

# **Environmental Public Interest Litigation and the Vitality of Environmental Courts:**

## *the development and future of environmental courts in China*

Gao Jie

Staff Attorney, Natural Resources Defense Council (NRDC) China Program

Environmental public interest litigation (EPIL)<sup>1</sup> has been sought after in China for many years. However, even after the “State Council Decision on Implementing a Scientific Development Outlook and Strengthening Environmental Protection” specifically mentioned the “promot[ion of] environmental public interest litigation” in 2005,<sup>2</sup> the development of environmental public interest litigation had still never advanced beyond desire and debate. This situation fundamentally changed on December 27, 2007, when the Environmental Court of Qingzhen, a county-level city under the jurisdiction of the provincial capital, Guiyang, Guizhou Province, publicly rendered its judgment on the Tianfeng Chemical Factory case.<sup>3</sup> Environmental public interest litigation has only become relatively operational since then. But the Qingzhen Environmental Court, along with ten other environmental courts in Guizhou Province, Jiangsu Province, and Yunnan Province, has now become an important focus of attention in environmental public interest, as these courts provide an important judicial forum. How and why were the environmental courts established in China? How have the environmental courts been performing thus far? What are the pros and cons of specialized environmental courts in China? What will be the future destinies of these pilot courts? This

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<sup>1</sup>There is still debate in China as to what constitutes environmental public interest litigation. Generally, EPIL can be defined as a new type of litigation in contrast to private interest litigation, which is traditionally represented by tort litigation. The purpose of public interest litigation is to protect the public interest, not to gain compensation for personal economic loss, as in tort litigation. Whereas private interest litigation is led by a plaintiff who has “direct interest” in the dispute, public interest litigation can be initiated by parties who do not possess “direct interest.” Further, remedies in environmental public interest litigation are often issued as injunctive reliefs, not damages.

<sup>2</sup> Relevant wording stated in Article 27: “Develop the potential of social groups, encourage reporting to authorities and exposing various environmental law violations, promote environmental public interest litigation” (“发挥社会团体的作用, 鼓励检举和揭发各种环境违法行为, 推动环境公益诉讼”). See [http://www.gov.cn/zwgk/2005-12/13/content\\_125680.htm](http://www.gov.cn/zwgk/2005-12/13/content_125680.htm).

<sup>3</sup> See below for basic information on this case.

article attempts to address these important questions, as well as offer suggestions to the environmental courts for future development.

### **Environmental Courts in China**

The term “environmental court” in this article refers to a judicial body created for the adjudication of environmental protection cases in China, including environmental protection tribunals of intermediate courts and basic courts, as well as other judicial bodies specialized in environmental cases, but excluding environmental protection panels.

As a new initiative created through judicial reform, environmental courts have also adopted new rules in accepting cases. Some of these pilot courts, such as the Guiyang Environmental Court, the Qingzhen Environmental Court, and the Wuxi Environmental Court, follow the model of “integrating four types of cases” (civil, criminal, administrative, and enforcement). Others, such as the environmental courts in Yunnan province, follow the model of “integrating three types of cases” (civil, criminal, and administrative). Whereas the traditional practice in the Chinese court system is to channel cases into civil, criminal or administrative tribunals during the filing process by screening the litigation procedure for applicability, the model of “integrating three types of cases” allows environmental courts to accept and process *all* civil, criminal, and administrative cases, so long as environmental disputes are involved. The model of “integrating four types of cases” further relocates enforcement power in environmental cases to the environmental courts, while traditional practice relies on a separate enforcement organs to enforce judgments made by tribunals.

From late 2007, eleven environmental courts have been set up in three provinces in China; specifically, two in Guizhou, one in Jiangsu, and eight in Yunnan.

### ***Establishment of environmental courts: triggered by major environmental pollution incidents***

As mentioned above, Guizhou Province was the first to start experimenting with environmental courts<sup>4</sup>. The Environmental Protection Tribunal of Guiyang Intermediate

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<sup>4</sup> In 1989, the People’s Court in Qiaokou District of Wuhan city attempted to establish an environmental court, but the Supreme People’s Court vetoed the attempt in an official response statement, *see* Supreme People’s Court, “Report about Establishing an Environmental Court by the People’s Court of Qiaokou District in Wuhan City,” *Fajinghan* (1989) 19 hao (10 Feb 1989). For almost 20 years after this incident, although local courts in Liaoning, Hebei, and Shandong provinces began to experiment with environmental courts or environmental *xunhui* courts (环保巡回法庭), these local initiatives yielded minimal influence in terms of cases accepted or systematic innovation. For this research, I will analyze the growth and development of environmental courts starting from late 2007.

People's Court and the Environmental Protection Tribunal of the Qingzhen Basic People's Court ("Guiyang Environmental Court" and "Qingzhen Environmental Court," or "Two Environmental Courts in Guiyang"<sup>5</sup>) were established on November 20, 2007, to curb the serious and damaging environmental pollution in Hongfeng Lake, Baihua Lake, and Aha Reservoir, which are the main sources of drinking water for about 3.9 million people in Guiyang City.<sup>6</sup> As environmental pollution posed a serious threat to the safety of drinking water, establishing environmental courts was put on the agenda of local officials and Guizhou High Court.<sup>7</sup> From the submission of the initial proposal to the full establishment of the two tribunals, only 68 days were needed—an extremely unusual speed for setting up courts, indicating the importance of the issue and investment in reaching a solution.<sup>8</sup>

Five months later, the Environmental Protection Tribunal of the Wuxi Intermediate People's Court of Jiangsu Province ("Wuxi Environmental Court") was established on May 6, 2008, exactly one year after the blue algae incident of Taihu Lake. The water ecological crisis caused by the blue algae incident directly led to the establishment of the Wuxi Environmental Court.<sup>9</sup>

Yunnan Province established its first group of environmental courts in December 2008,<sup>10</sup> and by September 2009, had already established six other environmental courts, as well as publicly announced plans to establish more specialized environmental courts in the future.<sup>11</sup> Like in Guizhou and Jiangsu, the establishment of environmental courts in Yunnan is also closely related to environmental pollution incidents. The first group of environmental courts in Yunnan Province, namely, the Environmental Protection Tribunal of Kunming

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<sup>5</sup> Qingzhen city is a county-level city within the jurisdiction of Guiyang city. The cases of Qingzhen environmental court will be appealed to the Guiyang environmental court. The Guiyang Intermediate People's Court calculates the judicial statistics of the two environmental courts together and calls them the "Two Environmental Courts in Guiyang."

<sup>6</sup> Zhou Zhijiang, "Guiyang City establishes environmental protection courts to make polluters of water resources accountable" (Xinhuanet, 21 Nov 2007): [http://news.xinhuanet.com/newscenter/2007-11/21/content\\_7119580.htm](http://news.xinhuanet.com/newscenter/2007-11/21/content_7119580.htm).

<sup>7</sup> Guizhou Party Building Net, "The Establishment of the First Environmental Court and the Innovation of Judicial Mechanism in Environmental Protection" (19 Nov 2008): <http://dddjw.com/NewTopic/zflt/200811/5209.html>.

<sup>8</sup> Interview with the Environmental Protection Tribunal of Guiyang Intermediate Court conducted by the research group of the Research Institute of Environmental Law of Wuhan University, the American Bar Association (ABA), and the Natural Resources Defense Council (NRDC) on June 4, 2009.

<sup>9</sup> Wu Jing, "Wuxi Environmental Protection Tribunal established and environmental NGOs for the first time have standing to initiate public interest actions" (People's Daily, 8 May 2008): [http://www.gov.cn/jrzg/2008-05/08/content\\_964276.htm](http://www.gov.cn/jrzg/2008-05/08/content_964276.htm).

<sup>10</sup> Bai Licheng, "Environmental Protection Tribunal of Kunming Intermediate Court established and Kunming has specialized cases" (Yunnan Net, 12 Dec 2008): [http://www.yunnan.com.cn/2008page/yn/html/2008-12/12/content\\_161890.htm](http://www.yunnan.com.cn/2008page/yn/html/2008-12/12/content_161890.htm).

<sup>11</sup> Wang Yan, "Yunnan promotes environmental courts in the whole province" (Xinhuanet, 14 May 2009): <http://env.people.com.cn/GB/9296891.html>.

Intermediate People’s Court (“Kunming Environmental Court”) and the Environmental Protection Tribunal of Yuxi Intermediate People’s Court (“Yuxi Environmental Court”), were established when Yangzong Lake was experiencing dangerously high arsenic pollution levels. The other six environmental courts were established with the main objective to curb environmental pollution in major alpine lakes, among which six of nine are seriously polluted.<sup>12</sup> As it is the first environmental court set up in Yunnan province, the Kunming Environmental Court has taken the most initiative and has also received the most publicity. When comparing and analyzing environmental courts in Guizhou, Jiangsu, and Yunnan provinces, the Kunming Environmental Court is cited in this article as an example of the eight Yunnan environmental courts.

***Caseload of environmental courts: large number of cases, but few public interest cases***

The following table contains some basic information on the establishment and operation of environmental courts of Guiyang, Wuxi, and Kunming:

Table I: Establishment and Operation of Environmental Courts in China

<b>Environmental Court</b>	<b>Date Established</b>	<b>Total number of cases</b>	<b>Main types of cases</b>	<b>Number of public interest cases</b>	<b>Procedural rules on public interest actions</b>
Two courts in Guiyang, Guizhou Province <sup>13</sup>	20 Nov 2007	110 (20 Nov 2007 – 20 Dec 2008)	70% are criminal cases	3	Rules of the Guiyang Intermediate People’s Court
Wuxi Environmental Court, Jiangsu Province <sup>14</sup>	6 May 2008	More than 300 (May 2008 – May 2009)	95% are non-litigious administrative enforcement cases	1	Rule jointly issued by the Wuxi Intermediate People’s Court and the Wuxi Procuratorate
Kunming Environmental	11 Dec 2008	12 (Dec 2008 –	57% are criminal cases	0	Rule issued by the Yunnan High People’s Court, and

<sup>12</sup> According to information provided by judges from the administrative division of the Yunnan High People’s Court and the Environmental Protection Tribunal of Kunming Intermediate People’s Court, pollution in Yangzonghai Lake was an important reason for the establishment of environmental courts. Interview with the Yunnan environmental courts conducted by the research group of the Research Institute of Environmental Law of Wuhan University, ABA, and NRDC on June 22-23, 2009.

<sup>13</sup> Data provided by Qingzhen Environmental Court, April 2009.

<sup>14</sup> Data provided by Zhao Weimin, Chief Judge of the administrative division of Wuxi Intermediate Court during the Environmental Litigation and Environmental Court Workshop held in Beijing on May 22 and 23, 2009.

Court, Yunnan Province <sup>15</sup>		May 2009)			rule jointly issued by the Kunming Intermediate People's Court, the Kunming Procuratorate, the Kunming Environmental Protection Bureau, and the Kunming Public Security Bureau
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Table I shows that the total number of cases handled by an environmental court is generally commensurate with the current demand for judicial services; however, the number of public interest cases is a notably small. In regard to the type of cases, Guiyang and Kunming are in a very similar situation, where more than 50% of cases handled by environmental courts are criminal cases, followed by civil cases and administrative cases. The large number of criminal cases can be explained in part by the proactive attitude of the public procuratorates. The Wuxi Environmental Court, on the other hand, handled a larger relative number of non-litigious administrative enforcement cases as compared to criminal cases.<sup>16</sup> This is due to the fact that the Wuxi Environmental Court was designed to assist environmental protection agencies in administrative enforcement of environmental law.

To date, four environmental public interest cases have been accepted and resolved by the environmental courts. The Two Environmental Courts in Guiyang have taken the lead among the environmental courts in all three provinces, as three of the four public interest cases were handled by the Two Courts.

In December 2007, the Management Bureau of Hongfeng Lake, Baihua Lake, and Aha Reservoir initiated and won an environmental public interest action against Guizhou Tianfeng Chemical Company, located in Anshun City. The Management Bureau acted as plaintiff and filed the case to the Qingzhen Environmental Court, requesting Tianfeng Chemical Company to stop polluting the local environment. This was the first environmental public interest action in Guizhou Province, and the first cross-jurisdiction environmental public interest action in

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<sup>15</sup> Data provided by Yuan Xuehong, full-time member of the adjudication committee of the Kunming Intermediate Court during the Environmental Litigation and Environmental Court Workshop held in Beijing on May 22 and 23, 2009. Corrections were made according to an interview with the Yunnan environmental courts conducted by the research group of the Research Institute of Environmental Law of Wuhan University, ABA, and NRDC on June 22-23, 2009.

<sup>16</sup> Non-litigious administrative enforcement cases are cases where local environmental protection bureaus (“EPB”) apply to the courts to enforce administrative penalties or injunctive orders that EPBs had previously issued but that polluters failed to voluntarily comply with.

China.<sup>17</sup>

On November 26, 2008, the Qingzhen Environmental Court heard a case initiated by the Procuratorate of Guiyang City against Mr. Xiong Jinzhi, Mr. Lei Zhang, and Mr. Chen Tingyu for illegally constructing buildings in a water source protection area. The environmental court conducted mediation during the court proceedings, and the parties reached a settlement agreement. This is the first environmental public interest action initiated by a procuratorate serving as the plaintiff of a civil action in an environmental court.<sup>18</sup>

The Wuxi Environmental Court also handled an EPIL case on July 6, 2009. The Wuxi Environmental Court heard a case filed by the All-China Environment Federation, a national environmental group, against Jiangyin Port Container Company of Jiangsu Province on account of an environmental pollution dispute. The case was settled through mediation on September 23, 2009.<sup>19</sup> This case was the first environmental public interest action filed by an environmental group in China.

On July 28, 2009, the Qingzhen Environmental Court heard a case, again filed by the All-China Environment Federation, against the Qingzhen City Bureau of Land and Resources on account of administrative inaction. The defendant then performed the administrative responsibilities asked for by the plaintiff, and the plaintiff withdrew its complaint from the court on September 1, 2009. The implementation of this action prompted relevant administrative agencies to complete responsibilities that had been delayed for 15 years, demonstrating the value of environmental public interest actions. This is the first administrative environmental public interest action in China, and it is also one of two public interest actions initiated by an environmental group thus far. It symbolizes a major breakthrough in environmental public interest litigation.<sup>20</sup>

There has yet to be an EPIL case accepted by the Kunming Environmental Court.

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<sup>17</sup> Zhou Zhijiang, "Guizhou duly hears the first trans-regional environmental public interest case" (Xinhuanet, 27 Dec 2007): [http://news.xinhuanet.com/legal/2007-12/27/content\\_7325592.htm](http://news.xinhuanet.com/legal/2007-12/27/content_7325592.htm). See also:

Li Yunchao, Jin Jing, Zha Xingtian: "Judgment rendered for the first environmental public interest action of Guizhou, Tianfeng Chemical Company ordered to discontinue damage" (People's Court Daily, 2 Jan 2008): [http://oldfyb2009.chinacourt.org/fybpdf/2008\\_01/20080102\\_1.pdf](http://oldfyb2009.chinacourt.org/fybpdf/2008_01/20080102_1.pdf).

<sup>18</sup> He Qing, "Court begins to hear the first civil environmental public interest litigation brought by a procuratorate in Gouzhou" (Legal Daily, 28 Nov 2008): [http://news.ifeng.com/mainland/200811/1128\\_17\\_898288.shtml](http://news.ifeng.com/mainland/200811/1128_17_898288.shtml).

<sup>19</sup> "The first civil environmental public interest case mediated" (Caijing Net, 24 Sept 2009): <http://www.caijing.com.cn/2009-09-24/110260142.html>.

<sup>20</sup> "Court begins to hear the first administrative environmental case initiated by an environmental NGO at Guiyang," (Guiyang Daily, 2 Sept 2009): [http://www.gz.xinhuanet.com/2008htm/xwzx/2009-09/02/content\\_17581899.htm](http://www.gz.xinhuanet.com/2008htm/xwzx/2009-09/02/content_17581899.htm).

***Rules: local rules on public interest litigation with limited scope of application and authority***

Given the lack of nationally applicable rules about EPIL in the form of laws, State Council regulations, and Supreme People's Court judicial interpretations and orders, environmental courts in these three provinces have made many efforts and innovations in developing local rules on public interest litigation, thereby causing the environmental courts in all three locations to display unique features.

**Guiyang**

The Guiyang Intermediate People's Court issued a series of documents and orders to establish the basic rules on the handling of cases.<sup>21</sup> According to these documents and orders, procuratorates, relevant administrative agencies, and special agencies such as the Management Bureau of Honghong Lake, Baihua Lake, and Aha Reservoir, have standing to initiate public interest actions. These rules do not specifically authorize, nor do they prohibit, environmental groups and private citizens from initiating public interest actions. The attitude of the Two Environmental Courts in Guiyang toward the standing of NGOs and other organizations as the plaintiff in a public interest action became clearer when Qingzhen Environmental Court accepted the above-mentioned case initiated by All-China Environment Federation against the Qingzhen City Bureau of Land and Resources.

**Wuxi**

In November 2008, the Wuxi Intermediate People's Court and the Wuxi Procuratorate jointly issued the "Experimental Rules on the Handling of Civil Environmental Public Interest Actions," becoming the first local regulation on environmental public interest litigation in China.<sup>22</sup> Compared with the documents and orders issued by the Guiyang Intermediate People's Court, the Wuxi regulation provides more systematic and detailed procedural rules on civil environmental public interest litigation. But the Wuxi regulation also has some drawbacks, such as overreliance on the procuratorate to be the plaintiff in public

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<sup>21</sup> Documents and orders include: "Implementation Plan on the Establishment of Environmental Court of Guiyang Intermediate People's Court"; "the Decision of the Guiyang Intermediate People's Court on the Change of Venue (2007)"; and "Rules on the Jurisdiction of the Environmental Protection Tribunal of Guiyang Intermediate People's Court and the Environmental Protection Tribunal of the Basic People's Court of Qingzhen City."

<sup>22</sup> Chen Yuanyuan, "Wuxi issues rules on environmental public interest actions" (China Environment Daily, 24 Nov 2008): [http://www.cenews.com.cn/xwzx/fz/qt/200811/t20081124\\_591631.html](http://www.cenews.com.cn/xwzx/fz/qt/200811/t20081124_591631.html).

interest actions and insufficient procedure to address administrative agencies that fail to meet responsibilities for environmental protection. Nevertheless, it is undeniable that the Wuxi Environmental Court made a breakthrough in public interest litigation by permitting environmental groups to possess standing, as exemplified by the Court's handling of a case initiated by All-China Environment Federation against Jiangyin Port Container Company, Ltd, as mentioned above.

### **Yunnan**

Among the three provinces, Yunnan was the latest to establish environmental courts. However, Yunnan has shown great ambition to overtake the other two provinces by making rapid progress in terms of both the number of environmental courts and rules on public interest litigation. Yunnan has the largest number of environmental courts, and it is also the first province to make rules on environmental public interest litigation at both the provincial high court level and the intermediate court level. In November 2008, the Kunming Intermediate Court, the Kunming Procuratorate, the Public Security Bureau of Kunming City, and the Environmental Protection Bureau of Kunming City jointly issued "Implementation Opinions on the Establishment of Environmental Protection Law Enforcement Coordination Mechanisms," in which EPIL rules were first set up for cases in the Kunming Environmental Court<sup>23</sup>. Then on May 13, 2009, the Yunnan High Court adopted "Minutes of the Conference on the Adjudication of Environmental Cases," which became the guidelines for the adjudication of environmental cases, including EPIL cases, throughout Yunnan province.<sup>24</sup> More importantly, Yunnan is the first province that expressly provides environmental NGOs to have standing to initiate environmental public interest actions. However, the "Minutes" provide that only procuratorates and public interest organizations duly registered in China may have plaintiff standing; courts in Yunnan do not currently accept environmental public

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<sup>23</sup> Document issued by Kunming Intermediate People's Court, Kunming People's Procuratorate, Kunming Public Security Bureau, Kunming EPB, Kunhuanbao [2008] No. 520, see Kunming EPB website, November 6<sup>th</sup>, 2008: <http://www.kmepb.gov.cn/kmhbj/75157117316628480/20081106/11030.html>

<sup>24</sup> "Yunnan issues "trial guide" for environmental cases, ruling on reforestation can be made if there is deforestation", Xinhuanet, May 14<sup>th</sup>, 2009: [http://news.xinhuanet.com/legal/2009-05/14/content\\_11372002.htm](http://news.xinhuanet.com/legal/2009-05/14/content_11372002.htm); also see Chu Wanzhong, "Sharing Kunming and Yuxi's experiences in environmental court building and environmental trials, another step forward for environmental public interest litigation in Yunnan", Legal Daily, May 14<sup>th</sup> 2009: <http://news.sohu.com/20090514/n263952222.shtml>; also see "New rules on trying environmental cases in Yunnan, EPB not allowed to file environmental public interest litigation", Du Shi Shi Bao, May 14<sup>th</sup>, 2009: [http://news.yninfo.com/yn/shxw/200905/t20090514\\_805647.htm](http://news.yninfo.com/yn/shxw/200905/t20090514_805647.htm); also see Zi Min, "Trial of arsenic pollution in Yang Zong Hai sends an alarm, environmental cases in Yunnan have trial guide to follow", China Environmental News, June 2<sup>nd</sup>, 2009: <http://env.people.com.cn/GB/9395699.html>.

interest actions filed by individual citizens.

### **Pros and cons of environmental courts**

Domestic debate surrounding the advantages and disadvantages of specialized environmental courts has been lively since the establishment and development of the pilot courts. Below is a brief overview of the major opinions surrounding environmental protection courts in China.

#### ***Advantages of environmental courts***

The advantages of environmental courts as embodied in the judicial experiment of environmental courts in China are generally in accord with the research results from University of Denver, Sturm College of Law, Professor George Pring's study, which focused on more than 200 environmental courts from about 40 countries and districts.<sup>25</sup>

##### **(1) Consistency in law application**

Environmental cases are complicated in technical issues and small in number. If the cases are scattered among different courts, different courts may treat similar cases differently, thus jeopardizing consistency in law application and the court's authority. A more centralized system for handling environmental cases is conducive to consistent law application.

##### **(2) Improved proficiency of environmental judges**

Well-educated and experienced judges were selected by the three provinces when the environmental courts were established in China. This became a good start to improving the proficiency of environmental judges. Because of the centralized treatment of environmental cases in environmental courts, judges in environmental courts will develop specialized expertise. In addition to general knowledge of the law, judges in environmental courts are in a better position to understand technical issues, i.e., evidence involving environmental science. This is helpful for improving the proficiency of judges, leading to more efficient and better informed judgments.

##### **(3) Enhanced environmental awareness among the government and the public**

The establishment of environmental courts also fosters a positive atmosphere for environmental protection. When environmental courts are involved, administrative agencies

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<sup>25</sup> George Pring and Catherin Pring, "Enhancing Environmental Governance and Access to Justice: A Global Study of Specialized Environmental Court and Tribunals", the Seventh Colloquium of the IUCN Academy of Environmental Law, 3<sup>rd</sup>, Nov. 2009.

pay more attention to, and play a more active role in, environmental adjudication, especially by providing technical support in environmental cases. Some judges in environmental courts believe that the increased share of cases handled through mediation can partially be attributed to the active participation of administrative agencies; for example, administrative agencies may complete analysis on reasons for excessive discharge, provide recommendations on methods to improve industrial processes, present evaluative opinions on settlement offers, etc.<sup>26</sup> The 2008 data from the Two Environmental Courts in Guiyang indicate that 62% of all cases handled by the environmental courts were resolved through settlement.<sup>27</sup> The experience of the Wuxi Environmental Court has shown that the city government and people's congress will mainly ask environmental courts for their opinion when these administrative agencies make decisions related to environmental protection.<sup>28</sup> In addition, the public also exhibits a higher awareness of environmental protection after environmental courts are established. For example, in order to put pressure on administrative agencies to take action on violations of environmental law, the public began to include the Qingzhen Environmental Court in any correspondence or complaint made to the administrative agencies<sup>29</sup>; this direct engagement with legal organs had seldom occurred prior to the establishment of the environmental court in Qingzhen.

#### **(4) Increased deterrence among enterprises and improved law enforcement results**

From the perspective of the courts, the effect of environmental law enforcement is increased when non-litigious administrative enforcement cases and regular enforcement cases are successful. From the perspective of relevant administrative agencies, this helps to enforce administrative penalties and injunctive orders. For example, from November 20, 2007, to December 20, 2008, all non-litigious administrative enforcement cases and 80% of regular enforcement cases handled by the Two Environmental Courts in Guiyang were successfully

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<sup>26</sup> From an interview at the Guiyang Environmental Court conducted by the research group of the Research Institute of Environmental Law of Wuhan University, ABA, and NRDC on June 4, 2009.

<sup>27</sup> According to an interview conducted by CLAPV of China University of Politics and Law, the Environmental and Resources Law Institute of Zhongnan University of Economics and Law, and NRDC at the Qingzhen Environmental Court conducted on January 22, 2010, data for the period November 20, 2007 to November 20, 2009, indicate that 69% of civil cases were handled through mediation.

<sup>28</sup> From an interview at the Wuxi Environmental Court conducted on October 17, 2008, administered by the Environmental and Resources Law Institute of Zhongnan University of Economics and Law, ABA, and NRDC.

<sup>29</sup> From an interview at the Qingzhen Environmental Court conducted by the research group of the Research Institute of Environmental Law of Wuhan University, ABA, and NRDC on June 5, 2009.

enforced.<sup>30</sup>

### **(5) Space for the development of rules on environmental public interest litigation**

The environmental courts' experiment with environmental public interest litigation, as well as relevant local regulations on environmental public interest litigation, will be of great value for the development of nationally applicable rules on environmental public interest litigation in China.

#### ***Doubts about environmental courts***

##### **(1) Hopes surpass practical value**

As mentioned above, the establishment of the environmental courts in all three provinces in China was closely related to major environmental pollution incidents. Therefore we must ask, is the establishment of environmental courts more to express the strong will of the government, rather than providing the actual means for practical adjudication work?

##### **(2) No substantial difference in the handling of cases**

Regardless of whether an environmental court integrates the four types of cases (civil, criminal, administrative, and enforcement cases) or three types of cases (civil, criminal, and administrative) as the environmental courts have done, if the court simply takes cases previously handled by other tribunals and then handles such cases in the same manner as other courts, then the legal issues handled by environmental courts are not substantially different. If this is the case, how much significance does the establishment of specialized environmental courts really have?

##### **(3) Small caseload casts doubt on the sustainable development of environmental courts**

Environmental courts generally do not have many cases when compared with non-specialized courts; for instance, the Kunming Environmental Court only accepted 12 cases in 5 months. Furthermore, the proportion of civil cases and administrative cases accepted by environmental courts is quite small, which is unusual in comparison with non-specialized courts. Does the small number of cases indicate that society does not in fact

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<sup>30</sup> According to an interview conducted by CLAPV of China University of Politics and Law, the Environmental and Resources Law Institute of Zhongnan University of Economics and Law, and NRDC at the Qingzhen environmental court on January 22, 2010, data from November 20, 2007, to November 20, 2009, indicate that 100% of enforcement cases were successful.

have much demand for the adjudication of environmental cases, and does not justify the establishment of special environmental courts?

**(4) Slow development of environmental public interest litigation indicates that environmental courts may have limited impact on the innovation of new rules**

Environmental courts in these three provinces have only handled four environmental public interest cases in the past two years. Is this too slow and insufficient?

## **The vitality of environmental courts**

We can make a guess as to the possible future outcomes of environmental courts in China. The experiment may win formal recognition from the Supreme Court, leading to promotion of specialized environmental courts throughout the nation. This would solidify environmental courts and the specialized treatment of environmental cases to become a regular part of judicial practice. This is the most optimistic situation. The most pessimistic situation, however, is that this experiment would be understood as a failure, and the influence of environmental courts eventually would be weakened—similar to tax courts and industry and commerce courts established in various locations some years ago<sup>31</sup>. Between these two extremes, yet another possibility is that environmental courts will be maintained in certain locations as experimental courts for a long time. The destiny of environmental courts depends on the answer to the following questions: do environmental courts have vitality? If so, where does that vitality lie?

To summarize the doubts concerning environmental courts, we can pinpoint three major

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<sup>31</sup> Recent years have seen a flurry of news about local *xunhui* courts (巡回法庭) established in the department of industry and commerce; see for example, “Pujiang County consumer dispute *xunhui* court established” (Zhejiang Province Pujiang County Industry and Commerce Administrative Department Website, 7 Nov 2004): <http://www.pjaic.gov.cn/News/List.asp?newsid=187>. For news about the establishment of local tax courts, for example the Henan Province Zhecheng County People’s Court, see “Zhecheng County tax court: the primary-level tax collector’s defender” (Shangqiu Daily, 28 May 2004): [http://www.sqrb.com.cn/gb/wbbm/2004-05/28/content\\_89954.htm](http://www.sqrb.com.cn/gb/wbbm/2004-05/28/content_89954.htm); or the Anhui Province Wuwei County People’s Court, see “Resolving difficulties in carrying out tax collection and other issues: Anhui’s first local tax court established” (Hefei Evening Paper, 30 Sept 2007): <http://www.hf365.com/html/01/02/20070930/56332.htm>. From 1996 onwards, scholars have also published articles about the establishment of tax courts in China. See Jiang Jingliang, “Investigation about the Establishment of Tax Courts,” *Modern Information*, 1996, Issue 6; and, Zhu Daqi and He Xiayang, “Establishment of Tax Courts in China,” *Contemporary Law Review*, 2007, Issue 3. These leading scholars are skeptical about this type of *xunhui* court practice and argue that the experiments with tax courts were unsuccessful. For example, Zhu and He write “From experience, mainland China’s experiments with ‘tax courts’ and ‘tax enforcement divisions’ have been unsuccessful; these courts often partake in the administrative activities of tax mechanisms, thus becoming dependent on the tax mechanisms to enhance tax collection and strengthen tax administration.” See Zhu Daqi and He Xiayang “Mainland China Should Establish Tax Courts,” China Civil and Commercial Law Web (23 Sept 2007): <http://www.civillaw.com.cn/Article/default.asp?id=35181>. Further, the Supreme People’s Court of China released a judicial interpretation on September 23, 2005, requiring strict establishment of people’s courts and *xunhui* court trial locations, declaring that people’s courts must stringently rely on the law to carry out adjudication responsibilities, and may in no way supersede functions by partaking in administrative enforcement activities. See article 8 of “Decision on Comprehensive Strengthening of the People’s Courts Work” in Supreme Court Release 2005, No. 16. See also “Supreme Court Strictly prohibits people’s court from participating in local administrative enforcement activities” (China Youth Paper, 29 Sept 2005): <http://www.chinalawinfo.com/fzdt/NewsContent.aspx?id=15184>.

sources of concern: first, are there a sufficient number of cases? That is to say, is there an actual demand for the establishment of specialized environmental courts? Second, do the types of cases being accepted contain innovative value? That is to say, does the establishment of specialized environmental courts promote judicial innovation? Third, does the judicial practice of environmental courts help control pollution and conserve resources? That is to say, will the practice of the specialized environmental courts help realize the ultimate goals of establishing environmental courts?

***The increasing trend in the number of cases indicates that there is a real demand for environmental adjudication***

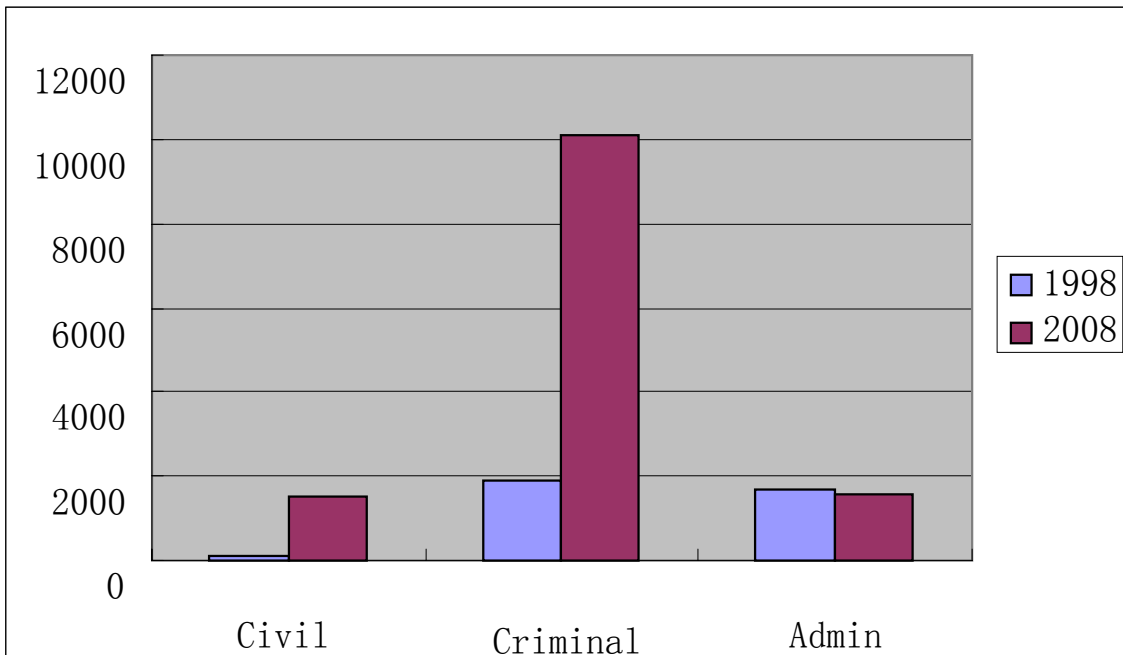
Although environmental courts do not have many cases currently, the general trend of environmental cases is increasing.

First, it is important to note that the total number of environment-related cases handled by all courts in China has increased in the past years. The total number of environment-related cases handled in 1998 and 2008 are typical examples:<sup>32</sup> the total number of environmental civil cases in 1998 and 2008 were 96 and 1509, respectively; this is an increase of 1471% in environmental civil cases in 10 years. As for environmental criminal cases, the total number in 1998 was 1912, while 2008 saw a total of 10075 environmental criminal cases; this is an increase of 427%. In regard to environment-related administrative cases, the total numbers of cases in 1998 and 2008 were generally the same. The number of cases in 1998 was 1670, while the number of cases in 2008 was 1601. Figure I below shows the rapid increase in number of environmental cases handled by courts throughout China.

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<sup>32</sup> Jin Junyin, Director of the Research Department of the National Judicial College, Environmental Litigation and Environmental Courts Workshop, May 22 and 23, 2009.

Figure I: Number of Environmental Cases Handled by Courts in China



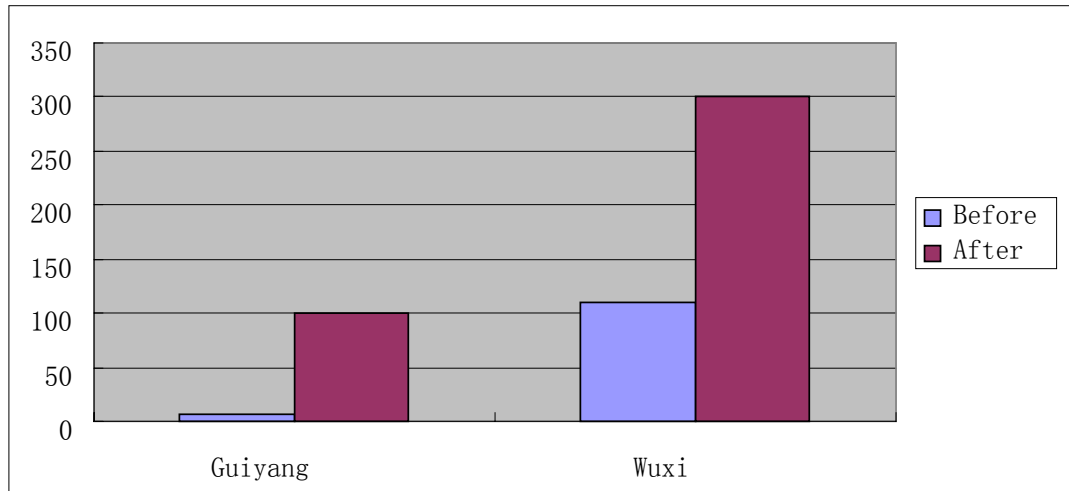
First, it is important to note that these data are in accord with the general trend of rapid economic development and increased living standards. In one respect, such data indicates that the high speed of development has caused serious pollution problems. At the same time, however, after standards of living are improved, the public possesses a stronger desire for a clean and healthy environment and is less likely to tolerate violations of environmental law.

Next, the number of cases handled by environmental courts is generally increasing.

Before the establishment of environmental courts, seven environmental cases were filed at relevant divisions of the Court of Qingzhen City in 2006. Within one year of the establishment of the environmental court, 110 cases were filed—an increase of 1471% from 2006.<sup>33</sup> The case in Wuxi is similar: two levels of courts in Wuxi handled a total of 302 environmental cases of all types during the three years from 2005 to 2007. Within the first year of establishing the Wuxi Environmental Court, however, more than 300 cases were filed, an increase of about 200%. Figure II indicates the increase of environmental cases before and after the establishment of environmental courts:

<sup>33</sup> These numbers are just for a rough comparison due to two reasons: first, the amount of cases from November 20, 2007 (when the Qingzhen Environmental Court was established), to December 20, 2008, covers 13 months, while the data from 2006 covers 12 months. Secondly, the 110 cases handled by December 20, 2008, are cases of both the Environmental Protection Tribunal of Guiyang Intermediate Court and the Environmental Protection Tribunal of Qingzhen Basic Court, whereas the statistic from 2006 only included cases from the Qingzhen Basic Court.

Figure II: Number of Cases Before & After the Establishment of Environmental Courts



These two sets of numbers indicate that there was a general increase in environmental cases handled. Therefore, we can surmise that there is clearly a demand for environmental adjudication.

***Environmental public interest litigation: an embodiment of judicial innovation and an effective measure for achieving the ultimate goals of environmental protection***

Hearing cases is not the ultimate goal of environmental courts; nor is the number of cases the sole reason to establish or maintain environmental courts. The establishment of environmental courts was in response to the worsening of environmental pollution and increased frequency of environmental incidents. Therefore, the mission of environmental courts is to curb and eliminate environmental pollution and improve the condition of the environment. Environmental public interest litigation that seeks injunctive action is a new preventative mechanism that has the potential to surpass suits brought by individuals where the only available remedy is damages on a case-by-case basis; indeed, a public interest litigation mechanism provides the opportunity for injunctive orders that would prevent future pollution incidents, thus benefiting the wider community, and not a single individual or plaintiff. In this way, environmental public interest litigation enables judicial innovation while also enhancing environmental protection.

These objectives will be obtained for four major reasons. First, environmental public interest litigation is an important supplement to governmental resources for legal enforcement. Due to limited resources, the government cannot timely or effectively handle all

environmental pollution activities. Furthermore, the influence of political pressure and interest groups cause the government to potentially break the law or neglect its law enforcement responsibilities. Therefore, environmental public interest litigation gives other actors, including environmental NGOs, the opportunity to supplement government efforts and ensure effective enforcement of environmental law. A look to the American experience is helpful for understanding the benefits of public interest litigation (termed “citizen suits”) in supplementing governmental enforcement of environmental law. For example, statistics show that between January 20, 1993, and May 5, 1995, Clean Water Act citizen suits resulted in \$3 million in civil penalties payable to the U.S. Treasury, \$10 million in penalties payable to state governments, and \$61 million in quantified injunctive reliefs to address environmental harms.<sup>34</sup>

Second, environmental public interest litigation has a deterrent effect on enterprises. Environmental public interest litigation may bring about heavy civil penalties, which in turn may lead to the closure of factories, forcing enterprises to take pollution control measures or change their industry processes to reduce or eliminate pollution at its source. Environmental public interest action initiated by citizens or an NGO against one single enterprise may also have a deterrent effect on other enterprises, forcing them to comply with environmental laws. Again, a comparison with the US citizen suit experience is helpful here.<sup>35</sup> Citizen suits have ensured that numerous administrative agencies, as well as polluting enterprises, comply with the law; citizen suits have also reduced more than one billion tons of pollutants and protected a large number of endangered species and their habitats. Only imposing fines and other administrative measures on polluting enterprises severely limits the goal of fully achieving environmental protection. Fines or administrative measures are often understood by companies to be a relatively low cost of compliance, and thus do not foster sufficient deterrence among the enterprises. The result is enterprises will reasonably choose to continue polluting after paying the mandated fines. For example, after a major arsenic pollution incident happened in Yangzonghai Lake in Yunnan, relevant administrative agencies imposed fines to the emitters in 19 different instances; the fines totaled over 2 million RMB

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<sup>34</sup> Michael E. Wall, “Public Interest Litigation in the United States,” in *Environmental Public Interest Litigation*, edited by Zhongmei Lv and Alex Wang, Law Press (March 2009), p. 128.

<sup>35</sup> See Dan Guttman, “The U.S. Citizen Suit,” *World Environment*, Issue 1, 2007.

(about 300,000 USD). These fines obviously failed to foster sufficient deterrence among enterprises, and inevitably led to serious pollution of the community drinking water source.<sup>36</sup>

Third, environmental public interest litigation greatly impacts public policy concerning environmental issues. Public interest litigation not only affects the plaintiffs, defendants, and other members of society involved in a case, it also will impact adjustment of public policy, revision of law, and other matters. The handling of environmental public interest litigation greatly affects the direction of public policy and will undoubtedly provide the general public, administrative agencies, interest groups, and other stakeholders a basic guideline for similar incidents or similar conduct, ultimately inducing a wide impact on environmental protection work. For example, a series of legal actions initiated by the Sierra Club in 1972 directly led to the 1977 amendment to the Clean Air Act, which requires the EPA to design a regime to prevent significant deterioration in attainment areas. In addition, the Natural Resources Defense Council (NRDC) has succeeded in several citizen suits. Because of these cases, the EPA has to take measures to reduce lead in gasoline and adopt discharge limits for non-road engines, and polluters are prohibited from dispersing pollutants from extra-high chimneys.

Lastly, environmental public interest litigation helps to maintain social stability. Providing the public with a legal mechanism to solve their disputes will guide the public to the court and avoid the intensification of conflict and social unrest. In the process of environmental public interest litigation, the intervention of the court helps the government to make active responses to social changes and needs. Environmental public interest litigation promotes dispute resolution and social stability by fostering cooperation and compromise through litigation processes.

### **Two suggestions to the environmental courts**

#### ***Give adequate attention to the development of practical experience in environmental public interest litigation***

The most important goal for environmental courts is to put legal rules into practice and gain experience in judicial practice. Thus far, the practical application is insufficient. For example, as mentioned above, only one environmental group has been active in initiating

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<sup>36</sup> Yuan Xuehong, Member of the Judicial Committee of Kunming Intermediate People's Court, Environmental Litigation and Environmental Courts Workshop, May 22 and 23, 2009.

public interest cases. We suggest that environmental courts further expand its “test samples” beyond the All-China Environmental Federation. To avoid the possibility of frivolous suits flooding the courts, the courts could further develop their rules on EPIL to set certain limits. For example, the rule could require environmental groups to duly notify competent administrative agencies a set period of time in advance of initiating an environmental public interest action.

***Promote legislation on environmental public interest litigation with practical experience***

Environmental courts should make in-depth analysis of its cases and experiences, as well as distribute timely reports to the Supreme Court and people’s congresses at national and local levels; this will provide an important practical and theoretical basis for legislation regarding environmental public interest litigation. Environmental courts in Guiyang are forerunners in this respect. With their help, the People’s Congress of Guiyang City adopted the “Regulations Promoting the Development of Ecological Civilization” in October 2009. This document was approved by the Standing Committee of the People’s Congress of Guizhou Province and will be effective as of March 1, 2010. Article 23 of this document specifically provides that the procuratorates and administrative agencies responsible for environmental protection, as well as environmental NGOs, have standing to initiate public interest actions. This is the first legislative document in China that specifically addresses environmental public interest litigation.<sup>37</sup>

Environmental courts have made an unusual step forward in environmental public interest litigation. Such a step symbolizes a major achievement for environmental public interest litigation in China, and also reflects the ambition and courage of environmental courts in environmental public interest litigation. We would do well to put aside small disputes and give environmental courts a more comfortable and supportive environment, thus allowing them to produce even more achievements.

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<sup>37</sup> “Guiyang: Environmental NGOs may bring cases for inaction of the government concerning the environment and resources” (Xinhuanet, 15 Jan 2010): [http://www3.xinhuanet.com/chinanews/2010-01/15/content\\_18777895.htm](http://www3.xinhuanet.com/chinanews/2010-01/15/content_18777895.htm).