

# COMMENTS

## DO CHINESE ENVIRONMENTAL LAWS WORK? A STUDY OF LITIGATION AS A RESPONSE TO THE PROBLEM OF FISHERY POLLUTION IN CHINA

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## I. INTRODUCTION

Every year, 4.5 million fish farmers in China<sup>2</sup> produce 115 billion pounds of seafood — seventy percent of the farmed seafood worldwide.<sup>3</sup> Every year, furthermore, the polluting industries that have underwritten China's economic miracle discharge billions of tons of pollutants into China's waterways — four billion tons into the Bohai Gulf alone.<sup>4</sup>

It is therefore unsurprising that the combination of highly polluted waters and abundance of large-scale fish farming operations has caused a substantial amount of litigation in China. The following story frames the all too common scenario that is at the heart of this paper:

For several days, a yellowish-brown substance from an unknown source appeared in the river. The substance caused tens of thousands of mature fish to suddenly die. As the Department of Fishery Administration approached the area [to perform an inspection] they could smell rotting fish from a far distance. When they arrived they saw the white bellies of the fish floating on the surface surrounded by a yellowish-brown substance. . . . Before the arrival of the inspectors, the villagers had collected samples near several factories upstream that they suspected of causing the pollution. [These villagers] were preparing to use the weapon of the law to protect their personal rights, and demand an explanation from the [person(s) responsible] for their enormous loss.<sup>5</sup>

It seems that an increasing number of victims in China are using the law to seek redress. According to one estimate, in the years from 1998 to 2001, the number of environmental cases heard by courts increased by 25.35% annually,<sup>6</sup> though only 5%

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2. David Barboza, *In China, Farming Fish in Toxic Waters*, N.Y. TIMES, Dec. 15, 2007, at subhead "Fishing for Prosperity," available at [http://www.nytimes.com/2007/12/15/world/asia/15fish.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/12/15/world/asia/15fish.html?_r=1&oref=slogin).

3. *Id.* at introduction.

4. Ministry of Agriculture, *Lu yuan wu ran yi cheng Bohai by kan cheng shou de zui da "bing liu"* [*Land-based Pollution Has Become Bohai Gulf's Biggest Cancer*] Zhongguo yu ye zheng wu wang [China Fishery Management Web], Aug 13, 2007, <http://www.cnfm.gov.cn/info/display.asp?sortid=54&id=24374> (last visited April 30, 2008).

5. Ministry of Agriculture, *Wu shui tu xi wan yu zao yang* [*Polluted Water Brings Catastrophe to Tens of Thousands of Fish*] Zhongguo yu ye zheng wu wang [China Fishery Management Web], May 25, 2005, <http://www.cnfm.gov.cn/info/display.asp?sortid=54&id=7405> (last visited April 30, 2008). Throughout this paper, all translations unless otherwise indicated are my own.

6. Rachel E. Stern, "Negotiating the Zone of Tolerance: Lawyers & Environmental Litigation in China," presented at the Graduate Seminar on China, The Chinese University of Hong Kong, Jan. 11, 2007 (not yet published, on file with author).

of environmental disputes were handled through legal means (*suzhu falü*).<sup>7</sup>

While very little has been written in the West about the seemingly arcane subject of fishery pollution litigation, the topic receives considerable attention in China. A substantial portion of all environmental cases in China involve fishery pollution and articles have been written specifically on how to win fishery pollution cases.<sup>8</sup> The government has also passed a number of laws that specifically address fishery pollution.<sup>9</sup> Not only is the subject of fishery pollution litigation important to people in China, it also has implications for the West. Increasingly, China's exports have health effects internationally. The last two years provide a number of high profile examples; the tainted milk scandal, the lead paint scandal, and scandals involving contaminated dog food, toothpaste, and blood thinner. There have also been incidents involving fish. Melamine, the chemical at issue in the tainted milk scandal has also been found in fish<sup>10</sup>, as have certain banned antibiotics which have the potential of causing cancer. In 2007, the United States rejected 210 shipments of fish because they contained illegal drugs—drugs used primarily to combat the effects of polluted water.<sup>11</sup> Because fishery pollution has broad implications domestically and abroad, the litigation that arises out of fishery pollution deserves serious attention.

This paper will discuss the degree to which fish farmers<sup>12</sup> in China, are able to access the law and vindicate their legal rights. The main obstacles preventing fish farmers from receiving compensation exist outside the legal realm. These obstacles include protectionism from local governments reliant on the polluting industries, technical difficulties in locating the polluters, and the financial constraints of both government agencies and aggrieved fish farmers. Ambiguities in the law compound these problems.

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7. Sha Lin, *Ji shi yu* [Timely Rain], *Zhongguo qing nian bao* [China Youth], September 10, 2003, at subhead, “*Gai sheng bu sheng, sheng su le ye zhi shi hua ping*,” [http://www.cyol.net/zqb/content/2003-09/10/content\\_730989.htm](http://www.cyol.net/zqb/content/2003-09/10/content_730989.htm).

8. See, e.g., Gu Jiajun, *Yu ye wu ran shi gu shou hai fang ru he da ying suo pei guan si* [The Injured Party of Fishery Pollution Accidents How to Win Squabbles], *Fa zhi yu guanli* [Legal System and Management], Aug. 2002.

9. See Section III, *infra*.

10. Linden J. Ellis & Jennifer L. Turner, *Sowing the Seeds: Possibilities for U.S.-China Cooperation on Food Safety* Widrow Wilson International Center for Scholars (Sep. 2008), [http://www.wilsoncenter.org/topics/pubs/CEF\\_food\\_safety\\_text.pdf](http://www.wilsoncenter.org/topics/pubs/CEF_food_safety_text.pdf), at 26.

11. Barboza, *supra* note 2, at Introduction.

12. To avoid the awkward sounding alternatives, I use the term “fish farmer,” although the original Chinese word, *yangzhihu*, simply means “cultivator.” The term “fish farmer” as used in this paper, includes not only one who raises fish, but also shellfish, crabs, lobsters and other water dependent animals used for food.

Circumstantial evidence suggests that many farmers lack the resources necessary to bring them to the stage at which strictly legal considerations are the primary focus in resolving their claim. Indeed, an analysis of all available fishery pollution cases supports a conclusion that large-scale fish farmers are generally able to use their financial power and political capital to break through such non-legal barriers, such that they are able to fully access the power of the relevant laws. Once the plaintiffs break through this initial barrier, the law usually operates effectively to provide legal relief.

Section II of this paper discusses the extent and impact of water pollution in China. Section III summarizes the laws governing water pollution in China, and Section IV discusses the degree to which those laws function effectively. Section V focuses on the laws relating to environmental litigation, and the legal elements that a plaintiff must establish in order to win a case against a polluter. Section VI discusses plaintiffs in fishery pollution cases, the types of obstacles they have faced in litigation, and the degree to which they have been successful in overcoming those obstacles.

## II. WATER POLLUTION IN CHINA: ITS OVERALL EFFECTS ON FISHERIES, THE ENVIRONMENT, AND CHINESE SOCIETY

### A. NATIONAL STATISTICS ON WATER POLLUTION

China is facing a water pollution problem of enormous magnitude. More than half of the rivers in China are too polluted to serve as a source of drinking water, and seventy percent of the water in five of China's seven major river systems has been deemed unsuitable for human contact.<sup>13</sup> Water pollution has dire economic consequences as well. Damages from rural water pollution equaled 1.9 percent of gross domestic product in 2003.<sup>14</sup> Annual reports prepared by the Ministry of Agriculture and the State Environmental Protection Administration (SEPA) provided the following statistics on the economic harm caused by water pollution, measured in RMB:

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13. *A Great Wall of Waste*, *ECONOMIST*, Aug. 21, 2004.

14. Mun S. Ho & Dale Jorgenson, *Greening China: Market-based policies for air-pollution control*, *HARVARD MAGAZINE*, Sep.-Oct. 2008, at 32.

TABLE 1: ECONOMIC HARM CAUSED BY WATER POLLUTION

	2001	2002	2003	2004	2005	2006	2007
Number of accidents	1242	1255	1274	1020	1028	1463	1442
Direct economic harm (measured in millions of RMB)	350	388	713	1080	640	243	298
Calculable economic loss to natural fishery resources caused by pollution (measured in millions of RMB)	3000	3600	3600 <sup>15</sup>	3600	4600	3643	5490

Annually, the levels of pollution, the number of accidents, and the resulting economic damages have remained relatively stable over the last six years.<sup>16</sup> However, the problem is no less serious than it was six years ago. The 2007 Fisheries Report provides a snapshot of persistently critical water pollution problems:

15. In this year there were 80 registered marine accidents covered 90,262 hectares and caused damages as high as 2.740 million (Qu Xia, *Walking Towards Oceans and Treat Oceans Well*, 6 ENVIRONMENTAL ECONOMICS 21 (2004)). If both figures are accurate, then 6% of the accidents (80/1274) accounted for 76% (2740/3600) of the damages.

16. *2005 nian Zhongguo yu ye shengtai huan jing zhuang kuang gong bao* [Report on the State of the Fishery Eco-Environment in China] (promulgated by the Ministry of Agriculture and the State Environmental Protection Administration) available at <http://www.cnfm.gov.cn/info/display.asp?sortid=56&id=14010>, at 42 [hereinafter "2005 Fisheries Report"].

TABLE 2: IMPORTANT FISHING AREAS WITH HIGHER THAN PERMISSIBLE LEVELS OF POLLUTANTS

	Rivers <sup>17</sup>	Lakes/ Reservoirs <sup>18</sup>	Oceans <sup>19</sup>
Total phosphates	10.9%	84.9%	66.9% (measure of activated phosphates)
Total nitrates		87.1%	74.4% (measure of inorganic nitrogen)
Non-ionized ammonia	12.5%		
Oil	12.0%	21.7%	40.4%
COD <sup>20</sup>			17.4%
Permanganic acid	15.9%	54.9%	
Copper	19.2%	11.6%	3.2%
Lead	3.8%		
Zinc	10%		
Cadmium	3.2%		
Mercury			3.4%

\*Note that values are not blank to signify zero percent, but rather the government does not test for those particular pollutants.

As the table shows, a significant number of pollutants exceed water quality standards. Phosphate and nitrate standards were out of compliance in over eighty percent of lakes and reservoirs, and in approximately seventy percent of ocean fishing areas. This has led to widespread algae blooms, which lower the oxygen content of the water and often lead to massive fish die-outs. One such algae bloom near Qingdao recently threatened to ensnarl boats competing in the upcoming Olympic games, necessitating the deployment of ten thousand volunteers and one thousand vessels to dispose of the algae.<sup>21</sup>

Oil residues resulting from spillages also remain an enormous problem, especially in the ocean, where 40.4 percent of test cites reported higher than permissible levels. Heavy metal contamination, even though the percentage of test cites out of compliance is relatively small, poses a serious health threat because of the acuteness of health effects attributable to heavy metals.

17. 2007 nian Zhongguo yu ye sheng tai huan jing zhuang kuang gong bao [Report on the State of the Fishery Eco-Environment in China] (promulgated by the Ministry of Agriculture and the State Environmental Protection Administration) available at <http://www.cnfm.gov.cn/info/display.asp?sortid=56&id=30691>, at 16 [hereinafter "2007 Fisheries Report"].

18. *Id.* at 22.

19. *Id.* at 4.

20. COD stands for "Chemical Oxygen Demand" and indirectly measures the amount of organic material in water. If COD levels are too high, fish can die of oxygen deprivation.

21. Jim Yardley, *To Save Olympic Sailing Races, China Fights Algae*, N.Y. TIMES, Jul. 1, 2008, available at <http://www.nytimes.com/2008/07/01/world/asia/01algae.html>.

## B. SOURCES OF WATER POLLUTION

Industrial waste is by far the biggest cause of fishery-related pollution harms. According to one estimate, industrial effluent is responsible for seventy percent of fishery pollution incidents in China.<sup>22</sup> Estimates from the region around Wuhan put the figure at seventy five percent.<sup>23</sup> Other external causes include household wastewater (and lack of effective treatment plants), agricultural runoff, pollution from watercraft,<sup>24</sup> oil drills, construction<sup>25</sup> and dams.<sup>26</sup> In the thirty-five court cases that dealt with fishery pollution, ninety-one percent of the defendants were industrial polluters.<sup>27</sup>

## C. REGIONAL IMPACTS: THE BOHAI GULF

The Bohai Gulf in northeastern China is one body of water in China where pollution levels have dramatically worsened. The Gulf is one of the busiest seaways in the world; ships destined for Tianjin, a large port city near Beijing, travel through it regularly.

From 2004 to 2007, the amount of water in the gulf considered seriously polluted increased five-fold, eventually covering about forty percent of the Gulf. Algae blooms are a particularly serious local problem. In 2002, red tide, a type of algae bloom, affected only ten square kilometers of the Bohai Gulf. By 2006, red tide affected an astonishing 860 square kilometers.<sup>28</sup> More than thirty species that existed in the Gulf in the 1980s can no longer be found.<sup>29</sup>

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22. Qi Guosheng, Jiang Jinhua, *Yu ye huan jing wu ran de fang zhi dui ce* [Means of Preventing and Ameliorating Environmental Pollution Affecting Fisheries], *Jiang su nong cun jing ji* [Jiangsu Rural Economy], Issue 1, 2007, at 39.

23. Wang Xiaogang & Li Hongyu, *Yu ye shui ti wu ran bu ke xiao kan* [Don't Underestimate Fishery Pollution], *Ren min ri bao* [People's Daily], Mar. 3, 2008, available at <http://www.people.com.cn/GB/paper464/3815/462049.html>.

24. Qi & Jiang, *supra* note 22.

25. Gao Jide, *Leting xian Luanhe, Daqing he ru hai kou yang zhi shui yu wu ran shi gu ji qi fan si* [Reflections on Pollution Accident in the Leting County Luanhe and Daqinghe Estuary], *Hebei yu ye* [Hebei Fishery], Issue 1, 2002, at 54.

26. Wang Wenbin, *Guan zhu yu ye wu ran chong xun lan tian bi shui* [Focus on Fishery Pollution: Searching for the Return of Azure Skies and Turquoise Waters], *Xu mu shou yi ke ji xin xi* [Livestock Veterinary Technology News], Aug. 2008, at 89.

27. Of the 54 defendants, 12 were chemical factories, 11 were involved in oil exploration or refining, 7 were paper or paper pulp factories, 5 were food processing factories, 5 were dye and garment manufacturers, 4 were mining companies, 3 were other fish farmers, 3 were manufacturers, 2 were city governments, 1 was a carpet manufacturer, and 1 was an electric power generating company.

28. Ministry of Agriculture, *Bohai zhong du jia zhong "tian ran yu cang" lao bu chu xiang yang hai huo* [Poisoning of Bohai Worsens, Natural Stocks Depleted—Can't Get a Decent Catch] *Zhongguo yu ye zheng wu wang* [China Fishery Management Web], Aug. 13, 2007, <http://www.cnfm.gov.cn/info/display.asp?sortid=54&id=24372> (last visited Aug. 6, 2008).

29. *Id.*

The pollution problems in the Gulf, as elsewhere in China, stem from both the huge number of industries and by the degree to which they exceed their effluent limitations. Ninety percent of point sources along the coast of the Bohai Gulf exceed effluent limitations for pollutants,<sup>30</sup> and as a result, every year an estimated four billion tons of pollutants enter Bohai Gulf.<sup>31</sup> Most of these pollutants are dumped into streams that flow into the gulf. Several of these streams that were once abundant with fish are now highly polluted and “[appear] the color of soy sauce, covered with an oily film and bubbly froth, giving off bursts of unpleasant odor, staining the embankment blackish-red and lining the high water mark with ‘white frost.’”<sup>32</sup>

Such a degree of pollution has had disastrous consequences on fishing in the Gulf. A reporter observed that “the formerly busy pier is now quiet; dilapidated boats stay moored in the harbor. When boats do come in they bring in mostly small fish and shrimps, which do not pay for the trip that fetched them in. . . . Many fishermen have gone into debt and others have stopped fishing altogether.”<sup>33</sup>

#### D. SOCIAL IMPLICATIONS OF WATER POLLUTION

A tremendous amount of social unrest in China is related to environmental pollution and inadequate compensation for land that is effectively taken by polluting state-owned enterprises. From 2001 to 2005, environmental authorities received more than 2.53 million letters and 430,000 visits by 597,000 petitioners seeking environmental redress<sup>34</sup> and the rate at which these letters and petitions (*xinfang*) are received is increasing at an annual average rate of 26%.<sup>35</sup> In 2005 there were around 50,000 legal disputes related to pollution.<sup>36</sup> These disputes can lead to violence, as in one case in which “[t]housands of people rioted. . . overturning police cars and driving away officers who had tried

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30. Ministry of Agriculture, *supra* note 4 (citing 2006 nian Zhongguo hai yang huan jing zhi liang gong bao [2006 Public Report on Quality of the Ocean Environment]).

31. Ministry of Agriculture, *supra* note 4.

32. *Id.*

33. Ministry of Agriculture, *supra* note 28.

34. *Id.*

35. Wu Weixing, *Zhongguo huan jing jiu fen xing zheng chu li de li fa wen ti yu jian yi [Problems and Suggestions Concerning the Administrative Handling of Environmental Conflicts]* Fa zhi jing wei [Legal Strands] 2008, volume 406, at 34.

36. Li Fangchao, *Environmental Issues Addressed More Urgently*, CHINA DAILY, May 4 2006, available at [http://www.chinadaily.com.cn/bizchina/2006-05/04/content\\_582631.htm](http://www.chinadaily.com.cn/bizchina/2006-05/04/content_582631.htm) (last visited May 9, 2008).

to stop elderly villagers from protesting against pollution from nearby factories.”<sup>37</sup>

### III. CHINESE LAWS REGULATING WATER POLLUTION: STRENGTHS AND WEAKNESSES

The 1978 amendment to the Chinese Constitution provides that “[t]he state protects and improves the environment in which people live and the ecological environment.”<sup>38</sup> Since then, China has passed an extensive set of laws directly regulating environmental pollution.<sup>39</sup> The Chinese government in 1983 elevated the importance of these laws when it named environmental protection as one of the country’s five “basic state policies” (*jiben guocce*).<sup>40</sup>

Laws that address the problems of environmental pollution in China include the Criminal Law, which contains provisions aimed at punishing environmental polluters,<sup>41</sup> and other laws that allow victims of pollution to sue polluters for damages.<sup>42</sup> Most pertinent to this article’s discussion is the *Law on the Prevention of Water Pollution of the People’s Republic of China*.<sup>43</sup> This Law requires the Central State Environmental Protection Administration (SEPA) to set water quality standards.<sup>44</sup> Once these standards are established, SEPA will, “according to the national water quality standards, and national economic and technical conditions[,] set effluent limitation standards.”<sup>45</sup> Companies must pay a fee for the right to pollute into the water; if they ex-

37. Jim Yardley, *Rural Chinese Riot as Police Try to Halt Pollution Protest*, N.Y. TIMES, Apr. 14, 2005, available at [http://www.nytimes.com/2005/04/14/international/asia/14riot.html?\\_r=1&oref=slogin](http://www.nytimes.com/2005/04/14/international/asia/14riot.html?_r=1&oref=slogin).

38. Constitution of the People’s Republic of China, art 26, (1982), available at: <http://english.people.com.cn/constitution/constitution.html>.

39. For an extensive account of China’s current environmental laws, see Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 184 (2006).

40. Zhou Fang & Zhu Deming, *Qiang hua huan bao ji ben guo ce chuang xin huan jing guan li ti zhi* [*Strengthening Environmental Protection Basic National Policy and Innovating Environmental Management System*] Jiangsu huan jing ke ji [Jiangsu Environmental Technology] 2007, volume 20, issue 4. China’s “basic state policies” are; family planning, environmental protection, opening to the outside world, gender equality and wise use of land resources.

41. These include provisions against “causing serious pollution accidents, . . . illegally acquiring aquatic products. . . illegal catching/killing/transportation of endangered species. . . and illegal mining.” Wang Canfa, *supra* note 39, at 162.

42. See Section V, *infra*.

43. Law on the Prevention of Water Pollution (promulgated by the Nat’l People’s Cong., May 11, 1984), available at <http://www.lawofchina.com> (last visited Mar. 8, 2008).

44. *Id.* at Art 6.

45. *Id.* at Art 7.

ceed their effluent limitation standards, they must pay additional fees.<sup>46</sup>

One weakness of the *Law on the Prevention of Water Pollution*, in terms of providing clean water for fish farmers, is that water quality standards are not the sole factor in determining discharge allowances — economic and technological considerations play equally large roles. The *Implementing Legislation of the Law on Prevention of Water Pollution*<sup>47</sup> allows, but does not require, the implementation of additional measures in order to bring water quality into compliance in areas where the discharge standards are being met.<sup>48</sup> Another weakness is in the effectiveness of imposing fees: the law does not require polluters to stop polluting if they exceed discharge limits. Instead, it only requires them to pay a fee, which may be lower than the cost of complying with discharge standards.<sup>49</sup>

While many believe that China's laws are complete, and any problems lie only in the realm of implementation and enforcement, Alex Wong, head of the NRDC's (National Resources Defense Council) Environmental Project in Beijing, points out that this sentiment is only partially true.<sup>50</sup> According to Wong, China's environmental laws on their own suffer from a range of problems including large numbers of vague policy provisions,<sup>51</sup> weak or nonexistent enforcement provisions,<sup>52</sup> and unrealistic goals.<sup>53</sup>

#### IV. THE DIFFICULTIES OF ENFORCING WATER POLLUTION LAWS IN CHINA

While the weaknesses of Chinese environmental laws raise some concern, a more concerning problem is the systemic under-

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46. *Id.* at Art 15.

47. This is a law passed by the People's Congress that implements and fleshes out the Law on the Prevention of Water Pollution.

48. Article 6 states: "Even if discharge standards are being met and yet the body of water still does not meet nationally established water quality standards, site-specific (*zhongdian*) discharge control systems *may* be implemented. (*zhong hua ren min gong he guo shui wu ran fang zhi fa shi shi xi ze* [*Implementing Legislation of the Law on Prevention of Water Pollution*] (promulgated by the Nat'l People's Cong., Mar. 20, 2000), available at [http://www.sepa.gov.cn/law/fg/xzhg/200701/t20070124\\_100218.htm](http://www.sepa.gov.cn/law/fg/xzhg/200701/t20070124_100218.htm) (last visited Mar. 8, 2008).

49. See generally, Charlie McElwee, *Water Pollution Act Amendments (Penalty Box II)*, available at <http://www.chinaenvironmentallaw.com/?p=27>. In Chinese this phenomenon is colloquially referred to as "polluting is cheap, keeping the law is expensive." (*Wuran chengben di, shoufa chengben gao.*)

50. Alex Wang, *The Role of Law In Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 203 (2006).

51. *Id.*

52. Wang, *supra* note 39, at 164.

53. *Id.*

enforcement of existing laws.<sup>54</sup> This section focuses on why Chinese water pollution laws are irregularly enforced, and will also serve as a background for understanding why Chinese citizens choose to litigate. It will also cast light on the degree to which those who are unable to litigate nonetheless obtain legal results through the general enforcement of environmental laws.

#### A. CHINA'S DIFFICULTY OF DETECTING POLLUTERS

##### *i. Industries Take Proactive Steps to Hide Pollution*

Industrial polluters have taken proactive steps to avoid detection by environmental authorities. There are numerous stories about secret pipes buried underground that discharge into streams at night to avoid detection.<sup>55</sup> This practice is such a widespread problem that the *Law on the Prevention of Water Pollution* explicitly addresses and forbids it.<sup>56</sup> Another strategy is for factories to build close together and pollute in "spurts" so that it is more difficult for inspectors to determine the source of the pollution.<sup>57</sup> Still other factories keep wastewater in pools, knowing that these pools will spill over during rainstorms making liability for any one factory impossible to pin down. A description of one such incident occurred in Hubei, as described in *Southern Weekend* a widely read news magazine:

Usually they keep their wastewater in their holding pool, but when it rains heavily, they will dump [the wastewater] during the night. When [one] sees a layer of dead fish and shrimp floating on the water [one] knows that they've polluted again. During those times, [one] can't wash [one's] clothes because the clothes will break down. During those times the water is white like milk, sometimes yellow, and makes one gag.<sup>58</sup>

Besides secretly releasing pollutants, some companies have also been known to conceal pollution problems by adding clean

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54. *E.g.* "In the five years since the revision of China's criminal law, the total number of serious environmental accidents has increased to over 387. Each of these accidents, according to the Criminal Law, constitutes an environmental crime. Unfortunately, less than 20 cases have been prosecuted." Wang, *supra* note 39, at 168.

55. *See, e.g.*, BENJAMIN VAN ROOIJ, REGULATING LAND AND POLLUTION IN CHINA (Leiden Univ. Press, 2006), at 191, and 194; Yang Shankun & Wu Fengquan, *Zai zou huai he zai ci jing xin [Return to the Huaihe River Again Brings New Surprises]*, Nan fang zhou mo [Southern Weekend], May 27, 2004, available at <http://www.hnhb.gov.cn/hnhb1/files/list.asp?id=1541>, at subhead "Niu tui go de bei hou." *See also*, Jin Xinxiang, Qian Caiyuan & Zhang Jianquan, *Guan yu ye wu ran shi gu cha chu nan de cheng yin pou xi ji dui ce de tan tao [A Discussion About the Reasons Inspection of Fishery Pollution Accidents is Difficult]*, Xian dai yu ye xin xi [Modern Fisheries Information], Sep. 2002, at 23.

56. *Law on the Prevention of Water Pollution*, *supra* note 43, at Art 42.

57. Yang & Wu, *supra* note 55, at subhead "Huaihe hai wei bian qing."

58. *Id.*, at subhead "Huaihe yuan, wu ran chu xian duan ni."

water to the area to be tested before inspectors arrive.<sup>59</sup> One such incident was described in the *New York Times* as follows:

In 2001, Wen Jiabao, . . . now China's prime minister, came to investigate reports of Lake Tai's deterioration. Like most Communist Party inspection tours, word of this one reached local officials in advance. When Mr. Wen asked to see a typical dye plant, one was made ready, according to several people who witnessed the preparations.

The factory got a fresh coat of paint. The canal that ran beside it was drained, dredged and refilled with fresh water. Shortly before Mr. Wen's motorcade arrived, workers dumped thousands of carp into the canal. Farmers were positioned along the banks holding fishing rods.<sup>60</sup>

ii. *The Difficulties of Connecting Pollutants to Polluters*

Besides the difficulties in detecting deliberately secretive polluters, environmental authorities face a number of technical problems in linking pollutants found in poisoned fish to a particular polluter. For example, some chemicals can break down or dissipate twelve to twenty-four hours after a fish has been exposed to them, making timely inspection critical.<sup>61</sup> However, many fishermen do not notify the authorities promptly after finding poisoned fish.<sup>62</sup> Even if they do, "a lot of time [usually] elapses from the time when the farmer discovers the pollution, reports to the administrative agency, the administrative agency comes and collects samples and takes the samples to a testing agency."<sup>63</sup> In fact, there is also no guarantee that an inspection will actually take place at all.<sup>64</sup>

Determining the source of a pollutant can be especially problematic in cases where it appears that any number of factories in a particular area could have discharged the chemical responsible for the harm.<sup>65</sup> Placing blame can be even more challenging when there are intervening causes. For example, some dramatic fish die-offs are not the result of a sudden discharge, but rather temperature or precipitation changes that

59. *Id.*, at subhead "*Fen hong se de he liu.*"

60. Joseph Kahn, *In China, A Lake's Champion Perils Himself*, N.Y. TIMES, Oct. 14, 2007, available at <http://www.nytimes.com/2007/10/14/world/asia/14china.html?pagewanted=5> (last visited April 30, 2008).

61. Ministry of Agriculture, *Xiamen shi jia qiang zhi dao yu ye yang zhi hu ying dui wu ran shi gu* [*Xiamen City Increases Guidance to Fish Farmers Affected by Pollution Accidents*] Zhongguo yu ye zheng wu wang [China Fishery Management Web], Feb. 24, 2006, <http://www.cnfm.gov.cn/info/display.asp?sortid=54&id=11495> (last visited April 30, 2008).

62. *Id.*

63. Jin et al. *supra* note 55, at 22.

64. See Section b), *infra*.

65. Jin et al. *supra* note 55, at 23.

spark the chemical reactions that are actually fatal to fish.<sup>66</sup> In other cases, two pollutants may not be individually harmful, but the combination of those two pollutants in water or in fish can be toxic.<sup>67</sup> Finally, with certain chemicals, it is not the immediate exposure of fish to those chemicals that is fatal. Rather, the concern lies with the long-term exposure to large amounts of those chemicals, which can build up over time.<sup>68</sup>

## B. LIMITED GOVERNMENT FUNDING, LIMITED INSPECTION MANDATE

### i. *The Problems of Government Agencies' Lack of Funding, Staff, and Qualified Inspection Units*

Material constraints on the environmental agencies who attempt to find and punish polluters represent additional obstacles in enforcing China's water pollution laws. The agencies charged with enforcing those laws include the State Environmental Protection Administration (SEPA) (*guojia huanjing baohu ju*), the Department of Fishery Administration (*yuzheng ju*), and the Department of Water Resources (*shuichan ju*, or *shuili bu*). Though SEPA is perhaps the best-funded and well-known of these, it has only 2,200 employees nationwide.<sup>69</sup>

Perhaps the greatest impediment to enforcing environmental laws for these agencies is the low number of inspection units<sup>70</sup> (*jiance zhan*) that are qualified to issue reports that a court will accept. Many areas lack inspection units; an article written in 2002 stated that the Ministry of Agriculture had only licensed 41 inspection units nationally and only one in Jiangsu province.<sup>71</sup> Those that do have the units often lack appropriate equipment or well-trained staff.<sup>72</sup> Therefore, qualified inspection stations are rare.<sup>73</sup> In 2000, the Ministry of Agriculture issued the *Directive*

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66. *Id.* at 22.

67. *Id.* at 23

68. *Id.*

69. Wang, *supra* note 50, at 199.

70. Inspection units are independent of government agencies but are often required by agencies such as the Department of Fishery Administration, Environmental Protection Administration, and Water Resource Administration to perform scientific tests.

71. Gu Jiajun, *supra* note 75, at 23.

72. Jin Xianxiang, et. al., *supra* note 55, at 23.

73. While the Department of Fishery Administration has the legal authority to assign blame courts will often not accept scientific conclusions from the Department of Fishery Administration which may lack the technical skill to make such an evaluation. "When the case is simple, facts are clear, causation is clear, the Department of Fishery Administration doesn't need a report from the inspection station." (*Yu ye wu ran an jian cha chu zhong cun zai de wen ti yu si kao* [*Questions and Thoughts on the Investigation of Fishery Pollution Accidents*], Ke xue yang yu [*Scientific Fish Farming*], Feb. 2007, at 40).

on *Qualifications for Fishery Pollution Accident Inspection Units*,<sup>74</sup> which set forth stringent procedures for licensing inspection units. If an inspection unit does not have a proper license, a court will generally not accept its findings. An article written in 2002 stated that the Ministry of Agriculture had only licensed 41 inspection units nationally and only one in Jiangsu province.<sup>75</sup>

There are recent signs of progress. In 2004, five new units became licensed in Fujian<sup>76</sup> — at that time, the Bohai region had 82 licensed stations.<sup>77</sup> However, even with the increased number of inspection stations, smaller accidents are often not inspected. As one lawyer put it, “When the harm is relatively small, it will usually be hard to get a qualified unit to do the testing.”<sup>78</sup>

ii. *The Limited Legal Mandate of the Department of Fishery Administration*

The fact that relatively small fishery accidents are rarely inspected may not simply be due to a lack of resources, but rather to the lack of a requirement in the law of inspection of small scale accidents. The *Rules on Investigating and Handling Water Pollution Accidents in Fishery Waters (Rules on Investigating)* state that the Department of Fishery Administration is responsible for inspecting *major* pollution accidents, but does not say who is responsible for accidents that are not major.<sup>79</sup> While other laws mandate that the Department of Fishery Administra-

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74. *Yu ye wu ran shi gu diao cha jian ding zi ge guan li ban fa* [Directive on Qualifications for Fishery Pollution Accident Inspection Units] (promulgated by the Ministry of Agriculture, Apr. 12, 2000), available at <http://www.cqagri.gov.cn/nyfz/detail.asp?pubID=134436&page=1> (last visited May 30, 2009).

75. Gu Jiajun, *Yu ye wu ran shi gu shou hai fang ru he da ying suo pei guan si* [The Injured Party of Fishery Pollution Accidents How to Win Squabbles], *Fa zhi yu guan li* [Legal System and Management], Aug. 2002, at 23.

76. Ministry of Agriculture, *Fu jian sheng wu ge dan wei huo de “Yu ye wu ran shi gu diao cha jian ding zi ge zheng shu”* [Five Unites in Fujian Gain Fishery Pollution Accident Inspection Licenses] *Zhongguo yu ye zheng wu wang* [China Fishery Management Web], Feb. 25, 2004, <http://www.cnfm.gov.cn/info/display.asp?sortid=54&id=1421> (last visited April 30, 2008).

77. Ministry of Agriculture, “*Yu yewu ran shi gu diao cha jian ding zi ge zheng shu*” *gong gao* [Announcement on Licensing of Fishery Pollution Inspectors] *Zhongguoyu yezhengwuwang* [China Fishery Management Web], Feb. 16, 2004, <http://www.cnfm.gov.cn/info/display.asp?sortid=54&id=1310> (last visited April 30, 2008).

78. Gu, *supra* note , at 23.

79. *Yu ye shui yu wu ran shi gu diao cha chu li cheng xu gui ding* [Rules on Investigating and Handling Fishery Water Pollution Accidents] (promulgated by the Nat'l People's Cong., Mar. 26, 1997) Art. 6, available at [http://www.sepa.gov.cn/law/gz/bmgz/qtgz/199703/t19970326\\_81954.htm](http://www.sepa.gov.cn/law/gz/bmgz/qtgz/199703/t19970326_81954.htm) (last visited Mar. 8, 2007) (translation is my own). In addition, Article 5 of the *Rules on Investigating* also leaves open the question of who is to investigate accidents that are not “relatively large.” This provision states that the local level government handles “relatively large” fishery pollution incidents, the province handles cases in which damages exceed one million RMB, and the Department of Fishery Administration handles cases in which dam-

tion has the responsibility to investigate and to handle a water pollution accident, the more specific provisions such as the *Rules on Investigating* suggest that the Department of Fishery Administration has no responsibility to investigate non-major accidents, and these specific provisions ultimately control.<sup>80</sup>

iii. *The Problem of the Department of Fishery Administration's Lack of Authority to Directly Enforce its Decisions*

The Department of Fishery Administration's mandate is to investigate and resolve fishery accidents, but it has no independent enforcement power. Instead, it must first go through the court to enforce a regulatory decision if the polluter does not voluntarily comply.<sup>81</sup> SEPA is similarly unable to enforce its mandates directly. According to Wang Canfa, one of China's preeminent environmental lawyers, "SEPA is subject to decisions from the corresponding administrative departments, while the power to order company renovation within a certain deadline and stop operation is authorized through local governments."<sup>82</sup> That the Department of Fishery Administration and SEPA must operate through courts controlled by the local government introduces an additional level at which local protectionism in favor of industry can alter the outcome of a judgment.<sup>83</sup>

### C. THE PROBLEM OF JURISDICTIONAL CONFUSION

Confusion about which agency has jurisdiction over a particular issue or area poses another problem to legal enforcement of water pollution issues. Specifically, it leads to a situation in which "laws aren't relied on, laws are hard to rely on, and laws are relied on incorrectly."<sup>84</sup> One reason for such confusion is poor drafting of environmental statutes, which makes it unclear who has jurisdiction over particular issues. While it seems clear to some that the Department of Fishery Administration has juris-

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ages exceed ten million RMB. What the standard of "relatively large" encompasses is not clear from the provision.

80. Law on the Prevention of Water Pollution, *supra* note 43, at articles 28 and 52. Also, Gu Jiajun, states that various administrative laws require the Department of Fishery Administration to inspect. Gu, *supra* note 75, at 23

81. Wang Zhiming, *Lun yu ye xing zheng chu fa de qiang zhi zhi xing* [Discussion of Compulsory Enforcement of the Department of Fishery Administration], *Bei jing shui chan* [Beijing Water Management], Apr. 2003, at 58.

82. Wang, *supra* note 39, at 169.

83. See Section VI(e), *infra*.

84. "You fa bu yi, you fan an yi, you fa luan yi" (Ni Zhenyang, *Shi lun yu zheng ji gou dui yu ye wu ran shi gu de guan li quan* [Discussion of the Authority of the Department of Fishery Management to Manage Fishery Pollution Accidents], *Zhongguo yu ye jing ji* [Chinese Fisheries Economics], Issue 6, 2005, at 45.

diction to oversee all pollution accidents, most people — even those working at environmental agencies — are unclear about the extent of the authority of the Department of Fishery Administration.<sup>85</sup>

Agency confusion over jurisdictional authority can lead to inaction over water pollution problems. In one instance, a fish farmer sustained one million RMB in damages because of pollution. However, because the farmer did not have the proper permit to raise fish in the area, the Department of Fishery Administration did not believe it had jurisdiction to investigate the issue. In fact, not only did they have jurisdiction, they were obligated under law to address the issue.<sup>86</sup>

In another case, a massive mercury discharge poisoned fish along the coast in Guangxi province. SEPA launched an investigation and “took care of the situation.”<sup>87</sup> One year later, the Department of Fishery Administration also sought to intervene, and to administer additional penalties against the polluter. A dispute ensued between the agencies over who had authority to handle the issue. According to applicable laws, SEPA had in fact acted outside its authority and should not have become involved in the first place.<sup>88</sup>

In addition to conflicts that can arise from the confusion over jurisdiction, there are also conflicts between provinces and between cities over pollution levels.<sup>89</sup> Central to this problem is the fact that cities and provinces upstream have little incentive to control their pollution that flows downstream. Some provinces complain bitterly about pollution from upstream, but also add to the problem themselves by contributing to the pollution that flows downstream.<sup>90</sup>

In one case that illustrates the effect of jurisdictional confusion on litigants, a paper manufacturer was blamed for massive fish poisoning. The manufacturer claimed that it was a recycler and thus could not have used the particular harmful chemicals found to have poisoned the fish. However, a cursory inspection of the factory by investigative newsmagazine *Southern Weekend* revealed that the company was in fact not a recycler, and could

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85. *Id.*

86. The Law on the Prevention of Water Pollution states: “Department of Fishery Administration must investigate pollution accidents.” The Law on the Prevention of Water Pollution, *supra* note 43, at Art. 28. If it does not then it has violated a non-discretionary duty to act. Ni, *supra* note 84, at 45, 47.

87. Ni, *supra* note 84, at 47.

88. *Id.*

89. Ministry of Agriculture, *supra* note ; Yang & Wu, *supra* note 55, at subhead “*Huaihe hai wei bian qing*.”

90. Yang & Wu, *supra* note 55, at subhead “*Huaihe hai wei bian qing*.”

very well be responsible for the pollution at issue. A stream in front of the main entrance to the factory which flowed into plaintiff's fish pond was dark yellowish-green because of the discharged pollutants. The owner of the paper manufacturer claimed that the pollution in the river came from neighboring Shandong province. Authorities at the SEPA branch in Linyi City, Shandong province, claimed that they did not manage "this part" and did not understand the situation, suggesting that the reporters investigating the issue visit the Huaihe River Committee. Officials at the Huaihe River Committee, in turn, said that they "weren't all that clear" and suggested that the reporters check again with Shandong.<sup>91</sup> In the end the plaintiff was marooned in a jurisdictional nether-land unable to receive redress.

Ironically, the cross-jurisdictional nature of some of these claims at times can make regulation easier.<sup>92</sup> That is because many intra-jurisdictional efforts at regulation by the local branch of SEPA are quashed by the local government which receives much of its tax revenue from the offending factory. However, cross-jurisdictional conflicts often pit one locality dependent on fish farming against another locality dependent on the polluting industries. When those leaders confront each other, there is likely to be a more level playing field than when fish farmers attempt to take on industries within their own locality that are closely intertwined with the local government in that area.

## V. A LEGAL BASIS FOR FISHERY POLLUTION LITIGATION

### A. IN GENERAL

Pollution victims can either request the Department of Fishery Administration to mediate a settlement, or they can directly sue in court.<sup>93</sup> In order for the Department of Fishery Administration to mediate, (1) both sides must agree to the mediation; (2) the victims must have suffered a direct harm; (3) there must be sufficient evidence; and (4) the Department of Fishery Administration must have jurisdiction over the issue.<sup>94</sup> If fish farmers do not agree to mediate,<sup>95</sup> or if they decline the proposed

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91. Yang & Wu, *supra* note 55, at subhead, "*Mei ren pei chang Du Xiangji.*"

92. *Id.*

93. Rules on Investigating and Handling Fishery Water Pollution Accidents, *supra* note 79, at Art. 16.

94. *Id.* at Art. 17.

95. Chinese legal scholar, He Xin believes that the public campaign to "build a harmonious society" may have led some local leaders to push parties into mediation and discourage litigation. Personal conversation with He Xin, Aug. 2008.

settlement (which even if accepted is not contractually binding), they can file a lawsuit.<sup>96</sup> The Department of Fishery Administration has the responsibility to actively assist farmers in filing their lawsuit,<sup>97</sup> but cannot sue on their behalf.<sup>98</sup> Choosing where to bring the suit is also extremely important, as courts are not independent from the local governments which often have a financial stake in the outcome of the case. It is generally advantageous for plaintiffs to file in intermediate court (rather than city or county level courts), which they can do if the case is of “significant impact within a particular jurisdiction.”<sup>99</sup>

Unlike in the United States, where most environmental litigation is directed at agencies, most lawsuits in China are brought directly by victims against polluters.<sup>100</sup> China’s environmental laws provide the foundation for such suits. China’s *General Principles of Civil Law* states, “Any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.”<sup>101</sup> This language initially caused confusion because it was unclear whether a polluter who did not violate “state provisions for environmental protection,” but who nonetheless caused damage, was still required to pay compensation. The *Environmental Law*<sup>102</sup> and the *Law on the Prevention of Water Pollution* later clarified this issue.<sup>103</sup> Both statutes require polluters to pay for damages even if they did not violate “state provisions for environmental protection.” A landmark fishery pollution case that confirmed this interpretation was *Sun Youli et al. v. Qian’an Paper Factory et al.* The court there held that even though one of the defendants did not exceed its discharge limits, it was still liable for its share of damages that it had caused.<sup>104</sup>

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96. *Id.* at Art. 24.

97. Gu, *supra* note 75, at 23.

98. Li Meng, *Yu ye wu ran shi gu zhong guan yu suo pei deng xiang guan wen ti de fa lü yi ju* [The Legal Foundation for Compensation and Related Issues in Fishery Pollution Accidents], *He bei yu ye* [Hebei Fishery], Issue 6, 2005, at 44.

99. This was an important part of success in Rongping case discussed by Wang, *supra* note 50, at 215.

100. Wang, *supra* note 50, at 207.

101. General Principles of the Civil Law (adopted Apr. 12, 1986) Art. 124, available at <http://en.chinacourt.org/public/detail.php?id=2696>.

102. Environmental Protection Law of the P.R.C. (promulgated by the Nat’l People’s Cong., Dec. 26, 1989) Art. 41, available at <http://www.lawofchina.com> (last visited May 10, 2009). See also Wang, *supra* note 50, at 207.

103. Law on the Prevention of Water Pollution, *supra* note 43, at Art. 5.

104. *Sun Youli, Gao Huawei, Xu Shutian deng yu Qianan di yi zao zhi chang, Qianan shi shu hua zhi ye you xian gong si, Qian an shi Ru yuan zao zhi chang deng*, [Sun Youli, Gao Huawei, Xu Shutian v. Qianan #1 Paper Factory, and Qianan Book Paper Company Ltd.] [http://big5.lawyee.com/Case/Case\\_Display.asp?RID=26122](http://big5.lawyee.com/Case/Case_Display.asp?RID=26122) (Tianjin Maritime Court, Apr. 12, 2002). This is also discussed in a number of

As a result of the laws mentioned above, the Chinese tort law applied in these cases differs from standard Chinese tort liability in that it does not require the defendant to have been “at-fault” (*you guocuo*).<sup>105</sup> The elements of this no-fault liability are: (1) there is an environmental harm, and (2) there is causation between the defendant’s act and the harm complained.<sup>106</sup> In addition to these substantive requirements, there are also standing requirements<sup>107</sup> and a three-year statute of limitations.<sup>108</sup>

#### B. THE ELEMENTS OF NO-FAULT LIABILITY: ESTABLISHING AN ENVIRONMENTAL HARM AND PROVING CAUSATION

The first element of no-fault liability is proving that there is an environmental harm. Chinese laws define such harm broadly. The *Directive on Qualifications for Fishery Pollution Accident Inspection Units* defines it as “declines in numbers, reproduction, growth of fish, or proper function of the water,”<sup>109</sup> while the definition in the *Marine Environment Protection Law* is “harm caused directly or indirectly to the marine environment, to marine natural resources, to human health, to the fishing industry and other lawful activities, and to the function and quality of

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sources including: Li, *supra* note 98, and “*Le ting fa sheng te da yu ye wu ran an yu min huo pei 1300 duo wan yuan* [*Especially Large Fishery Pollution Case in Leting, Fishers Get 13 million RMB*], *Hai yang xin xi* [Ocean News], published date uncertain; draft received on Apr. 25, 2002, at 18. One law that suggests that companies must pay compensation even if they are discharging within their effluent limitations is the *National Standard on Fishery Water Quality* [*Guo jia biao zhun yu ye shui zhi biao zhun*]. This law requires that any unit or industry that discharges waste water must take effective measures to ensure that the water quality is suitable for fisheries. This law is not mentioned in the Sun Youli case, but it has been used by the Fishery Management Department to coax industries into settling (*See*, Hubei Water Management Bureau. *Hubei wu han yu zheng yi fa wei hu yu ye jing ji li yi* [*Hubei, Wuhan Fishery Management Department Use Law to Protect Fish Farmers Economic Interest*] *Zhongguo yu ye zheng wu wang* [China Fishery Management Web], Apr. 19, 2007, <http://www.cnfm.gov.cn/info/display.asp?sortid=54&id=20607> (last visited April 30, 2008).

105. For a discussion of the relationship between environmental laws and the application of no-fault liability, *see*, *Li Guofa su dong feng qu quan qu guan li chu jiang shui ku fa bao gei Huang Jiasong yang yu yin tou fang hua fei yang yu zhi shui zhi wu ran zao cheng qu yong gai shui wei yang de ji si wang pei chang an*, [*Li Guofa v. Dong feng et. al*] [www.iSinoLaw.com](http://www.iSinoLaw.com) (Hubei province, Yichang Intermediate People’s Court, Sep. 2, 1999).

106. Li, *supra* note , at 42; Gu, *supra* note , at 22.

107. Li, *supra* note , at 44.

108. Wang, *supra* note 50, at 207.

109. Rules on Investigating and Handling Fishery Water Pollution Accidents, *supra* note 79, at Art. 4.

water being used.”<sup>110</sup> Lawsuits can be brought based on any of these alleged harms.<sup>111</sup>

Despite this expansive definition of harm, in thirty-five out of the thirty-six cases dealing with fishery pollution, the plaintiffs all sued for sudden massive fish die-outs and in only one case did a plaintiff sue for a pollution-related decline in productivity.<sup>112</sup> Perhaps the reason for this is because causation is more difficult to prove for gradual, non-cataclysmic harms. For example, a claim that a decrease in the productivity of a fishery was due to pollution would require establishing a verifiable pre-pollution baseline and would require tracing a cocktail of potentially harmful chemicals to a huge number of potential sources. The defendants could convincingly argue that there was no evidence connecting their particular pollutant to the particular harm alleged<sup>113</sup> and would also raise the possibility that the farmer’s own negligence caused the decline in question.<sup>114</sup> A sudden fish die-out, on the other hand, is more likely to be linked to a specific action by a specific polluter.

The second element of no-fault liability is causation. For environmental torts, the defendant bears the burden of disproving causation after the plaintiff “introduces the fact of the tortious harm.”<sup>115</sup> The Supreme People’s Court further clarified that the defendant has the burden of proving that either (1) it has legal

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110. Li, *supra* note 98, at 42, quoting the Marine Environmental Protection Law.

111. *Id.* at 44.

112. *Wang Shouxiang yu Ningbo shi Bei cang qu Bai feng shang yang dian hua yi chang, Ningbo shi Bei cang qu Bai feng Shang yang hua chang*, [*Wang Shouxiang v. Baifeng Corp. et. al.*] (Ningbo Intermediate People’s Court, Jun. 10, 2002) (defendants received 40,000 RMB in “production related damages”) (*shengchan sunshi*), available at <http://www.fsou.com/html/text/fnl/1174930/117493047.html>, which referred to a decline in the productivity of the fishery.

113. The conventional wisdom is that courts will be reluctant to assign liability to plaintiffs whose relative contribution to the pollution was relatively small. However, this is not always so. In one case, a court assigned a polluter with as little as 0.042% of the blame and required it to pay as little as 15 RMB (about \$2 USD). *Zhenping shui chan gong si deng su Hua rong gong si deng fen bie chan sheng de wu ran wu yin bao yu chong ji hui ji wu ran shui zhi zhi yang zhi de yu ye si wang pei chang an* [*Zhenping Water Company et. al. v. Huarong Company, et. al.*] (Henan Province, Zhenping County People’s Court, Apr. 9, 1997), available at <http://vip.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=fnl&Gid=117493047>.

114. See also, Section IV(a), *supra*, which discusses the obstacles faced by the Department of Fishery Administration in locating polluters.

115. *Guan yu shi yong “Min shi su song fa” ruo gan wen ti de yi jian* [Several Opinions on Applying the Civil Litigation Law] (promulgated July 14, 1992 by the Supreme People’s Court) (P.R.C) Art. 74, available at <http://www.dffy.com/faguix-iazai/ssf/200311/20031109201407-3.htm>.

reasons exempting it from liability<sup>116</sup> or (2) there was no causation.<sup>117</sup>

Even though the defendant technically has the burden of disproving causation, some courts have required the plaintiff first to show preliminary evidence the plaintiff's losses were *caused* by the defendant's pollution before the burden will shift to the defendant. This may be because the language of the first element of no-fault liability — establishing that there is an environmental harm<sup>118</sup> — implies that the plaintiff needs to prove something more than the presence of dead fish; namely, that the death of the fish was caused by some broader environmental harm.

Requiring the plaintiff to bear some of the causation burden also makes sense for practical reasons. There are many reasons fish may die (negligence of the fish farmer, inclement weather, disease, etc.) and it would be unfair to industry if they were required to prove that they were not at fault every time something unfortunate happened in a fish farm. However, as discussed in Section VI.b., the degree to which courts allocate the burden of causation often leads to inconsistency in how courts treat an environmental plaintiff's case.

## VI. THE SUCCESS OF ENVIRONMENTAL LITIGATION AND MEDIATION

In the years preceding 2000, the number of environmental cases increased by twenty-five percent annually; and in 2000, five percent of environmental disputes were handled through legal means.<sup>119</sup> This increasing use of litigation raises the question of how successful litigation is in practice. Different sources give different answers.

On the one hand, out of the thirty-six available cases involving fishery pollution, the plaintiffs won seventy-six percent of the time.<sup>120</sup> Successful plaintiffs won, on average, fifty-three percent of the compensation they requested, and received a median

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116. These are limited to: (1) the pollution was due to reasons entirely beyond the polluter's control, like a natural disaster, and the defendant has taken timely measures to try to prevent or mitigate the effects but was unable to prevent the losses that resulted; (2) pollution resulted from purposeful or accidental acts by a third party; and (3) the victim was himself responsible for the pollution damage that occurred. (Gu, *supra* note 75, at 22).

117. *Guan yu min shi su song zheng ju de ruo gan gui ding* [Several Rules on Evidence in Civil Cases] (promulgated Dec. 6, 2001 by the Supreme People's Court) available at <http://www.dffy.com/faguixiazai/ssf/200311/20031109201210.htm>.

118. The Chinese phrase is: *goucheng huanjing sunhai de shishi*.

119. Sha, *supra* note 7.

120. Information on file with the author. Available upon request.

award of 102,413 RMB per case.<sup>121</sup> Mediations handled by the Department of Fishery Administration also seem to achieve favorable results. Out of eight mediations reported on the Department of Fishery Administration website,<sup>122</sup> plaintiffs received a median award of 30,000 RMB per incident. Government statistics also confirm that victims of fishery pollution received substantial amounts of compensation. In 2007, pollution victims received 48,670,000 RMB,<sup>123</sup> an average of 33,752 RMB per pollution accident.<sup>124</sup>

On the other hand, statements such as the following from Wang Canfa, founder of the Center for Legal Aid for Pollution Victims, are also common: "It's incredibly hard to win environmental lawsuits. Even if you win, it's no use because the victims (most of whom are from the lowest levels of society) don't get any of the compensation. Litigation is hard; post-litigation enforcement is also hard."<sup>125</sup> Mr. Wang estimates that only about fifty percent of the cases in which plaintiffs are clearly entitled to win actually prevail in court.<sup>126</sup> Media reports also reflect a widespread perception that environmental litigation is both fraught with difficulty and often unsuccessful.<sup>127</sup>

What methodology should be used to find an explanation for this contradiction about the success of environmental litigation? It is possible that the available cases<sup>128</sup> are not representative of all fishery lawsuits in China, as a result a purely statistical approach might provide misleading answers. Alternatively, a purely anecdotal approach might also portray a skewed picture

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121. Many cases involved more than one plaintiff so an average winning plaintiff would receive less than 102,413 RMB.

122. <http://www.cnfm.gov.cn>.

123. 2005 Fisheries Report, *supra* note 16, at 32.

124. 2007 Fisheries Report, *supra* note 20, at 28. In 2006, pollution victims received 28,820,000 RMB, an average of 19,699 RMB per pollution accident. 2006 Fisheries Report, *supra* note 18, at 29. In 2005, pollution victims received 44,183,000 RMB, an average of 42,980 RMB per pollution accident. 2005 Fisheries Report, *supra* note 16, at 32. It is not clear how many people were affected by each pollution accident. It is also unclear the size of accidents that were considered.

125. Sha, *supra* note 7, at subhead "*Guo jia xinyong jing cheng wei bu fa zhi tu de bi nan suo.*"

126. Sha, *supra* note 7, at subhead "*Gai sheng bu sheng, sheng su le ye zhi shi hua ping.*"

127. See e.g., Yang & Wu, *supra* note 55, Sha, *supra* note 7.

128. In researching this paper I was able to find a total of thirty-four fishery pollution cases. Most of these came from the Peking University Website, <http://www.lawyee.net/>. Another sizable group of cases was extracted from the Hong Kong-based website, [www.iSinoLaw.com](http://www.iSinoLaw.com). Other cases were taken from media reports, from academic literature, and from the website for the Center for Legal Aid to Pollution Victims, [www.clapv.org](http://www.clapv.org). My impression is that I have found the vast majority of fishery pollution cases that are available online. Copies of any or all the cases can be provided by the author upon request.

by being random and individualized. The seemingly most reliable approach was a fact-based one: to read each case critically, and identify what the plaintiffs actually needed in order to win their case. After completing this case analysis, it was clear that the court opinions in the cases did not cover all available grounds. For example, court opinions say very little about the effects of local protectionism, the interaction between the media and the judiciary, or the difficulty of enforcing a judgment once a case has been won. Therefore, anecdotes relating to these subjects are included in this paper because their omission would make any discussion of environmental litigation in China incomplete.

The current system appears to favor large-scale fish farmers. Because the size of their operations provide these farmers with greater access to capital, they have more resources to pay court fees and inspection fees, hire lawyers, procure the scientific evidence needed to prove causation, overcome the effects of local protectionism, use the media, and collect a judgment upon winning their case. The most plausible explanation for the plaintiffs' high win ratio (over seventy percent) in available cases is because these cases all involved large-scale fish farmers. Thirty-four sample cases involved a total of seventy-eight plaintiffs, the vast majority of which were individual fish farmers.<sup>129</sup> On average, each individual farmer requested 385,938 RMB and on average was awarded 139,287 RMB. To put this in perspective, in 2003, the average Chinese farmer earned 2,621 RMB.<sup>130</sup> In other words, each plaintiff involved in these cases claimed a loss on their investment that was equal to 147 times what the average farmer would earn in a year and received a court award that was equal to fifty-three times as much as an average farmer would earn in a year. Even if the plaintiff's investments in their farms represented years of income, it is clear that the sums of money involved set the plaintiffs apart from the average Chinese farmer.

#### A. ABILITY TO PAY COURT COSTS

A necessary precondition to winning in court is getting into court in the first place. In addition to paying a qualified lawyer (of whom there are few), plaintiffs must pay the court an acceptance fee (*shouli fei*). From the years 1989 to 2007, courts were guided by a Supreme Court directive (the "Fee Directive") which

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129. The nine, non-farmer plaintiffs were: two chemical factories, a power plant, two city reservoir administrations, a city sanitation department, a county government, a procuratorate, and a water company.

130. *Chinese farmer's income sees highest increase in seven years*, People's Daily Online (Feb. 5, 2005), available at [http://english.peopledaily.com.cn/200502/05/eng20050205\\_173036.html](http://english.peopledaily.com.cn/200502/05/eng20050205_173036.html).

calculated the acceptance fees as a percentage of the demand the plaintiff requested. According to the Fee Directive, this amount should range between 0.5 percent and 4 percent, depending on the amount at stake.<sup>131</sup> From a sample of twenty-five cases in which the court fees were set forth, the average court fee was 22,138 RMB, though the median court fee was only 12,810 RMB.<sup>132</sup> This was, on average, 6.4 percent<sup>133</sup> of the damages requested, putting it well outside the upper bound set by the Supreme People's Court. Perhaps this widespread disregard of the Court's directive was at least one reason for abolishing the Fee Directive in 2007.<sup>134</sup>

While the amount of court fees exceeded the guidelines provided in the Fee Directive, one method of fee assessment was still consistent with the spirit of the Fee Directive. Under the Fee Directive, plaintiffs were required to pay court fees of four percent of the amount requested up to 50,000 RMB, three percent on the portion greater than 50,000 RMB and less than 100,000 RMB, and so forth until only 0.5 percent was to be paid on requests greater than 1,000,000 RMB. As shown in the graph below, this pattern of a decreasing percentage assessed as court fees as the amount of requested damages increases was evident from an analysis of the pertinent cases.<sup>135</sup>

As one can see from the shape of this graph, a plaintiff requesting a relatively small amount of damages would expect to pay a higher relative share of court fees than a plaintiff requesting larger damages. This fee assessment method would favor large-scale fish farmers who would usually suffer large-scale losses over smaller-scale farmers who would generally suffer smaller losses.

There was no significant difference in the total amount of the acceptance fees in cases in which plaintiffs won (6.4 percent of the amount of compensation requested) and cases in which the plaintiffs lost (5.9 percent of the amount of compensation requested). However, the share of court fees paid by the plaintiff

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131. Notice of the Supreme People's Court on the Printing and Distribution of "Measures for Handling Lawsuit Fees for People's Courts" [Ren min fa yuan su song shou fei ban fa] (promulgated by Sup. Peoples's Ct. June 29, 1989, abolished Apr. 1, 2007), available at [http://www.baihuayong.com/News\\_View.asp?NewsID=18](http://www.baihuayong.com/News_View.asp?NewsID=18).

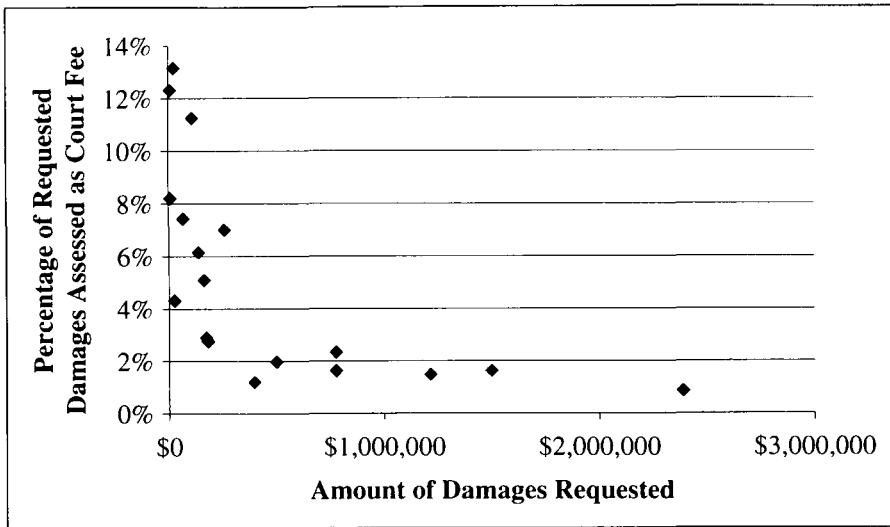
132. A small number of particularly large cases explains the difference.

133. The median was 6.5% of the amount requested.

134. All of my sample cases were heard before 2007 when the Fee Directive was still in effect.

135. Two outliers in the data set were not included in this graph. These cases involved fees that were a much larger share of the amount requested and are aberrations from the larger pattern. In one case 39% of the amount requested was assessed as a court fee and in another case 270% of the amount requested was assessed as a court fee.

TABLE 3



varied based on the outcome of the case. When the plaintiff won, the court fees were shared between the plaintiff and the defendant, with the plaintiff paying on average forty percent of the costs. In five cases in which the plaintiffs lost, the plaintiffs were required to pay one hundred percent of the court fee.

Inspection fees, required to reimburse the court for scientific tests it conducts of the contaminated site and affected aquaculture, are also substantial in most cases.<sup>136</sup> Inspection fees were mentioned in six cases and ranged from 1,000 RMB to 10,000 RMB with an average of 4,200 RMB.<sup>137</sup> While inspection fees are likely to increase as the size of the accident increases, that relationship is probably not linear; for example, the cost of inspecting an accident that involved 1,000 dead fish is probably not ten times the cost of inspecting an accident that involved 100 fish. Therefore smaller fish farmers must pay a larger relative amount in inspection costs than large fish farmers.

Because court acceptance fees and inspection fees can be so large, they may discourage smaller farmers from bringing a lawsuit. In the event that a small fish farmer were to lose, the court would require him or her to pay a substantial sum at a time when the farmer's livelihood and investment may have been wiped out

136. It's not clear if these refer to fees paid to the Department of Fishery Administration or fees paid to a court inspection unit.

137. Defendants were often, but not always required to pay a share of these inspection fees.

by the costs of litigation, and the demands of creditors may be coming due.<sup>138</sup>

B. THE EFFECT OF TRYING A CASE BEFORE A COURT WITH  
A FAVORABLE VIEW OF CAUSATION

To reiterate, the elements of no-fault liability are: (1) there is an environmental harm, and (2) there is causation between defendant's act and the harm complained. According to a Supreme People's Court directive, the defendant bears the burden of disproving causation after the plaintiff "introduces the fact of the tortious harm."<sup>139</sup> Even though the defendant has the burden of disproving causation, some courts require the plaintiff to show evidence that the losses were *caused* by the defendant's pollution.<sup>140</sup>

Courts allocate the burden of proving causation between plaintiff and defendant in a number of different ways. The divergence between these various standards creates a high degree of legal uncertainty concerning the outcome in these cases because causation is usually the central issue.<sup>141</sup> It also raises the possibility that courts may use causation as a pretext for disposing of cases for reasons not related to the substantive law.<sup>142</sup> The following are just a few of the standards used by courts that exemplify the diversity of standards by which the burden of proving causation is distributed.<sup>143</sup>

*i. Test 1: In order for the burden to shift, the plaintiff must prove that the defendant is polluting the environment.*

This test on its surface appears fairly easy for the plaintiff to satisfy. However, the case of *Liu Zhonglin v. Yancheng City Anda Chemical Factory* shows that it is possible to apply such a test with a high degree of stringency. It also highlights the reluc-

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138. *Especially Large Fishery Pollution Case in Leting, Fishers Get 13 million RMB*, *supra* note 104, at 18. Half the plaintiffs in that case were in this financial condition.

139. Guan yu shi yong "Min shi su song fa" ruo gan wen ti de yi jian [Several Opinions on Applying the Civil Litigation Law] (promulgated July 14, 1992 by the Supreme People's Court) (P.R.C) available at <http://www.dffy.com/faguixiazai/ssf/200311/20031109201407-3.htm>, at Art. 74.

140. See Wang, *supra* note 50, at 209.

141. "Given the difficulty of proving causation in environmental pollution cases, this reversal of burden of proof is often the critical determinant of outcome in environmental litigation." *Id.*

142. See subsections (d), (e) and (f).

143. For a more extensive analysis of the different standards used by courts, see "Joseph McMullin, *Fen xi huan jing wu ran pei chang an jian de yin guo guan xi ren ding biao zhun*" [Analysis of Different Standards Used to Determine Causation in Environmental Pollution Compensation Cases] unpublished manuscript, on file with author.

tance of courts to allow circumstantial evidence to trigger the reversal of burdens on the issue of causation.

The plaintiff's complaint (as rephrased by the court) alleged that:

On September 3, 1994, the plaintiff discovered that 548 of his geese showed signs of poisoning. . . . After efforts to save them failed, 378 geese died. On September 25, the Jiangsu province, Yancheng city Veterinary Inspection Station examined the dead geese, the water in the nearby river, and fluids stored in the Anda chemical factory storage pool. Their conclusion was: 'the digestive tract of the geese contained highly concentrated hydrochloric acid. After testing, it was found that the water in the river was clearly able to create such harm as was found in the body of the geese that underwent autopsies.' Nearby, only the defendant uses hydrochloric acid in its production process, and thus the plaintiff requested that the defendant pay 9,450 RMB of compensation.<sup>144</sup>

The court found for the defendant, stating that the plaintiff had not established that the defendant was polluting the environment.<sup>145</sup> In ruling against the plaintiff, the court relied on several facts. First, inspectors sent by the appellate court found no sign of pollution. (The court appeared to ignore evidence that the earliest these inspectors could have visited the factory was six months after the geese had died.)<sup>146</sup> Second, samples from the defendant's wastepool were taken without the defendant's permission, and were thus of questionable validity. Finally, other neighbors who raised geese near the factory appeared to have suffered no losses in their stock of geese. Therefore, the court refused to shift the burden of disproving causation to the defendant factory.

ii. *Test 2: The burden shifts if the victim produces preliminary evidence showing that it is more likely than not that the defendant polluted the environment and caused the victim harm.*

Courts have applied this test with varying degrees of strictness. The court in *Xie Zantian v. Leya Light Fixtures* held that circumstantial evidence was sufficient to satisfy the "preliminary

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144. *Liu Zhonglin su Yan cheng shi An da hua gong chang sun hai pei chang an*, [Liu Zhonglin v. Anda Chemical Factory], [http://hk.isinolaw.com/gate/big5/www.isinolaw.com/isinolaw/outline\\_cj.jsp](http://hk.isinolaw.com/gate/big5/www.isinolaw.com/isinolaw/outline_cj.jsp) (Jiangsu Province, Yancheng Intermediate People's Court, Oct. 30, 1995).

145. *Id.*

146. The geese died in September 2004 and the lower court made its decision six months later in March 2005.

evidence” needed to reverse burdens.<sup>147</sup> Another case applying the same standard held that “preliminary evidence” could not be satisfied unless there were actual fish specimens that had been inspected or could be inspected (a position expressly rejected in the *Xie Zantian* case.)<sup>148</sup>

iii. *Test 3: The burden does not shift unless three criteria are met: (1) the plaintiff has suffered a quantifiable loss, (2) this harm has been proven to be caused by pollution, (3) in the relevant temporal and physical space there is a possible source of this environmental pollution.*

The court in *Guo Qiqi v. Nantongheng Food Company* applied this test.<sup>149</sup> After a number of fish died unexpectedly in the plaintiff’s fish pond, a “village organization” mediated with Nantongheng Food Company, who promised to pay compensation for damages as long as the plaintiff signed a contract to no longer use the pond for aquaculture. Despite the mediation agreement, the plaintiff began farming soft-shelled turtles in the same ponds. When the turtles died as well, the plaintiff initiated a lawsuit against the factory. The court ruled against the plaintiff, but not by upholding the contract in favor of the defendant. Rather, the court ruled that the plaintiff had not proved causation. The court acknowledged that, superficially, causation appeared to exist. However, in order for the burden to be reversed, the plaintiff establish that (1) the plaintiff has suffered a quantifiable loss, (2) this harm has been proven to be caused by pollution, and (3) in the relevant temporal and physical space there is a possible source of this environmental pollution. The court held that the second element was not met, because there were various other possible non-pollution causes of the death of the plaintiff’s fish (despite a statement by a veterinarian that the fish did not die of an illness). The court also based its holding on an investigation by a county level branch of SEPA which found that there was sulphur in the fish pond, but not in the wastewater of the factory. The fact that this investigation took place six months

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147. *Xie Zantian yu Guangzhou Le ya deng shi zhi zao you xian gong si*, [Xie Zantian v. Leya Light Fixtures Ltd.], <http://www.zfwlxt.com/html/2007-7/2007792120591.htm> (Guangzhou Intermediate People’s Court, Apr. 3, 2006).

148. *Sun Danian yu Xin yi shi Tongli an ji suan chang*, [Sun Danian v. Tongli Acid Factory], <http://www.docin.com/p-7641974.html> (Xuzhou Intermediate People’s Court, Apr. 17, 2006).

149. *Guo Qiqi su Nan tong heng da shi pin you xian gong si huan jing wu ran sun hai pei chang an*, [Guo Qiqi v. Nantonghengda Foods Ltd.] [http://www.zhengfa.sdmu.edu.cn/yjs/News\\_View.asp?NewsID=78](http://www.zhengfa.sdmu.edu.cn/yjs/News_View.asp?NewsID=78) (Jiangsu Province, Nantong Intermediate People’s Court, Sep. 2, 1996).

after all the turtles had died apparently did not cause the court to question that the lack of a causal link was reliably shown.

iv. *Test 4: There must be direct evidence that the harm was caused by pollution.*

Some courts are extremely reluctant to allow circumstantial evidence to reverse the burden on causation. Courts almost always require an official inspection report before they are willing to infer causation. Yet, as the case below illustrates, even inspection reports might not satisfy the requirement of “direct evidence” that some courts impose.

In October 1997, Chen Biliang sued a chemical factory and a silk factory for discharging wastewater that killed large numbers of fish and crab in his fish pond.<sup>150</sup> He brought suit in intermediate court and requested 1,034,000 RMB in damages. During the hearing, the court commissioned the Nanjing SEPA Environmental Science Research Institute to test the wastewater of the two factories. The Institute concluded in its inspection report that pollution from the factories had harmed local fisheries. Despite this evidence, the intermediate court ruled against Mr. Chen. The procuratorate took his case to the Jiangsu Supreme People’s Court, which remanded the case back to the intermediate court. Upon rehearing, the intermediate court found:

In order for the reversal of burdens to apply, the defendant must first carry the burden of proving that a harmful act occurred. . . . At the initial hearing and at the rehearing, Chen Biliang provided no direct evidence that defendant’s pollution caused his fish and crabs harm. The indirect evidence that was provided cannot prove that there was a causal relationship between defendant’s pollution and the death of the fish and crabs; the report gathered by this court from the Nanjing SEPA Environmental Science Research Institute conducted on December 12, 1997 can only establish that at that time [December 1997] defendants discharged harmful pollutants into the water. It cannot prove that the death of Chen Biliang’s fish and crab that occurred in early October 2007 was caused by defendant’s pollution. Because plaintiff’s assertion lacks sufficient evidence his claim cannot be established.<sup>151</sup>

Thus, because the inspection was conducted two months after the fish die out, there was no “direct evidence” sufficient to reverse the burden on causation.<sup>152</sup>

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150. Wang Mingyuan, *Yan cheng wu ran an zhen xi qiao, fa tiao jing neng sui yi dao—dui yi qi zai shen and de kan fa* [A Truly Odd Case, the Yancheng Pollution Incident, Legal Rules Reversed on a Whim—Opinion on the Rehearing], *Zhongguo huan jing bao* [China Environmental News], Jan. 18, 2000.

151. *Id.*

152. *Id.*

### C. OBTAINING AN OFFICIAL INSPECTION REPORT

As the above cases make clear, an inspection report from a licensed government agency seems to be a necessary, though certainly not sufficient condition to win fishery pollution cases. In thirty-four out of thirty-six cases,<sup>153</sup> the plaintiffs presented as evidence inspection reports from a government inspection agency.<sup>154</sup> Even if these cases are not representative of all fishery pollution cases, this is still a striking statistic given that these reports are not formally required. Not only is it striking that ninety-six percent of plaintiffs presented inspection reports to a court, but that all of these inspection reports were produced by a licensed government agency.<sup>155</sup>

The fact that so many plaintiffs presented government inspection reports raises several possibilities. First, government inspection reports may be easily available to most fishery pollution victims. Second, courts may simply not accept cases without these reports. Another possibility is that plaintiffs know they have little chance of success, and therefore will not bother going to court without these reports. Finally, fish farmers who are able to get these reports are likely to be those who already have the resources to litigate their case before a court.

The first possibility seems unlikely. As discussed in section IV.b.i., it is often difficult for smaller scale farmers to obtain a government inspection report, due to the overall small numbers of inspection units throughout the country. Despite progress in establishing more units,<sup>156</sup> for a country with 4.5 million fish farmers even the increased number of licensed inspection units is inadequate. Because the resources of the government are limited, it must prioritize the fishery accidents that its inspection units handle. Naturally, the priority is to inspect accidents with the largest, most catastrophic losses. As one lawyer put it, "When the harm is relatively minor, it is often difficult to engage a qualified unit to perform the testing."<sup>157</sup> Even if a fishery is

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153. Inspection seems to play an equally important role in mediation. Two thirds of the eighteen news stories about mediation posted on the Department of Fishery Administration Website specifically mention inspection. (Inspections were likely performed on a greater percentage of cases and just not mentioned in the article.) Not only was inspection mentioned in reports on twelve mediations, but in six of these mediations the Department of Fishery Administration was reported to have "immediately raced to the scene to perform the inspection," and in five others the Department of Fishery Administration provided "immediate inspection."

154. In two cases it was unclear whether or not they had an inspection report.

155. Some plaintiffs also introduced private inspection reports. Gu is skeptical about whether courts would accept private inspection reports by themselves. Gu, *supra* note 75, at 23

156. Gu, *supra* note 75, at 23.

157. *Id.*

lucky enough to get an inspection, often these inspections come too late to be of any probative value to the courts. One such example is the case of *Guo Qiqi v. Nantonghengda Food Company*, where official inspection did not take place until two years after the plaintiff's farmed turtles began to die, and six months after the last turtle had died. Not surprisingly, due to the lag in time between the turtle die-off and the inspection, the court did not place much confidence in these reports and the plaintiff subsequently received no compensation.<sup>158</sup>

To make up for the shortfall in inspections, there is evidence that some farmers are trying to perform inspections and gather evidence themselves. In a number of cases, the plaintiffs included as evidence photographs of fish taken by the owner of the farm after die-offs began. In one mediation case, before the Department of Fishery Administration arrived, farmers took samples themselves after a brownish substance appeared in the water and fish began to die.<sup>159</sup> Courts sometimes use such plaintiff-collected evidence, but never rely on it as the sole basis of a holding.

Courts can also be somewhat arbitrary as to the degree they require compliance with the *Directive on Qualifications for Fishery Pollution Accident Inspection Units*.<sup>160</sup> An article entitled "*How to Win Fishery Pollution Accident Cases*"<sup>161</sup> discusses a frog farm in Pinghu, Zhejiang province that was affected by industrial waste. In response to the accident, both the city SEPA and the Ministry of Justice performed inspections. The local SEPA found that pollution in the water came from five factories upstream. Untreated wastewater from these factories caused the water quality to deteriorate to the point that it was deemed unfit both for human contact and even use for industrial purposes. The Ministry of Justice's "Legal Determination Scientific Technical Research Unit" found that the pollution from the five upstream factories "directly and undeniably caused the death of the fish."<sup>162</sup> Despite these unequivocal statements from seemingly legitimate sources, the court refused to accept the reports, purportedly because these government units were not properly qualified to perform the inspection. Article 5 of the *Directive on*

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158. *Guo Qiqi su nan tong heng da shi pin you xian gong si huan jing wu ran sun hai pei chang an*, *supra* note 149.

159. Ministry of Agriculture, *supra* note 5.

160. Directive on Qualifications for Fishery Pollution Accident Inspection Units, *supra* note 74.

161. Gu, *supra* note 8.

162. *Id.*

*Qualifications for Fishery Pollution Accident Inspection Units*<sup>163</sup> implies that SEPA normally lacks authority to research and handle fishery pollution cases. The article does not discuss why the court did not accept the Ministry of Justice report, but it presumably also did not satisfy the technical requirements of the *Directive on Qualifications*.

While the article does not criticize the basis of the court's holding, several flaws are apparent. First, the court seems to have not applied the mandatory reversal of burdens on the issue of causation.<sup>164</sup> It would have appeared that the plaintiffs had introduced enough evidence for the burden of disproving causation to shift to the defendant. Second, the written law does not require that causation only be inferred after a scientific report is produced by a government agency that is properly licensed in accordance with *Directive on Qualifications*. Third, even if an official inspection report is needed, some courts have taken a more pragmatic approach in examining the qualifications of the inspecting unit. Such qualifications were at the center of a trial dispute in one case. When the court found that no other inspection unit was willing to perform the inspection, the findings of the original inspection unit were reinstated even though there were concerns about the unit's license.<sup>165</sup>

In only one case out of thirty-six, the case of *Xie Zantian v. Guangzhou Leya Lamp Manufacturers Ltd.*, did a court infer causation from circumstantial evidence.<sup>166</sup> That case involved a factory that discharged pollutants without a permit. Regarding the issue of causation, the court stated:

[Environmental cases] often involve the use of advanced technology. Environmental impacts are often gradual, hidden and far-reaching. If causation in environmental cases can only be inferred by using this [type of advanced technology], then it's very likely that parties will engage in scientific debates and the victim will not receive the aid that they request.

In ruling for the plaintiff, the court relied on several bits of circumstantial evidence: (1) the local SEPA testified that the company discharged pollutants without a permit and had been fined in the past; (2) a government inspection agency had found that

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163. Directive on Qualifications for Fishery Pollution Accident Inspection Units, Article 5, *supra* note 74.

164. *See supra* note 115.

165. *Han Shaowei yu Liao he shi you kan tan ju di qiu wu li kan tan gong si*, [*Han Shaowei v. Wulikantan Company*] [http://www.lawyee.net/Case/Case\\_Display.asp?RID=84968&KeyWord=](http://www.lawyee.net/Case/Case_Display.asp?RID=84968&KeyWord=) (Shenyang Intermediate People's Court, Jun. 15, 2006) Perhaps this reflects the idea that an inspection report with some technical flaws is better than no inspection report at all.

166. *Xie Zantian yu Guang zhou Le ya deng shi zhi zao you xian gong si*, *supra* note 147.

the company had exceeded discharge limits;<sup>167</sup> (3) statements by witnesses seemed “reasonable and reliable” and were not “mutually contradictory”; (4) the plaintiff’s fish pond was downstream from the factory; and (5) the fish die-outs occurred after the factory went into operation. Thus, even though there was no scientific report linking the dead fish to a particular factory, the court nonetheless found that the plaintiff had established his preliminary burden, such that the burden shifted to the defendant to disprove causation.

#### D. ABILITY TO ENFORCE JUDGMENTS

The ability to collect court-awarded damages is a major obstacle facing Chinese litigants, especially in rural areas. Professor He Xin tentatively estimates that in rural areas, only about thirty percent of successful plaintiffs receive the full awarded amount of damages.<sup>168</sup> A report on fishery pollution victims in the Luoyang Economic Development Area also estimated that only thirty percent of litigants who won in court actually received money as compensatory damages.<sup>169</sup>

The following story illustrates the difficulties for plaintiffs in collecting money from defendants, even with the active involvement of a court. Five factories near Tianjin caused pollution that resulted in an estimated economic loss of 2,364,000 RMB. After mediation between the factories and affected fish farmers failed, the Tianjin Maritime Court required the five factories to compensate the plaintiffs for the entire economic loss. The defendants refused to pay this amount. Shortly thereafter, the Department of Fishery Administration imposed fines on the five factories, which the factories also refused to pay. The Tianjin Maritime Court then issued a second judgment against the factories, requiring that the administrative fines be paid. Five months passed, and the factory had still not paid the fines. Finally, the judge who had presided over the Department of Fishery Administration case personally visited the factories in an attempt to recover the money that was owed. Upon his visits, some factories’ legal representatives were not available. Other factories had no money in their accounts, had financial problems, or simply refused to cooperate. The court eventually recovered only 70,000

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167. These limits must refer to limits that would have been applicable had the factory been properly licensed.

168. Classroom presentation, UCLA School of Law, Mar. 2008.

169. In 2006, nine pollution incidents caused 680,000 RMB in direct economic damages. However, only 30% of victims have received compensation. Qi and Jiang, *supra* note 22.

RMB from the factories – less than thirty percent of the total awarded amount.<sup>170</sup>

This case study illustrates several issues related to enforcing judgments. The first involves the factories' blatant unwillingness to pay the court judgments levied against them. Even when the judge personally knocked on their doors, the factories' response was strikingly uncooperative. Second, that the court had to expend such extraordinary effort to collect just a part of the administrative judgment suggests that collecting judgments in all cases is not administratively feasible. In fact, the court's intervention in this case was the first compulsory enforcement of a fish pollution judgment in that province.<sup>171</sup> Third, administrative penalties against polluters have the potential to consume damages that would otherwise be available to the plaintiffs. Interestingly, eight months after the administrative judgment, eighteen farmers sued the same factories and won a 1.4 million RMB judgment.<sup>172</sup> It is not clear how much of this third judgment against the factories was ever collected, especially considering that extraordinary efforts had been necessary to extract 70,000 RMB from the factories. The determinative factors would have been the degree to which the court was actively involved in enforcing the plaintiff's judgment, and the degree to which the factories had successfully concealed assets the first time the court came to collect.

There are a number of other cases that describe the difficulties other plaintiffs have encountered in collecting a judgment.<sup>173</sup> For instance, in Chinese attorney Wang Canfa's first case, he represented a farmer whose thousands of ducks died in one day.

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170. The total amount of the fines is unclear.

171. Liu Jun, *Le ting xian xiao he zi zha yu ye wu ran shi gu chu li fen xi* [Analysis of a Fishery Pollution Accident in Leting County, Xiaohhezizha], He bei yu ye [Hebei Fishery], Issue 3, 2002, at 47.

172. Sun Youli *deng su Qian an di yi zao zhi chang deng qi ye yang zhi sun hai pei chang jiu fen an*, *supra* note 104.

173. For example, in the massive benzene spill in the Songhua River between Russia and China, the chemical company did not have enough money to pay damages. Heilongjiang Province Water Management Bureau, *Hei long jiang sheng shui chan ju ying dui Song hua jiang wu ran shi jian jin qi qing kuang ji xia bu she xiang* [What the Heilongjiang Province Water Management Bureau Is Doing and Plans to Do In Response to the Songhua River Pollution Accident] Zhongguo yu ye zheng wu wang [China Fishery Management Web], Mar. 3, 2006, at <http://www.cnfm.gov.cn/info/display.asp?sortid=54&id=11665> (last visited April 30, 2008). In the Shiliang river case, the plaintiffs won in court but didn't get money until CLAPV intervened. Wang Canfa, *supra* note 39, at 129). Plaintiffs who won their case against Rongping chemical factory still haven't gotten money even though they received considerable media attention and even though the factory was listed as one of the 55 worst polluters by the central government. Alex Wang, *supra* note 50, at 217. See also Van Rooij *supra* note 55 at 195 (discussing industries that outsourced the most polluting part of their operation to small, remote factories that had few assets, making collection on any potential judgment from these factories problematic).

When the farmer brought suit against a local polluting factory, the court awarded him 700,000 RMB. However, because of “all kinds of involvement at the local government level”, he ultimately only received 400,000 RMB.<sup>174</sup> Furthermore, an investigative report on fisheries described successful plaintiffs who, because “there were fees attached here and there” only received on average about half of what they were owed.<sup>175</sup>

#### E. COUNTERING THE EFFECTS OF PROTECTIONISM

Since Deng Xiaoping’s reforms during the 1980s, China has focused on economic growth as a way to improve living standards and strengthen the legitimacy of the ruling Communist Party. The central government measures the achievements of local government against the primary standard of China’s GDP.<sup>176</sup> As a result of this focus on economic-centered achievement, in some areas “[village] cadres have ceased to care about ideology and have become increasingly interested in economic benefits generated in the village rather than political rewards bestowed by the state.”<sup>177</sup>

This focus on economic growth often collides with local efforts to limit pollution. For example, in one instance, a Water Resource Administration official who suggested installing facilities to treat factory wastewater encountered resistance by others within the government, who cited the dependence of the local government on tax revenue derived from the polluting factories.<sup>178</sup> As Chinese legal scholar Benjamin van Rooij points out, factories might receive government protection not just because of the tax revenue they generate, but also because the factory consumes and produces products that are crucial to a web of economic interdependencies in the region.<sup>179</sup> As one SEPA official in Anhui province pointed out, “In backwards places like Bengbu, the government simply can’t afford to shut down all the factories.”<sup>180</sup>

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174. Sha, *supra* note 7, at subhead “*Huan jing fa yue lai yue duo, Zhongguo zheng ti de zi ran huan jing que yue lai yue cha.*”

175. Yang & Wu, *supra* note note 55, at subhead “*Huaihe yuan, wu ran chu xian duan ni.*”

176. Wang, *supra* note 39, at 171.

177. STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 110 (Stanford Univ. Press, 2000).

178. Yang & Wu, *supra* note note 55, at subhead “*Fan ge chang jiao ku.*” See also, Ministry of Agriculture, *supra* note 4 (“The Water Administration Agency lacks enforcement power and can only notify the local EPA which is often on the side of local protectionist interests.”).

179. See Van Rooij, *supra* note 55, at 193-94.

180. Yang & Wu, *supra* note note 55, at subhead “*Huaihe hai wei bian qing.*”

The following story illustrates how this type of local protectionism can handicap efforts to enforce judgments:

On the border of Jiangsu and Shandong there is a large man-made lake called Shiliang Reservoir. In July, 1999 large amounts of industrial wastewater entered the reservoir and caused fish raised by 300 farmers to die. Losses were estimated at 600,000 RMB. In September the same tragedy struck again. One farmer, Xie Hengbao described the scene:

At four o'clock in the afternoon, I rowed a boat full of fish food to the fish raising area. I discovered the fish there gasping for air and showing signs of oxygen deprivation. Upstream the surface of the water was covered with white foam . . . . At five o'clock all the fish had died."

After the accident, the local Department of Fishery Administration determined that the water came from Xinmuhe in Shandong province. The Jiangsu fish farmers were furious and loaded up several trucks full of dead fish and presented the dead fish to the local government where the pollution was reported to have come from. They requested that the polluting industries provide compensation. The response they received was, "All the industries here are within their discharge standards; the death of the fish has nothing to do with us." Some time later, the government promised the fish farmers that the industries would not again discharge wastewater into the river.

Believing the local government, the fish farmers again began raising fish, but in June 2000, tragedy struck again and within a short period of time all the fish completely died. . . . Inspections showed that the source was the same place where the farmers had previously gone to seek redress. The farmers, using these test results, went to the relevant agencies in Shandong to try to initiate a lawsuit but were unsuccessful. . . .

[After they had been unable to find a lawyer], the Center for Legal Aid for Pollution Victims (CLAPV) took on their case and brought suit in the Jiangsu province, Lianyungang City Intermediate Court. On December 14th, the court issued an injunction for the company to stop polluting and ordered it to pay the ninety-seven plaintiffs 5,604,000 RMB in compensation. . . . [The Jiangsu Supreme People's Court later upheld the lower court.]

The plaintiffs were relieved to have won but in the almost two years since, they haven't received so much as a penny. The plaintiffs, whose livelihoods were destroyed, applied for compulsory enforcement but the courts were not too proactive on this issue because it involved relationships between two provinces. The petitioners again appealed to the letters and petition department. After repeated prodding, courts from the two provinces appointed the Railroad Court to handle the issue. After the plaintiffs appealed to this court three times, representatives finally went to defendant's factory, walked

around it twice and returned saying the factory was without assets and was unable to pay.<sup>181</sup>

Protectionism plays out in several ways in this story. First, the government in the neighboring province was unwilling to take strong action against the local industries that were the likely cause of the pollution. Second, the courts were reluctant to enforce a judgment, even one that had been affirmed by the Jiangsu Supreme People's Court. Third, there is a possibility that even though the court made a public show of collecting the judgment, it may have secretly intervened to help the defendants conceal their assets.

It should be pointed out that protectionism does not necessarily imply a situation in which the local government is protecting a factory against the best interests of the local residents. As Chinese legal scholar Benjamin van Rooij points out, the degree to which local residents accept the financial benefits of the factory, despite its environmental burdens, will influence how vigorously the local government will enforce environmental standards.<sup>182</sup>

One way in which plaintiffs can limit the effects of protectionism is to appeal to higher level courts. One commentator attributes the success of the plaintiffs in the *Sun Youli* case, which was tried in the Tianjin Maritime Court, to their choice of forum. He points out that "these courts are in big cities and have considerable independence and expertise and have scholar-typed [sic] judges."<sup>183</sup> It is also possible that as a maritime court, it had less reason to protect land based factories.

Aside from choice of forum, it appears that the two largest factors that determine the degree to which local protectionism is a problem are the degree to which aquaculture is important to the local economy and the degree to which the polluting industries responsible for the pollution are important to the local economy. Large fish farms in an area where there is little heavy industry might actually benefit from local protectionism, because the local government will have an economic interest in the survival of the fish farms and the continued vitality of the aquaculture industry. Conversely, small fish farmers in areas where heavy industry is much more vital to the local economy are likely to suffer the most from local protectionism.

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181. Sha, *supra* note 7.

182. Van Rooij, *supra* note 55, at ch. 10.

183. Wen Hui & Xia Jun, *Judicial Protection of the Right to the Environment*, CHINA SOCIETY FOR HUMAN RIGHTS STUDIES, (undated), <http://www.humanrights.cn/zt/magazine/200402004827105642.htm>.

This effect of local protectionism can extend beyond local borders. Often, for instance, one city or province reliant on aquaculture will be in conflict with another city or province that is more reliant on heavy industry. This inter-jurisdictional aspect of many conflicts may make courts less eager to become involved in conflicts that implicate relations between provinces. In the case study described above in this subsection, for instance, the courts were reluctant to enforce a judgment because "it involved relationships between two provinces."<sup>184</sup> One reason for the court's reluctance is that courts lack judicial independence and would be thinly insulated from any negative consequences that might result from muddying the political waters.

On the other hand, the cross-jurisdictional nature of conflicts can at times help plaintiffs when their cause is adopted by the local government. For example, a fish farmer will often have a greater chance against a factory in another city upstream than that same fish farmer would have if he sued a factory in his own city. This is because the plaintiff will be supported in his lawsuit by the political clout of a city which relies on tax revenue generated by fish farmers. This assistance helps a great deal in the backstage horse-trading that often decides the disposition of cases. One official went so far as to say that the most successful cases are those that involve cross-administrative jurisdictions.<sup>185</sup>

#### F. THE EFFECT OF ATTRACTING THE ATTENTION OF THE NEWS MEDIA

While it is difficult to quantify the role that the media may play in court cases, the following two case studies show that both defendants and plaintiffs understand that the media plays a critical role in determining court outcomes.<sup>186</sup>

A factory in Rongping, Fujian province, provided twenty-five percent of the tax base for a village, but produced pollution that caused an increase in local cancer rates. The victims tried to raise money in order to bring a lawsuit against the factory, but the local police carted off their donation box. At the urging of the Center for Legal Aid for Pollution Victims, a news station arrived in Rongping and prepared a news report about the polluter. On the night the pollution exposé was to air, however, the entire city experienced a power outage. Apparently, the factory

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184. Sha, *supra* note 7.

185. *Id.*

186. See also Van Rooij, *supra* note 55, at 212, for an example of where national media attention spurred SEPA to perform an inspection.

had used its local financial influence to shut down the electricity, so that local citizens could not view the program.<sup>187</sup>

A similarly dramatic example occurred in Haiyang, Shandong:

In August, 2000, dozens of villagers gathered around an electric plating factory. They claimed that red wastewater discharged from the factory had harmed their health and their crops, and killed their fish and their ducks. The villagers cut off water going into the factory, knocked down the electrical poles leading to the factory and barricaded the main entrance. They also set up beds in front of the entrance and slept there, preventing the employees from coming to work. Twenty days later the police arrived and arrested twenty villagers, charging three with crimes.

The villagers contacted the Center for Legal Aid for Pollution Victims which dispatched Zhang Yiping, a volunteer lawyer. Mr. Zhang invited two reporters to come with him.

Mr. Zhang later said, "I knew full well that this case was going to be extremely prickly to handle. But, once I saw the confident smile of the two reporters who traveled with me, I felt much better. Talking with these two reporters, I realized that they were passionate about the issues—just the kind of reporters we would need."

Zhang Yiping knew that in cases where the defendant had attacked the polluting industry and had yet been acquitted—the acquittal had come after a local leader had read about the incident in a newspaper or heard about it on the television. Perhaps it was for this reason that the fight for media control was so intense during this case.

After the lawyer had taken the reporters to inspect the scene they split up. The reporters went to the Propaganda Department and the lawyer went to the prison to visit his clients. The lawyer and the reporters agreed to meet at noon for lunch.

[Zhang Yiping stated] "At lunchtime, I got a call from one of the reporters saying that they couldn't come. . . . At [two o'clock], the reporter called back and said that he was returning to Beijing. . . . I was saddened though I had tried to prepare myself. Litigation is like a war. I had never thought that these two reporters could have been so easily swayed by the cadres at the Propaganda Department. . . .

"Through various sources, I was able to locate them before they departed. They were waiting in the main courtyard of the local SEPA. Their bags were packed and they were waiting. The Propaganda Department's black sedan stopped in front of them and was preparing to take them to the airport. As the reporters were pulling some materials out of the trunk, I noticed that it was filled with thermal underwear, dress shirts and

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187. Sha, *supra* note 7, at subhead "Dan qiang pi ma zhan 'da hu'".

other gifts. The reporters didn't say much to me as they left; only that the accused enterprise didn't have any real problems and that the defendants were simply using it as an excuse to make a ruckus."

The defendants were later found guilty. Villagers who had packed the courthouse wept when the verdict was announced.<sup>188</sup>

This story illustrates the battle over media attention in pollution cases and shows some of the tricks used by both sides. The environmental group brought in reporters from Beijing who, because of their outsider status, would be freer than local reporters to publicize the pollution.<sup>189</sup> The local government, on the other hand, used its financial resources to influence the opinion of the journalists. Both tactics underscore the importance both sides accorded to sympathetic media coverage.

## VII. CONCLUSION

Citizen-based environmental litigation in China, particularly regarding the pervasive problem of fishery pollution, embodies a glaring contradiction. On the one hand, available cases show that plaintiffs overwhelmingly win in court. Conversely, however, media reports and statements by lawyers suggest that plaintiffs actually have a very difficult time winning their cases. This article attempts to resolve this contradiction, at least in part, by illustrating the various obstacles that Chinese fish farmers face in litigation, and finding commonalities among successful plaintiffs who were able to overcome these obstacles.

A weak environmental regulatory system in China allows for the occurrence of regular pollution accidents, and for the resultant chronically poor water quality. The most obvious problems facing the Chinese regulatory system is that limited funding makes government agencies ill-equipped to perform complex and technical investigations. Confusing legal mandates, as well as interference from local governments which are often highly reliant on the polluting industries, only confounds this issue.

Once pollution has occurred, fish farmers face a number of obstacles in suing for redress. These include finding a qualified

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188. Sha, *supra* note 7, at subhead "*Fa lü zhi yuan zhe men gan dao le qian lu jian nan.*"

189. Benjamin Lieberman, points out that because of local government influence, it is much easier to expose problems in your neighbor's backyard than in your own. Benjamin Lieberman, *Watchdog Or Demagogue? The Media In The Chinese Legal System*, 105 COLUM. L. R. 1 (2005). Interestingly, the central government has allowed many pollution related news stories to be published and broadcast despite that the fact they often incite social unrest and highlight the failure of the government to control pollution. Perhaps one reason for this is that the central government is increasingly concerned about pollution and sees the media as a way to indirectly enforce its policy priorities.

lawyer, paying expensive court acceptance fees, procuring an inspection report from a licensed inspection agency, and proving the legal elements of their case in front of a judge. Even if these plaintiffs win, they often face obstacles collecting money from factories that often deliberately hide their assets. Throughout the process, local protectionism plays a heavy role in influencing courts to not accept a case or to rule against plaintiffs, interfering with the collection of court-awarded compensation, and repressing media coverage of a case of illegal pollution and the resultant trial.

Understanding these obstacles provides guidelines to understanding which kinds of cases are more likely to succeed in court. Successful cases usually share certain characteristics. For instance, plaintiffs who win in court generally include those who sustain a substantial enough loss that the local Fishery Administration Department will be willing to visit and perform an inspection, paving the way for litigation by the plaintiff. Moreover, successful plaintiffs often may receive sympathetic media attention, or are usually large fishing operations that, because of their financial heft, have influence in the local government. Finally, those plaintiffs whose cases are heard by higher-level courts which are better insulated from the pressures of local protectionism have a higher chance of success. As a result, plaintiffs with more money or a larger claim have a greater chance of winning over plaintiffs with less money or a smaller claim.

Thus, it appears the Chinese legal system is less interested in helping underdog plaintiffs seek justice from evil-doing industrial polluters, and more interested in crafting pragmatic solutions to ensure social stability by regulating conflicts between massive industries. In other words, courts are better conceived of as cost-benefit-weighting government regulators rather than neutral arbiters. However, in applying the language and form of neutral arbiters to cases that are often decided by non-legal considerations (such as social stability, Party policy, economic necessity, etc) courts are laying the theoretical and procedural foundation for underdog plaintiffs to seek the legal redress to which they are entitled. As this body of case law grows and as plaintiffs, lawyers, and society increasingly embrace the ideal of neutral judges who independently apply firm legal remedies provided by law, the prospect of environmental justice will increasingly become a reality in China.