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Practical Review and Improvement of Preventive Environmental Civil Public Interest Litigation

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Abstract. With the increasingly severe ecological and environmental problems, China's environmental protection has gradually shifted from post-damage relief to ex-ante risk prevention, and preventive environmental civil public interest litigation has become an important judicial path to maintain the safety of the ecological environment. At present, in practice, there are problems such as the limited function of the procuratorate as the main body of litigation, the vague standard for accepting cases, the contradiction in the application of the burden of proof, the relatively single mode of bearing responsibility, and the competition between judicial power and administrative power. Contribute to the realization of the modernization goal of harmonious coexistence between man and nature.

Keywords: preventive environmental civil public interest litigation, significant risks, Preventive liability

1. Introduction

Under the theory of risk society, the health damage caused by environmental pollution is latent, time-lag and irreparable, which makes it difficult for the traditional tort liability system with actual damage as the premise of remedy to play a role. With the increase of typical cases such as the "Yunnan Green Peacock Case" and the "Sichuan Acer Five-leafy Maple Case", the importance of preventive environmental civil public interest litigation in environmental protection governancelt has become increasingly prominent and has received extensive attention from the academic community in recent years. However, at present,there are still various deficiencies such as vague standards for accepting cases, which restricts the realization of its institutional goals. Therefore, this paper analyzes the operation status and existing difficulties of the system based on classic cases, and proposes an optimization path to improve the prevention and operation efficiency of the system.

2. Normative analysis of preventive environmental civil public interest litigation in China

China's preventive environmental civil public interest litigation system has undergone three stages of progressive development.Although the establishment of this system has a certain legal basis and fills the gap in the preventive environmental public interest litigation system, the shortcomings of the existing norms are still significant. In China's current legal framework, there is no departmental law specifically for preventive environmental public interest civil litigation, and there is no systematic

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norm to interpret it. The relevant provisions are scattered in special legislation, administrative regulations, civil procedure laws and relevant judicial interpretations in various fields of environmental protection, and most of them stay at the level of principle, and the specific application rules are seriously lacking, and the overall characteristics are fragmented, vague and unsystematic. If the rules of traditional remedial civil public interest litigation are copied, it will hinder the play of its preventive function and bring great difficulties to the operation of judicial practice.

3. The current status of preventive environmental civil public interest litigation in China

In order to better understand and deal with the practical problems of preventive environmental civil public interest litigation, it is particularly important to search and analyze relevant cases. The following is an empirical analysis of five typical cases, and then effectively explores the specific problems existing in the preventive environmental civil public interest litigation system, which is summarized as follow.

Case One: Paraquat Case (2024) Su Min Zhong 554, the plaintiff was a certain environmental protection promotion center in Beijing. The litigation requests were: 1. Immediately stop the sale and recall the paraquat previously put on the domestic market; 2. Bear the cost of environmental restoration; 3. Apologize. The focus of the dispute in this case was: 1. Whether the paraquat already sold and scattered in rural areas posed a significant risk to the ecological environment and public health, and whether this case fell within the scope of environmental civil public interest litigation; 2. What measures should Nanjing a certain Yangsheng Chemical Company take to eliminate the ecological environment and public safety risks caused by its products. The trial result was: The first instance judgment was: 1. Eliminate the danger, recall the paraquat previously produced and sold on the domestic market; 2. Pay an environmental damage compensation of 266,000 yuan; 3. Apologize. The second instance ruling was to handle the appeal as withdrawn.

Case Two: Gamma Knife Case (2023) Lu Min Zhong No. 143. The plaintiff was the People's Procuratorate of Jinan City. The litigation requests were: 1. To bear the cost of disposing of the radioactive source amounting to 2.9 million yuan; 2. For a certain tumor hospital in Jinan to fulfill the obligation of assisting in handling the disposal procedures. The key point of dispute in this case was whether there was a "major risk" despite the fact that the abandoned Gamma Knife equipment had not yet caused actual radioactive pollution and whether a lawsuit could be filed. The trial results were: 1. The first instance court issued an injunction, prohibiting the disposal of the involved Gamma Knife medical equipment and radioactive source without the permission of the court or the competent environmental protection authority; 2. The second instance court ruled to eliminate the danger and ordered the three defendants to pay the disposal fee of 2.9 million yuan to a third-party institution in advance.

Case Three: The Acer mono case (2015) Gansu Civil Case No. 45. The plaintiff was the China Biodiversity Conservation and Green Development Foundation. The lawsuit requests were: 1. Immediately suspend the construction of the Yagen Second Hydropower Station and its auxiliary facilities; 2. Immediately take measures to prevent damage to Acer mono. The focus of the dispute was that the plaintiff believed that the construction of the power station would pose a significant risk to the environment of Acer mono, while the defendant held the opposite view, arguing that the project had not officially started and had not caused actual damage. Both sides could not reach a consensus on the judgment of "significant risk". The trial result was a final judgment in the first instance: 1. The hydropower station had not started construction, and the survival of Acer mono was

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to be the focus of the project's environmental impact assessment; 2. Work could only proceed after the environmental impact report was approved by the administrative department.

Case Four: Green Peacock Case (2020) Yun Min Zhong No. 824. The plaintiff was Friends of Nature. The litigation requests were: 1. Immediately halt the construction of the Jiasa Hydropower Station; 2. Do not cut down the precious vegetation in the area to be submerged by the hydropower station. The focus of the dispute was the criteria for determining whether the project in question posed a "major risk of damaging public interests". The trial result was: The first instance judgment was: 1. Cease the infringement: suspend the construction of the hydropower station; 2. The defendant shall complete the environmental impact assessment and the administrative organ shall make a decision in accordance with the law. The second instance judgment upheld the original judgment. The retrial judgment upheld the original judgment and rejected the retrial application.

Case Five: Yunnan Refinery Case (2017) Yun Min Zhong No. 417. The plaintiff was Friends of Nature. The litigation requests were: 1. To stop the operation of the refinery project and not to discharge any sewage; 2. To withdraw the environmental impact report of the optimized adjustment; 3. To publicly apologize. The focus of the dispute was whether the defendant's construction without approval posed a significant risk of harm to public interests. The trial result was that the first instance court ruled not to accept the case: 1. The environmental impact assessment report of the project had been approved by the Ministry of Environmental Protection; 2. The evidence failed to show that public interests were harmed or at significant risk; 3. The request to prohibit the supplementary filing of the environmental assessment document for approval and to order its withdrawal fell within the administrative management authority and was not within the scope of civil public interest litigation. The second instance court ruled to dismiss the appeal.

From the above cases, it can be seen that the current judicial practice of preventive environmental civil public interest litigation in China still faces many challenges, with a small number of cases accepted and low trial efficiency [2]. The main reason for this is "major environmental risks". The lack of clarity in the current system in terms of the division of the burden of proof and the form of legal liability objectively restricts the full play of the function of preventive environmental public interest litigation. The details are as follows:

3.1. The functions of the procuratorate as the subject of litigation are restricted

Through the analysis of existing cases, it can be seen that there is only one case in which the procuratorate has filed a preventive environmental civil public interest lawsuit as a plaintiff. In the field of environmental public interest civil litigation, the particularity of the procuratorate's status as a prosecutor - it also has the function of legal supervision - has led to a special dilemma in the legal status of the plaintiff, the defendant and the court in judicial practice. Judicial practice shows that courts usually position the procuratorate as a "public interest litigant",but there is still room for ambiguity as to whether its legal status falls within the category of plaintiffs [3]. The root cause of this dilemma lies in the unclear legal definition of the right to prosecute and dispose of it. As the subject of litigation in the procedural sense, the procuratorial organs cannot theoretically be equated with ordinary civil parties that integrate substantive and procedural rights, and cannot exercise all litigation disposition rights completely freely [4]. The procuratorial organ's exercise of the power to dispose of public interest litigation is essentially within the scope of procuratorial power, and is the proper meaning of performing statutory duties. However, from a practical perspective,procuratorial organs often adopt a conservative and modest attitude when exercising the power of punishment, and fail to give full play to their active initiative in the protection of public interests.

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3.2. The criteria for accepting cases are vague

First, the meaning of "major risk" is unclear. The Interpretation has established the clarification of the connotation and extension of "major risks" as a core element for clarifying the criteria for accepting cases for preventive environmental public interest civil litigation and ensuring the precise implementation of the system, but the interpretation of this in the current legal system and normative documents is still ambiguous.Article 6 of the Work Specifications of the Supreme People's Court on the Trial of Environmental Public Interest Litigation Cases (for Trial Implementation) (hereinafter referred to as the "Work Specifications")promulgated in 2017 sets out the requirements of "realism" and "urgency" for preliminary proof of major risks of environmental damage. It does not elaborate on the specific criteria for determining "reality" and "urgency". In addition, as a normative document, the Work Specification does not have the force of legal compulsion, and can only be used as a reference basis for judges to exercise their discretionary powers [5].

Second, the criteria for determining "significant risk" are different, and each court has its own definition of whether it constitutes a risk or not, and it is impossible to reach a unified standard. In the Acer Wuxiao case, the trial court held that the defendant's conduct had reached the statutory standard of "substantial risk", even though the damage caused by the defendant's conduct had not even produced substantial harmful consequences. In stark contrast, in the Yunnan oil refining case, although detailed arguments provided by the plaintiff,the Court ruled not to file the case on the grounds that the project in question had already passed the environmental impact assessment and approval of the environmental protection department. The contradiction of this kind of adjudication has led to the tendency of "mechanical adjudication" in the process of judicial adjudication, so that the approval decision of the administrative organ or the professional opinion of the environmental assessment agency occupies a dominant position in the judicial adjudication, and the legal argumentation process of judicial adjudication is substantively hollowed out.

3.3. Contradictions in the application of the burden of proof

Under the framework of the current system of preventive environmental public interest civil litigation, the legislative level continues the traditional rule of reversal of the burden of proof in environmental public interest litigation. According to Article 8 of the Interpretation, the plaintiff is required to provide "preliminary supporting materials" for the defendant's conduct that "has a significant risk of harming the public interest", while the defendant is required to exempt it from legal liability by proving that the causal relationship is not established. This provision aims to achieve a balanced allocation of the interests of the parties in environmental infringement litigation by lowering the threshold for the plaintiff to prove the essential facts of causation.

However, relevant empirical studies show that judges are constrained by adjudication inertia or differences of understanding when determining the plaintiff's burden of proof standard, and there are common problems in judicial practice, such as the excessively high standard of proof of "relevance" and the alienation of the function of the "prima facie evidence" rule. The frequent use of such evidence in litigation shows that the actual direction of the plaintiff's evidence has gone beyond the scope of "relevance" proof and extended more to the in-depth proof of "causation", which undoubtedly makes the plaintiff bear far more than "preliminary evidence" The burden of proof required by the rules [6].

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3.4. There is a single way to bear responsibility

The core of preventive environmental civil public interest litigation is to block environmental risks before damage occurs, but the lag and singularity of the current liability bearing method do not match the preventive characteristics of the system, and it is difficult to effectively prevent and control risks. The mode of liability established in China's Interpretation, such as removing obstacles, stopping infringements,eliminating dangers, etc., tends to focus on the environmental damage that has already occurred, and has limited ability to eradicate potential major environmental risks. In the Green Peacock case, the court made a judgment of "temporarily stopping the infringement", which reflects that in the current liability assumption of preventive environmental civil public interest litigation, the application of liability methods such as removing obstruction and eliminating danger is relatively infrequently,and the core is mainly to stop the infringement, and more rigid disposal methods such as "shutting down" are mostly relied upon. From the perspective of long-term governance, it is worth exploring whether such "one-size-fits-all" liability measures can completely eliminate major environmental risks [7].

The Several Provisions of the Supreme People's Court on the Application of Injunction Preservation Measures in Ecological and Environmental Infringement Cases promulgated in 2022 introduced environmental injunctions, which provide a more timely and effective judicial means to deal with urgent and major environmental risks by virtue of their stronger preventive attributes. However, it should not be ignored that the existing environmental injunction system directly invokes the relevant provisions of the Civil Procedure Law in the design of rules, and lacks a detailed construction for the particularity of the environmental field [8].

3.5. There is competition between judicial power and administrative power

As forms of public power belonging to different state organs, there are essential differences in the attributes of administrative power and judicial power. In the field of environmental governance, administrative power is mainly embodied through environmental administrative law enforcement, while judicial power, as the final guarantee of rights and remedies, is concentrated in the environmental civil public interest litigation system. As a result, the phenomenon of power competition between the executive power and the judicial power inevitably arises in the operation of practice. Taking the Green Peacock case as an example,after the court accepted the lawsuit, the administrative authority required Xinping Company to carry out a post-environmental impact assessment of the project and rectify the record, and the court finally ruled that the company should suspend the construction and deal with it after the evaluation was completed. It is not difficult to find that the content of judicial rulings and the handling opinions of administrative organs show a high degree of convergence.

4. Improving the path for preventive environmental civil public interest litigation

4.1. Establish the procuratorate's status of "thorough prosecution"

The Plan for the Construction of the Rule of Law in China (2020-2025) clearly proposes to strengthen the deployment of procuratorial public interest litigation as an important starting point for promoting the modernization of the national governance system and governance capacity. In response to practical needs, all localities have actively explored the innovative model of "multiple procuratorates in one", and built a pluralistic governance platform led by the procuratorate and

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coordinated participation of multiple departments through the integration of criminal, civil, and administrative litigation functions. However, the establishment of the main position of the procuratorate in environmental public interest civil litigation is not intended to limit the subject of prosecution to the procuratorateOn the contrary, the system is designed to give full play to the professional advantages of the procuratorate in civil public interest litigation,including the right to investigate and collect evidence and rich judicial practice experience, while properly coordinating the relationship with other litigation subjects.

4.2. Clarify the criteria for accepting cases and the designation of "major risks"

4.2.1. Clarify the connotation of major risks

The three-point risk theory proposed by the German scholar Breuer has important theoretical reference value, which divides the risk into three categories: first, "danger" with high risk and high probability of occurrence; second, the probability of occurrence is low, but there is still a "general risk" of the possibility of occurrence; The third is the "residual risk" with a very low probability of occurrence and a negligible impact on the damage result. If we look for the basis of the current legal system, we can refer to Article 19 of the Interpretation on Several Issues Concerning the Application of Law in the Trial of Environmental Public Interest Civil Litigation Cases to include "major risk" as "danger" scope to be understood.To deconstruct the legal concept of "major risk", it is necessary to clarify the specific directions of "major" and "risk"respectively. The "significant" attribute can be defined from the time dimension and the outcome dimension: in the time dimension, it is manifested as the urgency of environmental risk to be transformed into actual damage; In terms of results, it is emphasized that the infringement may cause serious and irreversible damage to the ecological environment. The concept of "risk" encompasses two situations: one is the potential risk that exists before the environmental damage occurs; The second is that environmental damage has already occurred, but there is a risk of further expansion.

4.2.2. Clarify the entity for the identification of major risks

As the core subject of judicial adjudication, the court should play a decisive role in the determination of "major risk". By virtue of their professional legal literacy and guided by the value of environmental protection goals and the protection of public rights and interests,judges make scientific, reasonable and stable judgments on "major risks", which is conducive to solving the dilemma of "difficulty in filing cases" and ensuring the uniformity and predictability of the standards for accepting cases. However, emphasizing the central position of the courts in the determination of "major risks" does not exclude the synergistic and auxiliary role of administrative organs [9]. Courts should construct adjudication norms through judicial interpretations and guiding cases, and conduct substantive reviews of "major risks";Environmental protection administrative organs use professional means such as monitoring and assessment to provide support for the identification of "major risks". According to article 75 of the Civil Procedure Law, environmental protection administrative organs can participate in litigation as witnesses, and the normative documents and specific administrative acts issued by them can also be used as auxiliary eidence for judicial determination. However, it is necessary to be vigilant against over-reliance on administrative judgment, avoid problems such as "construction without approval" and "inaccurate content of the EIA report" in the Yunnan oil refining case, clarify the boundary between judicial and administrative functions, and maintain the independence and authority of judicial adjudication.

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4.3. Optimize the distribution of the burden of proof

In environmental infringement cases, there is a significant difference between the objective situation of evidence bias and the litigation ability of the parties, resulting in many difficulties for the plaintiff in the process of investigation and evidence collection and technical demonstration. In order to achieve fairness and substantive justice in litigation, it is necessary to scientifically allocate the burden of proof and reduce the burden of proof on the plaintiff.In the system of allocating the burden of proof in preventive environmental public interest civil litigation, the proof of "causation"follows the logical path of "the plaintiff preliminarily proves that the causal relationship is preliminarily established→the causal relationship is preliminarily established→the defendant refutes that the causal relationship is not established". Specifically, the plaintiff bears the minary burden of proof of the "relevance" between the infringement and the result of the damage [10], and it only needs to submit prima facie evidence that can prove the causal relationship between the defendant's act and the significant environmental risk, and the probative force only needs to reach the probable probability of the occurrence of the damage (i.e., proving that the probability of the damage occurring is greater than the probability of not occurring, which is usually understood to be greater than 50% but less than 80%), which can prompt the judge to presume causation according to the rule of thumb. In this process, the distinction between "basic facts" and "consequential facts" is the logical basis for realizing the presumption of causation, and the plaintiff only needs to prove the basic facts to complete the preliminary burden of proof with the help of the judge's presumption of facts [11]. When the causal relationship is presumed to be established, the burden of proof is immediately shifted to the defendant, and the defendant shall bear the burden of counter-proof that the causal relationship does not exist or that there are statutory exemptions, and the counter-evidence shall meet the standard of "high probability", and if the defendant fails to complete the proof, it shall bear the consequences of losing the case.

4.4. Complete methods of taking responsibility for prevention

The current legal system has established a system of pre-litigation and in-litigation injunctions in ecological and environmental infringement litigation, but since the implementation of the relevant provisions of environmental protection injunctions in 2021, the application of the system has been extreme, resulting in the failure of the system to give full play to its function in ecological and environmental protection. In view of this, there is an urgent need to systematically improve the restraining order system [12]. In order to enhance the effectiveness of injunctions, judges should comprehensively apply the principle of proportionality in judicial adjudication, fully assess their impact on the public interest and economic development while considering the necessity of assuming responsibility, and avoid adopting a "one-size-fits-all" simplistic approach. This requires the court to assess the remedial nature of the environmental damage and weigh the potential impact of the injunction on the business operation and social economy of the case, so as to achieve a dynamic balance between ecological protection and economic development through flexible judicial adjudication. Although preventive judicial intervention may impose certain restrictions on economic activities, in view of the irreversibility and severity of environmental damage, the priority application of preventive measures such as injunctions is a necessary choice to avoid irreparable losses to the ecological environment.In order to ensure the efficiency of adjudication enforcement, it is necessary to build a multi-coordinated enforcement guarantee system,take into account both short-term and long-term effects in enforcement, and achieve the unity of legal, political and social effects through dynamic supervision. In addition, a risk tracking mechanism should be established to update

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environmental monitoring data in real time to provide risk information for long-term cases and help judicial authorities flexibly adjust their enforcement strategies.

4.5. Strengthen the connection between judicial power and administrative power

In the face of the lack of connection between judicial power and administrative power in preventive environmental public interest civil litigation, pre-litigation procedures can be set up. The core function of the program is to accurately identify the absence or failure of environmental law enforcement methods, and to prevent environmental risks from turning into actual damage through judicial intervention. It is suggested that a new clause be added under the current legal framework to clarify that when an administrative organ with supervision and management responsibilities performs its duties or fails to act in violation of the law, the procuratorate may initiate a lawsuit in accordance with the law. Although the Interpretation stipulates that the court shall notify the environmental administrative law enforcement department with regulatory responsibilities within 10 days after accepting an environmental public interest case, it is difficult to achieve the original intention of the system of resolving disputes at the front end of litigation and saving judicial resources because the notification time node is set after the case is accepted and the court is not the plaintiff who performs the notification obligation.

5. Conclusion

Since the promulgation of the Interpretation in 2015, preventive environmental public interest civil litigation has gone through a 10-year development process, but the construction of any system is not a one-step process, and it must be continuously explored and developed in practiceand perfect. As China enters a new stage of development,the research on preventive environmental civil public interest litigation will continue to be committed to strengthening the front-end prevention and control efficiency of environmental protection, and realizing the source management of environmental risks by improving the design of preventive systems, so as to avoid the occurrence of environmental harm. Greater efforts should be made to plan and promote the ecological and environmental protection work of the new journey, and write a new chapter in the construction of ecological civilization in the new era.

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