Social Sciences
2021; 10(6): 279-285
http://www.sciencepublishinggroup.com/j/ss
doi: 10.11648/j.ss.20211006.14
ISSN: 2326-9863 (Print); ISSN: 2326-988X (Online)

The Practical Dilemma and Improvement of the Pre-litigation Procedure of Procuratorial Environmental Public Interest Litigation

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To cite this article:
Gao Guilin, Chen Weixian. The Practical Dilemma and Improvement of the Pre-litigation Procedure of Procuratorial Environmental Public Interest Litigation. *Social Sciences*. Vol. 10, No. 6, 2021, pp. 279-285. doi: 10.11648/j.ss.20211006.14

Received: October 27, 2021; **Accepted**: November 16, 2021; **Published**: November 17, 2021

Abstract: The new era of environmental public interest litigation is a beautiful crystallization of the relationship between the maintenance of public interest and legal supervision in China. It is an extension of the legal supervision function assigned to the procuratorial organs by the Constitution, which can better promote national governance and safeguard the public interest of the environment. However, in practice, the imperfection of the system and extra-legal factors have induced various problems in the pre-litigation procedure of prosecutorial public interest litigation, such as the difficulty of social environmental organizations to file public interest litigation and the legitimacy of the procuratorial organs for the "performance of duties" of administrative organs. In order to further improve the pre-litigation procedure system of procuratorial environmental public interest litigation, firstly, it is clear that the focus lies on the principle of procuratorial humility according to law. Secondly, the civil public interest litigation needs to optimize the institutional arrangement of environmental protection organizationsin ecological environmental damage litigation, strengthen the linkage between procuratorial organs and social groups, and set up multiple administrative acts review standards for administrative public interest litigation, in order to help Chinese characteristics of procuratorial system of environmental public interest litigation in before litigation procedure of continuous development and improvement in practice.

Keywords: Procuratorial Environmental Public Interest Litigation, Pre-litigation Procedures, Environmental Organization, Administration Organs

1. Introduction

In 2015, the Supreme People's Procuratorate promulgated the "Pilot Program for Public Interest Litigation Reform by Procuratorial Organs" (hereinafter referred to as the "Pilot Program"), making procuratorial organs "public interest litigants". In addition, the Interpretation of the Supreme People's Procuratorate on Several Issues Concerning the Application of Law to Public Interest Litigation Cases promulgated in 2018 has established a public interest litigation prosecution system with Chinese characteristics. Overall, the public interest litigation has been in operation for two years and has greatly advanced the process of environmental protection, environmental restoration and ecological civilization construction in China, which is a milestone. However, the pre-litigation procedures of the system have been considered, and there are certain obstacles and irrationalities that cause many practical problems. This article will analyze the individual problems and provide a basis for the expansion of the pre-litigation procedure of public interest litigation.

2. The Current Situation of the Prosecution of Environmental Public Interest Litigation

The traditional private interest litigation system is essentially a tort litigation, that is, the prosecutor must have a direct interest with the infringed legal interests. In contrast, environmental public interest litigation is characterized by the special nature of the subject of prosecution, the special

nature of the protection of legal interests, the plurality of the beneficiary subjects and the special nature of the start-up procedure,[1] all of which are different from the traditional private interest litigation. Therefore, the traditional private interest litigation system is not sufficient to solve the outstanding environmental problems in China. In this context, the amendments to the Civil Procedure Law and the Administrative Procedure Law have initially improved the situation that environmental public interest litigation procedures were not effective in practice, coupled with the Pilot Program and the Implementation Measures for Pilot Public Interest Litigation Initiated by People's Procuratorates (hereinafter referred to as the Implementation Measures) promulgated by the Supreme Procuratorate, which have advanced the process of procuratorial public interest litigation system and improved several specific details.

First, environmental public interest litigation with procuratorial organs as the main status not only enhances the effectiveness of environmental public interest litigation, but also serves as the final bottom line for protecting environmental public interests. By sorting out the cases issued by the Supreme People's Procuratorate on the national public interest litigation in 2020 (see Table 1), it is intended to clarify the current status of public interest litigation after the current system reform.

Table 1. *Data on Public Interest Litigation Cases by Procuratorial Organs in 2020.*

Type	Number (pieces)	Percentage	Year-on-year change
Civil public interest litigation category (filed)	14264	9.4%	+3.8%
Administrative public interest litigation category (filed)	136996	90.6%	-3.8%
Total	151260	/	/
Civil public interest litigation category (litigation)	7166	89.5%	1.3%
Administrative public interest litigation category (litigation)	844	10.5%	-1.3%
Total	8010	5.3% (of cases filed in the same period)	+1.5%
Civil Notice	12398	9.5%	+5%
Prosecutorial Suggestions	117573	90.5%	-5%
Total	129971	/	+20.4%

The data reflects that under the guarantee of diversified mechanisms, China gives full play to the functional positioning of procuratorial organs, strengthens the articulation and cooperation between non-litigation and judicial confirmation, and forms a protective synergy for all types of public interest cases and disputes, and the effect of procuratorial public interest litigation speaks for itself.

Furthermore, in 2020, the procuratorial authorities insisted on achieving the purpose of maintaining public interest before litigation as the best judicial state, and 93.8% of public interest litigation cases were resolved in the pre-litigation link. [“151,000 Public Interest Litigation Cases to be Filed in 2020" [R], in Supreme People's Procuratorate of the People's Republic of China, January 11, 2021.] Based on the above statistics, it can be found that in many civil public interest litigation and administrative public interest litigation cases, the pre-litigation procedures initiated by the procuratorial organs can efficiently handle most of the cases and play a pivotal role.

In the pre-litigation procedure of civil public interest litigation, the procuratorial authorities can only choose to supervise or support social organizations in filing lawsuits, which means that the procuratorial authorities' right to sue should be a supplementary, remedial and posterior right. The specific duties of the procuratorial authorities in the pre-litigation procedure of civil public interest litigation are to issue civil announcements to the relevant organizations prescribed by law and to urge them to investigate and obtain evidence and file lawsuits. The authorities or relevant organizations specified in the law shall handle the matter in accordance with the law within one month after receiving the supervisory or supporting prosecution opinion letter, and reply to the procuratorial authorities in writing in a timely manner. The pre-litigation procedure in administrative public interest litigation is that the procuratorial organ issues reasonable procuratorial suggestions to the appropriate administrative organ, and the recognition of the legality of the legal responsibility of administrative act is the premise and key of the pre-litigation procedure.

3. Practical Issues

The above two types of pre-litigation procedures are both urgent to protect the public interest of the environment by procuratorial environmental public interest litigation and have the same value pursuit. "Public interest litigation prosecution is in the promotion of national governance system and governance capacity modernization exploration came into being, is the legal supervision function of the procuratorial organs 'era response'. The lawsuit is the carrier, is the way and means of the procuratorial organs to perform the legal supervision function; supervision is the essence, is the fundamental attribute and value pursuit of the procuratorial system."[2] However, although theoretically clarify the positioning of the functions of the procuratorial organs of pre-litigation procedures, but it does not mean that it coincides with the practice. In practice, the pre-litigation procedures at different levels of the system deficiencies are sometimes reflected, and this has produced a lot of trouble.

3.1. The Dilemma of Environmental Protection Organizations Filing Lawsuits

Social organizations are important participants in China's environmental civil public interest litigation, but they have

long played a painless role in practice. In 2020, there were only 103 cases of environmental civil public interest litigation brought by social organizations in the national courts, and although the number is increasing year by year, it is only 3% of the public interest litigation cases brought by procuratorial organs as "public interest litigants".[3] The original purpose of the public interest litigation system reform is to make the public power and social forces together to integrate governance, to achieve a model of multi-governance. Compared to the procuratorial authorities, the weaknesses of environmental organizations in general, their limited capacity and imperfect systems are particularly obvious. For example, in a public interest litigation brought by the China Biodiversity Conservation and Green Development Foundation (hereinafter referred to as the "GDF") against the pollution of the Tengger Desert, the Ningxia Zhongwei Intermediate People's Court dismissed the case on the grounds of "subject matter qualification The court dismissed the lawsuit on the grounds of "ineligibility". The court gave the following reason: Although the purpose and business of the GDF is to protect the public interest, it cannot be considered as "specializing in environmental protection public welfare activities" according to its constitution.[4] As a pioneer in the protection of the public interest, environmental organizations have institutional safeguards, but in practice, in many cases, they cannot be supported and defended by public authority. The court ruled that the GDF did not qualify as a plaintiff based solely on the fact that its constitution did not specify that it was "engaged in the business of environmental protection". The ultimate consequence of the court's dismissal of the case is that the damaged public interest will not be repaired and maintained in a timely manner, and will continue to be damaged, contrary to the top-level design of the system. The root of the problem is that the role of prosecutors in environmental public interest litigation has been overly expanded, resulting in a natural confrontation with environmental organizations, especially in the pre-litigation process.

3.2. The Dilemma of Identifying "Non-performance" by Procuratorial Organs

The core of the pre-litigation procedure of administrative public interest litigation is to identify the administrative violations or omissions, which is also the condition for the procuratorate to initiate administrative public interest litigation. In recent years, we have examined and analyzed the cases of administrative public interest litigation, especially the cases in which the pre-litigation procedure failed to correctly identify the legitimacy of administrative acts, resulting in the litigation procedure. For example, in the case of Longgui Town Zhiwang Farming Demonstration Park v. Shaoguan City Wujiang District Finance Bureau, the administrative organ's defense mentioned that the defendant was actively carrying out persuasion and urging Zhiwang Farming Park to consciously return the aforementioned money; the defendant proposed to apply for enforcement by the people's court in accordance with the provisions of Article 7 of the Administrative Compulsory Law if Zhiwang Farming Park refused to perform. In accordance with the provisions of Article 7 of the Administrative Compulsory Law, the defendant intends to apply to the people's court for compulsory enforcement. In this case, the administrative organs have not fully exhausted the means of redress, but also in the process of restoring public interest, the procuratorial organs should not easily intervene in administrative affairs. At this point, the procuratorial authorities should respect the administrative organs, it is not appropriate to bring administrative public interest litigation but giving the administrative organs a certain amount of time to continue to rectify the situation. Again, the administrative organ can continue to follow up the case or request the administrative organ to give feedback on the case after the deadline for rectification.

4. Analysis of the Causes of the Hidden Problems of Pre-litigation Procedure

The procuratorial authorities need to go through the statutory pre-litigation procedures before filing public interest litigation in court. The procuratorate's constitutional position and duties indicate that it is in fact the defender of the public interest, and has the identity of a representative of the public interest, which determines that it can file public interest litigation on behalf of the general public in special circumstances. In the pre-litigation process, the choice of subject and the timing of intervention in administrative affairs affect the overall function of the system. But the practice pattern shows that prosecutorial public interest litigation may have dilemmas, the reasons for which are mainly the following.

4.1. The Legal System of the New Conflict

In terms of civil public interest litigation, public interest litigation practice in the six years, the number of environmental protection social organizations filed public interest litigation cases in more than one of about 30. The data show that, since the practice of public interest litigation, due to the change in focus and function of the overall reform of the procuratorial organs, more cases of public interest litigation have been filed directly by them, weakening the practical application of the support prosecution system and contradicting the original design of the environmental public interest litigation system. Some scholars believe that the vagueness and inspecificity of the basis for supporting prosecution greatly reduces the operability of application.[5] Primary reason is that although the related judicial interpretation provisions of the procuratorial organ support prosecution system, and mainly around the procuratorial organ provide legal advice to social organization, submit written opinions, to assist the investigation method to carry out the support prosecution, but just check the content in the surface, how to start the prosecution system and social organization support prosecution system should have what

kind of program again, Many details, such as how to delimit the scope of evidence to assist investigation and evidence collection, need further regulation. Although the number of environmental social organizations continues is increasing, the secondary reason for the serious decline in the proportion of support for the prosecution system is that environmental social organizations are more concerned about the embodiment of their own value. Under the background of imperfect institutional norms, the intervention of the procuratorial organs may squeeze the living space of environmental social organizations, resulting in the interchange of roles between the two in the litigation process, so environmental social organizations in the process of environmental civil public interest litigation. The proportion of applications for prosecution support is very small.

The fruit of the priority theory of ecological and environmental damage compensation litigation. Both the lawsuit of compensation for ecological environment damage and the procuratorial civil public interest litigation system are relief mechanisms for public welfare damage in the field of ecological environment. They overlap in the application fields, have a high degree of agreement in the purpose of the system, and have basically the same lawsuit request, which leads to the possibility of "collision" between the two lawsuits in judicial practice. In June 2019, the Supreme People's Court issued several Regulations on the Trial of Eco-environmental Damage Compensation Cases, in which Article 17 formally established the order of litigation rules for limited eco-environmental damage compensation lawsuits. The "priority theory of ecological environmental damage compensation lawsuit" and its judicial practice is contrary to the original intention of China's dual channel of environmental civil public interest litigation system and ecological environmental damage compensation system to achieve ecological environmental damage relief, and there is a risk of marginalizing and deflating the environmental civil public interest litigation system.[6] In practice, there are cases where the government has carried out ecological and environmental damage compensation consultation or has filed ecological and environmental damage compensation lawsuits, but the enthusiasm of social organizations to file lawsuits is greatly undermined by the lack of financial support and imperfect regulations.

In administrative public interest litigation, there are four kinds of criteria for judging that administrative organs do not perform their duties in accordance with the law: (1) administrative organs have tried their best to fulfill the procuratorial recommendations, but due to the constraints of external factors, the environmental public interest is still in a damaged state or the improvement is not effective; (2) administrative organs have effectively fulfilled the procuratorial recommendations, but have not made timely responses to them; (3) administrative organs have only partially fulfilled the procuratorial recommendations, but not all of them; (4) administrative organs have only partially fulfilled the procuratorial recommendations; (5) administrative organs have not fulfilled the procuratorial recommendations; (6) administrative organs have not fulfilled the procuratorial recommendations. (3) the administrative organ has only partially fulfilled the content of the recommendation; (4) the content of the recommendation is inconsistent with the administrative organ's authority, such as the need to improve certain legislative provisions.[7] The main manifestation of inappropriate timing of procuratorial intervention in administrative affairs is the inappropriate filing of administrative public interest litigation. This inappropriateness is mainly due to the inadequacy of the current laws and regulations on administrative public interest litigation and the lack of clarification on the interface between pre-litigation and litigation procedures and the review benchmarks for entering litigation procedures, resulting in insufficient basis for regulation. In addition, some procuratorial organs lack practical experience and are prone to poorly grasp the identification criteria for supervising the legitimacy of administrative affairs when the normative basis is insufficient.

4.2. The Modesty of Not Reaching One

Modesty in administrative public interest litigation is reflected in the appropriately limited review of administrative acts by the procuratorate to respect the administrative autonomy of the administrative organs. Article 20 of the revised Organic Law of the People's Procuratorates in 2018 clearly stipulates the public interest litigation authority of the people's procuratorates, making it theoretically justified for the procuratorate to intervene in administrative affairs with its constitutional status as a "legal supervisory organ". In addition, the "principle of maturity" and the "principle of exhaustion of remedies" are the twin principles that procuratorial organs need to abide by, that is, the administrative organs should be given a certain period to self-correct their responsibilities, which is the unique design of the pre-litigation procedure of public interest litigation in China. This is the uniqueness of the pre-litigation procedure.[8] The pre-litigation procedure is designed to fully implement the above two principles and to prevent the administrative power from being infringed by the abuse of supervisory authority by the procuratorial organs, which is bound by the legal procedures. However, some scholars analyzed 100 administrative public interest litigation cases and found that when some administrative organs failed to fully perform their duties based on some objective reasons with legitimacy, the procuratorial organs still filed administrative public interest litigation against them.[9] In this case, the procuratorial organ should maintain the modesty mentioned above. [9] If it ignores these objective reasons and directly initiates administrative public interest litigation, it may face the risk of interfering in the appropriate administrative affairs.

The pre-litigation procedure of civil public interest litigation should also implement the lawful modesty of public interest litigation. The essence of civil public interest litigation is still a civil dispute, which is a dispute between private rights, and the public power should not intervene. The public interest litigation power of the people's procuratorate is to give way to

other subjects, and is not the first in line, that is, the defendant is not the primary responsibility of the procuratorial organs to initiate litigation.[10] Therefore, in the pre-litigation procedure, the procuratorial authorities should do the original purpose and meaning of the system, which is to supervise and support the relevant social organizations to collect evidence and file lawsuits, and not to intervene too early, too much and too deeply.

4.3. Extra-legal Factors of the Implication

Legal rules, as rules of binding force or standards of judgment of behavior, usually have general characteristics and cannot be fully applied to specific events, so the rules also need to be interpreted in the process of legal use.[11] Although a relatively sound methodology for interpreting the law has been developed, in judicial practice, extra-legal factors such as utilitarianism or consequential considerations are inevitably intermingled.[12] Although the Civil Procedure Law of the People's Republic of China provides for the reversal of the burden of proof in environmental public interest litigation brought by environmental protection organizations, it is still necessary to prove that there is a correlation between the polluter and the polluter. Lastly, the direct filing of civil public interest litigation by the procuratorial authorities may result in an imbalance in the status and power of the two parties, and the excessive number of environmental litigation cases may increase the workload of the procuratorial authorities.

For environmental public interest litigation, some courts still hold the habitual thinking of "environmental issues are not my responsibility, but the government's" and are unwilling to take "political responsibility", thus trying to find "loopholes" in the legal provisions " to prevent or delay social organizations from filing lawsuits in environmental cases that have a large impact. In this context, the procuratorial organs and the courts are the same judicial organs, with an independent legal status free from interference by administrative organs, by the procuratorial organs to support environmental social organizations to bring environmental public interest litigation is conducive to alleviate the court's doubts, share the court's "political responsibility" to help the court enter the role as soon as possible, in order to solve the environmental public interest litigation file difficult The problem.

5. The Path to Perfection

As mentioned above, through the examination and analysis of the practical dilemma of the pre-prosecution public interest litigation procedure, corresponding suggestions are made from the theoretical and practical perspectives on the real problems.

5.1. Optimize the Institutional Arrangement for Ecological and Environmental Damage

The procuratorial public interest litigation system and the ecological environmental damage compensation system are both important components of the relief system for public welfare damage in the field of natural resources and environment. They should cooperate and complement each other to jointly build a complete relief system for public welfare damage to the natural ecological environment. [13] The existing rules and regulations have determined that the lawsuit of compensation for ecological environmental damage is the preferred way of environmental relief in the two lawsuits of environmental civil public interest. Under this institutional arrangement, if social organizations want to ensure the enthusiasm of protecting environmental public interests, they must make corresponding institutional arrangements for the two situations in practice.

In view of the ecological environmental damage has occurred, if the leading social organization initiate civil environmental public interest litigation, and the government has yet to carry out ecological environment damage compensation consultation or by ecological environment compensation proceedings should be covered completely by the civil environmental public interest litigation ecological environmental damage compensation negotiations and litigation, in order to avoid repeated consultations and repeat the referee. After civil environmental public interest litigation cases in the courts, the government and the ecological environment shall be notified in authority at the same time, ask the government no longer otherwise start ecological environmental damage compensation program, and in accordance with the authority to the government as civil environmental public interest litigation plaintiff together, or to allow the government to participate in the meeting to support the prosecution civil environmental public interest litigation.

If the government has already started the ecological and environmental damage compensation consultation but has not yet filed the ecological and environmental damage compensation lawsuit, the court should suspend the trial of the environmental civil public interest lawsuit and inform the social organizations to participate in the ecological and environmental damage compensation consultation between the government and the indemnifier first. Polluters" two parties involved in closed consultation into "government - social organizations - public - polluters" multi-participation open consultation. However, if no agreement on compensation is reached within a reasonable period, the court should continue to hear the civil environmental public interest litigation, and the government may participate in the civil environmental public interest litigation as a co-plaintiff or as a supporter, but the government may not file a separate lawsuit for compensation for ecological and environmental damages.

5.2. Strengthen the Linkage Between the Prosecution and Social Organizations

"The optimal use and allocation of resources in the economic sense and efficiency are implicit in each other. The establishment of the value of efficiency, so that the intrinsic value of the law and the mission of its time to maintain unity." [14] In the pre-litigation process, prosecutors should be positioned as "litigation helpers". First, the establishment of

evidence-sharing mechanisms between the procuratorate and social organizations. In the field of environmental civil public interest litigation, social organizations, given their flexibility and grassroots nature, may have clues that are not available to the procuratorial authorities, while the procuratorial authorities, thanks to their function as public authorities, have an absolute advantage in investigating and collecting evidence and identifying the facts of the case. At this time to strengthen the evidence sharing mechanism between the two can undoubtedly greatly reduce the difficulty in identifying the facts of the case and investigation and evidence collection. Second, Clarify the specific content of the prosecutorial support. In terms of the initiation of support for prosecution, this can be done by way of "application by the environmental protection society", and the procuratorial authorities need to conduct a preliminary investigation of the environmental protection society's ability to investigate and collect evidence, the target situation and the impact of the case, and start the support for prosecution process for environmental protection society organisations that meet the conditions for support for prosecution. In the process of supporting the prosecution, the plaintiff status of environmental social organisations should be fully respected, and they should be involved in the whole process of litigation, to avoid the problem of virtualisation of the support prosecution system by refining the relevant rules. The use of the support for prosecution system can effectively motivate environmental NGOs to file civil public interest lawsuits and link them with the procuratorial authorities in order to improve the quality of environmental civil public interest litigation. In addition, when supporting the prosecution, the prosecution is neither a party nor agent AD litem. In other words, the Civil Procedure Law should give the procuratorial organ the legal status as an independent participant in the proceedings, and clearly stipulate its rights and obligations. [15]

5.3. Establish Multiple Standards for Reviewing Administrative Actions

In the administrative public interest litigation, the court should apply different standards to the review of administrative organs' performance of their duties, and the procuratorial organs should also initiate public interest litigation according to the specific situation. First, the single standard of review should be abandoned. For example, in environmental administrative public interest litigation, the actual effect of rectification can be observed, whether the harm has been curbed or eliminated to a certain extent. The effect of rectification cannot be judged by the sole criterion of "complete restoration of the original state", but should be judged according to specific cases. Therefore, in the future operation of the pre-litigation process, can consider the introduction of third-party assessment mechanism, the difficult to judge the recovery of the environment, by professionals to assess. Secondly, attention should be paid to whether the administrative organ has clarified the rectification period or long-term treatment mechanism in the response to the procuratorial recommendation. For example, in some cases, the performance of administrative organs not only depends on their own actions, but also on the approval of their superiors, the cooperation of the relatives and the cooperation of other organs. Therefore, for such cases, the procuratorial authorities should not only pay attention to whether the administrative organ has issued a Notice of Order to Correct the Violation, but also whether the administrative organ has taken the initiative to report the current rectification situation and further follow-up measures, so that the procuratorial authorities can have a comprehensive grasp of the remedial situation of the illegal or inactive behavior. In environmental public interest litigation, due to the constraints of the objective situation, it is difficult to restore the damaged condition immediately within a short period of time, which requires the administrative organ to establish a long-term treatment mechanism for the ecological restoration process. In the case of state-owned land use right transfer, the recovery of state-owned land depends on the cooperation of the administrative counterpart, and other disputes may be involved in the process, so the administrative organ should also specify further follow-up measures. In this way, the procuratorate has sufficient information to determine whether the proceedings should continue. In fact, the Supreme People's Procuratorate has issued a guiding case that implies that it is not appropriate to use only a single standard of review. According to "Prosecution Case No. 30: The Supreme People's Procuratorate held that the damage to the public interest of the state and society should be judged by the actual infringement of the public interest caused by the illegal administrative act, and whether the public interest is removed from the infringed state after the issuance of the procuratorial recommendation. This also indicates that after the issuance of procuratorial recommendation, the only criterion is not whether the public interest is fully restored, but whether the public interest is removed from the "infringed" state can also be a cause of action.

6. Conclusion

The pre-litigation procedures of civil and administrative public interest litigation have their own advantages and characteristics. Civil environmental public interest litigation pre-litigation procedure can better save judicial resources, through the judicial correction of environmental problems directly, to achieve the common governance of social interests. The administrative public interest litigation procedure reflects the indirect nature of the procuratorate's governance of the public interest in the environment, by urging the administrative organs to actively perform their duties, thus avoiding further damage to the public interest. Secondly, if it fails to focus on the modesty of the procuratorial organs, the lack of the top-level design system and extra-legal factors, it will not be able to fully play the institutional function of procuratorial public interest litigation, which will largely result in a waste of judicial resources. In the pre-litigation procedure, it is necessary to summarize the practical dilemma, clarify the sequence of consultation and litigation of

ecological damage compensation, strengthen the linkage between procuratorial organs and social organizations, reasonably apply the system according to the specific situation and establish the review standard of administrative behavior, and then promote the environmental public interest cases to be solved in the pre-litigation procedure to achieve the best judicial status.

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