhongming CHEN opened a laundry facility (Xin Zhong Xing) in the Haizhu District of Guangzhou Municipality in September 2007, without obtaining either a valid business license from the local industrial and commercial bureau or a pollution discharge permit from the local EPB.<sup>63</sup> When conducting the laundry business, the facility used several detergents, including laundry soap powder, ferment power, and oxalic acid, which mixed with dye in the clothes being washed. The wastewater produced at the end of the laundry process was channeled to a collecting tank in the facility for simple deposition and was then discharged directly into Shi Liu Gang River.<sup>64</sup> Since the wastewater was not properly treated before discharge, the pollutants in the wastewater caused severe pollution to this small river, which used to be clean and clear. After noticing a black coloration and a noxious odor emanating from the river, local residents went to the facility to complain. The facility denied discharging any pollution to the river and turned a deaf ear to the residents' complaints.<sup>65</sup>

After learning of this pollution from local residents,<sup>66</sup> the Haizhu District People's Procuratorate (Haizhu Procuratorate), a nationally acclaimed basic-level procuratorate that won many top awards within the

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environmental public interest litigation that regular courts generally would not accept under existing Chinese law.

63. No. 382 Verdict of Guangzhou Maritime Court for First Instance Trial (2008).

64. *Id.*

65. Chunyan Qiu, Yuanqiang Liu & Ying Cheng, How Prosecutors Deal With the Three Challenges Facing Public Interest Litigation, *PROCURATOR DAILY*, Feb. 27, 2009, [http://www.2008red.com/member\\_pic\\_516/files/qhsxnsjcmxc/html/article\\_6922\\_1.shtml](http://www.2008red.com/member_pic_516/files/qhsxnsjcmxc/html/article_6922_1.shtml).

66. *Id.* The chief of the civil and administrative division of the Haizhu Procuratorate and also the chief prosecutor in this case, Mr. Chaohong Liang, learned about the pollution by the laundry facility when he conducted a routine visit to this community within the jurisdiction of the Haizhu Procuratorate to hear the voices of local residents. During this visit several local residents asked him whether the procuratorate will deal with river pollution in addition to arresting corrupt officials.

procuratorate system,<sup>67</sup> decided to act as the plaintiff and bring a civil lawsuit against the owner of the facility, Zhongming Chen, in July 2008. The plaintiff requested compensation of 117,289.20 RMB<sup>68</sup> (approximately \$18,000) for the environmental impacts and economic losses caused by the illegal discharge and payment of a case acceptance fee by the defendant. The Guangzhou Maritime Court heard this case in November 2008, and, in December 2008, ordered the defendant to pay the case acceptance fee of 2,646 RMB and to pay the full amount of 117,289.20 RMB to the national treasury<sup>69</sup> to be used exclusively for pollution treatment of the Shi Liu Gang River. After the judgment became effective, defendant Zhongming Chen closed the laundry facility and left Guangzhou. Today, Shi Liu Gang River is clean again and has beautiful scenery for local residents to enjoy.

After this case, several local procuratorates in Guangdong Province brought environmental civil enforcement cases in the Guangzhou Maritime Court, as well as regular courts. The fact that regular courts, in addition to the maritime court, continue to accept environmental civil enforcement cases shows the precedential value of the Xin Zhong Xing case.<sup>70</sup> This trend promises robust development of environmental civil enforcement actions in Guangdong Province.

There are several interesting issues coming out of this successful lawsuit brought by the Haizhu Procuratorate. Many of the same issues exist in environmental civil enforcement actions taken by procuratorates in other parts of China.

First, despite ambiguous legislative authorization, this is the first environmental civil enforcement case in Guangdong Province. There were two major reasons leading to Haizhu Procuratorate's decision to bring this case. One is the ineffectiveness of administrative actions. After receiving complaints from local residents about the deterioration of Shi Liu Gang River, the local EPB investigated all the factories along the river and discovered the pollution discharge activities of the Xin Zhong Xing laundry

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67. The Haizhu Procuratorate was awarded the title of the National Model Procuratorate in 2001, and, in 2002, was awarded the title of the National Model Basic-Level Procuratorate by the Supreme People's Procuratorate, and, in 2005, was awarded the title of Top Ten Procuratorates in China.

68. See No. 382 Verdict of Guangzhou Maritime Court for First Instance Trial (2008). This included a monitoring fee of 7,806 RMB, a defaulted water resources fee of 312 RMB, and compensation of 109,171.20 RMB for causing environmental harm and economic losses.

69. *Id.*

70. It is particularly encouraging that regular courts have started to take environmental civil enforcement cases. Ultimately, this type of cases should be accepted by all courts across China, not just by a few maritime courts and specialized environmental courts.

facility.<sup>71</sup> However, the EPB could only issue a warning, impose a fine, or order the facility to stop production and install proper pollution treatment facilities.<sup>72</sup> As mentioned in some of the previous cases, such administrative actions have had little effect upon the polluters.<sup>73</sup> In order to ensure Xin Zhong Xing and its owner were held responsible for the environmental harm the facility caused and to change the pattern of weak administrative enforcement, the EPB discussed with Haizhu Procuratorate the possibility for the latter to bring a judicial enforcement action against Xin Zhong Xing as an experiment to develop new enforcement tools.<sup>74</sup>

After taking the case, Haizhu Procuratorate and Haizhu District EPB signed implementing measures to conduct joint public interest litigation concerning land-originated pollutants that are contaminating watersheds. These measures stipulate that when Haizhu District EPB conducts environmental supervision and management, it is responsible for discovering and providing cases, assisting Haizhu Procuratorate in collecting relevant technical data and assessment materials required for litigation, and assisting in other work required for litigation.<sup>75</sup> Following in the footsteps of Haizhu Procuratorate and Haizhu District EPB, procuratorates in Guangzhou Municipality, as well as several other provinces, issued implementing measures with the EPBs at the same level to facilitate better cooperation in promoting public interest litigation, particularly case transfers, joint investigations, evidence collection, etcetera.<sup>76</sup>

The other reason Haizhu Procuratorate brought this civil enforcement action was that it believed such an action would have a long-term

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71. Huiling Deng, *The First Environmental Public Interest Litigation in Guangdong Province Won, and Polluting Factory Lost to Clear Evidence*, China Environment Daily, Jan. 21, 2009, <http://env.people.com.cn/GB/8706544.html>.

72. *Id.*

73. Sometimes the polluters may pay a fine, but refuse to install pollution treatment facilities because the costs of installing such facilities are much higher than simply paying a fine; at other times, the polluters simply ignore the EPB's orders. While the EPB could potentially request the court to enforce its orders, the outcome of such request depends entirely upon the court.

74. Deng, *supra* note 71.

75. Implementing Measures for Jointly Conducting Public Interest Litigation Over Land-Originated Pollutants Contaminating Watersheds (promulgated by Guangzhou Haizhu Dist. Procuratorate & Guangzhou Haizhu Dist. Env'tl. Prot. Bureau., China).

76. See e.g. Summary of the Meeting Between Guangzhou Municipal People's Procuratorate and the Guangzhou Municipal Environmental Protection Bureau Regarding Conducting Environmental Public Interest Litigation (promulgated by <enacting authority>, May 2010, effective May 2010) (China); Provisions Regarding Actively Exercising Civil and Administrative Prosecutorial Functions to Improve Environmental Protection (promulgated by Zhejiang Provincial People's Procuratorate & Zhejiang Provincial Env'tl. Prot. Bureau, Oct. 2010, effective Oct. 2010) (China).

educational function. The defendant, Xin Zhong Xing, was a small, privately owned business. Such small to medium-sized private businesses have played a decisive role in Guangzhou's economic development. By taking civil enforcement action against this defendant for damaging the environment, the small and medium-sized business community will be pushed to improve its environmental awareness, and ultimately will promote economically and socially sustainable development.<sup>77</sup> The educational function of this case cannot be ignored; however, it should also be noted that, because this was the first environmental civil enforcement case in Guangdong Province and its judgment will be used by millions of people to evaluate the current strength and future ability to initiate environmental civil enforcement actions, Haizhu Procuratorate had significant interest in the outcome of the case. Given that the defendant was a small privately owned business, rather than a multinational corporation or state-owned enterprise with greater financial resources to devote to the case, and that the facts of this case were quite straightforward, Haizhu Procuratorate was heavily favored to win, and did.

Many of the environmental civil enforcement cases brought by procuratorates in other parts of China share similar traits when it comes to the types of defendants and violations prosecuted. Most of these cases had relatively clear facts supported by strong evidence from the procuratorates, and involved defendants that were usually individuals or small to medium-sized, privately owned businesses. The result is that procuratorates won or reached settlement agreements in all of the environmental civil enforcement cases brought so far. This may give the appearance that the procuratorates are doing "selective enforcement" or misusing public resources. However, environmental civil enforcement is a new initiative and the procuratorates need to go step-by-step to learn and explore all aspects of it. It is hoped that, after a period of accumulating experience, the procuratorates will be able to take on bigger, more complicated, and more controversial environmental civil enforcement cases.

Second, there was communication prior to trial between the procuratorate and the court regarding case acceptance. Since Haizhu Procuratorate is a basic-level procuratorate and Guangzhou Maritime Court is an intermediate-level court,<sup>78</sup> it may have needed Guangzhou Municipal

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77. Chunyan Qiu, Yuanqiang Liu & Ying Cheng, *How Prosecutors Deal With the Three Challenges Facing Public Interest Litigation*, PROCURATORIAL DAILY (Feb. 27, 2009, 9:46 AM), [http://2008red.com/member\\_pic\\_516/files/qhsxnsjcyjmx/html/article\\_6922\\_1.shtml](http://2008red.com/member_pic_516/files/qhsxnsjcyjmx/html/article_6922_1.shtml).

78. Maritime courts have only one level, equivalent to that of intermediate-level courts. Their decisions can be appealed to the high courts of the provinces where the maritime courts are located.

People's Procuratorate, Haizhu Procuratorate's superior, to bring the case at Guangzhou Maritime Court to ensure equity in the levels of the procuratorate and the court in the same case. Haizhu Procuratorate communicated this concern to Guangzhou Maritime Court, who decided it was not a problem for Haizhu Procuratorate to bring this case given that it was not considered significant or complicated enough to require the involvement of Guangzhou Municipal People's Procuratorate.<sup>79</sup> More important is the issue of communication regarding whether the court would actually accept this case despite a legislative requirement that the plaintiff in a civil case must have direct interest with the case. Such communications, clearly *ex parte* by American standards, exist in many of the civil enforcement cases brought by the procuratorates, and sometimes are essential to ensure acceptance of such cases by the courts.

To a certain degree, procuratorates' initiation of civil enforcement actions under the existing legislative framework involves balancing the relationship between the procuratorate and the court. Even within the senior leadership of the Supreme People's Court, there were contrasting views towards such prosecutorial activism.<sup>80</sup> In 2006, Vice President Zelin Su of the Supreme People's Court wrote, "in recent years there are cases in which the procuratorates, as the state's legal supervision agency, brought civil lawsuits as plaintiffs; for these types of lawsuits, currently the people's courts have no legal basis to accept them."<sup>81</sup> On the other hand, another vice president of the Supreme People's Court, Er'xiang Wan, has submitted legislative proposals or made appeals for establishing civil environmental public interest litigation during the annual meetings of the NPC and the Chinese People's Political Consultative Conference every year since 2009. Despite different opinions within the senior leadership of the Supreme People's Court, local courts, in practice, not only accept environmental civil cases brought by the procuratorate, but also rule in favor of the procuratorates or help the procuratorates and the other parties reach settlements that are in compliance with the law. This conveys the courts' recognition and support of the environmental civil enforcement initiatives from the procuratorates.<sup>82</sup>

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79. Qiu, Liu & Cheng, *supra* note 65.

80. Yanmin Cai, *supra* note 50, at 162.

81. Zelin Su, *Several Issues Regarding Specialization of Case Acceptance and Adjudication*, PEOPLE'S COURT DAILY, Nov. 30, 2006, [http://oldfyb2009.chinacourt.org/fybpdf/2006\\_11/20061130\\_5.pdf](http://oldfyb2009.chinacourt.org/fybpdf/2006_11/20061130_5.pdf) (citing Yanmin Cai, *supra* note 50, at 163).

82. Yanmin Cai, *supra* note 50, at 162.

Third, in the Xin Zhong Xing case there was no challenge regarding the standing of Haizhu Procuratorate as the plaintiff. In this case, defendant Zhongmin Chen did not attend the court hearing and certainly did not challenge the plaintiff's standing. The Guangzhou Maritime Court ruled that:

[A]s the state agency for legal supervision, the procuratorate's functions include protecting state assets and resources from damages by illegal activities, and representing the state to bring litigation when state assets and resources are damaged by illegal activities. Since in this case the polluted Shi Liu Gang watershed belongs to state-owned water resources, and since Shi Liu Gang watershed is within the plaintiff's jurisdiction as well as within this court's jurisdiction, the plaintiff enjoys standing to sue the damages caused by the defendant's illegal activities at this court.<sup>83</sup>

Even though—in this particular case—the defendant was absent and did not challenge the procuratorate's standing, there have been few challenges to the procuratorate's standing in many other environmental civil enforcement cases where defendants did appear in court. One reason for this is that defendants are hesitant to challenge the procuratorate, which represents the state and enjoys extensive public power.<sup>84</sup> Another, more important reason is that, despite legislative ambiguity and contrasting views of the Supreme People's Court regarding procuratorates' role in environmental civil enforcement, several provinces and cities have issued local regulations,<sup>85</sup> court rules,<sup>86</sup> joint provisions issued by local courts and local procuratorates<sup>87</sup>, and joint provisions issued by local procuratorates

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83. No. 382 Verdict of Guangzhou Maritime Court for First Instance Trial (2008).

84. This is consistent with the Chinese traditional culture that private individuals tend to yield in front of public power, even though these are civil lawsuits in which both parties enjoy equal status.

85. Guiyang Municipal Regulation Regarding Promoting Construction of Ecological Civilization (Jan. 2010, effective Mar. 2010) (China).

86. Implementing Opinions of Guiyang Municipal People's Court and Qingzhen Basic People's Court Regarding Actively Promoting Environmental Public Interest Litigation and Construction of Ecological Civilization (March 2010, effective March 2010) (China).

87. *See e.g.* Several Provisions Regarding Dealing with Environmental Civil Public Interest Cases (for Trial Implementation) (promulgated by Kunming Intermediate People's Court & Kunming Intermediate People's Procuratorate, Oct. 2010, effective Oct. 2010) (China).

and local EPBs<sup>88</sup> to give procuratorates standing to bring environmental civil enforcement actions. Such local experiments have shown a bottom-up movement to push the envelope for formally allowing environmental civil enforcement actions.

Fourth, because the defendant in the Xin Zhong Xing case did not attend the court hearing and, therefore, could not possibly discuss settlement options with Haizhu Procuratorate, the case was adjudicated by Guangzhou Maritime Court—which ruled for the plaintiff. However, in other environmental civil enforcement cases brought by procuratorates across China, many were able to reach a mediated agreement under the guidance of the court. This, to a certain degree, is similar to the U.S. experience in which the vast majority of environmental civil enforcement cases are resolved through settlement.<sup>89</sup>

There has been heated debate in China over whether environmental civil enforcement cases brought by the procuratorate should be mediated. Opponents' concerns are twofold. The first is whether the procuratorate, who enjoys extensive public power, can negotiate with a private individual or entity.<sup>90</sup> The second is whether mediated agreements between the procuratorate and polluter defendants will tarnish the public interest nature of this type of case.<sup>91</sup> However, such opposition is overshadowed by the various benefits a mediated agreement can bring to both parties of an environmental civil enforcement lawsuit,<sup>92</sup> as indicated by the extensive application of mediation in this type of case. One thing Chinese procuratorates could learn from their U.S. counterparts is how to use a “public notice and comment” procedure, an important part of the settlement process in the U.S.<sup>93</sup> China currently does not have such a mechanism in place, and could benefit from a public notice and comment procedure, which helps ensure that the public interest is not violated during mediation.

Finally, no civil penalty was imposed on the polluter. In the Xin Zhong Xing case, Haizhu Procuratorate requested, and Guangzhou Maritime Court

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88. *E.g.*, Provisions Regarding Actively Exercising Civil and Administrative Prosecutorial Functions to Improve Environmental Protection, jointly issued by Zhejiang Provincial People's Procuratorate and Zhejiang Provincial Environmental Protection Bureau in October 2010.

89. John C. Cruden & Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors, and Trends*, 18 NAT. RES. & ENV'T. 10, 15 (2004).

90. Yanmin Cai, *supra* note 50, at 170.

91. *Id.*

92. Mediation is consistent with the traditional Chinese legal culture in terms of using extra-judicial means to resolve disputes. It also helps save time and costs and, particularly in environmental cases, helps both parties craft innovative remedies tailored to their needs.

93. Cruden & Gelber, *supra* note 89, at 16.

ruled, that the defendant pay compensation of 117,289.20 RMB for the environmental harm and economic loss caused by the facility's illegal discharge. However, Haizhu Procuratorate did not request that the defendant pay a civil penalty, despite the fact that the facility did not have a pollution discharge permit and severely polluted Shi Liu Gang River. This is because existing Chinese law generally does not allow for civil penalty,<sup>94</sup> except in cases of fraud committed against consumers.<sup>95</sup>

This is very different from the U.S. practice that almost all federal environmental statutes provide for civil judicial enforcement to secure civil penalties, in addition to injunctive relief, recovery of government response costs, enforcement of administrative orders, and other relief.<sup>96</sup> Requiring that the defendant pay an appropriate civil penalty for the violation will help educate the defendant and deter further violations. Given that in China the administrative penalty and civil compensation for environmental damages are usually small compared to the profits polluters can make from violating the law, it is particularly meaningful for the law to provide for substantial civil penalties against the violators.

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94. General Principles of the Civil Law of the People's Republic of China (promulgated by Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 134 (China). According to Article 134 of the General Principles of the Civil Law, the available civil remedies include:

- (1) cessation of infringements;
- (2) removal of obstacles;
- (3) elimination of dangers;
- (4) return of property;
- (5) restoration of original condition;
- (6) repair, reworking or replacement;
- (7) compensation for losses;
- (8) payment of breach of contract damages;
- (9) elimination of ill effects and rehabilitation of reputation; and
- (10) extension of apology.

*Id.* The above methods of bearing civil liability may be applied exclusively or concurrently.

When hearing civil cases, a people's court, in addition to applying the above stipulations, may serve admonitions, order the offender to sign a pledge of repentance, and confiscate the property used in carrying out illegal activities and the illegal income obtained therefrom. It may also impose fines or detentions as stipulated by law.

95. Law on Protection of Consumer Rights and Interests of the People's Republic of China (promulgated by the Standing Comm. Of the Nat'l People's Cong., Oct. 31, 1993, effective Jan. 01, 1994) Art. 49 (China). According to Article 49 of the Law on Protection of Consumer Rights and Interests (1993), business operators engaged in fraudulent activities in supplying commodities or services shall, on the demand of the consumers, increase the compensations for victims' losses; the increased amount of the compensations shall be two times the costs that the consumers paid for the commodities purchased or services received.

96. Cruden & Gelber, *supra* note 89, at 10.

## CONCLUSION

Despite China's civil procedure law requirement that the plaintiff in a civil lawsuit have a direct interest in the case, there have been local experiments in several provinces and cities to allow for relaxed standing requirements for the purpose of bringing public interest litigation. In particular, the procuratorates, environmental protection agencies, environmental NGOs, and sometimes even private individuals are allowed to bring environmental public interest litigation in the provinces and cities experimenting with relaxed standing requirements.

Compared to other entities and individuals that enjoy relaxed standing, the procuratorates are uniquely positioned to bring environmental civil enforcement actions. Procuratorates employ full-time legal professionals<sup>97</sup> and have significant experience dealing with different types of cases. They also enjoy statutory authority to conduct investigations. This is particularly beneficial while investigating and collecting evidence in environmental cases,<sup>98</sup> where finding relevant evidence is always a significant challenge. Procuratorates taking environmental civil enforcement actions is also consistent with the civil and common law practice in many other countries. In these cases, the procuratorate steps out of its traditional role of criminal enforcement and plays an active role in civil enforcement.

On the other hand, Chinese procuratorates also face many challenges in their new civil enforcement role. First, there is no clear legal basis for the procuratorate to bring civil enforcement lawsuits. Despite bottom-up efforts to push the envelope for relaxed standing, these efforts are generally local and experimental in nature. In order to ensure a civil enforcement mechanism is formally in place, revision of relevant national law is necessary. Fortunately, the latest draft amendment to the Civil Procedure Law included a provision that allows relevant agencies and social groups to bring environmental public interest lawsuits, so hope remains that statutory recognition of the procuratorates' role in civil enforcement will come in the near future.

One concern related to prosecutorial activism in civil enforcement is whether the procuratorates have sufficient resources to devote to civil

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97. Different from EPA and the state environmental protection agencies in the U.S., there are very few lawyers on the staff of China's environmental protection agencies at various levels. In terms of environmental NGOs, the majority of Chinese environmental NGOs is still in a preliminary stage and struggling with funding and staff resources, so many of them are unlikely to have a full-time lawyer on the staff to bring public interest litigation.

98. Yanmin Cai, *supra* note 50, at 167.

enforcement. Chinese procuratorates have already been fully loaded with criminal prosecutions and various other statutory functions, and will have limited resources to devote to civil enforcement. Particularly, given that civil enforcement is relatively new to most of the procuratorates, they will likely need to spend significant time and resources exploring the new system before formally instituting any civil enforcement action.

Another issue raised by environmental NGOs is how to balance their relationship with the procuratorate when bringing civil environmental public interest litigation. The procuratorates possess unique strength that NGOs generally do not have in terms of experienced litigators and statutory authority to conduct investigations. Procuratorates have won or reached settlement agreements in all of the environmental civil enforcement cases brought so far.<sup>99</sup> The NGOs are concerned that if the procuratorates continue to be aggressive in bringing civil environmental public interest litigation, then it will squeeze the NGOs out of the process, hinder their healthy development, and limit the development of civil society in the long run.<sup>100</sup>

A final concern relates to prosecutorial activism. Civil enforcement is still a relatively uncharted territory in China, where rules are not clear and the procuratorate is a very powerful state agency with few meaningful external checks from either the legislature or the judiciary.<sup>101</sup> If procuratorates become more and more aggressive in pursuing civil enforcement, it may raise the issue of “who is supervising the supervisor”?

Despite various concerns regarding prosecutorial activism in civil enforcement, it has, overall, provided an effective alternative to administrative enforcement, and it has, to a certain degree, changed the landscape of judicial enforcement of environmental law in China. Going forward, if national law can be amended to formally recognize the role of the procuratorate in civil enforcement and detailed and feasible rules can be promulgated to facilitate and guide the procuratorate's work to achieve

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99. A significant portion of the environmental public interest cases brought by individuals and NGOs were not so successful.

100. An interesting argument made by Justice Antonio Herman Benjamin of the High Court of Brazil, who used to be a public prosecutor, is that prosecutorial activism in environmental civil enforcement actually helped and supported the growth of environmental NGOs in Brazil's experience. Because there were essentially no NGOs bringing environmental public interest litigation at the very beginning, the procuratorate decided to set an example through its civil enforcement actions and, along the way, worked together with the NGOs to strengthen their capacity to bring environmental public interest litigation.

101. Hai-Ching Yang, *An Alternative to Impact Litigation in China: the Procurator as a Legal Avenue for Cases in the “Private Family Sphere” of Domestic Violence*, 20 PAC. RIM L. & POL'Y. J. 237, 261 (2011).

effective and efficient civil enforcement, it will help strengthen China's environmental governance and push the country one step closer to long-term sustainable development.