U.S. Environmental Public Interest Litigation: Experiences and Lessons Learned

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EXECUTIVE SUMMARY

Environmental public interest litigation (EPIL) has emerged as a key tool for Chinese Non-Governmental Organizations (NGOs) to protect China's natural resources and enforce existing environmental regulations. China's new Environmental Protection Law came into effect on January 1, 2015, giving approximately 700 Chinese NGOs standing to bring EPIL suits for the first time in Chinese history.[1] This project aims to provide guidance to Chinese EPIL lawyers by outlining selected developments of EPIL in the United States over the past 40 years. The project comes at a crucial time for Chinese EPIL, as the success or failure of these early cases will have major implications for the future of environmental law and regulation in China.

Chinese EPIL lawyers face many challenges: barriers to filing public interest litigation cases at the courts; difficulty collecting and assessing evidence of environmental harms, proving causation, and securing funding for lawsuits; coping with a lack of technical and legal knowledge; and dealing with a lack of funding to monitor enforcement. As a growing number of lawyers and NGOs enter the environmental public litigation field in China, there is a greater need for training and targeted guidance.

The cases included in this compendium highlight key elements of environmental law and practice in the United States. The first chapter traces the development of U.S. standing doctrine. Although there are many differences between the U.S. and Chinese approaches to standing, U.S. standing doctrine is the starting point for understanding the history of U.S. EPIL. Chapters II and III discuss *Scenic Hudson* and *Calvert Cliffs*, two early cases which establish bedrock principles of U.S. environmental law: the environmental impact assessment requirement, the legitimacy and importance of aesthetic and conservational harms, and the requirement that all government entities consider and follow environmental regulations.

Chapter IV surveys the extensive litigation resulting from an accident at the Three Mile Island nuclear facility in Pennsylvania. The chapter discusses the use of class-action litigation environmental law and touches on the use of settlement funds—large pools of money for paying expenses related to plaintiffs' harm. *Sunburst School District*, presented in Chapter V, dealt with a benzene leak that contaminated nearby groundwater. The judgment in *Sunburst* illustrates the difference between restoration damages, which require payment for the entire cost of fixing any harm caused by the defendant, and "diminution in value" damages, which equal the difference between the value of property before and after contamination. The compendium closes with an analysis of two recent cases, *Conservation Law Foundation* and *Dickson*, which explain details of environmental litigation from the point of view of the NGOs seeking to protect the people and natural resources around them.

[1] *700 Green NGOS can file Pro Bono Lawsuits, Official Estimates*, CAIXIN ONLINE (Jan. 08, 2015), http://english.caixin.com/2015-01-08/100772415.html (last visited June 12, 2016).

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We hope you find this information of use and remain at your disposal should you have any follow-up questions or comments.

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I. INTRODUCTION

A. Background: Environmental Public Interest Litigation in China

Prior to the revision of China's Civil Procedure Law in 2012, no Chinese laws regulated environmental public interest litigation.[2] Although some local courts had set up environmental tribunal pilot projects for specialized environmental case hearings, few EPIL cases successfully made it to court.[3]

From 2012 to 2016, the National People's Congress and other institutions revised a series of environmental laws and statutes. In 2012, the revised Civil Procedure Law provided organizations with standing for environmental public interest litigation for the first time. Article 55 of the new law provides that, "[f]or conduct that pollutes the environment, infringes upon the lawful rights and interests of a large number of consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court."[4]

In 2014, the Environmental Protection Law was revised to specify which types of organizations had standing to file environmental public interest litigation cases to the People's Courts. Article 58 requires that these organizations meet the following conditions to have standing as a plaintiff in an EPIL case: "(1) Have their registration at the civil affair departments of people's governments at or above the municipal level with sub-districts in accordance to the law; and (2) Specialize in environmental protection public interest activities for five consecutive years or more, and have no records of legal violations. Where a social organization satisfying the provisions in the preceding paragraph files a lawsuit with the people's court, the people's court shall accept the lawsuit in accordance with the law. The social organization that files a lawsuit shall not make use of the lawsuit to seek economic benefits."[5]

In January 2015, the Supreme People's Court (SPC) issued "The Judicial Interpretation Addressing Environmental Public Interest Litigation," which clarified a number of issues relevant to EPIL, including court jurisdiction, plaintiff qualifications, litigation procedures,

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[2] *A Comparative Study on the Domestic and Overseas Public Interest Litigation System*, OPEN JOURNAL OF POLITICAL SCIENCE (Apr. 08, 2015), http://file.scirp.org/pdf/OJPS_2015040916272745.pdf (accessed June 12, 2016).

[3] *China's Top Level Environmental Tribunal Strengthens Lower Courts*, CHINA DIALOGUE (Oct. 24, 2014), https://www.chinadialogue.net/article/show/single/en/7420-China-s-top-level-environmental-tribunal-strengthens-lower-courts (accessed June 12, 2016).

[4] Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013), art. 55, ZHONGGUO FALÜ GUIDING XINXI XITONG, *translated in Civil Procedure Law of the People's Republic of China (2012 Amendment)*, BEIDA FABAO, http://en.pkulaw.cn/display.aspx?cgid=183386&lib=law (accessed May 10, 2016) [hereinafter Civil Procedure Law].

[5] Huanjing Baohu Fa (环境保护法) [Environmental Protection Law] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 24, 2014, effective Jan. 1, 2015), art. 58, ZHONGGUO FALÜ GUIDING XINXI XITONG, *translated in Environmental Protection Law of the People's Republic of China (2014 Revision)*, BEIDA FABAO, http://en.pkulaw.cn/display.aspx?id=18126&lib=law (accessed May 10, 2016) [hereinafter Environmental Protection Law].

liabilities and remedies, litigation costs, and lawyer fees.[6] Later that year, the SPC set up environmental and natural resources tribunals specifically to hear environmental cases, and did so with an emphasis on promoting environmental public interest litigation.

Most recently, the SPC issued "Implementation Measures for Pilots on People's Procuratorate-Initiated Public Interest Litigation," which gives Chinese procuratorates the authority to initiate civil and administrative public interest litigation, including EPIL.[7]

These laws and statutes constitute the current legal framework for EPIL in China. However, EPIL has developed faster on paper than in practice, with the number of cases increasing at a much slower rate than anticipated. From 2007 to 2014, courts across China accepted a total of 65 environmental public interest cases. EPIL actions brought under the 2012 Civil Procedure Law did not fare well,[8] possibly because the law did not clearly indicate which organizations had standing.[9] During the first 11 months of 2015, the first year that NGOs had the advantage of the new Environmental Protection Law, courts at all levels had accepted 48 environmental public interest litigation cases.[10] But of these cases, only nine different organizations brought lawsuits, and of the 37 cases on record, only six were tried and completed.[11]

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[6] Sup. People's Ct., *Zuigao Renmin Fayuan Guanyu Shenli Huanjing Minshi Gongli Susong Anjian Shiyong Falü Ruogan Wenti de Jieshi* (最高人民法院关于审理环境民事公里诉讼案件适用法律若干问题的解释) [The Supreme People's Court Interpretation of Several Issues Regarding the Application of Law in Public Interest Environmental Civil Litigation], ZHONGGUO FAYUAN WANG (Jan. 6, 2015), http://www.chinacourt.org/law/detail/2015/01/id/148058.shtml (accessed May 10, 2016), *translated in SPC Opinion on Environmental Public Interest Civil Litigation*, CHINA LAW TRANSLATE (Jan. 6, 2015), http://chinalawtranslate.com/spcenviropubinterest/?lang=en (accessed May 10, 2016) [hereinafter SPC EPIL Opinion].

[7] Sup. People's Ct., *Renmin Fayuan Shenli Renmin Jianchayuan Tiqi Gongyi Susong Anjian Shidian Gongzuo Shishi Banfa* (人民法院审理人民检察院提起公益诉讼案件试点工作实施办法) [Implementation Measures for Pilots on People's Courts Hearing Public Interest Lawsuits Initiated by People's Procuratorates], ZHONGGUO FAYUAN WANG (Feb. 25, 2016), *translated in Implementation Measures for Pilots on People's Courts Hearing Public Interest Lawsuits Initiated by People's Procuratorates*, CHINA LAW TRANSLATE (Feb. 28, 2016), http://chinalawtranslate.com/spcprocpubintcases/?lang=en (accessed May 3, 2016).

[8] *See "0 Tupo" Tuidong Lifa* ("0 突破"推动立法) ["0 Breakthroughs" in Promoting Legislation], ZHONGHUA HUANJING, Mar. 2014, at 53, http://www.acef.com.cn/uploads/soft/140718/2014%E7%AC%AC3%E6%9C%9F.pdf (accessed May 10, 2016) (courts rejected at least 9 cases brought by prominent environmental NGOs—the All-China Environment Federation and Friends of Nature—in 2013).

[9] *See, e.g.*, Zhonghua Huanbao Lianhehui Su Hainan Luoniu-shan Zhongzhu Yuzhong Youxian Gongsi (中华环保联合会诉海南罗牛山种猪育种有限公司) [*ACEF v. Luoniushan Pig Breeding Co., Ltd.*], TIANYA FALÜ WANG (Hainan High Ct. 2013), http://www.hicourt.gov.cn/juanzong/detail_new_ws.asp?N_LSBH=50812&N_DWDM=2900&C_AH=%A3%A82013%A3%A9%C7%ED%C1%A2%D2%BB%D6%D5%D7%D6%B5%DA154%BA%C5&C_SJDCSJ=2014-1-16&C_BMMC=%C1%A2%B0%B8%D2%BB%CD%A5 (accessed May 10, 2016) (noting confusion over Article 55's language and finding the plaintiff unable to claim standing under the "prescribed by law" language).

[10] *Qian 11 Yue Quanguo Shouli 48 Jian Huanjing Gongyi An* (前 11 月全国受理 48 件环境公益案) [48 Environmental Public-Interest Cases Accepted over the Past 11 Months], BEIHUA DIANZI BAO (Dec. 30, 2015), http://epaper.jinghua.cn/html/2015-12/30/content_268013.htm (accessed May 10, 2016).

[11] *9 Jia Huanbao Zuzhi Yi Nian Yiqi 37 Qi Huanjing Gongyi Susong* (9 家环保组织一年提起 37 起环境公益诉讼) [9 Environmental Organizations Bring 37 Environmental Public-Interest Cases in One Year], FAZHI RIBAO (Mar. 20, 2016), http://www.legaldaily.com.cn/index_article/content/2016-03/20/content_6531732.htm?node=5955 (accessed May 10, 2016).

Several cases illustrate how NGOs have put these laws and statutes into practice. *Fujian Green Home & Friends of Nature v. Xie Zhijin & 3 Other Defendants* is especially significant for Chinese EPIL, because it was the first case filed under the 2015 Environmental Protection Law by an NGO plaintiff in which the NGO won.[12] The case implicated many of the statutes in the new Environmental Protection Law and related judicial interpretations, including standing of NGOs, environmental damage assessment, expert testimony, litigation cost, and so on. A lawsuit by the China Biodiversity Conservation and Green Development Foundation against multiple industries that had caused pollution in Ningxia's Tengger Desert was also pivotal for Chinese EPIL. On appeal from a rejection by the Ningxia Zhongwei Intermediate People's Court, the Supreme People's Court officially confirmed the organization's standing qualifications to bring environmental public interest litigation suits.[13] This was also the first time that an EPIL case had been accepted in a western Chinese province.[14]

Despite the past year's major breakthrough cases, significant obstacles and challenges stand in the way of NGO's bringing successful EPIL cases, chief among them being how to effect long-lasting environmental restoration and compensation. In most of the cases to date, the most common method for environmental remediation has been a one-time, lump-sum damages award. Though this mechanism represents real progress toward environmental restoration in the EPIL context, improvement is needed in rigorous, long-term, post-case environmental monitoring. Also, unlike the United States, Chinese regulations do not provide a mechanism for funding future environmental remedies that may be required.

Looking forward, practitioners' primary focus will be on improving implementation of the new Chinese EPIL system. Particular challenges include funding for EPIL, the use of pollution monitoring and testing as evidence in cases brought under the new laws, and ensuring that litigation effects meaningful improvements in environmental quality by monitoring the distribution of post-litigation remediation funds. Although the road ahead will be difficult for NGO plaintiffs, skilled litigators, using the new EPIL legal framework and working with the government and utilizing nationwide expert networks, have a real opportunity to protect both the

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[12] Beijingshi Chaoyangqu Ziran zhi You Huanjing Yanjiusuo, Fujian Sheng Lü Jiayuan Huanjing Youhao Zhongxin yu Xie Zhijin, Ni Mingxiang Deng Linye Chengbao Hetong Jiufen Ershen Minshi Panjue Shu (北京市朝阳区自然之友环境研究所，福建省绿家园环境友好中心与谢知锦，倪明香等林业承包合同纠纷二审民事判决书) [*Beijing, Chaoyang Friends of Nature Research Institute and Fujian Green Home Environmental Center v. Xie Zhijin, Ni Mingxiang, and Other Forestry Contractors, Ruling on Civil Appeal*] (Fujian High Ct. Dec. 14, 2015), FUJIANSHENG GAOJI RENMIN FAYUAN CAIPAN WENSHU, http://www.fjcourt.gov.cn/Page/Court/News/ArticleTradition.aspx?nrid=9d919a38-e9db-4144-8920-93b5880d8ba7 (accessed May 10, 2016).

[13] *Zhongguo Shengwu Duoyangxing Baohu yu Lüse Fazhan Jijinhui Huanjing Wuran Zeren Jiufen Shenpan Jiandu Minshi Caiding Shu* (中国生物多样性保护与绿色发展基金会环境污染责任纠纷审判监督民事裁定书) [Ruling on *China Biodiversity Conservation and Green Development Foundation Environmental Pollution Civil Case*] (Sup. People's Ct. Mar. 17, 2016), ZHONGGUO CAIPAN WENSHU WANG, http://wenshu.court.gov.cn/content/content?DocID=20b74880-54ea-4bdc-86d4-d6fbca2f6ef4 (accessed May 10, 2016).

[14] Press Release, THE SUP. PEOPLE'S CT. OF THE PEOPLE'S REP. OF CHINA, *China's Environment Minister Hails Court Ruling on Desert Pollution* (Mar. 11, 2016) http://english.court.gov.cn/2016-03/11/content_23860678.htm (accessed May 10, 2016).

environment and public health.

B. An Introduction to Standing for EPIL in the United States

The United States Constitution provides that courts of the United States may only decide "cases" and "controversies."[15] Courts have interpreted this case-or-controversy requirement to mean that in order to bring a lawsuit in the courts of the United States, a plaintiff must have both a cognizable cause of action and standing to prosecute the case. The cause of action requirement concerns the merits of the case: whether the defendant violated either common law or a statute. The standing requirement focuses on the plaintiff as a party to the case. Even if a plaintiff properly identifies a cause of action under statutory or common law, courts will not entertain the lawsuit unless the plaintiff has standing to bring the claim. As described in further detail below, to establish standing to bring suit, a plaintiff must show that defendant's conduct caused an actual injury to plaintiff, and that plaintiff's injury is of a kind that the court is empowered to remedy. Because standing is a constitutional requirement, it must be satisfied in every case, regardless of statutory law.

The development of standing doctrine in the United States is intimately linked to environmental law. This is largely because the major federal environmental statutes in the United States—the Clean Water Act, the Clean Air Act, the Endangered Species Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Resource Conservation and Recovery Act—each contain a provision permitting suits by individuals or groups to enjoin statutory violations, known as "citizen suits."[16] However, although these laws provide a cause of action for environmental public interest litigation, they cannot establish standing to bring suit under such laws.

The requirement for Constitutional standing distinguishes U.S. EPIL from Chinese EPIL under Art. 58 of the Environmental Protection Law or Art. 55 of the Civil Procedure Law.[17] This section outlines the development of standing doctrine in the United States as it relates to environmental law.

1. A Fork in the Road: *Sierra Club v. Morton*

Sierra Club v. Morton[18] was the first Supreme Court decision to squarely address the issue of whether an environmental organization could bring EPIL litigation simply because of its mission. Sierra Club was (and remains) a well-established conservation organization. It brought

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[15] U.S. CONST. art. III, § 2.

[16] *See* 42 U.S.C. § 7604(a) (Clean Air Act); 33 U.S.C. § 1365(a) (Clean Water Act); 42 U.S.C. § 9659(a) (Comprehensive Environmental Response, Compensation, and Recovery Act); 42 U.S.C. § 6972 (Resource Conservation and Recovery Act).

[17] The standing requirement is, in terms, roughly equivalent to Art. 119(1) of the Civil Procedure Law. *Compare* Civil Procedure Law, *supra* note 4, art. 119(1) ("[T]he plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case.") *with, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) ("[A] party seeking review must allege facts showing that he is himself adversely affected."). But in the United States, the standing requirement takes precedence over statutory provisions because "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions . . . or to entertain 'friendly' suits." *Id.*at 732 n.3. Thus, the U.S. legislature is incapable of passing a law overriding the standing requirements the way the revised Environmental Protection Law overrode the Art. 119(1) requirements.

[18] 405 U.S. 727.

this case in an attempt to prevent Walt Disney Enterprises from developing a ski resort in Mineral King Valley, located in the Sierra Nevada Mountains in central California. The Department of the Interior (DOI)—the government body in charge of regulating the use of Mineral King—had approved the project, and Sierra Club sued Rogers Morton, who was then head of the DOI, to prevent the project from receiving the permits it needed to proceed.[19]

The Sierra Club sued under the Administrative Procedure Act (APA),[20] which governs most substantive actions by federal agencies. The Supreme Court had previously held that to have standing under the APA, a claimant had to show they suffered an "injury in fact."[21] Here, the relevant injury would have been that the decision to develop Mineral King "would destroy . . . the scenery, natural and historic objects and wildlife of the park."[22] The Sierra Club argued that, because it was generally dedicated to the preservation of wild areas, the organization itself would be harmed by the DOI's approval of the Mineral King resort.

The Court accepted that harm to "aesthetic, conservational and recreational . . . values" would qualify as "injury in fact."[23] But it refused to count this harm as an injury to the Sierra Club merely because the organization supported these values. Instead, it required the Sierra Club to find an individual member who would herself suffer some harm as a result of the development.[24] Three Justices dissented. Most famously, Justice William O. Douglas argued that Mineral King should itself be considered a legal person and be granted standing on the ground that it would suffer injury, similarly to the practice of giving legal personality to ships in maritime cases.[25] Justice William J. Brennan's dissent argued that organizations with "pertinent, bona fide, and well-recognized attributes and purposes in the area of environment" should be granted special permission to bring EPIL cases.[26]

Sierra Club was a significant decision for EPIL litigation in the United States. The Supreme Court came close[27] to a very different interpretation of standing law, which would have permitted standing based either on harm to natural resources or on a group's organizational values. Instead, the Court developed an individualist approach to standing, requiring organizations to demonstrate specific harm to specific people. Interestingly, the approach advocated by Justice Brennan is very similar to that embodied by the expansion of standing embodied in Art. 58 of the Environmental Protection Law and in the subsequent interpretation by the Supreme People's Court,[28] under which organizations may sue based on their demonstrated commitment to the relevant values at stake, rather than harm to their membership.

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[19] *See generally id.* at 728–31.
[20] 5 U.S.C. §§ 701–706.
[21] *Sierra Club*, 405 U.S. at 733.
[22] *Id.* at 734.
[23] *Id.* at 734, 738.
[24] *See generally id.* at 739.
[25] *Id.* at 741–43 (Douglas, J., dissenting) ("The ordinary corporation is a 'person' for purposes of the adjudicatory processes .... So it should be as respects valleys, alpine meadows, rivers, lakes . . . .").
[26] *Id.* at 757–58 (Brennan, J., dissenting).
[27] Because two Justices recused themselves from the case, *Sierra Club* was a 4-3 decision, with four Justices in the majority and three in dissent.
[28] SPC EPIL Opinion, *supra* note 6.

2. The Constitutional Test: *Lujan v. Defenders of Wildlife*

Sierra Club interpreted the Administrative Procedure Act, not the Constitution, which ordinarily would mean that the standing requirements it established would not apply to a suit alleging a violation of a different statute. However, the principles behind that decision came to be included as part of "the irreducible constitutional minimum" for standing in *Lujan v. Defenders of Wildlife*.[29] *Lujan* provided the elements of the current test for determining a plaintiff's standing to sue under U.S. law: (1) an "actual or imminent" "injury in fact"; (2) a "causal connection between the injury" and defendant's conduct, which the lawsuit is intended to stop; and (3) some action that the court can take which would alleviate the harm ("redressability").[30]

The plaintiffs in *Lujan* sued the DOI, alleging a violation of Section 7 of the Endangered Species Act. Section 7 requires federal agencies, in consultation with the DOI, to ensure that their actions will not "jeopardize the continued existence of any endangered species or threatened species."[31] The DOI had interpreted this requirement not to include federal agency actions taken outside the United States, and Defenders of Wildlife (DOW) sued, alleging that this interpretation was contrary to the statute. By this point—20 years after *Sierra Club*—the "injury in fact" requirement was well-established. DOW attempted to show injury by identifying two of its members who had traveled to areas in which foreign developments, supported by the United States, threatened endangered species: an Egyptian dam that would damage the habitat of the Nile crocodile, and a large-scale development project in Indonesia which threatened eight endangered or threatened species.[32] These members also testified that they wanted to return to the project areas at some point, although they did not have specific plans or dates for when they would do so.[33]

The Supreme Court held that DOW did not satisfy the requirements for standing. Because the individual members had no specific plans to return to the area, they would not suffer "actual or imminent" harm if the endangered species became more rare or extinct.[34] The Court also rejected several alternative approaches to showing injury: harm to the ecosystems in which the endangered species lived did not suffice; nor did harm to DOW members' general or professional interest in endangered species.[35] Finally, the Court found that DOW had not shown redressability, as it was unclear whether the DOI could regulate activity outside of the United States, and the U.S. agencies provided "only a fraction of the funding" for the foreign projects.[36]

3. Recovering the Citizen Suit: *Friends of the Earth v. Laidlaw*

The *Lujan* case demonstrates the substantial limits on the ability of U.S. environmental organizations to bring EPIL suits without showing specific harm to individual members. This seemed to threaten the entire system of citizen suits,[37] since environmental regulation is rarely

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[29] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Sierra Club*, 405 U.S. at 740–41 n.16).
[30] *Id.* at 560–61.
[31] 16 U.S.C. § 1536(a)(2).
[32] *Lujan*, 504 U.S. at 563–64; *see also id.* at 591 n.1 (Blackmun, J., dissenting).
[33] *Id.* at 563–64.
[34] *Id.* at 564.
[35] *Id.* at 566–67.
[36] *Id.* at 568–71.
[37] *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163,

aimed at harms to individual people, but instead seeks to protect ecosystems, natural resources, and other large-scale interests. *Friends of the Earth v. Laidlaw Environmental Services*[38] provided an illustration of the circumstances under which citizen suits against pollution in populated areas are viable.

Friends of the Earth brought suit against Laidlaw to prevent the company's wastewater-treatment plant from violating its permit under the Clean Water Act.[39] The organization was able to show that Laidlaw's plant released more mercury than was allowed under the permit, but could not show any actual environmental harm resulting from the elevated mercury levels.[40] Instead, the organization presented testimony showing that its members, and members of another plaintiff organization, would have used the river for camping and fishing if not for concern about the pollution.[41]

The Court found that these allegations were sufficient to establish standing. Specifically, the Court held that as long as the plaintiff could show that its members were deprived of use of the river by the pollution, it was unnecessary to establish physical damage.[42] The Court distinguished *Lujan* by noting that the plaintiffs in *Laidlaw* were living in or near the area and would definitely visit the area if it were clean, whereas in *Lujan* the injury was remote and speculative.[43]

4. Conclusion

The three *Lujan* requirements remain the test for standing in U.S. law: injury in fact, a causal connection between the actions of the defendant and the injury, and redressability. *Sierra Club* prevents environmental organizations from being universally qualified to bring environmental EPIL, as they can be under Chinese law. *Laidlaw* eased the injury requirement by permitting plaintiffs to sue based on their members' regular use of a natural resource. But there will remain some harms that are beyond the scope of US EPIL to remedy.

166 (1992) (referring to "the invalidation of the citizen suit"). The *Lujan* test bars "'pure' citizen suits," in which plaintiffs have only "ideological or law-enforcement interest[s]." *Id.* at 226. But, as Prof. Sunstein predicted, *id.* at 221, and *Laidlaw* made clear, *infra* notes 41–43 and accompanying text, environmental organizations will typically be able to establish standing by asserting harm to their members.

[38] 528 U.S. 167 (2000).

[39] *Id.* at 176–77

[40] *Id.* at 181.

[41] *Id.* at 181–83.

[42] *Id.* at 182–83.

[43] *Id.* at 184.

II. LITIGATION TO END PROJECTS: *SCENIC HUDSON V. FEDERAL POWER COMMISSION*

Case title:	*Scenic Hudson Preservation Conference v. Federal Power Commission*
Case area:	*Water, power generation, conservation*
Case cite:	*354 F.2d 608*
Court	*United States Court of Appeals, 2nd Circuit*
Date of decision:	*Dec. 29, 1965*
Relevant law(s):	*Federal Power Act, 16 U.S.C. 803(a); 16 U.S.C. § 825l(b)*
Decision:	*License to construct hydroelectric project set aside until agency conducted proceedings to consider environmental impacts of project and investigate possible alternatives.*
Key words:	*Water, power generation, EIA, EIS, standing, administrative law.*
Summary:	*Environmental organizations sued to require Federal Power Commission to examine harm to environment, landscape, and recreational use of area likely to occur as result of proposed stored-hydropower dam; after extensive litigation and political work, project was abandoned.*

Case Background

In 1965, the Federal Power Commission (FPC) issued a license to a power generation company to construct a pumped storage hydroelectric project (the Storm King project), which would generate electricity when the power generation grid was overtaxed. When operating, the facility would draw 1,080,000 cubic feet of water per minute from the Hudson River in New York State, substantially altering an area known for its natural beauty, recreational activities, and historical significance. The project also required construction of miles of underground and overhead transmission lines. Scenic Hudson Preservation Conference (SH), an association of nonprofits, environmental groups and local towns, petitioned the FPC to reconsider the licensing order and petitioned for a rehearing to submit additional evidence. After the FPC denied SH's petitions, SH appealed to the courts to set aside the FPC's orders.

In its decision, the Second Circuit Court of Appeals determined that the FPC had not developed a sufficient record to demonstrate a thorough decision-making process and had not considered all

of the relevant factors before making its decision.[44] Additionally, the Court explicitly recognized the validity and importance of environmental, conservational, and recreational interests, which agency decision makers must consider.[45] The Court noted that cost is only one of many factors that must be considered, and it found other concerns, including aesthetic impacts, equally compelling when an agency makes a decision. In addition, the Court held that the plaintiffs had standing even though their interests were non-economic, in this case environmental, conservational, and recreational interests.[46]

In its decision, the Court explained the role of courts and agencies in these types of disputes, finding that it is the responsibility of agencies to use their resources and expertise to produce a full and adequate record and consider all of the relevant facts before making a decision.[47] Courts, while not empowered to substitute their judgment for an agency's, must ensure that agencies fulfil their duties and thoroughly review the facts before making a decision.[48]

Case Timeline and Pivotal Moments

- **1964:** The Federal Power Commission holds hearings on the planned development of a hydropower plant and approves a license to build the plant.

- **1965:** Court sets aside licensing order, requiring FPC to conduct new proceedings and to consider environmental and conservational factors when it makes its decision.

- **1970:** After holding additional hearings and investigating alternatives, the Federal Power Commission decides to reissue the license for the Storm King project.

- **1976:** Along with the New York City Attorney General, some FPC staff, and the Hudson River Fisherman's Association, SH petitions the FPC to restart the hearings on the Storm King license to consider new evidence regarding the project's economic feasibility and its potential impact on local fisheries.

- **1980:** SH and the power company responsible for the project, Consolidated Edison, agree to a settlement. Potentially facing another decade of proceedings and related Environmental Protection Agency hearings concerning construction of cooling towers, Consolidated Edison surrenders its license and ends its plans to construct a hydroelectric plant on Storm King Mountain.

Decision

The Court set aside the Federal Power Commission's decision to license the Storm King project. The Court also remanded the matter to the FPC with instructions to hold additional proceedings and produce a more complete record before issuing a decision. In its new proceedings, the FPC

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[44] *Scenic Hudson Preservation Conf. v. Fed. Power Comm'n,* 354 F.2d 608, 613 (2nd Cir. 1965).
[45] *Id.* at 614–15.
[46] *Id.* at 616.
[47] *Id.* at 620.
[48] *Id.*

was ordered to investigate reasonable alternatives and to include preservation of natural beauty and preservation of historic sites as basic concerns when making the final decision.

Key Takeaways and Lessons

Scenic Hudson Preservation Conference v. Federal Power Commission is a historic example of how nonprofit coalitions can use the courts to prevent projects that will cause widespread environmental degradation.

Form a broad and resilient coalition
SH was founded by six residents of the Hudson Valley. By forming an association made up of a wide variety of interest groups, including local city governments, fishermen, recreational groups, and conservation groups, SH created a powerful coalition that was able to take the issue to court and apply continued pressure on the agency, and the project, until it was ultimately cancelled 15 years later.

Attack agency procedures using the statute
Although the Court was unwilling to second-guess the agency's judgment, SH convinced the Court that the agency's decision-making process had been inadequate. By studying the language of the statute that authorized the license, SH discovered that the agency was required to consider recreational factors and other issues that were never considered in the agency's original decision. This enabled SH to attack the FPC's decision-making process and persuade the Court to remand the decision back to the agency.

Gather convincing scientific evidence
To show that the agency had not considered all the relevant factors, it was critical for SH to gather evidence on possible alternatives and potential environmental damage caused by the plan. In the original 1965 trial, SH presented strong evidence showing that there existed viable alternatives to the project that could generate similar amounts of electricity with a smaller environmental impact. Then in the 1970s, SH continued to petition against the project, providing the agency with scientific evidence regarding the project's potential effects on local fisheries.

Continue to organize and petition courts/agencies even after the decision
Although the Court ultimately ruled in favor of SH, the nonprofit continued actively to oppose the project. After holding additional hearings, the agency reissued its license to the power company, but SH successfully challenged those orders and prevented the construction of the project.

Implications and Notes for Chinese EPIL

Forming broad coalitions is an effective way to organize sustained opposition to a development project. The life of development projects can last several years and possibly decades, so it is crucial that advocates continue to follow agency actions and prepare to file new suits even after the initial case is decided.

If courts are unwilling to invalidate or second-guess the judgment of other government bodies,

advocates may be able to successfully argue for narrower holdings, such as remanding agency decisions until additional evidence is considered.

Text of Official Rulings

- *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (1965), https://law.resource.org/pub/us/case/reporter/F2/354/354.F2d.608.106.29853_1.html.

Additional Resources

- Dale McKnight, *Scenic Hudson's 50th Anniversary: A History and the 17-Year Battle to Preserve Storm King Mountain*, HUDSON VALLEY MAGAZINE, Oct. 2013, http://www.hvmag.com/Hudson-Valley-Magazine/October-2013/Scenic-Hudsons-50th-Anniversary-A-History-and-the-17-Year-Battle-to-Preserve-Storm-King-Mountain/.

III. DEFINING THE ROLE OF NEPA: *CALVERT CLIFFS V. ATOMIC ENERGY COMMISSION*

Case title:	*Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*
Case area:	*Interpretation of environmental statute*
Case cite:	*449 F.2d 1109*
Court	*United States Court of Appeals, District of Columbia Circuit*
Date of decision:	*July 23, 1971*
Relevant law(s):	*National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4347*
Decision:	*The D.C. Circuit Court of Appeals held that courts have the authority to require federal agencies to comply with NEPA's procedural requirements. The case was remanded with instructions for the Atomic Energy Commission (AEC) to conduct further rulemaking procedures to incorporate environmental factors "to the fullest extent possible" to improve evaluation and regulation.*
Key words:	*NEPA, environmental impact statement and assessment, nuclear power, NGO, public interest litigation.*
Summary:	*Group of local stakeholders challenged Atomic Energy Commission's permit allowing construction of two nuclear power plants in the area. D.C. Circuit Court ruled for plaintiffs, requiring AEC comply with NEPA and consider the environmental impact of the proposed action.*

Case Background

In 1962, Rachel Carson published the book *Silent Spring*, documenting the detrimental effects of pesticides on songbirds across the United States.[49] The next two decades marked a pivotal period for the environmental movement in the United States. In response to increasing pressure for environmental action, President Richard Nixon signed into law the National Environmental Policy Act (NEPA) in December 1969. The goal of NEPA was to "promote efforts which will

[49] Rachel Carson, SILENT SPRING (1962).

prevent or eliminate damage to the environment,"[50] and NEPA was one of the first laws in the United States to propose an overarching, national framework for environmental protection.

NEPA's primary environmental protection mechanism was the requirement that federal agencies prepare environmental impact statements to guide their regulatory work and avoid "to the fullest extent possible" detrimental impacts to the environment in concert with major federal actions.[51] NEPA immediately came into conflict with other national policy priorities, which resulted in an early test of whether the law would provide meaningful protections for environmental interests. Growing demand for electrical power prompted the United States government to press the Atomic Energy Commission (AEC) to rapidly expand nuclear power across the United States.[52] On July 7, 1969, the AEC issued a provisional construction permit to the Baltimore Gas and Electric Company for the construction of two nuclear power plants in Calvert Cliffs, Maryland. As the permits were issued *prior* to the enactment of NEPA, the AEC did not conduct an environmental impact statement.

The Calvert Cliffs' Coordinating Committee—a group of local actors, including environmental NGOs and local officials—concerned with the growing evidence around the health and environmental dangers of nuclear power,[53] requested that the AEC halt construction of the two nuclear power plants in Calvert Cliffs to consider an environmental impact statement as required under NEPA. The AEC argued that conducting full environmental impact statements would lead to significant delays in granting critical permits for nuclear power plants, and that their current policies already considered environmental impacts in concert with the need to address the national power crisis.[54] In response, the Calvert Cliffs' Coordinating Committee challenged the AEC's policies as "fail[ing] to satisfy the rigor demanded by NEPA" because no environmental impact statement had been prepared in connection with the Calvert Cliffs nuclear-power projects.[55]

Case Timeline and Pivotal Moments

- **July 7, 1969:** AEC issues a provisional construction permit to the Baltimore Gas and Electric Company for the construction of two nuclear power plants in Calvert Cliffs, Maryland.

- **December 3, 1970:** Calvert Cliffs' Coordinating Committee files a case challenging AEC's procedural policies to consider environmental impacts under revised NEPA standards.

- **April 16, 1971:** The case is argued before the United States Court of Appeals, District of Columbia Circuit.

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[50] 42 U.S.C. § 4321, https://ceq.doe.gov/laws_and_executive_orders/the_nepa_statute.html.
[51] *Id.*
[52] A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, *in* ENVIRONMENTAL LAW STORIES 77, 101 (Richard J. Lazarus & Oliver A. Houck eds., 2005).
[53] *Id.*
[54] *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971).
[55] *Id*. at 1109.

- **July 23, 1971:** Court of Appeals remands to AEC for consideration of environmental factors.

- **September 8, 1971:** AEC issues revised regulations to include environmental considerations under NEPA, in accordance with the court's ruling.

Decision

The Court of Appeals ruled in favor of Calvert Cliffs' Coordinating Committee, holding that "the [Atomic Energy] Commission's procedural rules do not comply with the congressional policy [of NEPA]."[56] The Circuit Court reached this decision by distinguishing between two sections of NEPA: Section 101, which the court ruled was substantive but unenforceable policy, and Section 102, which the court found legally enforceable, if purely procedural.

Section 101 requires the federal government to "create and maintain conditions under which man and nature can exist ... consistent with other essential considerations of national policy."[57] The court ruled that NEPA "leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances."[58] Thus, Section 101 was considered substantive policy and not legally enforceable.

The D.C. Circuit ruled that the primary enforceable provisions of NEPA were found in Section 102(C), which required that every federal agency draft "a detailed statement" on the environmental impact of the proposed action.[59]

The court ruled that AEC's policy of not considering environmental impacts in permitting and licensing hearings—unless specifically raised by outside parties or internal staff members—fell considerably short of the legally binding standards set by Section 102 of NEPA, creating "a mockery of the Act."[60] Specifically, the court questioned:

> What possible purpose could there be in requiring the "detailed [environmental]

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[56] *Id.* at 1112.
[57] 42 U.S.C. § 4331.
[58] *Calvert Cliffs*, 449 F.2d at 1112.
[59] The relevant text requires that agencies:

> [I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
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> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332.
[60] *Calvert Cliffs*, 449 F.2d at 1117.

> statement" ... if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy [but] must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the "detailed statement," be *considered* through agency review processes.[61]

The D.C. Circuit ruled that the AEC "must revise its rules governing consideration of environmental issues" to be in line with the "the grand congressional purposes underlying NEPA."[62] The AEC presented revised regulations to the public on September 8, 1971, which included the consideration of environmental factors in accordance with NEPA. The opinion argued that only with these key revisions could the AEC shift toward "an exercise of substantive discretion which will protect the environment 'to the fullest extent possible.'"[63]

Key Takeaways and Lessons

Calvert Cliffs was a historic case that set the precedent for the NGO community to use the power of the courts to challenge major federal projects that may cause widespread environmental harm.

Defined NEPA's procedural policy
While an earlier case from 1970 had considered NEPA's substantive provisions,[64] *Calvert Cliffs* provided the first authoritative interpretation of the procedural requirements established by NEPA for federal agency action. The court held that NEPA's key enforcement mechanism was found in Section 102(C), which requires major federal projects to conduct an environmental impact statement to assess the project's projected environmental impact. The court's ruling and interpretation of Section 102 set clear standards as to the binding nature of NEPA as not merely a consideration, but a process by which environmental factors are mitigated to the fullest extent possible.

Provided a legal framework for NGOs to challenge federal actions
The court's ruling in this case occurred at a critical time, positioning environmental protection on par with issues of national interest, such as energy security. The ruling was the basis for a legal interpretation of NEPA's requirements that started "a flood of new litigation…seeking judicial assistance in protecting our natural environment."[65] Both federal agencies and NGO communities now had clear guidelines to which environmental standards must be held; this was perhaps the court's most critical, lasting impact.

Established the importance of environmental impact statements
This case established the important role of environmental impact statements in determining the potential environmental impacts of future federal projects. The environmental impact statement required by NEPA has been adopted extensively around the world—referred to commonly as

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[61] *Id.* at 1118–1119.
[62] *Id.* at 1129.
[63] *Id.*
[64] *Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970).
[65] *Calvert Cliffs*, 449 F.2d at 1111.

environmental impact assessments (EIAs)—as a model for environmental management.[66]

Implications and Notes for Chinese EPIL

The United States has been a champion of the EIA process since the D.C. Circuit's ruling in favor of a strict interpretation of NEPA. Many countries around the world have followed suit in enacting EIAs into their decision-making processes. China introduced EIAs as part of the Environmental Protection Law adopted in 1989,[67] and subsequently expanded the legal significance in a stand-alone Environmental Impact Assessment Law in 2003.[68]

Historically, EIAs in China have been administered by local government officials, who often face major economic disincentives—limited funding and local investment pressure—in conducting comprehensive EIAs.[69] Despite specific requirements for public involvement under Articles 11 and 21 of the Environmental Protection Law, public participation to date has been limited and there is much room for improvement.[70]

The passage of several amendments to the Environmental Protection Law, which went into effect on January 1, 2015,[71] may finally match legally backed public participation with the EIA process. The *Calvert Cliffs* case serves as a powerful example of how a strong legal framework can allow NGO participation in the protection of environmental resources. The legalization of Chinese EPIL provides a platform for expanding the role of EIAs in national decision-making and for voicing a collective concern about environmental issues throughout China, potentially preventing environmentally harmful projects before they happen in the first place.

Text of Official Rulings

- *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1117 (D.C. Cir. 1971).

Additional Resources

- National Environmental Policy Act, 42 U.S.C. §§ 4321–47, http://www.epw.senate.gov/nepa69.pdf.

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[66] *See* Jennifer C. Li, *Environmental Impact Assessment in Developing Countries: An Opportunity for Greater Environmental Security?* (USAID Working Paper No. 4, 2008), http://www.fess-global.org/workingpapers/eia.pdf.
[67] Environmental Protection Law, *supra* note 5, arts. 13, 26, 36.
[68] Environmental Impact Assessment Law of the People's Republic of China, http://api.commissiemer.nl/docs/os/sea/legislation/china_s_ea_legislation_03.pdf.
[69] *See* Li, *supra* note 66.
[70] *See id.*
[71] *See* Barbara Finamore, *New Weapons in the War on Pollution: China's Environmental Protection Law Amendments*, NATURAL RESOURCES DEFENSE COUNCIL EXPERT BLOG (April 25, 2014), https://www.nrdc.org/experts/barbara-finamore/new-weapons-war-pollution-chinas-environmental-protection-law-amendments.

IV. COMPLEX LITIGATION: THE THREE MILE ISLAND CLASS ACTION LAWSUIT

Case title:	*In re Three Mile Litigation Consolidated Proceedings, Class of Residents in the Three Mile area v. Nuclear Power and Construction Companies involved in TMI plant.*
Case area:	*Nuclear, Class Action, Damages*
Case cite:	*927 F. Supp. 834 (M.D. Pa. 1996)*
Court	*United States District Court for the Middle District of Pennsylvania*
Date of decision:	*June 7, 1996*
Relevant law(s):	*Price-Anderson Act, 42 U.S.C. § 2210; "toxic tort" principles*
Decision:	*The court granted the motion for summary judgment filed by the nuclear power and construction entities on the issue of dose and medical causation. The ruling was binding upon all injured residents in the consolidated case.*
Key words:	*Nuclear, spill, expert testimony, class action, health impacts, monitoring.*
Summary:	*Almost 20 years after the initial class actions were filed, a consolidated class action eventually denied plaintiffs' claims. However, during this process, the owners of Three Mile Island paid between $70 to $82 million in settlements and compensation claims, including funding the TMI Public Health Fund. Issues regarding expert testimony, new medical theories, and other outstanding issues continued to be litigated after 1996. Questions regarding decommissioning nuclear facilities and radiation reporting continue to be addressed by the courts.*

Case Background

On March 28, 1979, the Three Mile Island (TMI) nuclear reactor near Middletown, Pennsylvania experienced a partial meltdown, allowing reactor coolant to escape and releasing radioactive gases and iodine into the environment. This was the worst nuclear disaster in American commercial nuclear power history. The incident had broad repercussions throughout the nuclear

power industry and environmental advocacy community, and increased the credibility of anti-nuclear groups throughout the country. In 1981, citizens' groups filed a class-action lawsuit against Three Mile Island, which was settled out of court for $25 million. A part of the settlement proceeds were used to create the TMI Public Health fund, which provided funding for medical studies of radiation monitoring. The case was one of the most visible and influential class action lawsuits in the environmental sphere.

Key actors include the aggrieved parties, who argued that the release of radioactive material during the meltdown was responsible for development of cancer, and the owners of the Three Mile Island Plant. Since the technology was so new, there was little legislation regarding nuclear power. Although no causal connection between radiation exposure from a reactor leak like that at Three Mile Island and the development of cancer has been conclusively shown, this lawsuit played a large role in the broader environmental protection movement that was emerging at the time. No new nuclear reactors were built for more than three decades following the accident, and public opinion shifted dramatically in opposition to nuclear power. The incident bolstered the credibility of anti-nuclear groups, who had been active for a decade before the incident, and multiple demonstrations were held nationwide. Finally, both the nuclear industry and government regulators acted quickly to improve safety standards.

Decision

Shortly after the partial meltdown of Reactor 2 at Three Mile Island on March 28, 1979, a class action suit was filed against Metropolitan Edison Company on behalf of all businesses and residents in the vicinity.

In total, local residents and businesses filed more than 2,000 personal injury claims, regarding a variety of health injuries allegedly caused by radiation exposure. The Pennsylvania District Court consolidated Plaintiffs' claims into ten test cases, which were heard over the following 15 years due to the considerable number of issues being litigated simultaneously. The case was heard through various district and appeals courts. Resolution was finally reached in June of 1996 when district court Judge Sylvia Rambo granted summary judgment in favor of the defendants, entities involved in the construction and management of the Three Mile Island Plant.

While defendants eventually prevailed on summary judgment, the Three Mile Island disaster resulted in an extraordinary amount of litigation on a variety of issues including permissibility of expert testimony, liability for government agency representatives, and court-appointed legal fees. And while the 10 test cases were eventually dismissed, during the course of this 15-year period many individuals reached settlements relating to the disaster, resulting in millions of dollars in recovery.

Case Timeline and Pivotal Moments

- **April 12, 1979:** The first complaint is filed approximately two weeks after the partial plant meltdown, on behalf of thousands of individuals and businesses within a 25-mile radius of the damaged plant.

- **September 9, 1981:** The court enters final judgment in the TMI class action for economic losses as a result of the 1979 nuclear accident. The judgment results from a settlement agreement between defendants (various companies which owned, operated, designed, constructed and maintained TMI) and plaintiffs' executive committee (a group of 10 law firms appointed by the court to coordinate the prosecution of the many cases filed).[72]

- **November 7, 1983:** Metropolitan Edison—the company that ran the TMI Nuclear facility—is indicted by a grand jury on criminal charges for the falsification of safety test results prior to the accident.[73] On February 29, 1984, Metropolitan Edison enters into a plea agreement with the U.S. government, pleading guilty to one count of the indictment charging it with failure to establish, implement, and maintain the reactor's coolant system. The company also pleads no contest to six other counts of the indictment, including manipulation of tests.[74]

- **December 9, 1982:** The 10 law firms that secured the initial settlement litigate the issue of court-awarded legal fees. The District Court awards higher attorneys' fees to one firm (in the form of an addition of 0.25 to their fees multiplier) as a result of the "fine legal contributions during the course of this lawsuit" especially given the highly complex and technical nature of the subject matter, and the "outstanding" settlement negotiation.[75]

- **January 5, 1996:** The court grants in large part the Defendants' motion to exclude the testimony of Plaintiffs' experts offering scientific information on effects of varying levels of radiation, finding that the proposed evidence did not meet the legal requirements for expert scientific testimony. Only one scientist's testimony is not excluded.[76]

- **June 7, 1996:** The parties continue to litigate the aspects of the case beyond the 1981 settlement, including on behalf of those outside the 25-mile radius, who were not covered by the initial settlement, as well as regarding the long-term health impacts of the meltdown. However, Judge Sylvia Rambo ultimately grants summary judgment for Defendants, finding that Plaintiffs had presented insufficient evidence on the issues of dose and medical causation to continue litigating the case (expert witnesses were deemed unable to testify with a sufficient level of certainty). Because the ruling applies to all injured residents in the consolidated case, it effectively brings an end to the litigation more than 15 years after it first began.[77]

Settlement Terms

While no health damages could be conclusively proven due to a lack of knowledge and evidence on the impacts of nuclear radiation, the owners and operators of the TMI plant paid out significant settlements during the course of the litigation.

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[72] *In re Three Mile Island Litig.*, 557 F. Supp. 96 (M.D. Pa. 1982).
[73] *United States v. Metro. Edison Co*., 594 F. Supp. 117 (M.D. Pa. 1984).
[74] *In the matter of Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification*, 22 N.R.C. 877, 879 (1985).
[75] *In re Three Mile Island Litig.*, 557 F. Supp. 96.
[76] *In re TMI Litig. Cases Consol. II*, 911 F. Supp. 775 (M.D. Pa. 1996).
[77] *In re TMI Litig. Consol. Proceedings*, 927 F. Supp. 834 (M.D. Pa. 1996).

The first settlement, reached in 1981, provided $20 million for local residents' business and economic losses as a result of the partial meltdown.[78] The negotiated terms left open the possibility for other damages claims for personal injury and claims regarding local government costs.[79]

In addition, the settlement established the TMI "Public Health Fund" to provide money for further studies of radiation and radiation monitoring in the area. The Fund was endowed with $5 million to "finance studies on the long-term health effects of the Three Mile Island incident."[80] The Fund also financed public education programs for local residents and physicians on early cancer detection and other radiation-related diseases.[81] In addition, provisions for medical monitoring were established for the plaintiffs. While many had experienced no immediate effects of radiation exposure, little was known about the long-term health effects of such exposure. The creation of this fund essentially provided damages for possible future health effects of the partial meltdown.

These benefits were distributed across the three classes of plaintiffs in the class action.[82] The settlement was paid by two consortiums of insurance companies for the nuclear plant.[83]

Payments to individuals and groups continued in the years following the initial settlement "amounting to a total of more than $70 million through 1997 ($42 million in indemnity settlements and $28 million in expenses)."[84] Other estimates put this number close to $82 million in damages.[85]

Key Takeaways and Lessons

Expert testimony is crucial

A main reason the case was eventually dismissed was the lack of scientific evidence on the then-nascent field of nuclear power, and a lack of experts who could testify to the health effects of exposure to nuclear radiation. Expert testimony could have provided a stronger causal link between the accident and any medical cases that resulted. In the U.S., expert testimony is often obtained by hiring outside consultants, though organizations may use their own members if they have staff who specialize in a given area.

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[78] Ben A. Franklin, *Agreement Reached in 3 Mile Island Suit*, NEW YORK TIMES, Feb. 22, 1981, http://www.nytimes.com/1981/02/22/us/agreement-reached-in-3-mile-island-suit.html.

[79] *Id*.

[80] Ann Taylor, *Public Health Funds: The Next Step in the Evolution of Tort Law*, 21 B.C. ENVTL. AFF. L. REV. 753, 791–92 (1994), http://lawdigitalcommons.bc.edu/ealr/vol21/iss4/5.

[81] *Id.*

[82] Class I consisted of business entities suffering economic loss; Class II consisted of all individuals who suffered economic harm, such as evacuation expenses, lost wages, and diminished property values; and Class III consisted of all persons seeking future medical detection damages. Classes I and II received $20 million in damages and Class III was the recipients of the $5 million "Public Health Fund." *Id*. at 791 n.358.

[83] *See* Franklin, *supra* note 78.

[84] CTR. FOR NUCLEAR SCIENCE AND TECH. INFO., *The Price-Anderson Act: Background Information*, http://www.ans.org/pi/ps/docs/ps54-bi.pdf.

[85] Bonnie Pfister, *Three Mile Island: 30 Years of What If . . .*, PITTSBURGH TRIBUNE-REVIEW, Mar. 22, 2009, http://large.stanford.edu/publications/coal/references/pfister/.

Create a "Public health fund" for settlement money
The financial settlement worked toward achieving the goals of the plaintiffs even though the case was resolved out of court. This settlement gave funds to impacted local businesses and funded public health research in the field. Industry standards on nuclear power plants were also quickly improved due to public pressure.

Utilize media attention
Nuclear safety activists had established a network dedicated to abolishing or at least improving the regulation of nuclear power in the decade before the accident. This network, combined with widespread media attention, prompted mass protests that worked to improve nuclear safety. As a result, regulations were drastically improved.

Implications and Notes for Chinese EPIL

A public health fund, as described in the Three Mile Island Case, is a potentially useful mechanism for Chinese EPIL post-case enforcement and monitoring. The public health fund can be used not only to address existing health problems, but also health problems that are likely to occur in the future. In China, most cases relating to individual property loss or health impacts are relegated to the realm of tort law. This specific type of public health fund may also be applicable to this type of tort law.

Text of Official Rulings

- *In re Three Mile Island Litig.*, 557 F. Supp. 96 (M.D. Pa. 1982), http://law.justia.com/cases/federal/district-courts/FSupp/557/96/2239284/.

- *In re TMI Litig. Cases Consol. II*, 911 F. Supp. 775 (M.D. Pa. 1996), http://law.justia.com/cases/federal/district-courts/FSupp/911/775/1971018/.

- *In re TMI Litigation Consol. Proceedings*, 927 F. Supp. 834 (M.D. Pa. 1996), http://law.justia.com/cases/federal/district-courts/FSupp/927/834/2092292/.

- *In re TMI Litigation*, 193 F.3d 613 (3rd Cir. 1999), http://law.justia.com/cases/federal/appellate-courts/F3/193/613/477570/.

V. MEASURING DAMAGES: *SUNBURST SCHOOL DISTRICT NO.2 V. TEXACO*

Case title:	*Sunburst School District No. 2 v. Texaco, Inc.*
Case area:	*Groundwater contamination, toxic torts, damages*
Case cite:	*338 Mont. 259, 165 P.3d 1079*
Court	*State Supreme Court of Montana*
Date of decision:	*August 6, 2007*
Relevant law(s):	*Comprehensive Environmental Cleanup and Responsibility Act, Mont. Code Annotated §§ 75-10-705 to 728; Article II, Section 3, of the Montana Constitution; M.R. Civ. P. 26(b)(4)(A)(i); § 27–1–221*
Decision:	*Affirmed restoration damages and compensatory damages for benzene migration injury to real property, vacated punitive damages, and trial court abused discretion in awarding attorney fees.*
Key words:	*Citizen suits, cleanup costs, compensatory damages, contamination, costs of collateral property damage, diminution, expert witnesses, groundwater, jury award, personal use, private attorney general attorney fee award, punitive damages, regulations, repair, restoration, value of damaged property.*
Summary:	*Sunburst School District and approximately 90 landowners brought action against oil company to recover for property damage caused by the migration of gasoline and benzene from adjoining oil refinery. The state district court entered judgment on jury verdict in favor of plaintiffs and oil company appealed.*

Case Background

Texaco, Inc. operated a gasoline refinery outside Sunburst, Montana between 1924 and 1961.[86] After it emerged that the refinery had leaked gasoline and other toxic substances into the surrounding soil and groundwater, the Sunburst School District No. 2 and approximately 90 adjoining landowners sued Texaco for damages from the leak.[87]

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[86] *Sunburst Sch. Dist. No. 2 v. Texaco, Inc*., 165 P.3d 1079, 1083 (Mont. 2007).
[87] *Id*.

The trial court found Texaco liable for conducting abnormally dangerous activity and for trespass against the plaintiffs who owned property above the contamination plume.[88] The jury awarded the plaintiffs $15 million in restoration damages to restore the property to its pre-contamination state; $16 million in compensatory damages to compensate for the past and future cost of environmental investigation, and the loss of use and enjoyment of the property; and $25 million in punitive damages to punish Texaco for its continued fraud and malice. The trial court also granted Sunburst's attorneys' fees, but the amount was not fixed. On appeal, Texaco argued that the damages should have been capped at the pre-contamination market value of the property.[89]

Case Timeline and Pivotal Moments

- **1924:** Gasoline begins leaking from Texaco refinery contaminating surrounding soil and groundwater.[90]

- **1955:** Benzene contamination is first noticed after fumes from the leakage cause a house fire; Texaco begins a very limited cleanup of the site, but significant levels of gasoline remain.[91]

- **1985:** U.S. Environmental Protection Agency investigation determines that the area is still contaminated, leading to an agreement with the Montana Department of Environmental Quality (MDEQ) to develop a remediation plan.[92]

- **1991:** Texaco investigation confirms contamination, but study by an environmental consultant finds that resulting benzene vapors were within state regulatory limits.[93]

- **1994:** The MDEQ releases a statement that further actions are unnecessary because the contamination does not impose a significant risk.[94]

- **1995:** The MDEQ promulgates new regulations for groundwater; test data indicates that contaminated Sunburst groundwater violates the amended groundwater regulations for excessive benzene levels; the MDEQ denies Texaco's waiver requests.[95]

- **February 2001:** Sunburst files complaint in Montana State District Court, citing various tort and constitutional actions, including trespass and wrongful occupation, abnormally dangerous activity, public nuisance, violation of the state-constitutional right to a healthy environment, and fraud.[96]

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[88] *Id.* at 1085–86.
[89] *Id.*
[90] *Id*. at 1083.
[91] *Id*.
[92] *Id*.
[93] *Id*. at 1083–84.
[94] *Id*. at 1084.
[95] *Id*.
[96] *Id.* at 1085, 1093–95.

- **June 2001:** MDEQ releases information to the public on contamination levels; Texaco releases a map of the contamination plume and a newsletter claiming benzene levels had dramatically declined due to natural designation, both of which Sunburst later challenges at trial as ignoring unfavorable data regarding benzene degradation and having been manipulated to show less contamination than actually indicated by testing.[97]

- **2003:** Texaco proposes a monitored natural attenuation ("MNA") remediation plan; the MDEQ proposes, for public comment, that Texaco use MNA to conduct the remediation.[98]

- **2004:** State trial court held three-week jury trial in July and August, 2004; the jury finds for Sunburst and the other plaintiffs, awarding $56 million in restoration, compensatory, and punitive damages, as well as attorneys' fees.[99]

- **2005:** Texaco appeals the jury verdict to the Montana Supreme Court.

- **2007:** Montana Supreme Court affirms restoration and compensatory damages, but reverses on punitive damages and attorneys' fees.[100]

Decision

Restoration damages

On appeal, the main issue before the Montana Supreme Court was whether restoration damages were properly awarded for injury to real property in excess of a property's pre-tort market value.[101] The total value of the damaged properties was about $2 million,[102] but the jury had awarded the plaintiffs $15 million for restoration alone, as well as other damages for related harm and to punish Texaco for its fraudulent behavior. Texaco argued that the extra $13 million would be an unfair windfall for the plaintiffs, since nothing would require them to actually use the money on environmental restoration.

The Montana Supreme Court found restoration damages to be appropriate, despite the lack of restrictions on the use of the money, based mostly on the plaintiffs' testimony that they would use the award to clean up their property and the fact that the award fell within the estimated remediation cost of $1 million to $30 million.[103] But the court also pointed out that establishing a strict cap on damages would effectively mean that Texaco had forced the plaintiffs to sell their land: Texaco would be able to do as much damage to the land as it wanted, and only be forced to pay the initial market value, just as if the corporation had required the plaintiffs to sell their land prior to the contamination.[104]

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[97] *Id*. at 1084.
[98] *Id*.
[99] *Id*. at 1085–86.
[100] *Id*. at 1099.
[101] *Id.* at 1083.
[102] *Id.* at 1090.
[103] *Id.* at 1089.
[104] *Id.* at 1089–90.

Punitive damages
The Montana Supreme Court concluded that the trial court's exclusion of evidence that Texaco cooperated with state regulators following contamination was not relevant in determining liability or compensatory damages.[105] The Montana Supreme Court explained that the trial court had broad discretion in ruling on the admissibility of evidence and Texaco had not shown that the trial court abused its discretion. However, the Montana Supreme Court held that the evidence was relevant to evaluate whether Texaco acted with fraud or malice for purposes of punitive damages.[106] Thus, the punitive damages award was vacated and remanded for a jury to assess Texaco's presentation of additional evidence.

Private attorney fees
The Montana Supreme Court reasoned that the plaintiffs could not recover private attorney fees pursuant to the "American Rule," followed in Montana, because the award was not governed by a statute or contract. Nor did the award fall under the private attorney general doctrine exception, which allows a party to obtain an award when the government fails to properly enforce a significant citizen interest.[107] The Court held that the multi-million dollar judgment was a sufficient incentive for plaintiffs to file the lawsuit.[108]

Key Takeaways and Lessons

Restoration damages
The choice of what damages to award a plaintiff is almost as important as the choice of whether to allow a plaintiff to recover in the first place. If damages are capped at a certain amount, polluters will have no reason to stop polluting once the harm reaches a certain point—and if the cap is at the market value of the property, this is very similar to requiring the plaintiffs to sell their land, a right ordinarily reserved to the government. This also leaves injured property owners with a "take it or leave it" choice: They are forced to either sell the homes or continue to live with the threat of exposure to toxic chemicals.[109] On the other hand, there are some cases where such a cap might be appropriate; for example, if the plaintiff has already sold the land or has made it clear that she is not interested in repairing it. Courts hearing "toxic torts" cases should consider which value is right for their particular case, and plaintiffs' attorneys should make it clear whether their plaintiff plans to use the damages to repair any damage caused by pollution.

Third-party estimates of damages
The Montana Supreme Court considered the range of restoration approaches suggested by the defendant in determining whether the amount of the award was appropriate: Texaco's environmental consultant recommended a remediation plan that could have cost over $30 million, while Texaco requested a "natural attenuation" plan which would primarily allow the

[105] *Id.* at 1083, 1095.
[106] *Id.* at 1096–97.
[107] *Id.* at 1097. Factors used to determine significant interest include "(1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision." *Id.*
[108] *Id.* at 1083, 1097.
[109] *Id.* at 1090.

contamination to dissipate on its own and cost only $1 million.[110] The Court's found the $15 million figure acceptable because it "falls comfortably within these two extremes."[111] This demonstrates the importance of third-party consultants in the process, since without the consultant's $30 million recommendation, the Court would likely have been nervous about approving an award that was so far above both the market value of the property and the proposed remediation method.

Similar cases

Many U.S. courts have adopted the flexible standard of the Restatement (Second) of Torts § 929 to award environmental restoration damages beyond the costs imposed by the State Department of Environmental Quality (MDEQ) and the Environmental Protection Agency.[112] This may be attributable to numerous jurisdictions following The Restatement (Second) of Torts § 929, the stark reality that natural attenuation leaves residential communities exposed to contamination, and the significant cost of active remediation.[113]

Implications and Notes for Chinese EPIL

The Chinese governments' effort to reform environmental law to address the imminent threat of pollution, combined with the increasingly prominent role of courts in the environmental domain are indicative of a growing sentiment aligned with the public policy concerns in *Sunburst*. As this case makes clear, the amount of damages available to environmental-tort plaintiffs is extremely important. Simply calculating the economic loss suffered by the plaintiffs may not be sufficient to protect their interests. Furthermore, a strict cap on damages could turn into an incentive for continued environmental harm. Finally, restoration damages are an important means of protecting ecologically sensitive areas. On the other hand, if plaintiffs do not continue to use the property, and do not use the award to remedy the ecological harm to the property, restoration damages may be an inappropriate windfall.

Text of Official Rulings

- *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007), http://caselaw.findlaw.com/mt-supreme-court/1299438.html.

Additional Resources

- James M. Fischer, *The Puzzle of the Actual Injury Requirement for Damages*, 42 LOY. L.A. L. REV. 197 (2008), http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2651&context=llr.

- James R. Cox, *Reforming the Law Applicable to the Award of Restoration Damages As A Remedy for Environmental Torts*, 20 PACE ENVTL. L. REV. 777 (2003),

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[110] *Id.*
[111] *Id.*
[112] Ted A. Warpinski, *Restoration Damages: Sunburst School District v. Texaco*, ABA ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSL., December 2007, at 23, 24.
[113] *Id.* at 24–25.

http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1182&context=pelr.

- Randy Tanner, *Sunburst School District No. 2 v. Texaco, Inc.: Rethinking Restoration Damages As A Remedy for Tortious Injury to Land and Property*, 70 MONT. L. REV. 291 (2009), http://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=2034&context=mlr.

VI. ENFORCING THE CLEAN WATER ACT: *CONSERVATION LAW FOUNDATION V. BWSC*

Case title:	*Conservation Law Foundation, Inc. v. Boston Water and Sewer Commission*
Case area:	*Water pollution*
Case cite:	*Case No. 10-cv-10250 (not reported in F. Supp. 2d)*
Court	*United States District Court for the District of Massachusetts*
Date of decision:	*December 21, 2010*
Relevant law(s):	*Clean Water Act, 33 U.S.C. §§ 1311, 1342, 1365; Boston Water and Sewer Commission's mandate: Mass. Acts of 1977, c. 436 §§ 1–3*
Decision:	*Defendant paid a civil penalty of $235,000 to the United States and provided another $160,000 to fund a Supplemental Environmental Project to eliminate leakage of untreated sewage from privately owned drains into its system.*[114]
Key words:	*Water pollution, civil society/NGO initiative, public interest litigation, settlement, monitoring.*
Summary:	*Conservation Law Foundation brought a citizen suit to enforce the requirements of the Clean Water Act. The settlement it reached with the Boston Water and Sewer Commission included reparations, improved monitoring, and a Supplemental Environmental Project.*

Case Background

The Conservation Law Foundation (CLF) is a not-profit NGO dedicated to protecting New England's environment, including through public interest litigation.[115] CLF has been engaged in efforts to clean up the Boston Harbor for more than 30 years,[116] including more than 50 citizen

[114] *See* Press Release, Ben Carmichael, CONSERVATION LAW FOUNDATION, *Landmark Clean Water Settlement Promises Cleaner, Greener Future for Boston* (Aug. 23, 2012), http://www.clf.org/newsroom/landmark-clean-water-settlement-promises-cleaner-greener-future-for-boston/.

[115] *See Our Focus: Clean Water*, CONSERVATION LAW FOUNDATION, http://www.clf.org/our-focus/clean-water/ (last visited June 14, 2016).

[116] *See* Laurie O'Reilly, *Boston Harbor Clean Up Reaches New Milestone*, CONSERVATION LAW FOUNDATION

enforcement actions against facilities that release pollutants into public waters without permits, based on the citizen-suit provisions of the federal Clean Water Act (CWA).[117]

The CWA prohibits the discharge of pollutants into the waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit, which require that systems be put in place to reduce the discharge of pollutants to the "maximum extent practicable,"[118] and that permittees report on the levels of specified pollutants being discharged from their systems and revise their systems as necessary to control these pollutants.

In 2010, CLF sued to address three main problems related to the BWSC's discharge. First, CLF alleged that BWSC had failed to maintain the water quality standards as required by its NPDES permit. Second, CLF claimed that BWSC failed to monitor sewage flow into Boston Harbor as required by its permit: it monitored only three of the required five representative drainage areas, three of the required four receiving waters, and 24 of the more than 90 outfalls. Such monitoring is particularly important for protection of the local environment, as storm water runoff carries many pollutants that have been found to "significantly degrade water quality and aquatic habitat" in Massachusetts.[119] Third, CLF argued that BWSC should have coordinated with municipal authorities to reduce pollutant discharge and eliminate illicit connections to the BWSC system.[120]

Case Timeline and Pivotal Moments

- **1999:** The Environmental Protection Agency (EPA) approves NPDES permit for BWSC. Permit requires BWSC to implement 17 pollution control measures.

- **2001:** BWSC unilaterally reduces the number of representative storm water drainage area sites that it was required to monitor under its NDPES permit from five to three, and the number of wet-weather receiving waters sites from four to three.[121] BWSC's own monitoring of these remaining sites indicated that the levels of bacteria and metals significantly exceeded those allowed by Massachusetts's water quality standards.[122] Despite these findings, BWSC's required annual reports in 2001–2004 stated that no changes to its system were proposed, and no changes were made from 2002–2009.[123]

- **2010:** CLF files lawsuit against the BWSC in United States District Court for the District of

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BLOG (Mar. 21, 2016), http://www.clf.org/blog/video-boston-harbor-clean-up-reaches-new-milestone/; *see also* Chris Kilian, *Our 30-Year Fight to Clean Up Boston's Harbor of Shame*, CONSERVATION LAW FOUNDATION BLOG (Mar. 26, 2016), http://www.clf.org/blog/our-30-year-fight-to-clean-up-bostons-harbor-of-shame/.

[117] *Enforcing the Law*, CONSERVATION LAW FOUNDATION, http://www.clf.org/strategies/environmental-enforcement/ (last visited June 14, 2016).

[118] 33 U.S.C. § 1342(p)(3)(B)(iii).

[119] Complaint for Declaratory and Injunctive Relief and Civil Penalties, *Conservation Law Found., Inc. v. Boston Water and Sewer Comm'n*, Case No. 10-cv-10250, 2010 WL 2069360 (D. Mass., Feb. 12, 2010).

[120] *Id.*

[121] *See* Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment, *Conservation Law Found., Inc. v. Boston Water and Sewer Comm'n*, Case No. 10-cv-10250, 2010 WL 5861860 (D. Mass, Sep. 20, 2010).

[122] *Id.*

[123] *Id.*

Massachusetts under the citizen suit provision of the CWA.[124]

- **2010:** The United States filed a motion to intervene with its own complaint against BWSC on behalf of the EPA, as required by federal rules, and the court granted the motion. This is a major turning point for this case, as the United States had additional inspection information and an ironclad case on numerous aspects of liability beyond what CLF had noticed. It is at this point that BWSC agrees to begin negotiating a settlement.[125]

- **2012:** Parties sign Consent Decree (see specific provisions below).

Key Settlement Terms

Overall, CLF was pleased with the outcome of this case.[126] The injunctive relief met CLF's primary goal of pushing BWSC to modernize its outdated system for storm water control. The key provisions of the consent decree[127] required BWSC to pay reparations, increase and improve monitoring, and implement a Supplemental Environmental Project:[128]

Reparation: BWSC paid a civil penalty of $235,000 to the United States.

Monitoring: BWSC was required to inspect and sample the outfalls of its municipal separate storm sewer system in accordance with specific screening thresholds for bacteria, surfactants, ammonia, and chlorine. The decree also required BWSC to carry out confirmatory dry- and wet-weather investigations after removing all known illicit discharges from a specific sub-catchment area. Other obligations included developing an Industrial Facility Stormwater Pollution Prevention Program, a Public Education and Outreach Program, and a Staffing Plan to ensure implementation of the consent decree, among other things.[129]

Supplemental Environmental Project: BWSC was also required to implement a Supplemental Environmental Project (SEP), consisting in this case of a project called the Leaking Sewer Lateral Lining Program. It had been determined that private sewer laterals were leaking sanitary flow into BWSC's storm drain infrastructure. Thus, for its SEP, BWSC was required to spend at least $160,000 to address a minimum of 25 private sewer laterals that were leaking sewage into its infrastructure.[130]

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[124] 33 U.S.C. § 1319(b).
[125] Interview with Christopher Killian, Vice President and Director, Clean Water & Healthy Forests, Conservation Law Foundation, conducted by LIDS members on April 15, 2016.
[126] *Id.*
[127] A "consent decree" (or "consent order") is an agreed-upon court order. A consent decree that resolves a lawsuit effectively amounts to a settlement embodied in a court order, but differs from a private settlement in that the judge retains control over the agreement, and can use the powers of the court (including sanctions) to ensure that it is implemented. *See Consent Decree*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[128] *See* Consent Decree, *Conservation Law Found., Inc. v. Boston Water and Sewer Comm'n*, Case No. 10-cv-10250 (D. Mass. Sep. 28, 2012), https://www.epa.gov/sites/production/files/documents/bwsc-cd.pdf.
[129] *See id.* Section VII.
[130] *See id.* Section VIII.

Key Takeaways and Lessons[131]

Conservation Law Foundation, Inc. v. Boston Water and Sewer Commission serves as a good example of how NGOs can enforce environmental legislation or regulation by identifying environmental harms, bringing lawsuits, and settling cases in a way that requires defendants to comply with environmental regulations and even fund projects to benefit the specific areas in which the environment has been harmed. The settlement was also easier to reach by virtue of the fact that it was not punitive, but collaborative.

Make use of "citizen suit" provisions

Conservation Law Foundation brought this case as a "citizen suit" under a provision of the CWA that allows enforcement of the law by private citizens, in a manner somewhat similar to China's Environmental Protection Law.[132]

CLF's objectives in filing this lawsuit were not necessarily to penalize BWSC and force it to comply with its NPDES permit, but to work together with BWSC in order to identify better, more modern systems that would reduce pollution.[133] CLF sought to use this enforcement case as an opportunity to discuss with BWSC options for bringing its system up to date,[134] such as more innovative systems and "green infrastructure" could be put in place relatively easily in order to soak up runoff and minimize the amount of storm water that flows off of pavement.

Consider how settlement can be an effective tool

This case ended in a consent decree that provided for both ongoing pollution monitoring and repairs and upgrades to Boston's sewer system. In general, settlement can serve as an effective means to enforce environmental protection statutes or regulations while avoiding the expense and risk of taking a case to trial.

All of CLF's settlements rely on three pillars. The first is full compliance with the law, usually in the form of injunctive relief. This often involves filing lawsuits to enforce regulations, particularly as many of the industries that CLF targets do little or nothing to attempt to comply with existing regulations, including by failing to obtain the required permits in the first place.

The second pillar of CLF's settlement strategy is requiring polluters to fund a SEP whenever it wins or settles a case. These projects allow for research and/or restoration projects to be undertaken to further protect the environment in the affected area. The inclusion of SEPs in settlements thus amplifies the impact of CLF's public interest litigation and ensures that it has a lasting effect in the target area.

SEPs are standard practice under the CWA and many other environmental statutes in the United States. Ordinarily, penalties assessed against the violator of a similar statute would take the form of a payment to the United States Treasury, which would not directly benefit the environment.

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[131] These takeaways are largely based the authors' interview with Christopher Killian, supra note 125.

[132] For further discussion of the connection between citizen suits and Art. 58 of the Environmental Protection Law, *see supra* note 17 and accompanying text.

[133] Interview with Christopher Kilian, *supra* note 125.

[134] An outside consultant had evaluated the BWSC system as being a "state of the art system—as of 1954." *Id*.

By contrast, SEPs directly benefit the environment in the affected area at a level commensurate with what a penalty would be, and in a manner that is related to the harm that was incurred.

The third pillar that CLF seeks to include in settlements is full payment of attorneys' fees. Particularly in strong cases, CLF attempts to make defendants aware that it may be in their benefit to settle early, as they may end up paying for the work that CLF puts into the suit.

Allocate limited resources carefully
CLF has found that it is imperative to be efficient with the limited resources at its disposal, particularly by carefully selecting which cases to pursue. It is not always best to bring the biggest, most egregious cases, as this can mean litigating one case for many years. At times it is possible to have a greater impact by bringing smaller, more straightforward cases. This case was particularly strategic due to the fact that BWSC was one of the largest entities providing sewer and storm water infrastructure in the greater Boston area, with its service territories covering more than 17 square miles.

Consider how litigation can enhance other areas of work (if applicable)
Part of the benefit of having an enforcement program is that it gives CLF greater leverage in its lobbying and advocacy efforts. Similarly, it is important not only that people recognize that CLF has the ability to sue, but that it can point to a legacy of successful litigation. This "credibility threat" can add more clout to applications for information, and other work that NGOs do to encourage compliance.

Integrate scientific data
CLF works to integrate the latest science into its work. It does this by maintaining sophisticated networks of partners, including with academic institutions in the region and opinion leaders in relevant sectors. It also took advantage of the data collected by BWSC at the three monitoring sites to keep track of pollutant discharge.

Include the local community
CLF has found it useful to focus on the story behind whatever problem it is seeking to address. Rather than technocratic, dry information about violations of law, judges and communities want to understand the human side of the case, including what harm has been incurred. Similarly, it is important to frame these stories in a positive light, as people want to know not just about the challenge being faced, but about the opportunities that exist for change in order to reach a better environmental outcome.

Utilize government and court-requested data as a tool to press suit, provide evidence, and push for early and effective settlement
In *Conservation Law Foundation, Inc., v. Boston Water and Sewer Commission*, much of the science that motivated CLF to press suit, and the initial evidence, came from BWSC's own site monitoring data. These data indicated that the pollutant loads in their "representative" sites (a selected number of sites where water quality was regularly monitored) were in violation of the relevant water quality standards. When the EPA got involved in the case later, it also brought a significant amount of its own data, which was instrumental in getting BWSC to settle.

Implications and Notes for Chinese EPIL

It should be noted that in China, generally speaking, only data from the court or from court-certified institutions can be considered as legal evidence for EPIL. However, this case indicates that careful NGO monitoring of government-published data, as well as pre-emptive court requests for information disclosure from these court-certified institutions can serve as a basis for an EPIL suit, as well as providing evidence throughout the case and potential motivation for a quick and effective settlement. In the Chinese context, it may be particularly useful for EPIL lawyers and NGOs to use and carefully monitor data from key enterprises, and the official monitoring data they are mandated to release. This careful monitoring could potentially provide a strong evidence base to press suit, as well as a court-sanctioned avenue to bring polluters into compliance.

In China, post-case fund allocation is case-specific, and currently will either go to the treasury, to the local government, or to a third party, most likely an environmental-repair company or other third party. Chinese NGOs are also exploring new monitoring mechanisms for post-case funds and compensation, as there is currently no cohesive system for the distribution and use of fines, fees, and post-case funds. That being said, SEPs, as brought up in this case analysis can be used as an innovative mechanism for making long-term improvements to pollution-control facilities, as well as environmental quality. It is likely that these SEPs would have to be executed in collaboration with a government-licensed environmental repair company.

Chinese NGOs may find it valuable to identify large enterprises or key enterprises for litigation efforts against air, water, ecological, and soil pollution, as the results of these cases could yield strategically powerful results if successful. NGOs with scarce resources trying to address severe pollution across China can use this mechanism in order to better maximize litigation results.

Text of Official Rulings

- *Conservation Law Found., Inc. v. Boston Water and Sewer Comm'n*, Case No. 10-cv-10250, 2010 WL 5349854 (D. Mass., Feb. 12, 2010).

- Consent Decree, *Conservation Law Found., Inc. v. Boston Water and Sewer Comm'n*, Case No. 10-cv-10250 (D. Mass., Sep. 28, 2012), https://www.epa.gov/sites/production/files/documents/bwsc-cd.pdf.

Additional Resources

- Clean Water Act, 33 U.S.C. § 1251–1375, https://www3.epa.gov/npdes/pubs/cwatxt.txt.

- CONSERVATION LAW FOUNDATION, http://www.clf.org/.

VII. ENVIRONMENTAL JUSTICE: *NATURAL RESOURCES DEFENSE COUNCIL V. DICKSON*

Case title:	*Natural Resources Defense Council, Inc. v. County of Dickson, Tennessee*
Case area:	*Groundwater contamination, environmental justice*
Case cite:	*Case No. 08-cv-0229 (not reported in F.Supp.2d)*
Court	*United States District Court for the Middle District of Tennessee*
Date of decision:	*January 3, 2011*
Relevant law(s):	*Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B)*
Decision:	*The parties' motions for summary judgment were denied with the exception of the plaintiffs' request for summary judgment on the issue of jurisdiction.*
Key words:	*Clean water, toxic, settlement, summary judgment.*
Summary:	*A settlement was eventually reached to provide residents of Dickson County access to clean drinking water after groundwater was contaminated with toxic industrial chemicals (TCE, PCE). Plaintiffs (Natural Resources Defense Council, Inc., Beatrice Holt, and Sheila Holt-Orsted) brought the action pursuant to the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA). A settlement was also reached in a separate civil rights lawsuit by members of the Holt family to provide damages for their exposure to TCE.*

Case Background

In 2011, the Natural Resources Defense Council (NRDC) filed a case against the County and City of Dickson, Tennessee regarding contamination of the local water supply. For decades, the water supply had been contaminated through dumping of the industrial chemical trichloroethylene (TCE) into a local landfill, which leeched into the groundwater supply and made local wells and springs located as far as a few miles from the site unsafe for human consumption. The NRDC brought suit under the Resource Conservation and Recovery Act (RCRA), which has been infrequently litigated. Under RCRA, a plaintiff may bring an action against any person "who has contributed or who is contributing to [a] past or present …

imminent and substantial endangerment to health or the environment."[135]

Several plaintiffs' firms had looked into taking on the case, but were put off by the high costs and risks involved. The NRDC was only able to take the case and spend 8,000–10,000 hours litigating it through the eve of trial as a result of generous private donations.

A key part of this case was its connection with a related civil rights suit brought by the National Association for the Advancement of Colored Peoples (NAACP). The town was majority white, but the landfill was located in a small portion of the town that was predominantly African-American. This disparity gave rise to the related civil rights case, and provided the NRDC's environmental case with a powerful narrative beyond the environmental angle. Ultimately, a separate settlement was reached in the civil rights case as well.

The Plaintiffs brought this action against the County of Dickson, Tennessee, City of Dickson, Tennessee, ALP Lighting and Ceiling Products, Inc., Nemak USA, Inc., and Interstate Packaging Co., pursuant to the citizen suit provisions of RCRA.[136] The suit alleged "imminent and substantial endangerment to human health and the environment posed by trichloroethylene ('TCE') and perchloroethylene ('PCE') disposed at the Dickson Landfill, in Dickson, Tennessee."[137]

Case Timeline and Pivotal Moments

- **March 4, 2008:** Initial Complaint filed by Beatrice Holt, Sheila Holt Orsted, and NRDC. Plaintiffs filed an amended complaint on October 28, 2009, which also included ALP Lighting, Nemark USA, and Interstate Packing as defendants.[138]

- **January 3, 2011:** The district court denied summary judgment to both the city and corporate defendants.[139,140] RCRA allows for "citizen suits" to challenge disposal of hazardous wastes that present an "imminent and substantial endangerment."[141] The court ruled that genuine issues of material fact existed as to whether each of the defendants had contributed to the hazard posed by the contamination, and thus denied summary judgment.[142]

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[135] Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B).
[136] *Id*.
[137] First Amended Complaint for Declaratory and Injunctive Relief, *Natural Resources Defense Council, Inc., et al. v. Cty of Dickson, Tennessee, et al*., Case No. 08-cv-0229 (M.D. Tenn., Oct. 28, 2009).
[138] *Id*.
[139] *Natural Resources Defense Council, Inc., et al. v. Cty. of Dickson, Tennessee, et al.*, Case No. 08-cv-0229, 2011 WL 8214 (M.D. Tenn., Jan. 3, 2011).
[140] The issue of NRDC's standing was also addressed in this proceeding. For an organization to have standing, it must demonstrate: (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Joyce Tucker, a NRDC member, was deemed to have adequately alleged injury to establish standing as a result of the inability for her to use and enjoy the West Piney River as a result of TCE contamination. *Id.*
[141] Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B).
[142] *Natural Resources Defense Council*, 2011 WL 8214.

- **December 9, 2011:** The parties reached a settlement agreement on the eve of trial, which provided for a Remedy fund—administered by experts—to ensure the community had access to clean water and sufficient monitoring of TCE levels.[143]

Key Settlement Terms

The settlement established an independent scientific panel to ensure that residents are protected from the risks associated with contaminated water, and to provide the County with information on how to protect residents.[144] As noted above, the case was also part of a broader effort to address racial and environmental injustice in the area. The related civil rights case led by the NAACP settled around the same time as the RCRA case.

On December 9, 2011, shortly before trial was scheduled to begin, the parties settled and the court entered a consent decree that terminated Beatrice Holt and Sheila Holt-Orsted's claims, and established the following remedies:

Creation of a remedy fund
The County was ordered to establish a $5 million remedy fund to reduce and/or eliminate the risks presented by TCE and PCE in the area, and to ensure that any migration of these chlorinated solvents would be detected and addressed.[145]

Establishment of an expert panel
The decree also established an expert panel composed of two experts appointed by NRDC and two by the County, which was tasked with administering the fund.[146] The expert panel's responsibilities also included defining an Expanded Environmental Risk Area, developing a groundwater and surface water monitoring program, and providing educational materials to landowners.

Access to Public Water Supply
The consent decree also required the County to ensure all affected residents were hooked up to the public water supply.[147]

Attorneys' Fees
The settlement required defendants to pay the NRDC's attorneys' fees.[148]

Key Takeaways and Lessons

[143] Interview with Selena Kyle, Senior Attorney, Litigation Program, National Resources Defense Council, conducted by LIDS members and an Orrick attorney on April 13, 2016.
[144] Press Release, NATURAL RESOURCES DEFENSE COUNCIL, *Tennessee Residents Protected from Toxic Chemical Exposure* (Dec. 8, 2011), https://www.nrdc.org/media/2011/111208.
[145] Consent Order, *Natural Resources Defense Council, Inc., et al v. County of Dickson, Tennessee, et al.*, Case No. 08-cv-0229 (M.D. Tenn., Dec. 9, 2011).
[146] *Id.*
[147] *Id.*
[148] *Id.*

Develop a compelling narrative
The racial discrimination aspect of the case allowed the NRDC to present a compelling narrative.

Citizen suits
Citizen suit provisions enabled this litigation. Without RCRA's citizen suit provisions, the NRDC would not have been able to bring the case as it did, and would have had to look to other laws for relief.

Cooperate with other organizations when available
The case was very labor intensive and required help from other partners. The NRDC partnered with the law firm Orrick, Herrington & Sutcliffe in the early stages on a pro-bono basis, and the NRDC would have been unable to conduct thousands of hours of research and litigation without the help of generous private donors.

Implications and Notes for Chinese EPIL

There has been significant progress on the national-policy level for ecological compensation and remediation fund management in China. In 2015 the State Council of People's Republic of China issued the "Pilot Program Plan on Reforming the Compensation System for Ecological and Environmental Damages."[149] Notable articles include Article 5, which strengthens public participation,[150] and Article 8, which stresses the role of a third party in managing environmental damage and compensation funds.[151] The statute also instructs that the state council will appoint a limited number of provinces to pilot compensation systems for environmental damage during 2015–2017, with the aim of building a nationwide system for compensation for environmental damage by 2020.[152]

Recent developments indicating additional policy strengthening in this area include statements

[149] Shengtai Huanjing Sunhai Peichang Zhidu Gaige Shidian Fang'an (生态环境损害赔偿制度改革试点方案), ZHONGYANG RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (Dec. 3, 2015), http://www.gov.cn/zhengce/2015-12/03/content_5019585.htm (accessed May 10, 2016).
[150] *Id.* art. 5 ("Innovate methods for public participation, invite experts and citizens that have had their interests impacted, legal persons, and other organizations to attend ecological environmental remediation or compensation consulting work. Make ecological environmental damage investigations, appraisal and assessments, compensation, the official legal judgments, environmental repair result reports, and other information public in accordance to the law, guarantee the public's right to know.").
[151] *Id.* art. 8 ("Strengthen the management of environmental damage compensation funds. Undergo consultation or litigation to decide which person is responsible for providing compensation the legal entity required to provide compensation, that entity with the compensation duty should act in accordance to the consultation or the requirements from the legal judgment, organizations developing environmental damage restoration. Entities responsible for providing compensation but lacking the ability to do so can entrust a third party organization with the ability to repair the environment through conducting environmental repairs. Environmental repair funds can be entrusted and paid to third party organizations from the initial entity required to provide compensation. For entities required to provide compensation that voluntarily repair the environment or are entrusted with the ability to repair the environment, those with the right to compensate should first conduct an environmental damage investigation, evaluation assessment, and finally, the entity responsible for compensating will be responsible for the repair result assessment, as well as other fee usages.").
[152] "中国印发《生态环境损害赔偿制度改革试点方案》." -新华网. Accessed May 05, 2016. http://news.xinhuanet.com/fortune/2015-12/03/c_1117348804.htm.

from certain deputies during the National People's Congress of 2016, suggesting that new statutes should be issued to support the creation of EPIL environmental remediation funds.[153] Though these statutes and statements all indicate significant legal progress, there has yet to be widespread implementation of the relevant law. Some of the *Dickson* settlement provisions could be effective techniques for environmental restoration, especially the establishment an expert panel to oversee the use of the remediation fund.

The role of media has also been instrumental in Chinese EPIL cases, notably the Tengger Desert cases, and more recently, the Changzhou Toxics case brought by Friends of Nature.[154] Crafting a story line that focuses on the people impacted by environmental degradation, particularly disadvantaged groups, as was done during the *Dickson* case can be a powerful mechanism for attracting public support and attention, as well as giving local courts pressure to accept and act on EPIL cases. This requires sophisticated strategy in making a media story line, and not just focusing on case and data details.

Text of Official Rulings

- *National Resources Defense Council, Inc., et al., v. Cty. of Dickson, Tennessee, et al.*, Case No. 08-0229, 2011 WL 8214 (M.D. Tenn., Jan. 3, 2011).

Additional Resources

- *Tennessee Residents Protected from Toxic Chemical Exposure,* NATURAL RESOURCES DEFENSE COUNCIL, https://www.nrdc.org/media/2011/111208.

[153] *See* 盘点两会慈善好声音（二），新化网 (Mar. 9, 2016), http://news.xinhuanet.com/gongyi/2016-03/09/c_128786657.htm (describing one representative's support for a "dedicated-fund system for environmental public-interest lawsuits" [环境公益诉讼专项资金制度]).

[154] *See Changzhou! Ziran zhi You Jinri Tiqi Huanjing Gongyi Susong* (常州！自然之友今日提起环境公益诉讼) [Changzhou! Friends of Nature File the Environmental Public-Interest Lawsuit Today] (Apr. 29, 2016), http://www.fon.org.cn/index.php/index/post/id/3417 (accessed May 10, 2016).

VIII. CHINESE LEGAL RESOURCES

- Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013), ZHONGYANG ZHENGFU MENHUWANGZHAN, http://www.gov.cn/flfg/2012-09/01/content_2214662.htm, *translated in Civil Procedure Law of the People's Republic of China (2012 Amendment)*, BEIDA FABAO, http://en.pkulaw.cn/display.aspx?cgid=183386&lib=law.

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- Huanjing Yingxiang Pingjia Fa (环境影响评价法) [Environmental Impact Assessment Law] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sep. 1, 2003), BEIDA FABAO, http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=42879, *translated in Law of the People's Republic of China on Appraising of Environmental Impact*, LAW INFO CHINA, http://www.lawinfochina.com/display.aspx?lib=law&id=2496.

- Shengtai Huanjing Sunhai Peichang Zhidu Gaige Shidian Fangan (生态环境损害赔偿制度改革试点方案) [Pilot Plan for Environmental Damage Compensation System Reform] (issued by the General Office of the Central Committee and the State Council on Dec. 3, 2015), CHINA LAW TRANSLATE, http://www.gov.cn/zhengce/201512/03/content_5019585.htm.

- Sup. People's Ct., *Renmin Fayuan Shenli Renmin Jianchayuan Tiqi Gongyi Susong Anjian Shidian Gongzuo Shishi Banfa* (人民法院审理人民检察员提起公益诉讼案件试点工作实施办法) [Implementation Measures for Pilots on People's Courts Hearing Public Interest Lawsuits Initiated by People's Procuratorates], QUANBU JIANCHAYUAN ZHENGWU WANGZHAN (Jan. 7, 2016), http://www.spp.gov.cn/flfg/201601/t20160108_110652.shtml, *translated in Implementation Measures for Pilots on People's Courts Hearing Public Interest Lawsuits Initiated by People's Procuratorates*, CHINA LAW TRANSLATE (Feb. 28, 2016), http://chinalawtranslate.com/spcprocpubintcases/?lang=en.