

Research on the Determination of "Major Risks" in Preventive Environmental Civil Public Interest Litigation

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Abstract: The green rule of law in the 21st century promotes the transformation of environmental justice to pre-emptive prevention, and the preventive environmental civil public interest litigation system established by relevant judicial interpretations in 2015 provides an important judicial tool for ecological protection. However, as a core element, "major risk" lacks clear norms in its connotation, object, subject and standards, resulting in differences in cognition, misalignment of rights and responsibilities, and inconsistent judgments in judicial practice. To this end, this paper proposes to clarify that the object of "major risk" is limited to the public interest of the environment, establish the core determination status of the court, and construct the elemental rules of "illegality of the act, causal relationship, and possibility of actual harm" based on the criterion of "highly probable damage and serious irreversible consequences".

Keywords: Preventive Environmental; Public Interest Litigation; Major Risks

1. Introduction

In 2015, the preventive public interest litigation clause was established for the first time, giving specific entities the right to file lawsuits against pollution and ecological damage that "harm the public interest", breaking the traditional limitation of "no damage is no remedy". However, the system is still in its infancy, and there is a lack of clear norms on core issues such as the definition of the connotation of "major risks", the scope of the object, the subject and standards of identification, resulting in cognitive differences, misalignment of powers and responsibilities, and different judgment standards in judicial practice. To this end, this paper focuses on the above core issues, aiming to improve the relevant procedural rules and give full play to the forward-looking value of

ecological protection of the system.

2. Definition of the Connotation of "Material Risk" in Preventive Environmental Civil Public Interest Litigation

2.1 Determination of the Connotation of "Risk" in the "Major Risk" of Preventive Environmental Civil Public Interest Litigation

Scholars Yu Wenxuan and Mou Tong believe that major risk refers to behaviors that can be judged by evidence and current science and technology in litigation as potentially causing significant damage to the environment. [1] Scholars Qin Tianbao and Lu Yang believe that major risks mainly refer to environmental pollution and ecological damage, and social and public interests pose a real and urgent threat. [2] According to the contextual interpretation, "risk" can be interpreted as 'an act that has not yet led to actual damage results.' But there is a possibility that it will lead to a series of risks, and this possibility can be traced." There is a debate between subjective and objective theories about the nature of risk: the subjective theory believes that risk is a negative emotion caused by the potential adverse consequences of public perception of behavior, which belongs to subjective psychological feelings; The objective theory advocates that risk is an objective existence independent of cognition, and the core is the possibility of adverse consequences caused by behavior, and this possibility can be transformed into real damage. From the perspective of risk sociology, the connotation of risk is broader, including not only potential negative outcomes and possible events, but also human cognition and subjective feelings about these events. With the advancement of science and technology, globalization and environmental changes, various new risks have emerged in modern society, including global risks such as climate change and nuclear energy safety, as well as individual-level risks such as disease and

unemployment. The core of risk sociology is to study the impact of these risks on individuals and society, as well as the way human beings cognize, evaluate and respond to risks.

2.2 The Relationship between "Material Risks" and "Environmental Risks" in Preventive Environmental Civil Public Interest Litigation

In preventive environmental civil public interest litigation, material risks fall under the category of environmental risks. It is generally believed that environmental risks are the adverse consequences of human activities or their interaction with the natural environment, which may cause damage to the environment after being transmitted through environmental media [3]. Such major risks are uncertain, and the probability, type and degree of damage are difficult to accurately predict through scientific methods, and can usually be divided into predictable and unpredictable categories. Predictable risks can be measured and assessed with the help of scientific means, and then preventive measures can be formulated to reduce damage [4]; Unpredictable risks are difficult to carry out effective prevention due to high uncertainty and lack of scientific prediction basis. The major risks in preventive environmental civil public interest litigation must be predictable, otherwise the subsequent determination and demonstration will lose their practical basis.

In addition, such significant risks are closely related to the rapid development of science and technology. Although high technology can be predicted and prevented in theory, it puts forward high requirements for the scientific and technological level of risk assessment and the scientific and technological knowledge reserve of the identification subject.

3. Practical Exploration of "Major Risk" Identification

3.1 Typical Cases

This paper attempts to reveal the prominent problems in the determination of "major risks" in current judicial practice by sorting out the existing typical cases of preventive environmental civil public interest litigation (see Table 1).

3.2 Problem

3.2.1. Scope of "material risk"

In the Yunnan oil refining case, the plaintiff argued that oil refining not only harmed the natural environment, but also infringed on residents' safety and health expectations, so there was a major risk of harming the public interest. The plaintiffs in the other three cases all claimed significant risks and filed preventive lawsuits only on the grounds that their actions would have a significant impact on the natural ecological environment. This difference reflects the divergence in the understanding of the core direction of "major risk" - environmental public interest in China's judicial practice, and it is urgent to clarify whether the plaintiff only needs to prove that the behavior has a major risk to the ecological environment or whether it needs to prove that it has a dual risk to the ecological environment and personal health at the same time. The unclear definition of the basic object of environmental public interest directly affects the identification of major risks, which not only hinders the development of the preventive environmental civil public interest litigation system, but also dampens the enthusiasm of social organizations to participate in litigation and safeguard environmental public interests.

3.2.2. Division of rights and responsibilities of the determination of "material risks"

The determination of "material risk" is the prerequisite for filing a preventive environmental civil public interest litigation, and the attribution of the subject is different and controversial in judicial practice. Some courts directly accept the EIA documents of administrative organs, and even hand over the decision-making power of preventive measures to administrative organs, which has caused a difference between the court and the administrative organ who is the subject of qualified determination. [5] One view is that the determination of "major risk" belongs to the category of case facts and is the core content of the court's adjudication power, and the opinions of administrative organs and expert assistants are only judicial reference materials. [6] Another view is that preventive environmental civil public interest litigation is a law enforcement litigation, and environmental impact assessment is the statutory duty of administrative organs. [7] This dispute is evident in typical cases: in the Green Peacock case, the court was not limited by the approval opinions of the administrative organs, and independently determined that the project had significant risks based on the

plaintiff's evidence; In the PetroChina Yunnan refining case, the court directly rejected the plaintiff's request based on the EIA documents of the administrative organs. Therefore, clarifying the subject of "major risk" is the key to

clarifying the boundaries between the responsibilities of courts and administrative organs, resolving the confusion of rights and responsibilities, and improving the efficiency of litigation promotion.

Table 1. Typical Cases of Preventive Environmental Civil Public Interest Litigation

Case name and case number	The plaintiff pleaded	Judgment result	Reasons for the trial
Wu Xiaoye Maple Case (2015) Gan Min Chu Zi No. 45	The defendant was required to take measures to suspend the development of the Yalong River water elevator stage until the danger could be avoided	The plaintiff prevailed	In view of the grade of Acer five-leaved in the red list of biodiversity and the potential risks that exist after the completion of the tooth root cascade power station involved in the case, it was determined that the defendant should ensure that the development plan did not damage the living environment of Acer five-leaved maple
Green Peacock Case (2020) Yun Min Zhong No. 824	The defendant was required to immediately stop the construction of the hydropower station, not to intercept water storage, and not to cut down the vegetation in the flooded area of the hydropower station	The plaintiff prevailed	The evidence provided by the plaintiff suggests that there is an unquestionable possibility of significant risk to the environment's biological habitats, and that the damage is significant and irreversible, given that the project will affect the ecosystem of the region as a whole. Therefore, the court held that the continued construction of the project would pose a significant risk to the green peacock habitat, Chen's cycads, and the ecosystem and biosecurity as a whole
Huilongshan Hydropower Station case (2018) Yun 04 Early Republic of China	The defendant is required to stop the infringement, eliminate the risk, and bear the restoration fee for ecological damage caused by his own actions	Mediation and settlement	—
Friends of Nature v. PetroChina Yunnan Petrochemical Co. Ltd (2017) Yun Min Zhong No. 417	The court was requested to revoke the ruling not to file a case and ordered the entrusted environmental civil public interest litigation case of Beijing Chaoyang District Friends of Nature Environmental Research Institute v. PetroChina Yunnan Petrochemical Co. Ltd	The appeal was dismissed and the original ruling was upheld	project in question has been approved by the national environmental protection authority. Therefore, the evidence submitted by the plaintiff cannot demonstrate that "the public interest has been harmed" or that "the defendant's actions have harmed the public interest or pose a significant risk of harming the public interest."

Source: Judgment Documents Network

3.2.3. Refinement of the degree standard of "major risk"

The Interpretation of Environmental Civil Public Interest Litigation does not clarify the connotation and extension of "material risk", and judicial personnel can only use this vague concept to measure the environmental risk that is inherently uncertain, and it is difficult to judge whether there is a risk of ecological and environmental damage if the behavior that does not cause actual damage is not the risk of ecological and environmental damage. The essence of major risks is the ecological and environmental risks naturally generated by human transformation, which are scientifically

uncertain, and cannot be quantified but can be delineated to make them concrete. The definition of "major", the conceptual correlation between "major risk" and "danger" in the Interpretation, and the difference in probability all need to be clarified urgently.[8]

3.2.4. Establishment of a rule system for the identification of "major risks"

The lack and inconsistency of this standard not only puts the plaintiff in the dilemma of redundant evidence, but also makes the court face the problem of determination. For example, in the PetroChina Yunnan refining case, the court ruled that the plaintiff did not accept it because of insufficient evidence; In the Green Peacock case, the court was not limited by the

administrative approval opinion and recognized the existence of major risks based on the plaintiff's evidence, but the refining case directly rejected the claim based on the administrative EIA documents. The court's reference standards for administrative organs' opinions are very different, and the different judgment results of the two cases directly confirm the reality that there is no unified standard for determining "major risk".

4. Determination of "Material Risk"

4.1 Clarify the Scope of the Object

The essence of the definition of the basic object of "major risk" is to clarify the object of relief in preventive environmental civil public interest litigation - the environmental public interest, which is the key to determining whether the behavior constitutes a risk of significant damage to the environmental public interest. [9] The revision of the crime of environmental pollution in China's legislation marks the change in the focus of protection from personal and property rights and interests to the ecological environment itself. [10] Although environmental civil public interest litigation and private interest litigation exist in parallel, the value pursuit is completely different: private interest litigation focuses on protecting the personal and property rights and interests of individuals, while environmental civil public interest litigation focuses on protecting the ecological environment and ensuring ecological safety.

As a subcategory of environmental public interest litigation, the basic object of preventive environmental civil public interest litigation can be defined according to the basic theory of environmental public interest litigation: although environmental infringement damage is divided into two categories: environmental damage itself and double damage to environmental and personal rights and interests, but from the original intention of system design, the core of the protection of environmental public interest litigation is the environmental public interest, and the direct object of infringement of pollution and ecological damage is the ecological environment itself. Article 29 of the Interpretation of Environmental Civil Public Interest Litigation also clarifies the principle that public interest litigation and private interest litigation go hand in hand. Therefore, the basic object of "material risk" should be limited to the

ecological environment itself, exclude personal and property rights and interests, and clarify this single object, which can effectively avoid the intersection of judicial application between public interest and private interest litigation and save judicial resources.

4.2 Establish the Main Body of Recognition

The author believes that the subject of determination of "material risk" should belong to the court rather than the administrative organ. First of all, the determination belongs to the category of determination of the facts of the case, which is a key link in judicial trial, and is under the jurisdiction of the court's jurisdiction, and the Judicial Interpretation of Environmental Civil Public Interest Litigation, which regulates this type of litigation, also determines that it is a judicial judgment matter for judges to exercise judicial power, and administrative organs are not qualified subjects. Secondly, compared with administrative organs, courts have more professional comprehensive argumentation ability and fair adjudication advantages, and can neutrally carry out scientific balance of interests and value judgments on the economic and social benefits and negative ecological impacts of environmental use behavior. [11] At the same time, in response to environmental risk problems that administrative organs have not been able to solve, the court should take the initiative to exercise its judicial power, play the role of the last line of defense for judicial remedies, and use judicial power to supervise environmental administrative law enforcement. Therefore, the court should make a scientific judgment based on the evidence presented by both parties, combined with the opinions of expert assistants, technical appraisers, administrative organs, the public and other subjects. When the court exercises this determination power, it is even more necessary to adhere to the principle of trial independence, eliminate external interference, reasonably exercise discretion in combination with the facts of the case and various reference materials, handle cases prudently, independently, and fairly, and effectively ensure judicial justice.[12]

4.3 Clarify the Degree Standard

The potential harm of environmental infringement can be classified into three levels: danger, risk, and residual risk. Danger refers to the situation where environmental damage is

highly likely to occur and preventive measures are urgently needed. Risk indicates that there is a certain possibility of damage, but the necessity of taking preventive measures is relatively low. Residual risk means that the possibility of damage is almost non-existent and no preventive measures are required. In light of the judicial viewpoint in the Green Peacock case, "major risk" is characterized by the fact that the damage has not yet occurred, but if not promptly stopped, it will inevitably cause serious and irreversible environmental damage. Its degree of danger lies between danger and risk, and leans more towards the higher probability of danger. To determine "major risk", two core conditions must be met: first, the probability of damage is high, and the necessity and urgency of taking preventive measures are extremely strong; second, the consequences of the damage must have a serious and irreversible impact on public interests. If the damage is only likely to be minor, it cannot be identified as "major risk". For special ecological environments, such as the habitats of rare and endangered species and unique landforms, even if the probability of damage caused by the infringement is low, but once the damage occurs, the consequences are unimaginable. As long as the possibility of damage cannot be completely ruled out, it should be determined that there is "major risk".

4.4 Construct Identification Rules

"Material risk" is an abstract presumptive risk, and if there is a lack of regulation, it is easy to lead to the problem of indiscriminate litigation and will also cause an imbalance in the protection of legal interests. In this regard, an operable elemental judgment rule can be constructed to determine that "material risk" must meet three core elements: first, the defendant's behavior clearly violates the duty of care under the Environmental Protection Law, is significantly illegal or has caused a danger to the environmental public interest; second, there is a causal relationship between the defendant's behavior and the potential abstract danger; Third, the possibility of the defendant's behavior being transformed into actual damage is extremely high, and from the perspective of society, the consequences of the damage are serious, irreversible and long-term. The judge may judge whether the behavior constitutes a material risk of harming the public interest of the environment based on the above elements based on the

evidence presented by the plaintiff and the supporting opinions of professionals from all parties.

At the same time, the concept can be concretized from the dimensions of "major" and "danger": "danger" can be divided into two categories: "danger" can be divided into two categories: "dangerous" and "species", and the unique value of the protected object should be considered when judging. [13] The criteria for determining "majority" can be determined with reference to the judicial interpretation of environmental pollution criminal cases issued by the two Supreme People's Courts in 2023, through scientific and technological assessment of the actual harm results that may be transformed into risks, and by reference to the relevant situations of "serious environmental pollution" and "serious circumstances" in the interpretation.

5. Summary

The preventive environmental civil public interest litigation system is an important development of China's environmental public interest litigation system, which implements the principle of "protection first, prevention first" in the Environmental Protection Law into judicial practice, and builds a solid judicial barrier for the pre-protection of the ecological environment. However, the system is still in the development stage, and due to the lack of unified norms on the connotation and object of the core element "major risk", there are problems such as cognitive differences and inconsistent judgment standards in judicial practice, which dampens the enthusiasm of social organizations for litigation and restricts the preventive function of the system. This paper sorts out typical cases such as the Wuxiaoye Maple case and the Green Peacock case, analyzes the dilemmas of "major risks" such as ambiguous object and subject dispute, and proposes a targeted improvement path: clarifying that the object is the public interest of the environment, establishing the core determination status of the court, defining the degree standard of "high probability of damage and serious irreversible consequences", and constructing the elemental rule of "illegality of the act, causal relationship, and possibility of actual harm". Only by realizing the standardization, scientificity and standardization of the identification of "major risks" can we unify the adjudication scale, give full play to the value of the litigation system, let the role of

environmental justice in advance prevention land, and build a solid judicial guarantee for the construction of ecological civilization.

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