Front. Law China 2008, 3(3): 455–476
DOI 10.1007/s11463-008-0021-9

RESEARCH ARTICLE

CHANG Jiwen

Issues of Chinese legislation on public environmental lawsuits and the way out
—Latest development of American case law and its practice for reference

© Higher Education Press and Springer-Verlag 2008

Abstract In developing Chinese legislation on public environmental lawsuits, it is not only to amend the *Constitution*, *Law on Environmental Protection*, *Civil Procedure Law* and *Criminal Procedure Law* from the aspect of legislative system, but also revise environmental regulations and judicial interpretation. In specific regulations, it is to explicitly define the scope of environmental citizen lawsuits to be accepted and heard by court, conditions of subjects, preconditions of litigation, procedures and rules for hearings, petitions of plaintiffs, modes and conditions for presenting evidence, which should not only affirm citizens' environmental rights, extend the scope of environmental damages and the scope of cases that indirect individuals can exercise the right to sue, but also establish litigation intervention system, environmental public prosecution system, and charging standard for the participation of attorneys.

Keywords environmental lawsuit, case law, public environmental lawsuit, right to sue

摘要 发展中国的环境公益诉讼立法，在法律体系上不仅应修订《宪法》、《环境保护法》、《民事诉讼法》和《刑事诉讼法》，还应修订单行环境立法及司法解释；在具体规定上，要明确规定环境公民诉讼的受案范围、主体要件、前提条件、程序规则、诉讼请求、举证方式和条件，不仅应承认公民的环境权，扩展环境损害的范围，扩大非直接利害关系人行使起诉权的受案范围，还要建立介入诉讼、环境公诉制度及律师参与代理的收费标准。

Translated from *Xiandai Faxue* 现代法学 (Modern Law Science), 2007(9): 103–112

CHANG Jiwen (✉)
Law Institution, Chinese Academy of Social Sciences, Beijing 100720, China
E-mail: changjiwen@yahoo.com.cn

关键词 环境诉讼，判例法，环境公益诉讼，起诉权

1 Necessity for China to research into US case law for environmental lawsuits of citizens

For the purposes of the rule of law, power balance and protection of environment and citizens' environmental rights and interests, by promulgating *Clean Air Act of 1970* and *Clean Water Act of 1972,* the US has made up for the defects of the governmental implementation of environment law (Miller, 1987), relaxed the restrictions on the environmental civil and administrative rights to sue, and initiated environmental citizen litigation system in the world. (Robbins, 1995) Consequently, such laws and regulations as *Ship Pollution Prevention Act*, *Comprehensive Environmental Response*, *Liability and Cleanup Act*, *Deepwater Port Act*, *Deep Sea Marine Bench Hard Mineral Resources Act, Emergency Planning and Community Right-to-know Act, Endangered Species Act*, *Consumer Products Energy Conservation Planning Act, Marine Protection, Research and Sanctuaries Act*, *Natural Gas Pipeline Safety Act, Noise Control Act, Thermal Sea Power Conservation Act*, *Outer Continental Shelf Lands Act, Power Plant and Industrial Fuel Use Act*, *Resource Conservation and Recovery Act*, *Safe Drinking Water Act*, *Surface Mining Control and Reclamation Act* and *Toxic Substances Control Act* further explicitly introduced and developed the environmental citizen lawsuit system. (Axline, 1995)

By the middle 1990's, the US environmental citizen lawsuit system was already very well developed and had far-reaching influence on the environmental public litigation legislation of various countries in the world. Some countries like the UK, Canada, Germany and Australia have learnt from the US environmental citizen lawsuit system and established citizen lawsuits or public lawsuit systems that suit their national conditions through special legislation. (Murdie, 1993) Moreover, the European Union has introduced the pre-suit notification requirement of the US environmental citizen lawsuit system to the regional international environmental law. If the European Commission finds its certain member violates EU's regulations, directives or decisions, it can issue a written notice to that member country and request it to make correction within two months. If the member country refuses to take action or its response can not satisfy the EU Commission, the EU Commission has the right to take further action and sue this member country in the European Court. (Onida, 2004) It can be seen that studying the development status of the US environmental citizen lawsuit system has become a necessary step in reinforcing the legislation on environmental citizen or public environmental lawsuits in democratic countries in the world. Currently China is revising its *Environmental Protection Law, Civil*

Procedure Law and *Administrative Procedure Law* to establish a public environmental lawsuit system for restricting environmental administrative power, fighting against enterprise management right, and preventing administrative nonfeasance or abuse of administrative power, hence eventually achieving the goal of environmental protection and improvement and the protection of citizens' environmental rights and interests, which has become a common understanding of the academic circle. And, legislation in this respect must make reference or borrow the experience of the US environmental citizen lawsuit system.

Since *United Nations Conference on Environment and Development* in 1992, there have been drastic changes in the international and domestic situation; many significant changes have taken place in terms of the awareness and position in environmental protection in most countries in the world including the US, and these changes are bound to be reflected in the evolution of the legal system. Article 2 of Section 3 of the *US Constitution* stipulates: "The application scope of judicial power includes: All the cases relating to common law and the equity law that arise from treaties that have been concluded or will be concluded based on the *Constitution* and the laws of the United States and according to the power of the United States…", which demonstrates that the US is a country implementing the combination of statute law and case law. In the US, the precedents that are based on practice and have been raised to the level of theory have been playing a very critical role in facilitating legislative innovation and development. (Seerden, 2002) For instance, when the Federal Supreme Court of the US tried the case of "Sierra Club v. Morton" in 1972, it expanded the "factual" damage scope, thus relaxing the restriction on the right to sue for environmental citizen lawsuits from the level of the federal case law. (Axline, 1995) As a result, it is difficult to have an in-depth understanding of the development status of the US environmental citizen lawsuit system by only studying the legal provisions without considering specific precedents. Some American scholars have analyzed the environmental citizen lawsuit provisions of the US environmental legislation and found that there are differences in the provisions of various laws. One important reason is that the development of case law in practice has facilitated the perfection of the statue law. (Miller, 1987) Based on the above analysis, it is necessary for China to have an extensive and systematic review of the case law of the US environmental citizen lawsuits since 1992.

2 Characteristics of the recent development of the US case law in environmental citizen lawsuits

In the US, the principle of power balance determines that the courts conduct judicial investigation on environmental protection issues not in the position of ordinary judicial organs but in the special position of the constitutional representative embodying the ultimate will of the people. (Zhao, Zhu, 2004) Through legislative delegation, the court's law application and the restriction and guidance of precedents, the US environmental citizen lawsuit system has been developed or reinforced in the following aspects in varying degrees since 1992.

With respect to the realization approach of litigation aim, there are three characteristics as follows: Firstly, plaintiffs protect their own interests by clarifying legislative stipulations or challenging the authority of administrative organs. An illustrating case is "the case of John A. Rapanos and others suing the US government" (Rapanos v. United States, 126 S Ct 2208) [1] Secondly, plaintiffs overcome the passiveness in environmental protection of various states by pressuring federal agencies. A typical case is "the case of Defenders of Wildlife suing the US Federal Environmental Protection Agency" (Defenders of Wildlife v. United States EPA, 450F. 3d 394) that has far-reaching influence. [2] Thirdly, plaintiffs accelerate the enforcement of environmental laws by conducting environmental citizen lawsuits supervision in the entire course of environmental law enforcement activities, and a typical case is "the case of Sierra Club suing the Federal Environmental Protection Agency's regional director Hankinson" (Sierra Club v. Hankinson, 351 F. 3d 1358).[3]

In terms of the scope of plaintiffs, there are three characteristics as follows: Firstly, federal governments, states and cities can be the plaintiffs in the citizen lawsuits based on their duties or interests, and a typical case is "the case of stakeholders of wastewater treatment in Northeastern Ohio region suing the Federal Environmental Protection Agency" (Northeast Ohio Reg'l Sewer Dist v.

[1] See http: //www. lexis com/research/retrieve/frames?_m=41041547b8e8al la0011 e859177cb4e9&csvc=bl&cform=bool& fmtstr=XC lTE&docnunm=1 & startdoc=I &wchp=dGLbVlb- zSkA b&_ md5=42dd4fl 07e48e34c4758460c473 eb913.

[2] See http: //www. lexis. com/research/retrieve/frames?_m=5eb83b65a1559de03d4750d25d 9674fe&csvc=bl&cform=bool&_fmtstr=XC ITE&docnum=1 & startdoc=I &wchp= GLbVzz-zSkA t& md5=44bbeab9e18533aa8d23ec0d96822d5c.

[3] See http: //www. lexis. com/research/retrieve/frames?_m=0e734bf61449da8b6a9b6e 5be47a3c3b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1 &_startdoc=1 &wchp= dGLbVib- zSkA b& _md5=c805eefd861243 fbl 4f21 f364e98a0bb.

United States EPA, 411 F. 3d 25);[4] Secondly, industrialists pay more and more attention to the instituting of citizen lawsuits and the participation of lawsuits instituted by them that have the nature of public interest through which they can safeguard their own and the industry's interests.[5] Typical cases are "the case of fisherman Medeiros suing Rode Island State Environmental Administration Director Vincent" (Medeiro v. Vincent, 431 F. 3d 25)[6] and "the case of S D. Warren Co. suing Maine State Environmental Protection Board" (S D. Warren Co. v. Me Bd of Envtl Prot, 126 S Ct 1843)[7]. Thirdly, except for the famous environmental protection organizations like Sierra Club, the Conservation Fund, the Environmental Defense Fund and the Natural Resources Defense Council, more and more newly established environmental protection organizations participate in the cases that have great significance in environmental protection through individual lawsuits or associated lawsuits to realize their goal of influencing national environmental rule of law and improving environmental quality.[8] Typical cases include "the case of Defenders of Wildlife suing the US Federal Environmental Protection Agency" (Defender of Wildlife v. United States EPA, 450 F. 3d 394)[9].

With regards to the qualifications and conditions for the lawsuits, though there is no relaxation in the preconditions that administration organs should be notified within prescription or litigation should be initiated within prescription, there are two development trends as follows: Firstly, judges are more lenient in determining the existence of environmental damages and the causal relationship. For example, in the event that environmental legislation does not specifically stipulate that citizen lawsuits can be instituted, while citizens and social organizations regard that the acts of administrative organs fail to strictly abide by

---

[4] See http: //www. lexis com/research/retrieve/frames?_m=6e3781 be176295510a49fe9884 584c60&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1 &_startdoc=I &wchp=dGLbVIb-zSkAb& md5=elc86d63f5059009cb21a9cea18ff22b.

[5] See M icheael D. Axline, Environmental Citizen Lawsuits, M ichie, Butterworth Legal Publishers, 1995, P.5 - I.

[6] See http: //www. lexis.com/research/retrieve/frames?_m=308992b0a38951106b26c392946 ffa7f&csvc=b1&cform=bool&_ fmtstr=FULL&docnurn=1 & _startdoc=1&wchp= dGLbVzW-zSkA I&_md5 = fl 593dl 847267 1 99227b2c3 e5a60bac3.

[7] See http: //wwv. lexis com/research/retrieve/frames?_m=49de69e14e4a72c6b538a3al df279587&csvc=bl&cforrn=bool&_fmtstr=FULL&docnum=1 &_startdoc=1&wchp= dGLbVzz-zSkAk&_md5=e225el f9f4c781 fl b412a3c987aabf6e.

[8] See Deirdre H Robbins, Public Interest Environmental Litigation in the United States, David Robinson and John Dunkley, Public Interest Perspectives in Environmental Law, London, John Wiley & Sons, Inc, 1995, P. 25, P. 39.

[9] See http: //www. lexis.com/research/retrieve/frames?_m=5eb8365a1559de03d4750 d25d9674fe&csvc=bl&cform=bool&_fmtstr=XCITE&docnum=1&_startdoc= 1&wchp=dGLbVzz-zSkAt&_md5=44bbeab9e18533aa8d23ec0d96822d5c.

relevant environmental legislation, they can look for the qualification basis for citizen lawsuits in other related legislation, for example, the case of Quachita Watch League suing Jacobs (Quachita Watch League v. Jacobs, 463 F. 3d 1163)[10] tried by the Federal Court of Appeal in 2006 and "the case of National Wildlife Federation suing Cleveland Cliffs Iron Co." (Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co., 471 Mich 608)[11] tried by Michigan State Supreme Court in 2004. Secondly, the determination of substantive damages in the court is supported by the principle of changed circumstances.[12] Judges in the US basically follow precedents; however, if judges believe the precedents are wrong; or based on the *Constitution*, the *Administrative Procedure Law* and environmental protection law, they believe the circumstances for enforcing the law have changed; or they believe the actual environmental circumstances have changed and judgments different with the precedents should be made, they do not have to be restricted by the principle of following the precedents. A typical case here is "the case of Ocean Advocates suing the US Army Corps of Engineers" (Ocean Advocates v. United States Army Corps of Eng'rs, 402 F. 3d 846). [13]

In the scope of cases that can be accepted and heard by the court, generally speaking, one important aim of citizen lawsuits is to stop present and future infringement or illegal acts, and their remedy measures are to seek the court's rulings of declaring law violation, and making restraining order, prohibition or mandatory bind-over order. These measures are normally applicable to current or ongoing law-breaking cases; then for cases where illegal acts existed in the past, and the defendants have started to make correction when the plaintiffs lodge lawsuits, do citizens or interest groups still have the right to sue for remedies? It is generally believed that the aim for citizen lawsuits is to declare law violation and to seek relief, thus citizen lawsuits for illegal acts that have been corrected do not make much sense and will be difficult to get the court's support, unless there is another remedy purpose such as hoping that the defendant will strictly follow the requirements of law on a long-term basis in the future, and the remedy measures of citizen lawsuits can realize this purpose. (Miller, 1995) A typical case

---

[10] See http: //www. lexis.com/research/retrieve/frames?_m=c02537c6f7d072bed8c95ff 1480fla2d&csvc=bl&cform=bool&_fmtstr=XC ITE&docnum=1 &_startdoc=1&wchp= dCLzVzz- zSkAA&_md5=9983db8f7f5afe205dfc420c8c6ea.

[11] See http: / www. lexis.com/research/retrieve/frames?_m=787c99bba17ddtbc7d91d 4344892fle6&csvc=bl&cf)rn=bool& fm tstr=FULL&docnum=1&_startdoc=1&wchp= dGLbVtz- zSkA t&_md5=1181 e06082f5d16e7057db5569551ed4.

[12] Dong Maoyun. Comparison of Cases Between the US and the UK[EB/OL] http://www.legalhistory.com.cn/docc/zxlw. detailasp?id=893&sortid=10.

[13] See http: //'www. lexis.com/research/retrieve/frames?_m=2ad0fbbfcccb3a6f144d019f4f 474629&csvc = bl&cform=bool&_fmtstr=XC ITE&docnum=1 &_ startdoc=I &wchp= dGLbV1b- zSkAA&_ md5=ad158ca52f37600b2cb571685ad7feel.

is "the case of citizens suing the US Steel Co." (Steel Co. v. Citizens for a Better Env't, 523 U.S 83). [14]

As to the petition of lawsuits, the court's rulings are more flexible with the following two main characteristics: Firstly, they not only support the request for remedies for damages that have been determined, but also support request for the study on determination of damages that may exist against the defendant. One of the preconditions for citizen lawsuits is that there must be substantive damages. If what the defendant does are really some dangerous activities, and this kind of substantive damages may have actually occurred, while the plaintiff can not provide evidence due to the limitations of economic or technical conditions, the plaintiff can institute a citizen suit to request the defendant to provide evidence to prove whether such substantive damages have occurred or not. A typical case is "the case of Maine People's Alliance suing Mallinckrodt Inc." (Maine People's Alliance v. Mallinckrodt, Inc. 471 E 3d 277).[15] Secondly, for the scientific uncertainty, the plaintiff's petition for administrative organs to take environmental protection measures based on the principle of risk prevention may be supported by the court. A typical case is "the case of Massachusetts and other environmental protection organizations suing the Federal Environmental Protection Agency" (Massachusetts v. EPA, 367 U. S App. D.C. 282). [16] In the trial of this case, nine Grand Justices of the Federal Supreme Court made a ruling by a vote of 5 to 4 on April 2, 2007, confirming: (1) Carbon dioxide also belongs to air pollutants; (2) Unless the Federal Environmental Protection Agency can prove that carbon dioxide has nothing to do with the global warming, it has to supervise the situation; (3) The Federal Environmental Protection Agency fails to provide reasonable explanation for refusing to regulate carbon dioxide and other harmful gases discharged from vehicles. Based on this, the Federal Supreme Court made the judgment: It is incorrect for the government to claim that the US does not have the right to regulate waste gas emission from cars and trucks that are newly off the line, and the government must regulate vehicle pollution. (Yuan, 2007)

In terms of the supporting mechanism for attorneys' participation, the principle of market orientated fee standard for attorneys in environmental citizen lawsuits

---

[14] See http: //www. lexis.com/research/retrieve/frames?_m= ffe23d4e60f2e9204b99e28942 ca9c0a&csvc=bl&cform=bool&_fmtstr=XCITE&docnum=1&_startdoc=1 &wchp= dGLbV1b- zSkA l& _md5=51c0ee72bf73b7cae822c035741451a6.

[15] See http: //www. lexis.com/research/retrieve/frames?_m=8baddeff0a834d494af9770 ee8cf9c4e&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1 &_startdoc=1&wchp= dGLzVtz-zSkAA&_md5=98969217ab19563556a64c50332dl 7fd.

[16] See http: //www. lexis com / research/retrieve/frames?_m=7ebffb4722c2dbaecf42ca 754df3c35f&csvc=le&cform=&fmtstr=FULL&docnnm=I &_ startdoc=1 &wchp= dGLbVzW-zSkAb&_md5=33ae38f098a2c69307b 1867833d8e40d.

has received the support of the federal court, which is conducive to the balance of power and rights of attorneys' participation. A typical case is "the case of Interfaith Community Organization suing Honeywell International Inc." (Interfaith Cmty Org v. Honeywell Int'l, Inc, 426 F. 3d 694). [17]

3 Comparison between the US environmental citizen lawsuits and China's theoretical model of environmental public lawsuits

When studying environmental litigation system, some Chinese scholars often identify the US environmental citizen lawsuits with China's theoretical public environmental lawsuits model. This needs to be reconsidered. What are the features of the public environmental lawsuits promoted by Chinese's scholars? It is generally believed that firstly, the direct purpose of environmental lawsuits is to realize social justice and social fairness so as to safeguard national interests and social public interest. Of course this does not exclude remedying one's interests while safeguarding national interests. And secondly, the prosecutor of the lawsuits can be one that does not have direct interest relationship with the case.[18] Some scholars have summarized these two characteristics of public environmental lawsuits as far as the identity of the plaintiff and the purpose of the lawsuits are concerned, it demonstrates the outstanding feature of "private for public interest". (Bie, 2006)

In terms of litigation purpose, China's theoretical public environmental lawsuits are mostly the same with the US environmental citizen lawsuits. The major difference is: If remedying one's interest is the citizens' first aim, and citizens exercise the right to sue in their own names, but the case objectively safeguards social public interest, in the US the case can be categorized as an environmental citizen lawsuit, but in China it may not be able to be classified as an environmental public lawsuit.

With respect to the scope of plaintiffs, the plaintiff of China's theoretical public environmental lawsuits is not necessarily one that has direct interest relationship with the case; most scholars believe that to protect national and social interests, any organization or any individual can push anyone that damages public environmental interests to the position of the defendant, for instance, anyone from Hubei province or Hubei province's environmental protection

[17] See http: //www. lexis.com/research/retrieve/frames?_m=41cl91f17cd8c87d9dd6df643el c4692&csvc=bl&cform=bool& fmtstr=XCITE&docnum~=I& _startdoc=I&wchp= dGLbVtz-zSkAA&_md5=4b01bd8dd01d8248946f2069b14097ac.

[18] Zhou Yifa, Zhou Shujun. On Public Interest Administrative Lawsuits by Citizens [EB/OL] http://www. lawlib.com/lw/lw_view.asp?no=4286.

organization can sue Baiyangdian's water polluting acts in Hebei province. There is a certain difference between the litigation model of this idea and that of the US environmental citizen lawsuits. The precedents of the US court include interest damages of visual beauty and entertainment enjoyment in the substantive damages with the purpose to determine the interest relationship between the plaintiff and the damage and to eventually recognize the qualifications of the plaintiff to sue. This does not mean that any organization or individual can under any circumstances become the plaintiff of environmental citizen lawsuits. This is because although the scope of such substantive damages is so wide as to include environmental interest damages of visual beauty and entertainment enjoyment that it is very easy for the plaintiff to meet the conditions of the suit, "substantive damage" is after all a condition, and in many cases it can disqualify plaintiffs that can not comply with requirements like "time" and "geological area". For example, if an environmental protection organization whose members are all from the same state decides to sue the inner lake water quality protection acts of the government of a remote state, its right to sue will not be recognized by the court as it does not suffer any substantive interest damages; (Robbins, 1995) If a homeless person who wants to suit in the state where he is the state environmental protection agency claiming that his environmental interests have been damaged, his statement in the court regarding the damaged environmental interests will not be taken by the court either. (Robbins, 1995) For similar reason, in "the case of Sierra Club suing Hawaiian State Tourism Agency" introduced above, the plaintiff Sierra Club's right to sue was eventually not recognized by Hawaiian State Supreme Court.

Based on the above analysis, it can be concluded that the litigation model of the US environmental citizen lawsuits and the litigation model of China's public environmental lawsuits assumed by Chinese scholars are after all different. As there is certain limitation set for the conditions to sue in the US environmental citizen lawsuits, compared with China's hypothetical litigation model of public environmental lawsuits, the former is easier to be accepted by Chinese legislation. However, compared with the name of "citizen lawsuits", the name "public lawsuits" that expresses the meaning of protection of collective rights and interest lawsuits better in Chinese legislative terminology and is more easily accepted by the general public and legislators. Based on this, I am inclined to build Chinese public environmental lawsuits according to the model of the US environmental citizen lawsuits, and to use China's model of environmental public lawsuits to achieve a goal similar to that of the US environmental citizen lawsuits.

4 The status quo and deficiency of China's legislation on public environmental lawsuits

Public environmental lawsuits include administrative lawsuits, civil lawsuits and criminal lawsuits. Limited by the research range of this thesis, it is to focus on administrative and civil public environmental lawsuits.

4.1 The deficiency of the legislation on environmental public administrative lawsuits

Environmental public administrative lawsuits have the characteristic of "individual against public power (i.e. the environmental administrative organs), individual for public interest". In terms of demands, their purpose is to remove or change specific environmental administrative acts of environmental protection organs through individual's request for the court's judicial review. (Bie, 2006) Looking at Chinese relevant environmental administrative legislation, there are some deficiencies as follows.

4.1.1 Legal definition of environmental damages and insufficiency

Article 2 of Chinese *Administrative Procedure Law* stipulates: "If citizens, legal persons or other organizations regard that administrative organs and specific administrative acts of administrative organs infringe on their legitimate rights and interests, they have the right to start legal proceedings in the court according to this law." This means that the plaintiff must be citizens, legal persons or other organizations that have direct interest relationship with specific administrative acts. "Direct interest relationship" refers to the legal relationship of rights and obligations with specific administrative acts. (Lin, 1992) "Legal relationship of rights and obligations" means the plaintiff must be the owner of the damaged substantive rights, and this kind of rights must be owned by the plaintiff "on a proprietary basis" or "on an exclusive basis" (Jin, 2004) However, in the traditional meaning of civil law, many environmental elements, such as clean air and clean water, belong to "common" or "publicly owned" "assets", and river belongs to the state assets, hence no organizations or individuals have proprietary ownership. Consequently according to the stipulation of Chinese *Administrative Procedure Law*, the plaintiff can not institute legal proceedings against the non-penalizing specific administrative acts that cause pollution and undermine public environment. This kind of legislative situation is disadvantageous to the protection of public environment and the legitimate environmental rights and interests of citizens. According to the principle that special laws or special

stipulations supersede ordinary laws or ordinary stipulations, it is necessary to overcome the limitations of the *Administrative Procedure Law* in the special environmental legislation. Article 6 of *the Environmental Protection Law* stipulates: "All units and individuals have the obligation to protect the environment, and have the right to inform and bring an accusation against any units or individuals that pollute and undermine the environment." "Bring an accusation" not only means the approach of starting civil proceedings in the court, but also means the acts of informing relevant state organs against the facts or suspects of minor offense and serious offense and requesting processing of such according to the law. (Wei, 1999) Nonetheless, issues like which state organ is to report to and which approach is to adopt are not further detailed thus it is not operable, and this needs to be solved by special environmental legislation. Based on this, the newly revised *Law on Prevention and Control of Water Pollution, Law on Prevention and Control of Atmospheric Pollution* and *Marine Environment Protection Law* explicitly elaborate on the environmental administrative right to sue. For instance, Article 5 of *the Law on Prevention and Control of Water Pollution* stipulates: "Any unit or individual that has suffered damage directly from a water pollution hazard shall have the right to demand elimination of the hazard and compensation for the damage by the polluter." According to this stipulation, if the non-authority related behavior of environmental administrative organs cause environmental damage or hazard and infringe on other persons' environmental rights and interests and other rights and interests that are related to environmental rights and interests, the litigation remedy right of environmental hazard can only be exercised by civil litigation to demand the elimination of the hazard or/and compensation for the loss; if the environmental damage or hazard is caused by the specific administrative behavior of environmental administrative organs, then the litigation remedy right of environmental hazard can only be exercised by administrative litigation to demand the elimination of the hazard or/and compensation for the loss. (Cai, 1992) But, this provision has not clearly defined the meaning of "loss". From the perspective of legal principle, "loss" not only includes substantive loss but also includes non-substantive loss of visual and spiritual feelings. Then can the court accept and hear environmental administrative lawsuits that only involve non-substantive loss? Neither Chinese *Administrative Procedure Law* nor special environmental legislation has included any stipulations regarding this respect. Before this problem can be solved, reference to non-substantive damage and tolerated limit of citizens and units in visual and spiritual feelings should be resolved at first. As these issues have not been settled at the moment, courts at various levels do not accept and hear this kind of cases.

4.1.2 Regulations and insufficiency regarding the environmental administrative right to sue for social groups and people without direct interest relationship

Article 10 of the *State Council's Decision on Several Issues Regarding Environmental Protection* promulgated in 1996 and Article 10 of the *State Council's Decision on Implementing Scientific Concept of Development in Strengthening Environmental Protection* in 2005 stipulate that: "…establish public participation mechanism, give play to the role of social groups, encourage public participation in environmental protection, inform against and report various acts that violate laws and regulations on environmental protection." If the role of social groups and the general public that does not have direct interest relationship with environmental administrative acts is just limited to informing against and reporting environmental violations, when victims of environmental pollution and ecological damage do not dare to or can not institute environmental administrative lawsuits due to external administrative pressure or economic reasons, and the environmental administration organs and relevant authorities do not make any correction of illegal acts, administrative acts that harm or may harm the environment can not be effectively resisted legally. This will not satisfy the internal needs for modern environmental protection and public participation, therefore, it is necessary to reinforce the role of social groups and people without direct interest relationship in environmental administrative lawsuits. In China there are already legal regulations regarding social groups supporting civil lawsuits. For example, Article 15 of the *Civil Procedure Law* stipulates: "Units, social groups, enterprises and institutions can support the affected units and individuals to take legal actions in the court against acts that harm the civil rights and interests of the state, the collective or individuals." However, Chinese laws do not touch on issues such as social group's support for administrative lawsuits and whether or not environmental social groups can represent their members to institute environmental administrative lawsuits.

4.1.3 Regulations and insufficiency regarding the scope of judicial review for environmental administrative acts

Section 2 of Article 12 of the *Administrative Procedure Law* stipulates: "The court shall not accept and hear lawsuits instituted by citizens, legal persons or other organizations concerning the following matters: administrative regulations, rules or generally binding decisions and orders formulated and promulgated by administrative organs." This kind of legislative regulations that completely exclude abstract administrative acts from the scope of judicial review can not satisfy the needs of WTO judicial review rules and Chinese rule of law. (Tang, 2000) In the process of market orientation, it is impossible to stop local

administrative organs from formulating and promulgating generally binding decisions and orders for local interests or interests of certain units or individuals, which may infringe on the environmental rights and interests and other related rights and interests of domestic and overseas units and individuals. (Wang, 2000) For this reason, it is necessary to expand the scope of judicial review for environmental administrative lawsuits to meet the needs of full, effective and timely protection of the legitimate rights and interests of domestic and foreign market players.

4.1.4 The lack of regulations regarding reduction and exempt of litigation costs and attorney's fee

Article 45 and Article 46 of *Measures for Payment of Litigation Costs* promulgated by the State Council in 2007 stipulate reduction and exempt of litigation costs, but they do not explicitly include public administrative litigation cases. In addition, the *Measures for Payment of Litigation Costs* and other existing legislation do not explicitly specify that the attorney's fee for public environmental lawsuits shall be borne by the losing party, neither do they stipulate the attorney fee standard. This is disadvantageous both to public environmental lawsuits involving claim of large amount and to motivating attorneys to participate in public environmental lawsuits.

Moreover, some of Chinese environmental administrative laws deem administrative reconsideration as the demanded preceding procedure for the instituting administrative lawsuits and they even stipulate that the results of administrative reconsideration are final and are not to be for judicial review. This approach of "exhausting administrative remedy" and excluding judicial remedy limits the exercise of the environmental administrative right to sue the interested parties, and does not suit any more the specialization of modern judicature and the development trend of hiring specialists as jurors, making it difficult to align with WTO's judicial review rules.

4.2 The deficiency of public environmental civil legislation

In the respect of legal definition of environmental damage and its deficiency, Section 1 of Article 108 of the *Civil Procedure Law* stipulates: "Legal proceedings must comply with the following conditions: The plaintiff must be citizens, legal persons and other organizations that have direct interest relationship with the case." Deficiency of this provision is more or less the same with that of the stipulation of the *Administrative Procedure Law* and will not be elaborated here.

In terms of legal regulations for the environmental civil right to sue of social groups and their inadequacy, Article 15 of the *Civil Procedure Law* provides that:

"Units, social groups, enterprises and institutions can support the affected units and individuals to take legal action in the court against the acts that harm civil rights and interests of the state, the collective or individuals." "Support" means the role played by social groups is only supplementary. When a regional development behavior approved by environmental administrative organs is likely to harm the regional ecological safety, if all the potential victims still do not dare to institute legal proceedings for the elimination of the danger with the support of environmental social groups, the limitation of the role of environmental social groups will show. Furthermore, Chinese laws do not deal with whether or not environmental social groups can institute environmental civil lawsuits on behalf of their members.

In addition, issues like reduction and exempt of litigation costs of environmental public civil lawsuits and that the attorney's fee should be borne by the losing party are not specifically covered in the *Measures for Payment of Litigation Costs* and other existing legislation, which goes against the instituting environmental civil public lawsuits and participation of lawyers.

4.3 Typical case studies of the legislative deficiency of Chinese environmental administrative and civil public lawsuits

According to the above analysis, if the plaintiff does not have direct interest relationship of rights and obligations with the case, but only has reflective interest relationship that is not protected by the law, he will not be supported by the court. For instance, in the "case of lawyer Jin Quixi suing Hangzhou City Planning Bureau" in 2003, the plaintiff believed that as Hangzhou City Planning Bureau allowed the construction of Hangzhou University for the senior within the range of the West Lake scenic spots, the original appearance of the West Lake would be greatly damaged. According to the *Administration Regulations on the Protection of Hangzhou West Lake Scenic Spots of 1983*, Hangzhou City Planning Bureau should not have issued the permit for the planned construction; as such he demanded that the court cancel the permit for the project issued to the project of Zhejiang Province University for Old Age by Hangzhou City Planning Bureau. (Di, 2006) In three days after the legal proceedings were started, the court of the West Lake District gave the plaintiff a written administrative verdict stating that the case would not be filed. The reason was that the court did not regard that the plaintiff was qualified to institute the suit, as the administrative behavior of Hangzhou City Planning Bureau issuing the permit for construction did not have any actual impact on Jin Quixi.[19]

[19] Jin Kuixi v. Hangzhou Municipal Planning Bureau [EB/OL]. See http://www.chinacourt. Org/public/detailphp? id=92767.

According to the provisions of Chinese constitution, the procuratorate is a unit of legal supervision which has the duty of protecting environmental interests of the state and the public and stopping illegal environmental acts. Therefore theoretically the procuratorial organ has the qualification to institute environmental civil lawsuits. Article 4 of the *Organization Law of the Procuratorate* affirms this point. The provision stipulates that: "The procuratorate through exercising the procuratorial power… protects socialist assets owned by the whole people and the assets collectively owned by the working people, protects the legal assets privately owned by citizens, protects personal rights, democratic rights and other rights of citizens…" It is encouraging to see there have appeared in some cases in which the procuratorial organ exercises the right to institute environmental civil public lawsuits. An example is the case of Leling municipal procuratorate of Dezhou city in Shandong province instituting an environmental civil public suit on April 22, 2003 against Jinxin Chemicals Plant for polluting the environment, and demanding the court to order the plaintiff to stop the infringing acts, to clear away the obstacles and to eliminate the danger. On May 9 of the same year, the court of Leling city made the judgment, demanding Jinxin Chemicals Plant by itself to dismantle the polluting facilities, stop the infringement, clear away obstacles and eliminate the danger.[20] However, due to no explicit support of specific provisions of litigation law[21], this kind of new environmental judicial practice does not play the role of "precedents" and is not promoted by the judicial community. And the reason is mainly the lack of explicit legislative stipulations. In addition, most of the procuratorial organs are not willing to participate in the sensitive cases like environmental pollution which involves too many interest parties.

It is impossible to solve the aforesaid problem through precedents in China where statute law is adopted; the problem can only be solved by innovating and improving legislation on Chinese public environmental lawsuits.

---

[20] Bie Tao. Study on Legal Issues of Ecological Rectification and Restoration [EB/OL] http://www.lm.cn/economic/environmenteco/200611/t20061123_5731.htm.

[21] As what is stipulated in Article 15 of the Civil Procedure Law "Units, social groups, enterprises and institutions can support the affected units and individuals to take legal actions in the court against behaviors that harm the civil rights and interests of the state, the collective or individuals", they only support the system of instituting lawsuits but not represent the system of instituting lawsuits.

5 Suggestions for innovating and improving legislation on Chinese public environmental lawsuits

Although the system of the case law of the US environmental citizen lawsuits originates from the political structure of the "separation of three powers", it has technical characteristics; China, which adopts the statute law, can always convert these from the technical aspect into specific regulations of environmental legislation and litigation legislation by considering its own national situation. The following measures can be taken during the conversion.

At the constitutional level, the constitution should be amended to affirm citizens' environmental rights, to affirm social environmental rights and interests, and to confirm the role of judicial remedies in the protection of the rights and interests of citizens and society.

In the aspect of legislation on environmental administrative public lawsuits, we should focus on combating the abuse of administrative power with judicial review, making administrative organs responsible for their own acts and achieving the goal of preventing environmental problems. (Murdie, 1993) The *Administrative Procedure Law* and the *Law on Environmental Protection* should be revised according to the following thoughts to establish the standard and scope of public environmental lawsuits (Chen, 2007): Firstly, admit the environmental rights of citizens and the whole society, clarify the status of social groups of environmental protection and admit their social role, and establish a healthy legal mechanism of public supervision; (Lü, 2006) Secondly, expand the scope of environmental administrative damage to include non-substantive damage such as visual and spiritual feeling damage on top of the existing damage of environmental elements and the traditional asset damage and personal damage; Thirdly, expand the scope of cases where social groups and people who do not have direct interest exercise the right to institute environmental administrative lawsuits: (a) When the legitimate environmental rights and interests of environmental and other social groups and people who do not have direct interest relationship suffer non-substantive damages due to environmental administrative acts, grant them the administrative right to sue; (b) When the legitimate environmental rights and interests of environmental and other social groups suffer substantive or non-substantive damages due to environmental administrative acts, admit the right of the social groups to sue on behalf of their members; (c) In the lawsuits to clear away environmental obstacles or eliminate environmental dangers, establish the system for social groups and the public that do not have direct interest relationship with the lawsuits to support environmental administrative lawsuits. When conditions are ripe, the right to start legal proceedings of governments at various levels and their functional

departments as well as procuratorial organs should be confirmed to fill up the deficiency of the system of private actors instituting environmental administrative lawsuits; Fourthly, establish a standard fee system that will motivate lawyers' participation and litigation agency. Only by doing can social group's and the public's regular supervision and legal combating and checking of governmental environmental acts be facilitated It is worth mentioning that the instituting of environmental public administrative lawsuits should follow certain preceding procedure, that is, within a certain period (such as 30 days or 60 days) before taking legal actions, the plaintiff should notify relevant administrative departments,[22] and if the notified departments ignore the notification or their actions do not comply with legal requirements, the notifying party can start legal proceedings in the court. (Bie, 2006) Besides, in order to ensure public trust for administrative acts and the interests of other people, legal proceedings should be started within a certain period, which has been universally recognized by domestic and foreign legislation.[23] (Murdic, 1993)

In the aspect of legislation on public lawsuits of environmental civil litigation, we should focus on restricting environmental civil right that has been expanding under the condition of market economy with social public interests, aiming at preventing and clearing up environmental problems, and amend the *Civil Procedure Law* and the *Law on Environmental Protection* according to the following thoughts: Firstly, expand the scope of environmental civil damage to include non-substantive damage such as visual and spiritual feeling damage on top of the existing damage of environmental elements and the traditional asset damage and personal damage; Secondly, expand the scope of cases where environmental and other social groups exercise the right to institute environment administrative lawsuits: (a) When the legitimate environmental civil rights and interests of environmental and other social groups suffer non-substantive damage, grant them the administrative right to sue; (b) When the legitimate environmental civil rights and interests of environmental and other social groups suffer substantive or non-substantive damage, admit the right of the social groups to sue on behalf of their members; (c) In the lawsuits to clear away environmental obstacles or eliminate environmental dangers, except for sticking to the system for social groups to support environmental civil lawsuits, when conditions are ripe, the right to start legal proceedings of governments at various levels and

[22] The content of the notification should include the statement that the administrative behavior breaches the law and the measures that should be taken, and no response to the notification will lead to citizen lawsuits. These items have become common content of the legislation of most countries that implement citizen litigation system.

[23] For example, England stipulates that the time limit for environmental judicial review should be the three months after the administrative decision is made, and in some cases it can be six weeks.

their functional departments as well as procuratorial organs should be confirmed[24] to fill up the deficiency of the system of private actors instituting environmental civil public lawsuits;[25] (Seerden, 2002) Thirdly, combine the US's "intervention litigation" with Chinese system of third party's participation in the litigation. Citizens and social groups whose environmental interests such as visual beauty and entertainment are damaged should be granted the third party litigation status and allowed to participate in or intervene in the legal proceedings to implement environmental laws in which the plaintiffs are state organs and the defendants are enterprises or individuals.[26] For this purpose, the time and procedure for the intervention, the litigation petition that can be made in the intervention and the litigation rights of the interested parties should also be specified; Fourthly, establish a standard fee system that will motivate lawyers' participation and litigation agency. Only by doing so can the social group's and the public's regular supervision and legal combating and checking of the production and operation of big companies can be facilitated. Similarly, the instituting of environmental public civil lawsuits should follow certain preceding procedure, that is, within a certain period (such as 30 days or 60 days) before taking legal actions, the plaintiff should send the potential defendant a notice whose content and format should comply with legal requirements, and if the notified party ignore the notice or their actions do not comply with legal requirements, the notifying party can start legal proceedings in the court.

With respect to specific environmental laws, special environmental laws and regulations such as *Law on Prevention and Control of Water Pollution*, *Law on Prevention and Control of Atmospheric Pollution*, *Law on Protection of Marine Environment*, *Law on Prevention and Control of Environmental Noise Pollution*, *Law on Prevention and Control of Radioactive Pollution, Law on Land Administration*, *Forestry Law* and *Regulations on Natural Reserve* should be revised to include the specific citizen lawsuits that are consistent with the stipulations of the *Constitution*, *Administrative Procedure Law*, *Civil Procedure Law* and *Law on Environmental Protection.* These provisions should adopt the

[24] In the US, the Federal Department of Justice has the Environment and Natural Resources Office under it which is responsible for working with EPA and instituting environmental civil and criminal lawsuits against polluters on behalf of public interests.

[25] China's individual environmental laws already have explicit stipulations, for example, Article 90 of the *Law on Protection of Marine Environment* stipulates that for any losses incurred by the state due to marine environmental damage, relevant departments demand indemnity from the responsible parties on behalf of the state.

[26] In the US, in the lawsuits where the government is the plaintiff, the conditions and procedures for citizens or social groups to intervene in litigation are specified by the *Federal Rules of Civil Procedure*. In China, it can be considered that the *Civil Procedure Law* makes these specifications.

approach of combining affirmative exposition, negative exposition, general listing and summary listing to define the scope of environmental citizen lawsuits that can be accepted and heard by the court, the necessary conditions of parties, the preconditions of litigation, the petitions of plaintiffs, and the modes and conditions for presenting evidence. For example, in regards to the preconditions of litigation, it should be stipulated that the plaintiff should notify administrative organs within legal prescription or start legal proceedings within legal prescription. In terms of confirming damages, it should be explicitly stipulated that the confirmation of substantive damage should conform to the principle of changed circumstances; in the respect of the scope of cases that can be accepted and heard by the court, the two litigation models of the US environmental citizen lawsuits and ordinary infringement lawsuits can be merged[27] to stipulate that environmental citizen lawsuits can be instituted both for cases that are entitled to the application of the court's prohibition order and for cases that are entitled to the demand of environmental damage compensation; and in litigation petitions, diversified remedies that are consistent with the demand of environmental protection and interests protection can be stipulated, and under certain circumstances, based on the uncertainty of scientific basis, administrative organs can be requested to take environmental protection measures according to the principle of risk prevention.

As the Supreme Procuratorate and the Supreme Court have the power of judicial interpretation, it is necessary to strengthen their role in the public environmental lawsuits. In the Fifth National Administrative Trial Working Conference held in March 2007, president of the Supreme Court Xiao Yang pointed out: "In particular, for administrative disputes involving mass participation that are caused by social hot issues like the acquisition of agricultural land and resources and environmental protection require handling through coordination to the fullest extent… intensification and transformation of contradictions due to inappropriate way of working should be prevented and avoided. Judicial interpretation on relevant issues of administrative litigation coordination and reconciliation should be formulated to provide effective basis for properly handling administrative disputes."[28] It can be seen that the Supreme Court already has relatively thorough understanding of the realistic issues existing in the environmental public litigation. Although the *Administrative*

[27] In the US, the instituting of environmental citizen lawsuits does not stop individuals from exercising the right of litigation remedies for private interests through clearing away obstacles and compensating damages. That is to say, the two litigation models of citizen lawsuits and infringement damage compensation coexist.

[28] The courts explore new mechanism for solving difficulties of the "end of settlement by official agencies without the end of settlement by citizens".
See http://news.xinhuanet.com/legal/2007-03/28/content_5908959. htm.

Procedure Law and *the Civil Procedure Law* limit the scope of cases that can be accepted and heard by the court, the Supreme Court can play a pioneering role, such as making extended interpretation for the conditions of instituting lawsuits stipulated in Section 8 of Article 11 of *the Administrative Procedure Law* "Regarding that administrative organs have violated other citizens' personal rights and property rights", and for the conditions of instituting lawsuits stipulated in Section 1 of Article 108 of *the Administrative Procedure Law* that the plaintiff has "direct interest relationship" with the case, and including some non-substantive damages like the damage of visual beauty and the damage of the interests enjoyed in a beautiful environment, so as to provide citizens a judicial channel to remedy their social environmental interests.

6 Concluding remarks

The above measures, as far as concerning to the scope and depth of the innovation of system and mechanism, are a significant transformation for legislation of China's existing environmental litigation. This transformation has become very imperative in the reality that environmental problems are deteriorating and the citizen's appeals are getting louder. Some officials and scholars may have concerns that legislation affirming the system of public environmental lawsuits will not only get environmental protection administrative organs and state-owned large and medium enterprises trapped in lawsuits that is hard to get over, but will also add to the workload of courts which are already heavily overloaded. In the US, similar arguments and resistance were encountered when the system of citizen lawsuits was established through the *Clean Air Act* and the *Clean Water Act*, and in the initial stage of implementation there were also frequent occurrences of litigation cases. However, after over a decade of implementation, the federal and state courts have found that as there are preconditions for citizen lawsuits such as 60 days notice before legal proceedings and prior provision of security for the plaintiff's application for initial prohibition order, there have not been many excessive lawsuits and the effect on environmental protection has been very obvious. (Miller, 1987) On the part of the government and enterprises, it is regarded that the deterrence sword of the legally established "citizen lawsuits" hanging over them all the time will urge them to formulate scientific, prudent and responsible thoughts and modes of environmental protection. (Miller, 1987) Based on the same principle, if Chinese environmental public litigation system is designed properly, the situation that the officials and scholars are concerned about can be overcome or avoided on a long-term basis.

References

Axline M D (1995). Environmental Citizen Lawsuits. Michie: Butterworth Legal Publishers, A-A-1, 1–8

Bie Tao (2006). Chinese public interest environment litigation and legislative ideas // Chinese environmental rule of law. Beijing: China Environmental Science Press, 32, 35

Bie Tao (2006). Study on legal issues of ecological rectification and restoration. http://www.lm.cn/economic/environmenteco/200611/t20061123_5731.htm

Cai Shouqiu (1992). Environmental Administrative Enforcement and Environmental Administrative Litigation. Wuhan: Wuhan University Press, 272–276

Chen Jingjing (2007). Representative Lü Zhongmei: Attentions shall be paid to study on judicial practices in public interest litigation. Legal Daily, 2007–03–09

Di Jun (2006). Study on Chinese public interest environment litigation system [EB/OL] http://www. acla.org.cn/pages/2006–10–25/s36930.html

http: //www. tycool com/2007/04/03/00031.htm

Jin Ruilin (1994). Environmental Law Science. Beijing: Peking University Press, 203–204

Lin Lihong (1992). Survey of Administrative Procedure Law. Wuhan: Wuhan University Press, 88

Lü Zhongmei (2006). Perfect dispute settlement mechanism and construct environment-friendly society by force of law. Study Times, 2006–6–5

Miller J G (1987). Citizen Lawsuits: Private enforcement of federal pollution control laws. New York: Wiley Law Publications, 2, 5, 7, 9, 85

Murdie A (1993). Environmental Law and Citizen Action. London: Earthscan Publications Ltd., 83, 85

Onida M (2004). Europe and the Environment. Groningen: Europa Law Publishing, E 25

Robbins D H (1995). Public Interest Environmental Litigation in the United States. London: John Wiley & Sons, Inc., 5, 20

Robinson D and Dunkley J (1995). Public Interest Perspectives in Environmental Law. London: John Wiley & Sons, Inc, 18–19, 23, 25, 39

Seerden R, Heldeweg M, Deketelaere K (2002). Public Environmental Law in European Union and the United States. New York: Kluwer Law International, 528

Tang Haomin (2000). On WTO and Local Administrative Management System. Shanghai: Shanghai People's Press, 17

Wang Xinkui, Liu Guangxi (2000). Survey of WTO-DSB. Shanghai: Shanghai People's Press, 376–380

Wei Dingren (1999). Constitutional Science. Beijing: Peking University Press, 181

Yuan Xuan, Zhang Jun, Chang Jiwen (2007). Milestone environmental judgment by the US Supreme Court and the US government shall regulate the emission by vehicle of carbon dioxide

Zhao Qian, Zhu Ming (2004). Analysis on the causes for the acquisition by the US courts of special status in judicial investigation. Journal of Hubei Broadcasting and TV University, (3): 86

Author

Chang Jiwen is a professor and executive director for Social Law Research Department at Institute of Law, Chinese Academy of Social Sciences and associate secretary-general of Chinese Research Association on Environmental and Natural Resources Law. He once visited German Max-Planck-Institute for comparative public law and international law, American Temple University, Japanese Waseda University and Columbia University. He has published many monographs, such as *Principle of Environment Legal Liability*, *Basic Theories on Environmental Law*, *Market Economy and Innovation and Perfection of Chinese Environmental Law Institutions.* He was editor-in-chief of many textbooks, such as *Environmental Law, International Environmental Law.* He published over 130 articles in newspapers and journals, such as *People Daily*, *Review of Global Law*, *Chinese Environmental Science, Waseda Annual Journal on Comparative Law*, and *Temple Journal of Science, Technology & Environmental Law.*