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Vindicating Public Environmental Interest: Defining the Role of Environmental Public Interest Litigation in China

Juan Chu*

Chinese environmental public interest litigation has assumed increasing attention and significance in recent years. By simply granting standing to public authorities and environmental groups to challenge “acts of polluting or damaging the environment that have harmed the public interest,” the amended Civil Procedure Law of 2012 and Environmental Protection Law of 2014 created an amorphous and ambiguous liability regime. In particular, the central questions about the permissible causes of action and remedies under this new framework remain unanswered. Western observers simply view environmental public interest litigation as the Chinese equivalent of the U.S.’s citizen suit, which provides private parties an avenue for enforcing existing environmental requirements. Some Chinese scholars examine environmental public interest litigation from a citizen suit perspective while others consider environmental public interest litigation as a tort liability regime, but many struggle to reconcile how the public interest nature can exist within the characteristically private nature of traditional tort claims. Surprisingly, scholars have failed to notice and discuss these two discourses as two competing models for environmental public interest litigation, let alone which discourse is a superior model.

The goal of this Article is to explore the fundamental theoretical justification of the emerging environmental public interest litigation by

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evaluating these discourses. This Article first critiques the reflexive acceptance of the citizen suit model. It concludes that while citizen suits may address the failure of governmental enforcement due to a lack of will or resources, it would be politically difficult to implement the idea of private enforcement of regulatory laws in China. Also, the role of citizen suit-style environmental public interest litigation will be greatly diminished due to inherent limitations of existing Chinese environmental laws.

This Article then introduces public nuisance law as a path forward in reconciling the struggles of the tort discourse. It demonstrates that by operating like public nuisance law, environmental public interest litigation in theory could overcome the limitations of the citizen suit model by encompassing a wide range of harms resulting from or left uncured by weak environmental regulation and enforcement. It further demonstrates how environmental public interest litigation has been used by litigators as a broad and flexible tool in practice. Ultimately, this Article argues that the emerging environmental public interest litigation should be embraced as a public nuisance-style framework that stands as an independent tool to vindicate public environmental interests when statutory laws have been inadequate to prevent or redress harm.

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INTRODUCTION

In the 2000s, scholars began to call for establishing environmental public interest litigation (EPIL) in China.¹ Proposals on EPIL have mostly focused on liberalizing the restrictive standing rule under which a plaintiff must have a

1. Environmental public interest litigation (EPIL) is generally defined by Chinese scholars as a framework that allows qualified plaintiffs to bring lawsuits against conduct that has harmed the public environmental interest. Scholars further classify EPIL into two categories: (1) civil EPIL against polluters; (2) administrative EPIL against administrative agencies. *See, e.g.*, Bie Tao (别涛), *Zhongguo de Huanjing Gongyi Susong Jiqi Lifa Shexiang* (中国的环境公益诉讼及其立法设想) [*Chinese Environmental Public Interest Litigation and Legislative Proposals*], *Huanjing Gongyi Susong* (环境公益诉讼) [ENVIRONMENTAL PUBLIC INTEREST LITIGATION] 1, 1–2 (Bie Tao (别涛) ed., 2007). This Article only addresses civil EPIL because it was not until recently that the amended Administrative Procedure Law formally established administrative EPIL brought by the procuratorate. The new Administrative Procedure Law allows the procuratorate to sue administrative agencies whose abuse of power or nonfeasance in relation to environmental and natural resources protection, food and drug safety, preservation of state assets, and transfer of state-owned land use rights has led to harm to the national or public interest. *See* Xingzheng Susong Fa (行政诉讼法) [Administrative Procedure Law] (promulgated by Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990, amended Jun. 27, 2017), art. 25(4), 1989 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. The Chinese procuratorate is tasked with conducting criminal investigations and prosecutions. Unlike U.S. public prosecutors, however, the Chinese procuratorate also exercises supervision of the police, prisons, and courts to ensure that their activities conform to law. *See* Jingjing Liu, *China’s Procuratorate in Environmental Civil Enforcement: Practice, Challenges & Implications for China’s Environmental Governance*, 13 VT. J. ENVTL. L. 41, 47 (2011). Because the procuratorate traditionally lacked clear authority to bring civil (except in limited circumstances) and administrative lawsuits, many scholars believe that establishing a public interest litigation system in China entails granting standing to the procuratorate to initiate civil and administrative lawsuits on behalf of the public. *See e.g.*, Bie Tao (别涛), *Jiancha Jiguan Nengfou Tiqi Huanjing Minshi Gongyi Susong* (检察机关能否提起环境民事公益诉讼) [*Whether the Procuratorate Can Bring Civil Environmental Public Interest Lawsuits*]; *Renmin Jiancha* (人民检察) [PEOPLE’S PROCURATORIAL SEMIMONTHLY] 29 (2009); Cai Yanmin (蔡彦敏), *Zhongguo Huanjing Minshi Gongyi Susong de Jiancha Dandang* (中国环境民事公益诉讼的检察担当) [*The Procuratorate should be the Eligible Plaintiff to Bring Civil Environmental Public Interest Lawsuits in China*], 23 *Zhongwai Faxue* (中外法学) [PEKING U. L. J.] 161 (2011).

“direct interest in the case” to file a lawsuit.² The Civil Procedure Law as amended in 2012 (2012 CPL) and the Environmental Protection Law as amended in 2014 (2014 EPL) formally created EPIL by authorizing public authorities and environmental groups to bring lawsuits against “acts of polluting or damaging the environment that have harmed the public interest.”³ In other words, qualified plaintiffs need only show that there has been a harm to public interest, not a harm to an individualized property or economic interest, to have standing to sue.

In the course of opening up standing and creating this new category of public interest litigation, the broad and ambiguous language of the laws created a number of unanswered questions about the permissible scope and purpose of EPIL. In particular, it is unclear what causes of action and remedies this newly created framework would support.

Believing that the U.S. citizen suit inspired the creation of EPIL, many scholars simply treat EPIL as the Chinese equivalent of the citizen suit, which enables private citizens to directly enforce statutory requirements when agencies

2. Before the Civil Procedure Law was amended in 2012, Article 108 required that a plaintiff must have a “direct interest in the case” to bring a civil suit. *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Oct. 28, 2007), art. 108, 1991 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.

3. The 2012 amendment to the Civil Procedure Law had first allowed “government organs and relevant organizations prescribed by law” to bring lawsuits against acts of polluting the environment or infringing upon consumers’ rights and interests that have harmed the public interest. *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Aug. 31, 2012), art. 55, 1991 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. [hereinafter 2012 CPL]. The 2012 CPL, however, does not define what qualifies as “government organs and relevant organizations prescribed by law.” In 2014, the Environmental Protection Law was amended to extend the scope of EPIL to “acts of damaging the environment that have harmed the public interest” and to clarify the requirements that social organizations should satisfy to have standing. *Huanjing Baohu Fa* (环境保护法) [Environmental Protection Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 1989, amended Apr. 24, 2014, effective Jan. 1, 2015) art. 58, 1989 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. [hereinafter 2014 EPL]. According to Article 58 of the 2014 EPL, social organizations may file a suit if they: (1) are registered with the civil affairs department at or above the municipal/district levels; and (2) have specialized in environmental protection for five consecutive years or more and have no law violation records. The 2012 CPL was revised again in 2017, which explicitly authorized the procuratorate to initiate civil suits against acts that have harmed the public interest by damaging the environment and natural resources and infringing upon the consumers’ interests related to food and drug safety if there are no appropriate public organs and organizations that can bring a suit, or relevant organs and organizations fail to bring a suit. *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended June 27, 2017), art. 55(2), 1991 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. This provision seems to suggest that the procuratorate is not the only type of “government organs prescribed by law” despite the ambiguity of the law. In other words, administrative agencies should have standing to file EPIL suits. In practice, parties that have brought lawsuits on behalf of the public interest include administrative agencies, the procuratorate, and environmental groups. *See e.g.*, *Kunming Sannong Nongmu Youxian Gongsi Deng Yu Kunming Shi Huanjing Baohu Ju Huanjing Wuran Qinquan Jiufen Shangsu An* (昆明三农农牧有限公司等与昆明市环境保护局环境污染侵权纠纷上诉案) [Kunming Sannong Nongmu Co., Ltd. et al. v. Env’tl. Prot. Bur. of Kunming], Higher People’s Ct. of Yunnan Prov., May. 26, 2011, Second Instance No. 41 (2011) (Beida Fabao 北大法宝) [pkulaw.cn] (cleanup cost recovery claim filed by environmental protection agencies).

are unable or unwilling to enforce.⁴ Other scholars (primarily Chinese scholars), however, place the roots of EPIL in tort law.⁵ In order to implement EPIL, the Supreme People's Court (SPC) issued a judicial interpretation in 2015 which extended remedies provided by the Tort Law—cessation of infringement, removal of obstacle, elimination of danger, restoration to the original status, and damages—to EPIL.⁶ While the SPC's judicial interpretation regarding EPIL (2015 EPIL Interpretation) is intended to provide guidance for courts and other legal actors to implement EPIL, the tort discourse it adopted does not settle the fundamental nature of EPIL as judicial interpretations do not represent the most authoritative understanding of the law and are subject to amendment or abolishment by the SPC.⁷ In fact, scholars are still struggling with adapting private tort liability concepts to public interest lawsuits.⁸

Scholars generally have neglected the coexistence of the citizen suit and tort law as two different discourses on EPIL, suggesting that fundamental questions about the role and scope of this emerging framework remain unresolved. Should EPIL be viewed simply as an avenue for enforcing existing environmental laws? Or, should EPIL be embraced as a broader tool that turns only on the showing of environmental harm irrespective of existing statutory requirements? The answers to these questions, which strike at the underlying purpose of EPIL, will help inform EPIL's scope and offer a path forward to scholars who struggle with the proper role of EPIL. Practitioners can also benefit from a better understanding of the theoretical underpinning of EPIL, because whether EPIL is viewed as a U.S.-

4. See *infra* Part I.A.

5. See *infra* Part I.B.

6. See Guanyu Shenli Huanjing Minshi Gongyi Susong Anjian Shiyong Falv Ruogan Wenti de Jieshi (关于审理环境民事公益诉讼案件适用法律若干问题的解释) [Interpretation on Certain Issues Concerning Application of the Law in Adjudicating Civil Environmental Public Interest Litigation Cases] (promulgated by the Supreme People's Ct., Jan. 6, 2015, effective Jan. 7, 2015), arts. 19–21, SUPREME PEOPLE'S CT. [hereinafter 2015 EPIL Interpretation]. For how each type of remedies provided by the Tort Law would apply in EPIL, see *infra*, notes 30–32.

7. Chinese laws have granted the SPC authority to provide interpretations on issues arising out of concrete application of national law in adjudicative work. For several decades, the SPC “[has been] very active in issuing judicial interpretations that are oftentimes extensive and detailed, and are treated as supplementary laws.” Jingjing Liu, *Overview of the Chinese Legal System*, 41 ENVTL. L. REP. 10,885, 10,887 (2011). While many believe that judicial interpretations “play a crucial role in unifying the legal system and ensuring consistency in the application of law” by “address[ing] some ambiguities, gaps, and inconsistencies in legislation,” there are concerns that the SPC has “encroached on the legislative power of the people's congresses” by issuing interpretations that are legislative in both form and effect. Keith J. Hand, *Understanding China's System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 139, 219–20 (2013). To ensure that judicial interpretations do not exceed acceptable boundaries, the SPC judicial interpretations are subject to the review of the Standing Committee of the National People's Congress. Judicial interpretations that are found to conflict with laws may be amended or annulled. See *id.* at 139–216, for a discussion of how the national legislature exercises supervision over various sources of law, including SPC judicial interpretations, and addresses legislative conflicts through the filing and review system and other mechanisms.

8. See *infra*, note 33.

style citizen suit or as a tort-based regime will fundamentally shape the sort of environmental public interest cases that can be brought in China.

This Article explores the fundamental theoretical justifications of the emerging EPIL by examining the two simultaneous, and sometimes competing, discourses among scholars. In search of the appropriate scope and role of EPIL, Part I of this Article begins by introducing the two different discourses on EPIL—one frames EPIL as a model of the U.S. citizen suit while the other treats EPIL as a tort-based framework. Part II examines the benefits and limits of conceiving EPIL based on the citizen suit model. After providing an overview of citizen suit provisions in U.S. environmental statutes, it explores various factors that have hindered effective environmental regulation and enforcement in China and evaluates what citizen suit-style EPIL can and cannot achieve in addressing these problems. It concludes that while adopting citizen suit-like EPIL might help strengthen environmental enforcement undermined by agencies' lack of will or resources, it would be politically difficult to implement the idea of private enforcement of regulatory laws in China. Moreover, the significant limitations and gaps within existing environmental laws will greatly diminish the role of citizen suit-like EPIL.

In an effort to untangle the struggles Chinese scholars have had with conceptualizing EPIL as a tort-based liability, Part III advances the tort discourse by turning to U.S. public nuisance law as a useful model for conceiving how a tort-based liability addressing public environmental harm might function. Part IV draws together Parts II and III and evaluates which model, citizen suit or public nuisance law, can serve as an appropriate framework for conceptualizing and shaping the emerging EPIL. It argues that a public nuisance-like framework could encompass a wide range of environmental harms including harms that existing environmental laws fail to address, thus overcoming the limitations of citizen suit-style EPIL. Shifting attention to the litigation practice, Part V examines whether the landmark lawsuits that have been brought to date and the judicial responses to these suits serve a desirable and deliberately theorized purpose. It finds that EPIL has been used by litigators as a broad and flexible framework in practice rather than to simply enforce existing environmental requirements. This offers compelling support for the usefulness of public nuisance law as a model for conceptualizing and reforming the fledgling EPIL.

I. TWO DISCOURSES ON EPIL

Despite a robust discussion on issues such as who should have standing to sue, what constitutes the “public interest,” and what sort of relief should be available prior to the formal creation of EPIL in 2012,⁹ observers of EPIL have complained about the “surprisingly little clarity” on exactly what the prospective

9. Alex L. Wang, *Environmental Courts and Public Interest Litigation in China*, 43 CHINESE L. & GOV'T 4, 7–9 (2010).

EPIL would entail.¹⁰ Perhaps the only consensus was “some combination of the procuratorate, environmental bureaus, NGOs, and citizens should be allowed to initiate public interest environmental litigation.”¹¹ While the 2012 CPL and 2014 EPL allow qualified plaintiffs to challenge “acts of polluting or damaging the environment that have harmed the public interest,”¹² they provide little guidance on what constitutes an actionable harm. The broad language fails to define, for example, what qualifies as activities that could give rise to liability. Therefore, the emerging EPIL may take different shapes as presented by the two different discourses examined in this Part, and ultimately the role of EPIL will depend on what discourse is adopted by policy makers and practitioners.

A. EPIL as “Chinese Citizen Suit”

Citizen suit provisions under federal environmental statutes, which are known as “the most pervasive, prominent, and continuing innovation in the modern environmental era,” enable private entities to bring actions to enjoin violations of regulatory requirements.¹³ These provisions are most frequently implemented when government authorities have failed to enforce environmental laws due to lack of will or resources.¹⁴

The idea of the citizen suit has inspired the creation of Chinese EPIL. Since the early 2000s, scholars began to introduce the U.S. citizen suit and discuss how China may establish a similar system.¹⁵ In fact, many Chinese judges, government officials, scholars, and lawyers went to the United States to learn

10. *Id.* at 7.

11. Rachel E. Stern, *On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits*, 32 L. & POL’Y 79, 94 (2010).

12. *See supra* note 3.

13. Barton H. Thompson Jr., *The Continuing Innovations of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 185 (2000).

14. The citizen suit is discussed in depth in Part II.A, *infra*.

15. The literature on how China can learn from the U.S. citizen suit is voluminous. *See, e.g.*, CHEN DONG (陈东), *Meiguo Huanjing Gongmin Susong Yanjiu* (美国环境公民诉讼研究) [STUDY ON THE U.S. ENVIRONMENTAL CITIZEN SUITS] (2014); Patti Goldman, *Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience*, 8 VT. J. ENVTL. L. 251 (2007); Li Jingyun (李静云), *Meiguo de Huanjing Gongyi Susong—Huanjing Gongmin Susong de Jiben Neirong Jieshao* (美国的环境公益诉讼—环境公民诉讼的基本内容介绍) [*U.S. Environmental Public Interest Litigation—An Introduction to the Environmental Citizen Suit*], in *Huanjing Gongyi Susong* (环境公益诉讼) [ENVIRONMENTAL PUBLIC INTEREST LITIGATION] 92 (Bie Tao (别涛) ed., 2007); Li Yanfang (李艳芳), *Meiguo de Gongmin Susong Zhidu Jiqi Qishi—Guanyu Jianli Woguo Gongyi Susong Zhidu de Jiejian Xing Sikao* (美国的公民诉讼制度及其启示—关于建立我国公益诉讼制度的借鉴性思考) [*Lessons from the U.S. Citizen Suit—Thoughts on the Creation of Environmental Public Interest Litigation in China*]; *Zhongguo Renmin Daxue Xuebao* (中国人民大学学报) [J. RENMIN U. CHINA] 122 (2003); Wang Xi (王曦) & Zhang Yan (张岩), *Lun Meiguo Huanjing Gongmin Susong Zhidu* (论美国环境公民诉讼制度) [*On the U.S. Environmental Citizen Suits*], *Jiaoda Faxue* (交大法学) [SJTU L. REV.] 27 (2015); Zhang Hui (张辉), *Meiguo Gongmin Susong Zhi “Siren Jiancha Zongzhang Lilun” Jiexi* (美国公民诉讼之“私人检察总长理论”解析) [*Analysis of the “Private Attorney General” Theory in the U.S. Citizen Suit*], *Huanqiu Falv Pinglun* (环球法律评论) [GLOBAL L. REV.] 164 (2014).

how the citizen suit could serve as a model for the prospective EPIL.¹⁶ Prior to the official adoption of EPIL, therefore, many policy makers, scholars, and environmental groups in China had eagerly anticipated the advent of a system that would operate like the U.S. citizen suit.

When the 2012 CPL established EPIL, it was interpreted by western scholars as a sign of “moving toward express recognition of citizen suits against polluters” in China.¹⁷ Nevertheless, they warned that citizen suits “are no panacea for chronic enforcement in light of the difficulty of proving violations in many cases” despite the relatively successful U.S. experience.¹⁸ Following the adoption of the 2014 EPL, some analysts applauded “the advent of meaningful citizen suits in China” as “a watershed moment in Chinese environmental litigation, as was the case when citizen suit litigation was introduced into the United States decades ago.”¹⁹ The explicit or implicit treatment of EPIL as the equivalent of citizen suit can also be found in other U.S. literature on EPIL.²⁰

Because of the influence of the concept of the citizen suit throughout the development of EPIL, some Chinese scholars use a citizen suit lens to examine the emerging EPIL. When comparing the 2015 EPIL Interpretation with citizen suit provisions under U.S. statutes, scholars have noted some “deviations” of Chinese EPIL from the typical citizen suit. For example, because the 2015 EPIL Interpretation does not require a plaintiff to provide notice to the relevant agency and the defendant before filing a lawsuit,²¹ scholars are concerned that a plaintiff may inappropriately invoke the judiciary to infringe upon the administrative agency’s primary responsibility for environmental law enforcement.²² To fix the

16. Jingjing Liu, *Environmental Justice with Chinese Characteristics: Recent Developments in Using Environmental Public Interest Litigation to Strengthen Access to Environmental Justice*, 7 FLA. A&M U. L. REV. 229, 243 n.79 (2015) (reporting that since 2007, many Chinese judges, government officials, scholars, and lawyers began to visit the U.S.-China Partnership for Environmental Law at Vermont Law School to learn about the U.S. citizen suit and explore how it could serve as a model for EPIL in China).

17. Robert V. Percival & Zhao Huiya, *The Role of Civil Society in Environmental Governance in the United States and China*, 24 DUKE ENVTL. L. & POL’Y F. 141, 181 (2013).

18. *Id.* at 182.

19. Karl Bourdeau & Dan Schulson, “Citizen Suits” Under China’s Revised Environmental Protection Law: A Watershed Moment in Chinese Environmental Litigation?, BEVERIDGE & DIAMOND, P.C. (Mar. 9, 2016), <http://www.bdlaw.com/news-1863.html>.

20. See, e.g., Daniel Carpenter-Gold, Note, *Castles Made of Sand: Public-Interest Litigation and China’s New Environmental Protection Law*, 39 HARV. ENVTL. L. REV. 241, 256–57 (2015) (commenting that EPIL can serve as a means for NGOs to “pull the fire alarm” by suing companies that are in violation of environmental regulations and comparing standing requirements under U.S. citizen suit provisions with standing requirements of EPIL).

21. The 2015 EPIL Interpretation requires courts to notify the agency that holds the regulatory power over the defendant’s conduct within ten days after accepting a case. 2015 EPIL Interpretation, *supra* note 6, at art. 12. However, this notice does not function the same way as the sixty-day notice in citizen suits which provides agencies with an opportunity to block suit by initiating enforcement actions. See *infra* notes 44–45 and accompanying text.

22. See, e.g., Gong Gu (巩固), Datong Xiaoyi Yihuo Maohe Shenli Zhongmei Huanjing Gongyi Susong Bijiao Yanjiu (大同小异抑或貌合神离——中美环境公益诉讼比较研究) [*Just Look Like Twins: Comparative Research on Environmental Public Interest Litigation in China and U.S.*], Bijiao Fa

“loophole” and ensure that EPIL supplements rather than supplants government enforcement, scholars suggest that a similar prelitigation notice requirement contained in the citizen suit provisions should be incorporated into the rules on EPIL.²³

B. EPIL as a Tort-Based Regime

Alongside the citizen suit narrative of EPIL, the other main discourse in Chinese scholarship concerning EPIL is rooted in tort. The tort discourse on EPIL emerged following major pollution accidents in the first decade of this century (for example, the 2004 Tuo River pollution²⁴ and the 2005 Songhua River pollution accident²⁵) that intensified scholarly attention on the failure of existing law to remediate the disastrous ecological damage caused by pollution.²⁶

Yanjiu (比较法研究) [J. COMP. L.] 105, 123 (2017); Wang Mingyuan (王明远), Lun Woguo Huanjing Gongyi Susong de Fazhan Fangxiang: Jiyu Xingzheng Quan yu Sifa Quan Guanxi Lilun de Fenxi (论我国环境公益诉讼的发展方向: 基于行政权与司法权关系理论的分析) [*On the Future Development of Environmental Public Interest Litigation in China: Analysis based on the Relationship between Administrative Power and Judicial Power*], Zhongguo Faxue (中国法学) [CHINA LEGAL SCI.] 49, 55 (2016); Wang Xi (王曦), Lun Huanjing Gongyi Susong Zhidu de Lifa Shunxu (论环境公益诉讼制度的立法顺序) [*On the Sequence of Legislation on Environmental Public Interest Litigation*], 10 Qinghua Faxue (清华法学) [TSINGHUA U. L. J.] 101, 110–113 (2016).

23. See, e.g., Du Qun (杜群) & Liang Chunyan (梁春艳), Woguo Huanjing Gongyi Susong Danyi Moshi Ji Bijiao Shiyu Xia de Fansi (我国环境公益诉讼单一模式及比较视域下的反思) [*Reflections on the Unitary Model of the Environmental Public Interest Litigation in China from a Comparative Perspective*], Falv Shiyong (法律适用) [J. L. APPLICATION] 46, 54 (2016); Hu Jing (胡静), Huanbao Zuzhi Tiqi de Gongyi Susong Zhi Gongneng Dingwei—Jianping Woguo Huanjing Gongyi Susong de Sifa Jieshi (环保组织提起的公益诉讼之功能定位—兼评我国环境公益诉讼的司法解释) [*Defining the Function of the Public Interest Lawsuits Brought by Environmental Group—Comments on the Judicial Interpretation Concerning Environmental Public Interest Litigation*], Faxue Pinglun (法学评论) [L. REV.] 168, 176 (2016); Wang Mingyuan (王明远), *supra* note 22, at 66–67.

24. In early 2004, a factory of Sichuan Chemicals Group discharged huge amounts of unprocessed wastewater into the Tuo River, leading to a massive fish kill and water supply cutoff affecting millions of people downstream. The incident resulted in not only 300 million yuan (U.S. \$47,827,800) of economic losses but also significant ecological damage. It was estimated that at least five years were needed for restoring the damaged ecosystem of the river. Sichuan Chemicals Group was fined one million yuan (U.S. \$159,426) by the Department of Environmental Protection of Sichuan Province, which was the maximum penalty under applicable laws for causing pollution. In addition, the corporation compensated fishermen 8.2 million yuan (U.S. \$1,307,293) for losses they suffered, and paid another 3.5 million yuan (U.S. \$557,991) to the governments for recovering fish stocks in the river. See Xinhua News Agency, *Fishermen Compensated for Yangtze River Pollution*, CHINA.ORG.CN (May 27, 2004), <http://www.china.org.cn/english/environment/96676.htm>.

25. In November 2005, an explosion at a chemical plant of the Jilin Petrochemical Corporation dumped about 100 tons of toxic waste into the nearby Songhua River, forcing cities along the river to cut water supplies to 3.8 million people for several days. Again, the State Environmental Protection Administration imposed the maximum penalty one million yuan (U.S. \$159,426) on the company for the massive pollution. See Xinhua News Agency, *PetroChina Branch Fined for Pollution*, CHINA DAILY, (Jan. 25, 2007), http://www.chinadaily.com.cn/china/2007-01/25/content_792982.htm.

26. See e.g., Zhu Xiao (竺效), Fansi Songhuajiang Shui Wuran Shigu Xingzheng Fakuan de Falv Ganga—Yi Shengtai Sunhai Tianbu Zeren Zhi Wei Shijiao (反思 松花江水污染事故行政处罚的法律尴尬—以生态损害填补责任制为视角) [A Reflection on the Limitations of Administrative Penalties in Addressing the Songhua River Pollution Incident—From the Perspective of Liability for Ecological Damage], Faxue (法学) [L. SCI.] 6 (2007).

While personal injury and property damage sustained from pollution typically support a tort-based cause of action, no one has standing to sue under tort law for ecological injuries suffered by the general public for lack of a “direct interest.”²⁷ In addition, while environmental statutes impose administrative sanctions (e.g., fines) for polluters’ noncompliance with regulatory requirements, they do not explicitly empower public authorities to seek restoration or compensation for ecological damage as a consequence of pollution.²⁸ Therefore, one tool that scholars propose to hold a polluter liable for ecological damage is to create a public interest litigation system that affords standing to certain parties to bring a tort action in the public interest.²⁹

The 2012 CPL and 2014 EPL do not explicitly state that EPIL is a framework premised on tort theory. Nor do they emphasize that EPIL can be used only to deal with ecological damage. However, the 2015 EPIL Interpretation was an attempt to adapt remedies provided by the Tort Law to specifically address ecological damage. According to the 2015 EPIL Interpretation, “cessation of infringement, removal of obstacle, elimination of danger” may be applied to prevent threatened environmental damage or avoid further damage,³⁰ “restoration to the original status” can be used to restore the injured environment,³¹ and “damages” may be awarded to compensate for the interim losses during recovery.³²

Despite the SPC’s lead to embrace tort remedies in EPIL, Chinese scholars have grappled with conceptual difficulties in stretching tort law, which has

27. For example, following the Songhua River pollution incident, Professor Wang Jin from Peking University Law School brought an action with nature as joint-plaintiff to seek compensation of ten billion yuan for the cleanup and restoration of the Songhua River. However, the court did not accept this case. See Xinhua News Agency, *supra* note 25.

28. The only exception is the Marine Environmental Protection Law, which authorizes competent authorities to seek compensation when damage by pollution to the marine ecosystem, marine fishery resources, and marine protected areas has caused significant losses to the State. See Haiyang Huanjing Baohu Fa (海洋环境保护法) [Marine Environmental Protection Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Apr. 1, 2000, amended Nov. 4, 2017), art. 89 (2), 1982 STANDING COMM. NAT’L PEOPLE CONG. GAZ.

29. See, e.g., Lv Zhongmei (吕忠梅), Huanjing Gongyi Susong Bianxi (环境公益诉讼辨析) [Analysis of Environmental Public Interest Litigation], Fashang Yanjiu (法商研究) [ZUEL L.J.] 131 (2008); Wang Xiaogang (王小刚), Lun Huanjing Gongyi Susong de Liyi he Quanli Jichu (论环境公益诉讼的利益和权利基础) [On the Interests and Rights of Environmental Public Interest Litigation], 41 Zhejiang Daxue Xuebao (Renwen Shehui Kexue Ban) (浙江大学学报(人文社会科学版)) [J. ZHEJIANG U. (HUMAN. & SOC. SCI.)] 50 (2011).

30. 2015 EPIL Interpretation, *supra* note 6, at art. 19. Article 19 of the 2015 EPIL Interpretation also provides that if the plaintiff took reasonable measures to prevent or respond to (threatened) environmental damage, he may bring claims for reimbursement of costs incurred.

31. *Id.* at art. 20 (providing that when a plaintiff requests “restoration to the original status,” the court may order the responsible party to restore the damaged environment to its “pre-injured condition and services” or pay costs of restoration if the defendant is unable or unwilling to perform restoration. Restoration costs include cost of designing and implementing restoration plans as well as cost of monitoring and supervising restoration projects).

32. *Id.* at art. 21 (authorizing courts to award compensation for the interim losses of ecological service and functions during the recovery period if plaintiffs file a claim for “damages”).

traditionally focused on private interest, to remedy ecological damage that implicates public interest. Many scholars insist that ecological damage is different from traditional types of damage (i.e., personal injury, property damage, and economic loss) and does not fit properly in the tort law system that has traditionally focused on private interest.³³ Some scholars, however, try to fit ecological damage within tort liability by resorting to the theory of public ownership of natural resources. According to these scholars, because many natural resources (e.g. mineral resources, waters, sea areas, forests, mountains, grasslands, wasteland, tidal flats, and wildlife) are owned by the State or collectives under Chinese laws,³⁴ injury inflicted upon natural resources constitutes damage to the “property rights” of the State or collectives, which would grant standing to public authorities to seek compensation for natural resource damage under tort law.³⁵

As a result of these struggles, the tort discourse on EPIL has been underdeveloped. In fact, if we realize that giving standing to parties without a “direct interest” has already broken the link between personal interest and liability that is common in the paradigmatic structure of tort actions, we might be less bothered by other conceptual problems arising from extending tort liability to protect public interest. We can then move forward to think about the contours and the role of this reformed tort liability. For instance, how is a tort-based framework addressing harm to the public interest different from a citizen suit? What is the relationship between the causes of action supported by the tort-based EPIL and existing environmental laws? What role can a tort-based public interest litigation system play in supporting environmental protection efforts in

33. See, e.g., Li Zhiping (李挚萍), *Huanjing Xiufu de Sifa Cailiang* (环境修复的司法裁量) [*Judicial Discretion on the Environmental Restoration*], 14 *Zhongguo Dizhi Daxue Xuebao* (Shehui Kexue Ban) (中国地质大学学报(社会科学版)) [J. CHINA U. GEOSCI. (SOC. SCI. ED.)] 20, 22 (2014); Xu Xiangmin (徐祥民), *Huanjing Wuran Zeren Jiexi—Jiantan Qinquan Zeren Fa yu Huanjing Fa de Guanxi* (环境污染责任解析—兼谈《侵权责任法》与环境法的关系) [*Analysis of the Liability for Environmental Pollution—Relationship between the Tort Law and Environmental Laws*], *Faxue Luntan* (法学论坛) [LEGAL FORUM] 17 (2010); Zhang Zitai (张梓太) & Wang Lan (王岚), *Woguo Ziran Ziyuan Shengtai Sunhai Sifa Jiuji de Buzu Ji Duice* (我国自然资源生态损害私法救济的不足及对策) [*The Limitations of Private Law Relief for Injuries to Natural Resources in China and Solutions*], *Faxue Zazhi* (法学杂志) [L. SCI. MAGAZINE] 56, 59 (2012).

34. See *Xian Fa* (宪法) [Constitution] (promulgated by Nat'l People's Cong., Dec. 4, 1982, effective Dec. 4, 1982, amended Mar. 11, 2018) art. 9, 1982 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.; *Wuquan Fa* (物权法) [Property Law] (promulgated by Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) arts. 46–49, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

35. See, e.g., Li Chengliang (李承亮), *Qinquan Zeren Fa Shiye Zhong de Shengtai Sunhai* (侵权责任法视野中的生态损害) [*Ecological Injury from the Perspective of the Tort Law*], 32 *Xiandai Faxue* (现代法学) [MODERN L. SCI.] 63 (2010); Zhang Lu (张璐), *Lun Ziran Ziyuan Caichan Quanli Qinhai de Qinquan Zeren—Leixing Hua de Shijiao* (论自然资源财产权利侵害的侵权责任—类型化的视角) [*On the Tort Liability for Natural Resource Damage—Based on the Classification of Natural Resources*], 15 *Zhongguo Dizhi Daxue Xuebao* (Shehui Kexue Ban) (中国地质大学学报(社会科学版)) [J. CHINA U. GEOSCI. (SOC. SCI. ED.)] 1 (2015); Zhang Zitai (张梓太) & Wang Lan (王岚), *supra* note 33.

China? Part III and IV of this Article take up these seemingly central questions that scholars have not yet begun to tackle.

II. CITIZEN SUIT AS A NARROW CONCEPTION OF EPIL

This Part examines the discourse that simply frames EPIL as a model of the U.S. citizen suit but fails to demonstrate the extent to which a citizen suit-like regime would be possible and effective in China. In doing so, this Part first provides an overview of the purpose and operation of the U.S. citizen suit. Then, it evaluates whether the benefits of the citizen suit as a goad or supplement to government enforcement may be extended to the Chinese context. Finally, this Part considers a variety of challenges and limitations that are likely to arise when adopting citizen suit-style EPIL in China.

A. *The Outline of Citizen Suit Provisions*

Realizing that government agencies inevitably lack sufficient resources and political will to enforce all statutory violations, the U.S. Congress believed that empowering citizens to act as private attorneys general to enforce federal statutes “would provide a goad to government enforcement and, if that goad did not work, would provide an alternative means of enforcement.”³⁶ The first citizen suit provision appeared in Section 304 of the Clean Air Act, and was included in almost all federal environmental statutes adopted in the 1970s.³⁷ In general, citizen suit provisions authorize “any person” to commence a civil action against parties who have violated statutory requirements (citizen enforcement actions),³⁸ or to force the government to perform a mandatory duty under the statutes (action-forcing suits).³⁹ Because the scope of this Article is limited to civil EPIL lawsuits against harm-causing parties, the discussion of U.S. citizen suits focuses on citizen suits against violating polluters rather than suits against recalcitrant agencies.

36. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 ENVTL. L. REP. 10,309, 10,310–11 (1983).

37. 42 U.S.C. § 7604 (2012); *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365 (2012); Endangered Species Act, 16 U.S.C. § 1540(g) (2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2012); Toxic Substances Control Act, 15 U.S.C. § 2619 (2012); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (2012); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g) (2012); Deepwater Port Act, 33 U.S.C. § 1515 (2012); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (2012); Noise Control Act, 42 U.S.C. § 4911 (2012); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2012); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (2012). An exception is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (2012), which contains no citizen suit provisions.

38. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(a)(1) (2012) (allowing for enforcement against violations of “an effluent standard or limitation” or “an order issued by the Administrator or a State with respect to such a standard or limitation.”); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(A) (2012) (authorizing enforcement against violations of “any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.”).

39. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604(a)(2) (2012); Clean Water Act, 33 U.S.C. § 1365(a)(2) (2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(2) (2012).

While citizen suit sections in U.S. legislation literally allow “any person” to initiate a lawsuit, plaintiffs must satisfy standing requirements stemming from Article III of the Constitution. According to the Supreme Court’s construction, the standing doctrine encompasses three elements: first, a plaintiff is required to show that he has suffered actual or threatened injury as a result of the challenged action (injury-in-fact); second, the injury can fairly be traceable to the challenged action (traceability); third, it is likely that the injury will be redressed by a favorable decision (redressability).⁴⁰ Under the liberal view adopted in the landmark decision *Sierra Club v. Morton*,⁴¹ the alleged injury need not be of an economic nature that has traditionally been recognized to support standing; injuries to environmental and aesthetic interests may constitute an “injury in fact.”⁴² Apart from individual citizens, an organization or association may sue on behalf of its members when its members would themselves have standing.⁴³

In order to ensure that “citizens would [not] flood courts with suits and interfere with the proper enforcement role of the executive branch,” plaintiffs are required to send a sixty-day notice to the relevant federal agency, the relevant state, and the alleged violator prior to filing suit.⁴⁴ Citizen enforcement actions are barred if regulatory authorities have commenced or are “diligently”

40. *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (internal citations omitted).

41. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

42. *Id.* at 734 (acknowledging that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many, rather than the few, does not make them less deserving of legal protection through the judicial process.”). The liberal vision of injury embraced by *Sierra Club v. Morton* has been followed by courts. *See, e.g.*, *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688–695 (1973) (granting standing to plaintiffs who claimed that the Interstate Commerce Commission’s refusal to suspend a railroad rate increase would discourage the use of recycled materials and lead to increase in consumption of natural resources in areas which the plaintiffs used for hiking, fishing, and backpacking); *Save Our Wetlands Inc. v. Sands*, 711 F.2d 634, 640 (5th Cir. 1983) (finding standing to seek a completion of an environmental impacts statement about the consequences of the project despite “the fact of actual damage to the wetlands, fishing and aesthetics is somewhat speculative.”). However, the Supreme Court began to adopt a more restrictive view of standing in the 1990s by requiring plaintiffs to make detailed showings of individualized, causal injury in order to establish standing. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (requiring a plaintiff to show an injury that is “concrete and particularized . . . and actual or imminent, not conjectural or hypothetical.”). In *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, the Supreme Court seemed to reverse its course by holding that “[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.” 528 U.S. 167, 181 (2000). *Laidlaw* lowered the standing barrier because environmental plaintiffs need only show personal injury instead of actual harm to the environment caused by statutory violation to satisfy standing requirement.

43. In *Hunt v. Washington State Apple Advert. Comm’n*, the Court determined that an organization has “representational standing” when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” 432 U.S. 333, 343 (1977).

44. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 ENVTL. L. REP. 10,063, 10,064 (1984); *see, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b)(1)(A) (2012); Clean Air Act, 42 U.S.C. § 7604(b)(1)(A) (2012).

prosecuting an enforcement action.⁴⁵ However, citizens that give notice have a right to intervene in government enforcement actions commenced in a federal court.⁴⁶

Statutory requirements subject to citizen enforcement can include substantive standards as well as procedural requirements.⁴⁷ For largely political considerations, Congress authorizes private parties to enforce only violations mentioned in the citizen suit sections.⁴⁸ The primary remedy available in a citizen enforcement action is an injunction.⁴⁹ Some statutes also authorize courts to assess penalties payable to the federal treasury.⁵⁰ Plaintiffs are not allowed to recover monetary damages from the citizen suits, but courts may order defendants to reimburse prevailing plaintiffs for the costs of litigation, including reasonable attorney and expert witness fees.⁵¹

While the citizen suit is “a central element of American environmental law,”⁵² it has sparked much debate over the legitimacy and effectiveness of citizen enforcement actions. Critics raised the concern that citizen suits might violate the separation of powers doctrine by intruding on the executive power of Article II,⁵³ while challenges to the constitutionality of citizen suits have been

45. See, e.g., Clean Water Act, § 1365(b)(1)(B) (2012); Clean Air Act, § 7604(b)(1)(B) (2012).

46. See, e.g., Clean Water Act, § 1365(b)(1)(B) (2012); Clean Air Act, § 7604(b)(1)(B) (2012).

47. For example, the citizen suit section of the Clean Water Act authorizes enforcement actions against violations of “an effluent standard or limitation,” which was defined, inter alia, to include “a permit or condition thereof issued under section 1342 of this title.” § 1365(f)(6). According to courts’ interpretation, if monitoring, reporting, and recordkeeping requirements are expressly made conditions of a permit, violations of these procedural requirements constitute violations of “an effluent standard or limitation.” See *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988). Another example of enforceable procedural requirement is the Emergency Planning and Community Right-to-Know Act (EPCRA), which allows for citizen suit against failure to report EPCRA information in a timely fashion. 42 U.S.C. § 11046(a)(1)(A) (2012); see, e.g., *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 104–06 (1998).

48. Thompson, *supra* note 13, at 193. See Miller, *supra* note 36, at 10,319–21, for a survey of actionable violations encompassed by different statutes.

49. Miller, *supra* note 44, at 10,075.

50. See, e.g., Clean Air Act, 42 U.S.C. § 7604(a)(3) (2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(2) (2012). In the case of Clean Water Act, the fines can be up to \$25,000 per day for each violation. See 33 U.S.C. § 1319(d) (2012).

51. See, e.g., Clean Water Act § 1365(d) (2012); Clean Air Act § 7604(d) (2012). While citizen suit provisions permit courts to award costs of litigation to any party when appropriate, successful defendants in practice may receive attorney fee awards only when the action against them proved to be frivolous. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 ENVTL. L. REP. 10,407, 10,413 (1984).

52. George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10,028, 10,028 (1999).

53. See, e.g., Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 71–75 (1989) (asserting that citizen suit infringes upon the executive power that is vested only in the President, especially the executive authority not to enforce the law in particular circumstances); Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution’s Separation of Powers Principle*, 81 VA. L. REV. 1957, 1959 (1995) (“Congress takes the power of prosecutorial discretion from the Executive and transfers it to private citizens, and thereby clashes with the Constitution both by undermining the Executive Branch’s prosecutorial function and by seizing significant executive power for itself.”).

rejected by other scholars⁵⁴ as well as courts.⁵⁵ Critics and proponents of citizen suits also disagree on whether private enforcement will interfere with established government enforcement policy and strategy.⁵⁶ Some studies show that private enforcement actions were brought primarily by large national or regional environmental organizations against industrial dischargers under the Clean Water Act in the first decade following the adoption of citizen suit provisions.⁵⁷

54. Jeffrey G. Miller & Brooke S. Dorner, *The Constitutionality of Citizen Suit Provisions in Federal Environmental Statutes*, 27 J. ENVTL. L. & LITIG. 401, 433–49 (2012) (providing a comprehensive analysis of why citizen suit provisions are constitutional under the Vesting, Take Care, and Appointment Clauses); Cleve, *supra* note 52, at 10,037 (“Congress’ creation of checks on the President’s willingness to enforce particular laws, such as by authorizing individual citizens to enforce laws, cannot be described . . . as an unconstitutional intrusion into the President’s Article II authority.”); Robin Kundis Craig, *Will Separation of Powers Challenges Take Care of Environmental Citizen Suits - Article II, Injury-in-Fact, Private Enforcers, and Lesson from Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 101 (2001) (“[T]he injury-in-fact standing requirement renders environmental citizen suits private causes of action to which the separation of powers doctrine does not apply.”); Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 211–14 (1992) (arguing that the Take Care Clause of Article II poses no problem in suits by regulatory beneficiaries).

55. See, e.g., *Delaware Valley Toxics Coal. v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1138 (E.D. Pa. 1993) (finding “citizen suits are not an unlawful delegation of executive power, since Congress in enacting the EPCRA did not grant to a person or persons under its control executive power” and “the executive branch retains the authority to commence action against alleged violators via the sixty day notice provision of the EPCRA.”); *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 625–26 (D. Md. 1987) (holding that the citizen suit provision of the Clean Water Act does not violate the constitutional principle of separation of powers because “[it] does not aggrandize the Legislative Branch at the expense of the Executive, and because Congress may determine who will enforce the statutory rights and obligations that it creates.”).

56. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 375–76 (1990) (asserting that “citizen suit provisions do not permit the government to preserve its discretion or a coherent enforcement by terminating private actions” and the coordination scheme “poses a danger of overenforcement and underenforcement.”); Cross, *supra* note 53, at 66–70 (arguing that citizen suits may reduce compliance with environmental laws by destroying ongoing cooperative compliance and undermine the EPA’s enforcement and regulatory efforts); Abell, *supra* note 53, at 1971 (“[C]itizen suit provision does not allow the Attorney General to retain significant control over the execution of federal environmental law.”); *But see* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 897–907, 958 (1985) (acknowledging the limited effectiveness of the notice-preclusion mechanism in coordinating public and private enforcement, but arguing that agencies can determine what role private enforcement can play in particular regulatory programs “[b]y deciding how regulations will define compliance, what kinds of monitoring and reporting will be required, how compliance information will be gathered and disseminated, and what levels of noncompliance will be considered significant.”); Miller & Dorner, *supra* note 54, at 454–57 (discussing how citizen suit provisions provide a number of ways for the government to protect its policy and strategy choices); Thompson, *supra* note 13, at 203 (admitting that although it is difficult to determine whether citizen suits do generate net benefits to the public because there are scarce empirical insights into the decision-making of environmental groups, but pointing out that “[the] little evidence that exists suggests that environmental nonprofits have filed a sizable number of worthwhile actions that public enforcers either purposefully or unintentionally failed to pursue.”).

57. See, e.g., ENVIRONMENTAL LAW INSTITUTE, *CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES* vi (1984) [hereinafter *ELI STUDY*] (finding that 214 out of 349 citizen suits filed between 1978 and 1984 were brought under the Clean Water Act, and 162 out of these 214 were brought during the environmental group’s enforcement campaign); Greve, *supra* note 56, at 353 (reporting that from May 1984 to September 1988, national or regional environmental organizations continued to account for approximately two-thirds of enforcement actions

The pattern of early use of citizen suits has led to skepticism over the motivations of private enforcers.⁵⁸ The criticism of the citizen suit notwithstanding, it is widely accepted that its benefits have far exceeded its drawbacks and that private enforcement actions have played a valuable role in achieving compliance with environmental laws.⁵⁹

B. Benefits of Citizen Suit-Style EPIL

China's environmental laws are notorious for their lax enforcement in practice.⁶⁰ Among a variety of factors that conspire to undermine environmental

under the Clean Water Act). More recent studies, however, reveal a change in the trend of citizen suits. *See, e.g.*, Kristi M. Smith, *Who's Suing Whom: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359, 385 (2004) (examining the data of the period from 1995 to 2000 and showing that citizen suits are no longer dominated by large, environmental organizations. Instead, a majority of citizen enforcement cases were brought by small, local citizen plaintiffs (173 out of 287) and suits against public defendants represented one-third of all citizen enforcement actions).

58. *See, e.g.*, Greve, *supra* note 56, at 359–66 (criticizing that the strategies and case selection of environmental groups—e.g., targeting at recent and repeat industry violators of National Pollutant Discharge Elimination System permits and paperwork requirements of the Clean Water Act—are determined not by public environmental benefits but by economic rewards); *But see* Thompson, *supra* note 13, at 205 (maintaining that “most environmental nonprofits . . . are likely to be sensitive to the potential public costs of suing a particular company” and “the largest national and regional environmental nonprofits, which historically have filed the majority of citizen suits, are more likely to have a mainstream constituency and be responsive to broad public policy considerations.”).

59. *See, e.g.*, ELI STUDY, *supra* note 57, at V-5 (“Citizen suits are currently operating as Congress intended them to provide (1) a goad to EPA efforts and (2) an alternative to government enforcement.”); Boyer & Meidinger, *supra* note 56, at 957 (“Despite the fact that private enforcement has eroded administrative control over the enforcement process . . . the growth of private enforcement is acting as a competitive spur to government enforcers, prodding them to improve their management tools for measuring, securing, and overseeing compliance.”); David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1561 (1995) (“[O]nly extensive use of citizen suits as private attorneys general can safeguard the enforcement system from collapse and prevent states from using lax environmental enforcement as an economic development tool.”); Thompson, *supra* note 13, at 198 (highlighting the unique advantages of the citizen suit in bringing competition to the business of environmental enforcement and promoting democratic goals). In addition to the extensive scholarship that is favorable to the citizen suit, Congress and the Environmental Protection Agency (EPA) have repeatedly endorsed its value. *See, e.g.*, Environment & Natural Resources Policy Division, Cong. Research Serv., S. PRT. 100–144, A Legislative History of the Water Quality Act of 1987 1449 (1988) (“Citizen suits are a proven enforcement tool. They operate as Congress intended-to both spur and supplement . . . government enforcement actions. They have deterred violators and achieved significant compliance gains.”); OFFICE OF ENFORCEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, 22E-2000, ENFORCEMENT IN THE 1990’S PROJECT: RECOMMENDATIONS OF THE ANALYTICAL WORKGROUPS 5–48 (1991) (“To the extent that citizen groups successfully undertake enforcement, a positive result has been achieved; namely, the availability of citizen suit remedies has served to leverage [EPA’s] scarce enforcement resources . . . to the extent that the regulated community views citizens enforcement as unpredictable, an even greater deterrent effect is achieved by the reality of active, broadly spread citizen suits enforcement.”).

60. *See, e.g.*, Erin Ryan, *The Elaborate Paper Tiger: Environmental Enforcement and the Rule of Law in China*, 24 DUKE ENVTL. L. & POL’Y F. 183, 188 (2014) (“[W]hile China’s environmental laws may look good on paper, they have proven little more than a paper tiger when it comes to the lived experience of its people.”); Alex L. Wang, *The Search for Sustainable Legitimacy: Environmental Law*

enforcement, political pressure, resource shortages, and capture-like risks are important contributing factors. This section analyzes in detail how the lack of political will or resources has hampered government enforcement of environmental laws in China, and how establishing citizen suit-style EPIL may help address these concerns. It concludes that as an answer to the untrustworthy and inefficient government enforcement, the U.S. citizen suit holds promise for strengthening China's weak environmental enforcement by prompting or supplementing government enforcement actions.

1. *Countering Political Pressure in Environmental Enforcement*

Chinese environmental enforcement should be understood in the context of “central-local” relations. Under the decentralized structure of environmental administration, local governments are responsible for environmental protection and implementation of national and local environmental laws within their jurisdictions.⁶¹ An extensive body of literature has blamed local protectionism, which is generally understood as local governments’ tendency to favor economic development over environmental protection, for the gap between the central government’s environmental mandates and the implementation outcome at the local level.⁶² However, it should not be neglected that local governments are also incentivized by the cadre evaluation system designed by the central government, which prioritizes economic growth and social stability over environmental protection.⁶³ Notwithstanding the pro-growth tendency, there is great variation in local governments’ commitment and capacity to enforce environmental laws,

and Bureaucracy in China, 37 HARV. ENVTL. L. REV. 365, 367 (2013) (“Although China has constructed an expansive environmental law framework over the past 30 years, implementation of laws and regulations in practice has been notoriously weak.”).

61. Article 6 of the 2014 EPL provides that local governments at various levels shall be responsible for the environmental quality of areas under their jurisdictions.

62. See, e.g., ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA’S FUTURE* (2004); XIAOYING MA & LEONARD ORTOLANO, *ENVIRONMENTAL REGULATION IN CHINA: INSTITUTIONS, ENFORCEMENT, AND COMPLIANCE* (2000); CHARLES R. MCELWEE, *ENVIRONMENTAL LAW IN CHINA: MITIGATING RISK AND ENSURING COMPLIANCE* (2011); BENJAMIN VAN ROOIJ, *REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE AND ENFORCEMENT; THEORY AND CASES* (2006); OECD, *ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA: AN ASSESSMENT OF CURRENT PRACTICES AND WAYS FORWARD* (2006); Xin Qiu & Honglin Li, *China’s Environmental Super Ministry Reform: Background, Challenges, and the Future*, 39 ENVTL. L. REP. 10,152 (2009); Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195 (2006).

63. For analyses of how the incentives embedded in the cadre evaluation system contribute to poor environmental law enforcement in China, see Wang, *supra* note 60, at 386–90; Ran Ran, *Perverse Incentive Structure and Policy Implementation Gap in China’s Local Environmental Politics*, 15 J. OF ENVTL. POL’Y 17, 22–24 (2013). The central government substantially elevated environmental priorities by setting a number of binding environmental targets during the Eleventh Five-Year Plan for National Economic and Social Development (2006–2010), which thereafter became important criteria in the cadre evaluation system. Nevertheless, scholars are cautious about the effect of environmental cadre evaluation that suffers from limitations such as goal displacement and data manipulation. See, e.g., Wang, *supra* note 60, at 409–30; Genia Kostka, *Barriers to the Implementation of Environmental Policies at the Local Level in China*, Policy Research Working Paper 7016, WORLD BANK, 14–17 (2014).

which has contributed to regional variation in the effectiveness of environmental enforcement in China.⁶⁴

Local protectionism is possible because key enforcement powers are delegated to local environmental protection bureaus (EPBs) that are institutionally and financially subordinate to local governments. Local EPBs are subject to the dual leadership of their “vertical” superiors (the higher levels of environmental protection agencies), and their “horizontal” bosses (local governments where they reside).⁶⁵ While the superior level environmental protection agencies provide local EPBs with guidance and policy directives, local government leaders have a stronger influence on EPBs’ routine actions because they can exercise substantial control over EPBs’ budgetary funds and EPB director appointments.⁶⁶ Studies have shown that local government leaders tend to opt for EPB heads who can advance the province’s overall development plan rather than the narrow interest of environmental protection.⁶⁷ Consequently, local EPBs tend to be “more beholden to local leaders than to their duty to pursue environmental protection goals.”⁶⁸

As a mechanism to address agencies’ failure to enforce due to political considerations, citizen suit-style EPIL would help prevent political pressure from limiting appropriate enforcement activities in China. Compared with administrative enforcers, citizens and environmental groups are less likely to be deterred by political pressures if an environmental violation is worth prosecuting. By filing notices to sue, citizen plaintiffs can bring attention to violations not addressed by administrative agencies and prompt them into action. If agencies fail to enforce, citizen plaintiffs can bring their own enforcement actions under a citizen suit-style framework. In fact, in a country still characterized by “fragmented authoritarianism,” the marginalized environmental bureaucracy often finds environmental groups a good ally in pursuing their policy goals and institutional mandates.⁶⁹ Therefore, environmental groups’ mobilization,

64. For literature on regional variation in environmental enforcement in China and its contributing factors, see Abigail R. Jahiel, *The Organization of Environmental Protection in China*, 1998 CHINA Q. 757, 759 (1998); Benjamin van Rooij & Carlos Wing-Hung Lo, *Fragile Convergence: Understanding Variation in the Enforcement of China’s Industrial Pollution Law*, 32 L. & POL’Y 14 (2010); Benjamin van Rooij et al., *Centralizing Trends and Pollution Law Enforcement in China*, 231 CHINA Q. 583 (2017).

65. See Jahiel, *supra* note 64, at 759.

66. *Id.* at 759; MA & ORTOLANO, *supra* note 62, at 154; MCELWEE, *supra* note 62, at 115–16; OECD, *supra* note 62, at 18.

67. See Genia Kostka, *Environmental Protection Bureau Leadership at the Provincial Level in China: Examining Diverging Career Backgrounds and Appointment Patterns*, 15 J. ENVTL. POL’Y & PLAN. 41, 42 (2013); see also Kostka, *Barriers*, *supra* note 63, at 16 (quoting a leading EPB official: “Environmental and energy targets are binding targets but they are not our ultimate targets. No leader will be promoted because of their better achievements in environmental protection and energy savings. GDP growth is still the target that we work hardest to achieve.”).

68. Kostka, *Barriers*, *supra* note 63, at 26.

69. “Fragmented authoritarianism” was a framework proposed by scholars to understand the policy making process in China. This model argues that fragmentation of authority encourages a search for consensus among various bureaucracies and focuses on the importance of bargaining and negotiation among bureaucracies—each with its own sense of mission and interest—in the policy making process in

including bringing enforcement actions, may help address some environmental violations that agencies feel are difficult to enforce due to political interference.

2. *Compensating for Agencies' Inadequate Resources*

Even if local EPBs are committed to the faithful enforcement of environmental laws, they are hindered by the lack of sufficient capacity and resources. With inferior status in government hierarchy, EPBs often find it difficult to acquire necessary institutional capacity to carry out their duties.⁷⁰ Despite regional differences, EPBs are generally underfunded given their expanded mandates,⁷¹ with the allocated annual budget ranging from 0.5 percent to 2.5 percent of the local GDP.⁷² Associated with resource constraints are “shortages of needed inspection vehicles, up-to-date testing equipment, and skilled staff.”⁷³ The lack of technical equipment and well-trained staff has significantly limited the EPBs’ ability to monitor and detect environmental violations.⁷⁴

Because regulatory agencies are unavoidably understaffed and underfunded in China, citizen suits could provide additional resources to detect and prosecute violations. Citizens can help monitor companies’ performance and detect environmental problems, overcoming both the difficulties and inadequate

China. See Kenneth G. Lieberthal, *Introduction: The “Fragmented Authoritarianism” Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1, 6–12 (Kenneth G. Lieberthal & David M. Lampton ed., 1992). Andrew C. Mertha updates the “fragmented authoritarianism” framework by noting that the politics of hydropower in China has become increasingly pluralized, as actors and groups that were previously excluded from the policy making process—disgruntled officials, NGOs, and the media—have successfully entered the policy process by adopting strategies necessary to work within the constraints of the fragmented authoritarianism framework. In his study, Mertha also describes how environmental bureaus have formed coalitions with other policy entrepreneurs (e.g., environmental NGOs and the media) and sought their assistance to oppose certain hydropower projects. ANDREW C. MERTHA, *CHINA’S WATER WARRIORS: CITIZEN ACTION AND POLICY CHANGE* (2008).

70. See Kostka, *Barriers*, *supra* note 63, at 25.

71. The limited financial capacity of EPBs has been well documented in existing literature. See, e.g., ECONOMY, *supra* note 62, at 108–09; VAN ROOIJ, *supra* note 62, at 274–75; Kostka, *Barriers*, *supra* note 63, at 27–28; Wanxin Li & Krzysztof Michalak, *Environmental Compliance and Enforcement in China*, in GOVERNANCE, RISK, AND COMPLIANCE HANDBOOK: TECHNOLOGY, FINANCE, ENVIRONMENTAL, AND INTERNATIONAL GUIDANCE AND BEST PRACTICES 379, 385–386 (Anthony Tarantino ed., 2008); Guangdong Xu & Michael Faure, *Explaining the Failure of Environmental Law in China*, 29 COLUM. J. ASIAN L. 1, 47–48 (2016).

72. Kostka, *Barriers*, *supra* note 63, at 28. In China, the Central government calculates the national GDP while provincial governments are responsible for estimating the GDP (i.e., regional GDP) within their jurisdictions. Because of the insufficient basic data, the less developed estimation methods, and the manipulation of data by some local governments, there are great differences between national GDP estimates and regional GDP estimates. For statistics showing the GDP of China by province and selected cities, see *National Data: Annual by Province*, NATIONAL BUREAU OF STATISTICS CHINA, <http://data.stats.gov.cn/english/easyquery.htm?cn=E0103> (last visited Sept. 28, 2018).

73. *Id.*

74. See *id.* at 26–27 (describing how shortages of advanced monitoring equipment and technical staff have caused difficulties in monitoring and verifying environmental performance).

resources that agencies confront in identifying violations.⁷⁵ Since local citizens and groups are immediately affected by a specific environmental problem, they are also “in a better position than public authorities to assess the costs and benefits of enforcement actions.”⁷⁶ In addition, when the lack of resources is the only reason for agencies’ failure to enforce the law, citizen suit-like EPIL, by encouraging plaintiffs to bring enforcement actions, would supplement government enforcement efforts to curtail violations.

3. *Correcting Excessive Cooperation between Regulatory Agencies and Regulated Companies*

Apart from political, institutional, and resource constraints that hobble enforcing agencies, the capture-like risk is a potential impediment to the implementation of environmental laws in China. Environmental regulation is influenced by *guanxi*, or social connections, that pervade Chinese society.⁷⁷ The considerable discretion that EPB staff can exercise in enforcement decision making allows them to apply a “pragmatic” approach to enforce the regulatory requirements.⁷⁸ EPBs often develop cooperative relationships with regulated enterprises because they believe that maintaining harmonious *guanxi* with enterprises can make it easier to acquire information and enhance compliance.⁷⁹ However, the pragmatic enforcement and the *guanxi* practices have inevitably led to the capture-like risk and collusion of EPBs with polluters.⁸⁰

Involving citizens and environmental groups in the enforcement process through a citizen suit-like framework would overcome the potential for capture in China. Where regulating agencies develop relationships with regulated industries such that they are incentivized to overlook violations, citizen enforcement actions can correct such excessive cooperation and supplement agency enforcement.⁸¹ Moreover, citizen suits can deter future capture by “alter[ing] the incentives of regulated firms and regulatory agencies in their

75. Thompson, *supra* note 13, at 192.

76. Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 24 (1985).

77. For those who are not familiar with the Chinese word *guanxi*, *guanxi* “has long been an element of Chinese life, is based on a blend of exchanges and mutual affection that ‘create feelings of responsibility and obligation on the one hand and indebtedness on the other’ . . . In one of its simplest forms, *guanxi* is maintained by trading favors over long periods. These exchanges are often viewed as creating a resource that can be used to get things done.” MA & ORTOLANO, *supra* note 62, at 82.

78. See *id.* at 128 (explaining that pragmatic enforcement is “an approach in which the choice of enforcement action has more to do with the particular case at hand than with a rigid attachment to a single approach, such as insisting on strict compliance with environmental rules.”).

79. See *id.* at 83, 121–22.

80. See *id.* at 84–85 (citing examples of how firms have been able to circumvent regulation by employing *guanxi*); *id.* at 126–27 (reporting that EPB staff almost never revoked discharge permits because of the concern that revoking a permit would seriously damage an EPB’s relationship (*guanxi*) with an enterprise).

81. Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 133 (2002).

interactions generally”⁸² and “prompting more aggressive enforcement action by enforcement agencies.”⁸³

The pathologies in the government enforcement of environmental laws in China—political and institutional constraints, resource shortages, and the risk of capture—provide initial justifications for involving private parties in environmental law enforcement. By allowing private parties to push government to enforce or initiate independent enforcement suits when agencies fail to take actions, the citizen suit-like EPIL seems to have the potential to help strengthen China’s lax environmental enforcement.

C. Challenges and Limitations of Citizen Suit-Style EPIL

Despite the fact that a citizen suit-like framework may help address government enforcement failures caused by lack of will or resources, few advocates have provided a thoughtful analysis of whether it is possible to import the citizen suit and how effective it would be in China. The following Subparts examine challenges and limitations of adopting citizen suit-style EPIL in China. The first Subpart considers the political challenge of establishing a dual enforcement scheme under the current enforcement system. The rest of the Subparts explore various inherent deficiencies of existing environmental laws that can significantly restrict the role of citizen suit-style EPIL.

1. Political Challenges of Adopting a Citizen Suit-Style EPIL

While private enforcement of public law has long been a part of American legal practice, enlisting private parties in the enforcement process in China would require realignment of roles and powers in the existing enforcement system.⁸⁴ First, China’s law enforcement authority has traditionally been monopolized by public bureaucracies: administrative agencies enforce environmental regulatory laws by taking civil administrative actions while the procuratorate addresses serious violations through criminal prosecutions.⁸⁵ Under a citizen suit-style EPIL, private parties and administrative agencies will exercise concurrent civil

82. *Id.*

83. *Id.*

84. See Thompson, *supra* note 13, at 195–98 (exploring the longstanding tradition of private enforcement of public laws in the U.S. and the innovation of citizen suits).

85. For the administrative enforcement power of environmental agencies, see 2014 EPL, art. 10 (granting the power to supervise and manage environmental protection work to competent central and local environmental protection agencies); arts. 59–63 (providing for a range of administrative enforcement actions that environmental agencies can take against different violations). For the criminal enforcement power of the procuratorate, see Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by Nat’l People’s Cong., Jul. 1, 1979, effective Jan. 1, 2013, amended Oct. 26, 2018), art. 3, 1979 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (providing that the People’s Procuratorate shall be responsible for initiating criminal prosecutions). For different types of environmental crimes and corresponding criminal sanctions, see Xingfa (刑法) [Criminal Law] (promulgated by Nat’l People’s Cong., Jul. 1, 1979, effective Oct. 1, 1997, amended Nov. 4, 2017), arts. 338–46, 1979 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.

enforcement authority. Even if the “separation of powers” challenge to U.S. citizen suits is not likely to arise in the Chinese context,⁸⁶ the idea of private parties as alternative law enforcers will likely be too radical and thus meet strong resistance.

Second, unlike U.S. enforcement agencies that may choose to initiate civil administrative actions or file formal lawsuits in court to enforce environmental violations,⁸⁷ Chinese environmental protection agencies are only able to pursue administrative enforcement actions (e.g., issuing administrative orders or imposing administrative sanctions).⁸⁸ Only when persons or entities have failed to comply with an administrative order such as an administrative penalty, may agencies seek court assistance in enforcing their administrative decisions by filing “nonlitigation” administrative execution cases.⁸⁹ Therefore, the role of Chinese courts is limited to reviewing and enforcing administrative orders issued by agencies. This is different from the role of U.S. courts, which have the jurisdiction to determine whether a violation exists and to what extent to impose remedies. Therefore, although Chinese scholars who conceive EPIL as similar to the citizen suit are right to point out that EPIL may intrude on agencies’ enforcement authority without the pre-suit notice requirement,⁹⁰ they fail to realize the more serious challenge presented by the very idea of enlisting private parties as enforcers: it will call for a radical reform in the current enforcement landscape by altering the established divisions of responsibility and power.

2. *Inadequate Regulation and Weak Environmental Standards*

In addition to political challenges to implementing the dual enforcement scheme, EPIL modeled on the citizen suit may be not as effective as anticipated.

86. See *supra* notes 53–55 and accompanying text.

87. U.S. environmental statutes generally provide for two types of civil enforcement actions: civil administrative actions taken by EPA or a state, and civil judicial actions filed by the Department of Justice on behalf of EPA or by State Attorneys General on behalf of the states. In administrative enforcement, EPA can issue administrative compliance orders and assess administrative penalties; in judicial enforcement, EPA can seek injunctive relief as well as higher civil penalties. See Clean Water Act, 33 U.S.C. § 1319 (a)-(g) (2012). Because trials are expensive and time-consuming, environmental agencies usually prosecute violations that are most egregious in the courts.

88. See e.g., 2014 EPL, arts. 59–63; Shui Wuran Fangzhi Fa (水污染防治法) [Water Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat’l People’s Cong., May. 11, 1984, effective Jun. 1, 2008, amended June 27, 2017), arts. 81–95, 1984 STANDING COMM. NAT’L PEOPLE CONG. GAZ. [hereinafter 2017 WPPCL].

89. Environmental agencies in China usually lack coercive powers to force violators to comply with their administrative orders. When administrative orders are not followed by violators, agencies can file “nonlitigation” administrative execution cases (feisu xingzhen zhixing anjian 非诉行政执行案件) under the Administrative Procedure Law. As such type of case involves no trials, judicial review of administrative decisions is often limited to “documentary review.” Xuehua Zhang, Leonard Ortolano & Zhongmei Lu, *Agency Empowerment through the Administrative Litigation Law: Court Enforcement of Pollution Levies in Hubei Province*, 2010 CHINA Q. 307, 311 (2010). If the legality of an administrative order is upheld, a court may use coercive measures to enforce the obligations contained in the administrative order.

90. See *supra* notes 21–23 and accompanying text.

Because the efficacy of citizen suits depends on the scope and strength of the underlying environmental statutes, it is doubtful that citizen suits will function as a powerful enforcement mechanism in China as they do in the United States in the absence of far reaching and powerful statutory framework.

While China has achieved tremendous progress in enacting a collection of wide-ranging environmental laws since the late 1970s, some key issue areas are not yet regulated.⁹¹ For example, the national legislature has not adopted statutes to address the management of toxic chemicals, light pollution, electromagnetic radiation pollution, heavy metal pollution, and persistent organic pollutants.⁹² Not until recently did the Standing Committee of the National People's Congress pass legislation to regulate nuclear safety⁹³ and soil pollution.⁹⁴ Moreover, the implementing regulations have never been promulgated for several important environmental laws such as the Solid Waste Pollution Prevention and Control Law⁹⁵ and Noise Pollution Prevention and Control Law.⁹⁶ Similarly, for a long time, there were no viable means to implement key regulatory programs established by environmental statutes (such as total emission control, discharge permit system, and regional permit restrictions).⁹⁷

91. For a review of China's legislation on pollution control and natural resources conservation since the late 1970s, see Stefanie Beyer, Comment, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185, 191–200 (2006); Srinivasan, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 290–98 (2007).

92. Shi'er Wu Quanguo Huanjing Baohu Fagui He Huanjing Jingji Zhengce Jianshe Guihua (“十二五”全国环境保护法规和环境经济政策建设规划) [Twelfth Five-Year Plan on National Environmental Protection Legislation and Environmental Economic Policies] (promulgated by Ministry of Environmental Protection, Nov. 1, 2011), <http://www.zhb.gov.cn/gkml/hbb/bwj/201111/W020111109379710352245.pdf> [hereinafter Twelfth Five-Year Plan].

93. He Anquan Fa (核安全法) [Law on Nuclear Safety] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018) 2017 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

94. Turang Wuran Fangzhi Fa (土壤污染防治法) [Soil Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018, effective Jan. 1, 2019) 2018 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

95. Gutu Feiwu Wuran Huanjing Fangzhi Fa (固体废物污染环境防治法) [Solid Waste Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 30, 1995, effective Apr. 1, 2005, amended Nov. 7, 2016) 1995 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. [hereinafter 2016 SWPPCL].

96. Huanjing Zaosheng Wuran Fangzhi Fa (环境噪声污染防治法) [Noise Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 29, 1996, effective Mar. 1, 1997) 1996 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

97. Twelfth Five-Year Plan, *supra* note 92. The Ministry of Environmental Protection issued administrative measures to implement the regional permit restriction system on December 18, 2015. See Jianshe Xiangmu Huanjing Yingxiang Quyu Xianpi Guanli Banfa (Shixing) (建设项目环境影响评价区域限批管理办法(试行)) [*Measures on Administration of Regional Restriction on Approval of Environmental Impact Assessment of construction projects (For Trial Implementation)*] (promulgated by the Ministry of Environmental Protection, Dec. 18, 2015, effective Jan. 1, 2016). On January 10, 2018, the Ministry of Environmental Protection released administrative rules to provide guidance for implementing the discharge permit system which had been introduced as early as the late 1980s. See Paiwu Xuke Guanli Banfa (Shixing) (排污许可管理办法(试行)) [*Measures on Administration of*

Where an environmental concern is regulated by law, compliance with existing environmental standards is usually insufficient to achieve the goals of reducing pollution and improving the environment. For example, the current effluent standards in China suffer from several limitations. First, many important toxic pollutants are not controlled by the Integrated Wastewater Discharge Standard,⁹⁸ which is a national effluent standard that applies to discharges of regulated water pollutants where there is no industrial discharge standard. Second, for a long time, most of China's effluent standards only set limitations on the concentration rather than mass of a pollutant, which stimulated the use of dilution as a substitute for treatment.⁹⁹ Because there have been no effective mechanisms taking into consideration the impact of effluent on the quality of the receiving water,¹⁰⁰ compliance with national uniform effluent limitations alone is often not sufficient to meet the water quality standards in the receiving water. As a comparison, the Environmental Protection Agency (EPA) of the United States generally prefers setting mass-based effluent limitations except in limited circumstances to prevent intentional dilution of wastewater.¹⁰¹ In addition, a permit writer must consider the impact of the proposed discharge on the quality of the receiving water when developing effluent limitations for a National Pollutant Discharge Elimination System permit. In cases where technology-based effluent limitations are found to be insufficient to achieve the applicable water quality standards, the Clean Water Act and its implementing regulations require development of water quality-based effluent limitations, which can

Discharge Permitting (For Trial Implementation)] (promulgated by the Ministry of Environmental Protection, Jan. 10, 2018, effective Jan. 10, 2018). However, the administrative measures for these two systems are only under trial implementation and many rules still need improvement in the future.

98. There are only thirteen toxic pollutants regulated by China's Wushui Zonghe Paifang Biaozhun (污水综合排放标准) [Integrated Wastewater Discharge Standard] (GB 8978-1996) as compared to 126 priority pollutants listed by EPA under the Clean Water Act. *See* 40 C.F.R. § 423, appendix A, (2018).

99. MA & ORTOLANO, *supra* note 62, at 19-20.

100. Realizing the drawbacks of the concentration control strategy, the Chinese government has adopted some instruments to reduce increased level of pollution, including the total emission control policy and the discharge permit system. Since the Ninth Five-Year Plan for National Economic and Social Development (1996-2000), a total emission control policy has been adopted to set national reduction levels for targeted pollutants and allocate emission quotas to provincial governments which then assign the quotas down to municipal governments or industries within their jurisdiction. While under the total emission control policy certain industrial sources may be required to meet more stringent discharge standards if compliance with national effluent standards is insufficient to meet ambient air or water quality standards, only a small number of major pollutants have been targeted by this scheme. *See* OECD, GOVERNANCE IN CHINA (2005) at 497-8. In addition to the total emission control policy, China began to experiment with the discharge permit system in the late 1980s requiring enterprises to apply to EPBs for permits which set specific limits on the mass and concentration of pollutants in enterprises' emissions. Due to a lack of legislative support and consistency between the discharge permit system and other regulatory programs, the experiment with the discharge permit system has achieved moderate success over the last two decades or more. *See id.* at 503 (Box 17.3), 513 (Box 17.6).

101. *See* WATER PERMITS DIVISION, OFFICE OF WASTEWATER MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT WRITERS' MANUAL 5-21 (2010).

impose additional or more stringent effluent limitations and conditions to protect water quality.¹⁰²

3. Poor Enforceability of Legal Requirements

Enforcement of environmental laws can be hampered by the fragmented structure of environmental governance and ambiguous allocation of environmental responsibilities. In China, the authority of environmental implementation is divided between environmental protection agencies and other departments and within the vertical structure of environmental agencies due to the breadth of environmental problems. However, the horizontal and vertical allocation of authority is often ambiguous.¹⁰³ With overlapping jurisdictional and/or subject matter authority and conflicting mandates, it is often difficult to achieve cooperation and coordination among different departments. The ambiguous division of labor may ultimately lead to “a lack of accountability”¹⁰⁴ and “regulatory vacuum” on some issue areas.¹⁰⁵

Besides the overlapping and ambiguous authority, the drafting of many environmental provisions follows the general style of Chinese legislation that is characterized by the use of “highly general, often vague and aspirational language.”¹⁰⁶ The generality and vagueness of legal rules “makes it difficult to determine just what is prohibited”¹⁰⁷ and to identify responsible agencies and their respective responsibilities in many areas of concern.¹⁰⁸ Meanwhile, the aspirational tone¹⁰⁹ and the omission of liability provisions¹¹⁰ further undercut the enforceability of legal requirements.

102. See *id.* at 6-1.

103. See Qiu & Li, *supra* note 62, at 10,158–60, for a discussion of the conflicting and ambiguous horizontal and vertical allocation of environmental authority.

104. Ran, *supra* note 63, at 32.

105. See Xu & Faure, *supra* note 71, at 46 (mentioning the gap in the resolution of cross-region pollution problems as a consequence of “a fragmented and patchwork structure of environmental governance.”).

106. Beyer, *supra* note 91, at 205.

107. William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China’s Environmental Dilemma*, 16 STAN. ENVTL. L. J. 125, 135 (1997).

108. See, e.g., Qiu & Li, *supra* note 62, at 10,161–62 (citing Article 10 of the Solid Waste Pollution Prevention and Control Law as an example of the law’s vagueness in identifying responsible departments and corresponding responsibilities in regulation of solid waste); Xu & Faure, *supra* note 71, at 32–33 (discussing the ambiguity and vagueness of Article 25 of revised Environmental Protection Law).

109. Beyer, *supra* note 91, at 205–06 (noting that in environmental legislation “actions are encouraged but rarely required and even where concrete duties are stated, only little guidance is provided on procedures and specific goals,” and that it is difficult to evaluate and determine the potential of China’s environmental statutes to direct specific behavior due to the ambiguous use of the words “should” “shall” and “must”).

110. Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 170 (2007) (observing that environmental laws “contain many general provisions with a few liability provisions” and “ignor[e] the needed procedural and implementation mechanisms.”).

4. Limited Deterrence of Statutory Penalties

The rampant environmental violations in China can be largely attributed to the lenient sanctions for noncompliance. In principle, environmental statutes authorize a range of administrative sanctions for violation including warning letters, fines, suspension of production, enterprise shutdown, suspension or revocation of permits, confiscation of illegal gains, and administrative detention.¹¹¹ However, the harsher punishments, such as suspension of production and enterprise shutdown, can only be applied in limited circumstances and require approval from local leaders.¹¹² Consequently, fines are the most frequently applied sanction, which account for over 60 percent of noncompliance responses.¹¹³

Before the passage of the 2014 EPL, environmental protection agencies were only authorized to assess one-off fines, which were capped regardless of the severity of violations.¹¹⁴ It is widely acknowledged that penalties are usually lower than the cost of compliance.¹¹⁵ The average cost of environmental violation was estimated to generally be less than 10 percent of the cost of treatment.¹¹⁶ The unreasonableness of penalty amount has been brought back into the spotlight recently. It is reported that between 2013 and 2016 local EPBs in Sichuan, Guangdong, and Xiamen had imposed fines on five enterprises for noncompliance with effluent standards, with the amounts ranging from 0.8 yuan (U.S. \$0.12) to 550 yuan (U.S. \$80).¹¹⁷ Because of the surprisingly low penalties, polluters often find it cheaper and easier to pay fines than to install or

111. See Huanjing Xingzheng Chufa Banfa (环境行政处罚办法) [*Measures on Administrative Sanction for Environmental Violation*] (promulgated by Ministry of Environmental Protection, Jan. 19, 2010, effective Mar. 1, 2010), art. 10, 2010 MINISTRY OF ENVIRONMENTAL PROTECTION.

112. For example, Article 60 of the 2014 EPL authorizes environmental protection agencies to restrict production or suspend production for rectification where a regulated entity discharges pollutants in excess of emission standards or the total emission control quota of major pollutants. However, environmental protection agencies must acquire approval by competent local governments to impose suspension of operation and shutdown. 2014 EPL, art. 60.

113. OECD, *supra* note 62, at 27.

114. For example, the maximum fine for violating Water Pollution Prevention and Control Law and Solid Waste Pollution Prevention and Control Law is only one million yuan (U.S. \$159,426). See Shui Wuran Fangzhi Fa (水污染防治法) [Water Pollution Prevention and Control Law] (promulgated by the Standing Comm. Nat'l People's Cong., May. 11, 1984, amended Feb. 28, 2008, effective Jun. 1, 2008), art. 75; 2016 SWPPCL, *supra* note 95, at arts. 78, 82.

115. See, e.g., Beyer, *supra* note 91, at 207 ("Fees and fines are rarely determined authoritatively; instead, they are often negotiated and fall far below the cost of damage that the harmful activity has caused, as well as below expenses for pollution control facilities.")

116. Michael W. Vella & Lillian He, *China Begins Enforcing Newly Amended Environmental Protection Law*, JONES DAY (Jan. 2016), http://www.jonesday.com/china-begins-enforcing-newly-amended-environmental-protection-law-01-21-2016/#_edn6.

117. See Zhangbei (张蓓), Shui Wuran Fangzhi Fa Xingui Yuandan Shixing Feishui Chaobiao Fa BaMao Deng Chaodi Fadan Cheng Lishi (水污染防治法新规元旦施行, 废水超标罚 8 毛等超低罚单成历史) [*New Water Pollution Prevention and Control Law Took Effect in New Year's Day, the 0.8 Yuan Penalty for Non-Compliance with Effluent Standards Will Become History*], 澎湃 (THE PAPER), (Jan. 4, 2018) https://www.thepaper.cn/newsDetail_forward_1935929.

operate pollution control facilities.¹¹⁸ Consequently, fines rarely function as a meaningful deterrence to noncompliance of environmental laws.

As an effort to raise the cost of violation, the 2014 EPL introduced a new daily fines system authorizing environmental protection agencies to assess extra fines that accumulate on a daily basis for certain illegal discharges until the enterprises rectify the violations.¹¹⁹ Nevertheless, the circumstances where daily penalties can be applied are limited¹²⁰ and the extent to which they can effectively deter environmental wrongdoing remains to be seen.¹²¹

In sum, adopting a citizen suit-style framework that allows private parties to directly enforce regulatory laws will face formidable barriers in China. Even if the political obstacles can be overcome, constructing EPIL based on the citizen suit model risks diminishing its role because of significant gaps in existing statutory framework. Chinese environmental laws suffer from lack of regulation on important issue areas and weak environmental standards, poor enforceability of legal requirements due to fragmented structure of environmental governance and vague and aspirational language, and limited deterrence of statutory penalties. These inherent weaknesses can impede diligent government enforcement and citizen suits alike because the citizen suit simply provides an alternative avenue for enforcing existing environmental requirements.

118. Sitaraman, *supra* note 91, at 312–13; Carpenter-Gold, *supra* note 20, at 257–58 (noting that the maximum fine that EPB can impose on the owner of a project for failure to go through the environmental impact assessment process is less than the cost of compliance by modifying the project).

119. Article 59 of the 2014 EPL provides that where an entity or business operator is fined for the illegal discharge of pollutants and is ordered, but refused to make rectification, the administrative department may impose a fine equivalent to the original amount on a daily basis, starting on the second day after service of the rectification order.

120. According to Article 5 of Huanjing Baohu Zhuguan Bumen Shishi An'ri Lianxu Chufa Banfa (环境保护主管部门实施按日连续处罚办法) [*Measures on Implementing Daily Penalties by Environmental Protection Departments*] (promulgated by the Ministry of Environmental Protection, Dec. 19, 2014, effective Jan. 1, 2015), daily penalties can be imposed when the polluter was fined for one of the following illegal conduct and refused to comply with the compliance order:

- (1) discharge of pollutants exceeding national or local pollutant discharge standards, or total discharge control quota of key pollutants;
- (2) discharge of pollutants in ways intended to escape supervision, such as through underground pipelines, seepage wells, and seepage pits, through tampering and falsifying monitoring data, or through improper operation of a pollution prevention facility;
- (3) discharge of prohibited pollutants;
- (4) illegal dumping of hazardous waste; and
- (5) other illegal discharge of pollutants. *Id.*

121. In 2016, environmental authorities imposed daily penalties in only 4.47 percent of all environmental violation cases. See Xin Huanbao Fa Sixiang Peitao Banfa Shishi Pinggu Baogao Chulu, Weifa Chufa Lidu Da Kongqi Zhiliang Gaishan Mingxian (新环保法四项配套办法实施评估报告出炉 违法处罚力度大空气质量改善明显) [*Evaluation Report on the Implementation of Four Implementing Measures of New Environmental Protection Law Released, Stringent Penalties Led to Improved Air Quality*], Fazhi Ribao (法制日报) [LEGAL DAILY], Apr. 19, 2017.

III. PUBLIC NUISANCE LAW AS A COMMON LAW REMEDY FOR HARM TO PUBLIC ENVIRONMENTAL INTEREST

By allowing private parties to enforce only specific violations of environmental laws, citizen suit-style EPIL will play a limited role due to the inherent limitations and gaps within China's existing legal framework. Would a tort-based framework provide a better alternative? Could EPIL grounded on tort principles play a more robust role in protecting the public interest than a citizen suit model? As Chinese scholars get stuck trying to reconcile the incongruity between traditional tort liability, characterized by its private nature, and EPIL, which is supposed to reflect the public interest, none have imagined what a reformed tort liability might look like.

This Article is the first to propose that public nuisance law can provide a path forward in conceptualizing the role of EPIL and reconciling EPIL with the tort discourse. Unlike traditional tort law that focuses on discrete and individualized injuries, public nuisance law provides a tort-based cause of action to address harm to the public interest including harm to the public interest in a clean environment. Recognizing the difficulties in adapting tort law to public injuries, U.S. scholars are less bothered by the unique characteristics of public nuisance law. While they may perceive it as an anomaly in tort law, U.S. scholars are more interested in exploiting public nuisance law's utility in practice. This Part explores the basic contours of public nuisance law with an emphasis on its gap-filling role in a modern era dominated by comprehensive environmental statutes, which sets the stage for the discussion of why public nuisance law serves as a better model than the citizen suit for constructing the emerging EPIL in Part IV.

A. Overview of Public Nuisance Doctrine

Nuisance law had traditionally been the primary common law cause of action to resolve environmental problems and has been described as “the common law backbone of modern environmental and energy law.”¹²² There are two types of nuisance causes of action—private nuisance and public nuisance. Private nuisance protects private individuals against nontrespassory invasion of their interests in the use and enjoyment of land,¹²³ while public nuisance provides redress for unreasonable interference with rights held in common by the public.¹²⁴

A public nuisance is defined as “an unreasonable interference with a right common to the general public.”¹²⁵ In determining what constitutes an “unreasonable interference” with a public right, the *Restatement (Second) of*

122. WILLIAM H. RODGERS, ENVIRONMENTAL LAW § 2.1, at 113 (2d ed. 1994).

123. RESTATEMENT (SECOND) OF TORTS § 821D (AM. LAW INST. 1979).

124. *Id.* § 821B(1).

125. *Id.*

Torts directs courts to consider whether the conduct: (1) involves a significant interference with the public health, safety, peace, comfort, or convenience; (2) is illegal; or (3) is of a continuing nature or has produced a long-lasting effect on the public right that the actor has reason to know will be significant.¹²⁶ A key element to a public nuisance claim is that the alleged injury or interference “must affect an interest common to the general public, rather than peculiar to one individual, or several.”¹²⁷ However, a public nuisance does not need to affect the entire community “so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right.”¹²⁸

Public nuisance actions are generally brought by the state and other governmental entities to protect the welfare of the public.¹²⁹ Private plaintiffs cannot recover for a public nuisance unless they have suffered special injury that is different in kind and not just degree from that suffered by other members of the public.¹³⁰ The “special injury rule” has long been criticized by commentators as unduly restrictive on private parties’ ability to bring worthy public nuisance cases.¹³¹ Influenced by the development of federal standing law and the private attorney general concept in the late 1960s and 1970s,¹³² the *Restatement (Second) of Torts* broadened private parties’ access to public nuisance law by incorporating liberal standing principles in equitable suits.¹³³ While some scholars are optimistic about the transformation that the proposed liberalization of the special injury rule would bring about,¹³⁴ others maintain that a more liberal standing doctrine has “utterly failed to penetrate the case law.”¹³⁵

Remedies available for public nuisance actions include injunctions and damages. Private parties may seek equitable relief when they satisfy relatively less strict standing requirements, and they can recover damages for the typical

126. *Id.* § 821B(2).

127. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 645 (5th ed. 1984).

128. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. LAW. INST. 1979).

129. W. PAGE KEETON ET AL., *supra* note 127, § 90, at 643.

130. RESTATEMENT (SECOND) OF TORTS § 821C(1) & cmt. b (AM. LAW INST. 1979).

131. For a list of literature criticizing the “special injury” rule, see Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 760–61 n.8 (2001).

132. *Id.* at 828–49 (tracing the story of how members of the American Law Institute had attempted to infuse newly developed federal standing law into the Restatement’s formulation of the special injury rule).

133. See RESTATEMENT (SECOND) OF TORTS § 821C(2) (AM. LAW INST. 1979) (stating that a plaintiff who did not suffer special injury could bring abatement actions if they acted “as a representative of the general public, as a citizen in a citizen’s action or as a member of a class in a class action.”).

134. See, e.g., David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 *ECOLOGY L.Q.* 883, 886 (1989) (“By recommending that parties without special injuries be allowed to seek equitable relief . . . the *Restatement (Second)* invited a fundamental change in the law of public nuisance. In the past decade courts have begun to accept this invitation.”). Professor Hodas then discussed cases where courts have embraced liberal standing requirements to allow equitable actions by private parties acting as common law private attorneys general, class representatives, and associations. See *id.* at 900–03.

135. Antolini, *supra* note 131, at 762.

types of loss recognized in tort laws as well as economic losses.¹³⁶ While injunctions have been the traditional remedy for public nuisance claims brought by public authorities, many courts have empowered public plaintiffs to seek monetary damages to compensate for past environmental harm. For example, in *State Ex Rel. Dresser Industries, Inc. v. Ruddy*, the Supreme Court of Missouri ordered the trial court to determine whether the state is entitled to a “rejuvenating compensation” to repair past injuries to the waterways, the fish and wildlife in the streams, and the aesthetic, recreational, and economic values caused by the rupture of a settling dam.¹³⁷ The court reasoned that parties who injured the public interest would escape liability if the state was limited to seeking injunctions and no private parties could prove a special injury.¹³⁸ In public nuisance actions brought by governmental entities, courts generally impose strict liability: the defendants are strictly liable for a public nuisance without plaintiffs needing to prove negligence, intentional conduct, or an ultrahazardous activity.¹³⁹

B. Public Nuisance Law as Gap-filler in an Age of Comprehensive Statutes

Prior to the advent of modern environmental legislation in the late 1960s and early 1970s, the common law, especially nuisance law, was the primary tool to resolve environmental problems in the United States.¹⁴⁰ However, the common law causes of action were increasingly inadequate for addressing the broader and more complex environmental problems in modern industrialized society.¹⁴¹ Dissatisfaction with common law remedies led to the adoption of the comprehensive environmental statutes in the 1960s and 1970s.¹⁴² The proliferation of comprehensive regulatory statutes seems to have diminished the role of public nuisance law. A series of U.S. Supreme Court rulings suggest that

136. See W. PAGE KEETON ET AL., *supra* note 127, § 90 at 647–50, for a discussion of recoverable injuries in public nuisance actions.

137. 592 S.W.2d 789, 793 (Mo. 1980).

138. *Id.* (“[A]bsent such recovery, those causing damage to a public interest suffer no penalty whatever if the ‘cause’ has been corrected and no private individual can show a ‘special’ damage; that abatement or injunctive relief in retrospect would be a moot issue and constitute no relief at all.”).

139. See Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after Boomer*, 54 ALB. L. REV. 359, 367–74 (1989) (discussing the application of strict liability in public nuisance cases).

140. ROBERT V. PERCIVAL, ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 63 (6th ed. 2009).

141. See, e.g., Martin H. Belsky, *Environmental Policy Law in the 1980's: Shifting Back the Burden of Proof*, 12 ECOLOGY L.Q. 1, 5–12 (1984) (exploring various obstacles that individuals would have to overcome to stop environmental damage under common law tort doctrines); Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 424–25 (1974) (describing two difficulties in dealing with industrial nuisances through private nuisance: first, courts are inefficient and insufficient to establish and enforce standards of allowable emission levels; second, it is extremely difficult for a plaintiff to trace the source of the offense in an industrialized society).

142. Belsky, *supra* note 141, at 14.

federal common law nuisance actions were largely preempted by the elaborate regulatory schemes.¹⁴³

Noting that the state common law of public nuisance is generally not preempted by either federal or state statutes, however, scholars have called attention to the “tremendous vitality of public nuisance in modern times because of its great flexibility and adaptability.”¹⁴⁴ As “environmental statutes are never likely to form a seamless web of environmental protection and . . . national political shifts can poke huge holes in the web,”¹⁴⁵ scholars argue that public nuisance law can play an important role in filling the “inevitable interstices of an ever expanding regulatory system” in a variety of ways.¹⁴⁶

Public nuisance law can be useful for addressing environmental hazards not controlled by legislation (e.g. noise, odors, vibrations, and aesthetic harm), combating pollutants not regulated by statutes,¹⁴⁷ or seeking stricter control in regions where the standards are too weak.¹⁴⁸ In addition, public nuisance law can provide a supplemental or alternative remedy “where the statutory avenues for redress are incomplete, weak, or under siege.”¹⁴⁹ For example, a major gap in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is that while both the federal and state governments may recover costs incurred in responding to a release or threatened release of a hazardous substance,¹⁵⁰ CERCLA does not allow states to seek cleanup of the site.¹⁵¹ As a result, states have relied upon state public nuisance law as an alternative basis for injunctive relief while initiating cost recovery suits in federal courts under CERCLA.¹⁵²

Not only can public nuisance law supplement or strengthen statutory remedies implemented by governments, public nuisance law can also provide an

143. See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 332 (1981) (holding that federal common law applicable to interstate water pollution, including the federal common law of nuisance, was preempted by the Clean Water Act); *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 22 (1981) (ruling that in areas of ocean pollution, Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972 preempt federal common law of nuisance).

144. Abrams & Washington, *supra* note 139, at 391.

145. Antolini, *supra* note 131, at 775.

146. James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RESOURCES & ENV’T 29, 29 (1990).

147. See John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241, 278–80 (1972).

148. Gwyn Goodson Timms, Note, *Statutorily Awarding Attorneys’ Fees in Environmental Nuisance Suits: Jump Starting the Public Watchdog*, 65 S.CAL. L. REV. 1733, 1743–45 (1991) (describing how a public nuisance cause of action can be used to fill various gaps left by the statutes including when parties wish to impose stricter standards than are found in existing regulations).

149. Antolini, *supra* note 131, at 759.

150. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a) (2012).

151. *Id.* § 9606(a) only authorizes the federal government to take judicial or administrative action to abate “an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance.”

152. See Abrams & Washington, *supra* note 139, at 395–97, for a discussion of this point and relevant case law.

alternative cause of action for private parties when statutory claims fail. For example, in *Concerned Citizens of Bridesburg v. City of Philadelphia*, the plaintiffs, consisting of a nonprofit organization and a group of about 130 individuals, sought to enjoin malodorous emissions from a sewage treatment plant, claiming the emissions violated federal and state laws.¹⁵³ While the court found no actionable claim under federal and state environmental statutes, it found that the malodors constituted an enjoined public nuisance under state common law.

C. *The Role of Environmental Statutes in Public Nuisance Actions*

Where an environmental concern is subject to government regulation, it is necessary to consider the effect of regulatory compliance and violation in a public nuisance claim. Compliance with applicable environmental statutes generally does not immunize an activity from public nuisance liability.¹⁵⁴ This is because environmental standards, which are the product of science and public policy and are established through resolution of competing values, are artificial and usually establish minimum standards of conduct.¹⁵⁵ Additionally, agencies might make mistakes in issuing permits to polluting corporations based on inaccurate or false information.

An example of the inadequacy of environmental regulation is seen in *Village of Wilsonville v. SCA Services, Inc.* where the court found a “dangerous probability” that alleged injury would occur due to the leaking of toxic substances and enjoined the operation of a hazardous waste landfill licensed by the state as a public nuisance.¹⁵⁶ Rejecting the defendant’s assertion that the lower courts failed to give weight to the permits issued by Illinois Environmental Protection Agency, the court pointed out that the technical data relied upon by the agency in deciding to issue a permit were collected by the defendant, and the data had been proved to be inaccurate at trial.¹⁵⁷ Similarly, courts on other occasions had no difficulty in holding that an activity authorized by a regulatory agency can constitute a public nuisance.¹⁵⁸

Although adhering to environmental regulations does not preclude a public nuisance claim, the opposite can be true: a violation of applicable statutes may support a public nuisance claim. Courts have recognized that an activity that violated relevant environmental statutes may constitute a nuisance per se under

153. 643 F. Supp. 713, 714–15 (E.D. Pa. 1986).

154. Hodas, *supra* note 134, at 905.

155. Mark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *FORDHAM L. REV.* 737, 758 (2011).

156. 86 Ill. 2d 1, 25 (Il. 1981).

157. *Id.* at 27.

158. See, e.g., Neal v. Darby, 282 S.C. 277, 318 (S.C. Ct. App. 1984) (finding the trial judge balanced the interests involved and gave insufficient weight to the state and federal permits held by the defendant company and upholding the trial court’s ruling that the landfill constitutes a public nuisance by virtue of its location).

certain circumstances.¹⁵⁹ Drawing on the negligence per se doctrine, scholars suggest that if a statute creates a specific standard of conduct for the defendant to protect a plaintiff's nuisance-type interest, and the defendant has injured or threatened to injure the protected interest by violating the standard, a nuisance per se may be found by the court.¹⁶⁰ For example, a violation of statutes that established effluent or emission limitations would constitute a public nuisance under the theory of nuisance per se.¹⁶¹ Of course, a plaintiff still has to prove injury and causation to establish liability.¹⁶² Yet the court need not consider the reasonableness of the defendant's conduct, because the statute has precluded "the weighing of the relative interests of the plaintiff and defendant"¹⁶³ and established "a conclusive presumption of unreasonableness."¹⁶⁴

Instead of being preempted by environmental statutes, the state common law of public nuisance still plays an important gap-filling role in the modern era. By allowing public and private plaintiffs to challenge almost anything that constitutes "an unreasonable interference" with a public right, public nuisance doctrine provides a powerful and flexible remedy where existing regulation or statutory remedy is insufficient to prevent or redress environmental harms.¹⁶⁵ Where public nuisance law operates in tandem with environmental laws, compliance with applicable environmental standards does not preclude public nuisance liability while violation of statutory requirements "simply provides additional grounds for proving the existence of public nuisances."¹⁶⁶

159. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051 (2d Cir. 1985) (holding that the Shore's continuing violations of state hazardous waste statutes constituted a nuisance per se); *Erickson v. Sorensen*, 877 P.2d 144 (Utah Ct. App. 1994) (suggesting that nuisance per se exists when the conduct creating the nuisance is also specifically prohibited by statute).

160. John Harleston & Kathleen M. Harleston, *The Suffolk Syndrome: A Case Study in Public Nuisance Law*, 40 S. C. L. REV. 379, 400-01 (1988).

161. *Id.* at 400; see also *Comet Delta, Inc. v. Pate Stevedoring Co. of Pascagoula*, 521 So. 2d 857, 860-61 (Miss. 1988) (implying that a violation of clean air standards would support a public nuisance suit).

162. Harleston & Harleston, *supra* note 160, at 401.

163. *Erickson*, 877 P.2d at 149.

164. Harleston & Harleston, *supra* note 160, at 401.

165. See, e.g., *id.* at 380 ("nuisance law survives today amid apparently comprehensive federal and state environmental regulations because of its nearly infinite flexibility and adaptability and its inherent capacity to fill gaps in statutory controls."); Sevinsky, *supra* note 146, at 29 (arguing that public nuisance liability is "inherently flexible and uniquely capable of application to abate pollution, clean up contaminated sites, and recover damages in an ever expanding variety of ways. As New Age environmental problems are identified and grappled with, public nuisance can be looked to as a remedy itself or as a supplement to statutory remedies."); Miles Tolbert, Comment, *The Public as Plaintiff: Public Nuisance and Federal Citizen Suits in the Exxon Valdez Litigation*, 14 HARV. ENVTL. L. REV. 511, 526-27 (1990) (noting that a "common law approach boasts more flexibility and may readily be adapted to all varieties of pollution.").

166. Harleston & Harleston, *supra* note 160, at 400.

IV. A PATH FORWARD: CONSTRUCTING PUBLIC NUISANCE-STYLE EPIL

Part II of this Article examined the benefits and limits of adopting citizen suit-like EPIL in China. Part III introduced public nuisance law as a model of an alternative tort-based cause of action for redressing environmental harm suffered by the public. As citizen suits and public nuisance law represent two different models to defend the public's environmental interests, this Part engages in an in-depth analysis of how these two models differ and which model can better inform our understanding of EPIL in China. This Part begins with an investigation of the distinctions, benefits, and limitations of citizen suits as compared to public nuisance actions. It then explains why and how public nuisance law offers a preferable path forward in conceptualizing the role and scope of the emerging EPIL.

A. *Distinctions Between Citizen Suits and Public Nuisance Actions*

Citizen suits and public nuisance law provide two causes of action to protect public interest as compared to private interest. As discussed in Part II, a citizen suit framework recognizes that citizens have an interest in protecting an intangible environmental interest. The use of citizen suits can benefit plaintiffs and the public by providing injunctive relief and deterring defendants from committing future violations.¹⁶⁷ The use of public nuisance law accomplishes the objective of protecting the public environmental interest in a different way: public nuisance law allows governmental authorities and private parties to seek remedies where pollution has interfered with rights held in common by the public.¹⁶⁸ Nevertheless, citizen suits and public nuisance law have different theoretical underpinnings, leading to different inquiries and outcomes when litigating under these two theories.

Citizen suits derive their theoretical validity from the violation of precautionary regulations that are suited to address systemic environmental harms and impose strict liability for noncompliance.¹⁶⁹ Therefore, the scope of citizen suits is limited to specific violations defined by the underlying statutes. In citizen enforcement actions, the operative issue is whether an environmental standard has been violated irrespective of whether the conduct has caused an actual injury.¹⁷⁰ Because one of the U.S. Congress's purposes in creating citizen

167. See David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79, 85 (2004); see also Thompson, *supra* note 13, at 198 ("Greater deterrence was no longer a collateral benefit but became the primary benefit [in citizen suits]. Plaintiffs would no longer be pursuing a private benefit but providing a public good.")

168. See *supra* Part III.

169. See Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENVTL. L. & POL'Y F. 119, 129 (2001).

170. It should be noted that the proof of "injury in fact" is for purposes of establishing standing. Once the court grants standing, the inquiry shifts to the merits of the case: whether the defendant violated regulatory requirements. The stringent standing requirement before *Laidlaw*, that is, plaintiffs should make detailed showings of individualized injury to establish standing has been attacked by scholars. See

suits was to provide an alternative mechanism of enforcement when government fails to enforce,¹⁷¹ the result of citizen enforcement is identical to government enforcement: injunctions that compel compliance and/or fines paid to the government.

Unlike citizen suits, public nuisance law derives its theoretical validity from tort law and the showing of environmental harm regardless of whether the conduct has been formally prescribed by statute. As an independently operating system, public nuisance law can not only provide a remedy for environmental harm caused by regulatory violations but also address harms occurred or left uncured due to limitations and gaps in existing regulatory schemes. The inquiry in public nuisance claims is whether substantial and unreasonable harm to a public right has been caused—an environmental standard may be factored into the determination of harm, but the existence of a regulation is not a determinative factor. Remedies available in public nuisance actions are also different from those in citizen suits: plaintiffs in public nuisance suits often seek abatement of environmental harms and/or damages, while citizen suit judgments result in injunctions and fines.¹⁷²

From the perspective of litigation strategy, citizen suits and public nuisance actions each have their own advantages and disadvantages. Citizen suits typically focus on the issue of compliance and minimize factual disputes and evidentiary issues, while public nuisance cases are more fact intensive and complex, requiring proof of injury and causation.¹⁷³ In the United States, liberal standing requirements and the opportunity to recover attorney's fees and costs make citizen suits more appealing to private plaintiffs, especially environmental groups who are willing to stand for the public interest but are restricted by scarce resources.¹⁷⁴

However, a major drawback to citizen suits is their rigidity: citizen suits are less flexible because they must be based on a specific area regulated by statutes,¹⁷⁵ and the violations need to take a form defined by particular statutory frameworks.¹⁷⁶ In contrast, public nuisance law “boasts more flexibility,” since public nuisance suits have “a more direct focus on the merits” rather than

e.g., id. at 148 (“Justice Scalia’s campaign to require more definitive demonstrations of *actual or imminent* harm as predicate for standing undermined the very purpose of environmental regulation—to require dischargers to adhere to standards designed to prevent harm before it occurs. Adopting standing rules that would preclude citizen suits until illegal discharges have resulted in actual or visible harm would be inconsistent with the purpose of citizen-suits provisions.”); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433 (1988) (“Under this [private-law model of standing], a nineteenth century private right is a predicate for judicial intervention; as a result, courts may not redress the systemic or probabilistic harms that Congress intended regulatory schemes to prevent.”).

171. See Miller, *supra* note 36.

172. For remedies in public nuisance actions, see *supra* notes 136–138 and accompanying text; for remedies in citizen suits, see *supra* notes 49–50 and accompanying text.

173. Antolini, *supra* note 131, at 883.

174. *Id.* at 882.

175. Timms, *supra* note 148, at 1747.

176. Tolbert, *supra* note 165, at 526.

“procedure or violations of permits or standards,”¹⁷⁷ and may be adapted to a variety of environmental challenges that regulatory schemes fail to address.¹⁷⁸ Furthermore, in public nuisance cases, courts may have “greater leeway in fashioning remedies for problems unanticipated by statutes,”¹⁷⁹ including damages, which are not recoverable in citizen suits. In short, where both public nuisance actions and citizen suits are available in the United States, plaintiffs can choose their cause of action in order to get the appropriate remedy.

B. Public Nuisance Law as a Useful Model for Conceptualizing EPIL

After critiquing the citizen suit model that has been reflexively accepted by scholars, introducing public nuisance law to untangle the struggles of the tort discourse, and illustrating the distinctions between citizen suits and public nuisance law, we can now put all these pieces together to evaluate which model may serve as an appropriate framework for understanding the role of EPIL. As discussed in Part II, EPIL operating like citizen suits would empower private parties to exercise concurrent law enforcement authority with administrative agencies, a radical proposal that will be difficult to implement in China. Moreover, citizen suit-style EPIL would only play a modest role in redressing environmental harms, due to inherent gaps in China’s existing statutory framework for environmental regulations. These gaps mean that citizen suit-style EPIL cannot provide redress for environmental harms that are not subject to programmatic regulation or incurable by diligent government enforcement.

Alternatively, a public nuisance-type doctrine could fill these gaps: if EPIL is conceptualized as a public nuisance-like system, it would allow courts to provide remedies for a wide range of environmental harms regardless of whether a statute or regulation even exists. In other words, public nuisance-style EPIL can not only cover harms caused by regulatory violations but also remediate harms when there is no effective regulation or government enforcement.

From the standpoint of positive law, current EPIL in China is far from the typical citizen suit model as seen in the United States. First, compared with U.S. citizen suit provisions which are written into environmental statutes and specify actionable violations under each statute, the provisions of 2012 CPL and 2014 EPL establishing EPIL simply stipulate that qualified plaintiffs may challenge “acts of polluting or damaging the environment that have harmed the public interest.”¹⁸⁰ Second, while EPIL explicitly authorized public authorities (e.g., administrative agencies and the procuratorate) to bring lawsuits on behalf of the public interest, administrative agencies are not considered proper plaintiffs in citizen suits because it is unreasonable for agencies to rely on citizen suits rather than its own more extensive statutory enforcement authority and the agency will

177. Antolini, *supra* note 131, at 774.

178. Tolbert, *supra* note 165, at 526.

179. *Id.* at 527.

180. *See supra* note 3.

also be disadvantaged by doing so.¹⁸¹ Finally, an important difference exists in remedies: plaintiffs may seek civil penalties in citizen enforcement actions whereas penalties are not available in EPIL according to the SPC's 2015 EPIL Interpretation.¹⁸²

By contrast, EPIL as articulated by current laws and a public nuisance framework share important characteristics in common: the amorphous and mutable nature of both EPIL and public nuisance law means that plaintiffs can challenge almost anything that constitutes a harm to the public interest. EPIL and public nuisance law are similar in other key institutional features as well. While the standing rules in EPIL and public nuisance law are different,¹⁸³ both EPIL and public nuisance law empower governmental authorities to bring lawsuits to protect public interest. The resemblance between EPIL and public nuisance law is also seen in their available remedies. In addition to injunctive relief, plaintiffs in these two types of litigation can seek damages, instead of statutory penalties, for past injuries suffered by the public.¹⁸⁴

If we are willing to accept a public nuisance framework as a path forward in reconciling the tort discourse and conceptualizing the role of EPIL, we may begin to think about how public nuisance law can help us shape this reformed liability. For example, there is little guidance about the nature of harm that EPIL intends to redress—what particular thing is harmed (people, the environment, or both)? What specific type of harm (economic, physical, aesthetic, etc.) is caused? Many scholars and the SPC's 2015 EPIL Interpretation seem to focus on the occurrence of (threatened) damage to the environment, or ecological damage, as the only situation where public interest is harmed.¹⁸⁵ However, as the 2012 CPL and 2014 EPL do not expressly limit EPIL to cases that result in ecological

181. Miller, *supra* note 36, at 10,314.

182. According to the SPC, plaintiffs in EPIL can seek tort law remedies including cessation of infringement, removal of obstacle, elimination of danger, restoration to the original status, damages, and apologies. See 2015 EPIL Interpretation, *supra* note 6, at arts. 19–21. Therefore, statutory penalty is not one of the available remedies in EPIL.

183. While public nuisance law distinguishes between private actions for a public nuisance and public actions for a public nuisance (*see supra* notes 129–131 and accompanying text), private parties (environmental groups) and public authorities (administrative agencies and the procuratorate) have statutorily conferred standing to bring actions for both injunctions and damages in EPIL suits (*see supra* note 3).

184. Private plaintiffs can only sue under public nuisance actions to recover damages for the actual injury they have suffered. They cannot seek damages for harm to the public interest (e.g., cleanup costs). However, as scholars commented, “there is little difference between a state attorney general suing for damages as trustee for the public interest and a class action or citizen suit. Thus, the concern . . . that polluters should not be permitted to avoid liability for contaminating natural resources on the basis of rigid adherence to [the special injury rule] developed in 1536, should guide courts when damages are sought by private groups as trustees for the public. Indeed, by permitting private citizens to help police public nuisances, the courts would ease the burden on overworked attorneys general.” Hodas, *supra* note 134, at 899–900. Considering that environmental groups and public authorities have equal statutory standing to seek both injunctions and damages, Chinese EPIL seems more accessible to environmental groups acting as the representative of the public interest.

185. See *supra* notes 27–32 and accompanying text.

damage,¹⁸⁶ it is unreasonable to limit the coverage of EPIL to ecological damage and exclude injury to public health, safety, and welfare caused by environmental problems, all of which fall within the scope of public nuisance law. In addition, because the laws do not provide guidance about what constitutes an actionable harm, the standards that are used in public nuisance suits for determining the “unreasonableness” of an interference,¹⁸⁷ with or without the aid of legislation,¹⁸⁸ can be useful for formulating relevant rules in EPIL. Similarly, public nuisance litigation has developed useful jurisprudence in deciding whether the interference has affected the public at large as opposed to particular individuals¹⁸⁹ and what type of remedies (i.e., injunctions or damages) are appropriate for different types of injury. This jurisprudence can provide guidance to work out the key elements in the establishment of liability and determination of remedies in EPIL.

V. EPIL IN ACTION: FILLING GAPS IN THE STATUTORY FRAMEWORK

Despite unanswered fundamental questions about the appropriate role and scope of EPIL in China, there is a growing body of lawsuits filed by qualified plaintiffs to test the boundaries of EPIL.¹⁹⁰ While the discussion in Part IV suggests that the conceptualization of EPIL as public nuisance law could become a powerful weapon to combat various environmental problems in China, we still need to test whether this framework fits with how EPIL suits have progressed in practice. This Part provides a preliminary examination of the recent litigation brought after the 2014 EPL took effect to explore how this new cause of action has been employed by practitioners. Analyses of these cases show that plaintiffs have successfully invoked EPIL to strengthen weak government enforcement, clean up or remediate the injured natural environment, and challenge development projects approved by the government. By closely examining these cases, this Part demonstrates that a public nuisance model, rather than citizen suit model, provides a more convincing justification for analyzing these lawsuits’ merits.

186. Because the 2012 CPL and 2014 EPL authorize public interest litigation against all “acts of polluting or damaging the environment that have harmed the public interest,” the application of EPIL should not be limited to ecological damage. *See supra* note 3.

187. *See supra* note 126 and accompanying text.

188. *See supra* Part III.C for a discussion of how compliance with and violation of applicable environmental statutes may affect the court’s determination of “unreasonable interference.”

189. *See supra* notes 127–128.

190. The official data provided by the SPC shows that courts at various levels have accepted 232 lawsuits brought by qualified plaintiffs as of June 2017. Between January 2015 and June 2016, courts accepted ninety-three cases filed by environmental groups and eleven by the procuratorate. The number of accepted lawsuits brought by environmental groups and the procuratorate was fifty-seven and seventy-one respectively during the period from July 2016 to June 2017. *See* Zuigao Renmin Fayuan (最高人民法院) [Supreme People’s Court], Zhongguo Huanjing Ziyuan Shenpan (中国环境资源审判) [WHITE PAPER ON CHINA’S ENVIRONMENTAL RESOURCE TRIAL] (2016); Zhongguo Huanjing Ziyuan Shenpan (中国环境资源审判) [WHITE PAPER ON CHINA’S ENVIRONMENTAL RESOURCE TRIAL] (2017).

A. Complementing Limited Deterrence of Government Enforcement

Many cases brought under the young EPIL framework involved violations of applicable environmental requirements by defendants. In *All China Environmental Federation v. Jinghua Group Zhenhua Co., Ltd.* (*Zhenhua case*),¹⁹¹ the first air pollution case brought after the 2014 EPL took effect, the plaintiff alleged that the defendant caused serious air pollution by emitting air pollutants (including sulfur dioxide, nitrogen oxide, and fine particulate matter) repeatedly in excess of applicable emission standards.¹⁹² Before the suit was filed, the local EPB had taken multiple enforcement actions against the defendant and fined the company 200,000 yuan (about U.S. \$31,000).¹⁹³ However, the penalty was not a sufficient deterrent to the defendant, who refused to come into compliance. The defendant's intransigence led the plaintiff, an environmental group, to try a different approach: the plaintiff brought an EPIL suit to abate the illegal emissions and recover damages for the injury to the air. Because the defendant had shut down the plant by the time the court decided the case, an injunction was unnecessary, and the court awarded 21,983,600 yuan (approximately U.S. \$3.4 million) in damages which was put into a special account to fund projects for local air quality improvement.¹⁹⁴

In theory, the *Zhenhua* case, as well as many other cases alleging enterprises' violation of effluent/emission limitations,¹⁹⁵ may support both a citizen suit and a public nuisance claim; the determination is a matter of evidence and choice of litigation strategy.¹⁹⁶ In fact, the presence of regulatory violations in these cases might have led to scholars' hasty conclusion that EPIL is a type of citizen suit, and that because the purpose of citizen suits is to spur or supplement government enforcement, the lack of prelitigation notice and bar mechanism will

191. *Zhonghua Huanbao Lianhehui Su Dezhou Jinghua Jituan Zhenhua Youxian Gongsi Daqi Huanjing Wuran Zeren Jiufen An* (中华环保联合会诉德州晶华集团振华有限公司大气环境污染责任纠纷案) [*All China Env'tl. Fed'n v. Jinghua Group Zhenhua Co., Ltd.*], Dezhou Intermediate People's Ct., July 18, 2016, First Instance No. 1 (2015) (Beida Fabao 北大法宝) [pkulaw.cn] [hereinafter *Zhenhua* First Instance Judgment].

192. *Id.*

193. *Id.*

194. *Id.*

195. See, e.g., *Guiyang Gongzhong Huanjing Jiaoyu Zhongxin Su Guizhou Kaiyang Qingli Tianmeng Huagong Youxian Gongsi Wuran Shuiti, Daqi An* (贵阳公众环境教育中心诉 贵州开阳青利天盟化工有限公司污染水体、大气案) [*Guiyang Pub. Env'tl. Educ. Ctr. v. Guizhou Kaiyang Qingli Tianmeng Chemical Co., Ltd.*] (air and water pollution); *Zhongguo Shengwu Duoyangxing Baohu Yu Lvse Fazhan Jijin Hui Su Hebei Daguangming Shiye Jituan Jiajing Boli Youxian Gongsi Daqi Wuran An* (中国生物多样性保护与绿色发展基金会 诉河北大光明实业集团嘉晶玻璃有限公司污染环境案) [*China Biodiversity Conservation and Green Dev. Found. v. Hebei Daguangming Group Jiajing Glass Co., Ltd.*] (air pollution). These two cases are recorded in a research report which compiles forty-four EPIL cases brought by environmental groups in 2015. See *Huanjing Gongyi Susong Guancha Baogao* (环境公益诉讼观察报告) [REVIEW OF PUBLIC INTEREST LITIGATION IN ENVIRONMENT PROTECTION], (Li Dun (李楯) ed., 2016).

196. See *supra* notes 173–179 for a discussion of respective advantages and limitations of public nuisance actions and citizen suits.

inappropriately interfere with administrative agencies.¹⁹⁷ Interestingly, the plaintiff in the *Zhenhua* case also made a claim for statutory daily fines alongside ecological damages,¹⁹⁸ which was rejected by the court on the grounds that the daily fine is an administrative penalty rather than a form of remedies provided by the 2015 EPIL Interpretation.¹⁹⁹

In addition to the court's proposition that administrative remedies should be distinguished from remedies in EPIL, the citizen suit discourse is weakened by the important fact that administrative agencies have imposed penalties on polluters' violation in the *Zhenhua* case and many other similar cases.²⁰⁰ If EPIL is conceptualized as citizen suits, citizen enforcement suits would be barred even though government enforcement actions turned out to be unsuccessful to bring the recalcitrant polluters into compliance. Even in situations where an agency has failed to enforce the law, the prospect of relying on citizen enforcement actions to supplement government enforcement in China is less promising because as discussed above, the penalties under environmental laws are too low to effectively bring violations into compliance.

Due to the limitations in the citizen suit model, an alternative framework for EPIL is needed. Only when EPIL functions as a tort-based system can it provide a vehicle for plaintiffs to seek abatement of environmental harm that was allowed to continue owing to ineffective government enforcement. Currently, the 2012 CPL, the 2014 EPL, and the 2015 EPIL Interpretation do not provide guidance for the courts to determine when an act has harmed the public interest.²⁰¹ In many lawsuits, plaintiffs generally focused on the proof of a defendant's violation of relevant environmental requirements but made little efforts to show the injury and causation.²⁰² Courts also appeared to accept that the repeated or continuous violation of discharge limitations automatically

197. See *supra* notes 21–23 and accompanying text.

198. The plaintiff required the defendant to pay 7,800,000 yuan in penalties calculated on a daily basis for refusing to comply with emission standards after the EPB imposed sanctions. *Zhenhua* First Instance Judgment, *supra* note 191.

199. *Id.*

200. For similar cases involving violation of discharge limitations, see *supra* note 195.

201. The 2012 CPL and 2014 EPL simply provide that plaintiffs can bring suits against “acts of polluting or damaging the environment that have harmed the public interest.” See *supra* note 3. In implementing EPIL, the 2015 EPIL Interpretation provides that lawsuits can be initiated against “acts of polluting or damaging the environment that have harmed the public interest or pose a significant risk of harming the public interest.” 2015 EPIL Interpretation, *supra* note 6, at art. 1. However, the 2015 EPIL Interpretation does not provide any guidance on how to determine when acts of polluting or damaging the environment have harmed or pose a significant risk of harming the public interest.

202. The complaints of plaintiffs are generally not available due to poor judicial transparency in China. For example, the judgment of the *Zhenhua* case simply mentioned that the plaintiffs alleged that the defendant's illegal emissions “have caused serious air pollution and significantly affected the daily life of nearby residents.” See *Zhenhua* First Instance Judgment, *supra* note 191. It is not clear whether the plaintiff has provided sufficient evidence for the relevant injuries caused by the defendant's illegal emissions. However, my communications with environmental groups confirm that plaintiffs focus more on proving the continuous and repeated violations by defendants.

constituted harm to the public interest.²⁰³ To some extent, the courts' treatment of regulatory violations plays a similar role in easing the plaintiffs' burden of proof as the nuisance per se doctrine does in public nuisance suits.²⁰⁴

A public nuisance-like framework may not only allow the lawsuits to proceed even though the administrative agencies have taken enforcement actions, but can also complement limited deterrence of government enforcement by allowing courts to award considerable damages. The 2015 EPIL Interpretation provides that when it is difficult or costly to determine the actual damages for ecological injury, the amounts that the defendants would have spent on pollution control to achieve compliance can be used as a proxy for ecological damages.²⁰⁵ Relying upon this provision, courts have supported plaintiffs' requests for damages, sometimes in substantial amounts, in many illegal discharge cases.²⁰⁶ Damages calculated by this convenient virtual treatment cost method serve as a stronger deterrence for polluters than low statutory penalties. However, while an injunction is an appropriate remedy in public interest cases, the award of damages raises the issue of equity where it is difficult to define the affected area, quantify the injury directly caused by the defendant's discharge, and actually restore the injured environment (e.g., air pollution cases).²⁰⁷

B. Seeking Ecological Damages Unrecoverable Under Existing Law

As mentioned in Part I.B., existing environmental laws do not provide a remedy for past ecological damage caused by pollution. As a result, establishing a public interest litigation system based on tort law has been proposed by scholars as a possible solution for the remediation of ecological damage.²⁰⁸ Because of

203. See *id.*

204. See *supra* notes 159–164 and accompanying text for a discussion of nuisance per se doctrine.

205. See 2015 EPIL Interpretation, *supra* note 6, at art. 23. According to Article 23 of the 2015 EPIL Interpretation, where it is difficult or costly to determine the amount of damages for ecological injury, courts have discretion to assess restoration costs by taking into consideration opinions of relevant administrative agencies and experts, as well as the following factors:

- (1) Scope and extent of environmental pollution and destruction;
- (2) Scarcity of the ecological resources;
- (3) Difficulty of restoration;
- (4) Costs of operating pollution control facilities;
- (5) Economic benefits gained by the defendant;
- (6) Fault on the defendant. *Id.*

In practice, plaintiffs have frequently relied upon Article 23(4) to claim damages calculated by the “virtual cost of pollution treatment,” a method provided in Huanjing Sunhai Jianding Pinggu Tuijian Fangfa (II) (环境损害鉴定评估推荐方法(第 II 版)) [Recommended Methods of Assessing Environmental Damage (II)] (promulgated by the Ministry of Environmental Protection, Oct, 2014).

206. For example, the damages of 21,983,600 yuan (approximately U.S. \$ 3.4 million) in the *Zhenhua* case was calculated by the “virtual cost of pollution treatment” method. See *Zhenhua* First Instance Judgment, *supra* note 191.

207. In the *Zhenhua* case, one defense raised by the defendant was that it was difficult to prove the causation between the defendant's emission and air pollution. See *Zhenhua* First Instance Judgment, *supra* note 191.

208. See *supra* notes 27–29 and accompanying text.

this tort root, the 2015 EPIL Interpretation was designed to specially address ecological damage by expanding tort remedies. Following the initiative of the 2015 EPIL Interpretation, plaintiffs have brought lawsuits to pursue compensation for damage to the environment caused by pollution and other events.

As the first case heard after the 2014 EPIL took effect, *Friends of Nature et al. v. Xie Zhijin et al.* filed at the Nanping Intermediate People's Court in Fujian Province (*Nanping* case) was famous for the broad scope of ecological damages awarded.²⁰⁹ In this case, two environmental groups alleged that the four individual defendants had engaged in mining activities without obtaining relevant permits, causing extensive damage to the area's vegetation and ecological system.²¹⁰ The plaintiffs filed the suit to seek restoration of the destroyed land and compensation for the loss of interim "ecological services."²¹¹ The court held that the defendants' illegal mining operations had caused ecological destruction and constituted harm to the public interest.²¹² Ruling in favor of the plaintiffs, the court ordered the defendants to restore the site by replanting trees, or pay 1.1 million yuan (about U.S. \$180,000) for site remediation if they failed to perform the restoration.²¹³ The court also ordered the defendants to pay 1.27 million yuan (about U.S. \$200,000) for ecological interim losses during recovery.²¹⁴ On appeal, the ruling of the trial court was upheld by both the higher People's Court of Fujian Province²¹⁵ and the Supreme Court.²¹⁶ Because the *Nanping* case is the first case where plaintiffs requested damages for ecological injuries, its ruling is seen as an important victory for environmental groups.

Another case that resulted in significant damages for ecological injury is the landmark *Taizhou Environmental Protection Association of Jiangsu Province v. Taixing Jinhui Chemical Company, et al.* (*Taizhou* case).²¹⁷ In this case, six

209. Beijing Shi Chaoyang Qu Ziran Zhiyou Huanjing Yanjiu Suo Deng Su Xie Zhijin Deng Qinquan Zeren Jiufen An (北京市朝阳区自然之友环境研究所等诉谢知锦等侵权责任纠纷案) [*Friends of Nature et al. v. Xie Zhijin et al.*], Nanping Intermediate People's Ct., Oct. 29, 2015, First Instance No. 38 (2015) (Beida Fabao 北大法宝) [pkulaw.cn] [hereinafter *Nanping* case].

210. The facts of this case are drawn from two scholars' work that provides a detailed analysis of the *Nanping* case. Yanmei Lin & Jack Tuholske, *Field Notes From the Far East: China's New Public Interest Environmental Protection Law in Action*, 45 ENVTL. L. REP. 10,855, 10,856 (2015).

211. *Id.*

212. Yanmei Lin & Jack Tuholske, *Green NGOs Win China's First Environmental Public Interest Litigation: The Nanping Case*, 45 ENVTL. L. REP. 11,102, 11,102 (2015).

213. *Id.*

214. *Id.*

215. See Higher People's Court of Fujian Province, Dec. 14, 2015, Second Instance No. 2060 (2015) (Beida Fabao 北大法宝) [pkulaw.cn].

216. See Supreme People's Court, Jan. 26, 2017, Retrial No. 1919 (2016) (Beida Fabao 北大法宝) [pkulaw.cn].

217. Jiangsu Sheng Taizhou Shi Huanbao Lianhehui Su Taixing Jinhui Huagong Youxian Gongsi Deng Shui Wuran Minshi Gongyi Susong An (江苏省泰州市环保联合会诉泰兴锦汇化工有限公司等水污染民事公益诉讼案) [*Taizhou* Env'tl. Prot. Ass'n of Jiangsu Province v. Taixing Jinhui

companies were accused of causing severe ecological damage to the Yangtze River Basin by illegally dumping thousands of tons of chemical waste (hydrochloric acid by-product) into two rivers in the Taizhou area.²¹⁸ The court of first hearing found the defendants liable for the environmental damage resulting from their illegal disposal of acid waste and awarded plaintiffs 160,666,745 yuan (about U.S. \$26 million) in restoration costs,²¹⁹ making this case famous for the “sky-high” award of damages.²²⁰ This case was also appealed to the Supreme Court, which upheld the lower courts’ rulings.²²¹

In addition to the *Nanping* case and *Taizhou* case, public and private plaintiffs have brought numerous lawsuits to secure the cleanup of toxic dump,²²² contaminated soil,²²³ and polluted water bodies.²²⁴ It should be noted that plaintiffs did not bring these lawsuits to enforce existing regulatory requirements that agencies failed to enforce. Instead, the fundamental purpose of these lawsuits, which practitioners may not have realized, is to provide remediation for the injured environment caused by illegal conduct when a statutory remedy is not yet available. For example, while the defendants’ illegal mining activities in the *Nanping* case are subject to administrative penalties, both the Forestry Law and its implementing regulations do not expressly provide

Chemical Co., Ltd. et al.], Higher People’s Ct. of Jiangsu Prov., Dec. 29, 2014, Second Instance No. 00001 (2014) (Beida Fabao 北大法宝) [pkulaw.cn].

218. *Id.*

219. *Id.*

220. See Bie Tao (别涛) Huanjing Gongyi Susong An de Chenggong Tansuo—Taizhou “Tianjia Huanjing Gongyi Susong An” Shimo Ji Pingxi (环境公益诉讼案的成功探索—泰州“天价环境公益诉讼案”始末及评析) [Successful Experience of Environmental Public Interest Litigation—Analysis on the Taizhou “Sky High Award” Case], Zhongguo Huanjing Bao (中国环境报) [CHINA ENVIRONMENTAL NEWS], Jan. 14, 2015.

221. See Supreme People’s Court, Jan. 31, 2016, Retrial No. 1366 (2015) (Beida Fabao 北大法宝) [pkulaw.cn].

222. See Carpenter-Gold, *supra* note 20, at 262–63 (discussing cases involving site contamination due to illegal dumping of toxic chromium slag).

223. See, e.g., Zhongguo Shengwu Duoyangxing Baohu Yu Lvse Fazhan Jijinhui Su Ningxia Ruitai Keji Gufen Youxian Gongsi Deng Tenggeli Shamo Wuran Xilie Minshi Gongyi Susong An (中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司等腾格里沙漠污染系列民事公益诉讼案) [China Biodiversity Conservation and Green Dev. Found. v. Ningxia Ruitai Tech. Co., Ltd. et al. and a Series of Civil Public Interest Cases related to Tengger Desert Pollution] (desert pollution resulted from illegal discharge of waste water); Zhonghua Huanbao Lianhehui Su Jiangsu Jiangyin Changjing Liangping Shengzhu Zhuanye Hezuoshe Deng Yangzhi Wuran Minshi Gongyi Susong An (中华环保联合会诉江苏江阴长泾梁平生猪专业合作社等养殖污染民事公益诉讼案) [All China Env’tl. Fed. v. Jiangsu Jiangyin Changjing Liangping Pig Prof’l Coop.] (water and soil pollution caused by concentrated animal feed operation). These two cases are among the ten model EPIL cases released by the SPC in 2017. See Zuigao Renmin Fayuan Fabu Huanjing Gongyi Susong Dianxing Anli (最高人民法院发布环境公益诉讼典型案例) [The Supreme People’s Court Released Model Environmental Public Interest Litigation], Xinhua Wang (新华网) [XINHUA], Mar. 7, 2017, http://news.xinhuanet.com/legal/2017-03/07/c_129503217.htm.

224. See, e.g., Jiangsu Sheng Xuzhou Shi Renmin Jianchayuan Su Xuzhou Shi Hongshun Zaozhi Youxian Gongsi Shui Wuran Minshi Gongyi Susong An (江苏省徐州市人民检察院诉徐州市鸿顺造纸有限公司水污染民事公益诉讼案) [Xuzhou People’s Procuratorate of Jiangsu Province v. Xuzhou Hongshun Paper Co., Ltd.] (river pollution caused by discharge of pollutants exceeding permissible concentration). See *id.*

liability for the forest land damage resulting from defendants' violation.²²⁵ Similarly, in the *Taizhou* case, the Water Pollution Prevention and Control Law does not clearly deal with liability for ecological damage caused by defendants' illegal discharge of hydrochloric acid by-product.²²⁶ In these cases, EPIL provides a useful tool for plaintiffs to seek recovery of the injured environment where statutory remedy is not available or incomplete.

In fact, before the adoption of statutes specifically dealing with the disposal of hazardous waste and the remediation of old hazardous waste sites in the late 1970s and early 1980s, public nuisance law frequently offered the only means for public authorities to seek the cleanup of toxic wastes.²²⁷ Even when the cleanup and restoration of hazardous waste sites has been covered by comprehensive legislation (i.e., CERCLA), public nuisance law continues to be utilized to fill the gaps in the statutory scheme.²²⁸ Likewise, EPIL provides a viable tool to secure the cleanup and restoration of the injured environment while China's legislature is working toward the enactment of new laws to address this area of environmental concern.²²⁹ Even with specific statutes in place in the future, EPIL based on a public nuisance framework still has the potential to fill inevitable gaps in legislation due to its sweeping scope and flexibility.²³⁰

225. The Forestry Law requires that a forest land use approval document be obtained from competent forestry authorities if prospecting, mining, and various construction projects need to occupy woodlands. See Senlin Fa (森林法) [Forestry Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 20, 1984, effective Jan. 1, 1985, amended Aug. 27, 2009), art. 18, 1984 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. In the *Nanping* case, *supra* note 209, the defendants violated the Forestry Law by conducting mining projects without obtaining the approval for the use of forest land. According to the implementing regulations of the Forestry Law, competent forestry authorities can impose administrative fines for defendants' unpermitted change in the use of forest land. While agencies can also order the violator to "restore the forest land to its original status," it is not clear whether and how this tool has been applied by agencies in practice. Senlin Fa Shishi Tiaoli (森林法实施条例) [Regulations on the Implementation of the Forestry Law] (promulgated by the State Council, Jan. 29, 2000, effective Jan. 29, 2000, amended Mar. 19, 2018), art. 43, 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

226. The Water Pollution Prevention and Control Law authorizes environmental protection agencies to impose fines and/or issue cleanup order where any oil, acid, or alkaline solution as well as highly toxic waste liquid is discharged into any water body. See 2017 WPPCL, *supra* note 88, at art. 85. Again, the content and objective of the cleanup order are not clear and there is little guidance on the circumstances where the cleanup order can be issued.

227. Abrams & Washington, *supra* note 139, at 392. For a description of how New York State, in which the famous dumpsite Love Canal is located, was at the forefront in relying on public nuisance theory to compel remediation of hazardous waste sites in the 1980s, see *id.* at 392–93; Sevinsky, *supra* note 146, at 31.

228. See *supra* notes 150–152 and accompanying text for an analysis of the gap in CERCLA.

229. The Chinese government has recently taken steps to address the remediation of ecological damage. For example, a reform plan issued in December 2015 empowered provincial governments in pilot regions to claim compensation for ecological damage under certain circumstances. Shengtai Sunhai Peichang Zhidu Gaige Shidian Fang'an (生态环境损害赔偿制度改革试点方案) [Pilot Reform Plan on the Ecological Damage Compensation System] (promulgated by St. Council, Dec. 3, 2015), http://www.gov.cn/zhengce/2015-12/03/content_5019585.htm (last visited Nov. 1, 2018).

230. Even if a statute provides a remedy for ecological damage, it is usually only applicable in particular situations that serve the purpose of the statute. For example, natural resource damages under CERCLA are only available when there has been a release of hazardous substances into the environment and are limited to resources "belonging to, managed by, held in trust by, appertaining to, or otherwise

C. Challenging “Lawful Projects” Threatening Harm to the Public Interest

While the cases discussed in previous sections are concerned with either the continuous violation of regulatory requirements or the ecological injury caused by illegal conduct, the target of a recent EPIL lawsuit was a hydropower project that has been approved by the government. Alleging that the dam would destroy the critical habitat of an endangered green peacock (*Pavo muticus*), which was listed as a Grade One National Key Protected Species in China, an environmental group, *Friends of Nature*, brought a suit to enjoin construction of the dam.²³¹ The plaintiff questioned the validity of the environmental impact statement for the project, alleging that the statement had failed to consider that the dam would flood monsoon forest inhabited by the green peacock and several other species.²³² Before the plaintiff had filed this case, another environmental group also filed a suit requesting that a hydropower company take appropriate measures to ensure that the development of hydropower projects would not destroy the habitat of an endangered plant, the *acer pentaphyllum*.²³³

These two pending cases would not be possible if EPIL is conceived as a citizen suit model. Because the purpose of citizen suits is to rectify noncompliance with statutory requirements, neither government agencies nor environmental groups can take enforcement action against a legal project. However, by exploiting the broad frame of EPIL, plaintiffs were able to bring the companies to courts in spite of the fact that the projects had been licensed by government agencies and were otherwise legal.

If citizen suits cannot provide an appropriate avenue in these two cases, do they have additional tools to advance their agenda? In fact, had environmental plaintiffs in China, like their U.S. counterparts, had access to courts to challenge actions of administrative agencies,²³⁴ they would be able to seek judicial review of the agencies’ approval of specific projects. For example, in the United States, the National Environmental Policy Act (NEPA) requires all federal agencies to prepare an environmental impact statement on major federal actions significantly affecting the quality of the human environment.²³⁵ With the liberalized standing doctrine, citizens and environmental organizations in the United States have

controlled by” federal, state, or tribal governments. Unlike statutes, the scope of EPIL is very broad—it can cover ecological damage caused not only by pollution but also by physical means and the injury does not need to occur within a specific boundary. See *Nanping* case, *supra* note 209, where the defendants were held liable for damaging forestry due to illegal mining operations.

231. See Zhou Tailai et al., *Protect Green Peacocks From Dam, Environmentalists Urge Court*, CAIXIN (Aug. 15, 2017), <http://www.caixinglobal.com/2017-08-15/101130883.html>.

232. See *id.*

233. See Li Lin (李林), *Zhongguo “Lvfaui” Tiqu Shouli Baohu Binwei Zhiwu Gongyi Susong (中国“绿发会”提起首例保护濒危植物公益诉讼)* [*China Biodiversity Conservation and Green Development Foundation Initiated the First Public Interest Litigation to Safeguard the Endangered Plant*], *Zhongguo Qingnian Bao (中国青年报)* [CHINA YOUTH DAILY], Sept. 18, 2015.

234. The new Administrative Procedure Law does not authorize citizens and organizations to challenge agency action in the public interest. See *supra* note 1.

235. See National Environmental Policy Act, 42 U.S.C. § 4332(C) (2012).

routinely brought actions under the Administrative Procedure Act to halt projects where the environmental impact statements prepared by agencies were inadequate.²³⁶

While NEPA provides an important avenue for environmental plaintiffs to challenge questionable projects, NEPA does have some drawbacks. As noted by scholars, the victory in NEPA litigation “is often likely to be only a temporary one” because over time agencies will “become more adept at preparing invulnerable statements” that satisfy the statutory requirements.²³⁷ Eventually, NEPA is unlikely to allow environmental plaintiffs to “go beyond the procedural requirements of the impact statement to challenge the merits of the contested actions.”²³⁸ The limitations of NEPA litigation can be overcome by public nuisance actions. Rather than attacking procedure or “technical violations,” a public nuisance action “focuses squarely on the merits and is brought directly against the source, not the government.”²³⁹ As a result, public nuisance law provides plaintiffs with more leverage for challenging agencies’ substantive decisions.

It is desirable for China to move toward lifting the restriction on standing to pursue judicial review of agency actions. However, even if plaintiffs could seek judicial review in these two dam cases, it would be difficult for them to challenge the merits of the projects. Instead, by “direct[ing] [litigation] at the polluter himself rather than at the government which licenses, leases, sells to, or otherwise enables the environmental degradation,”²⁴⁰ litigation under a public nuisance-like framework would provide a legitimate opportunity to second guess the agency’s authority.²⁴¹ In conclusion, a public nuisance-style EPIL would have unique advantages over citizen suits and judicial review when an activity is fully in compliance with environmental laws.

CONCLUSION

Chinese EPIL has attracted widespread attention in recent years. By simply allowing public authorities and environmental groups to bring a suit against “acts of polluting or damaging the environment that have harmed the public interest,” the 2012 CPL and 2014 EPL created an amorphous and ambiguous liability regime. There have been two alternative discourses on EPIL among scholars. Western observers conveniently view EPIL as something equivalent to the citizen suit that is familiar to them. They are less patient in understanding the essence of this emerging framework but more interested in drawing some

236. See, e.g., *Dubois v. U.S. Dep’t of Agric., et al.*, 102 F.3d 1273, 1301 (1st Cir. 1996) (holding that the Forest Service violated NEPA in issuing a permit for the expanded ski resort because it failed to consider and evaluate the relative merits of reasonable alternatives in the environmental impact statement).

237. Bryson & Macbeth, *supra* note 147, at 277.

238. *Id.*

239. Antolini, *supra* note 131, at 884.

240. Bryson & Macbeth, *supra* note 147, at 278.

241. Abrams & Washington, *supra* note 139, at 397.

profound implications from the establishment of EPIL and expressing their cautious optimism about the future of EPIL. For Chinese scholars, the influence of the citizen suit induced some to examine this newly created EPIL from a citizen suit perspective, while the ingrained tort law tradition led others to conceive EPIL, more or less uncomfortably, as an expanded tort liability. Unfortunately, few scholars have realized the differences between these two discourses on EPIL, let alone which model is better. For practitioners, this ambiguity leads to confusion regarding what kind of acts they can challenge and what sort of relief they can seek. In China, practitioners are testing the boundaries of the new liability regime of EPIL but doing so without knowing its core, putting them at a distinct disadvantage.

By evaluating the two discourses on EPIL, this Article provides the first in-depth exploration of the fundamental theoretical justification of the emerging EPIL. After examining the benefits and limits of viewing EPIL as a type of citizen suit and introducing public nuisance law as a path forward in reconciling the tort discourse, this Article argues that EPIL should be embraced as a public nuisance-style framework that could provide a broad and flexible remedy when weak environmental regulation or enforcement is shown to be inadequate to protect the public from harm.

Admittedly, by allowing private parties to initiate enforcement actions, EPIL modeled on the citizen suit may cure government enforcement failure due to political pressure, resource shortages, and capture-like risk. However, it will be politically challenging to import the dual enforcement mechanism in China. In addition, as citizen suits can only tackle specific violations defined by statutes, the role of citizen suit-like EPIL will be moderate because of significant gaps and limitations in existing environmental laws.

Instead of simply functioning as an alternative to government enforcement, public nuisance law serves as a complement to existing environmental laws by requiring only the showing of environmental harm. Therefore, EPIL operating like public nuisance law may encompass a wide range of harms especially when there is a lack of effective regulation or government enforcement. The persuasiveness of public nuisance law as a useful model for conceptualizing the role of EPIL is also strengthened by similarities between current EPIL and public nuisance law: Chinese EPIL is of an amorphous nature, encompasses public authorities as plaintiffs, and provides more flexible remedies, all hallmarks of public nuisance doctrine. Finally, by examining the landmark cases that have been brought to date, this Article finds that EPIL has been utilized as a broad tool to fill the myriad gaps in existing environmental laws in a variety of ways. In other words, litigation in practice has largely honored the theorized purpose of a public nuisance-like regime whereas using a citizen suit model alone to explain EPIL fails to justify many of the recent lawsuits.

Having argued that a public nuisance model can better inform our understanding and reform of the emerging EPIL, it is necessary to point out that the differences between citizen suits and public nuisance actions might not be as

vast as previously thought. Fundamentally, both citizen suits and public nuisance actions are intended to tackle diffuse environmental harms by inviting intervention by public-spirited citizens and governmental authorities as representatives of the public interest. Due to public nuisance actions' and citizen suits' different relationships with existing environmental laws, the choice of a citizen-suit framework versus a public nuisance framework varies with the development of environmental laws. The prominence of citizen suits and the modern use of public nuisance law as gap-filler in the United States illustrate how a mature legal system has captured the full breadth of broad-based environmental harms, still leaving room to reform the "special injury" rule with public nuisance actions. Therefore, while this Article argues that current EPIL should be embraced as an independent tool to vindicate public environmental interest, in the future it is advisable for China to enact separate citizen suit provisions under individual environmental statutes which are becoming increasingly comprehensive and powerful.

We welcome responses to this Article. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.