

UNDEF 4th Round Project: “Protect the Environmental Rights and Justice of the Public”

Evaluation Report

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Acronyms

ACEF	All-China Environment Federation
CLAPV	Center for Legal Assistance to Pollution Victims
CSOs	civil society organizations
EPB	Environmental Protection Bureau
PIL	public interest litigation
UNDEF	United Nations Democracy Fund
UNDP	United Nations Development Programme

I. Introduction

A. Background

The United Nations Democracy Fund (UNDEF), All China Environmental Federation (ACEF), and United Nations Development Programme (UNDP) signed the project document (Project No. UNDF-CPR-O9-320) on 2 December 2010, and agreed to implement a UNDEF 4th Round project entitled “Protect the Environmental Rights and Justice of the Public” from 1 January 2011 to 31 December 2012. The project was supported by UNDEF with a total funding of 37500 USD, with ACEF as the Implementing Agency and UNDP as the Executing Agency.

The All-China Environment Federation (ACEF), established in 2005, is a nationwide non-profit civil society organization (CSO) in the field of the environment, and is supported by the government. It is composed of CSOs and individuals who are enthusiastic about and support environmental protection and are willing to work for it. The objective of ACEF is to serve as a bridge between the government and the public in implementing the sustainable development strategy, achieving national objectives on environment and development, and protecting the environmental rights of the public. By fully utilizing its organizational advantage, ACEF aims to promote environmental protection and sustainable development in China and the world at large.

UNDP promotes sustainable human development to help build resilient nations and to empower people to build better lives. As the UN's development network, UNDP draws on world-wide experience to assist China both in developing solutions to its own ongoing development challenges, and in its south-south cooperation and engagement in global development.

The environmental challenges faced by China need little introduction. In its remarkable economic rise, China has become the workplace for the world, fueling global development as well as its own. The environmental costs of economic development include:

- 1) China's water resources, limited by nature on both a per capita and regional bases, are in critical peril from overuse, and industrial and agricultural pollution;
- 2) China's air quality is daily challenged by reliance on coal as primary fuel, increased auto use and continued construction;

- 3) The pervasive, often long term latent effects of the use of heavy metals, and accumulations of solid waste;
- 4) Ecological degradation such as desertification, deforestation, and loss of biodiversity.

These environmental challenges are, in turn, set in a context of governance challenges.

- China has many environmental laws, regulations and standards, but their enforcement is weak, especially by industries at the local level;
- Public Interest litigation (PIL) is new to China; at the time the project began, there were a few environmental tribunals, but the numbers of cases were small
- Environmental Civil Society Organizations (CSOs) as a means to engage citizens in environmental protection face many difficulties, including lack of financial resources, lack of an adequate enabling legislative framework, and limited availability of lawyers who will volunteer for environmental legal aid (in the absence of fees).

The challenge of reconciling economic development and environmental goals as China develops is well known to be a deep one.

B. Evaluation Approach

In performing this evaluation, the authors reviewed the Project Document and materials and information provided by ACEF and UNDP related to the project implementation, discussed questions with ACEF staff, drew on their experience attending project activities, and reviewed further relevant materials on China's environment and environmental governance.

The evaluation of this project presents some basic challenges.

First, in general, projects directed at improving "governance" may be evaluated at many levels, with related difficulties and potential rewards. Much governance evaluation focuses on what might be called "outputs"- for example, the numbers of reports produced, the numbers of recommendations that result in policies, the numbers of cases decided, investigations conducted, workshops held, or the numbers of citizens whose complaints were responded to.

In this case, this project called on ACEF/UNDP to create a handbook on the protection of the environmental rights of the public, to engage in legal aid on 20

cases, to propose environmental policy and law reforms, and to do lawyer training. As we will discuss in Part II and III, by these measures (performance of surveys, publication of the handbook, legal aid in twenty cases, training 80 lawyers, as examples), the project goals were met. However, these accomplishments do not yet tell us fully the deeper effects (sometimes called “outcomes”) of the project on producing desired change.³

Moreover, in this project the basic objectives were at least three fold. The primary objectives included: (a) increasing public awareness of environmental rights; (b) influencing policy change and gaining support for establishing an environmental PIL system; (c) protecting the rights of the public to a clean environment as an important part of human rights, and contributing to the democratization process in China. In each case, evaluation involves further levels of consideration.

In regard to the evaluation of progress on environmental law, it may be easy to get measures on the numbers of cases that have been brought or decided; or the numbers of penalties that have been assessed, and their amounts (as we will do in regard to the cases of legal aid related to this project.) However, deeper questions include, as examples:

Did the decisions or penalties in each case effect only the case at hand or have broader effects in improved compliance with the law? If so, did improved compliance with the law result in improvement in environmental quality, as measured by pollution indices for example? And did improved environmental quality result in improvement in human and further life? And, in any case, were the time and money spent on the cases used well in comparison with alternative uses of the resources?

In relation to environmental awareness, as the literature discusses, environmental awareness is a multidimensional concept. For example, the “naming, blaming, claiming” framework distinguishes levels of awareness:²

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³See, generally, Oran R. Young: *On Environmental Governance: Sustainability, Efficiency, and Equity*: (Paradigm: 2012).

awareness:²

-- a citizen may be aware he or she is not healthy, but may not be aware that the source of poor health comes from environmental pollution (as opposed, for example, to the citizen's own conduct or bad luck);

-- a citizen may be aware that the health problem comes from environmental pollution, but may not know the source(s);

-- a citizen may know the source(s) but not know how to take action to protect himself/herself-or may know but lack the resources to take action.

Similarly, the literature on risk perception explains that awareness may be high but erroneous; citizens may think they have awareness of environmental pollution, but, when measured by relevant expertise, the perceptions of risk may be in error.

In short, awareness is essential for citizen action to protect the environment, but the relation between awareness and useful action to protect the environment may not be simple.

The same is the case with the related questions of the evaluation of "capacity building". Training sessions can be conducted and, by the measure of numbers of those trained, the training may be evaluated as successful. However, the impact of the training-the numbers of participants who took action based on it, who took action that was well founded, and who took action that had impact (and the effects of that impact) -- is much more difficult.

In sum, governance evaluations may show excellent performance by some measures, but may omit the most important measures of real world effect. There is a value to the use of multiple measures. In Part II, this evaluation focuses on what might be called "output" measures; in Part III we try to reflect more deeply on the impact (or "outcome") of the project efforts. The focus will be on lessons learned that may be the basis for future action and continued progress.

²William Felsteiner, Richard Abel, Austin Sara, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming", 15 *Law and Society Review* 631 (1981) (reprinted in John J. Bonsignore et al. (eds.) *Before the Law: An Introduction to the Legal Process* (Boston: Houghton-Mifflin, 4th ed., 1989); Benjamin van Rooij; "The People v. Pollution: Understanding citizen action against pollution in China," *Journal of Contemporary China*, 19:63; 55-77 (2010) (applying Felstiner et al to citizen environmental action in China context).

C. Project Strategy

What is to be evaluated? We used the basic agreement between UNDP/ACEF and UNDEF reflected in the Project Document as our guide. The Document provides a “strategy” for the project and the specific activities to be conducted.

1. Strategy

The Project Document states that the strategy of the project is to:

- raise public environmental awareness;
- influence policy change, gain support from the government for the legislation on liability and compensation for damages caused by environmental pollution and ecological degradation, and for establishing an environmental PIL system and environmental tribunals; and
- to provide legal aid to the victims of environmental damages, thus protecting the rights of the public to a clean environment, an important part of human rights, and contributing to the democratization process in China.

2. Implementation steps

The Project Document also states the steps to implement the strategy:

- a baseline survey to collect data related to project objectives and activities;
- to raise public awareness, printed and video materials to be produced, including a handbook with 5000 copies to be distributed widely, especially to pollution victims and vulnerable groups, producing and broadcasting TV programs, and disseminating information on the ACEF website and websites of other organizations;
- legal aid, including providing legal aid in 20 cases, developing environmental tribunals and training lawyers;
- legislative policy proposals on an environmental PIL system and on liability and compensation for environmental damages;
- survey of public opinion towards the end of the project.

The Project Document recognizes that risk factors include the difficulties in filing environmental lawsuits in China, including the absence of the right of CSOs to appear in court on behalf of the public interest and the uncertainties of the legislative process.

II. Review of the Project Outputs

In this section we summarize activities undertaken to implement the project. As explained in the Part One discussion of “Evaluation,” this section may be said to focus, though not exclusively so, on more readily available “output” measures- surveys conducted, publications produced, legislative proposals made, TV programmes developed, number of legal assistance cases conducted and lawyers trained.

A. Baseline Survey Reports

In 2010, prior to project implementation, ACEF conducted a baseline survey on the public awareness of, and opinion about, environmental conditions, environmental rights, and the protection of environmental rights; In 2012, towards the end of the project, a followup survey was conducted. The surveys relied on the posting of a questionnaire on an environmental discussion website and the distribution of questionnaire in hard copies. 3822 and 1567 responses were received, respectively, from the 1st and 2nd survey.

The survey results should be viewed with the sample population in mind. Since the bulk of the responses were from the website focused on environmental issues, it must be presumed that the sample population was self-selected from a (website) group already focused on the environment. Primary results of the surveys include:

1. The first survey found that a majority of respondents have heard of the concept of environmental rights, though 42.84% have heard of it but do not know details.
2. In the first survey, 20.29% of the respondents said they would take

all necessary measures to protect their environmental rights; in the second the percentage was 30.4%.

3. In the second survey 56.2% of the respondents reported they had had some experiences in the protection of their environmental rights, compared to 22.2% in the first survey.
4. Regarding the methods to be used to protect environmental rights, 13.08% of the respondents said they prefer seeking assistance from lawyers and settling the case through litigation while in the second survey, the number was 25%. However the public has limited knowledge about Public Interest Litigation (PIL). In the second survey, only 3.5% of the respondents knew about PIL and 37.2% have heard of the term.
5. 65.9% of the respondents acknowledged the role of the CSOs in the protection of environmental rights in the second survey, while the number was 34.07% in the first survey.

B. Educational Materials and Media

The Project Document provided that a Handbook on the Protection of the Environmental Rights was to be produced. This was done, and 6000 copies were distributed. The Handbook has been translated into English and is available in hardcopy and the web. The Handbook should have a sustaining role in increasing citizen environmental rights awareness and capacity.

In addition, ACEF also worked with media in publicizing, and thereby helping to address, cases resulting from citizen complaints. 10 TV programmes on the protection of environmental rights were produced and broadcasted.

C. Policy/Legislative Development

The Project Document called on ACEF to help promote the development of the environmental PIL system through the promotion of amendments to existing law.

Towards this end, three expert workshops were conducted and expert analyses commissioned and six legislative proposals were produced and provided to China's top legislature, the National People's Congress. The proposals focused on amendments to the Civil Procedure Law of the People's Republic of China, and the Environmental Protection Law of the People's Republic of China to include provisions on PIL.

In 2012, China revised its Civil Procedure Law (with an effective date of January, 2013). The law now includes a provision that states: "The institutions and related organizations provided by law can bring suits to the Peoples Court on violations of the public interests such as environmental damages and violation of consumers' legal rights and interests" (Article 55 of the revised Civil Procedure Law of China). This is a first step in the development of the China PIL system. The UNDEF project contributed to this progress. This is an outstanding outcome of the project.

The Environmental Protection Law is in the process of revision, and ACEF is making efforts to include a provision to clarify and render more readily operational the rights provided in the Civil Procedure Law amendment now in effect.

ACEF also worked in support of the development of environmental tribunals. This work included legislative proposals and two workshops on the establishment of environmental tribunals, which involved Presidents and senior judges of Intermediate Courts from 10 major cities. During the project's lifespan, the numbers of environmental tribunals have grown from 41 to over 90 (by year end 2012). ACEF contributed to this development through these activities. ACEF helped directly in the establishment of the Yubei District Environment Tribunal and the Wanzhou District Environmental Tribunal in Chongqing Municipality. Averagely ACEF handled 4 PIL cases with involvement of at least 4 judges every year. Since 2008, ACEF has worked in PIL cases with Environmental Tribunals in Wuxi City of Jiangsu Province, Guiyang Intermediate Court and Qingzhen City of Guizhou Province, Kunming

City of Yunnan Province, Haikou City of Hainan Province, and the Yubei District and Wanzhou District of Chongqing Municipality.

In 2011 a workshop was also organized to discuss the concept of “Environmental Public Interest Compensation Fund(s),” which would provide for appropriate distribution of compensation monies awarded to victims of environmental pollution. As a result of the workshop, in 2012 a proposal was produced and submitted to the National People’s Conference in March 2012. The proposal was transferred to the relevant legislative and government organs for consideration.

D. Legal Aid

Under the Project Document, legal aid was to be provided to 1000 victims in 20 cases of environmental damages. The project exceeded these targets.

(1) According to ACEF, legal aid was provided to thousands of victims in 24 cases in different cities and provinces. ACEF categorizes its efforts into three kinds of legal assistance work; litigation, mediation and supervision. In litigation, ACEF brings a case to court with ACEF as the plaintiff, with the result (settlement or decision) coming through court proceedings; In mediation, ACEF meets with parties to the dispute, and seeks to persuade them to settle the case through negotiation. Alternatively, when a case is brought to the court, the judge can try to persuade the two parties in the litigation to consult with each other and settle the case on mutually agreeable terms. Supervision refers to situations where settlement is sought outside of court with the potential involvement of ACEF investigation, media, central or local government assistance, and settlement negotiations.

Dingpa Paper Mill pollution case is a good example of a successful PIL case handled by ACEF. In January 2011, ACEF brought a lawsuit to Qingzhen City Environmental Tribunal against Dingpa Paper Mill in Wudang District, Guiyang City, Guizhou Province, which had polluted the environment. It was tried with ACEF as the plaintiff. After

the hearing, the tribunal announced its verdict, which supported all of ACEF's litigation claims. Dingpa Paper Mill was shut down. It is the first PIL won by a CSO in China.

An example of legal aid by mediation is the Haoyiduo Dairy Corporation pollution case. In October 2011, ACEF brought a lawsuit to the Environmental Tribunal of Qingzhen City against Haoyiduo Dairy Corporation Ltd in Guizhou Province for discharging waste water directly into the rivers, polluting the environment and impairing people's health. The case was settled through mediation by the tribunal with participation of ACEF and a local environmental CSO. The corporation stopped pollution and took pollution control measures under the supervision of Guiyang Public Environmental Education Center.

In the 24 cases under the Project, twenty have been settled, of which four were settled by litigation, eight by mediation and eight by supervision. The remaining four cases are pending, with related settlement efforts, including the Conoco Phillips Bohai Bay oil pollution case. The victims have been awarded 3.16 million CNY (about 508,000 USD) as compensation for their direct economic loss.

(2) The majority of all cases (and all litigated cases but for one) focused on water pollution. The water pollution litigation cases were based on ACEF presentation of evidence of noncompliance with relevant national standards (for example, for Chemical Oxygen Demand, Biological Oxygen Demand as found in the National Standards No. GB-3544-2008).

(3) Further cases settled by mediation and supervision involved mining, agricultural chemicals, waste gas, noise and powder.

(4) We discuss the Dingpa case and the open information case below)

- settlements including compensation for damage to fish, silkworms, and crops, and in which polluters were ordered to cease pollution.³

(5) While the cases may have involved impairment of human health, the cases generally did not involve claims for compensation for damage to human health. In general, the remedy sought in court was cleanup order (not compensation); in one case the request was for local government compliance with the information disclosure policy; In one case there was compensation (for silk worm damage), but the compensation decision was made by mediation, not court order.

(6) As discussed in Part III below, the cases also encountered difficulties, including:

- Difficulty in obtaining government certified experts to testify to/prove environmental damages;
- Difficulty in showing harm to human health;
- Difficulty in collecting and analyzing evidence in air pollution cases (as a most important pollution concern).

E. Promoting Information Disclosure

As a matter of special note, ACEF legal aid also included promoting information disclosure pursuant to the relevant regulations of the government, as contained in the Regulations on the Government Information Disclosure promulgated by the State Council and the Methods of Environmental Information Disclosure (for Trial Implementation) issued by SEPA in April 2007. [we should refer to the name of the policy] In December 2011, ACEF requested the Environmental Protection Bureau (EPB) of a county in Guizhou Province to provide information on pollution of a dairy company. The EPB did not provide the information within the time limit provided by law. ACEF sued the EPB for its violation of the law on disclosure. ACEF won the case. This is the first successful PIL case achieving court ordered disclosure of environmental information in China.

³ACEF reports that the task of ensuring that court ordered relief was followed through on was usually the job of the local Environmental Protection Bureau (EPB).

[I deleted the People's Daily sentence; we explain the Dingpa case is the first successful PIL case-and the open information comes after]

Following the case, in October 2012 the Ministry of Environmental Protection issued a Circular on the Strengthening of the Work on Environmental Information Disclosure in October 2012.

F. Volunteer Lawyer Training

According to the Project Document, 80 volunteer lawyers were to be trained under the project, through two training sessions. The lawyers were selected from web applicants. As a condition to participation, lawyers agreed to handle at least one case on a volunteer basis. As of yearend 2012, about 25% had done so.

The first training took place in Shanghai from 2 to 4 November 2011 on development of the environmental legal system, basic issues in environmental protection, methodologies in determination and assessment of environmental damages, and responsibilities of evidence proof in environmental litigation. The trainers included professors from 4 universities and legal experts from the East China Supervision Center of the Ministry of Environmental Protection and the China Institute of Environmental Planning. 44 volunteer lawyers from the East China region participated in the training. [Explanation for deletion; we don't have formal evaluations; in any case, the test is whether they volunteered-which we discuss elsewhere]

The second training took place in Beijing from 7 to 9 June 2012, focusing on development of Environmental Law in China, trends of development of environmental law enforcement, discussion on the revision of the Environmental Protection Law of China, risk prevention by lawyers in handling environmental cases, environmental information databases, evidence gathering and proof in environmental litigation cases, environmental public litigation in the US, the PIL system in China, and the role of negotiation in handling environmental cases. The

trainers include professors of law from 3 universities, and legal experts from Supreme People’s Court, ACEF and a law firm. 35 volunteer lawyers and representatives from 9 law firms participated in the training. [Explanation; again, the evaluation criteria is how many volunteer-which we say elsewhere]

III. Review of the Project Outcomes

In this section, in accord with the discussion of the evaluation criteria in Part I, we provide qualitative reflections on the results summarized in Part II.

A. Baseline Surveys

As discussed in Part II, the two baseline surveys conducted, one in 2010 and the other in 2012, addressed difficult topics - public awareness of the environment and environmental rights, government environmental protection capacity, government implementation of the law, and the state of environmental civil society development. As noted in Part II, the sample population’s nature limits the use of surveys. However, the survey results provide some information that indicate general levels of awareness on protection of environmental rights have been raised to a certain degree, to which this project has contributed to and it, can serve as a baseline for the development of subsequent surveys.

Policy and Legislative Development

As noted in Part II, ACEF efforts (in concert with others) to expand the Civil Procedure Law to include a provision on PIL system have been successful in gaining an amendment to the Law. This is an outstanding outcome of the project. However, at the same time, the wording of the amendment will require elaboration or interpretation to determine which CSOs can bring lawsuits as plaintiffs. Thus, the success in gaining the amendment also illuminates the roadmap for the path to be taken by ACEF and others seeking to promote environmental PIL.

1. The Implementation of the Amendment to the Civil Procedure Law

First, the success in the amendment indicates that ACEF may now act on multiple fronts to make the PIL a practical reality, ACEF can:

- continue to bring public interest suits to environmental tribunals (some of which recognized ACEF as public interest plaintiff in litigation prior to the law change)
- use the amendment to bring cases and establish civil society standing in common courts (in localities where there are no environmental law tribunals);
- continue to advocate-through expert advice and lobbying-for adequate clarification and implementation of the law-through amendment to the Environmental Protection Law, judicial interpretation and other appropriate means;
- seek to cooperate with local civil society organizations as joint plaintiffs to expand the scope of civil society organizations that may serve as plaintiffs

2. Further policy challenges

Second, the ACEF litigation experience under the project was similarly helpful in highlighting policy questions which need attention, and which ACEF may seek to address through some combination of new policy, interpretation of old policy and/or court decisions or interpretations. The policy challenges which have been identified include:

- the need for assurance that courts will properly apply the burden of proof already provided for by law itself;
- the need for assurance that there will be available certificated

- experts needed for proof of damages and compensation; and
- the provision of mechanisms to assure compensation that has been awarded by a court is received by those who are entitled to it.
- the need to make efforts to include a provision on the PIL system with more clearer terms in the Environmental Protection Law of China , which is in the process of revision.

B. Legal Aid

Under the project, legal aid was provided to over 50,000 victims in 24 cases in different cities and provinces. This outcome is more than what is required by the project.

China is vast and still rapidly developing. The numbers and variety of pollution cases extend well beyond the capacity of ACEF to help in all but a fraction of individual cases. Every effort to assist citizens is important, but ACEF must use its mounting experience to develop a strategy likely to assure that ACEF's resources are used most efficiently and with greatest impact on the capacity of citizens to act for themselves. The experience in this project, in tandem with further ACEF experience, may provide a useful guide to reflection on longer term strategy.

1. Pollution Sources: What strategy is best to focus resources efficiently among many high priorities?

The legal aid cases under the project show that while China has a broad array of environmental challenges, in practice legal aid is devoted to some of these concerns more so than others.

Most prominently, both air and water pollution are recognized as primary environmental priorities for China. However, attention and success related to this project dramatically differ between the two.

Water pollution was the focus of the majority of the cases, and nearly all

the litigation cases. Control of water pollution is a top priority for China, but so is control of air pollution (and control of heavy metals, solid waste and other pollutants).

Why were so few litigated cases addressed by the project focused on pollution other than water pollution? Why was water the prime focus for all cases? ACEF reports that the focus on water was possible because water pollution and its effects may be (relatively) easy to trace (pollution from a factory is emitted into a stream or river, for example), ACEF team has capacity to investigate the source and flow of the pollutants, to take samples and send to a laboratory for analysis.

ACEF reports that it receives complaints about air pollution, but they are not typically handled by litigation. Citizens can look to damaged trees (and leaves and fruits) and crops for evidence of air pollution. But ACEF reports that measurement of air pollution from cause (sources) to effects (damage) is difficult (pollution from a factory may be dispersed in many directions) and requires substantial expert and financial resources. The difficulties are compounded where as ACEF reports, in environmental litigation (1) the burden of proof is not applied according to law, and (2) a court requires certificated expert to prove cause and effect.

The project further indicates:

- successes in cases relate to mining are possible, though they were not obtained through litigation.
- success is less clear in relation to industrial heavy metals pollution, solid waste, and nonpoint pollution; for example, human or animal waste or agricultural pesticide runoff).

In sum, the experience in this project (and further ACEF work) suggests reflection and refinement of strategies:

- (1) In the case of water, ACEF achieves successes, but problems are omnipresent and ACEF resources limited. What can be done to maximize impact of water cases-to

make sure that success in one case or region may be basis for continued environmental protection in that region, and success elsewhere?

- (2) Air pollution cases are limited, in part by difficulties of evidence gathering for proof and expertise to testify on the evidence. What strategy can ACEF employ to test ways to success in identifying and addressing air pollution concerns?
- (3) Further key pollutants (e.g. heavy metals, solid waste) and pollutant sources (such as Mines). What does experience to date suggest about strategy in these areas?

2. What institutional factors and patterns provide clues to “what works and what does not?”

In addition to showing patterns related to pollution source, the legal aid experience under the project highlights “institutional factors” that help make law work and some that do not. For example:

- (1) The cases show that some laws, regulations and standards may be effectively used, and how they may be used. In the water cases, for example, measurements based on water quality national standards proved effective. In other cases (mines, for example) failures by enterprises and/or the government to follow procedural standards provided legal basis for claims.
- (2) The cases showed that local problems may exist for years without receiving attention from the government (or polluting enterprises).
- (3) The cases showed that some kinds of citizens are likely to identify problems, and serve as first line of defense for

the public at large. For examples, fishermen may be likely guardians of the integrity of water supplies, and farmers of the integrity of air quality.

Here, as in the case of the focus on pollutants, there is opportunity to draw from experiences to develop strategies that make efficient use of models that have succeeded and identify areas where models are needed. For example:

- (1) where rules (laws, regulations and standards) have proved to be useful, how can their use be broadened? Similarly, where relevant rules or standards have been less useful, why not? And what can be done to make them useful?
- (2) where pollution problems existed for years in the absence of government action, how did ACEF assistance change the long-term pattern? Can the lessons be applied by citizens in other localities without ACEF assistance?
- (3) where certain citizen groups-fishermen for example- have shown themselves likely to serve as watchdogs for pollution harm, what can ACEF do to make sure these groups more widely have access to information and expertise needed to serve as lines of defense for the public interest?

3. Pollution Effects and Compensation: What strategy to address and resolve difficulties to achieving compensation?

Environmental pollution in China causes substantial damage to the environment, human, animal and plant life, and to property. However, determination of the effect on living things and compensation that is in order- is often difficult. Damage may become manifest only after many years, and even then in only a small percentage of the exposed population. Moreover, in China today where there are many pollution sources and pollutants, it is often more difficult to identify cause and effect in relation to particular harms.

a. Difficulties in Evidence Gathering and Proof

The experience of the legal aid program indicates that (1) legal proceedings for obtaining compensation are often quite difficult; (2) compensation for harm to humans is difficult in any case.

Among the litigated cases, compensation was provided in 3 cases, but through mediation by the court. In negotiation, claims for compensation for damage to fish, trees, crops and silk worms were successful. In these cases, the basis for the calculation of damage was market price (for example, evidence on the type and number of fish killed and the market price of the fish).

Claims for damage to human life were much more difficult to establish, though damage may have existed. In one case (in the Inner Mongolia Autonomous Region, involving cement plant wastewater), a man exposed to polluted water for a long time developed cancer. The victim received 180,000 CNY (29,000 USD) from the cement company defendant, through mediation in a settlement approved by the court.

b. Shortcoming in China Law Implementation

In addition to inherent problems of collecting and analyzing evidence, in its efforts to obtain compensation ACEF experienced a difficulty related to the implementation of China law.

Ministry of Justice certificated institutions are often relied on by courts for determination and assessment of environmental damages and compensation measures in environmental (and other) cases. However, ACEF reports there is not a certification for environmental damage institutions. ACEF reports that a judge may recognize that the plaintiff is harmed, but still will not act to provide compensation in the absence of certificated institution attestation to damage and compensation measure. ACEF may hire an expert and present evidence of damage and needed compensation, but this may be insufficient in the absence of an expert

from a certificated institution. In one case (the Guizhou Province Dingpa case involving water pollution), the environmental tribunal accepted the expert presented by ACEF as basis for damage order. This may be an important precedent.

In sum, there is value for a strategy to develop models for obtaining compensation (where compensation is merited), particularly (1) in litigation (2) for harm to humans.

4. What may be learned from experiences in other countries about the specific problems encountered in the project implementation?

In relation to some of the specific obstacles identified in the project experience, there are some lessons to be learned from experience in other countries. For example, drawing on the US experience, which is likely the deepest in public interest law and related litigation:

Compensation for human health damage: The difficulty of proving harm to humans (and other living things) from pollution is universal.⁴ Where the evidence shows humans have been exposed to pollutants but harm (illness) has not manifested itself, U.S. cases have provided that the polluter must bear the cost of medical monitoring of potential victims (to check on their health and provide compensation if illness results).

Air pollution cases: As discussed above, evidence and expert proof in air pollution cases is difficult. Here, too, the problem is not unique to China (but a characteristic of air pollution). China might consider the use of evidentiary tools and techniques employed elsewhere—for example the “Calpuff” model which the U.S. Environmental Protection Agency may employ.⁵

⁴Indeed, the difficulty may be greater in developed countries where exposures are often less acute; harms may take longer to manifest itself and then do so in a relatively small proportion of the exposed population.

⁵http://www.epa.gov/scram001/dispersion_prefrec.htm

Lawyer's compensation: A key to citizen use of law, especially in litigation, is the availability of lawyers. Lawyers are expensive and often beyond the means of affected citizens. ACEF seeks to address this problem by training volunteer lawyers. ACEF reports that it requires that, as condition of training, lawyers agree to serve as volunteers in one case, and, in fact, about 25% (20 of 80) of lawyers ACEF trained have done so by year end 2012. This is a good start.

The difficult, and underlying, challenge is the development of means by which lawyers can make a sustainable living doing environmental law in China. At present, core obstacles to this development include: (1) difficulties in gaining court acceptance of cases; (2) difficulties in representing groups of plaintiffs (3) difficulties in providing for lawyer compensation where victims lack financial resources-even where cases are successful.

The two long term (more than five years) sustaining environmental CSOs, i.e. ACEF and the Center for Legal Assistance to Pollution Victims (CLAPV) of the Chinese University of Political Science and Law rely on financial support from the Chinese government or foreign sources for providing legal aid to pollution victims. Such support is not generally available for private lawyers.

In this context, efforts to find ways to support legal aid would be useful. In fact, ACEF reports that it is trying to develop the use of contingent fee in cases where there is possibility of damage compensation. [what is the PIL fund? If it is the compensation fund I think it provides for victims not lawyers. We have not mentioned any other fund] If ACEF can demonstrate success with this arrangement, it may be a model for use by environmental (and other) public interest lawyers. At the same time, as discussed above, this approach will only work if there are models for successfully obtaining compensation for victims. Thus, ACEF may want to consider policy efforts focused on providing for attorneys compensation in cases where evidences of damage are not available.

The challenge of finding appropriate compensation means for public interest lawyers is a universal one. In the U.S., and other countries, environmental public interest lawyers (working in private law firms and NGOs) sustain their work through receiving “attorney’s fees” for successful litigation. In the U.S. there are now multiple means by which attorney’s fees can be awarded. These include, as ACEF is pursuing, cases where successful attorneys may be paid from damages awarded clients; but they also include cases where success may not include damage awards. For example:

- under “citizen suit” provisions of most major US environmental laws, if a citizen sees that a law is violated, the citizen can go to court to, in essence, represent the government; if the court case is successful, then the citizen’s lawyer will get attorney fees;
- under the U.S. False Claims Act (the “whistleblower law”) citizens who see that the government is being cheated can get a lawyer and bring a lawsuit to protect the government; if the citizen wins, the government should provide the citizen and the lawyer a share of the money the government recovers from the cheater. This law may be used in environmental cases, for example, when a government contractor who is working on construction for a government project tells the government it is following environmental laws, but in fact is not following environmental law).

C. Refinement and Publication of “Fact Patterns” to Promote Public Awareness and Public Participation

ACEF’s experience and successes (but also the difficulties it encountered, can provide the public with “fact patterns” to help focus on and address common problems.

The problems that the project addresses occur daily throughout China. For example, the cases of water pollution the project dealt with are likely not unique, but occur in similar ways in myriad towns and villages

throughout China. ACEF can assist directly in only a small number of cases. But ACEF can provide the public with the benefit of what has been learned from the project.

The Handbook on Protection of Environmental Rights provides a “baseline” document for the public seeking to protect their own environmental rights. It explains what environmental rights citizens have, and how they can protect such rights.

However, as discussed above, ACEF’s continued experience now permits it to go much deeper in the information provided to citizens. It now has considerable experience, for example, with the litigation of water pollution cases. It now also has experience with the resolution of mining related concerns through non-litigation approaches. ACEF has experience that shows, for example, that, in some cases evidence may be relatively easy to gather, standards exist, and courts can be successfully used, and in other cases, air pollution, for example, evidence may and solutions may be more difficult.

In tandem with developing its own next steps strategy based on this experience, ACEF can deepen the Handbook (through continued website updates) by beginning to construct a matrix of common “fact patterns.” With its continuing accumulation of experience, It should be able to tell citizens with increasing depth and specificity what specific pollution problems they should be aware of, what risks they present, and how they can address them.

Drawing from the project experience with each fact pattern, the matrix might include for each fact pattern:

- (1) the kind of pollutant at issue, its characteristics and sources and the risks involved:
- (2) the laws, regulations and policies that are related to the control

of this pollutant;

(3) how to identify and measure the presence of the pollutant; including (from the project experience) the location of experts and equipment needed for investigation and proof;

(4) the methods to be used to address the pollutant to date - litigation, supervision, mediation or some combination;

(5) the remedies that have been obtained to date - including, for example, treatment, relocation, compensation for damages to the environment, living things and property;

(6) particular challenges citizens might expect in dealing with the pollutant, and how they can be dealt with (for example, difficulties in collecting evidence or finding experts, government inaction).

As ACEF, and citizens, continue to learn more the fact pattern matrix can be deepened and expanded to include new fact patterns.

D. UN/ACEF Cooperation

In addition to the express goals stated in the Project Document (as summarized at IC above), it is essential to note the value of UN/ACEF cooperation in summarizing what has been learned from the project. UNDP did substantial work, particularly on international knowledge and best practices transfer and policy advice, to ensure project success, including:

- 1) increasing the project visibility and public awareness of environmental concerns and rights by producing a project video;
- 2) providing ACEF with a platform for international exchanges through several international conferences, such as the

Guiyang International Eco Forum in 2011.

- 3) supporting ACEF's staff and volunteer lawyers' participation in several UNDP regional and global workshops on Access to Justice and Environmental Governance, thereby building their capacity through exposure to the experiences of other countries;
- 4) providing strong technical support through a UNDP international technical advisor to the project, in order to further bring relevant technical advice and relevant global experience to ACEF;
- 5) enhancing the development of South-south cooperation channels for ACEF with other developing countries, such as Vietnam and Mongolia.
- 6) joining in ACEF's efforts in policy and legislative change, including assisting in lobbying the Legislative Affairs Commission of the National People's Congress to include ACEF proposals in revising the Civil Procedure Law and the Environmental Protection Law.
- 7) providing global awareness of ACEFs work, through ACEF participation in UN conferences as noted above, and also through visits of UN officials to China to meet with ACEF s, including the UNDP Associate Administrator (Rebeca Grynspan) and the UN Deputy Secretary General (Jan Eliasson).

IV. Conclusions and Recommendations

A. Conclusions

ACEF, as the Implementing Agency, and UNDP, as the Executing

Agency, have cooperated well and successfully implemented the project by following the strategy as set out in the Project Document.

As discussed in Parts II and III, ACEF has implemented all the activities and produced the planned outputs and achieved notable successes. Its legal aid has achieved landmark litigation successes; Its policy recommendations have played a role in the amendment to the Civil Procedure Law, which should broaden CSO environmental litigation rights, and ACEF has trained dozens of lawyers and produced a Handbook for general public use.

As discussed in Part III, UNDP's contribution has been substantial, particularly in bringing international knowledge and best practices to bear on the project, as well as in project implementation.

Explanation for deletion; we say this in the second paragraph above; also, democratization was not part of the Project (see out project definition in Part I), and we do not explain what it means in this context)

B. Recommendations: Next Steps

ACEF now has the opportunity to build on this experience, developing a strategy to build on successes and to address the obstacles to success that it encountered. In doing so, the focus may be on (1) continued development of ACEF strategy based on reflection on what has been learned from its experiences; (2) organization of these experiences to support citizen capacity to address environmental concerns directly.

1. ACEF should reflect on and organize its legal aid experience to permit ACEF, citizens and officials to efficiently and effectively address common environmental fact patterns.

As discussed at Parts II and III, ACEF's legal aid experience indicates:

- (1) how some key pollution problems may be successfully

addressed, while others remain challenging; in the case of water, for example, litigation and other legal aid practices are successful; in the case of air pollution, success has been much more limited;

- (2) how courts and litigation may be used, and their limits;
- (3) how alternative approaches—mediation and supervision—may be used with law to address;
- (4) institutional obstacles that remain to be addressed.

In short, ACEF’s experience increasingly provides information on what works and what may not work. This experience provides opportunity to reflect on, for example, how to best multiply successes in cases which address substantial problems, and how to address important problems that have not been successfully addressed. As discussed at III D, ACEF can review and organize its experience to develop a matrix of “fact patterns,” so that ACEF and citizens may get the benefit of what ACEF has learned. As ACEF continues to gain experience the matrix can be deepened and expanded.

ACEF’s experience can then be used as bedrock for ACEF own strategy development, for deepening the Handbook on the protection of the environmental rights of the public and for training of lawyers, citizens and CSOs.

2. ACEF should deepen its Handbook and related training and education materials to provide the fact pattern learning from ACEF’s continued experiences.

Public participation requires an informed public. Because there are so many environmental problems, their nature is often technical and social resources are limited, there is a premium on an informed citizenry that knows as much as it can about common problems and ways to address them; and about the difficulties that will be met.

In this context, ACEF can deepen and expand its Handbook to provide

the public with key information on the fact patterns they are likely to encounter, and the tools and strategies to deal with them.

3. ACEF's legal aid strategy should incorporate lessons learned from the project.

As discussed in Part III C, ACEF's experience in providing legal aid under the project provides lessons to be incorporated in ACEF strategy to use its resources efficiently and effectively.

For example, as discussed, ACEF's success with water and air pollutants -both primary pollution concerns-calls for strategic reflection. Thus, in relation to water and air (and other high priority pollutants) the strategic need is to (1) determine how to multiply ACEF's success in water; how can citizens use ACEF models for success to take actions without reliance on ACEF's limited resources? (2) test ways to provide a model by which citizen air pollution concerns can be effectively addressed.

Similarly, ACEF has found common challenges to success, including difficulties in obtaining compensation for human health damage, difficulties in gaining court adherence to the burden of proof provided by China law for environmental litigation, and difficulties in obtaining certificated expertise. Thus, in relation to institutional obstacles to environmental protection, the strategy might focus on: (1) the best method to gain court adherence to the burden of proof and to address the current limits on certificated experts; (2) way(s) to provide for lawyer compensation needed to sustain environmental PIL; (3) way(s) to develop capacity to make successful claims for compensation for harms to humans.

4. ACEF should use the amendment to the Civil Procedure Law to practice and improve the PIL system.

As discussed at II C an amendment to the Civil Procedure Law including the PIL, to which ACEF has contributed, is vague, and needs to be

practiced and improved. Steps ACEF can take include:

- (1) work with courts and legislature and other CSOs to assure that the law's definition of "related organizations" is interpreted in an appropriately broad way so that CSOs can bring suits to the court and act as plaintiffs;
- (2) Cooperate with other CSOs as co plaintiffs in addressing more environmental cases;
- (3) work with the Ministry of Environmental Protection and China's legislative bodies to include a provision(s) in the Environmental Protection Law (which is in the process of revision) to strengthen the PIL system;
- (4) assert CSO rights to bring public interest lawsuits in common courts, in locale where there is no environmental tribunal;
- (5) further make efforts to provide means to compensate lawyers who provide environmental PIL service.

5. ACEF should further work on the promotion of public participation and democratic decision making in environmental protection

As discussed earlier, because of lack of resources (including time, money, and information), many people in China are not able to participate in decision making and exercise supervision on environmental matters. Therefore they are not able to protect their environmental rights. Steps ACEF can take include:

- (1) ACEF should further its work in the promotion of the disclosure of information by the government and industries and the use of open information as a key to, public participation in decision making and public oversight related to environmental protection;

(2) ACEF should further conduct educational programs that provide citizens with opportunity to develop skills to use law and information to participate in environmental decision-making towards the end of democratic decision-making

I deleted this because we do not explain what a “public supervision” system is-and do not discuss it Parts II and III. If we want to use this we should explain what we mean, and why it is likely to be a good idea.

(4) ACEF should use the web to expand the existing Handbook, as ACEF and other CSOs continue to develop experience, to include, for example, (a) the new information on fact patterns as noted in “2” above; (b) examples of documents and other materials used in successful litigation (or mediation or supervision);

(5) ACEF should continue to work with broadcast and print and web media to publicize environmental problems and the ways to use law to deal successfully with them.

6. ACEF May Continue to Work with the UN on the protection of the environmental rights of the public.

As discussed herein, the UNDEF project realized many achievements-in legal aid, policy development, environmental awareness raising and etc. ACEF should seek to continue to work with UNDEF and UNDP to build on the success of the UNDEF 4TH Round Project, and to address the challenges and opportunities the project identified.