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中国最具影响力的环境资源案例
中华人民共和国最高人民法院环境资源审判庭 编

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序　言

生态文明是人类社会进步的重大成果，是实现人与自然和谐共生的必然要求。中国政府高度重视生态文明建设，将生态文明建设纳入国家总体发展战略，持续推进理念、制度和实践创新，谋划开展了一系列根本性、长远性、开创性工作，推动中国生态文明建设和生态环境保护取得历史性成就。

环境司法是环境治理体系的重要一环，在推进环境治理和生态文明制度建设中发挥着不可替代的重要作用。中国最高人民法院于 2014 年 7 月设立环境资源审判庭，负责审理重大环境资源案件，指导全国法院环境资源审判工作，推动构建专业化的环境资源审判体系。截至 2019 年底，中国各级法院共设立环境资源审判庭、合议庭和人民法庭 1353 个。六年来，中国法院通过完善审判体制机制，加强审判队伍建设，健全审判程序规则，依法公正高效审理各类环境资源案件 120 余万件，为推进生态文明建设和绿色发展提供坚强有力的司法服务和保障。

呵护美丽地球、建设美好家园是人类共同愿望。中国法院积极开展中外环境司法合作，尤其注重加强在环境司法案例领域的交流。最高人民法院和联合国环境规划署于 2017 年 9 月签订谅解备忘录，商定在联合国环境规划署法律数据库建立专门的中国环境司法裁判板块，由最高人民法院选送环境资源案例和环境司法白皮书在网站上发布，将优秀的中国环境司法裁判文书与世界各国共享。首批收录的 10 个案例及 2016 年、2017 年发布的《中国环境资源审判》白皮书英文版已于 2019 年 3 月入库。

本书系将首批发布于联合国环境规划署法律数据库的 10 个环境资源案例集结成册。这 10 个案例是从最高人民法院历年发布的环境资源典型案例中选取，包括刑事、民事、行政、公益诉讼各种类型，涵盖大气、水、土壤、矿产、林业、渔业、野生动物自然保护区等环境要素，对于统一中国环境资源案件裁判标准，完善审理规则，发挥司法的评价指引和政策形成功能发挥了重要作用。相信案例英文版的出版对于传播中国环境司法声音，加强中外环境司法案例交流和研究，必将起到积极的推动作用。这里，要感谢欧洲环保协会的支持，使得本书得以顺利面世。

文明因交流而多彩，文明因互鉴而丰富。当前，中国正处于全面深化生态文明体制改革、加快生态文明建设的关键期，中国各级法院在习近平生态文明思想指引下奋力前行。在这个过程中，我们既要立足本国国情、坚持自身特色，又要吸收借鉴世界各国司法文明成果。中国最高人民法院希望通过在国际环境司法领域充分交流、务实合作，为维护全球生态安全、构建人类命运共同体作出积极贡献。

陶凯元

中华人民共和国最高人民法院副院长，二级大法官

Preamble

Ecological civilization is a great accomplishment of human society and the inevitable pathway to harmonious coexistence betweenhuman and nature. Therefore, great importance has been attached to ecological civilization in China and the government has incorporated it into the country's overall development strategy. With constant innovation in theory, practice and institutional design, the country strives to make a series of fundamental, long — term, and groundbreaking arrangements that secure historical progress in environmental protection and in the journey towards ecological civilization.

Environmental justice, integral to the environmental governance system, plays an irreplaceable role in building ecological civilization system. In July 2014, the Supreme People's Court of China set up a specialized Environment and Resources Division to hear major environment and resources cases and guide the environmental adjudication across the court system. Since then, specialized environmental divisions and tribunals have been created within courts of all levels. By the end of year 2019, a total of 1，353 environment and resources divisions, collegial panels and tribunals had been established across China. Over the past six years, more than 1,200,000 environment and resources cases have been heard by law, fairly and efficiently. The court system, with sound adjudication rules, a well—designed mechanism and ever more experienced judges, have provided sound judicial safeguards for ecological civilization and green development.

It is the shared aspiration of mankind to protect the mother earth and build a beautiful home.China's court system has been active in collaborating with its international counterparts in environmental adjudication, with focus on stepping up the sharing and studying of environmental cases. In September 2017, the Supreme People's Court and the UN Environment Programme signed the Memorandum of Understanding to create a Chinese environmental adjudication section in the UN Environment Programme's global online law database, where example cases and white papers on environmental justice will be selected by the Supreme People's Court and then published on the database and shared across the world. The English translation of the first batch of 10 example cases and the White Paper of “China's Environment and Resources Adjudication” 2016, 2017 were already released on the online database on March, 2019.

This book is a collection of the 10 environment and resources cases published in the UN Environment Programme's environmental law database. These 10 cases are selected amongst the environment and resources guiding cases issued by the Supreme People's Court over the previous years, including criminal, civil, administrative, public interest litigations and actions for ecological damages and involving environmental elements such as air, water, soil, minerals, forestry, fisheries, wildlife, natural reserves, and so on. Sharing guiding cases as such can help set a uniform standard and improved rules for environmental adjudication, and strengthen the role of law in behavior guiding and policy formulation. The English publication is believed to be another active step towards publicity of China's environmental justice and more in—depth international exchanges and study on environmental cases. I would like to take this opportunity to thank ClientEarth China, for the publication would not happen without their support.

Civilizations thrive as they learn from each other. China is at a critical stage of comprehensively deepening the reform of ecological civilization system and accelerating

thedevelopment towards ecological civilization. Courts of all levels are making strides under the guidance of Xi Jinping's thought of ecological civilization. At this juncture, we must absorb and learn from the judicial civilizations of other countries while bearing in mind our national conditions and sticking to Chinese characteristics. The Supreme People's Court hopes to contribute to global ecological security and the building of a community with a shared future for mankind through in－depth exchanges and fruitful cooperation in the field of international environmental justice.

TAO Kaiyuan
Justice and Vice－President
The Supreme People's Court
The People's Republic of China

序

人类的生存离不开健康的环境，而健康的环境离不开法治的保障。

人类在环境法治建设领域已经取得了显著的进步，全球现行环境法数量已经在 1972 年的基础上增加了 37 倍，但执法不力仍是环境法治面临的一大挑战。未能全面地实施和执行环境法律已经成为阻碍我们缓解气候变化、减少污染和防止大范围的物种和栖息地丧失的主要威胁之一。

然而，可以看到的是：世界各国的法官在保护环境方面正扮演着越来越积极的角色，这是一个值得鼓励的趋势，因为法官是保证法律实施和执行的最后一道防线。

在这样的大背景下，中国在推进环境法治方面取得的进步无疑是令人振奋的。在最高人民法院的领导下，全中国已经设立了上千个专门的环境资源审判机构，审理了大量的环境案件。

本书整理了中国十大最有影响力的环境案件，将中国不断演进的环境法治体系通过具体的案例呈现出来，为世界其他国家提供了有益参考。正因如此，联合国环境署也在环境署全球线上环境法数据库发布了这十大案例，以此来展现司法系统如何运用环境法的核心原则来保护我们呼吸的空气、饮用的水和食用的鱼。

中国最高人民法院和全国各地的法官正在努力为全人类创造一个健康的环境，联合国环境署期待能继续推进这一良好的合作伙伴关系。

英格·安德森

联合国环境署执行主任

FOREWORD

A healthy environment is the foundation of human life.Without the rule of law, achieving this will be impossible.

We have seen remarkable progress in ensuring the law is fit to protect the environment. There are now 38 times as many environmental laws in place as in 1972. But weak enforcement remains a challenge. Failure to fully implement and enforce laws is one of the greatest threats to mitigating climate change, reducing pollution and preventing widespread species and habitat loss.

However, we are seeing judges around the world play a more vocal role in environmental protection. This is a welcome trend, because judges are often the last line of defense in ensuring laws are implemented and enforced.

With this in mind, it is encouraging to see the advance of environmental law in China.Under the leadership of the Supreme People's Court, China now has more than 1000 dedicated environmental divisions in courts around the country.A significant number of environmental caseshave been handed down.

This publication tells the story of the ten most influential environmental cases in China.These cases weave together an evolving jurisprudence on environmental rule of law, with lessons for the rest of the world. This is why we published the ten cases on UN Environment's global online environmental law database. We hope they will help illustrate how courts can apply core environmental legal principles to protect the air we breathe, the water we drink, and the fish we eat.

We look forward to a continuing partnership with the Supreme People's Court and judges across China who are working towards a healthy environment for all.

Inger Andersen，
Executive Director， UNEP

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一、被告单位德司达(南京)染料有限公司、被告人王占荣等污染环境案

江苏省扬州市中级人民法院
刑 事 裁 定 书

(2016)苏 10 刑终 185 号

原公诉机关江苏省高邮市人民检察院。

上诉单位(原审被告单位)德司达(南京)染料有限公司，住所地江苏省南京市六合区化学工业园区白龙路×号，法定代表人李某甲。

诉讼代表人沈学廉，该公司行政部经理。

辩护人殷庆华，江苏君诚兴律师事务所律师。

上诉人(原审被告人)王军，系德司达(南京)染料有限公司总经理助理。因涉嫌犯污染环境罪，于 2014 年 6 月 10 日被江苏省扬州市江都区公安局刑事拘留，同年 7 月 17 日经江苏省扬州市江都区人民检察院批准，当日由江苏省扬州市江都区公安局执行逮捕。现羁押于扬州市看守所。

辩护人杨冬，江苏三法律师事务所律师。

原审被告人黄进军，男，1971 年 12 月 31 日生，居民身份证号码 43052119711231××××，汉族，广东省梅州市人，大专文化，系德司达(南京)染料有限公司废水/公用工程主管，户籍地广东省梅州市梅江区更楼下×号，捕前住江苏省南京市六合区康而富小区×栋×××室。因涉嫌犯污染环境罪，于 2014 年 6 月 10 日被江苏省扬州市江都区公安局刑事拘留，同年 7 月 17 日经江苏省扬州市江都区人民检察院批准，当日由江苏省扬州市江都区公安局执行逮捕。现羁押于高邮市看守所。

原审被告人王占荣，系南京顺久化工有限公司法定代表人。因涉嫌犯污染环境罪，于 2014 年 5 月 25 日被江苏省扬州市江都区公安局刑事拘留，同年 7 月 1 日经江苏省扬州市江都区人民检察院批准，当日由江苏省扬州市江都区公安局执行逮捕。现羁押于高邮市看守所。

辩护人杨耀雷、李小飞，江苏中盟律师事务所律师。

原审被告人徐某甲，驾驶员。因涉嫌犯污染环境罪，于 2014 年 5 月 27 日被江苏省扬州市江都区公安局刑事拘留，同年 7 月 1 日经江苏省扬州市江都区人民检察院批准，当日由江苏省扬州市江都区公安局执行逮捕。2016 年 7 月 13 日，被江苏省高邮市人民法院决定取保候审。

原审被告人孙某，船工。因涉嫌犯污染环境罪，于 2014 年 5 月 22 日被江苏省扬州市江都区公安局刑事拘留，同年 6 月 26 日经江苏省扬州市江都区人民检察院批准，当日由江苏省扬州市江都区公安局执行逮捕。现羁押于高邮市看守所。

原审被告人钱某，船工。因涉嫌犯污染环境罪，于 2014 年 8 月 15 日被江苏省扬州市江都区公安局取保候审；2015 年 5 月 21 日以及 9 月 20 日、2016 年 3 月 20 日，被江苏省高邮市人民法院决定取保候审。2016 年 9 月 20 日，经本院决定继续取保候审。

江苏省高邮市人民法院审理江苏省高邮市人民检察院指控被告单位德司达(南京)染料有限公司(以下简称德司达公司)、被告人王军、黄进军、王占荣、徐某甲、孙某、钱某犯污染环境罪，被告人黄进军犯非国家工作人员受贿罪一案，于 2016 年 7 月 13 日作出(2015)邮环刑初字第 00003 号刑事判决。在上诉期限内，原审被告单位德司达(南京)染料有限公司、原审被告人王军不服，均提起上诉。本院依法组成合议庭，经过阅卷，提讯了上诉人、原审被告人，听取了上诉单位的诉讼代表人以及各自辩护人的意见，认为案件事实清楚，上诉人、原审被告人、上诉单位的诉讼代表人以及各自辩护人亦未提出新的事实和证据，故此依照《中

华人民共和国刑事诉讼法》第二百二十三条的规定，决定不开庭审理。本案现已审理终结。

原判决认定：一、污染环境罪。被告单位德司达公司于2004年9月29日注册成立，经营范围为纺织及化纤抽丝用助剂、油剂、染化料生产。2013年9月至2014年5月，德司达公司行政部经理兼总经理助理被告人王军、废水公用/工程主管被告人黄进军明知被告人王占荣经营的南京顺久化工有限公司无废酸处置资质，仍多次将公司生产过程中产生的废酸以每吨处置费580元的价格交给王占荣处置。王占荣明知丁卫东(另案处理)无废酸处置资质，仍雇佣被告人徐某甲驾驶苏A××××××号槽罐车将其中的2828.02吨废酸运至丁卫东的船上，以每吨150元的价格交给丁卫东处置。丁卫东安排船工被告人孙某、钱某与张建福、王礼云(均另案处理)等人驾驶套牌俞垛机1048号船，将其中2698.1吨废酸倾倒至泰东河、新通扬运河水域的河水中。其中，孙某参与排放1729.82吨，钱某参与排放318.78吨。因司法机关调查泰州“5.15”重大污染环境案，丁卫东将存放未排放的129.92吨废酸的套牌俞垛机1048号船停放在扬州市祥发资源综合利用有限公司码头，后被查获。经江苏科技咨询中心评估，上述废酸属于危险废物。德司达公司、王军、黄进军、王占荣、徐某甲、孙某、钱某归案后如实供述主要犯罪事实。二、非国家工作人员受贿罪。2011年1月至2014年春节期间，被告人黄进军利用担任德司达公司罐区主管、废水/公用工程主管的职务便利，向王占荣索要处置废酸的提成费，后八次索取王占荣所送的提成费计人民币28.1万元，并为其在运送废酸等方面谋取利益。具体如下：1.2011年1月的一天，被告人黄进军在王占荣的汽车内，收取王占荣人民币2万元。2.2011年七八月份的一天，被告人黄进军在王占荣的办公室内，收取王占荣面额3万元承兑汇票。3.2011年的一天，被告人黄进军通过银行转账方式，收取王占荣人民币1万元。4.2011年底的一天，被告人黄进军在王占荣的汽车内，收取王占荣面额10万元的承兑汇票。5.2012年8月的一天，通过银行转账方式，被告人黄进军收取王占荣人民币8000元。6.2013年7月左右的一天，被告人黄进军在王占荣的办公室内，收取王占荣人民币3万元。7.2014年春节前的一天，被告人黄进军在王占荣的汽车内，收取王占荣人民币5万元。8.2014年春节后的一天，通过银行转账方式，被告人黄进军收取王占荣人民币3.3万元。上述事实，有相关物证、书证，证人证言，被告人的供述和辩解，鉴定意见，勘验检查工作记录等证据证明。

原审人民法院认为：被告单位德司达公司违反国家环境保护法律规定，明知被告人王占荣无废酸处置资质，而将本公司生产过程中产生的废酸交由其处置；被告人王占荣明知丁卫东亦无废酸处置资质，仍将德司达公司的废酸转交给其处置；被告人徐某甲明知其运输的是化工废液以及丁卫东可能没有处置废酸的能力，而帮助王占荣进行运输作业；被告人孙某、钱某明知是化工废液，仍然违反国家规定偷偷排放河中，最终导致严重污染环境且后果特别严重，均已构成污染环境罪，且属共同犯罪。被告人王军、黄进军明知王占荣没有废酸处置资质，仍然在各自职责范围内促成交易进行，导致严重污染环境的后果发生，是德司达公司直接负责的主管人员和其他直接责任人员，依法应当以污染环境罪追究刑事责任。被告人黄进军利用职务上的便利，索取被告人王占荣的财物，为其谋取利益，数额较大，其行为构成非国家工作人员受贿罪。黄进军一人犯数罪，依法应当数罪并罚。

在污染环境共同犯罪中，德司达公司和王占荣起主要作用，是主犯，应当按照其所参与的全部犯罪处罚；徐某甲帮助王占荣运输废酸，起辅助作用，是从犯，应当从轻或者减轻处罚；孙某、钱某系丁卫东的雇佣人员，居于从属地位，是从犯，应当从轻或减轻处罚。各被告人归案后能如实供述基本犯罪事实，系坦白，可以从轻处罚。黄进军具有索贿情节，对其非国家工作人员受贿罪可酌情从重处罚；其在案发后主动退出赃款，可酌情从轻处罚。德司达公司犯罪后配合司法机关调查、采取补救措施，可酌情从轻处罚。徐某甲在共同犯罪中起辅助作用、钱某参与犯罪相对较少，且认罪态度较好，有一定的悔罪表现，对其判处缓刑不致再危害社会。依照《中华人民共和国刑法》第三百三十八条、第三百四十六条、第一百六

十三条第一款、第三十条、第三十一条、第二十五条第一款、第二十六条第一、四款、第二十七条、第六十七条第三款、第六十九条、第七十二条第一、三款、第七十三条第二、三款、第六十四条，《最高人民法院、最高人民检察院〈关于办理环境污染刑事案件适用法律若干问题的解释〉》第三条第(十一)项、第七条之规定，判决：1.被告单位德司达(南京)染料有限公司犯污染环境罪，判处罚金人民币二千万元。2.被告人王军犯污染环境罪，判处有期徒刑三年六个月，并处罚金人民币三万元。3.被告人黄进军犯污染环境罪，判处有期徒刑三年，并处罚金人民币二万五千元；犯非国家工作人员受贿罪，判处有期徒刑二年；决定执行有期徒刑四年，并处罚金人民币二万五千元。4.被告人王占荣犯污染环境罪，判处有期徒刑五年，并处罚金人民币一百八十万元。5.被告人徐某甲犯污染环境罪，判处有期徒刑二年六个月，缓刑三年六个月，并处罚金人民币五万元。6.被告人孙某犯污染环境罪，判处有期徒刑二年六个月，并处罚金人民币二万元。7.被告人钱某犯污染环境罪，判处有期徒刑一年，缓刑二年，并处罚金人民币一万元。8.扬州市江都区公安局暂扣被告单位德司达(南京)染料有限公司的人民币一千万元抵充罚金，上缴国库。9.没收被告人黄进军退出的违法所得人民币二十八万一千元。10.继续追缴被告人王占荣违法所得人民币一百三十九万六千九百五十一元六角。

上诉单位德司达公司及其辩护人提出的上诉理由和辩护意见是：1.一审判决将德司达公司员工的行为上升为公司意志，缺乏理论和事实依据，不应认定德司达公司为主犯。2.江苏省环境科学研究院出具的环境损害评估报告中的检材来源不合法，且内容不科学，鉴定结论错误，属于非法证据，应当予以排除。3.对德司达公司判处的罚金数额过高。

上诉人王军及其辩护人提出的上诉理由和辩护意见是：1.本案处置危险废物的数量不属于司法解释中的其他后果特别严重情形，对王军的量刑应在有期徒刑三年以下。2.在共同犯罪中，直接非法处置废物的主体责任更大，王军实施的行为是完成公司总经理交办的工作，不属于直接负责的主管人员，在共同犯罪中起辅助、次要作用，应认定为从犯，请求改判缓刑。

原审被告人王占荣的辩护人提出的辩护意见是：1.江苏省环境科学研究院出具的环境损害评估报告属于非法证据，应当予以排除。2.认定本案构成污染环境罪的后果特别严重情形不当。3.王占荣如实供述罪行，有悔罪表现，可以从轻或者减轻处罚，一审判处的刑期和罚金过重。

经审理查明：

一、污染环境事实

2004 年 9 月 29 日，上诉单位德司达公司注册成立，经营范围主要是纺织及化纤抽丝用助剂、油剂、染化料生产。该公司生产过程中会产生废酸液体，属于危险废物，依照国家相关规定应当交由具有资质的企业进行处置。

2010 年 9 月，时任德司达公司执行助理的上诉人王军受公司指派联系处置废酸事宜，后与经营南京顺久化工有限公司(以下简称顺久公司)的原审被告人王占荣进行联系，查看了该公司仅具有经销危险化学品资质的相关资料，后与王占荣达成了每吨 580 元处置废酸费用的口头协议，得到公司确认后，德司达公司产生的废酸液体均交由王占荣进行处置。时任公司罐区主管的原审被告人黄进军明知王占荣没有处置资质，仍具体负责与拉运废酸的王占荣直接对接，王军负责审核支付处置废酸费用。2012 年 9 月，李某甲接任德司达公司总经理，黄进军于 2013 年 1 月 1 日起担任公司废水/公用工程主管，王军于 2013 年 6 月 1 日起担任公司行政部经理兼总经理助理，继续负责公司处置废酸工作。

2013 年 9 月，王占荣明知丁卫东(另案处理)没有处置废酸资质，仍与丁卫东达成每吨 150 元处置费用的口头协议，并指使原审被告人徐某甲驾驶苏 A×××××号槽罐车从德司达公司拉运废酸，直接送至丁卫东停放在江都宜陵码头、姜堰马庄码头、姜堰清源净水剂厂码头、姜堰振昌钢厂码头等处的船上，至 2014 年 5 月间，交由丁卫东处置的废酸共计 2828.02 吨。

在此期间，丁卫东多次指使原审被告人孙某、钱某以及张建福、王礼云(均另案处理)等人于夜间驾驶船只，将其中2698.1吨废酸直接排放至泰东河和新通扬运河水域的河道中，其中，孙某参与排放1729.82吨，钱某参与排放318.78吨。泰州“5·15”重大污染环境事件发生后，丁卫东未及排放的储存在套牌俞垛机1048号船内的129.92吨废酸在扬州祥发资源综合利用有限公司码头被查获。

江苏科技咨询中心、江苏省环境科学研究院专家论证分析认为，德司达公司产生的上述废酸液体属于危险废物，其中主要成分为硫酸并含有大量有机物，硫酸浓度较高且具有极强的腐蚀性，对生物、水体、环境的危害极大，废酸中残存的大量有机废物对生物环境也会造成长远的累积性危害。

二、非国家工作人员受贿事实

2011年1月至2014年初，原审被告人黄进军利用担任德司达公司罐区主管、废水公用/工程主管的职务便利，以每吨20元、50元的比例向王占荣索取提成费，通过每月核对拉运废酸的数量，王占荣先后八次以现金、承兑汇票或者银行转账的方式向黄进军支付提成费计人民币28.1万元。此节事实，系王占荣归案后主动交代，黄进军如实供述了收取提成费的行为。

上述事实，有下列证据予以证明：

一、证明德司达公司主体身份以及王军、黄进军职务情况的证据

1．德司达公司企业法人营业执照以及出具的证明证实，该公司的营业期限自2004年9月29日至2054年9月28日，公司类型为有限责任公司(外国法人独资)，住所地南京化学工业园区白龙路×号，经营范围为一般经营项目，包括纺织及化纤抽丝用助剂、油剂、染化料生产(阳离子和VAT染化料、靛蓝溶液、活性染化料项目)等，李某甲自2012年9月1日担任总经理，同年10月7日起担任公司法人。

2.德司达公司有关岗位描述的文件以及出具的两份证明证实:王军于2007年6月至2011年6月30日担任执行助理,2011年7月1日至2013年5月31日担任公共关系副经理,2013年6月1日起担任公司行政部经理兼总经理助理，工作职责为协助总经理调查研究，在总经理领导下负责具体管理工作的布置、实施、检查、督促、落实执行工作，王军在岗位责任书上签名确认。黄进军于2010年1月1日至2010年12月31日担任罐区高级班长，2011年1月1日至2012年12月31日担任罐区主管，负责罐区管理和废水运行管理，2013年1月1日起担任废水公用/工程主管，负责全厂能源系统的供应管理及废水的运行管理工作。

3．证人李某甲(德司达公司总经理)的证言证明，德司达公司是2004年注册成立的一家外资独资公司，后浙江龙胜集团收购了部分股份，其于2012年9月担任公司的法定代表人和总经理，王军是总经理助理。

4．证人薛某(德司达公司设备副总)的证言证明，2013年6月1日，李某甲任命王军为总经理助理和行政经理，岗位责任在岗位描述中有详细说明，李某甲和王军签名确认，公司员工都是按照各自的岗位描述进行工作。

5．上诉人王军在侦查阶段的供述以及辨认笔录证明，德司达公司成立于2004年，先后有两任德籍总经理，2012年间，公司股权转让给浙江龙胜集团，李某甲从2012年9月担任法定代表人和总经理，其被任命为行政经理兼总经理助理，主要从事后勤服务、翻译以及处置总经理交办的工作。

6．原审被告人黄进军在侦查阶段的供述以及辨认笔录证明，2010年以来，德司达公司的废酸处置是王军总负责，其负责废酸罐区的装车事宜，出现的问题直接向王军反映，王军是公司行政经理兼总经理助理。

二、证明王军代表德司达公司联系王占荣处置废酸和德司达公司在事发后掩盖痕迹情况以及黄进军代表德司达公司交运废酸并从中索取提成的证据

7．上诉人王军在侦查阶段的供述以及辨认笔录证明：2010 年夏天，其受公司指派找到王占荣询问了资质和运输废酸的情况，王占荣表示有特殊关系可以处置废酸，其将相关资料交给了总经理。过了一段时间，第二任总经理让其与王占荣洽谈价格，最终确定每吨 580 元的处置费用，王占荣表示只能开具运输发票。黄进军与王占荣直接对接拉运废酸，每次结账时，王占荣都是拿运输发票给其核算。2011 年间，财务主管提出以承兑汇票支付费用，王占荣表示不同意，解释说要给下家现金，其意识到每吨 580 元的价格包括了运输和处置费用。李某甲接任总经理后，其将王占荣的运输发票给李某甲签名，明确告知是处置废酸的票据，并解释王占荣是将废酸运至扬子污水处理厂去处置，李某甲在发票上签了字，其曾接受王占荣 3 万元左右的购物卡。

对于案发后的情况，王军供认：2014 年 5 月 19 日，王占荣打电话告知出了事，调查人员会追究废酸的来源，其让黄进军与王占荣对接将刚运出的一车废酸位回公司。次日上午，李某甲当面交代王占荣如何应付调查，当日下午召开了会议，要求将涉及废酸处置的过磅单以及相关文件全部处理掉，将过磅单上的货物名称由废酸修改成硫酸退货。其将过磅单以及其他部门交来的文件藏匿到档案室，删掉了电脑中的相关邮件。

8．原审被告人王占荣在侦查阶段的供述以及辨认笔录证明：其经营的顺久公司没有处置废酸资质，2010 年下半年，其向黄进军提出想承接德司达公司的废酸处置业务，黄进军表示要向领导汇报。半个月左右，王军带人查看了公司营业执照等资料，知道其没有处置废酸资质，后谈妥每吨 580 元的处置费用，王军让其直接找黄进军对接去拉废酸。每月 25 日左右，其将开具的运输发票以及称重单据交给王军，货款会直接汇至公司的账上或者王军打电话让其去拿承兑汇票，其给了王军 4 万元左右的购物卡。2014 年 5 月，丁卫东打电话告知出了事，其联系了王军并让徐某甲将刚运出的废酸又送回德司达公司，德司达公司的领导为了应付检查，让其谎称运输的是硫酸退货，并修改了称重单据。

对于给予提成费用的情况，王占荣供认，黄进军主动提出要拿提成费，第一次以每吨 20 元提成，第二次开始以每吨 50 元提成，都是按照称重吨数结算，黄进军每个月都会核对数量，其通过支付现金、承兑汇票和银行转账方式给付黄进军约 30 万元。

9．原审被告人黄进军在侦查阶段的供述以及辨认笔录证明：2010 年以前，公司的废酸都是先中和处理，PH 值达到要求后，再将废水送至胜科污水处理厂处置，每吨处置费用约 3000 元。2010 年 7、8 月开始，公司产生的废酸量加大，王占荣提出欲承接处置废酸业务，并告知没有处置资质，其向领导汇报了废酸量过高的情况。9 月初，王军让其与拉运废酸的来人对接，徐某甲驾驶槽罐车过来，其知道废酸是交给王占荣处置的，之后其直接打电话通知王占荣拉运废酸。

对于案发后的情况，黄进军供认，事发之后，王军让其通知王占荣将最后一车废酸拉回公司，让其将有关数据销毁，薛某让其将两个废酸罐中的废酸排放处理掉，并安排人员将罐上的废硫酸字样除去再喷上硫酸字样，其将电脑上数据拷贝到 U 盘里，然后将电脑上数据删除。

对于索取提成费用的情况，黄进军供认，2011 年 1 月间，以每吨 20 元提成，王占荣第一次给其 2 万元现金，之后以每吨 50 元提成，每月底核对拉运总量，王占荣支付提成的时间不固定，有时给现金或者承兑汇票，也有通过银行转账，至 2014 年春节期间，共 8 次收得 28.1 万元。二审提讯时，黄进军对一审判决确认的 8 次收受提成费的时间、地点、方式、数额均表示没有异议。

10．侦查人员调取的 U 盘数据以及扬州市江都区公安局的扣押决定书、扣押清单证明，黄进军记载的王占荣拉运废酸的数量，与黄进军、王占荣供述的根据拉运废酸数量结算提成费以及未全部给付的情节基本吻合。

11．证人涂某(黄进军之妻)的证言证明，黄进军参与德司达公司将废酸交给王占荣处置，

当初拿回家的有时是现金，有时是承兑汇票，承兑汇票的面额不等。

12．证人李某甲的证言证明，其接手公司后，所有的运行模式都是遵循惯例运行，废酸处置由王军具体负责，污水处置由黄进军负责，其曾询问废酸是如何处置的，王军讲是交给顺久公司运输，这家公司有特殊关系能够将废酸交给扬子污水处理厂处置，2013 年下半年，公司产生的废酸量增加，其让王军督促处置废酸的进度。

对于案发后的情况，李某甲交代，其从王军处得知废酸被查获，担心会对公司产生影响，就叫王占荣不要承认查到的是废酸，要求各部门将相关书证物证处理掉，将称重单上的货物名称由废酸改为硫酸退货，将废酸罐里残留的废酸排入废水池中，并将罐上的废硫酸字样改成硫酸，让王军将电脑中的相关数据全部删除。

13．证人赵某(德司达公司员工)的证言证明，顺久公司为德司达公司处置废酸，单价是每吨 580 元，2012 年 9 月，李某甲任总经理后，处置废酸的请款申请单由王军制作并附上运输发票，请款申请单上有王军和李某甲的签字。

14．证人徐某乙(德司达公司员工)的证言证明，王军安排采购部制作处置废酸的运输订单，顺久公司接运废酸时过磅生成三联称重计量单，一段时间后交给王军或者黄进军，事发之后，李某甲让其补做了一份硫酸不合格退货手续，然后盖了公司印鉴，王军当天取走白色过磅单，让其将称重计量单产品名称由废酸改为硫酸退货。

15．证人薛某的证言证明，公司产生的废酸储存在 BA602、BA603 两个罐内，事发之后，李某甲让其安排人员将废酸罐上用于装车的管道拆掉，把上面的中文废字涂掉，将英文名称由废酸改成硫酸，把罐内的废酸排入公司的污水罐中。

16．证人沈某甲(德司达公司员工)的证言证明，公司的废酸经由专门管道放入 BA602、BA603 两个罐内储存，由黄进军对外联络接运，事发之后，李某甲让其安排人员将两个罐内的废酸全部排掉，出具一份硫酸不合格的检验报告用于制作退货通知单，修改废酸过磅单并把废酸改为硫酸退货。

17．证人陈某(德司达公司员工)的证言证明，2010 年起，公司的废酸处置由王军直接负责，顺久公司的苏 A×××××号槽罐车进行运输，一个月拉运有十几次，平均每车废酸量有 20 吨左右，运走有 1 万吨左右的废酸。

18．证人李某乙(德司达公司员工)的证言证明，公司的废酸主要是交给顺久公司处置，黄进军负责废水废酸的对接处理。

19．证人周某(顺久公司会计)的证言证明，顺久公司没有运输危险品资质，都是请外面的运输公司代开运输发票，用于结算处置废酸的费用，德司达公司将货款直接支付给顺久公司。

20．侦查人员调取了王军手机内保存的照片以及扬州市江都区公安局的扣押决定书、扣押清单证明，王军拍摄了部分请款申请单、货物运输增值专用发票、称重计量单、付款委托函等，其中请款申请单内容显示，请款人为顺久公司，支付的是废酸费用，有李某甲和王军的签名。与王军供述需经过李某甲审批后才能付款的情节相吻合。

21．侦查人员拍摄的现场照片证明，德司达公司内部罐区的情况，有多名员工指认其中的 BA602、BA603 罐为储存废酸罐。罐上喷涂的硫酸字样，与黄进军等人证明的事后受指使将废硫酸字样改为硫酸字样的情节相吻合。

22．德司达公司出具的情况说明以及账目明细、账目凭证证明，德司达公司与顺久公司往来账目的情况，其中，自 2010 年 10 月至 2014 年 5 月，支付顺久公司 6642758.5 元，尚有 2014 年 3 月 26 日至 4 月 25 日的废酸费用 243333.2 元没有支付。

23．侦查人员制作的搜查笔录以及扬州市江都区公安局的扣押决定书、扣押清单证明，侦查人员从顺久公司查扣企业法人营业执照、危险化学品经营许可证(批发、销售许可)、王占荣和丁卫东的个人名片以及红色称重计量单 4 张。其中，4 张红色称重计量单与德司达公

司查扣的4张绿色称重计量单、不合格硫酸退货通知的内容相一致，内容显示为苏A×××××号车于5月12至16日硫酸退货计80.09吨，与王军、王占荣供述的事发后伪造退货单据的情节相吻合。

24．扬子石化分公司企业法人营业执照以及该公司水厂净二装置出具的说明材料证明，该企业经营范围为废水处置，不包括废酸处置，企业从未与德司达公司、顺久公司签订过处置协议，也未帮助处置过废酸。

三、证明王占荣安排徐某甲从德司达公司拉运废酸数量以及交由丁卫东处置数量的证据

25．原审被告人王占荣在侦查阶段的供述以及辨认笔录证明：2010年9月开始，替德司达公司处置废酸，共收到处置费用600多万元，其先后找过扬子污水处理厂以及安徽的三家磷肥厂处置废酸，最后找的是丁卫东，约定每吨废酸处置费用150元，没有过问丁卫东是否有资质，给丁卫东处置有2000多吨的废酸，支付了近30万元，还有2万多元未付。其安排徐某甲驾驶槽罐车到德司达公司拉送废酸，每月支付5000元工资，在2013年10月，徐某甲对其说过，废酸都是卸到船里，怀疑丁卫东是将废酸排入河里，其打电话询问后，让徐某甲继续给丁卫东运送废酸。

26．原审被告人徐某甲在侦查阶段的供述以及辨认笔录证明：其驾驶的苏A×××××号槽罐车只有运输盐酸、硫酸的手续，没有运输废酸的手续，2010年9月间，王占荣承接德司达公司处置废酸业务，让其运送到安徽的三家磷肥厂。2013年9月起，王占荣让其将废酸运给丁卫东处置，其曾告诉王占荣，丁卫东极可能是将废酸排放到河里，王占荣打过电话后，让其继续运送废酸给丁卫东。其记录了2011年12月至2014年5月19日间每次运送废酸的情况，包括时间、地点、货物重量、过路费等情况，因为王占荣交代送废酸的时候少报重量可以减少费用，所以记录的数量比实际称重计量单上少。经徐某甲分别辨认，确认运送废酸给丁卫东的四处码头，确认了黄进军、丁卫东以及接收废酸的张建福、王礼云、孙某、钱某身份。

27．证人邓某(徐某甲之妻)的证言以及扬州市江都区公安局的调取证据清单证明，2013年9月起，其作为苏A×××××号槽罐车押运员随车去了德司达公司接运废酸，案发后，侦查人员调取了徐某甲的行车记录本。

28．证人吴某(栖霞车队负责人)的证言证明，苏A×××××号槽罐车是王占荣挂靠在南京栖霞车队进行运营。

29．证人张某(德司达公司员工)的证言证明，德司达公司还原染料产生的大量废酸排入公司灌区的BA602和BA693废酸罐。

30．证人黄某甲(德司达公司员工)的证言证明，称重计量单为一式三联，依次为白联、红联、绿联，上面有时间、品名、运货公司、运货车辆牌照、毛重、皮重、净重、操作员签名等信息，白联由操作员自己保管，红联、绿联交给驾驶员。

31．证人王某(德司达公司员工)的证言以及其提供的邮件打印件证明，废酸的储存是按照操作手册来完成，30%浓度以下的废酸直接排入公司的废水池，30%～50%浓度的废酸排入BA602废酸罐，大于50%浓度的废酸排入BA603废酸罐。

32．证人沈某乙、黄某乙(德司达公司员工)的证言证明，2013年以来，到公司装运废酸都是苏A×××××号槽罐车，驾驶员是同一个人。

33．证人魏某、马某(德司达公司员工)的证言证明，公司储存废酸的罐号是BA602、BA603，大部分废酸都是由苏A×××××号槽罐车拉走，驾驶员是姓徐的男子。

34．侦查人员制作的搜查笔录、照片以及扬州市江都区公安局的扣押决定书、扣押清单证明，从德司达公司档案室查扣白色称重计量单483张、红色称重计量单467张、绿色称重计量单334张、废酸装车检查表一本，出门登记本、与顺久公司的往来账目。其中白色称重计量单显示，2010年9月3日至2014年5月18日，苏A×××××号以及皖N×××××

号、皖 N×××××号汽车从德司达公司运出废酸计 11021.42 吨，苏 A×××××号槽罐车拉运废酸登记 397 次。

35．侦查人员制作的德司达公司废酸去向统计表证明，根据德司达公司称重单反映的时间、重量、车牌号码以及送货地点、车辆 GPS 数据、高速通行记录、驾驶员行车记录本等资料统计，2013 年 9 月 30 日至 2014 年 5 月 16 日，苏 A×××××号槽罐车共运出废酸 3647.2 吨，其中运往江都宜陵码头 1349.44 吨，运往姜堰马庄码头 840 吨，运往姜堰清源净水剂厂码头 195.4 吨，送往姜堰振昌钢厂码头 443.18 吨。

36．扬州市江都区公安局的调取证据材料清单证明，侦查人员调取了 2013 年 9 月 1 日至 2014 年 5 月 20 日，苏 A×××××号车在宁扬高速六合东收费站以及宁靖盐高速公路七里收费站、泰州北收费站的通行资料。

37．侦查人员拍摄的苏 A×××××号槽罐车照片以及扬州市江都区公安局的调取证据材料清单证明，侦查人员调取了苏 A×××××号车辆的资料以及车辆 GPS 行车轨迹，该车车主为王占荣，挂靠在栖霞车队有限公司，许可经营范围为危险品运输。

四、证明丁卫东安排孙某、钱某等人将废酸倾倒至相关水域的证据

38．原审被告人孙某在侦查阶段的供述以及辨认笔录证明，2013 年 9 月至 12 月中旬，丁卫东安排其到王礼云驾驶的船上帮忙，先后停过清源净水剂码头、钢厂码头、马庄码头，徐某甲驾车送来废酸后，丁卫东安排把废酸排到河里，其和王礼云在天黑时将船开到新通扬运河和泰东河、卤汀河交叉处，用水泵将船内的废酸全部排到河道里，排放过五次，有 600 吨左右。2014 年 2 月底至 5 月间，丁卫东安排其到张建福驾驶的俞垛机 1048 号船上，先后停过马庄码头、宜陵码头，徐某甲驾车送来废酸后，其和张建福将废酸偷排到新通扬运河和泰东河、卤汀河交叉处，排放过六七次，有 1000 多吨。5 月中旬，徐某甲又送来四车的废酸，还在船上没有被排到河里。经孙某辨认，确认了排放废酸的河道和装运废酸的码头。

39．原审被告人钱某在侦查阶段的供述以及辨认笔录证明，2013 年 3 月开始，其替丁卫东驾驶套牌俞垛机 1048 号船。10 月中旬，徐某甲将四车废酸送到振昌钢厂码头装到船上，其和丁卫东驾船进入泰东河，用潜水泵将废酸排入河里。几天之后，徐某甲又送来三车废酸，其和妻子在夜间驾船至泰东河将废酸排入河里。第三次和第四次，徐某甲都是送来四车废酸，其和妻子都是在夜间驾船将废酸排入泰东河里。12 月 13 日，其跌伤左腿后就没有继续开船。其参与排放的废酸计有 300 多吨，徐某甲从送来第二车废酸时给其每车 100 元的辛苦费，共 1400 元。经钱某辨认，确认接收废酸的码头和排放废酸的河道。

40．同案人丁卫东在侦查阶段的供述和辨认笔录证明，2013 年 10 月，王占荣与其谈妥以每吨 150 元的价格处置废酸，至 2014 年 5 月，共接收了徐某甲运来的 2200 多吨废酸，其通过电话安排船工张建福、孙某、王礼云、钱某等人驾驶套牌俞垛机 1048 号船以及另一条船将废酸排放到新通扬运河和卤汀河的河道里，王占荣已经给付了 29 万元，还欠 3 万元左右没有支付。5 月中旬，徐某甲连续送来四车约 80 吨的废酸，后听说相关部门正在调查兴化的水污染事件，其打电话通知了王占荣，并让张建福将装有废酸的套牌俞垛机 1048 号船停到祥发公司的码头上藏匿。经丁卫东辨认，确认了装运废酸的码头、运输船以及参与排放废酸的王礼云、张建福、钱某和运送废酸的徐某甲身份。

41．同案人张建福的供述证明，2014 年 3 月至案发前，其与孙某受丁卫东的指使将废酸排放到新通扬运河、卤汀河、泰东河、引江河附近，一般是选择水面比较宽、水流比较急的地方排放，不容易被发现。南京司机送来的废酸有 500 吨左右，其中 300 多吨已经排放到河里，有七八十吨被一条尖头铁皮船拖走，还有七八十吨在船上。

42．证人吕某(钱某之妻)的证言证明，2013 年 10 月至 11 月上旬，其与钱某在振昌钢厂码头替丁卫东接收过 15 车废酸，然后排放到河里有四次，都是晚上将船开到河道里偷偷排放。

43．证人贾某(船工)的证言证明，其替丁卫东运输过废盐酸，2011 年 9 月开始，将自己

的俞垛机 1048 号船租给丁卫东使用，是载重 200 吨的钢制化学品船。印证了查扣的俞垛机 1048 号船为套牌船。

44．证人姚某(扬州祥发资源综合利用有限公司经理)的证言证明，一般情况下，50%的废酸处置市场价在每吨 2500 元以上，有机废酸处置价格要根据废酸浓度、有机物种类和含量来确定，市场价能达到 3800 元左右。

45．侦查人员调取的工商登记资料、道路运输经营许可证以及扬州市江都区公安局的调取证据材料清单证明，扬州祥发资源综合利用有限公司的许可经营范围为危险货物运输。

46．侦查人员制作的德司达公司废酸去向统计表证明，根据德司达公司称重单反映的时间、重量、车牌号码以及送货地点、车辆 GPS 数据、高速通行记录、行车记录本等资料统计，并结合孙某、钱某等人供述的参与接收、排放废酸的时间、地点，确认孙某排放数量 1729.82 吨，钱某排放数量 318.78 吨。

47．侦查人员制作的排放废酸水域图证明，通过孙某、钱某的现场指认，确定孙某、张建福以及钱某等人排放废酸的水域在江都、泰州区域的分布情况。

48．江苏省水文水资源勘测局泰州分局出具的水质监测数据和状况表证明，2013 年 9 月至 2014 年 5 月，高港枢纽节制闸的引水数据，以及相关水域新通扬大桥、卤汀河口、泰州(新)、泰东河口、溱潼等测站监测的水质数据超标的情况。

49．侦查人员调取的工商登记资料、运输船检验证书、适航证书、许可证、挂靠协议以及扬州市江都区公安局的调取证据材料清单证明，丁卫东经营的姜堰清源净水剂有限公司不具有危险物质处置资质，俞垛机 1048 号船主为贾某。印证查扣的装有废酸俞垛机 1048 号船系套牌船。

五、证明德司达公司生产过程中产生的废酸液体和套牌俞垛机 1048 号船装载的废酸液体之间的关联性以及均属于危险废物的主要证据

50．江苏科技咨询中心出具的(2014)认字第 04 号污染环境损害评估技术报告证明，专家组经过审核相关涉案资料，并对德司达公司提供的生产资料和数据以及装有废酸的套牌俞垛机 1048 号船进行现场勘查和调研，依据相关法律和规定分析认为：①德司达公司还原染料生产过程必然产生废酸液，自 2010 年 9 月至 2014 年 5 月间产生的废酸液均收集在 BA602、BA603 两个储罐内，并被装载外运。②德司达公司产生的总废酸量为 14936.32 吨，其中硫酸平均浓度为 59.34%；查获的 129.92 吨废酸液中提取的 29 份样品硫酸浓度≥46%，检测结果与德司达公司提供的 13 个产品表中的废酸浓度值(≥46%)是相印证的。③德司达公司产生排放的废酸液中主要成分为硫酸并含有大量有机物，具有极强的腐蚀性，对生物、水体、环境的危害极大，绝大多数水生生物难以生存，另外，废酸中残存的大量副染料、中间体虽无腐蚀性与急性毒性，但对生物环境的危害是累积性，长远的危害程度也难以预见。④2010 年 9 月至 2014 年 5 月间，王占荣从德司达公司拉运的 11021.42 吨废酸液，均属危险废物，由丁卫东直接排放至河流中的 2698.1 吨废酸液造成严重的环境污染损害，查获的 129.92 吨废酸液，作为环境风险源，亟待应急处理。⑤由于长期、分散、多处多点在河网密度高、水系丰富的众多河流中偷排，经扩散、稀释、中和等作用，已无法截获并计量被污染河流水体的水量以及水质数据，对水生态环境、水生生物、河流底泥、岸边土壤及地下水资源污染等导致的环境污染损害难以计量。⑥结合国家环境保护部门推荐的虚拟治理成本法，认定已经排放的 2698.1 吨废酸液的污染修复费用为 2428.29 万元，以此数据作为环境污染损害评估值较为保守，查获的 129.92 吨废酸液应急处理评估值为 25.98 万元。

51.江苏省环境科学技术院出具的扬州市江都区丁卫东等污染环境案损害评估报告证明，专家组经过审核相关涉案资料以及对采集的 32 份废酸样品进行检测，评估认为：①德司达公司产生的废酸中硫酸平均浓度为 59.34%，判定为危险废物；②丁卫东直接排放至河流中的 2698.1 吨废酸液，因长期、隐蔽排放等因素，未获得相应的水质监测数据，但其污染水体造

成环境损害事实客观存在，直接影响水体和底泥环境质量以及水生动植物生存环境。

52．中国上海测试中心化学试剂行业测试点出具的 W2014－686 号、上海威正测试技术有限公司出具的 2014081305601S－01 号检测报告以及检测委托登记表、检测报告、资质认证表、情况说明证明，公安机关将取样的 32 瓶 250ml 黑色液体送至具有检测资质的机构进行硫酸含量、化学需氧量、色度、总有机碳的数据检测，其中 29 份样品的硫酸含量为 48.2%至 60.3%之间。

53．江苏省环保厅出具的苏环监认〔2014〕27 号函以及扬州市江都区环境保护局的(2014)扬江环监(水)字第 140 号环境监测报告证明，江都区环境保护局对套牌俞垛机 1048 号船进行采样检测，认定 PH 值为 1.19mg/L 以及化学需氧量(COD)、挥发酚、硝基苯类等 4 个数据指标，江苏省环保厅确认相关监测数据符合国家和省环境监测质量管理体系及相关技术规范要求。

54．证人夏某(江都环保局工作人员)的证言证明，国家危险废物名录中为 HW34 废酸所列举出来的物质属于危险废物，如认定需经过腐蚀性鉴别，按照 GB/T15555.12－1995 的规定制备的浸出液，PH≥12.5 或者 PH≤2.0 的，在 55℃的条件下，对 GB/T699 中规定的 20 号钢材的腐蚀速率≥6.35mm/a，具备条件之一的即属于危险废物。

55．德司达公司的 2010 年至 2014 年 5 月无机原料进货记录、产生较浓酸的还原产品情况、产生废酸染料生产指南和操作手册以及电子汽车衡器计量监督检测检定证书等以及扬州市江都区公安局的接受证据材料清单证明，侦查人员从德司达公司的相关部门调取了相关资料，该公司生产的每个操作流程均有操作人员签字，13 种还原性染料产生的废酸浓度为 46%～85%，含有丙酸、蒽醌、硫酸铁、钠盐、靛蓝、杂环等物质，废酸液排入 BA602 号、BA603 号储罐。

56.侦查人员拍摄的现场照片证明,侦查人员在套牌俞垛机 1048 号船上取样废酸的情况。

六、证明案发经过以及量刑情节的其他证据

57．扬州市江都区环保局的案件移送函以及现场检查笔录和照片、询问笔录、检测报告、丁卫东身份信息证明，2014 年 5 月 19 日上午，江都区环保局在扬州祥发公司码头上发现俞垛机 1048 号船上装有刺激性不明液体，后查找到船主丁卫东，其承认帮助他人处置废酸的行为，江都区环保局将该案移送给公安机关处理。

58．扬州市江都区公安局的受案登记表、立案决定书证明，2014 年 5 月 20 日，对丁卫东涉嫌污染环境案立案侦查。

59．扬州市江都区公安局的移送案件通知书证明，2014 年 7 月 9 日，将涉案的丁卫东移交泰州市姜堰区公安局处理。

60．侦查人员出具的抓获经过证明，公安机关立案侦查后，先后将涉案的其他六名被告人抓获归案。

61．扬州市江都区公安局的扣押决定书、扣押清单、银行支付凭证证明，查扣德司达公司人民币 1000 万元。

62．江都区公安局的协助查询财产通知书以及华夏银行南京分行提供的存款金融交易明细、协助冻结财产通知书证明，王占荣在华夏银行个人账户 10×××34 以及顺久公司账户 27×××43 交易明细情况，其中，冻结的个人账户资金有 273472.39 元，冻结的顺久公司账户资金有 37933.67 元。

63．代收罚没款收据证明，黄进军的亲属退出赃款人民币 28.1 万元。

64．南京市公安局鼓楼分局、南京化学工业园区分局、梅州市梅江分局城西派出所、姜堰市公安局、江都区公安局分别出具的户籍证明、人口信息查询、常住人口基本信息等证明，上诉人王军以及原审被告人黄进军、王占荣、徐某甲、孙某、钱某的身份概况。

上述证据，均经原审人民法院庭审质证，证据来源合法，证明内容客观、真实，与本案

具有关联性，且证据之间相互印证，能够形成证据链证明本案事实，其证明效力本院亦予确认。

本院认为：上诉单位德司达公司违反国家规定，明知王占荣经营的顺久公司没有废酸处置资质，仍委托王占荣处置废酸；原审被告人王占荣明知丁卫东没有处置废酸能力，仍指使原审被告人徐某甲从德司达公司运出废酸交由丁卫东处置；原审被告人孙某、钱某受丁卫东的指使，将接运的废酸偷排至河道中，严重污染环境，依照《中华人民共和国刑法》第三百三十八条、第三百四十六条、第二十五条第一款的规定，均构成污染环境罪，且属共同犯罪。上诉人王军、原审被告人黄进军在处置废酸过程中，应当知道王占荣没有处置资质，仍在各自的职责范围内促成双方交易完成，导致严重污染环境的后果发生，依照《中华人民共和国刑法》第三百三十八条、第三百四十六条的规定，系德司达公司直接负责的主管人员和其他责任人员，均应以污染环境罪追究刑事责任。原审被告人黄进军利用职务上的便利，收受王占荣的财物为其提供帮助，数额较大，依照《中华人民共和国刑法》第一百六十三条第一款的规定，已构成非国家工作人员受贿罪；其一人犯数罪，依照《中华人民共和国刑法》第六十九条第一、三款的规定，应予数罪并罚。

在非法处置废酸的共同犯罪中，上诉单位德司达公司、原审被告人王占荣均起主要作用，是主犯，依照《中华人民共和国刑法》第二十六条第一、四款的规定，应当按照其所参与的全部犯罪处罚；原审被告人徐某甲受王占荣的雇佣帮助运送废酸，在共同犯罪中起辅助作用，是从犯，依照《中华人民共和国刑法》第二十七条的规定，予以减轻处罚；原审被告人孙某、钱某受丁卫东的指使将废酸直接排放至河道中，在共同犯罪中起次要作用，是从犯，依照《中华人民共和国刑法》第二十七条的规定，予以减轻处罚。上诉人王军、原审被告人黄进军、王占荣、孙某、钱某归案后能如实供述基本犯罪事实，系坦白，依照《中华人民共和国刑法》第六十七条第三款的规定，可以从轻处罚。上诉单位德司达公司能够配合调查，具有一定悔罪表现，原审被告人黄进军在案发后主动退出赃款，在相应罪行中均可酌情从轻处罚。原审被告人黄进军具有索贿情节，在相应罪行中酌情从重处罚。综合原审被告人徐某甲、钱某参与犯罪的情节、认罪态度和悔罪表现，依照《中华人民共和国刑法》第七十二条的规定，可给予一定的缓刑考验期限。

对于上诉单位德司达公司、上诉人王军、原审被告人王占荣及各自辩护人提出上诉理由和辩护意见，综合评判如下：

一、关于江苏省环境科学研究院出具的环境损害评估报告是否属于非法证据的问题。本院审理认为：1.对于德司达公司交由王占荣处置的废酸所造成的环境损害值，江苏科技咨询中心专家经过审核相关涉案资料，并且进行现场勘查和调研，出具了损害评估技术报告，确认由于丁卫东长期、多处多点在河网密度高、水系丰富的众多河流中偷排，已无法截获并计量被污染河流水体的水量以及水质数据，对环境的污染损害难以计量，结合国家环境保护部门推荐的虚拟治理成本法，保守估算已经排放的 2698.1 吨废酸的污染修复费用为 2428.29 万元，并视为环境污染损害评估值，该鉴定结论具有客观性，本院予以确认。2.在案件审理期间，原公诉机关又补强了由江苏省环境科学技术院出具的环境损害评估报告，主要证明德司达公司产生的废酸属于危险废物范畴，直接排放至河流中造成环境损害的事实客观存在。该补强证据来源合法，亦经原审人民法院庭审质证，证明的相关内容与江苏科技咨询中心出具的损害评估技术报告结论基本一致，具有客观性，原判决确认了德司达公司产生的废酸液属于危险废物的结论，并无不当。3.江苏省环境科学技术院出具的环境损害评估报告中，有参照地方标准计算的虚拟治理成本以及推算的环境资源损害值等内容，原审人民法院并未确认这部分内容的证明效力，该鉴定报告不存在非法证据的情况。

二、关于王军、黄进军的行为是否属于公司意志以及德司达公司在共同犯罪中地位作用的问题。本院审理认为：1.根据我国刑法和相关司法解释规定，单位犯罪的特征体现为以单

位名义实施犯罪、违法所得归单位所有。本案中，王军作为德司达公司的员工，受公司负责人的指派联系处置废酸事宜，代表的是德司达公司并且是为了公司利益，后经公司负责人确认后交由王占荣处置，减少了处置费用支出，为公司争取了利益，王军的行为就是代表了公司意志。2.在泰州重大污染环境事件发生后，德司达公司为了逃避检查和追责，由公司负责人指使相关部门掩盖相关痕迹和证据的行为，进一步印证了王军、黄进军履职的行为就是代表公司的意志。3.德司达公司系污染环境行为的支配者，为了降低危险废物的处置费用，在明知王占荣没有处置资质的情况下，仍委托处置危险废物，王占荣同样明知没有处置资质仍将危险废物交给丁卫东任意排放处置，在共同犯罪过程中，德司达公司与王占荣均起主要作用，均系本案的主犯。

三、关于本案处置危险废物是否属于其他后果特别严重情形的问题。本院审理认为：1.环境污染损害的显现往往需要有一个过程，且因果关系很难直接证明，司法解释中对于非法排放、倾倒、处置危险废物状态下的后果特别严重情节没有直接规定，仅有其他后果特别严重情形的兜底性规定。实践中，正确适用兜底性条款是弥补法律、司法解释条文列举规定周延性不足的重要途径，如何把握需结合具体案情因素综合认定。2.本案中，大量的废酸被直接排放到河网密度高、水系丰富的众多河流中，排放的数量已经达到司法解释中规定的严重污染环境构罪标准的数百倍之多，而且，丁卫东等人长期、多处多点排放废酸，已经引起相邻区域的水质严重污染，造成多处水厂停产停水。有权鉴定机构的环境评估亦认为，排放的危险废物中残留物质会对水生态环境、水生生物、河流底泥、岸边土壤及地下水资源会造成长远的影响。故此，综合危险废物排放的时间和地域特点、排放数量、排放方式、超标程度以及已经发现的危害后果和潜在的危害等因素，本案处置危险废物的行为可以被司法解释中其他后果特别严重的情形所包容，应当认定为后果特别严重。

四、关于对德司达公司判处的罚金数额是否恰当的问题。本院审理认为：根据我国刑法和相关法律规定，人民法院应当根据犯罪情节，如违法所得数额、造成损失的大小等情节，并综合考虑犯罪分子缴纳罚金的能力，依法判处罚金。德司达公司为降低危险废物的处置成本，在明知他人没有处置资质仍委托进行处置，最终导致严重污染环境，德司达公司由此减少支出巨额的处置费用，实质上就是通过犯罪行为而获取了利益。同时，污染环境行为必然会造成严重的危害后果，而消除这一结果必然会有一定的费用支出，相关司法解释中规定，公私财产损失包括污染环境行为直接造成财产损毁、减少的实际价值，以及为防止污染扩大、消除污染而采取必要合理措施所产生的费用，这部分费用的确认，实质就是犯罪行为所造成的损失大小，由此，公私财产损失数额应当作为确定罚金的一个重要参数。综上，在污染环境犯罪案件中，在实际获取利益和公私财产损失数额的区间幅度内判处罚金具有基本法律依据，如此确定的幅度罚金既有利于环境生态的修复，也有利于刑罚威慑力的发挥。本案综合德司达公司的犯罪情节以及缴纳罚金的能力，原审人民法院在此幅度内判处的罚金数额并无不当。

五、关于王军是否属于直接负责的主管人员、从犯以及对王军、王占荣的量刑是否恰当的问题。本院审理认为：1.单位犯罪中直接负责的主管人员，是指在单位实施的犯罪中起决定、批准、授意、纵容、指挥等作用的人员。王军受总经理委派与王占荣洽谈处置危险废物事宜，审查相关资料和洽谈价格，审核处置费用的结算，并承认获取了一定的利益，对交易的完成起到促成、授意、纵容的作用。在公司新任总经理到任后，王军继续负责危险废物处置事宜，本案确认的 2828.02 吨废酸均是王军被任命为总经理助理之后，在污染环境的行为被发现后，王占荣亦是首先联系王军以应对检查，可见，王军参与危险废物处置的全部过程，从中所起作用符合直接负责的主管人员作用特征，不符合从犯的特征，应当认定为直接负责的主管人员。2.根据我国刑法规定，严重污染环境且后果特别严重的，应处三年以上七年以下有期徒刑。综合考虑王军的犯罪情节以及具有坦白从轻量刑情节，原审人民法院在相应幅

度内判处的刑罚恰当。3.王占荣为获取非法利益，无资质处置废酸液体，最终导致危险废物被直接排放到河道中，严重污染环境且后果特别严重，依法亦应在三年以上七年以下有期徒刑的幅度内量刑。其属于共同犯罪的主犯，应当按其所实施的全部犯罪行为进行处罚，考虑其归案后有一定坦白表现，原审人民法院在相应幅度内确定的刑期恰当，同时基于其犯罪所得数额，所判处的罚金亦无不当。

综上所述，原审人民法院判决认定的基本事实清楚，证据确实、充分，定性正确，量刑恰当，审判程序合法。上诉单位德司达公司、上诉人王军、原审被告人王占荣及各自辩护人提出上诉理由和辩护意见均不能成立，本院均不予采纳。

据此，依照《中华人民共和国刑事诉讼法》第二百二十五条第一款第一项的规定，裁定如下：

驳回上诉，维持原判。

本裁定为终审裁定。

审　判　长　尹晓涛

审　判　员　李春蓉

代理审判员　郝佳佳

二〇一六年十月八日

书　记　员　王梦露

二、被告人何建强等非法杀害珍贵、濒危野生动物罪、非法狩猎罪刑事附带民事诉讼案

湖南省岳阳市岳阳楼区人民法院
刑 事 附 带 民 事 判 决 书

(2015)楼刑一初字第 291 号

公诉机关岳阳市岳阳楼区人民检察院。

附带民事诉讼原告人岳阳市林业局。

法定代表人何祚云。

诉讼代理人高大立，系岳阳市林业局二级机构湖南东洞庭湖国家级自然保护区管理局科长。

被告人何建强，绰号“何老四”，男，1970 年 8 月 12 日出生，汉族，小学文化，渔民；因涉嫌犯非法猎捕、杀害珍贵、濒危野生动物罪，于 2015 年 1 月 21 日被岳阳市森林公安局刑事拘留，同年 2 月 16 日被逮捕；现羁押于岳阳市看守所。

辩护人张国辉，湖南岳州律师事务所律师。

被告人钟德军，绰号“军妹子”，男，1965 年 12 月 22 日出生，汉族，小学文化，农民；因涉嫌犯非法收购、运输、出售珍贵、濒危野生动物罪、非法狩猎罪，于 2015 年 1 月 21 日被岳阳市森林公安局刑事拘留，同年 2 月 16 日被逮捕；现羁押于岳阳市看守所。

被告人方建华，男，1976 年 3 月 25 日出生，汉族，小学文化，农民；因涉嫌犯非法收购、运输、出售珍贵、濒危野生动物罪、非法狩猎罪，于 2015 年 4 月 9 日被岳阳市森林公安局刑事拘留，同月 14 日被逮捕；现羁押于岳阳市看守所。

被告人李强，男，1990 年 8 月 9 日出生，汉族，小学文化，农民；因涉嫌犯非法收购、出售珍贵、濒危野生动物罪、非法狩猎罪，于 2015 年 9 月 26 日被岳阳市森林公安局刑事拘留，同年 10 月 12 日被逮捕；现羁押于岳阳市看守所。

辩护人刘宏，湖南民望律师事务所律师。

被告人龙某甲，男，1963 年 11 月 9 日出生，汉族，小学文化，农民；因涉嫌犯非法狩猎罪，于 2015 年 6 月 3 日由岳阳市森林公安局决定被取保候审；2016 年 3 月 1 日，由本院决定被逮捕；现羁押于岳阳市看守所。

被告人龙某乙，男，1987 年 1 月 15 日出生，汉族，高中肄业文化，农民；因涉嫌犯非法狩猎罪，于 2015 年 5 月 6 日被岳阳市森林公安局刑事拘留，同年 6 月 9 日被逮捕，同月 12 日由岳阳市森林公安局决定被取保候审；现在家候审。

被告人龙某丙，男，1968 年 10 月 6 日出生，汉族，小学文化，农民；因涉嫌犯非法狩猎罪，于 2015 年 4 月 27 日由岳阳市森林公安局决定被取保候审；现在家候审。

岳阳市岳阳楼区人民检察院以岳楼检公一刑诉〔2015〕280 号起诉书及岳楼检公一刑变诉〔2015〕3 号变更起诉决定书指控被告人何建强、钟德军、方建华、李强、龙某甲、龙某乙、龙某丙犯非法猎捕、杀害珍贵、濒危野生动物罪，于 2015 年 11 月 16 日向本院提起公诉。本院审查后于同日受理。在诉讼过程中，附带民事诉讼原告人岳阳市林业局向本院提起附带民事诉讼。本院依法组成由审判员肖冰峰担任审判长，审判员李林、人民陪审员文建设参加评议的合议庭，由书记员杨欢担任庭审记录，于 2016 年 1 月 21 日公开开庭合并进行了审理。岳阳市岳阳楼区人民检察院指派检察员胡立军、陈偲出庭支持公诉，并指派检察员曾银树出庭支持附带民事诉讼，附带民事诉讼原告人岳阳市林业局的诉讼代理人高大立、被告人何建强及其辩护人张国辉、被告人钟德军、方建华、被告人李强及其辩护人刘宏、被告人龙某甲、龙某乙、龙某丙到庭参加诉讼。在本案审理过程中，因案情复杂，经岳阳市中级人民法院批

准决定延期审理三个月。本案现已审理终结。

岳阳市岳阳楼区人民检察院指控：2014 年 11 月至 2015 年 1 月，被告人何建强在洞庭湖收鱼期间，雇请被告人钟德军帮忙，邀集被告人李强共同购买克百威农药后，多次在湖南东洞庭湖自然保护区毒杀野生候鸟。被告人何建强利用收鱼形成的相对固定的业务往来关系，向其供鱼业户提供克百威农药，并分别要求业户涂某某(在逃)、余某某(又名余某某，在逃)与被告人方建华、龙某甲、龙某乙、龙某丙以及雇请在围子守鱼的张某某(在逃)、任某某(在逃)等人在保护区内为其毒杀野生候鸟，被告人何建强向上述人员收购后再出售给被告人李强和何某某、汪某某(均另案处理)，最终转卖至常德市汉寿县的餐馆及个体小贩手中。2015 年 1 月 18 日，当被告人何建强、钟德军等人准备再次将毒杀的 63 只野生候鸟送上岸销售时，被湖南省东洞庭湖自然保护区管理局工作人员当场查获，被告人何建强、钟德军随即弃船逃离。经鉴定，查获的 63 只野生候鸟中，有 12 只小天鹅和 5 只白琵鹭是国家二级保护野生动物，有 2 只苍鹭、3 只赤麻鸭、3 只赤颈鸭、11 只斑嘴鸭、27 只夜鹭是国家三有保护野生动物，63 只死亡野生候鸟均检出有“克百威”成分，系中毒死亡。

2015 年 1 月 19 日下午，被告人何建强与钟德军到东洞庭湖国家级自然保护区管理局投案；同年 4 月 8 日，被告人方建华在南县被抓获归案；4 月 27 日，被告人龙某丙到沅江市南大膳派出所投案；4 月 28 日，被告人龙某乙在深圳市被抓获归案；6 月 3 日，被告人龙某甲自动投案；9 月 23 日，被告人李强在上海市被抓获归案。

2015 年 11 月 4 日，被告人何建强在汨罗市看守所羁押期间，检举了网上在逃人员李某某的行踪。岳阳市公安局刑侦支队根据其提供的联络方式将在逃人员李某某抓获归案并移交广东省博罗县公安局。

对上述指控的事实，公诉机关提交了相应的证据予以证实。公诉机关指控认为，被告人何建强、钟德军、方建华、李强、龙某甲、龙某乙、龙某丙无视国法，结伙采取毒杀的手段，非法猎捕、杀害国家重点保护的珍贵、濒危野生动物及其他野生动物，情节特别严重，其行为已构成非法猎捕、杀害珍贵、濒危野生动物罪。系共同犯罪，被告人何建强、钟德军、方建华在共同犯罪中均起了主要作用，属主犯；被告人李强、龙某甲、龙某乙、龙某丙在共同犯罪中均起了次要作用，属从犯；公诉机关提请依照《中华人民共和国刑法》第三百四十一条第一款，第二十五条第一款，第二十六条第一、四款，第六十八条，第二十七条的规定，予以判处。

附带民事诉讼原告人岳阳市林业局诉称：被告人何建强、钟德军、方建华、李强、龙某甲、龙某乙、龙某丙等七名被告人为了谋取非法利益，多次在湖南东洞庭湖国家级自然保护区内投毒杀害野生候鸟，其中在 2015 年 1 月 18 日，由保护区管理局执法人员当场查获被毒杀野生候鸟 63 只。根据主管部门核定，上述被查获的 63 只野生候鸟的经济价值为人民币 44617 元；此外，被告人李强伙同被告人何建强等人毒杀并销售的野生候鸟的经济价值为 8936 元。七名被告人的犯罪行为，造成国家野生动物保护资源损失共计人民币 53553 元，除依法请求追究七名被告人的刑事责任外，另判令七被告人共同连带赔偿相应损失。

被告人何建强、钟德军、方建华、李强、龙某甲、龙某乙、龙某丙对公诉机关指控其犯非法猎捕、杀害珍贵、濒危野生动物罪的事实供认不讳，对指控的罪名亦未提出异议。

被告人何建强的辩护人提出的辩护意见为：被告人何建强只是犯意的提起者，对其他被告人没有领导、指挥作用，其在共同犯罪中与其他同案犯所起作用相当；其在案发后主动向公安机关投案，并如实交代其主要犯罪事实，应认定为自首；被告人何建强在被羁押期间，向公安机关检举了他人的犯罪线索，公安机关据此抓获了其他案件的犯罪嫌疑人，应认定为立功；请求对其减轻处罚。

被告人李强的辩护人提出的辩护意见为：被告人李强的犯罪情节较轻，认罪态度好，有悔罪表现，请求对其从轻处罚。

七被告人对附带民事诉讼原告人提出的民事赔偿诉求均予以认可，未提出异议。

经审理查明：2014 年 11 月，被告人何建强与雇工钟德军在湖南省东洞庭湖国家级自然保护区收鱼时，分别向供鱼业户及帮工人员被告人方建华、龙某甲、龙某丙和涂某某、余某某、张某某、任某某(均在逃)等人提出，由被告人何建强提供农药克百威，让他们在保护区内毒杀候鸟后再由何收购。被告人方建华、龙某甲、龙某丙等人分别表示同意。同月 15 日，被告人李强因涉嫌犯非法收购珍贵、濒危野生动物罪被常德市汉寿县公安机关查获后监视居住。被告人李强在被监视居住期间，仍于同年 12 月 23 日驾车帮助被告人何建强、钟德军一起到湖南省南县茅草街“雨后农资店”购买了 10 余包克百威农药后，送至岳阳市岳阳楼区三角线被告人何建强的租住处。此后，被告人何建强安排被告人钟德军将上述克百威农药用船运至东洞庭湖自然保护区，分发给被告人龙某甲、方建华及涂某某等人，并将剩余的克百威农药藏匿于保护区内的白湖沙洲草丛内。

2014 年 12 月的一天，被告人何建强、钟德军到被告人方建华养鱼的围子收鱼时，与余某某共同下湖投放了一次克百威农药。次日，二被告人即到投毒区捡拾了若干毒死的野生候鸟运到岳阳市君山区壕坝出售给被告人李强联系的汪某某。

2014 年 12 月底至 2015 年 1 月 7 日期间，被告人方建华伙同余某某在其养鱼的围子外，采取投毒方式杀害了约 30 余斤野生候鸟后贩卖给了被告人何建强。

2014 年 12 月底的一天 15 时许，被告人何建强、钟德军单独到被告人龙某甲养鱼的围子内投毒时，遭到被告人龙某乙(被告人龙某甲之子)的反对，但在被告人何建强的坚持下，被告人龙某乙最终与被告人何建强、钟德军一起投放了两大包克百威农药，此后两天，被告人何建强、钟德军、龙某乙三人在投毒区域共捡拾了约 100 余斤野生候鸟，由被告人何建强、钟德军运至岳阳市岳阳楼区三角线后销售给被告人李强介绍的汪某某。

2015 年 1 月 13 日，被告人何建强伙同被告人钟德军开船下湖收鱼，在返回途中先后搭乘被告人龙某丙、龙某乙以及任某某上船。在此过程中，被告人何建强要被告人钟德军从白湖沙洲藏药的草丛里将事先藏匿的克百威农药搬出，当船行至白湖沙洲与被告人方建华座船不远的地方时，被告人何建强要求被告人钟德军停船。随后被告人何建强、钟德军、龙某丙、龙某乙以及任某某等五人共同下湖投放农药。当晚，上述被告人分别住在被告人方建华的两艘座船上。次日至 15 日，被告人何建强等人从投毒区捡拾了若干被毒杀的野生候鸟。随后被告人何建强在岳阳市君山区壕坝将上述候鸟贩卖给被告人李强介绍的汪某某。

2015 年 1 月 13 日，被告人龙某甲在其养鱼的围子内投放克百威农药，此后 3 天，其在投毒区域共捡拾 50 余斤野生候鸟。

2015 年 1 月 16 日，被告人何建强、钟德军再次下湖，在向涂某某等人的养鱼围子运送生活物资途中，沿途捡拾了 2 只被毒杀的小天鹅，二被告人于当晚在被告人龙某丙养鱼的围子留宿。

2015 年 1 月 17 日上午，余某某在被告人方建华养鱼的围子内投放了克百威后将情况告知被告人方建华，表示隔天即可在投毒区域捡鸟。次日早晨，被告人方建华在投毒区域内捡拾了 4 只小天鹅，余某某捡拾了 6 只小天鹅和三四只野鸭。

2015 年 1 月 18 日上午，被告人何建强与钟德军等人在被告人龙某丙围子吃过早餐后，在返岸途中开始向养鱼业户收集毒死的候鸟，并电话通知被告人李强驾车到君山区壕坝附近接人以及联系汪某某收货。此后，被告人何建强、钟德军分别从被告人方建华及余某某处收购了 4 袋野生候鸟(10 只小天鹅和三四只野鸭)；从被告人龙某甲处收购了 2 袋约 50 斤野生候鸟(主要有鹭类、野鸭等)；从张某某处收购了 2 袋共 15 只野生候鸟(5 只白琵鹭，10 只其他鸟类)；从涂某某处收购了 2 袋约六七十斤候鸟(主要有野鸭)。随后被告人何建强、钟德军将其捡拾及收购的野生候鸟进行整理，最终分装成 8 袋共计 63 只。同日 17 时 40 分许，被告人何建强、钟德军在岳阳市君山区壕坝码头准备上岸时，被湖南省东洞庭湖自然保护区管理局工

作人员发现，二被告人见事情败露，遂弃船逃离现场。被告人李强驾车在君山区壕坝附近等候被告人钟德军上岸的过程中，得知案发，亦驾车逃离。湖南省东洞庭湖国家级自然保护区管理局在依法扣押上述 63 只被毒杀的野生候鸟后，即将该案移交岳阳市森林公安局办理。

2015 年 1 月 19 日，被告人何建强与钟德军到湖南东洞庭湖国家级自然保护区管理局投案；同年 4 月 8 日，被告人方建华在湖南省南县被抓获归案；4 月 27 日，被告人龙某丙主动到湖南省沅江市南大膳派出所投案；5 月 2 日，被告人龙某乙在深圳市被抓获归案；6 月 3 日，被告人龙某甲自动到岳阳市森林公安局投案；9 月 23 日，被告人李强在上海市被抓获归案。

2015 年 11 月 4 日，被告人何建强在汨罗市看守所羁押期间检举了网上在逃人员李某某的行踪，公安机关根据其提供的线索将李某某抓获后依法移交给广东省博罗县公安局。

经湖南省野生动植物司法鉴定中心以及湖南省公安厅物证鉴定中心分别鉴定，上述查获的 63 只野生候鸟中，有 12 只小天鹅及 5 只白琵鹭，均属国家二级保护野生动物；有 2 只苍鹭、3 只赤麻鸭、3 只赤颈鸭、11 只斑嘴鸭、27 只夜鹭，均属国家“三有保护”野生动物；在 63 只野生候鸟体内均检出有农药“克百威”成分，均系中毒死亡。

另查明，根据林业部、财政部、国家物价局林护字〔1992〕72 号关于《陆生野生动物资源保护管理费收费办法》和《捕捉、猎捕国家重点保护动物资源保护管理费收费标准》以及林业部关于《在野生动物案件中如何确定国家重点保护野生动物及其产品价值标准》的通知(林策通字〔1996〕8 号)的相关规定，被告人何建强等人在东洞庭湖国家级自然保护区毒杀的 63 只野生候鸟给国家造成的直接经济损失为人民币 44617 元，具体情况如下：12 只小天鹅的价值为 16032 元(12 只×80 元/只×16.7 倍)，5 只白琵鹭的价值为 20875 元(5 只×250 元/只×16.7 倍)；2 只苍鹭的价值依据市场价定为 800 元(2 只×400 元/只)，3 只赤麻鸭的价值依据市场价定为 1800 元(3 只×600 元/只)，3 只赤颈鸭的价值依据市场价定为 900 元(3 只×300 元/只)，11 只斑嘴鸭的价值依据市场价定为 2860 元(11 只×260 元/只)，27 只夜鹭的价值依据市场价定为 1350 元(27 只×50 元/只)。

以上事实有公诉机关及附带民事诉讼原告人提供的经庭审举证、质证、认证的下列证据予以证明：

1．现场查获的野生动物死体、照片及查获物清单。证明 2015 年 1 月 18 日，湖南省东洞庭湖自然保护区管理局工作人员在东洞庭湖自然保护区君山壕坝区域内巡查时，在何建强当场遗弃的湘(岳)渔 060351 号木船上查获死亡的小天鹅 12 只、白琵鹭 5 只、苍鹭 2 只、赤麻鸭 3 只、赤颈鸭 3 只、斑嘴鸭 11 只、夜鹭 27 只。

2．现场提取物照片，提取痕迹、物证登记表，现场勘验笔录及照片。证明岳阳市森林公安局工作人员在钟德军指认的投毒地点，即东洞庭湖保护区白湖区域的沙洲草丛里提取了何建强等人藏匿的“百业成”编织袋装的重 20KG 的“海利”牌克百威 2 包及 1KG 的“海利”牌克百威包装空袋 1 只。

3．案件移送函。证明湖南东洞庭湖国家级自然保护区管理局将查获的被毒杀的野生鸟类移送至岳阳市森林公安局侦查。

4．证据调取通知书及南县农作物种子质量跟踪信誉卡、牌号为湘 F×××××的车辆高速收费信息及照片。证明岳阳市森林公安局工作人员在马某处提取了“海利”克百威的交易记录；在湖南岳常高速公路开发有限公司及南县公安局交通警察大队调取了牌号为湘 F×××××的车辆 2014 年 12 月 23 日在君山收费站进入高速公路至岳常分中心收费站下高速，又从该分中心收费站驶入返回君山，期间该车经过了大郎卡口、鸿雁卡口。

5．手机通话详单。证明 2014 年 12 月 23 日，何建强与马某之间电话联系的情况以及何建强、钟德军、方建华、龙某丙、龙某乙、李强之间电话联系的情况。

6．证人马某的证言及辨认笔录。证明 2014 年 12 月 23 日晚，何建强、钟德军、李强、

何某四人驾车前来他在南县茅草街经营的“雨后农资店”购买了“海利”牌克百威 18 大包。在公安机关组织的辨认下，他指认 2014 年 12 月 23 日来购买克百威的人系何建强，搬运克百威并装车的人系钟德军，开车的司机系李强。

7．证人戴某某的证言及辨认笔录。证明 2014 年 12 月至 2015 年 1 月期间，“何老四”等人雇请他的三轮车运输货物。其中，2014 年冬月中上旬，在洞庭南路 428 号小区运输了五六袋每袋重约 70 斤的有农药气味的蛇皮袋至君山壕坝。在公安机关组织的辨认下，他指认何建强、钟德军系在洞庭南路 428 号小区雇请他运输货物的人。

8．证人李某甲的证言。证明她与丈夫龙某甲在洞庭湖围子里打渔，何建强来向她们收鱼。她丈夫龙某甲在白湖里毒杀野生鸟类卖给何建强。2015 年 1 月 16 日，她看到何建强在湖里捡了 1 只天鹅和 1 只野鸭。同月 18 日，她丈夫龙某甲将毒杀的野鸭等鸟类卖给了何建强，后何建强被公安机关查获。

9．证人谭某的证言。证明她和丈夫方建华在东洞庭湖自然保护区的围子里打渔为生，何建强经常收她们打的鱼。2014 年 12 月份，“何老五”的妻子“燕子”打电话告诉她余某某、何建强、钟德军等人在她家围子的棚子附近投毒杀鸟，她得知后要余某某将棚子拆掉。2015 年 1 月 18 日，她丈夫方建华捡了天鹅卖给了何建强。

10．证人李某乙的证言。证明 2015 年 1 月份，他姐夫龙某甲因在东洞庭湖投放“呋喃丹”毒杀野鸭子被公安机关发现，他陪同龙某甲一同前往公安机关投案。

11．证人杨某甲的证言。证明他经常从何建强处买鱼，因此与何建强认识。2015 年 1 月 18 日 15 时许，何建强打电话要他派鱼罐车去君山壕坝码头运鱼。

12．证人杨某乙、杨某丙的证言。证明他们系在洞庭湖围子里打渔的渔民，他们打的鱼都卖给“何老四”。2015 年 1 月 18 日 9 时许，“何老四”在杨某丙的围子里收购了他们捕的鱼。

13．证人何某甲的证言。证明 2015 年 1 月 16 日 9 时许，他与父亲何建强及钟德军等人从君山的一个大堤上下湖，由钟德军开蹼滚船拖一台机帆船载他们去收鱼。在收鱼期间，他父亲何建强捡了几袋“鸭子”放在船上。2015 年 1 月 18 日 9 时许，他们从渔民手中收购鱼后返回岳阳，并联系买家前来君山码头运鱼。他们先将船上的几袋“鸭子”放在蹼滚船上，开机帆船将收购的鱼运至君山码头卖给买家，鱼卖完后，他们返回蹼滚船上将“鸭子”放到机帆船上运到君山大堤，他们靠岸后，有人前来检查他们的船，见状他们弃船逃跑了。

14．证人丁某某的证言及辨认笔录。证明他系东洞庭湖自然保护区管理局的工作人员。2015 年 1 月 18 日下午，他与高某某等人接到举报在君山壕坝巡查蹲守时，发现一只牌号为湘(岳)渔 060351 号的可疑木船。他在亮明执法身份后登船查看，船上三人见状弃船逃跑。他们在船上发现 8 袋死亡的野生候鸟，其中有 12 只小天鹅、5 只白琵鹭及赤麻鸭、斑嘴鸭、赤颈鸭、苍鹭、夜鹭等鸟类。他在公安机关组织的辨认下，指认何建强、钟德军系他们检查时弃船逃跑中的 2 人。

15．证人周某某的证言。证明 2015 年 1 月 18 日，她听儿子何某说她丈夫何建强在洞庭湖捡了死了的野鸭、鹅等野生鸟类运上案时被执法人员查获。

16．证人汪某某的证言。证明 2014 年 12 月份，他表弟李强介绍他从其老婆的四叔处购买被毒杀的野鸭。2015 年 1 月份，他通过李强的介绍，前后三次从李强的四叔处共购得野生候鸟一百余斤。

17．证人何某乙的证言。证明 2014 年 11 月 13 日 23 时许，她与李强一同驾车到汉寿贩卖死野鸭时被公安、工商执法部门查获。

18．证人何某丙、李某丙的证言。证明 2014 年 11 月 13 日晚，何某丙和李强一起将野鸭销售给汉寿县李厚勇经营的“春华轩”酒楼时被公安机关查获。

19．证人吴某某的证言。证明 2015 年 1 月份，他朋友韩某带何建强、钟德军及何某丁等

人向他咨询情况，他告诉何建强、钟德军等人被查获的野生鸟类如果是猎杀的就是犯罪行为，如果是捡来的就不构成犯罪。

20．证人岳阳市森林公安局民警陆新、刘向群的证言。证明2015年1月19日16时许，被告人何建强与钟德军主动到东洞庭湖自然保护区管理局投案；同年4月8日，公安民警在湖南省益阳市南县三仙湖镇利群村六组将被告人方建华抓获归案；同年4月27日，被告人龙某丙主动到沅江市南大膳派出所投案；同年6月3日，被告人龙某甲主动到岳阳市森林公安局投案。

21．证人深圳市公安局黄田派出所民警李郴仁、彭杰的证言。证明2015年5月2日1时许，公安民警在深圳市宝安区西乡街道三围村西七巷×号×××房将被告人龙某乙抓获归案。

22．上海市公安局松江分局新浜派出所出具的抓获经过、松江区看守所羁押证明以及移交、接收材料。证明2015年9月23日15时20分许，被告人李强在G60沪昆高速枫泾检查站被公安机关抓获，随后被羁押在上海市松江区看守所，于同月25日被移交给岳阳市森林公安局。

23．被告人何建强的供述。证明他在洞庭湖以收鱼后出售为生，并雇佣钟德军帮忙。2014年12月23日晚，他与儿子何某甲和钟德军一同坐李强开的车去南县茅草街一家农资店购买了几大包克百威后存放在洞庭湖“何老二”鱼棚旁的草丛里。几天后，他提议用克百威去毒鸟，当天16时许，他与钟德军从龙某丙的围子出发，走至存放克百威的地点，他让钟德军将克百威用竹竿挑至投放地，他一个人去投药，将7包药全部撒完了，他投毒的地方只有“三鸭子”。2015年1月16日他与钟德军、何某甲一起从君山壕坝下湖去收“黄古鱼”，由钟德军开蹼滚船拖着木船搭载他们。13时许，他们途经白湖区域时，他捡了几只被毒死的天鹅和尖嘴巴鸟。直至18日他们先后到了龙某甲的围子、“哑巴”围子、龙家围子、“蓝瓢”围子收鱼。18日10时许，他们返回岳阳途经白湖时又捡了约20只尖嘴巴鸟和七八只天鹅，他们先将死鸟一共装了几蛇皮袋存放在蹼滚船上，后开木船上岸将黄古鱼卖给杨某甲，杨某甲派了两台鱼罐车将鱼运走。当日17时许，他们又乘木船返回到蹼滚船上，将捡来的鸟搬到木船上，准备到壕坝靠岸运走时被东洞庭湖保护区的工作人员发现，他们三人便弃船逃跑了。

24．被告人钟德军的供述。证明他与何建强是老乡，何建强每年下半年雇他来帮忙收鱼，他负责开船。2014年农历10月22日他开始来帮何建强收鱼。一个星期后，何建强带他从涂胜保、龙某甲、方建华处收购了死亡的野鸭子，他们运到君山壕坝后，何建强打电话给李强来运野鸭子，李强安排了一台黑色的轿车来将野鸭子运走，李强另外开了一台车接他们回了岳阳。10天后，何建强又带他去了龙某甲、方建华处收购了野鸭子、雁子，他们还是从君山壕坝上岸，何建强又打电话给李强，还是那台黑色轿车来运的鸟，李强又开车将他们接回了岳阳三角线。12月23日晚，何建强叫他一起去南县购买呋喃丹，他和何建强、何某甲一起坐李强驾驶的一台白色小轿车到了南县茅草街的一个生资门市部购买了18包每包重20公斤的呋喃丹，他们回岳阳后把呋喃丹都放在何建强位于三角线家里的院子里，何建强说这些药是要拿到洞庭湖去毒鸟的。2014年12月底还是2015年1月初的一天，他和何建强一起去红旗湖湖里毒鸟，因龙某甲不在，他和何建强便与龙某甲的儿子龙某乙一起投放了2包呋喃丹，随后他们三人一起捡拾被毒杀的野生鸟，那次他们毒了约150斤野鸭子，他们用船将野鸭子运到三角线洞庭湖边的沙石码头后，何建强打电话给李强，然后一台黑色小轿车将鸟运走了。李强接他们回了岳阳。10天后，何建强又带他一起运了5包呋喃丹去了白湖“方姓”座船投毒，他和何建强及方老板一起去投了3包呋喃丹，当天他们都住在船上，此次只捡到了4只鸟，就返回了，并将未用完的2包呋喃丹存放在附近的杂草丛中。1月16日，他与何建强、何某甲、龙某甲的老婆一起从君山壕坝下湖，随后和何建强一起到了龙某甲的围子、“哑巴”围子、“蓝瓢”围子收鱼、休息。1月18日9时许，他们在“哑巴”围子收了黄古鱼，准备

回岳阳，在途经龙某甲的围子附近收购了死亡的鸟，其中从张某某手里收购了 2 袋共 15 只死亡候鸟(其中 5 只白琵鹭，10 只其他候鸟)；从涂某某处收购了 2 袋约六七十斤候鸟，均为野鸭子；从龙某甲手里收购了 2 袋约 50 斤尖嘴巴鸟(夜鹭、苍鹭)；从方建华手中收购了 4 袋，其中 3 袋共装了 10 只小天鹅，1 袋为野鸭子；此外他和何建强捡了 2 只小天鹅，最终他和何建强将上述候鸟整理成了 8 蛇皮袋放在木船上。同日 14 时许，他们回到君山壕坝，怕鸟被人发现，便将鸟放在蹼滚船上，后开木船到壕坝码头，将黄古鱼卖给杨某甲后，回到蹼滚船上将鸟放回木船，直至 17 时许，他们将木船停靠在壕坝码头附近并通知李强来运野生候鸟时，被东洞庭湖管理局的工作人员发现，他们遂弃船逃跑。

25．被告人方建华的供述。证明他是在洞庭湖红旗湖打渔的渔民，何建强经常来找他收鱼，并向他和余某某、龙某丙、龙某甲等人收购被毒杀的野生候鸟。2014 年农历 10 月上旬的一天下午，他舅舅余某某去洞庭湖围子里投放克百威毒鸟，第二天他和余某某一起去捡被毒死的鸟，他们捡了 20 斤左右的野鸭子，当天中午他以 12 元每斤的价格卖给了何建强，当时钟德军也在场。几天后，他与余某某一起在围子内又投放 12 小包克百威毒杀了约 60 斤野鸭子，他以同样的价格卖给了何建强。大概农历十一月十七日，他又与余某某一起在他围子外投放了 10 小包克百威，毒杀了 30 多斤野鸭子和 1 只天鹅，他以野鸭子每斤 12 元及天鹅 1 只 250 元的价格卖给了何建强。2015 年 1 月份的一天，何建强、钟德军、龙某丙、龙某乙等人投了毒后到他的座船上吃饭，并捡了 2 天鸟后上岸了。2015 年 1 月 16 日下午，余某某又到围子里投放了克百威，18 日上午，他与余某某一起去捡被毒杀的鸟，他捡到了 4 只天鹅，余某某捡了 6 只天鹅和三四只野鸭，当天他以 900 元的价格将 4 只天鹅卖给了何建强，余某某以 1000 余元的价格将 6 只天鹅和野鸭全部卖给了何建强。

26．被告人龙某甲的供述。证明他在东洞庭湖自然保护区内以打渔为生，每年 9 月份下湖，12 月底上岸，其在下湖捕鱼的过程中看见过湖里有大雁、小雁、天鹅、野鸭子、尖嘴巴鸟、宽嘴巴鸟等候鸟出现。因他养鱼的围子是向何建强的大哥何某丁承包的，所以他养的鱼只能卖给何建强，何建强到他围子收鱼的过程中，跟他说可以投毒毒鸟，并负责收购，他就同意了。2014 年 12 月至 2015 年 1 月期间，何建强、钟德军两次共带了几大包克百威农药给他。2015 年 1 月 13 日下午，他在围子前面投了药，此后 3 天，他在投毒的地方捡了 50 多斤被毒杀的“三鸭子”“对鸭子”等野生候鸟，18 日上午，他以每斤 12 元的价格将被毒杀的鸟全部卖给了何建强。

27．被告人龙某乙的供述。证明 2014 年 12 月底的一天，何建强、钟德军开蹼滚船到了他父亲龙某甲养鱼的围子里来，喊他一起到围子里去投药(即克百威)毒鸟，因他父亲当时不在，他刚开始便拒绝了，但在何建强的坚持下，他最终还是和何建强、钟德军 3 人一起放了 2 大包克百威农药。第 2 天早上，他们去投毒的地方捡鸟，捡了几十斤被毒死的野鸭。一个星期后，他见何建强、钟德军、龙某丙、任某某一起开着蹼滚船从龙某丙的围子出来，他因儿子生病便搭船一同回岸上，途中，何建强要他们帮忙在方建华的木船附近投放农药，第 2 天早上，他们去投毒的地方捡鸟，他只看到何建强捡了 2 只野鸭，然后他坐何建强的船到了君山壕坝坐李强的车子回了岳阳三角线何建强的家里。他前后共参与了 2 次投毒，但不知道具体毒死了多少鸟，也辨别不出来毒死的都是什么鸟，在这两次投毒的时候他只看见投毒区域有野鸭子，但平时他看见过天鹅、尖嘴巴鸟，他知道毒鸟是违法的事情，但因为是何建强要求的他不好反驳，此外他也想毒了鸟后可以搞点钱。

28．被告人龙某丙的供述。证明 2012 年起，他从何建强的哥哥何某丁手中承包了东洞庭湖自然保护区内的一个围子养鱼。2014 年农历 11 月，他与龙某乙、任某某等人准备上岸，途经余某某的座船时，看到余某某捡了 6 只被毒杀的天鹅，余某某还送了 1 只给任某某。农历 11 月中旬，他和任某某坐何建强、钟德军开的蹼滚船从君山壕坝下湖到了围子里。20 号，他和任某某又坐何建强的蹼滚船回去，经过龙某甲的围子时，龙某乙因儿子生病也坐何建强

的蹼滚船回去。途中，何建强让钟德军从白湖沙洲搬了一大包农药到船上，并要他们帮忙投药毒鸟。当晚，何建强、钟德军、龙某乙在方建华的座船上休息，他和任某某在旁边的小木船上休息，第2天，他们去投毒的地方捡鸟，他看见何建强捡了五六只野鸭，钟德军捡了1只天鹅，然后他们就开船到了君山壕坝。

29．被告人李强的供述。证明何建强是他妻子的四叔，他听说何建强在东洞庭湖收购被毒杀的野生候鸟，便从何建强处收购死亡的野生候鸟运至常德汉寿县进行销售。2014年11月13日，他在何建强处购得被毒杀的野生候鸟100余斤，其中包括一只小天鹅，驾驶牌号为湘F×××××的小轿车运至汉寿县销售，被汉寿县公安机关查获后于同月15日被监视居住。2014年12月份，他表哥汪某某得知他四叔何建强有被毒杀的野生候鸟出售，便通过他认识了何建强。2014年12月23日晚，他驾驶牌号为湘F×××××的小轿车搭载何建强、何某甲、“军妹子”前往南县茅草街一家农资店购买克百威。2014年12月底至1月初，在他的介绍下，汪某某三次从何建强处购买被毒杀的野生候鸟150余斤，其中包括1只小天鹅，在此过程中，汪某某让其转交给何建强一次购鸟的费用，数额为4100元。2015年1月18日上午，何建强电话通知他开车到君山区壕坝接何建强和钟德军，并说船上有毒杀的鸟，让他联系汪某某到壕坝接货。他当天下午三四点钟开车到了君山壕坝，等了一段时间后，何建强的妻子打电话给他，说何建强等人出事了，他便开车回去了。

30．湖南省汨罗市看守所2015年11月10日出具的《关于在押人员何建强检举的情况说明》《深挖犯罪综合材料》《谈话教育记录》、岳阳市公安局刑事侦查支队《关于抓获犯罪嫌疑人李某某的经过》。证明2015年11月4日，被告人何建强在汨罗市看守所羁押期间检举了网上在逃人员李某某的行踪。岳阳市公安局刑侦支队根据其提供的联络方式将在逃人员李某某抓获归案并移交广东省博罗县公安局。

31．湖南省野生动植物司法鉴定中心湘动植鉴〔2015〕动鉴字第8号野生动物种类鉴定意见书、湖南省公安厅物证鉴定中心湘公物鉴(理化)字〔2015〕100号物证鉴定书。证明现场被查获的63只死亡野生鸟类中有17只是国家Ⅱ级重点保护野生动物，分别是12只小天鹅、5只白琵鹭；46只是国家“三有保护”野生动物，分别是2只苍鹭、3只赤麻鸭、3只赤颈鸭、11只斑嘴鸭、27只夜鹭；以上63只死亡的野生鸟类经取样检测，体内均含有克百威成分。

32．讯问现场监控录像。证明公安机关在对七被告人进行讯问时的情况。

33．汉寿县公安局汉公(治)监居字〔2014〕0200号监视居住决定书。证明被告人李强因涉嫌犯非法收购、运输、出售珍贵、濒危野生动物罪，于2014年11月15日由汉寿县公安局决定被监视居住。

34．湖南东洞庭湖国家级自然保护区功能区划图及湖南省国有山林证书。证明东洞庭湖国家级自然保护区的区划范围及相关权属证明。

35.《陆生野生动物资源保护管理费收费办法》和《捕捉、猎捕国家重点保护动物资源保护管理费收费标准》(林护字〔1992〕72号)以及林业部关于《在野生动物案件中如何确定国家重点保护野生动物及其产品价值标准》的通知(林策通字〔1996〕8号)。证明国家二级保护陆生野生动物的价值标准，按照该种动物资源保护管理费的16.7倍执行，其中小天鹅的管理费为80元/只，白琵鹭的管理费为250元/只。

36.《国家重点保护野生动物驯养繁殖许可证》《湖南省地方重点保护野生动物驯养繁殖许可证》。证明岳阳兴国水禽驯养繁殖场可驯养繁殖鸿雁、白额雁、大天鹅、小天鹅、鸳鸯、绿头鸭、绿翅鸭、针尾鸭、花脸鸭、赤麻鸭、斑嘴鸭、灰雁、骨顶鸡、苍鹭等。

37.《湖南省野生动植物及其产品经营许可证》。证明岳阳兴国水禽驯养繁殖场可养殖、销售国家三级以及三级以下野生保护动物(人工养殖的水禽)。

38．岳阳兴国水禽驯养繁殖场出具的证明。证明2014年下半年至2015年1月期间，岳阳兴国水禽驯养繁殖场销售的赤麻鸭为每只600元、苍鹭每只400元、赤颈鸭每只300元、

斑嘴鸭每只 260 元、夜鹭每只 50 元。

39．被告人何建强、钟德军、方建华、李强、龙某甲、龙某乙、龙某丙的户籍资料。分别证明被告人何建强出生于 1970 年 8 月 12 日，被告人钟德军出生于 1965 年 12 月 22 日，被告人方建华出生于 1976 年 3 月 25 日，被告人李强出生于 1990 年 8 月 9 日，被告人龙某甲出生于 1963 年 11 月 9 日，被告人龙某乙出生于 1987 年 1 月 15 日，被告人龙某丙出生于 1968 年 10 月 6 日，七名被告人作案时均已达完全刑事责任年龄。

本院认为，被告人何建强伙同被告人钟德军、方建华在湖南东洞庭湖国家级自然保护区内，采取投毒方式非法杀害国家二级保护动物小天鹅和白琵鹭及其他野生候鸟，被告人李强帮助被告人何建强购毒并全程负责对毒杀的野生候鸟进行销售，被告人何建强、钟德军、方建华、李强的行为均已构成非法杀害珍贵、濒危野生动物罪，属情节特别严重。公诉机关指控被告人何建强、钟德军、方建华、李强犯非法杀害珍贵、濒危野生动物罪的事实属实，罪名成立。被告人龙某甲、龙某丙、龙某乙在被告人何建强的授意下，采取投毒方式，分别在国家级自然保护区内猎杀野生候鸟，破坏野生动物资源，情节严重，其行为均已构成非法狩猎罪。虽然被告人龙某甲、龙某丙、龙某乙在主观上对各自投毒行为的危害后果持放任态度，但最终并未杀害珍贵、濒危野生动物，根据主客观相一致原则，对公诉机关就被告人龙某甲、龙某丙、龙某乙犯非法杀害珍贵、濒危野生动物罪的指控，本院不予认定。本案属共同犯罪，被告人何建强与被告人钟德军、方建华、李强共同构成非法杀害珍贵、濒危野生动物罪，其中被告人何建强、钟德军、方建华在共同犯罪过程中起主要作用，均属主犯；被告人李强在共同犯罪过程中起次要作用，属从犯，应对其减轻处罚。对被告人李强的辩护人提出其属从犯的辩护意见，因与事实及法律相符，本院予以采纳。被告人何建强、钟德军另与被告人龙某甲、龙某丙、龙某乙构成非法狩猎罪的共同犯罪，被告人何建强、钟德军、龙某甲、龙某丙在非法狩猎罪共同犯罪过程中起主要作用，均为主犯；被告人龙某乙在非法狩猎共同犯罪过程中，起次要作用，属从犯，应对其从轻处罚。被告人何建强、钟德军的犯罪行为同时触犯非法杀害珍贵、濒危野生动物罪和非法狩猎罪，应择一重罪以非法杀害珍贵、濒危野生动物罪定罪处罚。案发后，被告人何建强、钟德军、龙某甲、龙某丙均能主动投案，供述了各自的犯罪事实且均能当庭认罪，均属自首，可分别对被告人何建强、钟德军、龙某甲、龙某丙从轻处罚。被告人何建强在被羁押期间，主动揭发了他人的犯罪行为并提供相应线索，协助公安机关抓获了其他案件的犯罪嫌疑人，属立功，亦可对其从轻处罚。对被告人何建强的辩护人提出被告人何建强具有自首和立功的辩护意见，因与事实及法律相符，本院予以认定；但对其减轻处罚的请求及其他辩护意见，本院不予采纳。被告人方建华、李强、龙某乙到案后能如实供述其犯罪事实并当庭认罪，均可从轻处罚。被告人龙某乙、龙某丙分别跟随被告人何建强等人投毒，其中被告人龙某乙在第一次参与投毒时曾向被告人何建强提出过反对意见；在第二次投毒时，被告人龙某乙、龙某丙均为临时根据被告人何建强的提议参与投毒，虽然被告人何建强曾向被告人龙某丙授意过毒杀野生候鸟，但最终被告人龙某丙与龙某乙并未向被告人何建强等人出售过毒杀的野生候鸟，故根据被告人龙某丙、龙某乙的犯罪情节及悔罪表现，可认为对被告人龙某丙、龙某乙适用缓刑对其各自所居住的社区没有重大不良影响，可对被告人龙某丙、龙某乙适用缓刑。此外，因被告人何建强、钟德军、方建华、李强、龙某甲、龙某乙、龙某丙的犯罪行为破坏了国家野生动物资源，致使国家财产遭受损失，各被告人应承担赔偿责任。在附带民事诉讼原告人提出的 53553 元的赔偿请求中，经庭审查明，有 44617 元以现场查获的 63 只野生候鸟的核定价值予以认定，剩余 8936 元的损失因没有充分证据予以证明，故本院不予认定。上述 44617 元的损失应根据各被告人在犯罪过程中所起的具体作用由七名被告人分担，其中 10 只小天鹅的损失 13360 元应由被告人方建华与在逃人员余某某共同赔偿，另外 2 只小天鹅的损失 2672 元，由被告人何建强、钟德军、李强共同赔偿；5 只白琵鹭的损失 20875 元应由被告人何建强、钟德军、李强与在逃人员张某某共同赔

偿；2只苍鹭、3只赤麻鸭、3只赤颈鸭、11只斑嘴鸭、27只夜鹭的损失共计7710元由被告人龙某甲、方建华、龙某乙、龙某丙与在逃人员涂某某分别按30%、10%、5%、5%、50%的比例承担，其中被告人方建华负责赔偿771元、被告人龙某甲负责赔偿2313元、被告人龙某丙负责赔偿385.5元、被告人龙某乙负责赔偿385.5元，剩余50%的损失3855元因涂某某在逃，故应由被告人何建强、钟德军、李强共同承担连带赔偿责任。被告人何建强、钟德军、李强还应对上述全部损失承担连带赔偿责任。据此，对被告人何建强依照《中华人民共和国刑法》第三百四十一条第一款，第二十五条第一款，第二十六条第一、四款，第六十七条第一款，第六十八条；对被告人钟德军依照《中华人民共和国刑法》第三百四十一条第一款，第二十五条第一款，第二十六条第一、四款，第六十七条第一款；对被告人方建华依照《中华人民共和国刑法》第三百四十一条第一款，第二十五条第一款，第二十六条第一、四款，第六十七条第三款；对被告人李强依照《中华人民共和国刑法》第三百四十一条第一款、第二十五条第一款、第二十七条、第六十七条第三款；对被告人龙某甲依照《中华人民共和国刑法》第三百四十一条第二款，第二十五条第一款，第二十六条第一、四款，第六十七条第一款；对被告人龙某乙依照《中华人民共和国刑法》第三百四十一条第二款，第二十五条第一款，第二十七条，第六十七条第三款，第七十二条第一款，第七十三条第二、三款；对被告人龙某丙依照《中华人民共和国刑法》第三百四十一条第二款，第二十五条第一款，第二十六条第一、四款，第六十七条第一款，第七十二条第一款，第七十三条第二、三款；另依照《最高人民法院关于审理破坏野生动物资源刑事案件具体应用法律若干问题的解释》第一条、第四条、第十一条以及《中华人民共和国民法通则》第四条、第一百零六条第二款，《中华人民共和国物权法》第四十九条之规定，判决如下：

一、被告人何建强犯非法杀害珍贵、濒危野生动物罪，判处有期徒刑十年，并处罚金人民币一万元。

(刑期自判决执行之日起计算，判决执行前先行羁押的，羁押一日折抵刑期一日，即自2015年1月19日起至2025年1月18日止。罚金限在本判决书生效后30日内缴纳，逾期强制缴纳。)

被告人钟德军犯非法杀害珍贵、濒危野生动物罪，判处有期徒刑十年，并处罚金人民币一万元。

(刑期自判决执行之日起计算，判决执行前先行羁押的，羁押一日折抵刑期一日，即自2015年1月19日起至2025年1月18日止。罚金限在本判决书生效后30日内缴纳，逾期强制缴纳。)

被告人方建华犯非法杀害珍贵、濒危野生动物罪，判处有期徒刑十二年，并处罚金人民币一万元。

(刑期自判决执行之日起计算，判决执行前先行羁押的，羁押一日折抵刑期一日， 即自2015年4月8日起至2027年4月7日止。罚金限在本判决书生效后30日内缴纳，逾期强制缴纳。)

被告人李强犯非法杀害珍贵、濒危野生动物罪，判处有期徒刑六年，并处罚金人民币五千元。

(刑期自判决执行之日起计算，判决执行前先行羁押的，羁押一日折抵刑期一日，即自2015年9月23日起至2021年9月22日止。罚金限在本判决书生效后30日内缴纳，逾期强制缴纳。)

被告人龙某甲犯非法狩猎罪，判处有期徒刑二年。

(刑期自判决执行之日起计算，判决执行前先行羁押的，羁押一日折抵刑期一日，即自2016年3月1日起至2018年2月28日止。)

被告人龙某乙犯非法狩猎罪，判处有期徒刑一年，缓刑二年。

(缓刑考验期自判决确定之日起计算。)

被告人龙某丙犯非法狩猎罪，判处有期徒刑一年，缓刑二年。

(缓刑考验期自判决确定之日起计算。)

二、被告人何建强、钟德军、方建华、李强、龙某甲、龙某乙、龙某丙的犯罪行为造成国家财产损失共计人民币 44617 元，各被告人应共同对附带民事诉讼原告人岳阳市林业局进行赔偿，其中由被告人方建华负责赔偿 14131 元、由被告人龙某甲负责赔偿 2313 元、由被告人龙某丙、龙某乙各负责赔偿 385.5 元，剩余损失 27402 元由被告人何建强、钟德军、李强共同负责赔偿；被告人何建强、钟德军、李强应对全部损失 44617 元承担连带赔偿责任。

以上款项限在本判决生效后十日内履行。

如不服本判决，可在接到判决书的第二日起十日内，通过本院或者直接向湖南省岳阳市中级人民法院提出上诉。书面上诉的，应当提交上诉状正本一份，副本二份。

审　判　长　肖冰峰

审　判　员　李　林

人民陪审员　文建设

二〇一六年三月二日

书　记　员　杨　欢

注：何建强、钟德军、方建华、李强、龙某甲不服上诉后，湖南省岳阳市中级人民法院于 2016 年 8 月 3 日作出(2016)湘 06 刑终 73 号刑事裁定，驳回上诉，维持原判。

三、江苏省泰州市环保联合会诉泰兴锦汇化工有限公司等水污染民事公益诉讼案

中华人民共和国最高人民法院
民 事 裁 定 书

(2015)民申字第 1366 号

再审申请人(一审被告、二审上诉人)：泰兴锦汇化工有限公司。住所地：江苏省泰兴市经济开发区新港路×号。

法定代表人：许江波，该公司董事长。

委托代理人：赵兵，北京市时代九和律师事务所律师。

被申请人(一审原告、二审被上诉人)：泰州市环保联合会。住所地：江苏省泰州市永晖路×号。

法定代表人：童宁，该联合会秘书长。

委托代理人：陈晓军，江苏江豪律师事务所律师。

委托代理人：张文灿，江苏天滋律师事务所律师。

一审被告、二审上诉人：江苏常隆农化有限公司。住所地：江苏省泰兴市经济开发区团结河路×号。

法定代表人：王卫华，该公司总经理。

一审被告、二审上诉人：江苏施美康药业股份有限公司。住所地：江苏省泰兴市经济开发区新港南路 10－×号。

法定代表人：王俊华，该公司董事长。

委托代理人：张亚斌，江苏恒桥律师事务所律师。

一审被告、二审上诉人：泰兴市申龙化工有限公司。住所地：江苏省泰兴市经济开发区疏港路×号。

法定代表人：蒋德生，该公司副总经理。

一审被告：泰兴市富安化工有限公司。住所地：江苏省泰兴市经济开发区中港路×号。

法定代表人：秦涛涵，该公司董事长。

委托代理人：俞鑫生，江苏有方律师事务所律师。

一审被告：泰兴市臻庆化工有限公司。住所地：江苏省泰兴市经济开发区疏港路×号。

法定代表人：杨继群，该公司经理。

再审申请人泰兴锦汇化工有限公司(以下简称锦汇公司)因与被申请人泰州市环保联合会以及一审被告、二审上诉人江苏常隆农化有限公司(以下简称常隆公司)、江苏施美康药业股份有限公司(以下简称施美康公司)、泰兴市申龙化工有限公司，一审被告泰兴市富安化工有限公司、泰兴市臻庆化工有限公司环境污染侵权赔偿纠纷一案，不服江苏省高级人民法院(2014)苏环公民终字第 00001 号民事判决，向本院申请再审。本院依法组成合议庭对本案进行了审查，现已审查终结。

锦汇公司申请再审称：(一)二审判决认定锦汇公司被江中公司倾倒副产酸的数量有误。1.根据戴卫国等人在公安机关的供述，锦汇公司被泰州市江中化工有限公司(以下简称江中公司)倾倒的副产酸数量为 653.08 吨。2.兴化市协宇运输有限公司泰兴分公司(以下简称协宇泰兴分公司)开具的运输费用票据显示锦汇公司运输副产酸的数量为 1702.27 吨。既然二审法院认定锦汇公司支付运费即为补贴倾倒费用，那么也应该按照协宇泰兴分公司开具运输费用票据的数额认定副产酸的倾倒数量。3.如果按照销售发票的记载计算，戴卫国等人于 2012 年 8 月开始倾倒锦汇公司出售给江中公司的副产酸，在此之前，锦汇公司开具给江中公司的副产酸发

票数量为3822.2吨；2011年12月29日锦汇公司开具给江中公司的455.42吨副产酸发票系于2012年入账，并非在2012年被倾倒。上述两笔副产酸数量应从锦汇公司出售给江中公司的总数量中扣除。因此，锦汇公司被江中公司倾倒的副产酸数量应该从653.08吨、1702.27吨等数字中认定。(二)二审判决认定锦汇公司应支付环境修复费用无事实依据。1.案涉河流无需修复及赔偿。如泰运河和古马干河被污染前水质为Ⅲ类，经过自我净化之后，2013年的河流水质仍为Ⅲ类。泰州市环保联合会未提交证据证明污染行为造成他人人身、财产等损失，锦汇公司不应承担环境修复费用及损失赔偿。2.二审判决缺乏对案涉河流生态环境损害的确认和评估，以水体污染修复费用代替生态环境损害，没有事实及法律依据。3.修复费用的认定及计算方法有误。环境保护部环境规划院《环境污染损害数额计算推荐方法》(以下简称《推荐方法》)(第Ⅰ版)确定了实际修复费用法、虚拟治理成本法和修复费用法。《泰州市泰兴市古马干河、如泰运河12.19废酸倾倒事件环境污染损害评估技术报告》(以下简称《评估技术报告》)中的治理成本法系依据《推荐方法》(第Ⅰ版)第4.5.2修复费用法确定水体修复参考的单位治理成本，其采用的方法是化学氧化法，计算的单位治理成本是每吨700元。因此，《评估技术报告》中的治理成本法实际就是《推荐方法》中的修复费用法，其敏感系数应为1.4～1.6倍，计算得出的环境修复费用应为5000余万元，锦汇公司应承担其中的8757855元。此外，泰州市环保联合会一审起诉时主张六家被告企业赔偿水环境污染损失，并未主张环境修复费用，二审判决判令六家被告企业承担环境修复费用，超出了原告的诉讼请求。(三)二审判决适用法律错误。1.《推荐方法》(第Ⅰ版)在二审时已经失效，二审法院并未依据《推荐方法》(第Ⅱ版)重新进行损害评估鉴定。《推荐方法》(第Ⅱ版)中规定了环境修复和生态恢复两种方式，都是以自然环境损害为前提，但本案并未有自然环境的损害，不应进行修复。2.锦汇公司尽到了销售副产酸的谨慎义务。锦汇公司与买受人订立合同，约定运费承担，属于《中华人民共和国合同法》的调整范畴，不能适用侵权责任法的规定。(四)泰州市环保联合会不具有提起本案环境民事公益诉讼的主体资格，二审判决认定其具有本案原告主体资格错误。(五)锦汇公司不是本案适格的责任承担主体。锦汇公司自身并未实施排放、倾倒、泄漏等污染行为，也没有指使他人实施该行为。江中公司在购买副产酸后的处置行为与锦汇公司无关，双方之间无意思联络，锦汇公司不应承担污染环境的侵权责任。(六)二审判决引用《中华人民共和国民事诉讼法》(以下简称民事诉讼法)第一百七十条第一款第一项关于维持原判的规定，但实际作出改判，属于适用法律错误。(七)二审判决主文第四项的内容属于企业自主经营权的范畴，二审判决将该内容的执行决定权置于环境保护行政主管部门手中，设置审批程序，侵犯了锦汇公司的企业自主经营权。(八)泰州市环保联合会没有对其他涉嫌污染环境的化工企业提起诉讼。北京市朝阳区自然之友环境研究所针对当地其他污染企业提起的环境民事公益诉讼案件被法院依法受理，会影响锦汇公司的责任承担数额。锦汇公司依据民事诉讼法第二百条第二项、第六项、第十一项的规定申请再审。

泰州市环保联合会提交意见称：(一)泰州市环保联合会作为民事诉讼法第五十五条规定的“有关组织”，在本案中具备提起环境民事公益诉讼的主体资格。(二)锦汇公司所谓“销售”副产酸的行为其实是非法处置行为，与环境污染之间存在因果关系。1.锦汇公司的所谓“销售”行为其实就是抛弃行为，不符合买卖合同的基本特征。锦汇公司工作人员在接受公安机关询问时也予以承认。2.锦汇公司知道或者应当知道江中公司没有处置副产酸的资质和能力。戴卫国、姚雪元在2013年4月24日的笔录中，也分别供述锦汇公司知道他们肯定没有处置副产酸的资质和能力。3.锦汇公司将副产酸交由江中公司处置的行为与环境污染之间存在因果关系。尽管锦汇公司没有自己实施排放、倾倒、泄漏等污染环境的行为，但锦汇公司知道或者应当知道江中公司等单位没有取得处理副产酸的资质和能力；锦汇公司知道自己支付的款项不足以支付正常无害化处理副产酸的费用；锦汇公司将对自己没有利用价值的副产酸交由江中公司戴卫国等人处理，不仅给倾倒者提供了污染源，客观上也为倾倒者谋取了非法利

益。(三)二审判决认定锦汇公司被江中公司倾倒副产酸的数量正确。1.锦汇公司在再审申请中提到的数据均以戴卫平记账本记载数量确定，但戴卫平的记账本无论是记账时间、还是记载内容都是不全面的。2.锦汇公司对刑事被告人供述的引用存在断章取义。(1)戴卫国、姚雪元已在 2013 年 8 月 8 日讯问笔录中确认倾倒常隆公司、锦汇公司副产酸 19361.16 吨。(2)锦汇公司摘取刑事被告人的部分供述，认为案涉副产酸开始倾倒的时间为 2012 年 8 月是错误的。实际倾倒时间应为 2011 年年底。3.锦汇公司副总经理杨军在 2013 年 10 月 10 日的询问笔录中明确说明，戴卫国、姚雪元等人通过给锦汇公司运输费用票据或者油票方式平账。因此，锦汇公司仅根据运输费用票据来计算被江中公司倾倒副产酸数量是片面的。(四)二审判决确定的环境修复费用是合法合理的。1.案涉被污染河流需要修复。大量副产酸被倾倒入河流后，对水体、水生物、河床等水生态环境造成严重的损害，损害后果的严重性决定了修复的必要性。当地政府发布的环境公告中对水质的检测项目仅仅是对水质常规项目的检测，并不能全面覆盖水质的整体状况，被倾倒水域的水质检测情况并不能说明污染对河流造成的损害情况。2.二审判决确定的环境修复费用的计算方法正确。《评估技术报告》中采用的实验值法仅仅是“从消耗长江水削减酸性污染”的角度，计算的只是降低污染源本身破坏性的成本费用，并非是对环境修复费用的评估。正是由于实际的环境修复费用难于计算，才适用虚拟治理成本法来计算，符合《推荐方法》的规定。3.关于采用哪一版本《推荐方法》的问题。本案损害事实发生时，只有《推荐方法》(第Ⅰ版)，《推荐方法》(第Ⅱ版)是在本案一审结束后出台的。二审程序中，锦汇公司从未以《评估技术报告》的依据失效为由主张无效或者申请重新鉴定。此外，《推荐方法》(第Ⅱ版)中，虚拟治理成本法仍是常用的环境价值评估方法。(五)二审判决援引民事诉讼法第一百七十条第一款第一项作为判决的程序法依据正确。1.二审判决的基础是认为一审判决“认定事实清楚，适用法律正确”。民事诉讼法第一百七十条第一款中只有第一项规定的情形为认定事实清楚，适用法律正确。2.二审判决维持了一审判决关于环境修复主体、需要赔偿的项目和环境修复费用的数额，只是对环境修复费用的支付、抵扣设置了一定的条件。这些内容不是对一审判决认定事实和适用法律的改变，而是二审法院基于从源头上预防和控制环境污染所做的司法探索与创新，体现了二审法院司法预防与司法惩治相结合的环保理念。3.锦汇公司一方面认为二审判决关于抵扣条件的设置没有法律依据；另一方面对二审判决确定的 40%的环境修复费用可以用技术改造费抵扣的做法表示认可，且在判决执行过程中已经根据二审判决向相关主管部门提出了抵扣申请。(六)锦汇公司认为二审判决确定的抵扣条件限制其企业自主经营权，属于认识错误。二审判决对环境修复费用的抵扣设定一定的程序，其目的是重在引导企业注重技术改造，变废为宝，循环利用，减少和避免副产酸对环境的损害。(七)本案是否存在其他污染主体或者漏列其他污染主体，不影响判决的公正性。本案并不是按照总体的环境污染损害结果来计算环境修复费用，而是按照污染者各自倾倒污染物的种类及数量来计算环境修复费用，判决结果并没有免除或者减少其他可能存在的污染者的环境侵权责任，也没有加重包括锦汇公司在内的六家被告企业的环境侵权责任。锦汇公司的再审申请缺乏事实与法律依据，请求予以驳回。

锦汇公司在本院召集的庭前会议中确认其依据民事诉讼法第二百条第一项、第二项、第六项、第十一项的规定申请再审。同时，锦汇公司向本院提交三份新的证据材料：1.江苏省泰州市中级人民法院(2014)泰中环刑终字第 00001 号刑事判决书，拟证明二审判决认定的锦汇公司被江中公司倾倒副产酸数量错误。2.江苏省泰州市中级人民法院(2015)泰中环公民诉初字第 00001 号民事裁定书，拟证明案涉环境污染责任案件中还有江苏中丹化工技术有限公司等污染企业的存在。3.江苏省高级人民法院(2015)苏环公民诉终字 00001 号民事裁定书，拟证明二审判决判令锦汇公司承担环境修复费用的数额错误。

泰州市环保联合会针对上述证据材料发表质证意见认为：1.锦汇公司提交的江苏省泰州市中级人民法院(2014)泰中环刑终字第 00001 号刑事判决书，不能证明本案二审判决认定锦

汇公司被江中公司倾倒副产酸数量错误。该判决关于锦汇公司被江中公司倾倒副产酸数量的认定与本案二审判决一致。2.锦汇公司提交的江苏省泰州市中级人民法院(2015)泰中环公民诉初字第 00001 号民事裁定书、江苏省高级人民法院(2015)苏环公民诉终字 00001 号民事裁定书，不能证明二审判决判令锦汇公司承担环境修复费用的数额错误。上述两份裁定仅是对案件审理程序的裁定，并非实体判决，无法确定案涉水体在同时期是否还存在其他的侵权主体。即使存在其他侵权主体，也不会对本案判决的数额产生影响。故锦汇公司提交的三份新的证据材料并非本案再审审查阶段的新证据。

本院认为：本案是民事再审审查案件。根据民事诉讼法第二百条、《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第三百九十五条的规定，本院应当围绕再审申请人主张的再审事由是否成立进行审查。本案所涉七个争议焦点中，对第一、二、五、七个争议焦点的审查，系判断锦汇公司的再审申请是否符合民事诉讼法第二百条第六项的规定；对第三、四、五个争议焦点的审查，系判断锦汇公司的再审申请是否符合民事诉讼法第二百条第二项的规定。此外，锦汇公司依据民事诉讼法第二百条第一项、第十一项提出的新的证据材料以及二审判决超出当事人诉讼请求的问题，本院结合相关争议焦点分别予以评判。

(一)关于二审判决认定泰州市环保联合会具有本案原告主体资格是否有法律依据的问题

民事诉讼法第五十五条规定：“对污染环境、侵害众多消费者合法权益等损害社会公共利益的行为，法律规定的机关和有关组织可以向人民法院提起诉讼。”泰州市环保联合会是 2014 年 2 月 25 日在泰州市民政局登记设立的社会组织，其宗旨是围绕可持续发展战略，贯彻落实科学发展观，围绕实现泰州市环境保护目标和维护公众环境权益，发挥政府与社会之间的桥梁和纽带作用，推动泰州市及全人类环境保护事业的进步与发展。其业务范围是提供环境决策建议、维护公众环境权益、开展环境宣传教育、政策技术咨询服务等。泰州市环保联合会于 2014 年 8 月 4 日依据民事诉讼法第五十五条的规定提起本案环境民事公益诉讼，有充分的法律依据。2015 年 1 月 1 日正式施行的《中华人民共和国环境保护法》不适用于本案。锦汇公司关于泰州市环保联合会不具有本案原告主体资格的主张，没有事实与法律依据，本院不予支持。

(二)关于二审判决认定锦汇公司以出售方式处置其生产的副产酸的行为与造成古马干河、如泰运河环境污染损害结果之间存在因果关系依据是否充分的问题

锦汇公司与江中公司签订《工矿产品购销合同》，约定锦汇公司向江中公司出售副产酸，每月 800 吨，价格随行就市。根据姚雪元、戴卫国在公安机关的讯问笔录以及锦汇公司副总经理杨军、安全生产部长戴建东在公安机关的询问笔录可知，锦汇公司在副产酸交易市场低迷的情况下，为了尽快处置副产酸，实际出售副产酸价格为 1 元/吨，同时每吨补贴江中公司 20 元运输费用，并以江中公司实际运出的副产酸数量结账。出卖人交付货物，买受人支付相应价款系买卖合同的本质属性。锦汇公司作为出卖人出售副产酸，买受人江中公司仅支付 1 元/吨的价款，锦汇公司反而支付 20 元/吨的运输费用或者其他补贴给江中公司，此种补贴出售行为明显不符合买卖合同的基本特征。

副产酸属于危险化学品，其生产、出售、运输、储存和处置有专门的规范。《中华人民共和国水污染防治法》第二十九条第一款规定，禁止向水体排放油类、酸液、碱液或者剧毒废液。副产酸作为企业生产化工产品过程中产生的副产品，在无法进入市场的情况下，应当按照国家法律、法规的规定由有资质处理危险废物的机构进行处置。作为危险化学品和化工产品生产企业，需要全面了解其主营产品和主营产品生产过程中产生的副产品是否具有高度危险性，是否会造成环境污染；需要使其主营产品的生产、出售、运输、储存和处置符合相关法律规定，亦需使其副产品的生产、出售、运输、储存和处置符合相关法律规定，避免对生态环境造成损害或者产生造成生态环境损害的重大风险。锦汇公司生产经营过程中产生的副产酸属于危险化学品，其生产、出售、运输、储存和处置有专门的规范，锦汇公司应对副产

酸的处置具有较高的注意义务。从实施倾倒行为的戴卫国、姚雪元等人在公安机关的讯问笔录及杨军、戴建东在公安机关的询问笔录看，锦汇公司明知戴卫国、姚雪元等人将副产酸倾倒入河而未加阻止。虽然锦汇公司并未直接实施倾倒行为，但其在明知副产酸市场低迷，对其进行无害化处理需花费高昂处理费用的情况下，采用补贴运输费用等方式将副产酸交给不具备处置资质的江中公司，并长期放任江中公司将副产酸倾倒入河，造成如泰运河、古马干河水体大面积污染，严重损害社会公共利益和公众环境权益，其行为与如泰运河、古马干河水体污染损害结果之间具有因果关系，应当承担侵权责任。

(三)关于二审判决判令锦汇公司承担生态环境修复责任依据是否充分的问题

虽然河流具有一定的自净能力，但是环境容量是有限的，向水体大量倾倒副产酸，必然对河流的水质、水体动植物、河床、河岸以及河流下游的生态环境造成严重破坏。如不及时修复，污染的累积必然会超出环境承载能力，最终造成不可逆转的环境损害。因此，不能以部分水域的水质得到恢复为由免除污染者应当承担的环境修复责任。

泰州市环保联合会申请东南大学能源与环境学院吕锡武教授作为专家辅助人出席一审庭审，对鉴定意见以及本案所涉专业问题提出意见。吕锡武教授认为，向水体倾倒危险废物的行为直接造成了区域生态环境功能和自然资源的破坏，无论是对长江内河水生态环境资源造成的损害进行修复，还是将污染引发的风险降至可接受水平的人工干预措施所需费用，均将远远超过污染物直接处理的费用；由于河水的流动和自我净化，即使倾倒点水质得到恢复，也不能因此否认对水生态环境曾经造成的损害。鉴定人南京理工大学贺启环教授出庭接受询问时也表示，无法计算得到实际人工干预的费用或者难于计算人工干预的费用，可以采用虚拟治理成本法计算损失。

水环境具有流动性，污染行为瞬间发生，损害现场无法复原，属于《推荐方法》(第Ⅰ版)规定的环境修复费用难于计算的情形，可以采用虚拟治理成本法来计算环境修复费用。且《推荐方法》(第Ⅱ版)与《推荐方法》(第Ⅰ版)关于虚拟治理成本法的规定并无本质区别，二审判决以《评估技术报告》确定的锦汇公司被江中公司倾倒的副产酸治理成本、被倾倒的数量再乘以Ⅲ类地表水环境功能敏感程度推荐倍数 4.5～6 倍的下限 4.5 倍计算环境修复费用，并无不当。

经查泰州市环保联合会的一审起诉状，虽然将诉讼请求表述为赔偿水环境污染损失，但在事实和理由部分明确此赔偿款项系环境修复费用。二审判决判令锦汇公司承担环境修复费用并未超出当事人的诉讼请求。

(四)关于二审判决认定锦汇公司被江中公司倾倒的副产酸数量为 5460.18 吨是否有事实依据的问题

常隆公司、锦汇公司向江中公司交付副产酸后，江中公司并未记载倾倒常隆公司、锦汇公司副产酸的具体数量，而是将收到的副产酸直接倾倒入河。但常隆公司、锦汇公司均通过开具增值税发票的方式记载了副产酸的出售数量，戴卫国、姚雪元在公安机关的讯问笔录记载了常隆公司、锦汇公司共同被江中公司倾倒的副产酸的数量。因此，为查明锦汇公司被江中公司倾倒副产酸的数量，需查明常隆公司、锦汇公司向江中公司出售副产酸数量和江中公司倾倒副产酸数量。二审判决根据常隆公司、锦汇公司出售副产酸的增值税专用发票以及戴卫国、姚雪元、丁劲光等人在公安机关的供述，认定常隆公司、锦汇公司出售给江中公司的副产酸分别为 17598.92 吨、8224.97 吨。两公司出售总量减去其中被江中公司以开票方式出售的 7170.71 吨，再减去江中公司以不开票方式出售的 1508.92 吨，剩余为被江中公司倾倒的 17143.86 吨。按照常隆公司、锦汇公司各自出售数量的比例分配，江中公司倾倒的副产酸中属于常隆公司的为 11683.68 吨，属于锦汇公司的为 5460.18 吨。由于常隆公司和锦汇公司的副产酸被江中公司混合倾倒，无法准确查明各自被倾倒的数量，二审判决按照两公司出售副产酸的比例确定各自被倾倒副产酸的数量，认定方法合理。

锦汇公司以戴卫国、姚雪元在公安机关的部分讯问笔录以及部分运输费用票据主张二审判决认定锦汇公司被江中公司倾倒副产酸数量错误，不能成立。

锦汇公司向本院申请再审时提交江苏省泰州市中级人民法院(2014)泰中环刑终字第00001号刑事判决书作为新的证据材料，用以证明本案二审判决认定锦汇公司被江中公司倾倒的副产酸数量错误。经查，上述刑事二审判决内容是对本案倾倒副产酸的犯罪嫌疑人的罪行认定。刑事二审判决载明戴卫国、姚雪元共同或者伙同蒋巧红以江中公司名义收集锦汇公司5460.18吨副产酸倾倒至如泰运河与古马干河水体，与本案二审判决认定锦汇公司被江中公司倾倒副产酸的数量一致。故刑事二审判决关于副产酸倾倒数量的认定不能证明本案二审判决认定的主要事实或者证据错误，不属于《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第三百八十七条、第三百八十八条规定的情形，亦不足以推翻二审判决。

(五)关于二审判决判令锦汇公司需凭环境保护行政主管部门出具的企业环境守法情况证明、项目竣工环保验收意见和具有法定资质的中介机构出具的技术改造投入资金审计报告抵扣40%的生态环境修复费用是否会侵害锦汇公司的企业自主经营权的问题

本案系社会组织为了保护环境，维护社会公共利益而提起的环境民事公益诉讼，其目的是发现污染环境、破坏生态行为，通过诉讼程序有序参与环境治理，以法治思维和法治方式解决环境保护领域的矛盾纠纷。本案一审、二审法院贯彻《中华人民共和国环境保护法》的基本理念，把生态保护和环境修复放在优先位置，依法认定生态环境受到损害，并根据《评估技术报告》以及专家意见合理确定生态环境修复费用，依法追究污染者的环境侵权责任。同时，充分运用司法智慧和审判手段，依法妥善衡平各方利益冲突，创新环境修复费用履行方式。二审判决生效后，六家被告企业中的三家企业积极履行了全部判决内容。施美康公司、常隆公司虽曾向本院申请再审，但最终撤回其再审申请。常隆公司在撤回再审申请时表示，从保护环境，维护社会公共利益角度出发，二审判决与企业自身发展目标是一致的。常隆公司在履行二审判决的过程中，从源头上解决企业在环境保护方面存在的问题，投入4700余万元用于副产酸循环利用等环境项目的建设，现已通过验收并投入运行。目前，常隆公司已经履行完毕二审判决的全部内容，并认识到案件给常隆公司造成的负面影响已经转化为企业改正错误、履行环境保护责任的正能量。由此可见，二审判决不仅没有干涉企业的自主经营权，反而发挥了环境民事公益诉讼应有的评价指引功能，指引污染企业通过技术创新和改造，担负起环境保护的企业责任。

二审判决主文第四项判令六家被告企业需凭环境保护行政主管部门出具的企业环境守法情况证明、项目竣工环保验收意见和具有法定资质的中介机构出具的技术改造投入资金审计报告抵扣40%环境修复费用的目的，是为了确定锦汇公司是否已经充分履行了技术改造义务，与企业的自主经营权无涉，亦非设置审批门槛。锦汇公司理应贯彻可持续发展理念，将环境保护作为生产经营过程中的重要因素，积极履行生效判决内容，通过技术改造降低环境风险，承担企业应当承担的环境保护主体责任和社会责任。

(六)关于北京市朝阳区自然之友环境研究所针对当地其他污染企业提起的环境民事公益诉讼案件是否会减轻锦汇公司责任的问题

锦汇公司提交江苏省泰州市中级人民法院(2015)泰中环公民诉初字第00001号民事裁定书、江苏省高级人民法院(2015)苏环公民诉终字00001号民事裁定书，拟证明二审判决判令锦汇公司承担环境修复费用数额错误。经查，北京市朝阳区自然之友环境研究所作为原告，针对古马干河、如泰运河水污染问题，在江苏省泰州市中级人民法院提起的环境民事公益诉讼案件正在一审审理中。本案二审判决根据锦汇公司被江中公司倾倒副产酸的数量计算出锦汇公司应承担的环境修复费用，与其他污染企业的责任不存在交叉或者重叠。锦汇公司在再审审查期间提交的两份另案民事裁定书，不影响本案二审判决对锦汇公司环境侵权责任的认定，不属于再审审查阶段的新证据，本院不予采信。

(七)关于二审判决引用民事诉讼法第一百七十条第一款第一项适用法律是否错误的问题

二审判决引用民事诉讼法第一百七十条第一款第一项关于“原判决、裁定认定事实清楚，适用法律正确的，以判决、裁定方式驳回上诉，维持原判决、裁定”的规定，在维持一审判决的同时，对于锦汇公司支付环境修复费用的期限和条件进行适当调整，并非基于一审判决存在错误而改判，适用法律并无不当。二审判决的裁判方法有利于引导和鼓励企业主动改进生产技术，降低环境风险，从源头上减少环境污染。锦汇公司关于二审判决引用民事诉讼法第一百七十条第一款第一项适用法律错误的主张，缺乏法律依据，本院不予支持。

综上，锦汇公司的再审申请不符合《中华人民共和国民事诉讼法》第二百条第一项、第二项、第六项、第十一项规定的情形。依照《中华人民共和国民事诉讼法》第二百零四条第一款之规定，裁定如下：

驳回泰兴锦汇化工有限公司的再审申请。

审　判　长　林文学

审　判　员　魏文超

审　判　员　刘小飞

审　判　员　王展飞

代理审判员　吴凯敏

二〇一六年一月三十一日

法官助理　刘慧慧

书　记　员　饶　赟

书　记　员　刘亚男

四、中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司等腾格里沙漠污染系列民事公益诉讼案

中华人民共和国最高人民法院
民 事 裁 定 书

(2016)最高法民再 47 号

再审申请人(一审起诉人、二审上诉人)：中国生物多样性保护与绿色发展基金会。住所地：北京市东城区永定门外西革新里××号。

法定代表人：胡德平，该基金会理事长。

委托代理人：王海军，北京德和衡律师事务所律师。

委托代理人：王晓，北京德和衡律师事务所律师。

再审申请人中国生物多样性保护与绿色发展基金会(以下简称绿发会)因起诉宁夏瑞泰科技股份有限公司(以下简称瑞泰公司)环境污染公益诉讼一案，不服宁夏回族自治区高级人民法院(2015)宁民公立终字第 6 号民事裁定，向本院申请再审。本院裁定提审本案后，依法组成合议庭进行了审理，现已审理终结。

绿发会向宁夏回族自治区中卫市中级人民法院起诉称：瑞泰公司在生产过程中违规将超标废水直接排入蒸发池，造成腾格里沙漠严重污染，截至起诉时仍然没有整改完毕。请求判令瑞泰公司：(一)停止非法污染环境行为；(二)对造成环境污染的危险予以消除；(三)恢复生态环境或者成立沙漠环境修复专项基金并委托具有资质的第三方进行修复；(四)针对第二项和第三项诉讼请求，由法院组织原告、技术专家、法律专家、人大代表、政协委员共同验收；(五)赔偿环境修复前生态功能损失；(六)在全国性媒体上公开赔礼道歉；(七)承担绿发会支出的鉴定费、差旅费、律师费等合理费用；(八)承担本案诉讼费用。

一审法院认为：绿发会的宗旨与业务范围虽然是维护社会公共利益，但其章程中并未确定该基金会同时具备《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》(以下简称环境公益诉讼司法解释)第四条规定的“从事环境保护公益活动”，且该基金会的登记证书确定的业务范围也没有从事环境保护的业务，故绿发会不能认定为《中华人民共和国环境保护法》(以下简称环境保护法)第五十八条规定的“专门从事环境保护公益活动”的社会组织。一审法院依照环境保护法第五十八条、环境公益诉讼司法解释第四条、《中华人民共和国民事诉讼法》(以下简称民事诉讼法)第一百二十三条的规定，裁定对绿发会的起诉不予受理。

绿发会不服一审裁定，向宁夏回族自治区高级人民法院提起上诉称：一审法院未能正确理解“环境”及“环境保护”的概念，从而错误得出绿发会宗旨和业务范围没有“从事环境保护公益活动”的结论。上诉请求：(一)撤销一审裁定，(二)依法受理绿发会的起诉。

二审法院认为：绿发会的上诉不符合环境保护法第五十八条和环境公益诉讼司法解释第四条、第五条的规定，上诉理由不能成立。二审法院依照民事诉讼法第一百七十条第一款第一项、第一百七十一条、第一百七十五条的规定，裁定驳回绿发会的上诉，维持一审裁定。

绿发会不服二审裁定，向本院申请再审称：(一)二审裁定没有写明事实和理由，也没有对上诉意见进行法律分析，就认定绿发会上诉理由不符合环境保护法第五十八条和环境公益诉讼司法解释第四条、第五条的规定，不符合民事裁定应有的内容要求，不利于环境民事公益诉讼制度的有效实施。(二)一审裁定未能正确理解“环境”以及“环境保护”的概念，错误得出绿发会宗旨和业务范围没有“从事环境保护公益活动”的结论。绿发会章程中的“生物多样性保护”“绿色发展事业”“生态文明建设”“人与自然和谐”“美好家园”等表述均属

于环境保护的范畴。一审裁定单纯以没有“环境保护公益活动”的文字表述为由，认定绿发会未从事环境保护公益活动，属于对法律条文的机械理解，应予纠正。(三)绿发会实际从事环境保护公益活动的情况，也印证了其章程所确定的“环境保护公益活动”的宗旨和业务范围。环境公益诉讼司法解释第四条放宽了对于社会组织专门从事环境保护公益活动的审查标准，体现了鼓励社会组织依法提起环境民事公益诉讼的司法导向。绿发会自成立以来，一直从事环境保护相关公益活动。二审裁定错误理解环境公益诉讼司法解释的上述规定，适用法律错误。请求：(一)撤销一审裁定和二审裁定，(二)依法受理绿发会的起诉。

本院查明：一审期间，绿发会提交了基金会法人登记证书，显示其系在中华人民共和国民政部登记的基金会法人；提交了 2009 年至 2013 年度检查合格的证明材料，显示其连续五年年检合格；提交了无违法记录声明，声明其五年内未因从事业务活动违反法律、法规的规定而受到行政、刑事处罚。二审期间，绿发会提交了“生态教育校园行”“环境公益诉讼案例研讨会”“中国自然保护区可持续发展管理研修班”“中美空气净化研讨会”“赴雅江拯救五小叶槭”等活动照片，显示其组织或者参与了有关环境保护公益活动。再审期间，绿发会提交了其历史沿革介绍，显示其前身系 1985 年成立的中国麋鹿基金会，曾长期从事麋鹿种群保护和繁育工作；提交了海南省海口市中级人民法院(2015)海中法环民初字第 1 号、青岛海事法院(2015)青海法海事初字第 117 号等七份立案受理通知书，显示其提起的多起环境民事公益诉讼已被立案受理；提交了 2014 年度检查合格证明材料，显示其 2014 年年检合格。

本院认为：本案系社会组织提起的环境污染公益诉讼。再审申请人绿发会认为，一审、二审法院认定其不是“从事环境保护公益活动”的社会组织，进而裁定不予受理其起诉，构成适用法律错误。故本案应围绕绿发会是否系专门从事环境保护公益活动的社会组织这一焦点进行审理。

为保障公众有序参与环境治理、确立和救济公众环境权益、依法追究侵权行为人法律责任，民事诉讼法第五十五条规定了环境民事公益诉讼制度，明确法律规定的机关和有关组织可以提起环境公益诉讼。因环境公共利益具有普惠性和共享性，没有特定的法律上直接利害关系人，有必要鼓励、引导和规范社会组织依法提起环境公益诉讼，以充分发挥环境公益诉讼功能。环境保护法第五十八条规定：“对污染环境、破坏生态，损害社会公共利益的行为，符合下列条件的社会组织可以向人民法院提起诉讼：(一)依法在设区的市级以上人民政府民政部门登记；(二)专门从事环境保护公益活动连续五年以上且无违法记录。符合前款规定的社会组织向人民法院提起诉讼，人民法院应当依法受理。”环境公益诉讼司法解释第四条进一步明确了对于社会组织“专门从事环境保护公益活动”的判断标准，规定“社会组织章程确定的宗旨和主要业务范围是维护社会公共利益，且从事环境保护公益活动的，可以认定为环境保护法第五十八条规定的‘专门从事环境保护公益活动'。社会组织提起的诉讼所涉及的社会公共利益，应与其宗旨和业务范围具有关联性”。故，对于本案绿发会是否可以作为“专门从事环境保护公益活动”的社会组织提起本案诉讼，应重点从其宗旨和业务范围是否包含维护环境公共利益，是否实际从事环境保护公益活动，以及所维护的环境公共利益是否与其宗旨和业务范围具有关联性等三个方面进行审查。

一、关于绿发会章程规定的宗旨和业务范围是否包含维护环境公共利益的问题

社会公众所享有的在健康、舒适、优美环境中生存和发展的共同利益，表现形式多样。对于社会组织宗旨和业务范围是否包含维护环境公共利益，应根据其内涵而非简单依据文字表述作出判断。社会组织章程即使未写明维护环境公共利益，但若其工作内容属于保护各种影响人类生存和发展的天然的和经过人工改造的自然因素的范畴，包括对大气、水、海洋、土地、矿藏、森林、草原、湿地、野生生物、自然遗迹、人文遗迹、自然保护区、风景名胜区、城市和乡村等环境要素及其生态系统的保护，均应认定宗旨和业务范围包含维护环境公共利益。

我国1992年签署的联合国《生物多样性公约》指出，生物多样性是指陆地、海洋和其他水生生态系统及其所构成的生态综合体，包括物种内部、物种之间和生态系统的多样性。环境保护法第三十条规定：“开发利用自然资源，应当合理开发，保护生物多样性，保障生态安全，依法制定有关生态保护和恢复治理方案并予以实施。引进外来物种以及研究、开发和利用生物技术，应当采取措施，防止对生物多样性的破坏。”可见，生物多样性保护是环境保护的重要内容，亦属维护环境公共利益的重要组成部分。

绿发会章程中明确规定，其宗旨为“广泛动员全社会关心和支持生物多样性保护和绿色发展事业，保护国家战略资源，促进生态文明建设和人与自然和谐，构建人类美好家园”，符合联合国《生物多样性公约》和环境保护法保护生物多样性的要求。同时，“促进生态文明建设”“人与自然和谐”“构建人类美好家园”等内容契合绿色发展理念，亦与环境保护密切相关，属于维护环境公共利益的范畴。故应认定绿发会的宗旨和业务范围包含维护环境公共利益内容。

二、关于绿发会是否实际从事环境保护公益活动的问题

环境保护公益活动，不仅包括植树造林、濒危物种保护、节能减排、环境修复等直接改善生态环境的行为，还包括与环境保护有关的宣传教育、研究培训、学术交流、法律援助、公益诉讼等有利于完善环境治理体系，提高环境治理能力，促进全社会形成环境保护广泛共识的活动。绿发会在本案一审、二审及再审期间提交的历史沿革、公益活动照片、环境公益诉讼立案受理通知书等相关证据材料，虽未经质证，但在立案审查阶段，足以显示绿发会自1985年成立以来长期实际从事包括举办环境保护研讨会、组织生态考察、开展环境保护宣传教育、提起环境民事公益诉讼等环境保护活动，符合环境保护法和环境公益诉讼司法解释的规定。同时，上述证据亦证明绿发会从事环境保护公益活动的时间已满五年，符合环境保护法第五十八条关于社会组织从事环境保护公益活动应五年以上的规定。

三、关于本案所涉及的社会公共利益与绿发会宗旨和业务范围是否具有关联性的问题

依据环境公益诉讼司法解释第四条的规定，社会组织提起的公益诉讼涉及的环境公共利益，应与社会组织的宗旨和业务范围具有一定关联。此项规定旨在促使社会组织所起诉的环境公共利益保护事项与其宗旨和业务范围具有对应或者关联关系，以保证社会组织具有相应的诉讼能力。因此，即使社会组织起诉事项与其宗旨和业务范围不具有对应关系，但若与其所保护的环境要素或者生态系统具有一定的联系，亦应基于关联性标准确认其主体资格。本案环境公益诉讼系针对腾格里沙漠污染提起。沙漠生物群落及其环境相互作用所形成的复杂而脆弱的沙漠生态系统，更加需要人类的珍惜利用和悉心呵护。绿发会起诉认为瑞泰公司将超标废水排入蒸发池，严重破坏了腾格里沙漠本已脆弱的生态系统，所涉及的环境公共利益之维护属于绿发会宗旨和业务范围。

此外，绿发会提交的基金会法人登记证书显示，绿发会是在中华人民共和国民政部登记的基金会法人。绿发会提交的2010年至2014年度检查证明材料，显示其在提起本案公益诉讼前五年年检合格。绿发会还按照环境公益诉讼司法解释第五条的规定提交了其五年内未因从事业务活动违反法律、法规的规定而受到行政、刑事处罚的无违法记录声明。据此，绿发会亦符合环境保护法第五十八条，环境公益诉讼司法解释第二条、第三条、第五条对提起环境公益诉讼社会组织的其他要求，具备提起环境民事公益诉讼的主体资格。

综上，本案一审、二审裁定认定绿发会不具备提起环境民事公益诉讼的主体资格，系对环境保护法、环境公益诉讼司法解释以及环境保护内涵的不当理解所致，适用法律确有错误，应予纠正。绿发会再审请求成立，本院予以支持。依照《中华人民共和国环境保护法》第五十八条，《中华人民共和国民事诉讼法》第二百零七条第一款、第一百七十条第一款第二项，《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第一条，《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第四百零七条第二款、第三百三十

二条之规定，裁定如下：

一、撤销宁夏回族自治区高级人民法院(2015)宁民公立终字第 6 号民事裁定和宁夏回族自治区中卫市中级人民法院(2015)卫民公立字第 6 号民事裁定；

二、本案由宁夏回族自治区中卫市中级人民法院立案受理。

本裁定为终审裁定。

审　判　长　刘小飞

代理审判员　吴凯敏

代理审判员　叶　阳

二〇一六年一月二十八日

书　记　员　魏　然

五、北京市朝阳区自然之友环境研究所、福建省绿家园环境友好中心诉谢知锦等四人破坏林地民事公益诉讼案

福建省高级人民法院
民 事 判 决 书

(2015)闽民终字第2060号

上诉人(原审被告)谢知锦，男，1963年10月27日出生，汉族，个体经商，住福建省福州市仓山区。

上诉人(原审被告)倪明香，男，1965年3月28日出生，汉族，农民，住福建省福清市。

上诉人(原审被告)郑时姜，男，1966年4月4日出生，汉族，农民，住福建省福清市。

以上三上诉人共同委托代理人谢长铃、陈燕敏，北京中银(福州)律师事务所律师。

被上诉人(原审原告)北京市朝阳区自然之友环境研究所，住所地：北京市朝阳区裕民路12号×号楼×层A×××。

法定代表人张赫赫，副总干事。

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法定代表人林美英，主任。

委托代理人吴安心，湖北隆中律师事务所律师。

原审被告李名槊，男，1968年12月16日出生，汉族，农民，住浙江省泰顺县。

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原审第三人南平市国土资源局延平分局，住所地：福建省南平市延平区胜利街×××号。

法定代表人黄革，局长。

委托代理人贺建华，福建舜宁律师事务所律师。

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法定代表人王承旭，局长。

委托代理人郭德辉，福建闽越律师事务所律师。

原审支持起诉人中国政法大学环境资源法研究和服务中心(又称中国政法大学污染受害者法律帮助中心)，住所地：北京市海淀区西土城路××号润博会议×××。

负责人王灿发，主任。

委托代理人祝文贺，北京市君永律师事务所律师。

上诉人谢知锦、倪明香、郑时姜因与被上诉人北京市朝阳区自然之友环境研究所(以下简称自然之友)、福建省绿家园环境友好中心(以下简称福建绿家园)、原审被告李名槊、原审第三人南平市国土资源局延平分局(以下简称国土延平分局)、南平市延平区林业局(以下简称延平区林业局)环境侵权责任纠纷一案，不服南平市中级人民法院(2015)南民初字第38号民事判决，向本院提起上诉。本院依法组成合议庭于2015年12月7日公开开庭审理了本案。上诉人谢知锦、倪明香、郑时姜及其委托代理人陈燕敏，被上诉人自然之友的委托代理人葛枫、刘湘，福建绿家园的法定代表人林美英及其委托代理人吴安心，原审被告李名槊的委托代理人邱树华，原审第三人延平区林业局的委托代理人郭德辉，原审支持起诉人中国政法大学环境资源法研究和服务中心的委托代理人祝文贺到庭参加诉讼。现已审理终结。

原审审理查明：中国文化书院绿色分院作为社会团体分支机构(英文名称为 Friends of nature，习称“自然之友”)，于 2003 年 5 月 8 日经民政部登记，并以“自然之友”名义开展环境保护公益活动。原告自然之友在此基础上于 2010 年 6 月 18 日在北京市朝阳区民政局登记成立，属于民办非企业单位，从事非营利性社会服务活动的社会组织。章程规定的宗旨：倡导生态文明、从事环境研究、促进可持续发展。业务范围：固体废弃物处理技术研究及相关政策研究，固体废弃物对生态环境的影响研究，固体废弃物研究相关科普活动推广及相关环境教育推广。经北京市朝阳区民政局年度检查，2010 年度合格、2011 年度基本合格、2012 年度合格、2013 年度合格。原告自然之友提供了 2009 年至 2014 年各年度工作报告，内容主要体现从事环境问题调查研究、保护生态环境、环保知识教育等公益活动，并声明自成立以来无违法记录。原告福建绿家园是 2006 年 11 月 7 日在福建省民政厅登记的民办非企业单位，是非营利性社会服务活动的社会组织。章程规定的宗旨：普及公民环境保护意识，保护生态环境与生态平衡。业务范围：保护生态环境、传播环境文化、开展学术技术交流。经福建省民政厅年度检查，2009 年至 2013 年度均合格。原告福建绿家园提供了 2009 年至 2013 年各年度工作报告，内容主要体现参与环境问题调查、保护生态环境、宣传环境保护等公益活动，并声明自成立以来无违法记录。

2005 年 5 月 18 日，经第三人国土延平分局许可，被告李名槊取得证号为 350702052××××的采矿许可证，采矿权人为被告李名槊，矿山名称为南平市延平区恒兴石材厂，有效期限自 2005 年 4 月至 2008 年 8 月，矿区面积 0.0039 平方公里，矿种为饰面花岗岩，开采深度由 282 米至 252 米标高。被告李名槊亦取得南平市延平区恒兴石材厂个体工商户营业执照。2008 年 6 月 3 日，经第三人国土延平分局许可，被告李名槊取得证号为 350702082××××的采矿许可证，有效期限自 2008 年 6 月至 2008 年 8 月，开采深度由 520 米至 483 米标高，采矿权人、矿山名称、矿区面积、矿种等与 350702052××××的采矿许可证一致。2008 年 5 月 28 日，被告李名槊向第三人国土延平分局交纳了 1 万元生态环境恢复保证金。被告李名槊采矿过程中未依法取得占用林地许可证。2008 年 11 月福建省冶金工业设计院出具一份《南平市延平区砂基洋(恒兴)矿区饰面花岗岩开发利用方案》对矿区水土保持、土地复垦、闭坑措施等作了可行方案。

2008 年 7 月 28 日，被告李名槊与被告谢知锦签订一份《采矿权转让合同》。2008 年 7 月 29 日，被告李名槊与被告谢知锦、倪明香、郑时姜又重新签订一份内容相同的《采矿权转让合同》，约定被告李名槊出让给被告谢知锦、倪明香、郑时姜的采矿矿区位于福建省南平市延平区太平镇葫芦山村，矿山名称为南平市延平区恒兴石材厂，矿区面积 0.0039 平方公里，矿种为饰面花岗岩，采矿权四至范围及界址为矿山范围扩大至现采矿点山顶整个范围。登记于李名槊名下的《采矿许可证》证号为 350702052××××，李名槊负责办理该采矿许可证续期十年，矿山范围扩大至现采矿点整个山顶范围。李名槊领取续期《采矿许可证》之日起配合将采矿权人变更至谢知锦名下。李名槊负责协调开通矿山脚部至山顶的道路。合同末尾注明：原 2008 年 7 月 28 日，被告李名槊与被告谢知锦单独签订的合同无效，以 2008 年 7 月 29 日被告李名槊与被告谢知锦、倪明香、郑时姜三个股东共同重新签订的合同为有效合同。合同还约定了价款支付、违约责任等内容。该合同签订后，未经采矿权审批管理机关审批。被告谢知锦、倪明香、郑时姜三人经商量决定由被告谢知锦具体负责矿山的采矿事宜。此后，在未依法取得占用林地许可证及办理采矿许可续期手续的情况下，被告谢知锦、倪明香、郑时姜改变被告李名槊原有塘口位置从山顶剥山皮、开采矿石，并将剥山皮和开采矿石产生的弃石往山下倾倒，直至 2010 年初停止开采，造成林地原有植被严重毁坏。被告谢知锦、倪明香、郑时姜还在矿山的塘口的下方兴建了砖混结构的工棚用于矿山工人居住。在国土资源部门数次责令停止采矿的情况下，2011 年 6 月份，被告谢知锦、倪明香、郑时姜还雇佣挖掘机到该矿山，在矿山边坡处开路和扩大矿山塘口面积，造成该处林地原有植被严重毁坏。经福

建天祥司法鉴定所鉴定，被告谢知锦、倪明香、郑时姜采石塘口位于 005 林班 08 大班 040 小班、013 林班 02 大班 050 小班，占用林地面积 10.54 亩；弃石位于 013 林班 02 大班 050 小班和 013 林班 02 大班 020 小班，占用林地的面积 8.62 亩；工棚位于 005 林班 08 大班 070 小班，占用林地的面积 0.28 亩，非法占用林地面积共计 19.44 亩。被告李名槊原采石塘口位于 013 林班 02 大班 020 小班、050 小班、070 小班占用林地面积 8.89 亩。占用林地现场被用于采石、堆放弃石弃土，造成林地的原有植被被严重破坏。被告谢知锦、倪明香、郑时姜因犯非法占用农用地罪，于 2014 年 7 月 28 日被南平市延平区人民法院分别判处有期徒刑一年六个月、一年四个月、一年二个月。三被告不服，提起上诉，南平市中级人民法院二审裁定：驳回上诉，维持原判。

2010 年 3 月 26 日，被告李名槊出具委托书委托被告谢知锦、倪明香、郑时姜代为办理证号 350702052××××《采矿许可证》所属矿山的拆迁补偿相关事宜。

2014 年 11 月 13 日，第三人国土延平分局向被告李名槊登记的南平市延平区恒兴石材厂发出一份《关于缴纳矿山生态环境恢复治理保证金的通知》，要求缴纳矿山生态环境恢复治理保证金 252000 元。

在被告谢知锦、倪明香、郑时姜犯非法占用农用地罪一案侦查过程中，侦查机关南平市公安局延平森林分局制作的 2014 年 1 月 20 日补充现场勘验笔录记载：“谢知锦、倪明香、郑时姜三人后期采矿的弃石处下方与原老板李名槊的矿山塘口部分重叠，原老板李名槊的矿山塘口部分被弃石覆盖。”2014 年 1 月 22 日被告谢知锦的现场辨认笔录记载：“原李名槊的旧塘口已被山顶新塘口采挖期间所产生的弃石、弃土所掩埋。”以及 2014 年 2 月 12 日第二次补充现场勘验笔录记载：“原老板李名槊在现场同时表示，他今天在现场指认的其原来采石塘口现部分已被谢知锦、倪明香、郑时姜三人后期采矿所产生的弃土、弃石掩埋覆盖。”

本案诉讼期间，原告自然之友委托北京中林资产评估有限公司评估。经评估，北京中林资产评估有限公司作出评估报告，意见为：生态修复项目的总费用在评估基准日的价值为 110.19 万元；价值损害即生态环境受到损害至恢复原状期间服务功能损失为 134 万元，其中损毁林木价值 5 万元，推迟林木正常成熟的损失价值 2 万元，植被破坏导致碳释放的生态损失价值、森林植被破坏期生态服务价值、森林恢复期生态服务价值 127 万元。

原告自然之友为本案支付评估费 6000 元，律师费 96200 元，为本案支出的其他合理费用 31308 元(合理的交通费 22840 元、合理的住宿费 4148 元、市内交通及用餐费参照《中央和国家机关差旅费管理办法》规定的标准并结合差旅费发票及案件合理的出差需要，确定为 4320 元)；原告福建绿家园为本案支付律师费 25261 元，为本案支出的其他合理费用 7393.5 元(交通费 4513.5 元、住宿费 400 元、市内交通及用餐费参照《中央和国家机关差旅费管理办法》规定的标准并结合差旅费发票及案件合理的出差需要，确定为 2480 元)。

原审法院认为，本案争议的主要焦点问题：1.原告自然之友、福建绿家园是否符合“从事环境保护公益活动连续五年以上”的主体资格要件；2.被告谢知锦、倪明香、郑时姜、李名槊是否应承担破坏生态环境的侵权责任，以及具体的责任形式和责任大小；3.最高人民法院《关于审理环境民事公益诉讼案件适用法律若干问题的解释》规定的生态环境受到损害至恢复原状期间服务功能损失是否适用于本案；4.评估费用、律师费以及为诉讼支出的其他合理费用的确定问题；5.第三人国土延平分局、延平区林业局是否应承担组织恢复植被的民事责任。

关于原告自然之友、福建绿家园的主体资格问题。《中华人民共和国环境保护法》第五十八条规定：“对污染环境、破坏生态，损害社会公共利益的行为，符合下列条件的社会组织可以向人民法院提起诉讼：(一)依法在设区的市级以上人民政府民政部门登记；(二)专门从事环境保护公益活动连续五年以上且无违法记录。”原告自然之友系 2010 年 6 月 18 日在北京市朝阳区民政局登记成立的民办非企业单位，虽然其自登记之日起至本案起诉之日止成立不满

五年，但其在登记前已经依法从事环境保护公益活动，至提起本案诉讼前从事环境保护公益活动已满五年，且在本案诉讼过程中其登记设立已满五年，并无违法记录。因此，原告自然之友在本案中符合“从事环境保护公益活动连续五年以上”的主体资格要件。原告福建绿家园于 2006 年 11 月 7 日在福建省民政厅登记，是从事环境保护的非营利性的社会组织，专门从事环境保护公益活动连续五年以上且无违法记录。故原告自然之友、福建绿家园均符合《中华人民共和国环境保护法》第五十八条规定，作为公益诉讼原告的主体适格。

关于被告谢知锦、倪明香、郑时姜、李名槊是否应承担破坏生态的侵权责任，以及具体的责任形式和责任大小问题。被告谢知锦、倪明香、郑时姜非法占用林地共 19.44 亩，被告谢知锦、倪明香、郑时姜依法应当承担该部分损坏林地植被的恢复义务。虽然被告李名槊与被告谢知锦、倪明香、郑时姜签订了《采矿权转让合同》，但该合同未经主管部门批准而未生效，且被告李名槊的采矿许可证到期未经行政主管部门办理续期手续的情况下，擅自将矿山采矿权四至范围扩大至原采矿点整个山顶范围转让给被告谢知锦、倪明香、郑时姜采矿，被告李名槊对被告谢知锦、倪明香、郑时姜非法占用林地造成植被破坏的行为具有共同过错，故被告李名槊对被告谢知锦、倪明香、郑时姜非法占用林地 19.44 亩应承担共同责任。由于被告李名槊的原塘口 8.89 亩部分已被被告谢知锦、倪明香、郑时姜之后采矿期间所产生的弃石、弃土所掩埋，对该部分被告李名槊与被告谢知锦、倪明香、郑时姜的责任无法区分，故被告谢知锦、倪明香、郑时姜也应对该部分承担共同恢复责任。《中华人民共和国森林法》第十八条规定：“进行勘查、开采矿藏和各项建设工程，应当不占或者少占林地；必须占用或者征用林地的，经县级以上人民政府林业行政主管部门审核同意后，依照有关土地管理的法律、行政法规办理建设用地审批手续，并由用地单位依照国务院有关规定缴纳森林植被恢复费。”被告李名槊和被告谢知锦、倪明香、郑时姜未经林业行政主管部门审批，为采矿先后非法占用林地共 28.33 亩，造成林地的原有植被被严重破坏，属于破坏生态环境、损害社会公共利益的行为。关于被告李名槊提出其采矿的矿区塘口早在 1995 年即已存在，其没有提供证据，且根据国土资源部《矿山地质环境保护规定》第二十四条规定：“采矿权转让的，矿山地质环境保护与治理恢复的义务同时转让。采矿权受让人应当依照本规定，履行矿山地质环境保护与治理恢复的义务。”其受让采矿权的同时，也应承受恢复的义务。综上，被告谢知锦、倪明香、郑时姜、李名槊依法应共同承担恢复林地植被的义务，如未在判决指定的期限内履行恢复林地植被的义务，则应共同赔偿生态环境修复费用 110.19 万元用于恢复林地植被。

关于《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》规定的生态环境受到损害至恢复原状期间服务功能损失是否适用于本案的问题。因新的法律、法规或者司法解释实施前的有关民事行为或者事件发生纠纷起诉到人民法院，在行为发生时的法律、法规或者司法解释没有明确规定时，可以适用新的法律、法规或者司法解释的规定。2015 年 1 月 7 日《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》正式施行，该解释第二十一条规定：“原告请求被告赔偿生态环境受到损害至恢复原状期间服务功能损失的，人民法院可以依法予以支持。”本案系于 2015 年 1 月 1 日立案受理，一审审理过程中上述司法解释颁布实施，故针对该司法解释规定的生态环境服务功能损失，可以适用于本案。因此，原告主张被告赔偿生态环境受到损害至恢复原状期间服务功能损失，予以支持。但因原告主张的损害价值 134 万元中的损毁林木价值 5 万元和推迟林木正常成熟的损失价值 2 万元属于林木所有者的权利，不属于植被生态公共服务功能的损失，故原告无权主张，不予支持；其余植被破坏导致碳释放的生态损失价值、森林植被破坏期生态服务价值、森林恢复期生态服务价值合计 127 万元属于生态公共服务功能的损失价值，予以支持。

关于鉴定费用、律师费以及为诉讼支出的其他合理费用问题。根据《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第二十二条规定，原告自然之友主张的评估费用 6000 元，属于为诉讼合理支出，予以支持；其主张的律师费 96200 元在律师收费

相关规定允许范围内，没有违反规定，予以支持；为诉讼支出的其他合理费用 31308 元亦属必要，予以支持。原告福建绿家园主张的律师费用 25261 元系参照律师收费办法的规定，在收费幅度内按标的额约 1%收取，合法合理，予以支持；为诉讼支出的其他合理费用 7393.5 元，亦予以支持。

关于第三人国土延平分局、延平区林业局是否应承担组织恢复植被的责任问题。本案中，第三人国土延平分局、延平区林业局作为对环境保护负有监督管理职责的行政执法部门，与本案处理结果没有民事法律利害关系，不应作为民事法律关系的第三人承担责任。

综上，依照《中华人民共和国民法通则》第一百一十七条、第一百三十条，《中华人民共和国环境保护法》第五十八条和《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第十八条、第二十条、第二十一条、第二十二条之规定，判决：一、被告谢知锦、倪明香、郑时姜和李名槊应于本判决生效后五个月内清除南平市延平区葫芦山砂基洋恒兴石材厂矿山采石处现存工棚、机械设备、石料和弃石，恢复被破坏的 28.33 亩林地功能，按照《造林技术规程》(DB35/T84－2005)标准并结合当地林业行政部门人工造林技术要求在该林地上补种林木，并对补种的林木抚育管护三年(管护时间从补种的林木经验收合格之日起计算)；二、被告谢知锦、倪明香、郑时姜和李名槊不能在第一项判决指定的期限内恢复林地植被，应于期限届满之日起十日内共同赔偿生态环境修复费用 110.19 万元(支付到南平市中级人民法院指定账户)，该款用于本案的生态环境修复；三、被告谢知锦、倪明香、郑时姜和李名槊应于本判决生效后十日内共同赔偿生态环境受到损害至恢复原状期间服务功能损失 127 万元(支付到南平市中级人民法院指定账户)，该款用于本案的生态环境修复或异地公共生态环境修复；四、被告谢知锦、倪明香、郑时姜和李名槊应于本判决生效后十日内共同支付原告北京市朝阳区自然之友环境研究所支出的评估费 6000 元、律师费 96200 元、为诉讼支出的其他合理费用 31308 元，合计 133508 元；五、被告谢知锦、倪明香、郑时姜和李名槊应于本判决生效后十日内共同支付原告福建省绿家园环境友好中心律师费 25261 元、为诉讼支出的其他合理费用 7393.5 元，合计 32654.5 元；六、驳回原告北京市朝阳区自然之友环境研究所和福建省绿家园环境友好中心的其他诉讼请求。如果未能按本判决指定的期间履行给付金钱义务，应当依照《中华人民共和国民事诉讼法》第二百五十三条之规定，加倍支付迟延履行期间的债务利息。案件受理费 26335 元，保全费 5000 元，由被告谢知锦、倪明香、郑时姜和李名槊共同负担 30775 元；由原告北京市朝阳区自然之友环境研究所和福建省绿家园环境友好中心共同负担 560 元，该款依原告申请准予免交。

一审宣判后，原审被告谢知锦、倪明香、郑时姜不服，向本院提起上诉。

上诉人谢知锦、倪明香、郑时姜上诉称：1.原判对上诉人是否构成侵权的主观过错未予查明，对于当地政府、相关行政执法部门当时制定的政策以及行政违法、不作为没有查明认定，将应当由当地人民政府、相关行政主管部门承担的责任全部归责上诉人承担，缺乏公平公正。2.关于生态环境修复费用、生态环境受到损害至恢复原状期间服务功能损失的评估意见不能作为认定本案事实的依据。3.《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》规定的生态环境受到损害至恢复原状期间服务功能损失不能适用于本案，原判适用法律错误。4.被上诉人自然之友提起本案诉讼时，依法设立时间不足五年，即专门从事环境保护公益活动达不到连续五年，不符合原告主体资格。综上，原判认定事实不清，适用法律错误，程序违法，请求撤销原审判决，改判驳回被上诉人的一审诉讼请求。

被上诉人自然之友、福建绿家园答辩称：1.上诉人在未经审批许可的情况下实施开采行为，主观过错明显，当地人民政府、相关行政主管部门当时制定的政策以及行政违法、不作为与上诉人的环境侵权后果没有直接必然的联系。2.评估意见系聘请具有森林资源评估能力的专家，对生态环境修复费用和生态环境受到损害至恢复原状期间服务功能损失提出的专家意见，并出庭接受询问，应予采信。3.《中华人民共和国民法通则》《中华人民共和国侵权责

任法》均规定恢复原状、赔偿损失等民事责任承担方式，应包括赔偿生态环境受到损害至恢复原状期间服务功能损失。《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》规定的生态环境受到损害至恢复原状期间服务功能损失可以适用于本案。4.自然之友已从事环境保护公益活动连续满五年以上，符合原告主体资格要件。综上，原判认定事实清楚，证据充分，适用法律正确，程序合法，请求驳回上诉，维持原判。

原审被告李名槊答辩称，同意上诉人一方的上诉意见，请求改判驳回被上诉人对其提出的一审诉讼请求。

原审第三人延平区林业局答辩称，原判认定其作为对环境保护负有监督管理职责的行政执法部门，与本案处理结果没有民事法律利害关系，不应作为民事法律关系的第三人承担责任，此认定事实清楚，适用法律正确，请求二审法院予以维持。

原审支持起诉人中国政法大学环境资源法研究和服务中心提交意见称，上诉人破坏生态环境的行为严重违反了我国环境保护的法律法规，已经给社会公共利益造成重大损失。被上诉人多年来专门从事环境保护公益活动，符合环境民事公益诉讼的起诉条件，其支持被上诉人提起本案环境民事公益诉讼。

本案二审审理期间，上诉人谢知锦、倪明香、郑时姜于二审庭审中当庭补充提交以下 5 份证据：证据 1.合肥至福州铁路(闽赣)公司筹备组合福(闽赣)筹综函(2009)29 号《关于协调解决新建合肥至福州铁路经过南平市境内压覆矿厂问题的函》复印件 1 份；证据 2.福建省南平市人民政府办公室南政办函(2009)71 号《关于转发合福铁路公司筹备组关于协调解决新建合肥至福州铁路经过南平市境内压覆矿厂问题的函》复印件 1 份；证据 3.南平市延平区铁路建设指挥部(2010)10 号《关于研究京福高铁经过延平区境内压覆矿厂有关问题的会议纪要》复印件 1 份；证据 4.京福闽赣公司、合福铁路南平征迁指挥部《关于合福铁(延平段)压覆矿问题协调会议纪要》复印件 1 份，上述证据 1 至证据 4 以证明上诉人至今未取得采矿许可证是当地政府因铁路建设而暂停办理。证据 5.南平市延平区恒兴石材厂从 2008 年 10 月至 2010 年 10 月的用电量情况记录表复印件 1 份，以证明根据用电量情况，上诉人采矿行为发生在 2008 年 11 月至 2009 年 7 月间，2009 年 8 月之后没有采矿行为。被上诉人自然之友、福建绿家园质证认为，上诉人提交的 5 份证据从证据的取得时间看，均不属于新证据，证据 1 至证据 4 与本案没有关联性，证据 5 不能证明上诉人于 2009 年 8 月之后停止生产。本院认为，上诉人提交的 5 份证据在本案一审诉讼前就已持有而未在一审告知的举证期限内提供，现于二审庭审中当庭提供，已超过举证期限，且不属于新证据范畴，亦不影响原判对上诉人环境侵权事实和责任承担的认定，故本院不予采纳。

经二审审理查明，一审认定的事实清楚，本院予以确认。

关于上诉人谢知锦、倪明香、郑时姜提出被上诉人自然之友不符合原告主体资格的上诉理由。经查，上诉人自然之友于 2010 年 6 月 18 日在北京市朝阳区民政局登记成立，其在登记前已经依法从事环境保护公益活动，虽然其自登记之日起至本案起诉之日止成立不满五年，但其提起本案诉讼前从事环境保护公益活动已连续满五年。故原判认定上诉人自然之友符合《中华人民共和国环境保护法》第五十八条规定，作为本案环境公益诉讼原告的主体适格，并无不当，上诉人的此项上诉理由不能成立，不予支持。

关于上诉人谢知锦、倪明香、郑时姜提出其不应承担本案侵权责任的上诉理由。经查，上诉人谢知锦、倪明香、郑时姜未经林业行政主管部门审批，为采矿非法占用林地，直接造成 19.44 亩林地的原有植被被严重破坏，依法应当承担环境侵权责任。上诉人谢知锦、倪明香、郑时姜在采矿过程中占用林地，除直接造成上述 19.44 亩林地植被被破坏外，还将采矿所产生的弃石、弃土堆放掩盖在原审被告李名槊的原采石塘口所占用破坏的 8.89 亩林地上，双方对造成上述 8.89 亩林地植被被破坏的侵权责任已无法区分，应共同承担责任。原审被告李名槊未经行政主管部门审批，擅自将矿山采矿权四至范围扩大至原采矿点整个山顶范围转

让给上诉人谢知锦、倪明香、郑时姜采矿，对造成上述 19.44 亩林地植被被破坏，具有共同过错，双方应共同承担责任。本案上诉人谢知锦、倪明香、郑时姜及原审被告李名槊实施了占用林地、破坏林地植被的侵权行为，所侵犯的客体是森林资源，而非矿产资源。根据《中华人民共和国森林法》第十八条的规定，上诉人谢知锦、倪明香、郑时姜及原审被告李名槊实施占用林地的行为是否经人民政府相关行政主管部门审批同意，均应承担恢复林地植被的责任。因此，当地人民政府和相关行政主管部门是否存在行政违法、不作为的情形，不影响上诉人谢知锦、倪明香、郑时姜及原审被告李名槊作为侵权人承担本案的环境侵权责任。故原审认定上诉人谢知锦、倪明香、郑时姜及原审被告李名槊应共同承担上述共计 28.33 亩林地植被被破坏的环境侵权责任，此认定事实清楚，于法有据，上诉人的此项上诉理由亦不能成立，不予支持。

关于上诉人谢知锦、倪明香、郑时姜提出生态环境修复费用、生态环境受到损害至恢复原状期间服务功能损失的评估意见不能作为认定本案事实依据的上诉理由。经查，该评估意见系具有资产评估资质的北京中林资产评估有限公司出具，虽未能提供评估人员的个人评估资格证书，但参与评估的主要人员具有生态学教授职称、生态学博士学位，其中评估人员厦门大学生态学教授李振基和生态学博士吴栋栋、景谦平在一审庭审中出庭接受质询，可以视为专家意见。鉴于上诉人谢知锦、倪明香、郑时姜及原审被告李名槊在一审和二审期间均未申请对本案生态环境修复费用、生态环境受到损害至恢复原状期间服务功能损失进行重新评估，根据《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第二十三条规定，原判将该评估意见视为专家意见予以参考，合理确定本案生态环境修复费用、生态环境受到损害至恢复原状期间服务功能损失，符合法律规定。故上诉人的此项上诉理由亦不能成立，不予支持。

关于上诉人谢知锦、倪明香、郑时姜提出《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》规定的生态环境受到损害至恢复原状期间服务功能损失不能适用于本案的上诉理由。经查，因新的法律、法规或者司法解释实施前的有关民事行为或者事件发生纠纷起诉到人民法院，在行为发生时的法律、法规或者司法解释没有明确规定时，可以适用新的法律、法规或者司法解释的规定。《中华人民共和国民法通则》《中华人民共和国侵权责任法》均规定了侵权人应承担赔偿损失的侵权责任，但对赔偿损失的具体事项没有明确规定。在本案于 2015 年 1 月 1 日立案受理，一审审理过程中《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》于 2015 年 1 月 7 日颁布实施，该司法解释第二十一条的规定：“原告请求被告赔偿生态环境受到损害至恢复原状期间服务功能损失的，人民法院可以依法予以支持。”因此，该司法解释明确规定了生态环境受到损害至恢复原状期间服务功能损失属于赔偿损失的事项，可以适用于本案。故上诉人谢知锦、倪明香、郑时姜及原审被告李名槊占用林地，造成林地植被被严重破坏，属于破坏生态环境、损害社会公共利益的行为，在共同承担恢复林地植被责任的同时，还应共同赔偿生态环境受到损害至恢复原状期间服务功能损失，上诉人的此项上诉理由亦不能成立，不予支持。

综上，本院认为，上诉人谢知锦、倪明香、郑时姜的上诉理由和原审被告李名槊的答辩意见缺乏事实和法律依据不能成立，对其上诉请求不予支持。被上诉人自然之友、福建绿家园以及原审第三人延平区林业局的答辩意见成立，予以支持。原判决认定事实清楚，适用法律正确，应予维持。依照《中华人民共和国民事诉讼法》第一百七十条第一款第(一)项之规定，判决如下：

驳回上诉，维持原判。

本案二审案件受理费人民币 26335 元，由上诉人谢知锦、倪明香、郑时姜共同负担。

本判决为终审判决。

审　判　长　祝昌霖

审　判　员　李和平

代理审判员　林锦斌

二〇一五年十二月十四日

书　记　员　林　辉

六、江苏省徐州市人民检察院诉徐州市鸿顺造纸有限公司水污染民事公益诉讼案

江苏省高级人民法院
民 事 判 决 书

(2016)苏民终 1357 号

上诉人(原审被告)：徐州市鸿顺造纸有限公司。住所地：江苏省徐州市铜山区柳新镇赵庄村。

法定代表人：尚爱平，徐州市鸿顺造纸有限公司经理。

委托诉讼代理人：周孝田，徐州市鸿顺造纸有限公司职员。

委托诉讼代理人：孟秋，江苏淮海正大律师事务所律师。

被上诉人(××)：江苏省徐州市人民检察院。住所地：徐州市西安南路 128 号。

法定代表人：韩筱筠，江苏省徐州市人民检察院检察长。

上诉人徐州市鸿顺造纸有限公司(以下简称鸿顺公司)因与被上诉人江苏省徐州市人民检察院环境污染侵权赔偿纠纷一案，不服江苏省徐州市中级人民法院(2015)徐环公民初字第 6 号民事判决，向本院提起上诉。本院于 2016 年 11 月 7 日立案后，依法组成合议庭，因各方当事人没有提出新的事实、证据或者理由，合议庭认为不需要开庭审理，依据《中华人民共和国民事诉讼法》第一百六十九条第一款之规定，决定不开庭审理。本案现已审理终结。

鸿顺公司上诉请求：撤销一审判决，驳回公益诉讼人起诉或改判赔偿生态修复费用 4.5 万元。

事实和理由：

(一)公益诉讼人的诉讼请求不符合受理条件，应当驳回起诉；原审法院超诉讼请求判决，审判程序违法。公益诉讼人关于判令鸿顺公司以 26.91 万元为基数的三倍至五倍承担赔偿责任的诉讼请求数额为约数，诉讼请求不明确，应当依法驳回起诉。公益诉讼人没有起诉请求赔偿生态环境修复费用，原审判决赔偿生态环境修复费用，属于超诉讼请求判决，审判程序违法。

(二)鸿顺公司不应当承担生态修复费用。鸿顺公司虽违法排放废水，但所排放废水的成分以有机物、木质素、纤维素为主，重金属等有毒有害物质极少，由于水体的自我净化，苏北堤河水质未受影响，排放废水行为未造成生态破坏。

(三)原审判决将 2.035 倍作为计算本案生态环境损害赔偿计算系数取值过高。鸿顺公司生产瓦楞纸采用全废纸造纸工艺，造纸废水主要为废纸的碎浆、筛选、浮选及抄纸过程中产生的废水。因无脱墨、漂白等工艺，与脱墨废纸浆生产工艺相比，排出的废水污染负荷少，生态修复容易。依据“虚拟治理成本法”环境损害数额赔偿倍数取值范围为 1.5～3 倍，本案应当按照 1.5 倍取值。

(四)原审判决以 26.455 万元为基数，以其三至五倍计算生态环境修复费用和服务功能损失缺乏法律依据。服务功能损失认定无事实依据。苏北堤河因水体流动及自我净化，水质早已自然恢复，无须恢复原状，也不存在服务功能损失。

(五)原审判决未将鸿顺公司已经缴纳的 15 万元罚款予以抵扣不当。铜山区环境保护局曾经依据水污染防治法对该公司处以罚款。水污染防治法的立法目的是防治水污染，保护和改善环境。该公司缴纳的罚款应当用于改善环境，与本案赔偿资金的使用目的一致。已经缴纳的罚款理应在赔偿金中予以抵扣。

被上诉人徐州市人民检察院收到上诉状后未提交书面答辩意见。

徐州市人民检察院向一审法院起诉请求：判令鸿顺公司将其污染损害的苏北堤河环境恢

复原状，并赔偿生态环境受到损害至恢复原状期间的服务功能损失；如鸿顺公司无法恢复原状请求判令其以环境污染损害咨询意见所确定的人民币 26.91 万元为基准的三倍至五倍承担赔偿责任；承担本案专家辅助人咨询费用 3000 元。事实与理由：(一)鸿顺公司于 2013 年 4 月 27 日、2014 年 4 月 5 日至 6 日、2015 年 2 月 24 日至 25 日使用暗排口直接排放废水。仅 2014 年 4 月 5 日至 6 日和 2015 年 2 月 24 日至 25 日两次偷排废水即达 2600 吨，该公司排放废水污染环境，应当赔偿生态环境修复费用和服务功能损失。(二)该公司应当按照“虚拟治理成本法”所确定的数额承担侵权赔偿责任。(三)该公司连续三年私设暗管偷排生产废水，且每次都加大废水排放量，有理由推定在 2013 年至 2015 年期间鸿顺公司的防治污染设备未能有效运行，违法排放量远超 2600 吨。应当以排放 2600 吨废水所需生态环境修复费用 26.91 万元为基数，在该基数的三至五倍之间确定生态环境损害赔偿责任。

鸿顺公司一审辩称，鸿顺公司系废旧物资再利用型民政福利企业，愿意对造成的生态环境损害进行赔偿，但认为：(一)苏北堤河取样监测结果表明排放的污染物超标程度不高，对灌溉影响不大。因环境自我净化，苏北堤河已经达到 V 类水质标准，无须承担恢复原状的责任。(二)鸿顺公司认可按照“虚拟治理成本法”确定本案生态环境修复费用，也同意在虚拟治理成本的 1.5～3 倍之间确定生态环境修复费用。鉴于鸿顺公司排放废水的污染物成分以有机物为主，重金属等有毒有害物质极少，生态环境受到的损害较小，恢复较为容易，应当以 1.5 倍作为计算系数确定生态环境修复费用。此外，该公司 2014 年排放的 600 吨废水，未对生产废水水质进行分析，考虑当时物价较低，计算系数应当低于 2015 年的计算系数。(三)公益诉讼人要求鸿顺公司以 26.91 万元为基数以其三至五倍确定生态环境修复费用的理由不能成立；公益诉讼人提出的服务功能损失并无确切证据证实，不应得到支持。(四)鸿顺公司已在两次行政处罚中共缴纳 15 万元罚款，该罚款应当用于环境治理，理应从生态环境赔偿数额中予以抵扣。

一审法院认定事实：

2008 年 8 月 20 日，徐州市环境保护局作出《关于对铜山县鸿顺造纸厂年产 6 万吨高强瓦楞原纸技改项目环境影响报告表的批复》(徐环项〔2008〕75 号)(以下简称技改项目环评报告表)。2014 年 12 月，江苏省环境保护厅给鸿顺公司颁发排放污染物许可证，要求该项目执行《纸浆造纸工业水污染物排放标准》(GB3544－2008)表 2 中“制浆和造纸联合生产企业”排放标准，废水排放总量限值为 19.5 万吨/年，废水只能用于回用或者灌溉，不能排放到地面水体。2013 年至 2015 年间，鸿顺公司 6 万吨高强瓦楞纸技改项目正常生产。

2013 年 4 月 27 日，徐州市铜山区环境保护局柳新环境监察中队发现鸿顺公司年产 6 万吨高强瓦楞纸项目存在私设暗管排放生产废水和污水处理设施不能正常运转等问题。

2014 年 4 月 5 日至 6 日，鸿顺公司私设暗排管排放未经处理的生产废水 600 吨，废水汇入苏北堤河。2014 年 4 月 18 日，徐州市铜山区环境保护局作出铜环责改字〔2014〕21 号责令改正环境违法行为决定书，责令该公司立即拆除暗管。2014 年 5 月 12 日，徐州市铜山区环境保护局向鸿顺公司发出铜环罚字〔2014〕25 号行政处罚决定书，对鸿顺公司处以人民币 5 万元的罚款。2014 年 8 月 14 日，鸿顺公司缴纳 5 万元罚款。

2015 年 2 月 24 日至 25 日，鸿顺公司临时设置直径 20 厘米铁质排放管，将未经处理的生产废水经该公司污水处理厂南侧排入苏北堤河，排放量 2000 吨。徐州市铜山区环境监测站于 2015 年 2 月 25 日对该公司外排废水进行采水样监测，数据显示“化学需氧量为 1180mg/L、氨氮为 28.2mg/L、总磷为 1.60mg/L”，分别超过《纸浆造纸工业水污染物排放标准》(GB3544－2008)12.1 倍、2.5 倍、1 倍。2015 年 3 月 12 日，徐州市铜山区环境保护局作出铜环罚字〔2015〕6 号行政处罚决定书，对鸿顺公司处以人民币 10 万元的罚款。2015 年 4 月 27 日，鸿顺公司缴纳罚款 10 万元。

苏北堤河入顺堤河后进入京杭运河不牢河段，系流经区域的灌溉排涝主要河流之一。公

益诉讼人为调查取证，支付专家咨询费用3000元。

一审法院认为：

(一)鸿顺公司应当承担恢复原状的侵权责任。鸿顺公司违反《中华人民共和国水污染防治法》等法律规定，2013年、2014年、2015年三次违法排放废水，2014年、2015年排放的废水直接汇入苏北堤河，造成环境污染，应依法承担相应的法律责任。鸿顺公司外排废水经稀释后浓度逐步降低，不能以此认为未对环境造成损害或损害程度较小。因河水流动，污染源向下游扩散，倾倒处的水质的好转并不意味着地区水生态环境已修复，生态环境依然有修复的必要。即使现在苏北堤河水质已达标准，依然需要用替代修复方案对地区生态环境进行修复，鸿顺公司应当承担替代修复责任。鉴于鸿顺公司已明确表示没有能力将环境恢复原状亦不能提出修复方案，依据《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第二十条规定，可直接确定鸿顺公司所应承担的生态环境修复费用来替代恢复原状的责任。

(二)公益诉讼人和鸿顺公司双方的技术专家均认可本案生态环境修复费用可按照环保部《关于开展环境污染损害鉴定评估工作的若干意见》(环发〔2011〕60号)和《环境损害鉴定评估推荐方法》(第Ⅱ版)(以下简称推荐办法)，采用“虚拟治理成本法”确定；均认可2014年及2015年两次违法排放的废水每吨治理单价为50元。综合考虑本次污染行为的污染物成分、被破坏的生态环境状况等因素，决定取双方申请的技术专家意见关于倍数取值的平均值，即2.035倍作为生态环境损害数额的倍数取值。由于2014年鸿顺公司违法排放生产废水时的生产工艺以及受污染环境情况与2015年基本相同，鸿顺公司也未能举证证明两次排污有实质区别，对2014年所排放的600吨生产废水的生态环境损害赔偿数额理应与2015年排放的生产废水以相同的方法予以计算。鸿顺公司2014年及2015年两次共计违法排放2600吨废水，按照“虚拟治理成本法”计算生态环境修复费用为2600×50×2.035＝264550(元)。

(三)鸿顺公司年产6万吨环境影响报告表、建设项目竣工环境保护验收申请表均表明，鸿顺公司运行生产设备每天废水排放量最高可达960吨，年度废水排放量更是高达19.5万吨。法院作出释明后，鸿顺公司未能提供近年的产量、废水产生量、防治污染物设施建设和运行情况等相关证据证明其违法排污量仅限于2600吨。根据《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第一百零八条规定，确信鸿顺公司实际排污量远大于2600吨的事实具有高度可能性。每吨50元的防治污染设备运行成本，意味着违法偷排能获取较高的非法利益。鸿顺公司连续三年、三次被查获违法排污，均采用偷埋、私设暗管等方式违法排放。鸿顺公司在环保部门给予环境监察建议、处以罚款后，仍加大废水排放量，主观过错明显。环境侵权行为及后果的复杂性、长久性、隐蔽性、迁移性等特点导致其危害性强、损害范围广且难以及时固定证据。不能仅就2600吨的排污事实确定鸿顺公司的赔偿责任。本案应综合考虑案件事实及相关因素，酌情确定生态环境修复费用。

《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第二十一条规定，原告请求被告赔偿生态环境受到损害至恢复原状期间服务功能损失的，人民法院可以依法予以支持。公益诉讼人申请出庭的技术专家提出，高浓度废水排入河流后会导致灌溉用水不符合灌溉需要，甚至会影响京杭运河的水质。鉴于本案受污染环境的复杂性、功能的多样性，虽然服务功能损失难以准确计算，但鉴于此项损失客观存在，在确定鸿顺公司所应承担的赔偿费用时，应予以酌情考虑。

综合考虑已查明的环境污染情节、违法程度及主观过错程度、防治污染设备的运行成本、鸿顺公司生产经营情况及因侵害行为所获得的利益、污染环境的范围和程度、生态环境恢复的难易程度、生态环境的服务功能等因素，酌情确定鸿顺公司所应当承担的生态环境修复费用及生态环境受到损害至恢复原状期间服务功能损失共计为105.82万元，并应承担公益诉讼人为本案支付的专家费用3000元。

(四)鸿顺公司因行政违法而被行政机关处以行政处罚，并不影响其民事责任的承担。鸿顺公司主张用已经缴纳的罚款抵扣赔偿数额，该主张缺乏法律依据，但在确定鸿顺公司应承担的环境污染责任时，对其已缴纳15万元行政罚款的事实酌情综合评判。

一审法院依照《中华人民共和国侵权责任法》第十五条第(五)项、第(六)项、第六十五条，《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第十三条、第十五条、第二十条、第二十一条、第二十二条、第二十三条，《人民法院审理人民检察院提起公益诉讼案件试点工作实施办法》第二条、第三条、第四条，《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第一百零八条之规定，判决：一、鸿顺公司于本判决生效后三十日内赔偿生态环境修复费用及生态环境受到损害至恢复原状期间服务功能损失共计105.82万元，支付至徐州市环境保护公益金专项资金账户；二、徐州市鸿顺造纸有限公司于本判决生效后十日内支付公益诉讼人为本案支付的合理费用3000元。案件受理费14324元，由徐州市鸿顺造纸有限公司负担。

本院认为，鸿顺公司上诉请求不能成立。具体理由分述如下：

(一)徐州市人民检察院的诉讼请求明确，原审判决未超公益诉讼人请求范围。《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第二十三条规定："生态环境修复费用难以确定的，人民法院可以结合污染环境、破坏生态的范围和程度、生态环境的稀缺性、生态环境恢复的难易程度、防治污染设备的运行成本、被告因侵害行为所获得的利益以及过错程度等因素，并可以参考负有环境保护监督管理职责的部门的意见、专家意见等，予以合理确定。"由于排污行为具有隐蔽性、污染后果显现具有滞后性等因素，根据上述规定，在一定条件下法官应当对生态环境修复费用作出裁量酌定。法官在行使自由裁量权过程中需要根据案件中各种主客观因素、在一定区间数额内进行权衡取舍。公益诉讼人提出的要求鸿顺公司在以26.91万元为基数的三倍至五倍范围内承担赔偿责任的诉讼请求，区间起止点明确具体，其实质是请求法院在该请求期间范围内，综合本案的情况，作出合理裁量。鸿顺公司认为该诉讼请求不成立，亦完全可以在实体审理过程中举出证据予以辩驳。徐州市人民检察院的诉讼请求符合《中华人民共和国民事诉讼法》第一百一十九条第(三)项规定。

徐州市人民检察院提起环境公益诉讼要求鸿顺公司承担将其污染的苏北堤河环境恢复原状并赔偿服务功能损失。由于鸿顺公司在一审审判过程中已明确表示没有能力将环境恢复原状亦不能提出修复方案，原审法院依照《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第二十条之规定直接确定鸿顺公司所应承担的生态环境修复费用来替代恢复原状的责任。该判决并未超出徐州市检察院的请求范围。

(二)污染物排放点的环境质量已经达标不能作为拒绝承担生态环境修复费用的理由。因鸿顺公司的生产废水具有明显的环境危害性，江苏省环境保护厅在作出环评许可时明确禁止鸿顺公司将生产废水排放到地面水体。但鸿顺公司以私设暗管的方式将化学需氧量超标12.1倍、氨氮超标2.5倍、总磷超标1倍的生产废水偷排进苏北堤河。仅2014年和2015年两次被查获排放废水就达2600吨。鸿顺公司上述行为必然对苏北堤河造成污染。

由于河水的流动性，污染物排放点的水质有可能好转，更多是污染物迁移的结果。污染物必将会向下游转移并逐步扩散，污染物依然存在于生态环境系统，生态环境依然需要修复。即使随着时间的推移，经生态系统的自然净化，污染物总量有可能减少甚至基本消失，但在生态环境自净期间，环境的整体质量已经下降，生态环境的承载能力受到不利影响。在自净过程中，由于灌溉用水水质下降，对农业生产会导致不利影响，对下游水生态会造成损害，存在着服务功能损失。依照《中华人民共和国侵权责任法》第六十五条之规定，鸿顺公司应当承担侵权赔偿责任，对遭受损害的生态环境进行修复或者承担替代修复责任，对服务功能损失进行赔偿。

(三)原审判决以2.035倍作为以虚拟治理成本法计算生态环境修复费用时计算系数并无

不当。因河水流淌、污染物扩散，无法获得实际工程修复费用，环境保护部《环境损害鉴定评估推荐方法(第Ⅱ版)》推荐虚拟治理成本法确定生态环境修复费用。本案一审中，鸿顺公司和徐州市人民检察院均认可依照该方法计算生态环境修复费用，均认可排放废水的虚拟治理成本为 50 元/吨，均认可按照虚拟治理成本的 1.5～3 倍计算生态环境修复费用。

《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第二十三条规定，生态环境修复费用难以确定的，人民法院可以结合污染环境、破坏生态的范围和程度、生态环境的稀缺性、生态环境恢复的难易程度、防治污染设备的运行成本、被告因侵害行为所获得的利益以及过错程度等因素，并可以参考负有环境保护监督管理职责的部门的意见、专家意见等，予以合理确定。就本案而言，应当考虑污染的后果、污染者主观过错程度等因素，合理确定计算系数。苏北堤河入顺堤河后进入京杭运河，系流经地区的灌溉排涝主要河流，其水质不仅影响到京杭运河的水质，也关系到流经区域的农业灌溉用水质量。鸿顺公司向苏北堤河排放生产废水对生态环境具有明显的危害。鸿顺公司多次反复以私设暗管的方式偷排，非法排放行为具有较强的隐蔽性，在环保机关查处后依然违法排放，过错程度严重。鸿顺公司每吨废水治理成本达 50 元，其偷排行为获利明显。一审法院在 1.5～3 倍计算系数的中间值以下确定 2.035 为系数计算鸿顺公司排放 2600 吨生产废水的生态环境修复费用，亦是考虑了鸿顺公司排放的废水成分为可降解的有机物这一因素。该系数并未超出合理的选择区间，不存在计算系数偏高的情形。鸿顺公司主张 1.5 倍计算生态环境修复费用，该主张缺乏事实依据，本院不予支持。

(四)以查获的排放废水量的四倍计算生态环境修复费用具有事实和法律依据。徐州市人民检察院以鸿顺公司多次偷排废水且防治污染设备未能有效运行为由，主张该公司实际排放废水远超 2600 吨，应当以 26.91 万元为基数，在该基数的三至五倍之间确定生态环境损害赔偿责任和服务功能损失赔偿责任。鸿顺公司运行生产设备每天废水生成量最高可达 960 吨，在 2013 年就存在污水处理设施不能正常运转问题，该公司连续三年被发现私设暗管排放废水，查获的废水排放量逐年增多。上述事实足以证明徐州市人民检察院该项诉讼主张的成立具有高度的可能性。

鸿顺公司有能力举证证明该企业废水的实际排放量。《中华人民共和国环境保护法》第四十二条第三款规定，重点排污单位应当按照国家有关规定和监测规范安装使用监测设备，保证监测设备正常运行，保存原始监测记录。鸿顺公司作为重点排污单位，早在 2009 年 9 月就安装了污染物排放检测计量装置，鸿顺公司完全有能力证明该公司生产废水的实际排放量，也完全可以举出净化污水实际耗费成本的财务证据。更由于偷排污染物系生产企业单方秘密实施的违法行为，本案应当由鸿顺公司承担该公司废水实际排放量的举证责任，并承担举证不能的法律后果。鸿顺公司在一审法院释明后依然未能提交相关证据以推翻徐州市检察院的主张。依照《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第十三条之规定，应当认定徐州市人民检察院所提鸿顺公司实际排放废水为查获偷排量 2600 吨的三至五倍的主张成立。一审法院认定鸿顺公司应当以实际查获偷排量 2600 吨的四倍计算侵权赔偿费用并无不当。

(五)已经缴纳的罚款不应从生态环境修复费用中抵扣。依照《中华人民共和国侵权责任法》第四条之规定，侵权人因同一行为应当承担行政责任或者刑事责任的，不影响依法承担侵权责任。环保执法机关对鸿顺公司做出罚款的行政处罚，属于该公司因行政违法而应当承担的行政责任，该处罚系对鸿顺公司违法排放废水的惩戒，目的在于遏制环境违法行为。徐州市人民检察院要求鸿顺公司支付生态修复费用，系要求该公司承担对生态环境造成损害的修复责任，属于民事侵权责任。两项法律责任的功能完全不同。鸿顺公司要求将其缴纳的罚款在侵权赔偿费中予以抵扣，该请求缺乏法律依据。

鸿顺公司非法排放生产废水污染苏北堤河，应当承担生态环境修复责任。原审判决认定

鸿顺公司非法排放生产废水的生态环境修复费用依据充分，计算方法合法适当；公益诉讼人的诉讼请求明确具体，原审审判程序合法。

综上所述，鸿顺公司的上诉请求不能成立，应予驳回；一审判决认定事实清楚，适用法律正确，应予维持。依照《中华人民共和国民事诉讼法》第一百七十条第一款第(一)项规定，判决如下：

驳回上诉，维持原判。

二审案件受理费 14324 元，由鸿顺公司负担。

本判决为终审判决。

审　判　长　陈　迎

审　判　员　臧　静

审　判　员　赵　黎

二〇一六年十二月二十三日

书　记　员　于　露

七、中华环保联合会诉德州晶华集团振华有限公司大气污染民事公益诉讼案

山东省德州市中级人民法院
民 事 判 决 书

(2015)德中环公民初字第 1 号

原告：中华环保联合会。住所地：北京市朝阳区和平里 14 区青年沟东路华表大厦×层。
负责人：谢玉红，副秘书长。
委托代理人：张猛，山东康桥律师事务所律师。
委托代理人：李树森，山东康桥律师事务所律师。
被告：德州晶华集团振华有限公司。住所地：山东省德州市德城区湖滨南路××号。
法定代表人：王金平，总经理。
委托代理人：张顺华，山东铜镜律师事务所律师。
委托代理人：刘洪赞，河北合明律师事务所律师。

原告中华环保联合会与被告德州晶华集团振华有限公司(以下简称振华公司)大气环境污染责任纠纷公益诉讼一案，本院于 2015 年 3 月 24 日受理后，于 2015 年 3 月 25 日公告案件受理情况。在公告期满后，未收到其他机关或社会组织参加诉讼的申请。本院依法组成合议庭，于 2016 年 6 月 24 日公开开庭进行了审理，原告中华环保联合会的委托代理人李树森、张猛，被告振华公司的委托代理人张顺华、刘洪赞到庭参加了诉讼。本案现已审理终结。

原告中华环保联合会诉称，振华公司原有三条浮法玻璃生产线，1#线已于 2011 年全面停产，2#线、3#线因玻璃生产特殊工艺要求及冬季供暖，一直继续生产，振华公司虽已投入资金建设了两线脱硫除尘设施，但 2#、3#线两个烟囱向大气长期超标外排放污染物，造成了严重的大气污染，严重影响了周围居民生活，被环境保护主管部门多次处罚后仍未整改，继续超标向大气排放污染物，根据《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》，特提起诉讼，请求法院判令：一、被告立即停止超标向大气排放污染物，增设大气污染防治设施，经环境保护行政主管部门验收合格并投入使用后方可进行生产经营活动；二、被告赔偿因超标排放污染物造成的损失 2040 万元(按照被告大气污染防治设施投入及运营的成本计算得出)；三、被告赔偿因拒不改正超标排放污染物行为造成的损失 780 万元(以 10 万为基数，自 2015 年 1 月 1 日开始暂计算至 2015 年 3 月 19 日)；四、被告在省级及以上媒体向社会公开赔礼道歉；五、本案诉讼、检验、鉴定、专家证人、律师及诉讼支出的费用由被告承担。上述第二、三项诉讼请求中的赔偿款项支付至地方政府财政专户，用于德州市大气污染的治理。后原告中华环保联合会将诉讼请求第二项变更为判令被告赔偿因超标排放污染物造成的损失 2746 万元。

被告振华公司答辩称，一、被告已经停止侵害；二、原告所诉因果关系难以判定，大气污染是动态的，无法确定大气污染是由被告一家企业造成的；三、对原告单方作出的鉴定评估意见不认可，原告所诉损害赔偿金额及要求在媒体公开道歉没有事实依据，原告在索赔时应当考虑被告已经实际投入的运营成本；四、同意原告要求被告将赔偿款项放置专项财政账户的诉讼请求。

经审理查明，原告中华环保联合会于 2005 年 4 月 22 日经民政部登记注册，宗旨为围绕可持续发展战略，围绕实现国家环境保护目标，围绕维护公众环境权益，发挥政府与社会之间的桥梁和纽带作用，推动资源节约型、环境友好型社会建设，推动中国及全人类环境事业的进步与发展。业务范围：围绕国家环境与发展的目标和任务，充分发挥政府与社会之间的桥梁和纽带作用，为各级政府及其有关行政主管部门提供决策建议；组织开展环境与发展论

坛、环保新技术推介等活动，受政府委托承办或根据环境保护需要开展相关成果展览，推动资源节约型、环境友好型社会建设；组织开展维护环境权益的理论研究和实践活动，积极推动维护环境权益的立法和执法，建立健全环境权益保障体系，为环境权益受到侵害的弱势群体提供法律帮助，维护其合法环境权益；开展环境领域公众参与、社会监督，多渠道多角度为环境领域公众参与和社会监督创造条件，构建环境领域公众参与和社会监督的平台；开展环境政策、法律、法规和环保科技咨询服务；开展环境保护的宣传教育活动，普及环境保护和维护环境权益知识，提高全民的环保意识和环境维权意识；组织开展国际民间环境交流与合作，接受委托，组织和承担环境保护国际合作项目；开展环境公益活动，促进环境公益活动社会化，承办政府及有关组织委托的其他工作。经民政部年度检查，2009 年度合格、2010 年度合格、2011 年度基本合格、2012 年度基本合格、2013 年度合格。原告中华环保联合会提供了 2009 年至 2013 年各年度工作报告，内容主要体现从事环境问题调研、提供环境保护咨询服务、承接国家课题、召开理论研讨会、交流会，并声明自成立以来无违法记录。

被告振华公司成立于 2000 年，经营范围包括电力生产、平板玻璃、玻璃空心砖、玻璃深加工、玻璃制品制造等。2002 年 12 月，该公司 600T/D 优质超厚玻璃项目通过环境影响评价的审批，2003 年 11 月，通过“三同时”验收。2007 年 11 月，该公司高档优质汽车原片项目通过环境影响评价的审批，2009 年 2 月，通过“三同时”验收。

根据德州市环境保护监测中心站的监测，2012 年 3 月、5 月、8 月、12 月，2013 年 1 月、5 月、8 月，振华公司废气排放均能达标。2013 年 11 月，2014 年 1 月、5 月、6 月、11 月，2015 年 2 月排放二氧化硫、氮氧化物及烟粉尘存在超标排放情况。德州市环境保护局分别于 2013 年 12 月、2014 年 9 月、2014 年 11 月、2015 年 2 月对振华公司进行行政处罚，处罚数额均为 10 万元。2014 年 12 月，山东省环境保护厅对其进行行政处罚。处罚数额 10 万元。2015 年 3 月 23 日，德州市环境保护局责令振华公司立即停产整治，2015 年 4 月 1 日之前全部停产，停止超标排放废气污染物。原告中华环保联合会起诉之后，2015 年 3 月 27 日，振华公司生产线全部放水停产，并于德城区天衢工业园以北养马村新选厂址，原厂区准备搬迁。

本案审理阶段，为证明被告振华公司超标排放造成的损失，2015 年 12 月，原告中华环保联合会与环境保护部环境规划院订立技术咨询合同，委托其对振华公司排放大气污染物致使公私财产遭受损失的数额，包括污染行为直接造成的财产损坏、减少的实际价值，以及为防止污染扩大、消除污染而采取必要合理措施所产生的费用进行鉴定。2016 年 5 月，环境保护部环境规划院环境风险与损害鉴定评估研究中心根据已经双方质证的本院调取的证据作出评估意见，鉴定结果为：振华公司位于德州市德城区市区内，周围多为居民小区，原有浮法玻璃生产线三条，1#浮法玻璃生产线已于 2011 年 10 月全面停产，2#生产线 600t/d 优质超厚玻璃生产线和 3#生产线 400t/d 高档优质汽车玻璃原片生产线仍在生产。1.污染物性质，主要为烟粉尘、二氧化硫和氮氧化物。根据《德州晶华集团振华有限公司关于落实整改工作的情况汇报》有关资料显示：截至 2015 年 3 月 17 日，振华公司浮法二线未安装或未运行脱硫和脱硝治理设施；浮法三线除尘、脱硫设施已于 2014 年 9 月投入运行；2.污染物超标排放时段的确认，二氧化硫超标排放时段为 2014 年 6 月 10 日至 2014 年 8 月 17 日，共计 68 天，氮氧化物超标排放时段为 2013 年 11 月 5 日至 2014 年 6 月 23 日、2014 年 10 月 22 日至 2015 年 1 月 27 日，共计 327 天，烟粉尘超标排放时段为 2013 年 11 月 5 日至 2014 年 6 月 23 日，共计 230 天；3.污染物排放量，在鉴定时段内，由于企业未安装脱硫设施造成二氧化硫全部直接排放进入大气的超标排放量为 255 吨，由于企业未安装脱硝设施造成氮氧化物全部直接排放进入大气的排放量为 589 吨，由于企业未安装除尘设施或除尘设施处理能力不够造成烟粉尘部分直接排放进入大气的排放量为 19 吨；4.单位污染物处理成本，根据数据库资料，二氧化硫单位治理成本为 0.56 万元/吨，氮氧化物单位治理成本为 0.68 万元/吨，烟粉尘单位治理成本为 0.33 万元/吨；5.虚拟治理成本，根据《环境空气质量标准》《环境损害鉴定评估推荐方法(第

II 版)》《突发环境事件应急处置阶段环境损害评估技术规范》，本案项目处环境功能二类区，生态环境损害数额为虚拟治理成本的 3～5 倍，本报告取参数 5，二氧化硫虚拟治理成本共计 713 万元，氮氧化物虚拟治理成本 2002 万元，烟粉尘虚拟治理成本 31 万元；鉴定结论，被告企业在鉴定期间超标向空气排放二氧化硫共计 255 吨、氮氧化物共计 589 吨、烟粉尘共计 19 吨，单位治理成本分别按 0.56 万元/吨、0.68 万元/吨、0.33 万元/吨计算，虚拟治理成本分别为 713 万元、2002 万元、31 万元，共计 2746 万元。

在本案审理过程中，原告中华环保联合会申请环境保护部环境规划院专家吴琼出庭，就二氧化硫、氮氧化物、烟粉尘超标排放给大气造成的损害、污染物排放时间、污染物排放量、单位治理成本、虚拟治理成本、生态损害赔偿数额的确定以及被告投入运营设备是否会对虚拟治理成本产生影响提出专家意见，本院予以准许。吴琼认为，二氧化硫、氮氧化物以及烟粉尘是酸雨的前导物，超标排放肯定会对财产及人身造成损害，进而对生态环境造成损害，使大气环境的生态服务价值功能受到损害，影响大气环境的清洁程度和生态服务价值功能；因被告单位项目区域周围多为居民社区、属于环境保护域内保护的敏感点，按照环境损害评估推荐方法虚拟治理成本可取 3～5 倍，可取较高值为参数 5；被告已经投入的运营设备对虚拟治理成本的计算不会产生影响，且虚拟治理成本中不包含惩罚性赔偿因素。

另查明，原告中华环保联合会支付技术咨询合同费用 10 万元；原告中华环保联合会与山东康桥律师事务所于 2016 年 4 月 20 日订立委托代理合同，约定按照诉讼标的 2746 万元计算代理费，为 436100 元，但未提交交款凭证或发票，原告中华环保联合会亦承认至开庭之日该费用未发生；原告中华环保联合会主张为诉讼支出交通住宿等费用 1 万元，但未提交支付凭证。

还查明，被告振华公司曾分别与德州峰骋液压机械有限公司、张家港市锦明环保工程装备有限公司、德州海山水电暖设备安装有限公司等公司订立施工合同或购销合同，就 2#生产线、3#生产线脱硫除尘项目供货、施工、安装、制作等进行了约定，各合同约定价款总计为 1815 万元，被告振华公司要求将此费用从赔偿数额中扣除。

以上事实，有中华环保联合会章程、声明、2009 年度至 2013 年度报告书、振华公司 600t/d 优质超厚玻璃生产线项目环境影响评价报告表及审批意见、振华公司高档优质汽车玻璃原片项目环境影响报告表及审批意见、振华公司 600t/d 优质超厚玻璃生产线项目及天然气替代重油燃烧节能改造工程竣工环境保护验收监测表及审批意见、振华公司高档优质汽车玻璃原片项目竣工环境保护验收监测报告表及验收的批复、振华公司废气监测报告、德州市环境保护局行政处罚决定书、技术咨询合同、鉴定评估意见、合同、调查笔录、庭前会议笔录、勘验笔录及开庭笔录在卷证实。

本院认为，根据双方的起诉与答辩，双方争议焦点为：一、本案原、被告主体是否适格？二、被告振华公司应承担何种民事责任，损害赔偿数额如何计算？

关于焦点一，本案原、被告主体是否适格？

《中华人民共和国环境保护法》第五十八条规定：“对污染环境、破坏生态、损害社会公共利益的行为，符合下列条件的社会组织可以向人民法院提起诉讼：(一)依法在设区的市级以上人民政府民政部门登记；(二)专门从事环境保护公益活动连续五年以上且无违法记录。”原告中华环保联合会系 2005 年 4 月 22 日在民政部登记成立的社会组织，自登记之日至本案起诉之日成立满五年，从事环境保护公益活动满五年，并无违法记录。庭审中，被告振华公司对原告中华环保联合会作为环保公益组织提起本案诉讼亦无异议。因此，原告中华环保联合会是本案的适格主体。

根据《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》(以下简称环境民事公益诉讼司法解释)第一条规定，法律规定的机关和有关组织依据《中华人民共和国民事诉讼法》第五十五条、《中华人民共和国环境保护法》第五十八条等法律的规定，对已

经损害社会公共利益或者具有损害社会公共利益重大风险的污染环境、破坏生态的行为提起诉讼，符合《中华人民共和国民事诉讼法》第一百一十九条第二项、第三项、第四项规定的，人民法院应予受理；第十八条规定，对污染环境、破坏生态，已经损害社会公共利益或者具有损害社会公共利益重大风险的行为，原告可以请求被告承担停止侵害、排除妨碍、消除危险、恢复原状、赔偿损失、赔礼道歉等民事责任。本院认为，企业事业单位和其他生产经营者超过污染物排放标准或者重点污染物排放总量控制指标排放污染物的行为可以视为是具有损害社会公共利益重大风险的行为。被告振华公司超量排放的二氧化硫、氮氧化物、烟粉尘会影响大气的服务价值功能。其中，二氧化硫、氮氧化物是酸雨的前导物，超量排放可至酸雨从而造成财产及人身损害，烟粉尘的超量排放将影响大气能见度及清洁度，亦会造成财产及人身损害。被告振华公司自 2013 年 11 月起，多次超标向大气排放二氧化硫、氮氧化物、烟粉尘等污染物，经环境保护行政管理部门多次行政处罚仍未改正，其行为属于法律规定的“具有有损害社会公共利益重大风险的行为”，故被告振华公司是本案的适格被告。

关于焦点二，被告振华公司应承担何种民事责任，损害赔偿数额如何计算？

根据环境民事公益诉讼司法解释十八条的规定，环境民事公益诉讼案件承担责任的方式包括六种：停止侵害、排除妨碍、消除危险、恢复原状、赔偿损失、赔礼道歉。原告中华环保联合会关于被告振华公司立即停止超标向大气排放污染物以及在省级以上媒体向社会公开赔礼道歉的诉讼请求于法有据。根据本院查明的事实，被告振华公司已于 2015 年 3 月 27 日放水停产，停止使用原厂区，可认定被告振华公司已经停止侵害。环境权益具有公共权益的属性，从经济学角度而言，环境资源是一种综合性的财产，在美学层面上，优良的环境可以成为人的精神活动的对象，因被告振华公司超标向大气排放污染物，其行为侵害了社会公共的精神性环境权益，应当承担赔礼道歉的民事责任。

关于生态损害赔偿费用。为证明被告振华公司因其行为应当承担的生态损害赔偿数额，原告中华环保联合会以双方提交的证据以及本院向环境保护机关调取的证据为依据，委托环境保护部环境规划院进行鉴定评估，经评估，二氧化硫单位治理成本为 0.56 万元/吨，超标排放 255 吨，虚拟治理成本为 142.8 万元(0.56 万元/吨×255 吨)；氮氧化物单位治理成本为 0.68 万元/吨，超标排放 589 吨，虚拟治理成本 400.52 万元(0.68 万元/吨×589 吨)；烟粉尘单位治理成本为 0.33 万元/吨，超标排放 19 吨，虚拟治理成本 6.27 万元(0.33 万元/吨×19 吨)。本院认为，一、原告中华环保联合会提交的鉴定评估报告虽系单方委托作出，评估机构具有法定资质，评估事项与待证事实有关，评估依据均已经过原、被告双方的质证，具备证据的真实性、客观性、关联性，且被告振华公司未举出相反证据推翻该鉴定评估报告，本院认为该报告可以作为认定事实的依据；二、根据德州市环境保护局《关于德州晶华集团振华有限公司高档优质汽车玻璃原片项目环境影响评价执行标准的意见》《环境空气质量标准》(GB3095－2012)、《环境损害鉴定评估推荐方法(第 II 版)》《突发环境事件应急处置阶段环境损害评估技术规范》的规定，利用虚拟治理成本法计算得到的环境损害可以作为生态环境损害赔偿的依据，被告振华公司所在区域为空气功能区为二类，按照规定，环境空气二类区生态损害数额为虚拟治理成本的 3～5 倍，本院认定按虚拟治理成本的 4 倍计算生态损害数额，即：2198.36 万元(142.8 万元×4＋400.52 万元×4＋6.27 万元×4)；三、《中华人民共和国侵权责任法》第六十六条规定，因污染环境发生纠纷，污染者应当就法律规定的不承担责任或者减轻责任的情形及其行为与损害之间不存在因果关系承担举证责任。《最高人民法院关于审理环境侵权责任纠纷案件适用法律若干问题的解释》第七条规定：“污染者举证证明下列情形之一的，人民法院应当认定其污染行为与损害之间不存在因果关系：(一)排放的污染物没有造成该损害可能的；(二)排放的可造成该损害的污染物未到达该损害发生地的；(三)该损害于排放污染物之前已经发生的；(四)其他可以认定污染行为与损害之间不存在因果关系的情形。”被告振华公司主张因其已投入脱硫设备，运营成本 1815 万元，应当据此减轻责任。本院认为，

鉴定评估报告是对被告振华公司现有脱硫、除尘设备予以确认的情况下对污染物超标排放量及治理成本进行了认定，被告振华公司该项请求不属于法律规定的不承担责任或者减轻责任的情形，故对被告振华公司该项抗辩本院不予认可。

关于原告中华环保联合会要求被告振华公司赔偿因超标排放污染物造成的损失780万元。本院认为，原告中华环保联合会该项诉讼请求的依据是《中华人民共和国大气污染防治法》第九十九条及《中华人民共和国环境保护法》第五十九条，该两条规定的是行政处罚而非民事责任，且环境民事公益诉讼司法解释中并未规定惩罚性赔偿，故原告中华环保联合会该项诉讼请求法律依据不足，本院不予支持。

关于原告中华环保联合会“增设大气污染防治设施，经环境保护行政主管部门验收合格并投入使用后方可进行生产经营活动”的诉讼请求，因该项诉讼请求不属于环境民事公益诉讼司法解释规定的承担责任的方式中的任何一种，加之被告振华公司已经放水停产，原厂停止使用，另选新厂址，故对原告中华环保联合会该项诉讼请求本院不予支持。

关于评估费用、律师费以及为诉讼支出的其他合理费用问题。根据环境民事公益诉讼司法解释第二十二条规定，原告请求被告承担检验、鉴定费用，合理的律师费以及为诉讼支出的其他合理费用的，人民法院可以予以支持。原告中华环保联合会主张的评估费用10万元，属于为诉讼合理支出，本院予以支持；其主张律师费40万元及其他诉讼支出费用1万元，原告中华环保联合会承认关于律师费仅订立委托合同，未实际支付，且未就诉讼支出1万元提交支付凭证，关于此项请求本院不予支持。

综上所述，依照《中华人民共和国民法通则》第一百二十四条、《中华人民共和国侵权责任法》第六十六条，《中华人民共和国环境保护法》第五十八条，《最高人民法院关于审理环境侵权责任纠纷案件适用法律若干问题的解释》第八条，《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第一条、第二条、第十八条、第二十条、第二十二条、第二十三条判决如下：

一、被告德州晶华集团振华有限公司于本判决生效之日起30日内赔偿因超标排放污染物造成的损失2198.36万元，支付至德州市专项基金账户，用于德州市大气环境质量修复；

二、被告德州晶华集团振华有限公司在省级以上媒体向社会公开赔礼道歉；

三、被告德州晶华集团振华有限公司于本判决生效之日起10日内支付原告中华环保联合会所支出的评估费10万元；

四、驳回原告中华环保联合会其他诉讼请求。

如未按本判决指定的期间履行给付金钱义务，应当依照《中华人民共和国民事诉讼法》第二百五十三条之规定，加倍支付迟延履行期间的债务利息。

案件受理费182000元，由被告德州晶华集团振华有限公司负担。

如不服本判决，可在判决书送达之日起十五日之内向本院递交上诉状，并按对方当事人的人数或者代表人的人数提出副本，上诉于山东省高级人民法院。

审　判　长　刘立兵

代理审判员　张小雪

代理审判员　高晓敏

二〇一六年七月十八日

书　记　员　王　洁

注：本案双方当事人均未提起上诉，一审判决已生效。

八、四川金核矿业有限公司诉新疆临钢资源投资股份有限公司特殊区域合作勘查合同纠纷案

中华人民共和国最高人民法院
民 事 判 决 书

(2015)民二终字第 167 号

上诉人(一审被告、反诉原告)：新疆临钢资源投资股份有限公司。住所地：新疆维吾尔自治区乌鲁木齐市天山区新华北路 165 号中天广场××层×室。

法定代表人：徐向东，该公司董事长。

委托代理人：李勇，北京市君合律师事务所律师。

委托代理人：郑跃杰，北京市君合律师事务所律师。

被上诉人(一审原告、反诉被告)：四川金核矿业有限公司。住所地：四川省成都市成华区东三环路二段龙潭工业园。

法定代表人：潘杨辉，该公司总经理。

委托代理人：刘兵，该公司工作人员。

委托代理人：邓学强，四川明炬律师事务所律师。

上诉人新疆临钢资源投资股份有限公司(以下简称临钢公司)因与被上诉人四川金核矿业有限公司(以下简称金核公司)合同纠纷一案，不服新疆维吾尔自治区高级人民法院(2014)新民二初字第 13 号民事判决，向本院提起上诉。本院依法组成合议庭，于 2015 年 8 月 18 日公开开庭审理了本案。临钢公司的法定代表人徐向东及委托代理人李勇、郑跃杰，金核公司的委托代理人刘兵、邓学强到庭参加诉讼。本案现已审理终结。

一审法院经审理查明：2011 年 10 月 10 日，临钢公司(甲方)与金核公司(乙方)签订《新疆塔什库尔干县乌如克铅多金属矿普查探矿权合作勘查开发协议》(以下简称《合作勘查开发协议》)，双方约定，甲方补偿乙方 3500 万元后，乙方愿意以本协议规定之对价及本协议所规定的其他条款和条件将其持有的新疆塔什库尔干县乌如克铅多金属矿普查探矿权(以下简称矿权)注入甲乙双方设立的项目公司，该项目公司甲方以现金出资、乙方以持有矿权出资共同设立，公司注册资本暂定为 1000 万元，其中甲方占 80%，乙方占 20%。之后由甲方出资对该矿进行普查、详查、勘探工作，相关成果由项目公司享有，相关风险由项目公司承担。在标的矿权未办理过户手续之前，甲方委托乙方代为持有该矿的矿权；在该标的矿权达到办理过户条件后，乙方直接将该标的矿权过户给项目公司。未办理过户手续之前，乙方负责标的矿权的维护工作，包括但不限于矿证有效期限的延续、年检、向有关部门报送相关资料等。本协议生效后，标的矿权的后续普查、详查、勘探工作均由甲方出资进行，在勘探阶段工作结束之前，乙方不再投入资金；由甲方出资进行的勘查工作成果由项目公司享有。甲方支付乙方标的矿权合作补偿款并向项目公司注入后续勘查资金与乙方将标的矿权转到项目公司并合作开发是不可分割的部分，两者互为条件。协议签订后 15 日内，甲方一次性支付定金 3500 万元到乙方指定账户；在标的矿权过户到项目公司的登记手续完成之日，该定金即直接转为甲方支付给乙方的矿权合作补偿价款。双方按法律法规的规定各自负担因订立和履行本协议而发生的税赋。因准备、订立及履行本协议而发生的费用及本协议所述的矿权发生的税务以外的费用和支出由甲乙双方均摊。乙方向甲方保证和承诺：乙方于 2008 年 12 月 30 日首次取得由新疆维吾尔自治区国土资源厅颁发的新疆塔什库尔干县乌如克铅多金属矿预查探矿权，2011 年 1 月 26 日正常延续并升级为普查，现名称为新疆塔什库尔干县乌如克铅多金属矿普查探矿权，《探矿权许可证》证号为：T6512008120202××××，矿区面积为 31.28 平方公里，

该探矿证有效期自 2011 年 1 月 26 日至 2013 年 1 月 26 日止。乙方保证取得的上述探矿证权属清晰、完整，不存在其他权利争议，亦不存在任何抵押等情况，该探矿证符合法律法规的取得条件，也拥有国家法律和地方法规所应具备的权利和许可，不存在可能被国土资源管理部门吊销《探矿许可证》等不确定事项，不在冰川保护区、自然保护区、风景区等可能影响矿山开发的区域范围内。甲方向乙方保证和承诺：甲方保证在本协议签订后即加快标的矿权的勘查工作，甲方保证标的矿权的后续普查、详查、勘探阶段的全部资金投入，在该矿完成勘探阶段之后的后续投入资金由全体股东按照股权比例承担。如发生以下任何一事件则构成该方违约：任何一方违反本协议的任何条款；任何一方违反其在本协议中作出的任何陈述、保证或承诺，或任何一方在本协议中作出的任何陈述、保证或承诺被认定为不真实、不正确或有误导成分；一方在未事先得到另一方同意的情况下，直接或间接出售所持有的标的矿权给第三方；如任何一方违约，另一方有权要求即时终止本协议及/或按照法律规定要求其承担违约责任，赔偿由此而造成的一切损失(包括但不限于诉讼费、律师费等)。本协议因下列原因而终止或解除：因不可抗力导致本协议无法履行，经双方书面确认后本协议终止；双方协商一致终止本协议；一方严重违反本协议，导致另一方不能实现协议目的，守约方有权解除本协议。同时，双方还对保密、通知等其他事项进行了约定。本协议在双方签字盖章后生效。

2011 年 10 月 25 日，临钢公司通过银行转账方式向金核公司支付 3500 万元，金核公司向其出具了收据。

2012 年 4 月 28 日，临钢公司与四川省核工业地质调查院(以下简称地质调查院)签订《地质勘查项目合同书》，约定：临钢公司委托地质调查院对新疆塔什库尔干县乌如克铁多金属矿进行地质勘查，并提交终审成果报告、原始资料、成果、相关图件及电子文档，所有资料的所属权归临钢公司，地质调查院不得向任何第三方泄露；合同工期：2011 年 12 月 20 日至 2012 年 12 月 30 日止；合同价格：预算合同价款 10960500 元(壹仟零玖拾陆万伍佰元整)。同时，双方还对结算与付款、技术标准和要求、违约责任、合同的变更和终止及争端的解决等事项进行了约定。该合同已实际履行。

2013 年 7 月 1 日，临钢公司与地质调查院签订《地质勘查项目合同书》，约定：临钢公司委托地质调查院对新疆塔什库尔干县乌如克铁多金属矿进行地质勘查，并提交终审成果报告及完整的所有原始资料，勘查工作所形成的所有原始资料、成果、报告及电子文档归临钢公司所有，地质调查院不得向任何第三方泄露；合同工期：2013 年 1 月 1 日至 2013 年 12 月 30 日止；合同价格：预算合同价款 10484200 元(壹仟零肆拾捌万肆仟贰佰元整)。同时，双方还对结算与付款、技术标准和要求、违约责任、合同的变更和终止及争端的解决等事项进行了约定。

2013 年 7 月 23 日，塔什库尔干县金核昆仑资源投资有限责任公司(以下简称项目公司)成立。

2013 年 11 月 22 日，临钢公司向金核公司出具《关于解除〈新疆塔什库尔干县乌如克铅多金属矿普查探矿权合作勘查开发协议〉的函》(以下简称《解除函》)，主要内容为：近期，临钢公司从有关部门惊悉案涉合作开发的项目位于新疆塔什库尔干野生动物自然保护区(以下简称保护区)中心区域，金核公司自合作至今未告知临钢公司。根据《合作勘查开发协议》第六条、第七条的规定，金核公司的行为已构成违约。为履行协议，临钢公司已向金核公司支付合作定金 3500 万元，并投入约 1700 万元用于矿山的道路建设、矿山建设、地质勘查、道路通行费等项目，相关支出资金成本也近 1000 万元。经研究，临钢公司决定终止合作，解除双方之间签订的《合作勘查开发协议》，望金核公司依《合作勘查开发协议》相关规定，承担相应责任。

2013 年 12 月 30 日，金核公司向临钢公司出具《关于继续履行〈新疆塔什库尔干县乌如克铅多金属矿普查探矿权合作勘查开发协议〉的复函》(以下简称《复函》)，主要内容为：

临钢公司的《解除函》已收悉。经向相关部门核实，早在金核公司 2008 年 12 月 26 日首次取得矿权前，保护区就已设立。自 2008 年 12 月 30 日至 2011 年 1 月 26 日止，矿权通过了自治区国土资源厅的正常年检，并延续升级为普查。双方签订《合作勘查开发协议》并合作勘查后，矿权于 2013 年 4 月 9 日再次获得正常延续，前后将近五年的时间(双方合作勘查也已两年多时间)。在此期间，无任何部门或机构就保护区事宜告知过金核公司，双方合作两年多的矿权勘查工作也未受到任何影响。故不存在金核公司明知矿权位于保护区而隐瞒不告知临钢公司。正因金核公司不明知前述情况，才会接受临钢公司提供的合作勘查协议文本第六条中关于保护区的“陈述和保证”条款的约定。由于获知保护区相关信息渠道的不对称，加之矿权自合法取得、正常年检延续之事宜，导致双方在订立和履行《合作勘查开发协议》时均未注意到前述情形。金核公司不存在明知矿权位于保护区而隐瞒不告知临钢公司，更不会在明知的情形下还在协议中作出不利的保证。矿权从取得到正常年检、延续获得批准，其真实合法性不存在任何问题，只要双方按照相关地方性法规的规定履行相关的审批手续，则矿权位于保护区的非核心区域的状态，对双方后续的合作勘查开发，继续履行协议不构成实质性的障碍。自双方签订协议友好合作两年多以来，金核公司代为持有矿权期间，按约切实履行了对矿权的维护工作，矿权在 2013 年 4 月顺利延续。同时，金核公司按约履行了设立项目公司的 200 万元出资义务。现项目公司已设立，各项工作依次展开，双方订立合同的目的是矿权的矿产开发，到目前为止未有管理部门对该项目的矿产开发明确禁止，故双方应继续友好合作，推进矿权的矿产开发工作。

2013 年 12 月 6 日，新疆塔什库尔干野生动物自然保护区管理局(以下简称保护区管理局)出具证明，主要内容为：保护区管理局根据金核公司提供的新疆维吾尔自治区基础地理信息中心新疆塔什库尔干县乌如克铅多金属矿预查转换坐标，对该坐标上图至保护区功能区划图，所属区域均在保护区范围内。

另查明，临钢公司为本案诉讼已支付律师费 20 万元。

金核公司向一审法院提起诉讼称：临钢公司与其签订《合作勘查开发协议》后，认为双方合作开发的项目位于保护区，违反了协议第 6.2.3 条“不在冰川保护区、自然保护区、风景区等可能影响矿山开发的区域范围内”的约定，提出解除协议。金核公司认为，该协议系双方真实意思表示，且已实际履行，临钢公司此时提出解除合同的理由不能成立。请求：1.确认临钢公司解除《合作勘查开发协议》的行为无效；2.确认《合作勘查开发协议》有效，金核公司无须退还临钢公司已支付的矿权合作补偿价款 3500 万元。本案诉讼费用由临钢公司承担。

临钢公司答辩称：金核公司的诉讼请求无法定依据，应予驳回。根据协议第六条、第七条的明确约定，该协议的解除条件已经成就，临钢公司解除合同有约定依据。金核公司的第二项诉讼请求没有意义，临钢公司已依约行使解除权，金核公司应当返还 3500 万元合作补偿款，诉讼费用由法院依法裁判。

临钢公司向一审法院提起反诉称：《合作勘查开发协议》签订后，临钢公司依约履行了相关合同义务，但金核公司却未诚信作出陈述和保证。2013 年，临钢公司得知合作矿权项下的勘查区块所属区域均在保护区范围内。依照协议第 7.1.2 条关于“任何一方违反其在协议中作出的陈述、保证或承诺，或任何一方在本协议中作出的任何陈述、保证或承诺被认定为不真实、不准确或有误导成分”，均构成违约以及第 7.2 条关于“如任何一方违约，另一方有权要求即时终止本协议及/或按照法律规定要求其承担违约责任、赔偿由此而造成的一切损失(包括但不限于诉讼费、律师费等)”的约定，金核公司应当向临钢公司承担返还财产、赔偿损失等违约责任。请求判令：1.解除双方签订的《合作勘查开发协议》；2.金核公司向临钢公司返还矿权合作补偿价款 3500 万元；3.金核公司赔偿临钢公司支出的勘查费用损失 3288150 元，修路费用损失 5538600 元，矿山道路通行维护费损失 150 万元，工程费用、管理费用等

损失 5702257 元；4.金核公司赔偿临钢公司利息损失 10843256.77 元；5.金核公司赔偿临钢公司律师费用损失 429161.32 元、担保费用损失 70 万元，以上共计：63001425.09 元。本案诉讼费用由金核公司承担。一审庭审后，临钢公司根据在庭审中的举证情况，将其诉讼请求第四项的利息损失 10843256.77 元变更为 9465104.15 元，同时放弃了第五项诉讼请求中担保费用损失 70 万元的部分。

金核公司答辩称：(一)合同解除权属私力救济权，由权利人单方作出需受领的意思表示即可，临钢公司向法院诉请以司法权解除双方签订的协议程序不当。(二)临钢公司诉请解除合同的事实与理由不客观充分，其诉讼请求不能成立。1.协议生效后双方已实际履行两年半，该矿的实际情况已发生实质性变化，现临钢公司要求解除协议，既不客观也不公平。2.双方已按约设立了项目公司，将该矿转入项目公司，由项目公司享有权利并承担风险，实行公司化运行。3.临钢公司在签约前查阅过该矿的相关资料，进行过调查评析和实地踏勘，其在签约时对该矿的具体情况是明知清楚的。4.金核公司的矿权合法、有效，不在自然保护区可能影响矿山开发的区域范围内，不影响本案协议的履行。5.保护区在《合作勘查开发协议》签订前就已设立，该事实是明示公开的。该保护区内设立了上百个矿权及采矿权，该区域不存在影响该矿勘查开发的政策因素。6.金核公司并未严重违反协议，不存在根本性违约，不影响临钢公司合同目的的实现，临钢公司按约无权解除协议，其以协议第七条 7.2 款主张解除有误。7.临钢公司因铁矿市场萎缩、价格下跌等因素企图解除协议的目的不正当，理应不予以支持。8.案涉协议合法有效，该协议交易程序的稳定性理应得到维护。9.临钢公司主张解除的合同条款是协议签订前已客观存在并公示的事实，其对权利是明知的，在自愿签订协议且已履行两年半后向法院提起诉讼已超过法律关于两年诉讼时效的规定，依法不应予以保护。10.临钢公司在协议签订履行后两年半以后行使解除权，期限已逾期，不应予以支持。

一审法院认为：2011 年 10 月 10 日，临钢公司与金核公司签订的案涉《合作勘查开发协议》，系双方的真实意思表示，且内容不违反《中华人民共和国矿产资源法》等法律法规的强制性、禁止性规定，当属合法有效。该协议已实际履行，临钢公司按约向金核公司支付了 3500 万元，双方按约共同出资设立了项目公司——塔什库尔干县金核昆仑资源投资有限责任公司，临钢公司亦委托地质调查院对新疆塔什库尔干县乌如克铁多金属矿进行了地质勘查。临钢公司未提供证据证明其对案涉矿权的地质勘查工作受到过干预、阻止等不利因素的影响。自双方签订协议至提起诉讼，该协议已履行了约两年半的时间。

(一)关于案涉《合作勘查开发协议》应否解除的问题。根据《合作勘查开发协议》的内容，协议生效后，案涉矿权的后续普查、详查、勘探工作均由临钢公司出资进行，临钢公司保证在协议签订后即加快对案涉矿权的勘查工作，并保证后续普查、详查、勘探阶段的全部资金投入。金核公司则承诺，案涉矿权不在冰川保护区、自然保护区、风景区等可能影响矿山开发的区域范围内。因不可抗力导致本协议无法履行，经双方书面确认后本协议终止；一方严重违反本协议，导致另一方不能实现协议目的，守约方有权解除本协议。根据 2013 年 12 月 6 日保护区管理局出具的证明，案涉矿权所属区域均在保护区范围内。对案涉矿权所属区域在保护区范围内的事实，以及在案涉合同签订前保护区就已设立的事实，金核公司与临钢公司均予以认可，而政府相关部门在设立保护区时应对保护区的相关信息资料予以公示，该信息资料均系公开的公众信息，本案双方当事人均可自行获取。因此，对于案涉矿权在保护区范围内的事实双方当事人在签订合同前均应当明知。虽然案涉矿权位于保护区范围内，但案涉合同履行两年多的期间，临钢公司未向金核公司提出过异议，亦未提供证据证明其勘查工作受到了影响。双方在案涉协议第六条约定的“可能影响”未明确约定可能影响的具体内容，属约定不明。案涉协议第十一条约定：“因不可抗力导致合同无法履行的，经双方确认后协议终止；因一方严重违约而导致另一方不能实现合同目的，则另一方有权解除合同。”金核公司并不存在上述约定所称的严重违约行为，不足以导致合同目的无法实现。由此可见，

案涉合同并不存在双方约定的应当终止或解除的情形。故，一审法院依法对金核公司确认临钢公司解除案涉协议行为无效的诉讼请求予以支持，对临钢公司要求解除案涉《合作勘查开发协议》的反诉请求不予支持。

(二)关于案涉3500万元的问题。金核公司对收到临钢公司支付3500万元款项的事实予以认可，从案涉《合作勘查开发协议》的内容来看，双方当事人约定的该款项应为矿权合作补偿款，虽然在案涉协议第四条中对该款有关于定金的表述和约定，但从临钢公司的银行转账付款凭证和金核公司出具的收据上来看，均未注明是定金，且临钢公司反诉请求第二项也明确主张系返还矿权合作补偿款，通过上述事实说明，合同双方均认为该款系矿权合作补偿款，而非定金，因此，一审法院依法确认该款项为临钢公司向金核公司支付的合作补偿款。现合同未予解除，故一审法院对临钢公司要求金核公司返还矿权合作补偿款3500万元的反诉请求不予支持。金核公司关于无须退还临钢公司已支付的矿权合作补偿价款的诉讼请求已包含在其要求确认临钢公司解除案涉协议行为无效的诉讼请求中，无须单独主张，故一审法院对金核公司该项诉讼请求在判项中不予表述。

(三)关于临钢公司主张的勘查费用损失3288150元，修路费用损失5538600元，矿山道路通行维护费损失150万元，工程费用、管理费用等损失5702257元、利息损失9465104.15元及律师费用损失429161.32元的赔偿问题。临钢公司的上述反诉请求均是基于案涉合同解除而主张，因合同未予解除，故一审法院对临钢公司的上述反诉请求均依法不予支持。

综上，根据《中华人民共和国合同法》第八条、第六十条，《中华人民共和国民事诉讼法》第一百五十二条及《最高人民法院关于民事诉讼证据的若干规定》第二条之规定，一审法院判决如下：一、临钢公司解除《合作勘查开发协议》的行为无效，临钢公司与金核公司继续履行双方于2011年10月10日签订的《合作勘查开发协议》；二、驳回临钢公司的反诉请求。本诉案件受理费100元，由临钢公司负担。反诉案件受理费356807.13元，由临钢公司负担。

临钢公司不服一审判决，向本院提起上诉称：(一)金核公司违反《合作勘查开发协议》，且合同目的因其违约行为而无法实现，临钢公司有权根据《中华人民共和国合同法》以及《合作勘查开发协议》的约定解除合同，一审判决错误地认定金核公司不存在违约行为，不足以导致合同目的无法实现，应当予以纠正。(二)在临钢公司有权解除《合作勘查开发协议》的情况下，金核公司应向临钢公司返还相应的款项，并赔偿损失，一审法院未支持临钢公司的相关诉讼请求，存在错误，应当予以纠正。请求：1.撤销(2014)新民二初字第13号民事判决的第一项和第二项；2.改判解除双方签订的《合作勘查开发协议》；3.改判金核公司向临钢公司返还矿权合作补偿价款3500万元；4.改判金核公司赔偿临钢公司支出的勘查费用损失3288150元，修路费用损失5538600元，矿山道路通行维护费损失150万元，工程费用和管理费用等损失5702257元；5.改判金核公司赔偿临钢公司利息损失，以同期同类银行贷款利率为计算标准，合作补偿价款3500万元从金核公司实际收款日(2011年10月25日)起计算至实际还款之日止；其他损失款从临钢公司提出解除合同之日(2013年11月22日)起计算至实际还款之日止；6.改判金核公司赔偿临钢公司一审律师费用损失20万元；7.判令金核公司赔偿临钢公司二审律师费用损失50万元；8.判令金核公司承担一审和二审全部诉讼费用。

金核公司答辩称：(一)金核公司自身并无过错，不存在严重违约行为，不影响双方签订的《合作勘查开发协议》合同目的的实现，临钢公司无权解除协议。一审判决的认定是客观、公正的。(二)临钢公司理应依法按约继续履行协议，其要求金核公司退回矿权合作补偿价款，并赔偿所谓损失，不能成立。请求驳回临钢公司的上诉请求。

临钢公司在二审中提供了以下新证据：新证据一，勘查区域与自然保护区位置平面图和卫星地图，拟证明案涉勘查区域位于保护区范围内。新证据二，《代理协议》和律师费发票，拟证明临钢公司因本案支出二审律师费50万元。新证据三，光盘视频和视频谈话文字记录，拟证明塔什库尔干县2012年起就不允许设立任何矿产开发企业。

金核公司对临钢公司出示的新证据质证认为：新证据一中的勘查区域坐标与金核公司掌握的坐标点有出入，应以探矿权证以及新疆维吾尔自治区国土资源厅官网上的坐标点为准。新证据二律师费是临钢公司的单方民事行为，不应由金核公司承担。新证据三视频来源不规范，存在不确定的因素，不符合证据三性原则，不能证明待证目的。

金核公司在二审中提供了以下新证据：新证据一，新疆塔什库尔干县乌如克铁矿详查探矿权证(证号：T6512008120202××××)，拟证明案涉矿权的有效期延续至 2017 年 5 月 19 日，合法有效，具备继续合作勘查开发的条件。新证据二，新疆维吾尔自治区国土资源厅《关于下达 2015 年中央返还两权价款资金矿产调查评价(第一批)项目任务书的通知》，拟证明 2015 年中央及新疆地方仍然加大在保护区范围内的矿产勘查开发投资、作业，地质调查院还继续承担该区域的矿产调查评价项目作业。新证据三，保护区功能区划图和该区域部分矿权分布情况及相关说明，拟证明保护区内存在上百家探矿权及采矿权，临钢公司在该区域还有其他已收购的矿权，双方合作的矿权位于实验区和缓冲区，不影响合作勘查开发的进行，不影响合同目的的实现。新证据四，现场照片一组，拟证明双方签订合同后进行了道路施工以及机械进场的情况，《合作勘查开发协议》已经实际履行了两年多时间。

临钢公司对金核公司出示的新证据质证认为：新证据一的真实性认可，但不认可合法性及证明目的，按照相关规定自然保护区内不允许任何矿产资源的勘探、开发，对主管部门是否应该颁发此证存疑。新证据二的真实性无法确认，不认可其关联性及证明目的，文件中未包含案涉矿权，且两权价款由中央财政予以返还不能证明勘探、开发矿产资源的合法性。新证据三由金核公司单方制作，内容是否准确无法确认，不认可其真实性及证明目的，探矿区域到底在自然保护区的实验区还是缓冲区，缺乏权威第三方来源。新证据四的八张现场照片的真实性存疑，且第一张拍摄于双方签订协议之前，这些照片反映了当地恶劣的自然条件，修建的道路桥梁等设施可以印证我方的损失。

本院对临钢公司出示的新证据认证如下：新证据一平面图及卫星地图由临钢公司单方自作，金核公司不予认可，其客观性无法确定，不予采信。新证据二《代理协议》及律师费支付凭证，金核公司对其真实性未提出异议，且未提交足以反驳的证据，予以采信。新证据三视频及其文字记录的真实性不能确定，不予采信。

本院对金核公司出示的新证据认证如下：新证据一探矿权证的真实性临钢公司不持异议，予以采信。新证据二当地国土资源厅的文件与本案无关联性，不予采信。新证据三图纸及相关说明由金核公司单方制作，临钢公司不予认可，其客观性、真实性无法确定，不予采信。新证据四照片的真实性无法确定，不予采信。

本院对一审法院查明的事实予以确认。

本院认为，当事人二审争议的焦点在于：(一)临钢公司与金核公司签订的《合作勘查开发协议》应否解除；(二)临钢公司要求金核公司返还合作补偿价款并赔偿投入损失的请求能否成立。

(一)关于案涉《合作勘查开发协议》应否解除的问题

《合作勘查开发协议》项下的探矿权位于新疆塔什库尔干野生动物自然保护区范围内，该自然保护区设立在先，金核公司的探矿权取得在后，从协议第 6.2.3 条关于“乙方保证取得的上述探矿证……不在冰川保护区、自然保护区、风景区等可能影响矿山开发的区域范围内”的约定来看，双方当事人均知道或者应当知道在自然保护区内不允许进行矿产资源的勘探和开发。《中华人民共和国自然保护区条例》第二十六条规定，禁止在自然保护区内进行砍伐、放牧、狩猎、捕捞、采药、开垦、烧荒、开矿、采石、挖沙等活动。金核公司主张，案涉矿权虽在自然保护区范围内，但处于实验区和缓冲区，依法允许勘探。《中华人民共和国自然保护区条例》第十八条规定：“自然保护区可以分为核心区、缓冲区和实验区。自然保护区内保存完好的天然状态的生态系统以及珍稀、濒危动植物的集中分布地，应当划为核心区，禁止

任何单位和个人进入；除依照本条例第二十七条的规定经批准外，也不允许进入从事科学研究活动。核心区外围可以划定一定面积的缓冲区，只准进入从事科学研究观测活动。缓冲区外围划为实验区，可以进入从事科学试验、教学实习、参观考察、旅游以及驯化、繁殖珍稀、濒危野生动植物等活动。”金核公司主张探矿属于“等活动”的范围。本院认为，开矿属于《中华人民共和国自然保护区条例》第二十六条明令禁止的行为，显然不包含在该条例第十八条所允许的活动范围内。金核公司的该项主张，缺乏法律依据，不能成立。因此，双方签订的《合作勘探开发协议》违反了《中华人民共和国自然保护区条例》的禁止性规定，如果认定该协议有效并继续履行，将对自然环境和生态造成严重破坏，损害环境公共利益。根据《中华人民共和国合同法》第五十二条第四项、第五项之规定，《合作勘查开发协议》应属无效。一审法院认定该协议有效并判令双方继续履行，适用法律错误，本院予以纠正。无效合同不存在解除问题，故对金核公司要求确认临钢公司解除《合作勘查开发协议》的行为无效的本诉请求，以及临钢公司要求判决解除《合作勘查开发协议》的反诉请求，均不予支持。

(二)关于返还财产及赔偿损失的认定问题

《中华人民共和国合同法》第五十八条规定：“合同无效或者被撤销后，因该合同取得的财产，应当予以返还；不能返还或者没有必要返还的，应当折价补偿。有过错的一方应当赔偿对方因此所受到的损失，双方都有过错的，应当各自承担相应的责任。”因《合作勘查开发协议》无效，临钢公司基于该协议向金核公司支付的3500万元矿权合作补偿价款，金核公司应当予以返还。临钢公司在《合作勘查开发协议》履行期间，与喀什地区公路桥梁工程有限责任公司签订了《新疆塔什库尔干乌如克铁矿普查项目道路施工工程项目合同书》及《补充合同》，委托后者为案涉勘查项目修建道路，该道路已物化为矿区财产，应由金核公司予以补偿。临钢公司为此支付的工程款中的250万元有加盖银行印鉴的付款凭证为凭，证据充分，本院予以支持。其余303.86万元修路费用以及临钢公司主张的328.815万元勘查费用、150万元矿山道路通行维护费，相关付款凭证为临钢公司自行打印的电子回单，未经银行盖章确认。金核公司在一审质证中提出，电子回单可以自己打印，但应当去银行补盖印章，对其真实性并不认可。临钢公司在二审中仍未就此补强证据，其付款凭证的真实性不能确定，本院不予认定。临钢公司主张的5702257元工程费用、管理费用损失是项目公司日常经营管理中的费用支出，付款人均为项目公司，而临钢公司及金核公司在项目公司成立时均有注资，不能仅认定为临钢公司的损失，该部分款项应在项目公司清算时另行解决。临钢公司在合作前未对矿区位置进行必要的调查了解便盲目投资，对《合作勘查开发协议》的无效具有过错，应当自行承担由此导致的资金利息损失，故对其上诉主张的约665.33万元利息损失，不予支持。临钢公司主张律师费用的依据为《合作勘查开发协议》第7.2条的约定，现该协议已被认定无效，律师费用应由临钢公司自行承担。金核公司的探矿权仍在其名下，不存在返还问题。临钢公司应将该矿的经营管理权交还金核公司。金核公司如因《合作勘查开发协议》无效而遭受损失的，可另案主张权利。

综上所述，一审判决认定事实清楚，但适用法律不当，应予纠正。本院根据《中华人民共和国民事诉讼法》第一百七十条第一款第二项之规定，判决如下：

一、撤销新疆维吾尔自治区高级人民法院(2014)新民二初字第13号民事判决；

二、新疆临钢资源投资股份有限公司与四川金核矿业有限公司签订的《新疆塔什库尔干县乌如克铅多金属矿普查探矿权合作勘查开发协议》无效；

三、四川金核矿业有限公司于本判决生效之日起十日内向新疆临钢资源投资股份有限公司返还矿权合作补偿价款3500万元；

四、四川金核矿业有限公司于本判决生效之日起十日内赔偿新疆临钢资源投资股份有限公司修路费用损失250万元；

五、驳回四川金核矿业有限公司的诉讼请求；

六、驳回新疆临钢资源投资股份有限公司的其他诉讼请求。

如未按本判决指定的期间履行给付金钱义务的，应当按照《中华人民共和国民事诉讼法》第二百五十三条的规定，加倍支付迟延履行期间的债务利息。

一审本诉案件受理费100元，反诉案件受理费356807.13元，由金核公司与临钢公司各负担178453.565元。二审案件受理费333711.54元，由金核公司与临钢公司各负担166855.77元。

本判决为终审判决。

审　判　长　王季君

代理审判员　晏　景

代理审判员　朱　婧

二〇一五年十一月十四日

书　记　员　冯哲元

九、贵州泰蕹河生态养殖开发有限公司诉贵州华锦铝业有限公司财产损害赔偿案

贵州省清镇市人民法院

民 事 判 决 书

(2015)清环保民初字第 16 号

原告贵州泰蕹河生态养殖开发有限公司，住所地贵州省清镇市王庄乡打磨冲村戈家寨组。

法定代表人陈慧菊，系公司董事长。

委托代理人何文华，男，1970 年 3 月 21 日出生，汉族，系贵州泰蕹河生态养殖开发有限公司法律顾问。代理权限为特别授权代理。

被告贵州华锦铝业有限公司，住所地贵州省清镇市王庄乡政府办公楼。

法定代表人冷正旭，系该公司董事长。

委托代理人李冀平，男，1964 年 3 月 15 日出生，住贵阳市云岩区，系该公司综合部经理。

委托代理人杨波，贵州红枫律师事务所律师，代理权限为特别授权代理。

原告贵州泰蕹河生态养殖开发有限公司(以下简称泰蕹河公司)诉被告贵州华锦铝业有限公司(以下简称华锦公司)财产损害赔偿纠纷一案，本院于 2015 年 8 月 31 日受理后，依法组成合议庭，于 2015 年 11 月 3 日公开开庭进行了审理，原告泰蕹河公司的法定代表人陈慧菊及其委托代理人何文华，被告华锦公司的委托代理人李冀平、杨波到庭参加了诉讼，本案现已审理终结。

原告泰蕹河公司诉称，原告是一家养殖企业，从戈家寨大沟取水，主要从事鲟鱼养殖。2013 年 3 月投产运行后，原告分三次从贵州玉屏诚端公司、遵义绥阳芙蓉公司购进 82440 尾，价值共 187380 元的鲟鱼苗。2014 年被告开始在王庄乡唐寨工业园建设氧化铝项目。因戈家寨水库尚未建成，清镇市政府同意被告可以在水库上游河段临时取水，但必须按照相关法律法规办理环保、建设、安全、水保、节水等相关手续。从 2015 年 4 月 20 日起，被告大规模蓄水，几乎是关闸蓄水，导致拦水坝下游河道水量很小，农户因灌溉用水多次与被告发生纠纷。2015 年 4 月 21 日下午 3 时许，原告养殖场工人电话报告，称暗流河河道水越来越小，供水困难。原告多方咨询打听，得知系被告在养殖场上游蓄水断水，原告即向清镇市水务局反映，请水务局协调被告开闸放水，保障企业生产用水。当晚 10 点过，工人再次反映个别养殖池已经出现进水困难，部分鲟鱼昏迷翻白肚。原告再次将此危急情况电话告知被告相关人员，再不开闸放水，将导致整个养殖场无水进入，同时向清镇市王庄乡派出所报案。21 日晚 12 时许，原告负责人赶到现场查看时，水量不足平时水量的 1/3，个别养殖池已呈现断水情况。约 22 日凌晨 1 时许，原告负责人与被告蓄水现场管理人员再次协商开闸放水，但无结果，被告工作人员称要领导同意。根据《清镇市戈家寨水库工程水资源论证报告书》，为保证水库下游灌溉和生态用水，戈家寨水库最小下放流量确定为 0.288 立方米每秒。根据《中华人民共和国水法》《中华人民共和国河道管理条例》《贵州省河道管理条例》等相关规定，河道最小下放流量为法定流量，任何单位和个人除因特殊原因不得拦蓄、取用。但直至 2015 年 4 月 23 日被告拦水坝出水口处下放的生态水量约为 12 升每秒，只有相关法定审批部门审批的保证下游灌溉和生态流量的 1/25，最终导致原告养殖的鲟鱼在 4 月 21～23 日因严重缺水缺氧而大量窒息死亡。其中，1 斤/尾以下的鱼种小鲟鱼死亡 24579.2 斤，3～5 斤/尾的成品鲟鱼死亡 20982.2 斤，损失达 869263.6 元。根据《中华人民共和国水法》《中华人民共和国民法通则》《中华人民共和国侵权责任法》等相关法律规定，被告从事工程建设，明知对原有供水水源有不利影响，应当采取相应的补救措施，被告却在未通知下游用水户做好应对措施的情况

下，擅自蓄水断水，造成原告养殖鲟鱼缺氧窒息大量死亡，被告依法应当给予原告经济补偿，被告因截水、蓄水损害原告合法权益，依法应承担民事赔偿责任。故提出如下诉讼请求：1.请求判令被告赔偿原告经济损失 869263.6 元；2.本案诉讼费用由被告承担。

原告为支持其诉讼请求，向本院提供了以下证据，被告亦对原告提供的证据发表了质证意见：

1．企业法人营业执照、税务登记证、组织机构代码证、取水许可证、中华人民共和国水生野生动物驯养繁殖许可证、中华人民共和国水生野生动物经营利用许可证、水域滩涂养殖证各一份；证明原告的主体资格，及相关手续齐全。被告对该组证据没有异议。

2．2013 年 11 月 6 日至 2014 年 9 月，购鱼鱼种发票共计十份。证实原告公司在投产初期有 8 万余尾鱼苗，2013 年的鱼苗已经长成 3～5 斤鱼可以销售，后面进的鱼苗现在是 1 斤左右的鱼了。被告认为原告购买鱼苗的公司应该出示鱼苗公司的营业执照证实真实性，原告提供的票据上证实鱼苗是 8 万余尾，但是原告没有提供证据证实原告全部养殖成功，不排除其他死亡原因，认为这组证据与本案没有关联。

3.清镇市人民政府专题会议纪要清府专议(2015)86 号关于对贵州泰蘋河生态养殖开发有限公司鱼死亡协调会议纪要；证实鱼有死亡的事实。被告对该会议纪要的真实性无异议，认为达不到原告的证明目的，该纪要证实有死鱼的存在，不能证明死鱼与被告有关系。

4.清镇市王庄乡政府出具关于贵州泰蘋河生态养殖开发有限公司养殖场鱼死亡的统计情况；证实原告现场死鱼的数量、规格。被告认为该证据并没有统计人员、参与人员签名，对于鱼的规格统计有跳跃性，对死鱼的核算没有经过公证部门的公证，也没有同步录音录像，只证实有死鱼的情况。

5.鲟鱼市场价寻价情况说明、渔樵水产品仓储物流配送中心近两日鱼价、鲟鱼价格证明，证明鱼种小鲟鱼、鲟鱼的价格，且是批发价，实际上原告卖出的价格应高于批发价。被告对真实性有异议，调查人是清镇渔政管理所不具备查询鱼类的价格，渔樵水产品仓储物流配送中心近两日鱼价证明盖的是其他物流公司的章，鲟鱼价格证明这些没有附有两家公司的营业执照。两家公司的价格是相互矛盾的。

6．清镇市渔政管理所出具关于对贵州泰蘋河生态养殖开发有限公司 4.23 鲟鱼异常死亡事故的调查情况，证实鱼死亡的事实，经过调查鱼的死亡原因排除人为、投毒、污染等原因，死亡原因是因为缺水、缺氧造成的。

7.关于对贵州泰蘋河生态养殖开发有限公司鱼死亡原因进行鉴定的委托函、委托书、养殖场现场情况照片、贵州泰蘋河生态养殖开发有限公司鲟鱼异常死亡原因分析报告、专家组人员名单、资格证书；证实鱼死亡原因是排出人为、暴力致死、毒物、水体污染的可能性，鱼是因为缺水、缺氧致死的。经专家走访养殖场周围了解后是因为被告拦截坝造成鱼死亡。

8.清镇市水务管理局出具关于暗流河水量减小造成贵州泰蘋河生态养殖开发有限公司鱼大面积死亡的调查情况，证实水务局根据会议纪要认真履职，对鱼死亡情况进行调查。

9.贵州省水利厅关于清镇市戈家寨水库工程水资源论证报告书的批复、清镇市戈家寨水库工程水资源论证报告书，证实经过专家现场查看，在被告拦截坝的上游来水是生态保障流量的 2.5 倍，下游只是生态流量的二十五分之一。

10.清镇市王庄乡戈家寨生态养殖项目 2015 年 4 月鱼死亡事故河流水量分析报告、建设项目水资源论证资质证书，证实河流水流量应该达到法定流量。

被告代理人对证据 6－10 集中发表了质证意见：证据 6，证明个别鱼池无水进入导致鱼死亡的原因；渔政管理所不是鉴定机构，对该组证据均持异议。证据 7，该分析报告作出基础是原告的陈述，被告认为鉴定基础不真实，该鉴定报告的鉴定单位不具备司法鉴定资质，司法鉴定人员应该在一个鉴定机构，并发放司法鉴定资格证，专家组不具备司法鉴定资格。证据 8，原告提供的取水证每天是 4989 方，暗流河今年的流量是往年的几分之一，印证原告

养殖场水量减少是自然因素造成的。从理论上分析是能满足生活、生产用水的。证据 9，该报告不客观，批复上写的戈家寨水库，原告不是在戈家寨组取水，与本案没有关联性。证据 10 与本案没有关联性。

11．现场照片 12 张，证明水量减少、死鱼现象；贵州华锦铝业有限公司断水时间视频资料、手机通话 26 组、录音资料光碟 2 张，证明原告缺水后一直找原因，水务局当天下午与被告公司联系都没有放水。视频证实，当天有老百姓在现场闹事，原告了解到被告从 20 号就开始蓄水拦截坝，原告请被告放水但未放水，因此给原告造成损失。被告认为根据图片可以看出沟渠里还有水，采取自救措施原告是可以减少损失的。

12．原告向法庭申请参与调查的三位专家晏宏、张晋芳、杨衡出庭作证，三位专家证实应清镇市农业局的邀请，对泰蘋河公司鲟鱼死亡事件进行调查，发现养殖场进水口已经没有水了，而原告养殖的这种鲟鱼对水的要求比较高。解剖了 3 条鱼，得出结论鲟鱼不是生病死亡，而是缺氧造成的。被告认为三位专家证人言词不一致，解剖的鱼是几条死的几条活的不清楚，并且专家组没有到华锦公司拦截坝现场看，不能得出是华锦公司拦坝造成的损害。

被告华锦公司答辩称，1.被告不是本案适格主体。在原告养殖场上游，还有卫城、王庄水站取水，4 月正是灌溉高峰，加之是枯水季节，被告自 4 月 3 日围堰取水 2000 立方米，仅为流量的 3%，一直保证水站及农灌用水，不可能导致下游流量大量减少缺水情形。2.被告取水经过批准，不存在侵权。被告已同清镇市水利工程建设管理局达成取水协议，获得政府批准，不存在违法围堰取水。3.原告鲟鱼死亡与被告围堰取水之间无因果关系。(1)原告提供的《贵州泰蘋河生态养殖开发有限公司鲟鱼异常死亡原因分析报告》不能作为定案依据。首先，出庭作证的三位专家对解剖死鱼说法矛盾，且都未到围堰取水现场踏勘过；其次，该报告由贵州水产技术推广站出具，该主体并不具备司法鉴定资质，技术人员也未到司法行政部门备案，报告的真实性合法性不能认可；第三，三位专家并未到过围堰现场，但报告称损失应由建设单位承担，属主观臆断；第四，鉴定的死鱼未留样，也未说明鉴定地点，送检死鱼、活鱼均未说明来源，也未得到被告认可，同时也没有考虑上游还有水站取水及农用灌溉等用水因素。(2)原告提供的《河水流量分析报告》缺乏真实性及客观性。其一，该报告数据来源不明。其二，该报告未考虑今年气候状况。今年河水流量仅为往年的 26.98%，即 0.7 立方米每秒，日流量为 60480 立方米。而被告人每日取水量为 9600 立方米，每天下放水量为 50880 立方米，原告每天取水量为 5027 立方米，仅为下放水量的 10%左右。被告下放水量为合理总流量的 84.13%，超过法律规定的 10%的生态用水流量。且该报告是戈家寨水库数据，与本案无关联。另外，根据清镇水务局调查情况，死鱼发生时，进入养殖场水量大约是 0.015 立方米每秒，每日进水约 1296 立方米，而根据原告的取水许可证，其每日取水约为 4958.9 立方米，实际进水量为需求的 26.13%，这与今年河水流量为往年的 26.98%相符，即原告养殖场进水量减少属自然因素而与被告无关。(3)原告提供的水产品价格证明是原告到水产市场咨询得来，而法律规定应由鉴定机构或物价部门核定，不能作为定案依据。(4)王庄乡政府出具的死鱼情况统计缺乏真实性、客观性。其一，该证据并无统计人员签字或捺印；其二，该证据仅对类别进行统计，未对死鱼条数进行统计；其三，该证据仅对一斤以下和三至五斤死鱼进行统计，有明显跳跃性，缺乏客观性；其四，该证据未经公证，也无同步录音录像；其五，该证据不能证明死鱼由华锦公司造成，与本案无关联；其六，该证据未说明死鱼处理结果，为孤证。(5)本案发生时，被告曾到现场查看，水流正常且与原告沟渠平行，原告可以凿低取水渠道引水，但原告并未采取任何自救措施。故认为原告请求缺乏事实和法律依据，请求驳回原告诉请。

被告向本院提供以下证据证实其答辩意见，原告亦对被告提供的证据发表了质证意见：

1．被告营业执照、组织机构代码证、法人身份证复印件，以证实被告主体身份。原告无异议；

2．施工合同、工程竣工验收证明书，证实被告拦截坝是在死鱼之前就竣工的。原告认为拦截坝竣工与本案没有关联，工程竣工与关闸截水没有直接关系；

3．设计说明图，证实被告工程的合法性。原告对真实性有异议，并认为被告取水没有问题，问题是在突然拦截水造成损害；

4．照片共计 30 张，证实下游生产正常。

根据被告申请，法院到新店、王庄、卫城三个乡镇水站了解取水情况，王庄乡正常取水(每日约 2200 立方米)，而其他两个乡镇未在该河段取水。被告据此认为在拦截坝取水期间是保证生活正常用水的。而原告认为该证据不能达到被告证明目的。王庄乡在被告修建拦截坝之前就开始取水，并非水量减少的原因。原告代理人对法院调取的证据真实性没有异议，但认为该证据不能达到被告证明目的。

庭审结束后，被告又向法院提交了部分证据：贵州华锦铝业有限公司与清镇市水利工程建设管理局签订的《贵州华锦铝业有限公司清镇氧化铝项目用水协议》1 页；黔水资函(2015)39 号省水利厅关于贵州华锦铝业有限公司清镇氧化铝项目水资源论证报告书的批复 2 页；黔申字(2015)第 000×××号取水许可申请书 13 页，以这三份证据证实被告取水是通过省、市、县政府同意的，取水量是在协议约定的范围，会议纪要也明确在戈家寨水库建成前可以在戈家寨水库上游围堰取水，故被告不存在取水违法。取水问题是经过市政府同意的，相关的取水手续一直在办理过程中。

原告同意对被告提交的证据进行质证并发表了质证意见：1.对于贵州华锦铝业有限公司与清镇市水利工程建设管理局签订的《贵州华锦铝业有限公司清镇氧化铝项目用水协议》，认为合法性、真实性没有问题，但认为协议仅仅是清镇市水利工程管理局与被告签订的管理协议，不能证明被告当时取水是合法的，被告当时没有取水许可证；2.对于黔水资函(2015)39 号省水利厅关于贵州华锦铝业有限公司清镇氧化铝项目水资源论证报告书的批复，批复是 2015 年 6 月 8 日作出的，事件发生在 2015 年 4 月 20 日至 4 月 23 日之间，批复在后。申请许可证是 2015 年 6 月 20 日才向水利厅申请的，水利厅于 2015 年 7 月 21 日批复，并告知要有相应的补救措施，在运行时造成水资源的损失应当给予补偿。被告不能证明事件发生时取水合法，相反证明了被告在围堰取水时没有办理相关手续导致没有采取相应的补救措施，导致生态流量水减少，发生鱼死亡的事实。

原告在庭审中提交了鲟鱼批发价格，被告方不予认可，但也未举证证明鲟鱼价格。为慎重起见，本院上网查询了今年 4 月 21～23 日期间鲟鱼及鱼苗价格，并走访了贵阳水产品批发市场，了解到贵阳地区今年 4 月 21～23 日左右鲟鱼批发价在 13～15 元之间，鱼苗价略高。原告认为应当按照市场价格计算，被告认为法院了解的价格与原告提供的价格不一致。

经审理查明：原告泰蘋河公司是一家主要从事鲟鱼养殖的企业，从戈家寨大沟取水。原告养殖场于 2013 年 3 月投产运行，并于 2013 年 11 月、12 月、2014 年 9 月分三次从玉屏、遵义绥阳两地购进 82440 尾鲟鱼苗进行养殖。被告作为乙方于 2014 年 7 月与甲方清镇市人民政府签订《贵州华锦清镇氧化铝项目投资协议》，在王庄乡唐寨工业园建设氧化铝项目，该《协议》第四条项目扶持第 5 项对项目用水进行了约定，甲方加快建设戈家寨水库向乙方供水，若戈家寨水库建设进度不能满足乙方投产进度要求，同意乙方先期在戈家寨水库上游河段建设临时取水设施，解决生产用水问题。同时，该《协议》对乙方的责任和义务进行了约定：1.乙方建设项目必须符合清镇市经济开发区控制性详细规划及生态、环保、产业等相关要求，规划要按程序报经甲方及相关部门评审后方可实施。2.乙方建设项目必须按照相关法律法规要求办理环保、建设、安全、水保、节水等相关手续，严格执行“三同时”制度。因戈家寨水库尚未建成，被告华锦公司即于 2014 年 10 月在戈家寨水库上游河段筑坝取水，该取水工程于 2015 年 3 月竣工并投入使用(该取水工程未办理环境影响评价)。从 2015 年 4 月 20 日起，被告拦水坝下游河道水量减少，导致原告养殖场进水减少，供水出现困难。因原告养殖的鲟

鱼为杂交鲟，对水体溶氧要求极高，4 月 21 日下午，原告即向清镇市水务局反映，请水务局协调被告开闸放水，保障企业生产用水。当晚 10 点过，养殖场个别养殖池部分鲟鱼昏迷，原告再次将此危急情况电话告知被告相关人员，要求被告开闸放水，同时向清镇市王庄乡派出所报案。22 日凌晨 1 时许，原告负责人与被告蓄水现场管理人员再次协商开闸放水，但无结果。最终导致原告养殖的鲟鱼在 4 月 21～23 日因严重缺水缺氧而大量窒息死亡。事后，原告方请清镇市人民政府调查处理，清镇市人民政府即于 4 月 23 日组织经开区、水务局、生态局、王庄乡、农业局、泰蕹河公司、华锦公司进行调查协调，形成会议纪要：“一、由王庄乡政府牵头，将死鱼规格、类别、数量进行核定，由泰蕹河公司负责，农业局、水务局配合，聘请有资质的第三方鉴定机构进行鉴定；二、由王庄乡政府牵头，泰蕹河公司负责，农业局配合，在第三方鉴定机构取样后，做好死鱼善后处理。三、鉴定结果出来后，双方通过司法途径对事故责任进行认定。四、华锦公司必须确保下游企业和群众生产生活用水。五、由水务局对水文情况进行调查，农业局对死鱼情况进行调查，并将调查情况在 4 月 24 日前向企业进行答复。”华锦公司李冀平、杨全昌，泰蕹河公司法定代表人陈慧菊参加了此次会议。此次会议后，各部门即按照会议纪要开展了工作：1.王庄乡政府对死鱼进行了称重，其中，1 斤/尾以下的鱼种小鲟鱼死亡 24579.2 斤，3～5 斤/尾的成品鱼死亡 20982.2 斤。2.原告泰蕹河公司、清镇市农业局共同委托贵州省水产技术推广站对死鱼原因进行分析鉴定。贵州省水产技术推广站接受委托后，即于 4 月 24 日牵头组织贵州省渔业局、贵阳市水产站、贵州大学、贵州省水产研究所等单位专家组成 5 人专家组，到现场进行查勘，并解剖了 3 条鱼(2 条死鱼、1 条活鱼)，经过调查得出结论，排除人为敲击致死、毒物致死、病害致死等因素，鲟鱼突发性大量死亡应与溶氧量不足有关。3.清镇市水务局在 4 月 22 日接到泰蕹河公司反映后于 22～23 日也对暗流河水量减少问题进行了调查，初步调查情况为：(1)华锦公司为保障 4 月 29 日点火生产，在 4 月 20 日将拦河坝关闸加快蓄水，未通知下游用水户做好应对措施；(2)王庄乡打磨村戈家寨大沟拦河坝将河道内水流全部拦截进入戈家寨大沟，流量约为 0.02 立方米每秒，泰蕹河公司将大沟水全部轧断进入养殖场，拦河坝下游河道内没有明水流入下游；(3)近期较干旱，来水量大约为 0.75 立方米每秒，但基本能满足华锦公司、新店水厂、泰蕹河公司取水及下游灌溉用水的需要；(4)华锦公司关闸蓄水是造成下游河段水量变小的原因之一。4.同时，泰蕹河公司、清镇市水务局共同委托贵阳市水利水电勘察设计研究院从水文资源角度对取水口来水量进行分析测算，对下游排放水量进行测量，分析下游排水量对下游取水的影响。贵阳市水利水电勘察设计研究院接受委托后于 2015 年 5 月 7 日出具《河流水量分析报告》，该报告的基本结论为：根据相关法律法规的规定，戈家寨水库最小下放流量为 0.288 立方米每秒，这是法定流量，任何单位和个人除因特殊原因不得拦蓄、取用；经勘查，距坝址上游约 4 公里的顺流河组洞底下拦河坝处河道流量约 0.7 立方米每秒，来水量是相关部门核定下放环境水量的 2.5 倍左右，华锦公司临时取水坝址处下放生态水流量约为 12L/秒，是审批的保证下游灌溉和生态水量的 1/25 左右，难以满足下游用水需求。原告据此认为，根据《清镇市戈家寨水库工程水资源论证报告书》，为保证水库下游灌溉和生态用水，戈家寨水库最小下放流量确定为 0.288 立方米每秒，《中华人民共和国水法》《中华人民共和国河道管理条例》《贵州省河道管理条例》等相关规定，河道最小下放流量为法定流量，任何单位和个人除因特殊原因不得拦蓄、取用。但直至 2015 年 4 月 23 日被告拦水坝出水口处下放的生态水量约为 12 升/秒，只有相关法定审批部门审批的保证下游灌溉和生态流量的 1/25。根据《中华人民共和国水法》《中华人民共和国民法通则》《中华人民共和国侵权责任法》等相关法律规定，被告从事工程建设，明知对原有供水水源有不利影响，应当采取相应的补救措施，被告却在未通知下游用水户做好应对措施的情况下，擅自蓄水断水，造成原告养殖鲟鱼缺氧窒息大量死亡，被告依法应当给予原告经济补偿，被告因截水、蓄水损害原告合法权益，依法应承担民事赔偿责任。故向本院提起诉讼，提出如前诉请。

另查明，被告华锦公司修建临时取水坝处系规划建设的清镇市戈家寨水库工程库区范围。根据贵州省水利厅对清镇市戈家寨水库工程水资源论证报告书的批复，戈家寨水库应下放0.288立方米每秒的下游河道生态与环境用水。在被告拦截坝下游，尚有王庄乡水站取水，日取水量为2200吨左右。

根据原告提供的清镇市渔政所提供的调查记录，21～23日期间，贵阳市鲟鱼鱼苗为18～20元/斤，成品鱼价格为15～18元/斤。本院亦到水产市场进行调查及上网查询，贵阳市成品鱼价格约为13～15元/斤，鱼苗价略高。

本案的争议焦点为：一、贵州省水产技术推广站出具的《贵州泰蘋河生态养殖开发有限公司鲟鱼异常死亡原因分析报告》能否作为定案依据？二、被告是否存在主观过错？三、鲟鱼死亡与被告蓄水是否存在因果关系？被告是否应当承担责任？四、死鱼价值？

贵州省水产研究所等单位专家组成5人专家组经过现场查勘，并解剖样本，作出《贵州泰蘋河生态养殖开发有限公司鲟鱼异常死亡原因分析报告》对鲟鱼死亡原因得出结论，排除人为敲击致死、毒物致死、病害致死等因素，鲟鱼突发性大量死亡与溶氧量不足有关，即鱼死于缺氧窒息。被告虽提出不排除其他原因造成鱼的死亡，但并未提供相关证据来佐证，被告进而对报告的三性提出质疑。本院认为，关于报告的客观性，该报告系独立的第三方接受政府相关部门和原告的委托，牵头组织不同单位的专家到现场踏勘、解剖样本得出的结论，这一客观事实不容否认。专家与原、被告双方并无利害关系，在通过解剖鲟鱼样本后得出科学结论，本身也具有客观性。当然，三位到庭接受质询的专家对解剖2条活鱼还是1条活鱼说法有一定出入，但调查至今已有数月，可能存在记忆误差，原始解剖过程在报告中已有详细记载，这种记忆误差对死因分析并无实质性的影响， 不能由此否定报告对鲟鱼死亡原因分析的客观真实性，而责任判断本院并未以此报告为依据。关于报告的合法性，本院认为，该报告是清镇市农业局按照政府协调会的意见与原告共同委托专业机构完成，人员又来自不同单位的渔业、水产方面专家组成，并非原告单方委托，此阶段也非诉讼阶段，法律并无规定需要委托具有司法鉴定资质的单位出具报告，也没有要求技术人员必须到司法行政部门进行备案登记，且参与调查的三位专家均到庭接受双方质询，庭审中，被告没有提出任何反驳该分析报告的证据，所以被告认为该报告不具合法性的意见不能成立。《贵州泰蘋河生态养殖开发有限公司鲟鱼异常死亡原因分析报告》对鲟鱼死亡原因的分析可以作为本案认定事实的依据。

关于被告是否存在主观过错，本院认为，清镇市人民政府在与被告华锦公司签订的《贵州华锦清镇氧化铝项目投资协议》中虽同意被告先期在戈家寨水库上游河段建设临时取水设施，解决生产用水问题，但同时明确要求乙方(即被告)建设项目必须符合清镇市经济开发区控制性详细规划及生态、环保、产业等相关要求，规划要按程序报经甲方及相关部门评审后方可实施，乙方建设项目必须按照相关法律法规要求办理环保、建设、安全、水保、节水等相关手续，严格执行“三同时”制度。这就是说，被告可以取水，但应按照法律法规规定办理相关手续。取水应当办理什么手续呢？首先，《中华人民共和国水法》第四十八条规定“直接从江河、湖泊或者地下取用水资源的单位和个人，应当按照国家取水许可制度和水资源有偿使用制度的规定，向水行政主管部门或者流域管理机构申请领取取水许可证，并缴纳水资源费，取得取水权。但是，家庭生活和零星散养、圈养畜禽饮用等少量取水的除外”，国务院《取水许可和水资源费征收管理条例》第二条也规定“取用水资源的单位和个人，除本条例第四条规定的情形外，都应当申请领取取水许可证，并缴纳水资源费”，可见，要合法取得用水权，必须向水行政主管部门或流域管理机构申请领取取水许可证。而根据《条例》第十一条第二款规定“建设项目需要取水的，申请人还应当提交由具备建设项目水资源论证资质的单位编制的建设项目水资源论证报告书。论证报告书应当包括取水水源、用水合理性以及对生态与环境的影响等内容”，同时，条例第十四条规定“取水许可实行分级审批”，第二十一

条规定“取水申请经审批机关批准，申请人方可兴建取水工程或者设施。需由国家审批、核准的建设项目，未取得取水申请批准文件的，项目主管部门不得审批、核准该建设项目”，也就是说，被告华锦公司要在涉案河道取水，必须先向有审批权的水务部门递交临时取水申请，经审批后才能建坝取水。而被告在2015年6月8日才获得省水利厅水资源论证报告书的批复，2015年7月21日省水利厅才批复其取水许可申请，显然，在事件发生之时被告并未取得合法取水手续，其筑坝取水具有违法性；其次，被告筑坝取水未尽注意义务，未保障下游用水合法权益，突破河流生态流量的限制。河流生态流量是出现于20世纪40年代的概念，是指为保障河流生态环境功能，维持水资源可持续开发利用，而不致发生生态环境恶化所必须保障下游河道的最小流量。河流生态流量可以保证河流所需的自净扩散能力，保证维持水生生态系统平衡所需的水量，保证库区养殖业所需的水质水量，维持水动力状况下不发生重大变化。我国虽然没有河流生态流量的法律规定，但实践中也有此要求，如水电站最小下泄流量就是保障河流生态流量的措施。2015年4月2日《水污染防治行动计划》(水十条)中也明确提出“加强江河湖库水量调度管理。完善水量调度方案。采取闸坝联合调度、生态补水等措施，合理安排闸坝下泄水量和泄流时段，维持河湖基本生态用水需求，重点保障枯水期生态基流”“科学确定生态流量。在黄河、淮河等流域进行试点，分期分批确定生态流量(水位)，作为流域水量调度的重要参考”，所以，维持河流生态流量非常重要。就本案而言，理论上，被告在取水前，若按照审批部门的要求，做好取退水监测和管理，遵守水资源管理规定，服从水行政主管部门的统一调度和管理，就可以兼顾下游生产生活用水，平衡河流生态流量。而被告却未经许可取水，按其代理人在法庭上陈述，被告华锦公司每日取水达9600m^3。根据贵阳市水利水电勘察设计研究院出具的《河流水量分析报告》，华锦公司临时取水坝址处下放生态水流量约为12升/秒，是审批的保证下游灌溉和生态水量的1/25左右，已经突破了生态流量的限制，且未告知下游用户，主观上存在过错。被告华锦公司认为，0.288立方米每秒的最小下放流量是针对戈家寨水库审批的流量，与被告取水没有关联性。根据庭审查明的情况，被告修建拦截坝取水地在拟建设的戈家寨水库库区，在水库大坝上游，常理而言，越在上游最小下泄流量保障应该越大，考虑被告实际取水的位置，以戈家寨水库审批的下泄流量作为参照并无不当，故被告这一意见不能成立。综上，被告未办理取水行政许可、未办理环境影响评价擅自修建拦截坝取水，且未保障必要的生态下泄流量，主观上存在明显过错。

关于原告鲟鱼死亡与被告蓄水行为是否存在因果关系，被告用一组计算证明其取水并未影响下游用户用水，水量减少系因干旱降水减少原因，从而否认其蓄水与鲟鱼死亡之间的因果关系。本院认为，从清镇市水务局在事件发生后的调查情况看，今年水量的确减少，但来水量大约为0.75立方米每秒，仍能基本满足华锦公司、新店水厂、泰蕨河公司取水及下游灌溉用水的需要。贵阳市水利水电勘察设计研究院出具的《河流水量分析报告》证实，在被告修建的拦截坝上游水量为0.75立方米/秒，是核定下放水量的2.5倍左右，而在被告拦截坝出水口，出水量为12升/秒，为拦截前的1/62.5，为核定生态流量的1/25，明显是因为被告筑坝取水导致下游水量减少。被告代理人在辩论中进行了一个简单的计算，认为被告人每日取水量为400 m^3×24＝9600m^3，来水量为0.7 m^3×60×60×24＝60480 m^3，每天下放水量为60480 m^3－9600 m^3＝ 50880m^3，由此认为被告下放水流量达河流总流量的84.13%，超过10%的下游生态用水量规定，且认为下游王庄水站取水正常，说明其满足了下游用水需求；又计算原告每日实际取水量为0.015 m^3×60×60×24＝1296 m^3，许可证许可每日取水为4958.9立方米，二者之比为26.13%，正好与今年跳蹬河流量自然减少比例26.98%接近，由此得出结论，原告养殖场水量减少系自然因素，与被告无关。实际上被告代理人此计算方式与案件事实明显不符：被告修建了拦截坝，将河水拦截后取水，仅让少量河水下泄，至技术人员前去调查时出水量为12升/秒，并非代理人所称每小时仅取水400立方米，然后多余的河水均向下游排放。可以对被告下放水量做一简单计算(当然，这种计算仅为简单模型，不完全等同

于事实状态)，被告拦截坝下放水量仅为 0.012×60×60×24＝1036.8 立方米/日，这一水量根本不能满足原告许可证上所载明的 4958.9 立方米/日的所需水量，更不要说原告上游还有水站取水、其他农户用水的情况，下游水站每天都在取水，并未引起原告养殖场用水减少，恰好是被告开始蓄水后才导致水量的减小。所以，本院认为，被告未经许可筑坝取水，导致下游水量减小，养殖场进水减少，鲟鱼因此窒息死亡，鲟鱼死亡与被告蓄水之间存在因果关系，被告所提系自然降水减少导致原告养殖场进水减少的主张与事实不符，本院不予采纳。《中华人民共和国水法》第二十八条规定“任何单位和个人引水、截(蓄)水、排水，不得损害公共利益和他人的合法权益”，被告违法取水导致河流水量减小而给原告造成损失，应当承担民事赔偿责任。

原告的损失应当如何计算？参照《农业部水域污染事故渔业损失计算方法规定》，水产品损失额＝当地市场价格×损失量，要计算原告损失，应当确定两个基数，即损失量和当地市场价格。关于损失量，按照王庄乡政府的称重，1 斤/尾以下的鱼种小鲟鱼死亡 24579.2 斤，3～5 斤/尾的成品鱼死亡 20982.2 斤。被告代理人对该数据提出质疑：认为该称重未经被告认可，且认为死鱼只有 1 斤以下和 3～5 斤两种规格有违常理。本院认为，王庄乡政府是根据清镇市政府协调会议的安排对死鱼进行称重，这一活动并非代表原告，是以第三方的身份进行的，具有客观性。至于死鱼仅分为 1 斤以下和 3～5 斤两种规格，根据原告陈述，其是分三批引进鱼苗养殖，至事发前，早些时候引进的鱼苗已长为成鱼，而引进晚的鱼苗还是幼鱼。结合原告庭审提交的证据，其有两批鱼购于 2013 年 11 月、12 月，该两批鱼至事发前已养殖一年零几个月，基本已为成鱼，而 2014 年 9 月引进的鱼苗仅养殖半年，仍为幼鱼，故原告陈述符合客观实际。当然，每一条鱼苗生长不可能完全同步，同一批引进的鱼苗大小不可能完全一致，因此，不排除有少量 1－3 斤的鲟鱼。但作为一种统计，尤其是对死鱼统计，作大概区分称重是符合实际情况的，面对数万斤的死鱼，去清点死鱼条数，严格区分各个级别的死鱼显然不现实，也完全没有必要，故本院对王庄乡政府的称重数量予以确认。关于鲟鱼的价格，被告代理人认为清镇渔政管理所不具备查询鱼类的资质，鱼樵水产品市场近两日鱼价证明盖的是其他物流公司的章，鲟鱼价格证明没有附有两家公司的营业执照，两家公司的价格是相互矛盾的。本院认为，鲟鱼价格证明是否必须附营业执照并无法律规定，但参照《农业部水域污染事故渔业损失计算方法规定》，水产品损失额按照当时当地主要菜市场零售价格来计算。原告提供的鲟鱼及鲟鱼苗价格是清镇市渔政管理所到市场了解的价格，并非原告自行定价，应当具有一定的客观性，被告不认可该价格，但并未提出相反证据证实。但为慎重，本院也上网查询了贵阳鲟鱼及鱼苗价格，也到贵阳主要农贸市场了解了一下鲟鱼及鲟鱼苗价格，综合这几方面的调查情况，本院以鱼苗 18 元/斤，成鱼 15 元/斤作为损失计算依据。故原告损失额为：1 斤以下鲟鱼 24579.2×18＝442425.6 元，成鱼 20982.2×15＝314733 元，以上共计 757158.6 元，被告应当承担赔偿责任。据此，依照《中华人民共和国侵权责任法》第六条“行为人因过错侵害他人民事权益，应当承担侵权责任”、第十五条“承担侵权责任的方式主要有：(六)赔偿损失”，《中华人民共和国水法》第二十八条，《中华人民共和国民事诉讼法》第六十四条第一款“当事人对自己提出的主张，有责任提供证据”，《最高人民法院关于民事诉讼证据的若干规定》第二条“当事人对自己提出的诉讼请求所依据的事实或者反驳对方诉讼请求所依据的事实有责任提供证据加以证明。没有证据或者证据不足以证明当事人的事实主张的，由负有举证责任的当事人承担不利后果”之规定，判决如下：

一、被告贵州华锦铝业有限公司于本判决生效之日起 15 日内赔偿原告贵州泰蕹河生态养殖开发有限公司经济损失人民币 757158.6 元；

二、驳回原告贵州泰蕹河生态养殖开发有限公司的其他诉讼请求。

案件受理费 12492.64 元，由被告贵州华锦铝业有限公司负担 10881.52 元，由原告贵州泰蕹河生态养殖开发有限公司负担 1611.12 元。

如未按本判决指定期间履行给付金钱义务，应当依照《民事诉讼法》第二百五十三条之规定，加倍支付迟延履行期间的利息。

如不服本判决，可在判决书送达之日起十五日内，向本院递交上诉状，并按对方当事人的人数提出副本，上诉于贵州省贵阳市中级人民法院。

审　判　长　罗光黔

代理审判员　李云鹤

代理审判员　张　奇

二〇一五年十二月十八日

书　记　员　罗朝娟

注：贵州华锦铝业有限公司不服上诉后，贵州省贵阳市中级人民法院于2016年5月5日作出(2016)黔01民终1019号民事判决，驳回上诉，维持原判。

十、海南桑德水务有限公司诉海南省儋州市生态环境保护局环保行政处罚纠纷案

海南省第二中级人民法院
行 政 判 决 书

(2016)琼 97 行终 34 号

上诉人(原审被告)儋州市生态环境保护局。

法定代表人蒙小明，局长。

委托代理人唐符力，儋州市国土资源局法规监察科科长。

被上诉人(原审原告)海南桑德水务有限公司。

法定代表人孙琳，总经理。

委托代理人杨路生，海南海大平正律师事务所律师。

上诉人儋州市生态环境保护局(简称儋州市环保局)因其与被上诉人海南桑德水务有限公司(简称桑德水务公司)环境行政处罚纠纷一案，不服儋州市人民法院(2015)儋行初字第 2 号行政判决，向本院提起上诉。本院依法组成合议庭，于 2016 年 6 月 1 日公开开庭审理了本案，上诉人儋州市环保局的委托代理人唐符力，被上诉人桑德水务公司的委托代理人杨路生到庭参加诉讼．本案现已审理终结。

一审法院查明，2013 年 6 月 5 日，海南省环境监测中心站出具的琼环监字〔2013〕第 153 号《监测报告》(以下简称 153 号《监测报告》)，载明 2013 年 5 月 22 日桑德水务公司那大污水处理二厂出口排放的废水，PH 值平均值 7.03，BOD5 平均值 3.0mg/L，总磷平均值 1.02mg/L，CODCr 平均值 16mg/L，色度平均值 2 倍，汞平均值 0.00004L，镉平均值 0.003L，铬平均值 0.01L，六价铬平均值 0.004L，砷平均值 0.0011mg/L，铅平均值 0.05L，悬浮物平均值 12mg/L，LAS 平均值 0.09mg/L，粪大肠菌群平均值 2.9×105 个/L，氨氮平均值 3.54mg/L，总氮平均值 9.30mg/L，石油类平均值 0.03mg/L，动植物油平均值 0.08mg/L，烷基汞平均值 0.00003L。儋州市国土环境资源局根据上述 153 号《监测报告》，认为桑德水务公司那大污水处理二厂涉嫌违法排放水污染物，于 2013 年 9 月 1 日立案查处，并于同年 11 月 27 日向海南桑德水务有限公司儋州分公司(简称桑德水务儋州分公司)送达《行政处罚事先告知书》。桑德水务儋州分公司于同年 11 月 29 日向儋州市国土环境资源局书面提出申辩并要求听证。儋州市国土环境资源局于 12 月 17 日向桑德水务儋州分公司送达《行政处罚听证通知书》，告知听证时间、地点等相关事项。因桑德水务儋州分公司未参加听证，儋州市国土环境资源局以桑德水务儋州分公司无正当理由不出席听证会为由终止听证。2014 年 1 月 7 日，儋州市国土环境资源局作出儋土环资罚决字〔2014〕3 号《行政处罚决定书》，认定桑德水务儋州分公司 2013 年 5 月 22 日排放的废水中粪大肠菌群数 2.9×105 个/升、总磷 1.02mg/L，分别超过《城镇污水处理厂污染物排放标准》(GB18918－2002)表 1 一级 B 标准限值 28 倍和 0.02 倍，违反了《中华人民共和国水污染防治法》第九条的规定，属于违法排放污染物的行为，依照该法第七十四条第一款的规定，对桑德水务儋州分公司处以 2013 年 5 月应缴纳排污费二倍的罚款人民币 177719.00 元。并于同年 1 月 10 日向桑德水务儋州分公司送达了该处罚决定书。同年 3 月 31 日，儋州市国土环境资源局以桑德水务儋州分公司不履行处罚决定为由向法院申请强制执行，后以处罚对象不当为由撤回强制执行申请。2014 年 4 月 16 日，儋州市国土环境资源局以处罚主体不具备法人资格为由作出儋土环资〔2014〕117 号《关于撤销行政处罚决定书的通知》，撤销了上述儋土环资罚决字〔2014〕3 号《行政处罚决定书》。2014 年 4 月 16 日，儋州市国土环境资源局又以上述违法排放事实为由拟对桑德水务公司作出行政处罚，并在作出处罚前向桑德水务公司送达了《行政处罚告知书》。桑德水务公司在法定期限内未提出陈述、申辩和

听证的申请。同年6月16日，儋州市国土环境资源局作出被诉儋土环资罚决字〔2014〕47号《行政处罚决定书》(以下简称47号处罚决定)，对桑德水务公司处以2013年5月应缴纳排污费二倍的罚款人民币177719.00元，并向桑德水务公司送达了47号处罚决定。桑德水务公司不服申请行政复议，儋州市人民政府经复议后于2014年10月31日作出儋府复决字〔2014〕25号《行政复议决定书》，维持47号处罚决定。桑德水务公司不服，以47号处罚决定认定事实错误，程序违法为由诉至本院，请求撤销47号处罚决定。

另查明，儋州市国土环境资源局在作出47号处罚决定的同日，还以海南省环境监测中心站琼环监字〔2013〕第024号《监测报告》和儋州市环境资源监测站儋环监字〔2014〕第08号《监测报告》为依据，分别对桑德水务公司2013年1月14日超标排放行为(粪大肠菌群数超标31倍)作出儋土环资罚决字〔2014〕50号《行政处罚决定书》(另案起诉)，对桑德水务公司处以191298.00元罚款；对桑德水务公司2014年1月7日超标排放行为(悬浮物超标0.15倍)作出儋土环资罚决字〔2014〕54号《行政处罚决定书》(另案起诉)，对桑德水务公司处以5745.35元罚款。还查明，海南百川水务有限公司于2013年4月2日经工商行政管理机关核准变更登记为海南桑德水务有限公司。

一审法院认为，根据《中华人民共和国水污染防治法》第八条第一款之规定，儋州市国土环境资源局作为儋州市环境保护工作的行政主管部门，具有对本辖区内违法排放水污染物的行为作出行政处罚的法定职权。本案当事人争议焦点主要有：一是153号《监测报告》能否作为处罚依据的问题；二是处罚程序是否合法的问题；三是处罚是否适当的问题。一、关于153号《监测报告》能否作为处罚依据的问题。一审法院认为，被告作出47号处罚决定的主要证据是153号《监测报告》。该《监测报告》系由海南省环境监测中心站根据儋州市环境资源监测站送检样品进行监测分析并作出。桑德水务公司认为被告取样程序不合法，监测结果不真实，对此，被告依法应承担举证证明责任。根据环境保护部《环境行政处罚办法》第三十四条规定，“需要取样的，应当制作取样记录或者将取样过程记入现场检查(勘察)笔录，可以采取拍照、录像或者其他方式记录取样情况。”据此，采样是本案监测的必经程序。但被告未能提供采样记录或采样过程等相关证据，无法证明其采样程序合法，进而无法证明送检样品的真实性，直接影响监测结果的真实性。同时，153号《监测报告》首页说明，由委托单位自行采集的样品，仅对送检样品监测数据负责，不对样品来源负责。根据环境保护部《环境行政处罚办法》第四十六条规定，被告应对违法事实是否清楚、证据是否确凿、调查取证是否符合法定程序等内容进行审查。被告在没有收集确凿证据证实样品来源真实可靠的情况下，仅以海南省环境监测中心站出具的153号《监测报告》就认定桑德水务公司超标排放废水，主要证据不足。二、关于处罚程序是否合法的问题。一审法院认为，根据环境保护部《环境行政处罚办法》第三章的规定，环境行政处罚的一般程序为立案、调查取证、案件审查、告知和听证，最后作出处理决定。被告依据监测报告认为桑德水务公司涉嫌超标排放后决定立案查处，在作出处罚决定前，依法告知桑德水务公司有关违法事实、理由、依据以及依法享有的陈述、申辩和听证权利，程序合法。根据该办法第十一条规定，环境保护主管部门实施行政处罚时，应当及时作出责令当事人改正或者限期改正违法行为的行政命令。责令改正期限届满，当事人未按要求改正，违法行为仍处于继续或者连续状态的，可以认定为新的环境违法行为。据此，违法行为处于继续或者连续状态的，在未作出处罚前，应作为一个违法案件查处。只有在作出处罚并在责令改正期限届满后仍未按要求改正的，才作为新的环境违法行为予以查处。本案中，被告根据监测报告认定桑德水务公司2013年1月14日和5月22日粪大肠菌群数超标排放，那也只能说明桑德水务公司超标排放是一个持续状态，如果要给予处罚，那也应当作为一个违法行为给予一次处罚。如果在此期间给予处罚并责令限期改正的期限届满后桑德水务公司仍未改正的，则可以作为新的违法行为再次给予处罚。但被告于2014年6月16日同时分别对桑德水务公司2013年1月14日和5月22日超标排放行为给予

二次处罚，程序违法。三、关于处罚是否适当的问题。一审法院认为，根据《中华人民共和国水污染防治法》第七十四条规定，对于超标排放水污染物的，应对排污者责令限期改正并处以罚款。根据环境保护部《环境行政处罚办法》第十一条规定，环境保护主管部门实施行政处罚时，应当及时作出责令当事人改正或者限期改正违法行为的行政命令。但47号处罚决定只给予桑德水务公司罚款，未责令桑德水务公司限期改正，行政处罚行为明显不当。此外，根据《中华人民共和国水污染防治法》第七十四条规定，排放水污染物超过国家或者地方规定的水污染物排放标准，或者超过重点水污染物排放总量控制指标的，由县级以上人民政府环境保护主管部门按照权限责令限期治理，处应缴纳排污费数额二倍以上五倍以下的罚款。据此，超标排放的处罚对象是排污者，处罚标准是是否超标排放水污染物，对于超标排放水污染物的原因则在所不问。故桑德水务公司以第三方污水处理厂设计存在缺陷、配套设施及设备不完善等非因其过错为由主张不承担超标排放行政处罚的理由不能成立。综上，47号处罚决定主要证据不足，程序违法，处罚不当，依法应予撤销。依照《中华人民共和国行政诉讼法》第七十条第一、三、六项之规定判决：撤销儋州市国土环境资源局2014年6月16日作出的儋土环资罚决字〔2014〕47号《行政处罚决定书》。本案受理费50元，由儋州市国土环境资源局负担。

上诉人儋州市环保局上诉称：一、一审判决认定《监测报告》不能作为处罚依据没有事实根据和法律依据。一审判决根据《环境行政处罚办法》第三十四条“需要取样的，应当制作取样记录或者将取样过程记入现场检查(勘察)笔录，可以采取拍照、录像或者其他方式记录取样情况”的规定，认定“无法证明其采样程序合法，直接影响监测结果的真实性”是不客观的，儋州市环境资源监测站的采样过程没有记录取样情况是存在瑕疵，但是并不影响采样程序合法的客观形成，而且在采样单上是由被上诉人负责人签字的，证明被上诉人环境违法事实的客观性。一审判决认定“仅以儋州市环境资源监测站出具的153号《监测报告》就认定桑德水务公司超标排放废水，主要证据不足”是没有法律依据的。海南省环境监测中心站是具有法定监测资质的，其作出的《监测报告》自然是有法律效力的，是可以作为处罚依据的。被上诉人若对检验结果不服，可以申请重新检验，否则就是认可检验结果。综上，海南省环境监测中心站出具153号《监测报告》可以作为上诉人对被上诉人进行处罚的依据。二、上诉人已作出限期改正的通知，被上诉人的超标排放构成新的环境违法行为。根据《环境行政处罚办法》第十一条“环境保护主管部门实施行政处罚时，应当及时作出责令当事人改正或者限期改正违法行为的行政命令。责令期限改正届满，当事人未按要求改正，违法行为仍处于继续或者连续状态的，可以认定为新的环境违法行为。”的规定，对改正限期结束后存在环境违法行为，可以认定为新的违法行为，并依法实施处罚。在海南省环境监测中心站出具的琼环监字〔2013〕第024号《监测报告》显示排放超标后，上诉人于2013年7月12日向被上诉人送达了责令限期改正的通知，“限于2013年10月15日前完成整改任务”，但该厂并未整改，继续超标排放，即构成了新的违法行为，因此上诉人对该厂的继续处罚是合法的，没有违反“一事不再罚”原则。三、47号处罚决定处罚适当。47号处罚决定只给予被上诉人罚款，是符合《中华人民共和国水污染防治法》第七十四条第一款“违反本法规定，排放水污染物超过国家或者地方规定的水污染物排放标准，或者超过重点水污染物排放总量控制指标的，由县级以上人民政府环境保护主管部门按照权限责令限期治理，处应缴纳排污费数额二倍以上五倍以下的罚款”的规定精神，并不是一审判决认定的“应对排污者责令限期改正并处以罚款”，一审判决认定“行政处罚行为明显不当”是没有法律依据的。综上，儋州市环保局上诉请求：一、撤销儋州市人民法院(2015)儋行初字第2号行政判决；二、改判驳回被上诉人的起诉或诉讼请求。

被上诉人桑德水务公司辩称：一、由于儋州市国土环境资源局取样送检过程严重违法，据此作出的监测报告不能作为行政处罚的依据，在儋州市国土环境资源局没有提交证据证明

监测报告具备合法性的情况下，应承担举证不能的法律后果。二、被诉行政处罚行为全程违法。儋州市国土环境资源局在立案、调查取证、取样送检、作出处罚的时间、送达等方面均违反环境行政处罚办法的相关规定。综上，请求二审法院驳回上诉，维持原判。

各方当事人在一审提交的证据材料已随案移送本院，并在二审庭审中再次进行了质证。一审法院对双方当事人证据的质证与认证，符合法律规定，本院予以确认。

本院经审理查明的事实与一审判决认定的事实一致，本院予以确认。另查明，在本案二审审理过程中，因行政管理体制的调整，儋州市国土环境资源局按职能分立为儋州市国土资源局和儋州市生态环境保护局，该两个新单位于2016年4月1日启用印章，儋州市国土环境资源局印章废止。2016年6月24日，儋州市国土资源局和儋州市生态环境保护局分别向本院发出儋国土资函〔2016〕166号《儋州市国土资源局关于海南桑德水务有限公司系列案件被告更名情况说明的函》和儋环函〔2016〕92号《儋州市生态环境保护局关于海南桑德水务有限公司系列案件被告更名情况说明的函》，函告本院原儋州市国土环境资源局作出的环境处罚行为法律后果按部门职能划分由儋州市生态环境保护局承担。

本院认为，本案的争议焦点是儋州市国土环境资源局作出47号处罚决定的行政行为，在职权依据、事实认定、适用法律、处罚程序、处罚结果等方面是否合法。

关于儋州市国土环境资源局是否具有职权依据的问题。根据《中华人民共和国水污染防治法》第八条第一款之规定，儋州市国土环境资源局作为儋州市环境保护工作的行政主管部门，具有对本辖区内违法排放水污染物的行为作出行政处罚的法定职权。

关于被诉环境行政处罚事实认定是否清楚的问题。本案中，儋州市国土环境资源局认定被上诉人桑德水务公司存在环境违法行为事实的依据是153号《监测报告》，故该153号《监测报告》的合法性是审查本案被诉环境行政处罚事实认定是否清楚的基础。《环境行政处罚办法》第三十四条明确规定："需要取样的，应当制作取样记录或者将取样过程记入现场检查(勘察)笔录，可以采取拍照、录像或者其他方式记录取样情况。"可见，在环境监测过程中，环境监测的程序或过程必须合法。本案中，由于儋州市国土环境资源局在一审中未能提供采样记录或采样过程等相关证据，无法证明其采样程序合法，故由此作出的153号《监测报告》亦不具有合法性，不能作为认定上诉人桑德水务公司存在环境违法行为事实的主要证据。因此，47号处罚决定认定桑德水务公司存在环境违法行为事实的主要证据不足。

关于被诉环境行政处罚行为是否符合法定程序的问题。依照《环境行政处罚办法》第三章的规定，环境行政处罚的一般程序包括立案、调查取证(或者调查取证、补充立案)、案件审查、告知和听证、作出处理决定、送达等。本案中，虽然儋州市国土环境资源局在作出处罚决定前，依法告知桑德水务公司有关违法事实、理由、依据，以及依法享有的陈述、申辩和听证权利，但是依照《环境行政处罚办法》第三章的规定，结合儋州市国土环境资源局在一审提交的证据来看，其作出47号处罚决定的程序还是存在明显违法。首先，从儋州市国土环境资源局在一审中提交的《案件立案呈批表》和《案件会审笔录》来看，其在集体审议是否立案的同时就已经形成了处理意见，违反了《环境行政处罚办法》第五条关于查处分离的规定；其次，儋州市国土环境资源局认定被上诉人桑德水务公司存在环境违法行为事实，除了依据153号《监测报告》外，没有证据证明其对当事人、证人或者其他有关人员进行询问等其他相关调查；再次，现场检查采样程序违反《环境行政处罚办法》第三十四条的规定，取样程序违法。因此，一审判决关于儋州市国土环境资源局作出47号处罚决定程序合法的认定有误，应予纠正。另外，上诉人在上诉状中主张儋州市国土环境资源局已作出责令限期改正的通知，其继续处罚是合法的。但儋州市国土环境资源局在本案审理过程中并未将该责令限期改正的通知作为本案证据向法院提交。经本院在二审审理过程中核实，儋州市国土环境资源局是在一审法院审理的(2015)儋行初字第5号案件中提交了儋土环资环字〔2013〕25号《儋州市国土环境资源局关于责令海南桑德水务有限公司儋州分公司那大污水处理一厂限期

改正的通知》，故上诉人在本案中应承担举证不利的法律后果。

关于儋州市国土环境资源局作出47号处罚决定适用法律是否正确、处罚结果是否适当的问题。由于法律适用建立在事实认定的基础之上，如前所述，47号处罚决定认定事实的主要证据不足，故儋州市国土环境资源局依据认定不清的事实适用《中华人民共和国水污染防治法》第七十四条第一款的规定对被上诉人桑德水务公司进行处罚，其适用法律亦错误。另外，《中华人民共和国水污染防治法》第七十四条第一款规定：“排放水污染物超过国家或者地方规定的水污染物排放标准，或者超过重点水污染物排放总量控制指标的，由县级以上人民政府环境保护主管部门按照权限责令限期治理，处应缴纳排污费数额二倍以上五倍以下的罚款。”《环境行政处罚办法》第十二条第二款规定：“根据最高人民法院关于行政行为种类和规范行政案件案由的规定，行政命令不属行政处罚。行政命令不适用行政处罚程序的规定。”依照上述规定，由于“罚款”属于环境行政处罚的种类之一，而“责令限期治理”则属于行政命令，不属于行政处罚，不应在处罚决定中作出。虽然依照上述规定，儋州市国土环境资源局应在作出处罚决定之前或同时作出“责令限期治理”的行政命令，但其在47号处罚决定中未同时“责令限期治理”并无不当，一审判决据此认定被诉行政处罚行为明显不当有误，应予纠正。

综上所述，儋州市国土环境资源局作出47号处罚决定认定事实的主要证据不足、程序违法、适用法律错误，应予撤销。一审判决认定事实基本清楚，适用法律虽然部分不当，但判决结果并无不当，应予维持。上诉人儋州市环保局的上诉理由不成立，本院不予支持。依照《中华人民共和国行政诉讼法》第八十九条第一款第一项的规定，判决如下：

驳回上诉，维持原判。二审案件受理费人民币50元，由上诉人儋州市生态环境保护局负担。

本判决为终审判决。

审　判　长　张德雄

审　判　员　文魁兴

审　判　员　刘　霞

二〇一六年六月二十七日

书　记　员　管　娜

Case 1：Environmental Pollution by Dystar Company, Wang Zhanrong et al

Criminal Order

Intermediate People's Court of Yangzhou City, Jiangsu Province

(2016) Su 10 Xing Zhong No.185

Original Procuratorate: People's Procuratorate of Gaoyou City, Jiangsu Province.

Appellant (defendant in the original instance): Dystar (Nanjing) Colorant Co., Ltd., with its domicile at No.×， Bailong Road, Chemical Industry Park, Liuhe District, Nanjing City, Jiangsu Province, and Li A as its legal representative.

Litigation Representative: Shen Xuelian, Manager, Administrative Department of the Company

Attorney: Yin Qinghua, Jiangsu Junchengxing Law Firm

Appellant (defendant in the original instance): Wang Jun, Assistant to the General Manager of Dystar (Nanjing) Colorant Co., Ltd., criminally detained by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on June 10, 2014 for the suspected crime of environmental pollution, arrested by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on July 17 after approved on the same day by People's Procuratorate of Jiangdu District, Yangzhou City, Jiangsu Province, and currently detained in the Detention Center of Yangzhou City.

Attorney: Yang Dong, Jiangsu Sunfair Law Firm

Appellant (defendant in the original instance): Huang Jinjun, male, born on December 31, 1971, ID No. 43052119711231××××， ethnic Han, from Meizhou City, Guangdong Province, a holder of associate bachelor degree, Sewage/Utilities Director of Dystar (Nanjing) Colorant Co., Ltd., domiciled as registered at No.×， Genglouxia, Meijiang District, Meizhou City, Guangdong Province, residing in Room ×××， Building ×， Kangerfu Neighborhood, Liuhe District, Nanjing City, Jiangsu Province before being arrested, criminally detained by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on June 10, 2014 for the suspected crime of environmental pollution, arrested by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on July 17, 2014 after approved on the same day by People's Procuratorate of Jiangdu District, Yangzhou City, Jiangsu Province, and currently detained in the Detention Center of Gaoyou City.

Defendant in the original instance: Wang Zhanrong, legal representative of Nanjing Shunjiu Chemistry Co., Ltd., criminally detained by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on May 25, 2014 for the suspected crime of environmental pollution, arrested by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on July 1, 2014 after approved on the same day by People's Procuratorate of Jiangdu District, Yangzhou City, Jiangsu Province, and currently detained in the Detention Center of Gaoyou City.

Attorney: Yang Yaolei and Li Xiaofei, Jiangsu Zhongmeng Law Firm

Defendant in the original instance: Xu A, driver, criminally detained by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on May 27, 2014 for the suspected crime of environmental pollution, arrested by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on July 1, 2014 after approved on the same day by People's Procuratorate of Jiangdu District, Yangzhou City, Jiangsu Province, and bailed out on July 13, 2016 as decided by the People's Court of Gaoyou City, Jiangsu Province.

Defendant in the original instance: Sun A, boatman, criminally detained by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on May 22, 2014 for the suspected crime of environmental pollution, arrested by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on June 26, 2014 after approved on the same date by People's Procuratorate of Jiangdu District, Yangzhou City, Jiangsu Province, and currently detained in the Detention Center of Gaoyou City.

Defendant in the original instance: Qian A, boatman, bailed by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province on August 15, 2014, and then by the People's Court of Gaoyou City, Jiangsu Province on May 21， September 20, 2015 and March 20, 2016, and further by the present court on September 20, 2016, for the suspected crime of environmental pollution.

The People's Court of Gaoyou City, Jiangsu Province made, on July 13, 2016, its criminal judgment (2015) You Huan Xing Chu Zi No.00003, on the case where the People's Procuratorate of Gaoyou City, Jiangsu Province accused the defendants of Dystar (Nanjing) Colorant Co., Ltd., Wang Jun, Huang Jinjun, Wang Zhanrong, Xu A, Sun A and Qian A of the crime of environmental pollution, and defendant Huang Jinjun of the crime of taking bribes by a person who is not a civil servant. During the period of appeal, Dystar (Nanjing) Colorant Co., Ltd., and Wang Jun, both defendants in the original instance, refused to accept the judgment, and appealed. After forming the panel in accordance with law, reviewing the case files, interrogating the appellants and defendants in the original instance, hearing the opinions of the litigation representative of the appealing entity and their respective defenders, the present court believes that the facts of this case are clear, and no new fact or evidence has been submitted by the appellants, defendants in the original instance, the litigation representative of the appealing entity or their respective defenders, and thus decides, in accordance with Article 223 of *the Criminal Procedural Law of the People's Republic of China,* not to conduct a hearing for this trial. The trial of the present case has been concluded.

The original judgment found：

A. Crime of environmental pollution.

The defendant, Dystar (Nanjing) Colorant Co., Ltd., was incorporated on September 29, 2004, with its scope of business being the production of auxiliaries, oiling agents and colorants for textile and chemical fibers. Despite their knowledge that Nanjing Shunjiu Chemistry Co., Ltd. operated by defendant Wang Zhanrong did not have the qualification to dispose waste acid, Wang Jun, Assistant to the General Manager of Dystar (Nanjing) Colorant Co., Ltd., and Huang Jinjun, the Company's Sewage/Utilities Director, repetitively engaged Wang Zhanrong, from September 2013 to May 2014, to dispose the waste acid generated in the course of the Company's production at a disposal fee rate of CNY 580/ton. Despite his knowledge that Ding Weidong (handled in another case) did not have qualification to dispose waste acid, Wang Zhanrong hired defendant Xu A, a boatman, to drive a tank truck (No. Su Axxxxx) and transport 2，828.02 tons of such waste acid to the boat of Ding Weidong for Ding Weidong's disposal at CNY 150/ton. Ding Weidong arranged defendant

Sun A and Qian A, boatmen, as well as Zhang Jianfu and Wang Liyun et al (handled in other cases) to drive a Yuduoji boat (with a fake plate, plate number 1048) and dump 2，698.1 tons of such waste acid into the water body of Taidong River and Xintongyang Cannel. Sun A and Qian A were respectively involved in 1， 729.82 tons and 318.78 tons of such discharge. Because of the judiciary's investigation of the Taizhou “May 15” Major Environmental Pollution Case, the fake Yuduoji boat No.1048 containing 129.92 tons of undisposed waste acid was berthed by Ding Weidong at the dock of Yangzhou Xiangfa Comprehensive Resource Utilization Co., Ltd., and later discovered. According to the assessment report by Jiangsu Scientific and Technological Consulting Center, such waste acid constituted hazardous waste. After being brought to justice, Dystar Company, Wang Jun, Huang Jinjun, Wang Zhanrong, Xu A, Sun A and Qian A truthfully confessed the main facts of the crime.

B. Crime of taking bribes by non－state functionaries.

From January 2011 to the Chinese New Year period of 2014, defendant Huang Jinjun took advantage of his positions as the Director of Tank Area and Director of Sewage/Utilities of Dystar Company, extorted from Wang Zhanrong commissions for waste acid disposal fees, totaling CNY 281,000 paid in eight instalments, and advanced Wang Zhanrong's interests in the transport of waste acid and other activities. More specifically：

1． One day in January 2011, defendant Huang Jinjun collected CNY 20,000 from Wang Zhanrong in the latter's car；

2． One day in July or August 2011, defendant Huang Jinjun collected CNY 30,000 of acceptance bill from Wang Zhanrong in the latter's office；

3．One day in 2011, defendant Huang Jinjun collected CNY 10,000 from Wang Zhanrong via bank transfer；

4．One day at the end of 2011, defendant Huang Jinjun collected CNY 100,000 of acceptance bill from Wang Zhanrong in the latter's car；

5． One day in August 2012, defendant Huang Jinjun collected CNY 8,000 from Wang Zhanrong via bank transfer；

6． One day around July 2013, defendant Huang Jinjun collected CNY 30,000 from Wang Zhanrong in the latter's office；

7． One day before the Chinese New Year of 2014, defendant Huang Jinjun collected CNY 50,000 from Wang Zhanrong in the latter's car；

8． One day after the Chinese New Year of 2014, defendant Huang Jinjun collected CNY 33,000 from Wang Zhanrong via bank transfer.

The facts above are proven by such evidence as the relevant physical evidences, documentary evidences, witness testimonies, defendants' confessions and defense, forensic opinions, and inspection records.

The court of original instance held: Despite its knowledge that defendant Wang Zhanrong did not have the qualification to dispose waste acid, defendant Dystar Company, in violation of the state's environmental law, engaged him to dispose the waste acid generated in the course of the Company's production; Despite his knowledge that Ding Weidong did not have the qualification to dispose waste acid, defendant Wang Zhanrong forwarded him Dystar Company's waste acid for his disposal; Despite his knowledge that it was chemical waste liquid and that Ding Weidong was unable to dispose waste acid, defendant Xu A, helped Wang Zhanrong with the transport; and despite their knowledge that it was chemical waste liquid, defendant Sun A and Qian A secretly

dumped it into rivers in violation of the regulatory provisions. These conducts finally caused severe environmental pollution and exceptionally serious consequences, and all constituted the crime of environmental pollution, as a joint offense. Despite their knowledge that Wang Zhanrong did not have the qualification to dispose waste acid, defendant Wang Jun and Huang Jinjun facilitated, within their respective authority, the consummation of the transaction, caused the consequence of severe environmental pollution, and shall be held criminally liable for the crime of environmental pollution as Dystar Company's direct supervisor and other directly liable person. By taking advantage of its position, defendant Huang Jinjun extorted properties from defendant Wang Zhanrong and advanced the latter's interest at a relatively large amount. His conduct constituted the crime of taking bribes by a person who is not a state functionary. Guilty of multiple crimes, Huang Jinjun shall be subject to combined punishments.

In the joint crime of environmental pollution, Dystar and Wang Zhanrong played the main role, constituted the principal criminals, and shall be punished for all the crimes involving them; Xu A helped Wang Zhanrong transport waste acid, played an ancillary role, constituted an accessory criminal and shall be subject to mitigated punishment within or below the statutory range of sentencing; Sun A and Qian A were hired by Ding Weidong, acted in an subordinate position, constituted accessory criminals and shall be subject to mitigated punishment within or below the statutory range of sentencing. After being brought to justice, all the defendants truthfully confessed the basic facts of crimes, and shall be deemed to have confessed and eligible for mitigated punishments within the statutory range of sentencing. Huang Jinjun extorted bribes, and warranted aggravated punishments for the crime of taking bribes by a person who is not a state functionary; and justified a discretionarily mitigated punishment for his return of the illicit gains after the case was found. After committing the crime, Dystar Company cooperated with the investigation by the judiciary, took remedial measures, and warranted discretionarily mitigated punishment within the statutory range of sentencing. In the joint offense, Xu A played an ancillary role with lesser involvement in the crime, admitted his crime relatively well, somewhat repented his crime, and would not harm the society again if awarded a probation. In accordance with Article 338, Article 346, Article 163.1, Article 30, Article 31, Article 25.1, Article 26.1&4, Article 27, Article 67.3, Article 69, Article 72.1&3, Article 73.2&3 and Article 64 of the *Criminal Law of the People's Republic of China,* as well as Article 3.11 and Article 7 of *the Interpretation of the Supreme People's Court and Supreme People's Procuratorate on the Certain Issues Concerning the Application of Law to the Handling of Criminal Cases on Environmental Pollution,* it was ruled:

1. Defendant Dystar (Nanjing) Colorant Co., Ltd. is found guilty of environmental pollution, and shall be fined CNY 20 million;

2. Defendant Wang Jun is found guilty of environmental pollution, and shall be imprisoned for 3 years and 6 months, and be fined CNY 30,000;

3. Defendant Huang Jinjun is found guilty of environmental pollution, and shall be imprisoned for 3 years and be fined CNY 25,000; is found guilty of taking bribes by a person who is not a state functionary, and shall be imprisoned for 2 years; and finally, be imprisoned for 4 years and fined CNY 25,000;

4. Defendant Wang Zhanrong is found guilty of environmental pollution, and shall be imprisoned for 5 years and be fined CNY 1.8 million;

5. Defendant Xu A is found guilty of environmental pollution, and shall be imprisoned for 2 years and 6 months, probated for 3 years and 6 months, and be fined CNY 50,000;

6．Defendant Sun A is found guilty of environmental pollution, and shall be imprisoned for 2 years and 6 months and be fined CNY 20,000；

7．Defendant Qian A is found guilty of environmental pollution, and shall be imprisoned for 1 year, probated for 2 years, and be fined CNY 10,000；

8．The CNY 10,000,000 temporarily seized from defendant Dystar (Nanjing) Colorant Co., Ltd. by the Public Security Bureau of Jiangdu District, Yangzhou City, Jiangsu Province shall be charged against the fine, and be paid into the national treasury；

9．The illicit gain of CNY 281,000 disgorged by defendant Huang Jinjun shall be confiscated; and

10．The illicit gain of CNY 1,396,951.6 by defendant Wang Zhanrong shall be continuously pursued.

The appellate's grounds and defenses raised by the appellant Dystar Company and its defender were：

1．The first－instance judgment elevated, without a theoretical or factual basis, the conduct of individual employees of Dystar Company to be the will of the Company, and therefore Dystar Company shall not be founded as a primary criminal；

2．Due to its illegal source of samples, unscientific content and erroneous conclusions, the environmental damage assessment report issued by Jiangsu Provincial Academy of Environmental Science shall be excluded as illegal evidence; and

3．The fine assessed for Dystar Company was excessively high.

The appellate's grounds and defenses raised by the appellant Wang Jun and his defender are：

1．Wang Jun's sentence shall be 3 years of imprisonment or less because the amount of hazardous waste disposed in the presented case did not belong to the other exceptionally serious circumstances set forth in the judicial interpretation; and

2．Wang Jun's punishment shall be changed into a probation because in joint offenses, the one who directly made the waste disposal is more culpable, and by doing the work assigned by the General Manager, Wang Jun was not a direct supervisor, played an ancillary and secondary role in the joint offense and thus shall be deemed an accessary criminal.

The appellate's grounds and defenses raised by the appellant Wang Zhanrong and his defender are：

1．The environmental damage assessment report issued by Jiangsu Provincial Academy of Environmental Science shall be excluded as illegal evidence；

2．It was inappropriate to find that the case caused exceptionally severe consequence of environmental protection; and

3．The imprisonment term and fines assessed in the first instance were excessively high because Wang Zhanrong truthfully admitted and repented the crime, and deserve mitigated punishment within or below the statutory range of sentencing.

It has been found through this trial that：

I. The facts on the environmental pollution：

On September 29, 2004, Dystar Company, the appellant, was incorporated, with its business scope being the production of auxiliaries, oiling agents and colorants for textile and chemical fibers. In its course of production, that Company would generate waste acid liquid, which belong to hazardous waste, and shall, according the state's relevant rules, be given to qualified companies for disposal.

In September 2010, Wang Jun, appellant, then Executive Assistant of Dystar Company, was assigned by the Company to liaise on the disposal of waste acid, and later contacted Wang Zhanrong of Nanjing Shunjiu Chemistry Co., Ltd. (hereinafter referred as "Shunjiu Company"), defendant in the original instance, checked the documents indicating that the Company was merely qualified for the distribution of hazardous chemicals, and later reached an oral agreement with Wang Zhanrong on the disposal of waste acid at a rate of CNY 580/ton. After confirmed by the Company, the waste acid liquid generated by Dystar Company was all given to Wang Zhanrong for disposal. Despite his knowledge that Wang Zhanjun was not qualified for the disposal, Huang Jinjun, defendant in the original instance, then directing the tank area of the Company, directly interfaced in details with Wang Zhanrong transporting waste acid. Wang Jun was in charge of checking and approving the payments of waste acid disposal fees. In September 2012, Li A took over as the General Manager of Dystar Company. As of January 1, 2013, Huang Jinjun assumed the position of the Company's Sewage/Utilities Director. As of June 1, 2013, Wangjun took office as the Company's Manager of Administrative Department and Assistant to General Manager, and continuously oversaw the Company's disposal of waste acid.

Despite his knowledge that Ding Weidong (handled in another case) was not qualified to dispose waste acid, Wang Zhanrong reached, in September 2013, an oral agreement with him on disposal at a rate of CNY 150/ton, and instructed Xu A, defendant in the original instance, to drive a tank truck (No. Su Axxxxx) and transport waste acid from Dystar Company directly to boats berthed by Ding Weidong the Yiling Dock of Jiangdu, Mazhuang Dock of Jiangyan, Qingyuan Detergent Factory Dock of Jiangyan, Zhenchang Steel Mill Dock of Jinagyan and other places. By May 2014, a total of 2，828.02 tons of waste acid had been given to Ding Weidong for disposal. On many occasions during this period, Ding Weidong instructed Sun A and Qian A, defendants in the original instance, as well as Zhang Jianfu and Wang Liyun (both handled in other cases) to drive boats at night and directly discharged 2， 698.1 tons of such waste acid into the water way of Taidong River and Xintongyang Cannel, with Sun A involved in the discharge of 1， 729.82 tons, and Qian A 318.78 tons. After the "May 15" Major Environmental Pollution Incident happened in Taizhou, the 129.92 tons of waste acid, which Ding Weidong stored inside the boat with fake plate Yuduoji No.1048 but did not have time to discharge, was seized at the dock of Yangzhou Xiangfa Comprehensive Resource Utilization Co., Ltd.

As concluded in the expert appraisal and analysis by Jiangsu Scientific and Technological Consulting Center and Jiangsu Provincial Academy of Environmental Science, such waste acid liquid generated by Dystar Company belong to hazardous waste, and mainly consisted of sulphuric acid and a lot of organics; the former are highly concentrated, extremely corrosive and extremely harmful to the living matters, water body and environment; and the latter, a lot of which was left in the waste acid, would also pose a long－lasting cumulative harm to the living matters and environment.

II. Facts on the taking of bribes by a person who is not a State Functionary

From January 2011 to early 2014, Huang Jinjun, defendant in the original instance, took advantage of his positions as Dystar Company's Tank Area Director and Sewage/Utilities Director, and extorted commissions from Wang Zhanrong at the rate of CNY 20 or CNY 50 per ton. After verifying the amount of waste acid transported each month, Wang Zhanrong paid Huang Jinrun CNY 281,000 of commissions in eight installments via cash, acceptance bill or bank transfer. Such facts were volunteered by Wang Zhanrong after being brought to justice. Huang Jinjun truthfully

confessed his collection of commissions.

The facts above are proven by the following evidence：

A.Evidence proving the identity of Dystar Company and the positions of Wang Jun and Huang Jinjun.

1． The business license of, and certificate issued by, Dystar Company prove: The Company's term of operation is from September 29, 2004 to September 28, 2054; the Company is categorized as a limited liability company (wholly owned by foreign legal person) and domiciled at No.×， Bailong Road, Chemical Industry Park, Nanjing City; its scope of business is ordinary business dealings, including the production of auxiliaries, oiling agents and colorants for textile and chemical fibers (cation and VAT colorants, indigo blue solutions and reactive dyes projects). Li A served as its General Manager since September 1, 2012, and as its legal representative since October 7, 2012.

2． Job description files of, and two certificates issued by, Dystar Company prove: Wang Jun served as Executive Assistant from June 2007 to June 30, 2011, as Deputy Manager of Public Relations from July 1, 2011 to May 31, 2013, as Manager of the Company's Administrative Department and concurrently as Assistant to General Manager since June 1, 2013, responsible for assisting the General Manager with investigation and research, and planning, implementing, checking, urging and following up with the concrete management work, as confirmed by a letter of job responsibilities signed by Wang Jun. Huang Jinjun served as Senior Foreman of the tank area from January 1, 2010 to December 31, 2010, as Director of the Tank Area from January 1, 2011 to December 31, 2012, in charge of the management of the tank area and the management of sewage operation, and as Director of Sewage/Utilities since January 1, 2013, in charge of the energy supply and sewage operations of the whole plant.

3． The testimony of witness Li A(General Manager of Dystar Company) proves: Dystar Company was incorporated in 2004 as a wholly foreign owned enterprise, and later partially acquired by Zhejiang Longsen Group; he served as the legal representative and General Manager of the Company since September 2012, with Wang Jun being the Assistant to General Manager.

4．The testimony of witness Xue A(Deputy General Manager of equipment, Dystar Company) proves: Li A appointed Wang Jun as Assistant to General Manager and Administrative Manager on June 1, 2013, with his job responsibilities detailed in the job description and confirmed by Li A and Wang Jun by signatures; all employees of the Company do their work according to their respective job descriptions.

5． The confession and identification transcript made by Wang Jun, appellant, during investigations prove: Dystar Company was founded in 2004 and led by two successive German General Managers; in 2012, the Company's equity was transferred to Zhejiang Longsen Group; Li A served as legal representative and General Manager since September 2012; Wang Jun himself was appointed Administrative Manager and concurrently Assistant to General Manager, mainly conducting logistical service, translation and work assigned by the General Manager.

6．The confession and identification transcript made by Huang Jinjun, defendant in the original instance, during investigations prove: Since 2010, Wang Jun had been in overall charge of waste acid disposal in Dystar Company; problems happening to the waste acid loading in the tank area which he oversaw shall be directly reported to Wang Jun; Wang Jun was the Company's Administrative Manager and Assistant to General Manager.

B.Evidence proving that Wang Jun contacted, on behalf of Dystar Company, Wang

Zhanrong for waste acid disposal, and hid the traces after the case was revealed, and that Huang Jinjun delivered, on behalf of Dystar Company, the waste acid, and extorted commissions therefrom

7. The confession and identification transcript made by Wang Jun, appellant, during investigations prove: In the summer of 2010, he inquired, as assigned by the Company, Wang Zhanrong about his qualifications and transport of waste acid; Wang Zhanrong stated that he had special connections and could dispose waste acid; and Wang Jun submitted the relevant files to the General Manager. After a while, the second General Manager instructed him to negotiate price with Wang Zhanrong, and the disposal fee was finalized at CNY 580/ton, for which Wang Zhanrong said that he could only issue invoices as transport cost. Huang Jinjun directly interfaced with Wang Zhanrong regarding the transport of waste acid. Whenever accounts were settled, Wang Zhanrong would bring transport invoice to him for verification. In 2011, financial manager proposed to pay the fee with acceptance bill; Wang Zhanrong disagreed on the ground that cash needed to be paid to the vendors. Wang Jun was cognizant that the rate of CNY 580/ton comprised the cost of transport and disposal. After Li A took over as the General Manager, Wang Jun submitted Wang Zhanrong's transport invoice to Li A for his signature, and clearly told the latter that it was a bill for waste acid disposal, and explained that Wang Zhanrong would transport the waste acid to Yangtze Sewage Treat Plant for disposal. Li A signed the invoices. Wang Jun accepted the shopping cards of around CNY 30,000 from Wang Zhanrong. Regarding the situation after the case was revealed, Wang Jun Confessed: On May 19, 2014, Wang Zhanrong called and told him that the incident happened and investigators would go after the source of the waste acid. Wang Jun asked Huang Jinjun to contact Wang Zhanrong and have the latest truckload of waste acid returned to the Company. On the morning of the next day, Li A instructed Wang Zhanrong, face to face, how to cope the investigation, requiring that weighing records and all other files relating to waste acid disposal be eliminated, and the items on the weighing records be changed from waste acid to returned sulphuric acid. Wang Jun hid the weighing records and the files submitted by other departments in the archive room, and deleted the relevant emails in the computers.

8. The confession and identification transcript made by Wang Zhanrong, defendant in the original instance, during investigations prove: The Shunjiu Company he operated was not qualified to dispose waste acid. In the second half of 2010, he proposed to Huang Jinjun to undertake Dystar Company's waste acid disposal business. Huang Jinjun replied that he needed to report to his superiors. After about two weeks, Wang Jun brought others and checked the company's business license and other files, became aware that the company was not qualified to dispose waste acid, and reached agreement on disposal fee rate of CNY 580/ton. Wang Jun instructed him to directly interface with Huang Jinjun for the transport of waste acid. Around the 25th day each month, he would submit his transport invoice and weighing record to Wang Jun. The payment would be either directly wired to his company's account, or be made via acceptance bill which Wang Jun would call him to fetch. He gave Wang Jun shopping cards of around CNY 40,000. In May 2014, Ding Weidong called and said things happened. He contacted Wang Jun, and asked Xu A to return to Dystar Company the waste acid just transported away. In order to cope with inspection, the leadership of Dystar Company asked him to misrepresent the transported cargo as returned sulphuric acid, and had the weighing records modified. Regarding the commissions paid, Wang Zhanrong confessed: Huang Jinjun proactively asked for commissions, the first time at CNY 20/ton and second time and afterwards at CNY 50/ton, all settled per tonnage as weighed. Huang Jinjun

would check the amount every month. Wang Zhanrong paid Huang Jinjun approximately CNY 300,000 via cash, acceptance bill and bank transfer.

9. The confession and identification transcript made by Huang Jinjun, defendant in the original instance, during investigations prove: Prior to 2010, the Company's waste acid would be first neutralized, and be transported, after its PH value met the requirements, to Shengke Sewage Treatment Plant for disposal at a rate of approximately CNY 3,000/ton. Since July or August 2010, the amount of waste acid generated by the Company increased. Wang Zhanrong proposed to undertake the business of waste acid disposal, and told him about the lack of disposal qualifications. He reported to his superiors about the excessively high amount of waste acid. Early September, Wang Jun asked him to interface with the waste acid transporter. Xu A drove here the tank truck. Huang Jinjun knew that the waste acid would be given to Wang Zhanrong for disposal, and later directly called Wang Zhanrong to transport the waste acid.

Regarding what happened after the case was revealed, Huang Jinjun confessed: After the case was revealed, Wang Jun asked him to notify Wang Zhanrong to return the last truckload of waste acid to the Company, and destroy the relevant data. Xue A asked him to discharge and dispose the waste acid in the two waste acid tankers, and arrange personnel to remove the indication of waste acid on the tank, and repaint the indication as sulphuric acid. He copied the data on computer to a USB stick, and deleted the data on computer.

Regarding the extortion of commissions, Huang Jinjun confessed: In January 2011, Wang Zhanrong made his first payment of CNY 20,000 in cash at a rate of CNY 20/ton; afterwards, Wang Zhanrong made payments, at irregular time, sometimes in cash, sometimes in acceptance bill or bank transfer, at a rate of CNY 50/ton as per the transported amounted verified at the end of each month; and by the Chinese New Year period of 2014, a total of CNY 281,000 was received in eight installments. In his interrogation by the appellate court, Huang Jinjun did not vary the time, location, format or amount of his receipt of commissions in eight installments.

10. The data in the USB flash disk recovered by investigators, the decision of seizure by the Public Security Bureau of Jiangdu District, Yangzhou City and the list of seized items prove that the amount of waste acid transported by Wang Zhanrong as recorded by Huang Jinjun basically match the settlement of commission per the amount of transported waste acid as confessed by Huang Jinjun and Wang Zhanrong, as well as the circumstance that the payment was not made in full.

11. The testimony of witness Tu A(wife of Huang Jianjun) proves: Huang Jinjun was involved in engaging Wang Zhanrong to dispose waste acid. He brought home sometimes cash, some times acceptance bills of various amount.

12. The testimony of withess Li A proves: After taking over Dystar, Li A ran it with business as usual, where waste acid disposal was managed by Wang Jun and waste water treatment by Huang Jinjun. Li A was once told by Wang Jun upon inquiry that the transport of the waste acid was handled by Shunjiu Company, who had connections with Yangtze Wastewater Treatment Plant for disposal. In the second half of 2013 when the amount of acid waste produced by Dystar increased, Li A requested Wang Jun to check and urge the progress of the waste acid disposal.

Li A also confessed that after the case was revealed, out of concern that the company might be affected, he instructed Wang Zhanrong to deny the seized products to be waste acid and ordered relevant departments to destroy all documentary and physical evidence, including to change the name of the items on the weighing records from waste acid to returned sulphuric acid, to discharge

remaining waste acid of the waste acid tankers into the sewage tank, to remove the indication of waste acid on the tank, and repaint the indication as sulphuric acid. He also requested Wang Jun to delete relevant data on computer.

13. The testimony of witness Zhao A (employee of Dystar Company) proves: Shunjiu disposed waste acid for Dystar at the rate of CNY 580/ton. After Li A took over as the General Manager in Sep 2012, payment requests for waste acid disposal were prepared by Wang Jun with invoices of transport costs and were signed by both Wang Jun and Li A.

14. The testimony of witness Xu B (employee of Dystar Company) proves: Wang Jun arranged the Procurement Department of Dystar company to produce Transport Order. Shunjiu Company, on the other hand, would weigh the waste acid when receiving it and generate triplicate forms for weighing records, then submit the forms to Wang Jun or Huang Jinjun at set intervals. After the case was revealed, Xu B made up a Purchase Return Note for substandard sulphuric acid with company stamp at the request of Li A, and on the same day, Wang Jun also requested Xu B to change the name of the item in relevant weighing records from waste acid to returned sulphuric acid and took away the white copy sheet of the triplicate form for weighing records.

15. The testimony of witness Xue A proves: Dystar's waste acid was stored in Tanker BA602 and Tanker BA603. After the case was revealed, Li A instructed Xue A to arrange personnel to remove the pipelines on the tankers used for loading the waste acid onto trucks, to repaint both the Chinese and the English indications on the tankers to be sulphuric acid, and to discharge the remaining waste acid in the tankers in to the sewage tank of the company.

16. The testimony of witness Shen A (employee of Dystar Company) proves: Dystar's waste acid was stored in Tanker 602 and Tanker 603 through special pipelines. Huang Jinjun was responsible for transporting the waste acid out. After the case was revealed, Li A instructed Shen A to arrange personnel to discharge all remining waste acid in both tankers, produce a Test Report claiming substandard sulphuric acid to support the Purchase Return Note, change the weighing records of the waste acid to be returned sulphuric acid.

17. The testimony of witness Chen A (employee of Dystar Company) proves: Wang Jun had been in charge of waste acid disposal of Dystar since 2010. A tank truck (Plate No.: Su A xxxxx) from Shunjiu Company was used for the transport of the waste acid at the frequency of dozens of times a month. On average, the tank truck can load around 20 tons of waste acid per time. In total, around 10,000 tons of waste acid was transported.

18. The testimony of witness Li B (employee of Dystar Company) proves: Most of the waste acid from Dystar was disposed by Shunjiu and Huang Jinjun was the one that directly interfaced with Shunjiu regarding transporting of the waste acid and sewage.

19. The testimony of witness Zhou A (accountant of Shunjiu Company) proves: Since Shunjiu Company is not qualified in transporting hazardous substances, all the invoices for transport cost that were used for settling the payment for waste acid disposal were issued by other transport companies. The payment was always made to the account of Shunjiu Company.

20. The photos in Wang Jun's mobile phone recovered by investigators, the decision of seizure by the Public Security Bureau of Jaingdu District, Yangzhou City and the list of seized items prove that Wang Jun took photo of some of the requests for payments, invoices for transport costs, weighing records, and authorization letter for payment. In the request for payment in the photo, the payment was requested by Shunjiu Company and the payment was for waste acid. The request was signed by both Li A and Wang Jun. This matches the account of Wang Jun that the payment cannot

be made without the approval of Li A.

21. The photos taken by the investigators at the site prove that Tanker BA602 and Tanker BA603 for storage of waste acid identified by many employees of Dystar were in the company's tanker area. The indication of sulphuric acid painted on the tankers match the confession and testimony of Huang Jinjun and others that they were instructed to change the indication from waste acid to sulphuric acid after the case was revealed.

22. The information note from Dystar Company, as well as the detail account and account vouchers prove the payment transfers between Dystar and Shunjiu. From October 2010 to May 2014, total payment from Dystar to Shunjiu was CNY 6,642,758.5, with an outstanding payment of CNY 243,333.2 for waste acid disposal during the period from March 26 2014 to April 25 2014.

23. Search record produced by investigators, the decision of seizure by the Public Security Bureau of Jaingdu District, Yangzhou City and the list of seized items prove that the investigators seized Business License for Legal Person and Business (Wholesale and Retail) Permit for Hazardous Chemicals of Shunjiu Company, business cards of Wang Zhanrong and Ding Weidong, as well as four red sheets from triplicate forms for the weighing records. Among them, the contents of the four red sheets of the weighing records match that of the four green sheets from the triplicate forms for the weighing records and that of the Purchase Return Note for substandard sulphuric acid seized from Dystar Company, which showed that 80.09 tons of sulphuric acid was returned by a tank truck with plate number Su A xxxxx from May 12 to May 16, consistent with the confession by Wang Jun and Wang Zhanrong regarding the forge of the Purchase Return Notes after the case was revealed.

24. The Business License for Legal Person of Sinopec Yangzi Petrochemical Company and the information note provided by the company's No.2 Sewage Treatment Plant prove that the business scope of the Company contains only sewage treatment, not waste acid treatment. The company has never signed any contracts with Dystar Company or Shunjiu Company on waste acid disposal and has never involved in disposing any waste acid for either of them.

C.Evidence proving the amount of waste acid transported by Xu A from Dystar as arranged by Wang Zhanrong and the amount forwarded to Ding Weidong for disposal:

25. The confession and identification transcript made by Wang Zhanrong, defendant of the original sentence, during investigations prove: he started to dispose waste acid for Dystar since September 2010 and received over CNY 6 million as payment for disposal. Before the deal with Ding Weidong in the end, he contacted Yangzi Sewage Treatment Plant and three phosphate fertilizer plants in Anhui. His deal with Ding Weidong was made at a rate CNY 150/ton for waste acid disposal and he had never asked if Ding Weidong was qualified for waste acid disposal. In total, he forwarded over 2000 tons waste acid to Ding Weidong for disposal with a payment of over CNY 300,000. Another payment of over CNY 20,000 was not yet made. He also hired Xu A with a monthly salary of CNY 5000 to drive a tank truck to transport waste acid from Dystar. In October 2013, after being told by Xu A that the waste acid was always unloaded on a boat and Xu A suspected the waste acid was discharged directly into rivers, he called Ding Weidong to check and continued to instruct Xu A to transport waste acid to Ding Weidong afterwards.

26. The confession and identification transcript made by Xu A, defendant of the original sentence, during investigations prove: his tank truck (Plate No. Su Axxxxx) was only qualified to transport hydrochloric acid and sulphulric acid, and was not qualified to transport waste acid. Previously, he had been instructed by Wang Zhanrong to transport waste acid from Dystar to three

phosphate fertilizer plants in Anhui since September 2010 when Wang Zhanrong undertook Dystar Company's waste acid disposal business. Since September 2013, Wang Zhanrong requested him to transport the waste acid to Ding Weidong for disposal. He once told Wang Zhanrong that he suspected it was highly likely that Ding Weidong discharged the waste acid into rivers without any treatment. However, after calling Ding Weidong to check, Wang Zhanrong instructed him to continue to transport the waste acid to Ding Weidong. He kept records of the waste acid transport from December 2011 to May 19 2014, including time, location, weight of goods, and road tolls. The weight of waste acid in his records was lower than actual weight because Wang Zhanrong told him that lower weight could save costs. Through identification by Xu A, the four docks where the waste acid was transported to Ding Weidong were confirmed, and the identities of Huang Jinjun, Ding Weidong, as well as Zhang Jianfu, Wang Liyun, Sun A and Qian A who received the waste acid were confirmed.

27．The testimony of witness Deng A (wife of Xu A) and the list of retrieved evidence by the Public Security Bureau of Jiangdu District, Yangzhou City prove that she was the supercargo of tank truck Su A xxxxx who would join the trip to transport waste acid from Dystar since September 2013. After the case was revealed, the driving record of Xu A was retrieved by the investigators.

28．The testimony of witness Wu A (person in charge of Qixia Trucking Fleet) proves that tank truck Su A xxxxx was entrusted by Wang Zhanrong to be operated by Nanjing Qixia Trucking Fleet.

29．The testimony of Zhang A (employee of Dystar) proves that vast amount of waste acid generated by vat dyes was discharged into Tanker BA602 and Tanker BA603 in the tanker area of the company.

30．The testimony of witness Huang A (employee of Dystar) proves: the weighing records were in triplicate forms (original copy in white, other copies in red and green) with information including time, item, transport company, vehicle plate number, gross weight, computed weight, net weight and signature of the operator. The original copy in white was kept by the operator, while the red and green copies were kept by the driver.

31．The testimony of witness Wang A (employee of Dystar) and email printouts provided by him prove: the storage of waste acid was handled in accordance with the operation manual, i．e., waste acid with concentration below 30% was discharged directly into the company's sewage tank, waste acid with concentration between 30% and 50% was discharged into Tanker BA602, and waste acid with concentration above 50% into Tanker BA603

32．The testimony of witneses Shen B and Huang B (employees of Dystar) proves that it was the same driver who drove the same tank truck (Plate No.: Su A xxxxx) to Dystar company to load and transport waste acid.

33．The testimony of witnesses Wei A and Ma A (employees of Dystar) proves that the waste acid of Dystar was stored in Tanker BA602 and Tanker BA603. Most waste acid was transported away by tank truck Su A xxxxx driven by a man whose family name was Xu.

34．The search records and photos generated by investigators, as well as the decision of seizure by the Public Security Bureau of Jiangdu District, Yangzhou City and the list of seized items prove that from the archive room of Dystar Company, 483 white copies, 467 red copies and 334 green copies of the triplicate forms for weighing records, as well as a check book for loading records of waste acid, a visitor registration book, and an account book that records payment transfers between Dystar and Shunjiu were seized. According to the seized white copies of the

triplicate forms for weighing records, 11，021.42 tons of waste acid was transported away from Dystar Company from 3 September 2010 to 18 May 2014 by vehicle Su A xxxxx, vehicle Wan N xxxxx, and vehicle Wan N xxxxx. Tank truck Su A xxxxx was registered 397 times for transporting waste acid.

35．The table of destinations for waste acid from Dystar generated by the investigators prove: based on the time, weight, vehicle plate number, destination, GPS data, expressway records, drivers logs and other relevant materials, 3647.2 tons of waste acid was transported away from Dystar by tank truck Su A xxxxx from 30 September 2013 to 16 May 2014, among which 1349.44 tons was transported to Yiling Dock of Jiangdu, 840 tons to the Mazhuang Dock of Jiangyan, 195.4 tons to the Qingyuan Detergent Factory Dock of Jiangyan, and 443.18 tons to the Zhenchang Steel Mill Dock of Jiangyan.

36．The list of retrieved evidence by the Public Security Bureau of Jiangdu District, Yangzhou City proves that the investigators retrieved driving records of vehicle Su A xxxxx passing through Liuhe East Toll Gate of Nanjing－Yangzhou Expressway, Qili Toll Gate and Taizhou North Toll Gate of Ningjingyan from 1 September 2013 to 20 May 2014.

37．The photos of tank truck Su A xxxxx taken by investigators and the list of retrieved evidence by the Public Security Bureau of Jiangdu District, Yangzhou City prove that based on the retrieved information of vehicle Su A xxxxx and its GPS records by investigators, the owner of the tank truck Su A xxxxx is Wang Zhanrong and it was entrusted to be operated by Qixia Truck Fleet and was qualified for transporting hazardous substances.

D.Evidences proving the dumping of waste acid by Sun A and Qian A into certain water bodies.

38．The confession and identification transcript made by Sun A, defendant in original instance, during investigation prove, from September to mid－December in 2013, Ding Weidong arranged him to work on the boat driven by Wang Liyun. During the period, the boat berthed at the Qingyuan Detergent Factory Dock, Steel Mill Dock and Mazhuang Dock. After Xu A transported the waste acid to the docks, Ding Weidong would arrange the dumping of the waste acid into the river – He (Sun A) and Wang Liyun would drive the boat at night to the confluence of Xintongyang Canal, Taidong River and Luting River and dump all the waste acid on the boat into the water way through a water pump. In total, there were five dumping, discharging around 600 tons of waste acid into the water body. From the end of February to May in 2014, Ding Weidong instructed him to work on the Yuduoji boat 1048 driven by Zhang Jianfu, and the boat berthed at Mazhuang Dock and Yiling Dock. After Xu A transported the waste acid to the docks, he (Sun A) and Zhang Jianfu secretly dumped the waste acid into the confluence of Xintongyang Canal, Taidong River and Luting River six/seven times, totaling over 1000 tons of such waste acid. The last four truckloads of waste acid transported by Xu A during mid－May was still on the boat, yet to be discharged into the river. Through identification by Sun A, the water way where the waste acid was discharged into and the dock where the waste acid was loaded were confirmed.

39．The confession and identification transcript made by Qian A, defendant in original instance, during investigation prove, from March 2013, he was driving boat (fake Yuduoji No. 1048) for Ding Weidong. In mid－October, he (Qian A) and Ding Weidong drove the boat to Taidong River and discharged into the river through a submersible pump the waste acid transported by Xu A (four truckloads of waste acid) to the boat berthed at Zhenchang Steel Mill Dock. A few days later, he (Qian A) and his wife drove the boat to Taidong River again at night to discharge another three

truckloads of waste acid transported by Xu A. So was the third and the fourth time, when both times Xu A transported four truckloads of waste acid. It was until December 13 when he (Qian A) broke his left leg and stopped driving the boat. During the period, he was involved in the discharge of over 300 tons of waste acid. Since Xu A transported the second truckload of waste acid, he gave him (Qian A) labor cost at the rate of CNY 100/tank, totaling CNY 1,400. Through identification by Qian A, the dock where the waste acid was unloaded from the tank truck and the water way where the waste acid was discharged into were confirmed.

40. Through confession and identification transcript by Ding Weidong, co－defendant handled in another case, during investigation prove, in October 2013, Wang Zhanrong made a deal with him to commission him to dispose waste acid at the rate of CNY 150/ton. By May 2014, he received over 2，200 tons of waste acid transported by Xu A. To dispose the waste acid, he arranged boatman Zhang Jianfu, Sun A, Wang Liyun, and Qian A through telephone to drive the Yuduoji boat with fake plate number 1048 and another boat to discharge waste acid to the water way of Xintongyang Canal and Luting River. For the disposal, Wang Zhanrong had made payment of CNY 290,000 to him, with CNY 30,000 payment yet to be made. In mid－May, soon after Xu A transported another four truckloads (totaling around 80 tons) of waste acid to him, he heard that relevant authorities were investigating the Xinghua water pollution incident and informed Wang Zhanrong of the situation through phone. He also instructed Zhang Jianfu to hide the Yuduoji boat with fake plate number 1048 that was loaded with waste acid at the dock of Xiangfa Company. Through identification by Ding Weidong, the docks where the waste acid was unloaded, the boats used for discharging the waste acid, as well as the identity of Wang Liyun, Zhang Jianfu, Qian A and Xu A who was responsible for transporting the waste acid were confirmed.

41. The confession by Zhang Jianfu, co－defendant handled in another case, during investigation prove, from March 2014 till the time when the case was revealed, he and Sun A was instructed by Ding Weidong to discharge the waste acid into water bodies close to Xintongyang Canal, Luting River, Taidong River and Yinjiang River. To conceal the dumping, the waste acid was usually discharged into spots with wide surface and strong currents. A total of around 500 tons of waste acid was transported by a driver from Nanjing. Among it, over 300 tons was discharged into rivers, around 70 or 80 tons was transported away by a pointed iron vessel, another 70 or 80 tons remained on the boat.

42. The testimony of witness Lv A (wife of Qian A) proves, from October to the first half of November in 2013, she and Qian A received 15 tanks of waste acid for Ding Weidong at the Zhenchang Steel Mill Dock. They made four discharges of the waste acid into the river, and every time they drove the boat to the water ways at night.

43. The testimony of witness Jia A (boatman) proves, he transported waste hydrochloric acid for Ding Weidong and rented his Yuduoji boat 1048 to Dingweidong since September 2011. It was a steel boat designed for chemicals. His testimony matches the fact that the seized Yuduoji boat 1048 was a boat with a fake plate.

44. The testimony of witness Yao A, Manager of Yangzhou Xiangfa Comprehensive Resource Utilization Co., Ltd, proves that in general, the market rate for disposal of waste acid with 50% concentration is over CNY 2500/ton. The rate for disposing organic waste acid, depending on the concentration of the waste acid, the type and contents of organic matters, can be as high as around CNY 3，800/ton.

45. The registration documents at the local Industry and Commerce Administration and the

road transportation operation permit retrieved by the investigators, as well as the list of retrieved evidence by the Public Security Bureau of Jiangdu District, Yangzhou City prove that the permitted business scope of Yangzhou Xiangfa Comprehensive Resource Utilization Co., Ltd includes transport of hazardous substances.

46．The table of destinations for waste acid from Dystar generated by the investigators prove, based on the time, weight, vehicle plate number, destination, GPS data, expressway records, drivers logs and other relevant materials, as well as the time and location of receiving and discharging the waste acid confessed by Sun A, Qian A and others, it is confirmed that 1，729.82 tons of waste acid was discharged by Sun A, while 318.78 tons of waste acid was discharged by Qian A.

47．The map showing the water areas where the waste acid was discharged into produced by the investigators prove that, through identification of Sun A and Qian A at the site, the locations in Jiangdu and Taizhou where Sun A, Zhang Jianfu and Qian A discharged the waste acid were confirmed.

48．The water quality monitoring data and the water quality condition table provided by the Taizhou Sub－bureau of Jingsu Province Hydrology and Water Resources Investigation Bureau proves the water diversion data at the check gate at Gaogang Hub, as well as exceedance of water quality standard at monitoring station of relevant water bodies including Xintongyang Bridge, Luting estuary, Taizhou(new), Taidong estuary, and Qintong.

49． The registration documents at the local Industry and Commerce Administration, the inspection certificate, the certificate for seaworthiness, permits, and the agreement for entrusted operation retrieved by the investigators, as well as the list of retrieved evidence by the Public Security Bureau of Jiangdu District, Yangzhou City prove that the Jiangyan Qingyuan Detergent Factory was not qualified to dispose hazardous substances and that the owner of Yuduoji boat 1048 is Jia A. This matches the fact that the seized Yuduoji boat 1048 loaded with waste acid was a boat with a fake plate.

E.Evidences proving the connection between the waste acid generated by Dystar Company and the waste acid loaded in the Yuduoji boat with fake plate number 1048, and that the waste acid is hazardous waste.

50．The environmental damage assessment report (〔2014〕 Ren Zi No.4) provided by Jiangsu Scientific and Technological Consulting Center proves: through expert review of all case－related materials, research of production information and statistics provided by Dystar Company and site investigation of Yuduoji boat with fake plate number 1048, the expert team believes the following based on analysis conducted in accordance with relevant laws and rules: (1) the production of vat dyes by Dystar Company inevitably generates waste acid liquid. All the waste acid liquid generated between September 2010 and May 2014 was collected and stored in Tanker BA602 and Tanker BA603 in the company and was then transported away. (2) the total amount of such waste acid generated by Dystar Company during the period was 14，936.32 tons and the average concentration of sulphuric acid was 59.34%. The concentration of 29 sulphuric acid samples out of 129.92 tons of the seized waste acid was ≥46%, which matches the concentration (≥46%) of products in 13 product lists provided by Dystar company. (3) the major component of the waste acid liquid generated by Dystar company was sulphuric acid with large quantities of organic matters, which is highly corrosive and extremely harmful to the living matters, water body and environment. Most aquatic life cannot survive in the liquid. Furthermore, large quantities of sub－dyes and dye intermediate that were left in the waste acid, despite them being non－corrosive and not acutely

toxic, their long－lasting cumulative harm to the living matters and the environment is beyond expectation. (4) all 11，021.42 tons of waste acid liquid transported away from Dystar Company between September 2010 and May 2014 fell in to the category of hazardous waste. The 2，698.1 tons of waste acid liquid discharged directly into the river by Ding Weidong caused severe environmental damage and the 129.92 tons of seized waste acid liquid is a source of environmental risk and requires immediate emergency disposal. (5) due to constant and dispersed secret discharges of the waste acid at various locations in many rivers in an area with high density of river channels and rich river systems, after diffusion, dilution and neutralization, it is impossible to capture the water quality data and calculate the quantity of water body being polluted. Nor is it possible to calculate the environmental damage on the aquatic environment, aquatic lives, river sediments, soils on the river banks and the groundwater. (6) The virtual remediation cost method recommended by national environmental protection authorities was then adopted. Through assessment and verification, the virtual remediation cost for the damage caused by 2，698.1 tons of waste acid liquid should be CNY 24.2829 million. It is conservative to use the above amount to conduct environmental damage assessment. The cost for emergency disposal of the 129.92 tons of waste acid liquid is assessed to be CNY 259,800.

51．The environmental damage assessment report (2014 Ren Zi No.4) provided by Jiangsu Scientific and Technological Consulting Center proves: through review of all case－related materials and test of 32 collected waste acid samples, the expert team believes: (1) the average concentration of the waste acid generated by Dystar was 59.34%, which falls under the definition of hazardous waste. (2) the water quality monitoring data after the direct discharge of 2，698.1 tons of waste acid into the river by Ding Weidong was impossible to acquire due to the discharge was conducted in a constant and secret manner. However, its pollution to the water body and its environmental damage are objective reality, and have directly affected the quality of the water body, the river sediments, and the aquatic life environment.

52．The No. W2014－686 report provided by China Shanghai Testing Center, the No. 2014081305601S－01 test report provided by Shanghai Weizheng Test Co., Ltd, the test entrust form, the test reports, the qualification form and the information letter prove: 32 bottles (250ml) of black liquid sampled by the public security authority were sent to qualified institutions for test of sulphuric acid contents, chemical oxygen demand, chromaticity, and total organic carbon. The content of sulphuric acid in 29 samples out of 32 was between 48.2% and 60.3%.

53．The Su Huan Jian Ren 〔2014〕 No.27 Letter provided by Jiangsu Provincial Environmental Protection Bureau and the Environmental Monitoring Report (〔2014〕 Yang Jiang Huan Jian (Shui) Zi No. 140 provided by the environmental protection bureau of Jiangdu District, Yangzhou City prove: the test result of samples collected from the Yuduoji boat with fake plate number 1048 conducted by Jiangdu District Environmental Protection Bureau affirmed the PH value to be at 1.19mg/L and three other indicators including the COD, volatile phenol and nitrobenzene. Jiangsu Provincial Environmental Protection Bureau confirmed that all relevant tests were in line with the requirements of the national and provincial environmental quality monitoring system and relevant technical specifications.

54．The testimony of witness Xia A (employee of Jiangdu District Environmental Protection Bureau) proves that substances listed under the category of HW34 waste acid are hazardous wastes according to the national hazardous waste inventory. Corrosivity test is required to identify such wastes. The test involves leaching liquid prepared in accordance with standard GB/T15555.12－

1995. For substances with PH≥12.5 or PH≤2.0, if the corrosion rate by such substance for Steel No. 20 as prescribed in GB/T699 was ≥6.35mm/a in a 55℃ environment, then the substance is hazardous waste.

55. The purchase record for inorganic materials of Dystar Company from 2010 to May 2014, the information of the vat dye products that generate high concentration waste acid, the company's production guidebook and manual for production that may generate waste acid, the test certificate and the list of received evidence materials by the Public Security Bureau of Jiangdu Distrcit, Yangzhou City prove: the investigators retrieved relevant materials from involved departments of Dystar Company. All operation procedures in production require signatures by operators in Dystar Company. The concentration of waste acid generated by production of 13 types of vat dyes ranges from 46% to 85%, and the waste acid contains substances including propionic acid, anthraquinone, iron sulfate, sodium salt, indigo, and heterocyclic ring. The waste acid liquid was discharged and stored in Tanker BA602 and Tanker BA603.

56. The photos of the site taken by investigators can prove the situation where the investigators sampled the waste acid from the Yuduoji boat with fake plate number 1048.

F.Other evidences proving the details of the case and sentenc-ing considerations

57. The letter of case transfer by the Environmental Protection Bureau of Jiangdu District, Yangzhou City, the site inspection transcript, the inquiry records, and the identity information of Ding Weidong prove: on the morning of 19 May 2014, unknown irritating liquid was found on Yuduoji boat 1048 by the Jiangdu District Environmental Protection bureau. It was then tracked down to Ding Weidong, the claimed owner of the ship, who confessed helping others to dispose waste acid. The case was since then transferred to the public security authority to handle.

58. The case acceptance registration form and the decision of case filing by the Public Security Bureau of Jiangdu District, Yangzhou City prove that on 20 May 2014, the case to investigate the suspected crime of environmental pollution by Ding Weidong was placed.

59. The case transfer notice by the Public Security Bureau of Jiangdu District, Yangzhou City prove that Ding Weidong, who was involved in the case, was transferred to the Public Security Bureau of Jiangyan District to handle on 9 July 2014.

60. The arrest record provided by the investigators proves that other six defendants involved in the case were arrested after the case was placed by the public security authority.

61. The decision of seizure by the Public Security Bureau of Jiangdu District, Yangzhou City, the list of seized items and the bank payment voucher prove that CNY 10 million from Dystar Company was seized.

62. The Request for Assistance in Property Inquiry by the Public Security Bureau of Jiangdu District, Yangzhou City, the Deposit and Financial Transaction Details, and the Notice on Assisted Assets Freezing provided by Nanjing Branch of Huaxia Bank prove the transaction details of the Huaxia Bank personal account 10xxx34 of Wang Zhanrong and the Huaxia Bank company account 27xxx43 of Shunjiu Company. CNY 273,472.39 was registered under the frozen personal account of Wang Zhanrong, while CNY 37,933.67 was registered under the frozen company account of Shunjiu Company.

63. The receipt for collection of fines and confiscated money proves that relatives of Huang Jinjun returned illicit gains of CNY 281,000.

64. The household registration information provided by the Gulou Sub－bereau of Nanjing Public Security Bureau, the Nanjing Chemical Industrial Park Sub－bereau, the Chengxi Police

Station of the Meijiang Sub－bureau, Meizhou, the Public Security Bureau of Jiangyan City, and the Public Security Bureau of Jiangdu District, population information, and permanent resident population information prove the identity of Wang Jun, the appellant, and those of Huang Jinjun, Wang Zhanrong, Xu A, Sun A, and Qian A, defendants of the original instance.

The aforementioned evidences have been cross－examined by the people's court of the original instance. They were legally acquired, contain objective and authentic details and were relevant to this case. There is mutual corroboration among the evidences and a chain of evidence can be established to prove the facts of this case. This court therefore affirms the efficacy of the aforementioned evidences.

This court finds： Despite its knowledge that the Shunjiu Company operated by Wang Zhanrong did not have the qualification to dispose waste acid, appellant Dystar Company, in violation of the state's environmental law, engaged him to dispose the waste acid; Despite his knowledge that Ding Weidong did not have the qualification to dispose waste acid, defendant of the original instance Wang Zhanrong instructed Xu A, defendant of the original instance to transport waste acid from Dystar Company to Ding Weidong for disposal; and Sun A and Qian A, defendants of the original instance, secretly dumped the received waste acid into rivers at the instructions ofr Ding Weidong, causing severe damage to the enviornment. In accordance with Article 338, Article 346, and Article 25.1 of the Criminal Law of the PRC, these conducts consitituted the crime of environmental pollution, as a joint offence. Despite their knowledge that Wang Zhanrong did not have the qualification to dispose waste acid, appellant Wang Jun and defendant of the original instance Huang Jinjun facilitated, within their respective authority, the consummation of the transaction, caused the consequence of severe environmental pollution, and shall be held criminally liable for the crime of environmental pollution as Dystar Company's direct supervisor and other directly liable person in accordance with Article 338 and Article 346 of the *Criminal Law of the People's Republic of China*. By taking advantage of its position, defendant of original instance Huang Jinjun extorted properties from Wang Zhanrong and advanced the latter's interest at a relatively large amount. His conduct constituted the crime of taking bribes by a person who is not a state functionary in accordance with Article 163.1 of the *Criminal Law of the People's Republic of China*. Guilty of multiple crimes, Huang Jinjun shall be subject to combined punishments in accordance with Article 69.1 and Article 69.3 of the *Criminal Law of the People's Republic of China*.

In the joint crime of environmental pollution, appellant Daystar and defendant of original instance Wang Zhanrong played the main role, constituted the principal criminals, and shall be punished for all the crimes involving them in accordance with Article 26.1 and Article 26.4 of the *Criminal Law of the People's Republic of China;* Xu A, defendant of the original instance, was hired by Wang Zhanrong to help transport waste acid, played an ancillary role, constituted an accessory criminal and shall be subject to mitigated punishment within or below the statutory range of sentencing in accordance with Article 27 of the *Criminal Law of the People's Republic of China;* Sun A and Qian A were instructed by Ding Weidong, acted in an subordinate position, constituted accessory criminals and shall be subject to mitigated punishment within or below the statutory range of sentencing in accordance with Article 27 of the *Criminal Law of the People's Republic of China*. After being brought to justice, appellant Wang Jun, defendants of the original instance Huang Jinjun, Wang Zhanrong ， Sun A and Qian A truthfully confessed the basic facts of crimes, and shall be deemed to have confessed and eligible for mitigated punishments within the statutory

range of sentencing according to Article 67.3 of the *Criminal Law of the People's Republic of China*. After committing the crime, the appellant Dystar Company cooperated with the investigation by the judiciary, showed certain repentance for its committed crimes, and warranted discretionarily mitigated punishment within the statutory range of sentencing. Huang Jinjun, the defendant of the original instance, extorted bribes, and shall be subject to discretionarily aggravated punishment within the statutory range of sentencing. Considering the involvement of Xu A and Qian A in the crime, and that they admitted their crime relatively well, somewhat repented their crime, they can be awarded a probation in accordance with Article 72 of the *Criminal Law of the People's Republic of China*.

On the appellate grounds and defenses raised by the appellant Dystar Company and Wang Jun, and by the defendant of the first instance Wang Zhanrong, this court finds：

1． On whether the environmental damage assessment report provided by Jiangsu Provincial Academy of Environmental Science shall be excluded as illegal evidence.

Through trial, this court believes：

(1)The environmental damage caused by the disposal of waste acid by Wang Zhanrong at the request of Dystar Company was assessed by experts of Jiangsu Scientific and Technological Consulting Center in the environmental damage assessment report through careful review of all case－related materials, site investigations and research. It was affirmed that due to constant and dispersed secret discharges of the waste acid as instructed by Ding Weidong at various locations in many rivers in an area with high density of river channels and rich river systems, it is impossible to capture the water quality data and calculate the quantity of water body being polluted. Nor is it possible to calculate the actual environmental damage. The virtual remediation cost method recommended by national environmental protection authorities was then adopted. Through conservative estimation, the virtual remediation cost for the damage caused by 2，698.1 tons of waste acid liquid should be CNY 24.2829 million and is deemed as the environmental damage cost caused by the environmental pollution. This court supports such assessment conclusion as it is objective.

(2)During the trial of the case, the original Procuratorate who filed the case submitted another environmental damage assessment report issued by the Jiangsu Provincial Academy of Environmental Science as a piece of corroborative evidence, with the intention to prove that the waste acid generated by the Dystar Company belongs to hazardous waste and that the environmental damage caused by the direct discharge of such waste acid into the river is an objective fact. The source of this piece of corroborative evidence was legal and had been cross－examined in court during the trial of the original instance. The relevant conclusion of the report was basically similar to the conclusion of environmental damage assessment report provided by the Jiangsu Scientific and Technological Consulting Center and was objective. There is nothing inappropriate about this piece of evidence.

(3)The efficacy of the calculation of virtual remediation cost based on local standards and the inferred environmental resources damages in the environmental damage assessment report provided by the Jiangsu Provincial Academy of Environmental Science was not confirmed by the people's court of the original instance. The assessment report cannot be deemed as a piece of illegal evidence.

2．On whether the conducts of Wang Jun and Huang Jinjun should be elevated to be the will of the Company and the position of the Dystar Company as a defendant in the joint

offence.

Through trial, this courts believes：

(1)In accordance with China's Criminal Law and relevant judicial interpretations, the feature of crimes committed by a unit is that the crime is committed in the name of a unit and that the illegal gains of such crime are held by the unit. In this case, Wang Jun, as an employee of the Dystar Company, was instructed by the person in charge of the Company to handle waste disposal. i． e., Wang Jun was acting on behalf of the company and was acting for the interests of the Company. Later on, after approval from the person in charge of the Company, the waste acid disposal was forwarded to Wang Zhanrong to handle, which was an action conducted in the interests of the company to reduce costs for waste acid disposal. In this sense, the conducts of Wang Jun represents the will of the Company.

(2)After the reveal of the Taizhou major environmental pollution incident, the Dystar Company (the person in charge of the company) instructed involved departments to hide relevant traces and evidence in order to avoid accountability and investigations. This again proves that the conducts of Wang Jun and HuANG Jinjun are the will of Company.

(3)The Dystar Company is the dominator of the conducts of environmental pollution. In order to reduce the costs of hazardous waste disposal, the Company entrusted Wang Zhanrong to dispose hazardous wastes despite its knowledge that Wang Zhanrong did not have the qualification to dispose such wastes. Similarly, despite his knowledge that Ding Weidong was not qualified in disposing hazardous wastes, Wang Zhanrong forwarded such wastes to Ding Weidong for his disposal. In the joint crime, both the Dystar Company and Wang Zhanrong played the main roe, constituted the principal criminals.

3．On whether the hazardous waste disposed in the presented case belong to the “other exceptionally serious circumstances” set forth in the judicial interpretation.

Through trial, this courts believes：

(1)It takes time for the consequences of environmental pollution to emerge. Furthermore, the causal link between the conduct of environmental pollution and its consequences is usually very hard to be established directly. In the relevant Judicial Interpretation, there is no article specifying the exceptionally serious circumstances caused by illegal discharge, dumping and disposal of hazardous wastes, but it set forth the overall “other exceptionally serious circumstances” in the article. In practice, to put such inclusive articles into correct application is an important way to remedy the limited comprehensiveness in listing out possible situations in laws and judicial interpretations. The court has the discretion to make the decision based on the facts of different cases.

(2)In this case, large quantities of waste acid were discharged directly into many rivers in an area with high density of river networks and rich river systems. The amount of the waste acid discharged was hundreds of times the standard to define serious crime of environmental pollution. Furthermore, the constant and dispersed discharge by Ding Weidong et al at various locations has caused serious degradation of water quality in water bodies close by, disrupting the production activities and water supply of many water plants in the area. The environmental damage assessment report by qualified agency also believes that the remaining substances in the discharged hazardous waste will cause long－lasting impacts on the aquatic environment, aquatic life, river sediments, soils along the river bans and groundwater. Therefore, considering the time, location, quantities, ways, the level of exceedance, the existing harmful impacts and the potential harms of the

discharge of the hazardous waste, the conduct of hazardous waste disposal in this case belong to the "other exceptionally serious circumstances" set for the in the judicial interpretation, and should be deemed as conducts with exceptionally serious consequences.

4. On whether the fine assessed for Dystar Company was appropriate.

Through trial, this court believes: in accordance with the *Criminal Law of the People's Republic of China* and relevant laws and rules, the amount of the fine shall be determined according to the circumstances of the crime, including the amount of illegal gains and the severity of damage caused by the crime, and shall give consideration of the capacity of the criminals to pay the fines. In this case, the Dystar Company, in order to cut costs of hazardous waste disposal, entrusted another entity to dispose its hazardous wastes, despite its knowledge that the entity had no qualification to handle such wastes, and eventually caused serious environmental pollution. Because of the conduct of the crime, Dystar company saved exceptionally high amount of waste disposal costs. This essentially is profits gained through conducts of crime. Meanwhile, the conduct of environmental pollution will inevitably cause severe consequences, which inevitably requires expenses to be eliminated. According to relevant judicial interpretations, the loss of public or private property shall include the actual value of the damage or loss of property directly resulting from acts of environmental pollution, and the expenses incurred due to necessary and rational measures adopted to prevent the expansion of pollution. The confirmation of such value and expenses is the loss caused by the act of crime. Hence, the loss of public and private property shall be an important factor for consideration in determining the amount of the fine.Summing up the above, in handling cases of environmental pollution crime, there is basic legal grounding in determining the fine to be within the range from actual illegal gains to losses caused to public and private properties. Such a range is conducive to environmental restoration and to giving full play to the deterrence function of punishments. Considering the circumstances of the crime by Dystar Company and its capacity to pay, there is nothing inappropriate in the amount of fine determined by the people's court of the original instance, which is within the range explained above.

5. On whether Wang Jun was a direct liable person in charge and an accessary criminal and on whether the sentencing for Wang Jun and Wang Zhanrong was appropriate.

Through trial, this court believes:

(1)A direct liable person in charge involved in a crime committed by a unit is the personnel who is responsible for decision－making, approval, inciting, conniving, and commanding of relevant conducts in the crime committed by a unit. Entrusted by the General Mangager, Wang Jun engaged Wang Zhanrong to discuss disposal of hazardous waste, checked relevant documents and agreed on the rate for disposal. He was also responsible for the review of the settlement of the disposal expenses, and has admitted certain gains from the deal. He played an important role in facilitating, inciting and conniving the consummation of the transaction. After the new General Manager took over, Wang Jun remained at his position to handle the disposal of hazardous waste. All 2，828.02 tons of waste acid as confirmed in this case was discharged after Wang Jun was pointed Assistant to General Manager. After the act of environmental pollution was revealed, it was Wang Jun whom Wang Zhangrong first contacted for strategies to cope with inspections. From these facts, it can be inferred that Wang Jun was involved in the whole process of the disposal of the hazardous waste and played such roles that meet the features of a direct liable person in charge, not those of an accessary criminal. He should be determined as a direct liable person in charge.

(2)According to the *Criminal Law of the People's Republic of China,* whoever causes serious

environmental pollution and if there are especially serious consequences, shall be sentenced to imprisonment of not less than three years but no more than seven years. Considering the circumstances of the crime by Wang Jun and the fact that he confessed after being brought to justice, making himself eligible for mitigated punishments, there is nothing inappropriate in the original punishments made within the statutory range of sentencing for Wang Jun by the people's court of the original instance.

(3)Wang Zhanrong, disposed waste acid liquid without qualifications for illegal gains and caused serious environmental pollution with especially serious consequences, shall be sentenced to imprisonment of not less than three years but no more than seven years. He should be deemed as the principal criminal in the joint crime, and should be punished based on all the criminal acts he conducted. Considering the fact that he confessed after being brought to justice, the imprisonment term within the statutory range of sentencing determined by the people's court of the original instance was appropriate. Meanwhile, based on the amount of his illegal gains out of the crime, there was nothing inappropriate in the amount of fine for him determined by the people's court of the original instance.

In conclusion, this courts holds that the grounds of appeals and the defenses raised by the appellant Dystar Company, appellant Wang Jun, and defendant of original instance Wang Zhanrong and their respective defenders shall not be supported and shall be dismissed. The facts were clearly found in the original judgement by the people's court of the first instance. The evidences were truthful and adequate, the nature of the case was determined correctly, the sentencing was appropriate, and the trial procedure was legal.

In view of the above, in accordance with Article 25.1.1 of the *Criminal Procedure Law of the People's Republic of China,* it is ordered as follows：

The appeal be rejected and the original judgement be sustained；

This order is final.

Presiding Judge,,Yin Xiaotao

Judge,,Li Chunrong

Acting Judge,,Hao Jiajia

October 8，2016

Clerk,,Wang Menglu

Case 2: People's Procuratorate of Yueyanglou District，Yueyang City, Hunan Province v. He Jianqiang et al. on Ilegal Killing and Hunting of Precious and Endangered Species

Judgment in a Criminal and Incidental Civil Action
People's Court of Yueyanglou District, Yueyang, Hunan

(2015) Lou Xing Yi Chu Zi No.291

The Procuratorial Organ: People's Procuratorate of Yueyang District, Yueyang.

Plaintiff of the incidental civil action: Yueyang Municipal Forestry Bureau.

Legal representative: He Zuoyun.

Entrusted agent: Gao Dali， Section Chief of Hunan East Dongting Lake National Nature Reserve Administration, a secondary institution under the Yueyang Municipal Forestry Bureau

Defendant: He Jianqiang, nicknamed “He Laosi”， male, born on August 12, 1970，Han Chinese, with an educational background of primary school, fisherman; detained on January 21，2015 and arrested on February 16 of the same year for illegal hunting and killing of endangered wildlife by Yueyang Forest Public Security Bureau; currently being detained at Yueyang Detention Center.

Attorney: Zhang Guohui, Hunan Yuezhou Law Firm.

Defendant: Zhong Dejun, nicknamed “Jun Meizi”， male, born on December 22, 1965，Han Chinese, with an educational background of primary school, farmer; detained on January 21，2015 and arrested on February 16 of the same year for illegal acquiring, transporting and selling endangered wildlife and for illegal hunting by Yueyang Forest Public Security Bureau; currently being detained at Yueyang Detention Center.

Defendant: Fang Jianhua, male, born on March 25, 1976, Han Chinese, with an educational background of primary school, farmer; detained on April 9，2015 and arrested on 16th of the same month for illegal acquiring, transporting and selling endangered wildlife and for illegal hunting by Yueyang Forest Public Security Bureau; currently being detained at Yueyang Detention Center.

Defendant: Li Qiang, male, born on August 9, 1990, Han Chinese, with an educational background of primary school, farmer; detained on September 26, 2015 and arrested on October 12 of the same year for illegal acquiring, transporting and selling endangered wildlife and for illegal hunting by Yueyang Forest Public Security Bureau; currently being detained at Yueyang Detention Center.

Attorney: Liu Hong, Hunan Minwang Law Firm.

Defendant: Long A, male, born on November 9, 1963, Han Chinese, with an educational background of primary school, farmer; granted bail while awaiting trial for illegal hunting by Yueyang Forest Public Security Bureau on June 3, 2015 and arrested at the discretion of this court on March 1，2016; currently being detained at Yueyang Detention Center.

Defendant: Long B, male, born on January 15, 1987, Han Chinese, high－school dropout, farmer; detained by Yueyang Forest Public Security Bureau on May 6, 2015 for illegal hunting, arrested on June 9 of the same year, and then granted bail by the Yueyang City Forest Public

Security Bureau on the 12th of the same month；currently awaiting trial at home.

Defendant: Long C, male, born on October 6, 1968, Han Chinese, with an educational background of primary school, farmer; granted bail on the 12th of the same month and ordered to await trial by the Yueyang City Forest Public Security Bureau for illegal hunting.

With a notice of public criminal prosecution (Yue Lou Jian Gong Yi Xing Su〔2015〕No. 280) and a revised decision to prosecute (Yue Lou Jian Gong Yi Xing Bian Su〔2015〕No.3), the People's Procuratorate of Yueyanglou District of Yueyang filed prosecution against defendants He Jianqiang, Zhong Dejun, Fang Jianhua, Li Qiang, Long A, Long B, and Long C for illegal hunting and killing of endangered wildlife to this court on November 16, 2015. The court accepted and heard the case on the same day. During the prosecution, Yueyang Municipal Forestry Bureau filed an incidental civil action to the court. The court duly formed a collegial panel with Xiao Bingfeng as the presiding judge, Li Lin the judge, and Wen Jianshe the people's jury. The trial record was kept by the clerk Yang Huan. An open trial was held on January 21, 2016. The People's Procuratorate of Yueyang District assigned prosecutors Hu Lijun and Chen Yu to appear in court to support the public prosecution, and another procurator Zeng Yinshu to appear in court to support the incidental civil action. Those appearing at the court were Gao Dali, entrusted agent of the plaintiff in the incidental civil action, Yueyang Municipal Forestry Bureau, the defendant He Jianqiang and his attorney Zhang Guohui, the defendants Zhong Dejun, Fang Jianhua, Li Qiang and his attorney Liu Hong; and the defendants Long A, Long B, and Long C. The trial, due to the complexity of the case, was postponed for three months with the approval from Yueyang Intermediate People's Court. The trial has been closed.

The People's Procuratorate of Yueyanglou District alleged that when collecting fishes in the Dongtinghu National Nature Reserve in Hunan Province, He Jianqiang and Zhong Dejun came to an agreement on killing wild migratory birds by poisoning with fish farmers and their helpers including Fang Jianhua, Long A, Long B, Tu A (on the run), Yu A (on the run), Zhang A (on the run), and Ren A (on the run), and He Jianqiang provided pesticides and took charge of purchasing such wild migratory birds. Afterwards, He Jianqiang and other persons repeatedly killed wild migratory birds in the nature reserve by poisoning. Such wild migratory birds were uniformly purchased by He Jianqiang and sold to Wang A under the agency of Li Qiang. He Jianqiang and Zhong Dejun successively purchased a total of 63 migratory birds in eight bags from Fang Jianhua and Yu A and such migratory birds were seized by officers of the nature reserve administration in the Haoba Wharf located in Junshan District, Yueyang City on January 18, 2015. It was identified that the aforesaid 63 migratory birds died of poisoning. In particular, 12 cygnets and 5 white spoonbills were wild animals under state protection (Category II); there were grey herons, tadornaferrugineas, eurasian wigeons, anaspoecilorhynchas, and nocturnal herons, 46 in total, which were all beneficial wild animals with important economic and scientific research value under state protection.

On the afternoon of January 19, 2015, the defendants He Jianqiang and Zhong Dejun turned themselves into the East Dongting Lake National Nature Reserve Administration; on April 8 of the same year, the defendant Fang Jianhua was arrested in Nanxian County; on April 27, the defendant Long C turned himself into Nandashan Police Station in Ruanjiang City; on April 28, the defendant Long B was arrested in Shenzhen; on June 3, the defendant Long A turned himself in; on September 23, the defendant Li Qiang was captured in Shanghai.

On November 4, 2015, the defendant He Jianqiang reported the whereabouts of Li A on the

run during his detention at Miluo Detention Center. With the contact provided by HeJianqiang, the fugitive Li A was captured by Yueyang Municipal Public Security Bureau and later transferred to the Public Security Bureau of Boluo County, Guangdong Province.

The above allegations have been supported by the evidence presented by the public prosecution service. The procuratorate held that the acts of the defendants He Jianqiang, Zhong Dejun, Fang Jianhua, Li Qiang, Long A, Long B, and Long C have constituted a crime of illegal killing of rare and endangered wildlife and the circumstances were particularly serious.In this joint crime, the defendants He Jianqiang, Zhong Dejun, and Fang Jianhua played a leading role and were the principals; the defendants Li Qiang, Long A, Long B, and Long C played less significant roles and were the accessory offenders. The procuratorate requested this court give sentences in accordance with Clause 1 of Article 341, Clause 1 of Article 25, Clause 1，4, and 68 of Article 26, and Article 27 of *the Criminal Law of the People's Republic of China*.

The plaintiff of the incidental civil action, Yueyang Municipal Forestry Bureau alleged that the 7 defendants including He Jianqiang, Zhong Dejun, Fang Jianhua, Li Qiang, Long A, Long B, and Long C repeatedly killed wild migratory birds in the nature reserve by poisoningfor ill－gotten gains. 63 wild migratory birds were seized by law enforcement officers from the Administration on January 18, 2015. Based on the assessment of the competent authority, the relevant losses were determined as CNY 44，617 according to the verified value of the 63 wild migratory birds involved and the losses were determined as CNY 8，936 for the migratory birds that were also poisoned and sold by the defendants Li Qiang and He Jianqiang. The losses of national wildlife resources caused by the 7 defendants' criminal conducts hereof stood at CNY 53，535. In this case, both the criminal liabilities of defendants for killing wild migratory birds and the civil compensation liability for losses caused by their criminal activities to the national wildlife resources were investigated.

The defendants He Jianqiang, Zhong Dejun, Fang Jianhua, Li Qiang, Long A, Long B, and Long C confessed to the fact that they had committed crimes by hunting and killing endangered wildlife and raised no objections to the charges.

The attorney of the defendant He Jianqiang contended that the defendant had only aroused the subjective intent to kill wild migratory birds in the nature reserve by poisoning and had no part in leading and commanding other defendants in criminal deeds. Therefore, his role in the joint crime should be deemed as aiding. In addition, he turned himself into the public security authority and truthfully confessed the crime, hence constituting voluntary surrender. Also, during detention he reported the fugitives' whereabouts to the public security authority, which eventually led to the arrest of several defendants on the run, hence the meritorious act. Given the reasons above, the defendant pled mitigation of punishment.

The attorney of the defendant Li Qiang submitted defending opinions: the defendant Li Qiang's circumstance of crime was minor and Li showed repentance, hence pleading lighter or mitigated penalty.

The 7 defendants agreed to the civil compensation claims filed by the plaintiff in the incidental civil action and raised no objection.

The court found that in November 2014, while fishing with the hired help Zhong Dejun at Hunan East Dongting Lake National Nature Reserve, the defendant He Jianqiang made the proposal to the defendants Fang Jianhua, Long A, Long C and Tu A, Yu A, Zhang A, Ren A (the latter four are still on the run) about killing the migratory birds at the Reserve by poisoning and selling the migratory birds to him. He also provided them carbofuran for poisoning. The defendants

Fang Jianhua, Long A, and Long C agreed to the plan. On the 15th of the same month, the defendant Li Qiang was captured and put under residential confinement by the Public Security Bureau of Hanshou County, Changde City for illegal purchasing of endangered wildlife. On December 23 of the same year during the residential confinement, the defendant Li Qiang still managed to drive the defendants He Jianqiang and Zhong Dejun to Yuhou Farmer's Shop at Maocao Street to purchase over 10 bags of carbofuran and helped transport the poison to the rental apartment of defendant He Jianqiang at Sanjiaoxian, Yueyanglou District. Later the defendant He Jianqiang asked the defendant Zhong Dejun to ship the carbofuran to East Dongting Lake Nature Reserve and give it away to the defendants Long A, Fang Jianhua, and Tu A. The remaining carbofuran was hidden under the bunch—tussock grasses of Baihu sandbank in the Reserve.

One day in December 2014, while fishing at defendant Fang Jianhua's fish farm the defendants He Jianqiang and Zhong Dejun put carbofuran in the Lake together with Yu A. The two defendants harvested several endangered wild migratory birds the following day at the same area where they put poison and took the birds to Haoba Wharf, Junshan District of Yueyang to sell to one of Li's contacts, Wang A.

From late December 2014 to January 7，2015, the defendant Fang Jianhua, in collusion with Yu A, poisoned and killed migratory birds weighing 15 kilograms outside the latter's farm. The birds were sold to defendant He Jianqiang.

At 15：00 pm of one day of the late December 2014, the defendants He Jianqiang and Zhong Dejun went to Long A's fish farm to place pesticide but was turned down by defendant Long B (son of the defendant Long A). However, the defendant He Jianqiang insisted on doing so and persuaded Long B to join them. In the end, the defendant Long B agreed and three of them emptied two bags of carbofuran. In the following 2 days the three defendants He Jianqiang, Zhong Dejun and Long B gathered migratory birds weighing 50 kilograms in total in the poisoned area. The birds were later transported to Sanjiaoxian, Yueyanglou District and sold to Wang A, one of the contacts of defendant Li Qiang.

On January 13，2015, the defendants He Jianqiang and Zhong Dejun operated a boat to harvest fish and gave the defendants Long C, Long B and Ren A a ride on their way back. During the trip, the defendant He Jianqiang asked the defendant Zhong Dejun to get the pesticide previously hidden in the grass at Baihu Shoal. The defendant Zhong Dejun stopped incited by the defendant He Jianqiang when they were getting close to the shoal not far away from the ships of the defendant Fang Jianhua. Then the defendants He Jianqiang, Zhong Dejun, Long C, Long B, and Ren A put pesticides in the lake. That night, the above defendants stayed over on the two fixed ships of the defendant Fang Jianhua. From the following day to the 15th, the defendant He Jianqiang among others harvested several migratory birds dead from poison and sold to Wang A one of the contacts of the defendant Li Qiang at Haoba Wharf in Junshan District, Yueyang City.

On January 13, 2015, the defendant Long A placed carbofuran in his own fish farm and collected dead migratory birds weighing more than 25 kilograms the following three days.

On January 16, 2015, the defendants He Jianqiang and Zhong Dejun once again operated a boat to transport the supply to Tu A's fish farm and picked up two dead cygnets en route. The two defendants stayed over for the night at the fish farm of the defendant Long C.

On the morning of January 17, 2015, Yu A informed the defendant Fang Jianhua of the fact that he put carbofuran in the latter's fish farm, claiming there would be birds for collection right after the day of poisoning. In the morning of the following day, the defendant Fang Jianhua later

picked up 4 cygnets, and Yu A 6 cygnets and 3 or 4 wild ducks.

On the morning of January 18, 2015, after breakfast at the defendant Long C's fish farm, the defendants He Jianqiang, Zhong Dejun headed for home and procured from the fish farmers en route the migratory birds dying from poisoning. They asked the defendant Li Qiang to meet them at Haoba Wharf in Junshan District and Wang A to collect the birds. Later, the defendants He Jianqiang and Zhong Dejun purchased 4 bags of migratory birds (including 10 cygnets and 3 or 4 wild ducks) from the defendants Fang Jianhua and Yu A respectively, 2 bags of migratory birds weighing 25 kilograms in total (which mainly included herons, wild ducks, etc) from the defendant Long A; 2 bags of migratory birds (including 5 white spoonbills and 10 other kinds of birds) from Zhang A; 2 bags of migratory birds (weighing approximately 30 or 35 kilograms, mainly wild ducks) from Tu A. Then the defendants He Jianqiang and Zhong Dejun sorted out the birds and put 63 in total into 8 separate bags. At 17：40 pm on the same day, the officers from the East Dongting Lake Nature Reserve Administration of Hunan Province were tipped off about the defendants He Jianqiang and Zhong Dejun's illegal attempts of selling wild birds at Haoba Wharf in Junshan District of Yueyang City. The two defendants abandoned the ship and fled immediately for fear of being caught red－handed. The defendant Li Qiang, while waiting for the defendant Zhong Dejun, also ran away by car after learning that their criminal deeds had been exposed. The East Dongting Lake National Nature Reserve Administration of Hunan Province seized the 63 wild birds in accordance with the law and transferred the case to Yueyang Municipal Forest Public Security Bureau.

On January 19, 2015, the defendants He Jianqiang and Zhong Dejun turned themselves in to the East Dongting Lake National Nature Reserve Administration of Hunan Province; on April 8 of the same year, the defendant Fang Jianhua was captured in Nanxian County, Hunan Province; on April 27, the defendant Long C turned himself in to Nandashan Police Bureau of Yuanjiang City, Hunan Province; on May 2, the defendant Long B was captured in Shenzhen; on June 3, the defendant Long A turned himself in to Yueyang Municipal Forest Public Police Bureau; on September 23, the defendant Li Qiang was arrested in Shanghai.

On November 4, 2015, the defendant He Jianqiang reported the whereabouts of the online fugitive Li A to Yueyang Municipal Public Security Bureau during his time at Miluo Detention Center, eventually leading to the arresting of the fugitive Li A which was later transferred to the Public Security Bureau in Boluo County, Guangdong Province.

According to Hunan Provincial Wildlife Judicial Appraisal Center and Hunan Provincial Public Security Bureau's Material Identification Center, of all the seized 63 migratory birds, there were 12 cygnets and five white spoonbills were wild animals under state protection (Category II) and there were grey herons, tadornaferrugineas, eurasian wigeons, anaspoecilorhynchas, and nocturnal herons, 46 in total, which were all beneficial wild animals with important economic and scientific research value under state protection. Carbofuran was found in all the 63 migratory birds. Therefore, the death was caused by poison；

It is also found under the regulations of *the Measures for Terrestrial Wildlife Resources Protection Management Fee Collection* (Lin Hu Zi 〔1992〕 No.72) and *the Standard for Catching and Hunting Wildlife under Special State Protection Management Fee Collection* issued by the Ministry of Forestry, Ministry of Finance and National Price Bureau, and *the Notice on the Standard for How to Determine Wildlife and Its Product Value in Wildlife Cases*(Lin Ce Tong Zi 〔1996〕 No.8) issued by the Ministry of Forestry, the defendant He Jianqiang and others have

caused direct economic loss of CNY 44，617 by poisoning and killing 63 migratory birds at the East Dongting Lake National Nature Reserve. The breakdowns are as follows: the 12 cygnets are worth CNY 16，032 (12 ×CNY 80 /per bird × 16.7), 5 white spoonbills CNY 20，875 (5×CNY 250/ per bird × 16.7 times) and based on the market price, 2 herons are priced at CNY 800 (2 ×CNY 400/ per bird), the 3 ruddy shelducks CNY 1， 800 (3 ×CNY 600/ per bird), the 3 red－necked ducks CNY 900 (3×CNY 300/ per bird)，the 11 spot－billed ducks CNY 2，860 (11 ×CNY 260/ per bird) and the 27 nocturnal herons CNY 1， 350 (27 ×CNY 50 / per bird).

The above facts have been supported by the evidence, cross－examination and attestation from the procuratorate and the plaintiff in the civil action during the trial：

1． Seized wildlife cadavers, pictures and a list of seized items together have proved that on January 18, 2015, while conducting the inspection at the Haoba Wharf of Junshan area, the officers of East Dongting Lake Nature Reserve Administration of Hunan Province seized on the spot 12 cygnets, 5 white spoonbills, 2 herons, 3 ruddy shelducks, 3 red－necked ducks, 11 spot－billed ducks, and 27 nocturnal heron on the wooden boat (license No. : Xiang 〈Yue〉 Fish No. 060351) abandoned by He Jianqiang.

2. Photos of on－site sample collections, traces of collection, registration form of physical evidence and transcripts and photos of on－site investigation have proved that the officers of Yueyang Municipal Forest Public Security Bureau found 2 woven bags of carbofuran under the brand name of "Haili" weighing 20kg each and 1 empty packaging bag of 1－kg carbofuran under the brand name of "Haili" brand at the site identified by Zhong Dejun as the poisoning spot at Baihu Shoal of the East Dongting Lake Nature Reserve.

3. Letter of Case Transfer has proved that the wild birds died from poisoning and seized by Hunan East Dongting Lake National Nature Reserve Administration have been transferred to Yueyang Municipal Forest Public Security Bureau for investigation.

4. Evidence collection notice, crop seed quality tracking credit card of Nanxian County, the expressway toll records and photos of the vehicle with the license plate No.F××××× have proved that the officers of Yueyang Forest Public Security Bureau collected the transaction records of "Haili" carbofuran from Ma A. Also, according to the information collected by the Traffic Police Brigade of Nanxian Public Security Bureau from Hunan Yuechang Expressway Development Co., Ltd. the vehicle (license plate No. Xiang F×××××) entered the highway through Junshan toll station and exit through Yuechang Sub－center toll station on December 23, 2014. Later, the car entered the freeway from the same sub－center toll station and returned to Junshan drove past the Dalang checkpoint and Hongyan checkpoint on the way back.

5. Call records have shown that there were calls between He Jianqiang and Ma A and calls among He Jianqiang, Zhong Dejun, Fang Jianhua, Long C, Long B and Li Qiang on December 23, 2014.

6. Testimony of the witness Ma A and his identification transcript have proved that on the evening of December 23, 2014, He Jianqiang, Zhong Dejun, Li Qiang and He A drove to his "Yuhou Farmer Shop" at Maocao Street, Nan County for 18 bags "Hai Li" carbofuran (large－size). Asked by the public security authority, Ma A identified that on December 23, 2014, He Jianqiang purchased carbofuran, Zhong Dejun loaded the poison onto the car and Li Qiang drove the car.

7. Testimony of the witness Dai A and his identification transcript have proved that between December 2014 and January 2015, he was hired by "He Laosi" among others to transport goods

using his tricycle. In the first half of the winter of 2014, he transported 5 or 6 bags, each weighing about 35kg with the smell of pesticide, to JunshanHaoba Wharf from a residential quarter at No. 428 Dongting South Road. Asked by the public security authority, Dai identified that it was He Jianqiang and Zhong who hired him to transport the goods at No. 428 Dongting South Road.

8. Testimony of the witness Li A has proved that she and her husband, Long A, were fishing in the Dongting Lake, and He Jianqiang came to collect fish from them. Her husband, Long A, poisoned and killed wild birds in Baihu Lake and later sold the birds to He Jianqiang. On January 16, 2015, she saw He Jianqiang pick up a swan and a wild duck from the lake. On the 18th of the same month, her husband Long A sold the poisoned wild ducks and other birds to He Jianqiang who was later captured by the public security authority.

9. Testimony of the witness Tan A has proved that her husband Fang Jianhua and she lived off the fish farm within the East Dongdong Lake Nature Reserve and He Jianqiang often procure fish from them. In December 2014, the wife of “He Laowu”, going by “Swallow”, told her over the phone that Yu A, He Jianqiang, Zhong Dejun and others had poisoned birds near the fish farm and she responded by urging Yu A to remove the shed at the farm. On January 18, 2015, her husband Fang Jianhua sold He Jianqiang a swam he had picked up near the farm.

10. Testimony of the witness Li B has proved that in January 2015, his brother－in－law Long A was found by the public security authority that he had put carbofuran in East Dongting Lake to poison the wild ducks and turned himself into the public security authority in the company of Li B.

11. Testimony of the witness Yang A has proved that he was acquitted with He Jianqiang who had been supplying him with fish for a while. At 15：00 pm on January 18, 2015, He Jianqiang called him to send a fish tanker to JunshanHaoba Wharf to get fish.

12. Testimony from the witnesses Yang B and Yang C has proved that, making a living by fishing it the Dongting Lake, they sold most of their catches to “He Laosi”. At 9：00 pm on January 18, 2015, “He Laosi” purchased fish from them at Yang C's fish farm.

13. Testimony of the witness He A hasproved that at 9：00 am on January 16, 2015, he and his father He Jianqiang, together with Zhong Dejun and others, went fishing on a motor sailer towed by a boat operated by Zhong Dejun. While fishing, his father He Jianqiang, picked up and bagged a few “ducks” and left them on board. At 9：00 am on January 18, 2015, having had bought some fish from local fishermen and returned to Yueyang, they contacted buyers to get fish at Junshan Pier. They put bags of “ducks” on the boat, and then took the motor sailer to deliver the fish to buyers waiting at the Junshan Pier. After that, they moved the “ducks” from the boat and to the motor sailer and transported them to Junshan pier. When they anchored ashore, the suspects abandoned the ship and fled immediately when the officers were approaching to examine the ship.

14. Testimony of the witness Ding A and his identification transcript have proved that as an officer of the East Dongting Lake Nature Reserve Administration, he and Gao A among other officers were tipped off about a suspicious ship (license plate No.: Xiang〈Yue〉Fishing 060351) while patrolling at JunshanHaoba Wharf on the afternoon of January 18, 2015. He showed his identity as law enforcement and boarded to check up the ship. At that moment, the three people on board abandoned the ship and fled right away. Ding and his colleagues found 8 bags of dead wild migratory birds on board, including 12 cygnets, 5 white spoonbills among a variety of other birds such asherons, ruddy shelducks, red－necked ducks, spot－billed ducks, and nocturnal herons. Asked by the public security authority, Ding A identified He Jianqiang and Zhong Dejun as two of those who had abandoned the ship and fled during the check－up.

15. Testimony of the witness Zhou Ahasproved that on January 18, 2015, she heard from her son He A that her husband, He Jianqiang, was found when shipping dead wild ducks, geese and other birds ashore in Dongting Lake.

16. Testimony of the witness Wang A hasproved that in December 2014 his cousin Li Qiang introduced him to his wife's uncle from whom he began to buy wild ducks dead from poison. In January 2015 Wang A purchased three times from Li Qiang's in－laws a total of more than 50 kilograms of wild migratory birds.

17. Testimony of the witness He B hasproved that at 23：00 p．m. on November 13, 2014, the dead wild ducks Li Qiang and she planned to sell at Hanshou were seized by the public security and the industrial and commercial authorities.

18. Testimony of witnesses He C and Li C hasproved that on the evening of November 13, 2014 the wild ducks He C and Li Qiang planned to sell to “Chun Hua Xuan” restaurant run by Li Houyong at Hanshou County were seized by the public security authority.

19. Testimony of the witness Wu A has proved that in January 2015, his friend Han A, together with He Jianqiang, Zhong Dejun and He D, reached him for enquiries. He told He Jianqiang, Zhong Dejun and others that hunting wild birds would constitute a crime, but picking up dead wild birds wouldn't.

20. Testimony of the witnesses Lu Xin and Liu Xiangqun, policemen at the Yueyang Municipal Forest Public Security Bureau has proved that at 16：00 pm on January 19, 2015, the defendants He Jianqiang and Zhong Dejun turned themselves into the East Dongting Lake Nature Reserve Administration; on April 8 of the same year, the public security arrested the defendant Fang Jianhua at Group 6 Liqun Village, Sanxianhu Town, Nanxian County, Yiyang City of Hunan Province; on April 27 of the same year, the defendant Long C turned himself in to Nandashan Police Station of Yuanjiang City; on June 3 of the same year, the defendant Long A turned himself in to Yueyang Municipal Forest Public Security Bureau.

21. Testimony of the witnesses of Li Yuren and Peng Jie, policemen at Shenzhen Municipal Public Security Bureau has proved that at 1：00 am on May 2, 2015, the public security captured the defendant Long B in the Room 907, No. 3, Xiqi Alley, Sanwei Village, Xixiang Street, Baoan District of Shenzhen.

22. The arrest process provided by Xinyi Police Station of Songjiang Branch of Shanghai Public Security Bureau and the certification of detention, transfer and reception records issued by Songjiang District Detention Center have proved that at 15：20 pm on September 23, 2015, the defendant Li Qiang was arrested by the public security authority at Fengjing checkpoint on G60 Shanghai－Kunming Expressway, and was later detained at Songjiang District Detention Center in Shanghai. On the 25th of the same month, Li was transferred to Yueyang City Forest Public Security Bureau.

23. The confession of the defendant He Jianqiang has proved that: he fished for a living at Dongting Lake and hired Zhong Dejun for help. On the evening of December 23, 2014, Li Qiang drove him, together with his son He A and Zhong Dejun, to a farmer's shop at Maocao Street, Nan County from which they purchased several large－sized bags of carbofuran, which were later stored in the bunch－tussock grasses near the fish farm of “He Lao Er” at Dongting Lake. A few days later, he suggested poisoning birds with carbofuran. At 16：00 pm that day, he and Zhong Dejun left Long C's fish farm and headed for the location where carbofuran was hidden. He asked Zhong Dejun to use a bamboo pole to carry the poison to the target site and he himself went there

to scatter all the 7 bags of carbofuran. But only “three ducks” were found at the spot where he scattered carbofuran. On January 16, 2015, together with Zhong Dejun and He A, he went collecting “Huanggu fish” on a boat operated by Zhong Dejun. At about 13：00 pm, He Jianqiang picked up several swans and sharp－beaked birds dead from poison while passing by the Baihu Lake. Until the 18th, they went to Long A's fish farms, namely “Dummy's Farm”， Long's farm, “Blue Scoop farm” to collect fish. At 10：00 pm on the 18th, they gathered up to 20 sharp－beaked birds plus 7 or 8 swans near the Baihu Lake on the way back to Yueyang. They put the dead birds in several plastic bags and then left them on the boat. Then they took a wooden boat to sell the Huanggu fish to Yang A who later sent two tankers to transport the fish away. At about 17：00 pm on the same day, the defendants returned and moved the birds to the wooden boat. When anchoring the wooden boat at the Haoba Wharf, they aroused attention of the officers of the East Dongting Lake Reserve. The three immediately abandoned the boat and fled.

24. The confession of the defendant Zhong Dejun has proved that He Jianqiang was a fellow villager who would hire him to collect fish every second half of the year and operate the fishing boat. He had been helping with fish collecting since October 22, 2014 on the Chinese calendar. A week later, He Jianqiang took Zhong with him to purchase dead wild ducks from Tu Shengbao, Long A, and Fang Jianhua. He Jianqiang called Li Qiang to get the wild ducks at JunshanHaoba Wharf. Li later sent a black car to pick up the ducks and another car to drive them home. Ten days later, He Jianqiang took Zhong to acquire wild ducks and geese from Long A and Fang Jianhua. The two went ashore at JunshanHaoba Wharf where He Jianqiang called Li Qiang again. The same black car was sent to collect the birds and Li Qiang himself drove He and Zhong back to Sanjiaoxian, Yueyang. On the evening of December 23, He Jianqiang invited Zhong Dejun to join him on a trip to Nanxian County to buy carbofuran. So Zhong Dejun, He Jianqiang and He A rode in a white car driven by Li Qiang to a farmer's shop at Maocao Street, Nanxian County. They bought 18 bags of carbofuran each weighing 20 kilograms. They left the carbofuran in the courtyard of He Jianqiang's house in Sanjiaoxian. According to HeJianqiang, the pesticide was used to poison the birds at Dongting Lake. Some day between the late December 2014 and the early January 2015, Zhong Dejun went poisoning the birds in Hongqihu Lake with He Jianqiang. In the absence of Long A, Zhong and He Jianqiang scattered 2 bags of carbofuran with Long B, the son of Long A. Later, the three began to pick up wild ducks dead from poison. On that day, wild ducks approximately weighing 75 kilograms in total died from poison. The ducks were shipped to a sandstone pier near Dongting Lake of Sanjiaoxian before being picked up by a black car sent by Li Qiang. Li Qiang then drove the three home. Ten days later, He Jianqiang, in the company of Zhong Dejun, carried 5 bags of carbofuran to Fang A's boat at Baihu Lake. Zhong Dejun, He Jianqiang and the owner of the boat, Fang A, spread 3 bags of carbofuran into the lake and spent the night on board. This time they ended up with only 4 birds. They put the remaining 2 bags of carbofuran under the bunch grasses nearby and returned. On January 16th, Zhong Dejun, He Jianqiang, He A, and the wife of the owner of Long's Farm went to Long's Farm, Dummy's Farm, and Blue Scoop Farm to collect fish. At 9： 00 am on January 18, they were ready to return to Yueyang after collecting the Huanggu fish from the Dummy's Farm. When passing by Long A's fish farm, they acquired dead birds form nearby including 2 bags of migratory birds (5 white spoonbills and 10 other birds) from Zhang A, 2 bags of wild ducks weighing 30－35 kilograms from Tu A, 2 bags (about 25 kilograms of birds with pointy beaks such as nocturnal herons and herons) from Long A, 4 bags (among which were 3 bags of cygnets, totaling 10 and 1 bag of wild ducks) from Fang

Jianhua. In addition, Zhong and He picked up 2 cygnets en route. Then the birds were sorted out and put in 8 bags and left on the wooden boat. At about 14：00 pm on the same day, they returned to JunshanHaoba Wharf. For fear of being caught red－handed, they moved the birds to a different boat and took the wooden boat instead to sell the Huanggu fish to Yang A at the Haoba Wharf. After that, they moved the birds back to the wooden boat. At 17： 00 pm, they stopped the wooden boat near the Haoba Wharf and asked Li Qiang to get the wild migratory birds. It was not until then that they were found suspicious by the officers of East Dongting Lake Administration and abandoned the boat and fled.

25. The confession of the defendant Fang Jianhua has proved that he was a fisherman from Hongqi Lake of Dongting Lake Rreserve. He Jianqiang often came to him for fish collecting and purchased dead wild migratory birds from him among others including Yu A, Long C, Long A. One afternoon of October 2014 on the Chinese calendar, his uncle, Yu A, put carbofuran in a fish farm at Dongting Lake. He went collecting the birds dead from poison with Yu A the following day and they bagged about 10 kilograms in total. The birds were then sold to HeJianqiang for CNY 12 per 500g at noon in the presence of Zhong Dejun. A few days later, together with Yu A, he put another 12 smaller bags of carbofuran into the farm and killed roughly 30kg of wild ducks. and sold to He Jianqiang at the same price. On November 17th on the Chinese calendar, together with Yu A, Fang put 10 small－sized bags of carbofuran in his fish farm and killed 15kg of wild ducks and 1 swan. Fang then sold the birds at the price of CNY 12 per 500g for ducks and CNY 250 each for swan to He Jianqiang. One day of January 2015, He Jianqiang, Zhong Dejun, Long C, Long B and others had dinner at Fang's fixed boat after spreading carbofuran. They went ashore after collecting birds for 2 days. On the afternoon of January 16, 2015, Yu A spread the carbofuran into the farm once again. On the morning of the 18th, Fang and Yu A went gathering the poisoned birds. Fang picked up 4 swans, Yu 6 swans and 3 or 4 wild ducks. On the same day, Fang sold the 4 swans to He Jianqiang for CNY 900, and Yu A sold 6 swans and other wild ducks in a lump for more than CNY 1,000.

26. The confession of the defendant Long A has proved that as a fisherman in the East Dongting Lake Nature Reserve, he went fishing from September to late December each year and had seen geese, small geese, swans, wild ducks, sharp and flat－beaked birds during fishing. Because his fish farm was contracted from He D, the elder brother of He Jianqiang, he could only sell the fish to He Jianqiang. Fang agreed to He Jianqiang's proposal to poison the birds and then sell to He when the latter showed up to collect fish. From December 2014 to January 2015, He Jianqiang and Zhong Dejun brought him several large bags of carbofuran on two occassions. On the afternoon of January 13, 2015, he spread the pesticide in his farm. Three days later, he collected more than 50 kilograms of poisoned wild migratory birds including “three ducks” and “a pair of ducks” from the poisoning area. On the morning of the 18th, he sold all the birds to He Jianqiang for CNY 12 per 500g.

27. The confession of the defendant Long B has proved that one day in the late December 2014, He Jianqiang and Zhong Dejun came to the farm owned by his father Long A by boat and invited him to poison birds with them. He refused at first since his father was away but eventually agreed to go with HeJianqiang and Zhong Dejun to spread two large－sized bags of carbofuran. They collected a few dozen kilograms of wild ducks from the poisoning site earlier the following day. A week later, he saw He Jianqiang, Zhong Dejun, Long C, Ren A leave Long C's farm by boat. He asked for a free ride because his son was sick. On the way, He Jianqiang asked them to help

with spreading pesticides around Fang Jianhua's wooden boat. They went to collect birds at the poisoning place earlier the following day. All he saw was He Jianqiang picking up 2 wild ducks, then he took He Jianqiang's boat to JunshanHaoba Wharf and later Li Qiang drove him to He Jianqiang's home in Sanjiaoxian, Yueyang. Despite being involved in poisoning activities on two occasions, Long B had no idea about the number and type of birds that were poisoned to death. He only saw dead wild ducks, no swans nor sharp－beaked birds which he had seen before. He was aware that poisoning wild birds violated the law, but he went ahead anyway because He Jianqiang was persistent. Also, he wanted to make some extra money.

28. The confession of the defendant Long C has proved that he had contracted a farm from He Jianqiang's brother, He D, in the East Dongting Lake Nature Reserve since 2012. In November 2014 of the Chinese calendar, he and Long B, Ren A and others were ready to debark. When passing by the fixed boat of Yu A, he saw Yu pick up 6 swans dead from poison and give one to Ren A. In mid－November of the lunar calendar, he and Ren A took the boat operated by HeJianqiang and Zhong Dejun to the lake from JunshanHaoba Wharf. On the 20th, Ren A and he returned by taking the same boat. Long B boarded later when the boat passed his farm because his son was sick. On the way, He Jianqiang asked Zhong Dejun to carry a large bag of pesticide from Baihu sandbank onto the boat and the rest on board to help poison the birds. He Jianqiang, Zhong Dejun, and Long B spent the night on Fang Jianhua's fixed boat, while Long C and Ren A slept on the small wooden boat. They went to check the poisoning site the following day and Long C saw He Jianqiang collect 5 or 6 wild ducks and Zhong Dejun a swan. Later, they arrived at the JunshanHaoba Wharf.

29. The confession of the defendant Li Qiang has proved that He Jianqiang is his wife's uncle. Having had heard of He Jianqiang acquiring poisoned wild migratory birds in East Dongting Lake, he purchased the dead birds from He Jianqiang and transported them to Hanshou County in Changde for resale. On November 13, 2014, having had purchased more than 50 kilograms of poisoned wild migratory birds from He Jianqiang, including one cygnet, he took the birds to Hanshou County for resale by driving a car with the plate number of Xiang F××X, but was arrested by the public security authority of Hanshou County and put under residential surveillance on 15th of the same month. In December 2014, his cousin Wang A made acquaintance with He Jianqiang through Li Qiang after learning that He Jianqiang was selling poisoned wild migratory birds. On the evening of December 23, 2014, he drove He Jianqiang, He A, and “Jun Meizi” to a farmer's shop at Maocao Street with a car under the registration number of Xiang F××X to purchase carbofuran. From late December to early January 2014, through him Wang A purchased a total of more than 75 kilograms of poisoned wild migratory birds from He Jianqiang three times, including 1cygnet.During this period, Wang A entrusted Li Qiang with a payment of CNY 4，100 for one purchase. On the morning of January 18, 2015, He Jianqiang called Li Qiang to pick up him and Zhong Dejun at Haoba Wharf in Junshan District and told him that they had poisoned birds on board, so Li Qiang could contact Wang A to get the birds. He arrived at JunshanHaoba Wharf at 15：00 that afternoon. While waiting for He Jianqiang, He 's wife called to let him know that He Jianqiang was exposed. So he left.

30. The *Notes of the Detainee He Jianqiang Reporting Other's Criminal Deeds, Comprehensive Document on In－depth Criminal Analysis,* and *Records of Correction by Conversation* issued by Minluo City Detention Center of Hunan Province on November 10, 2015 and *the Record of Capturing the Suspect Li A* issued by the criminal investigation branch of

Yueyang Public Security Bureau have proved that on November 4, 2015, the defendant He Jianqiang reported the whereabouts of the fugitive Li A during the detention in the Miluo City Detention Center. According to the contact he provided, Yueyang Municipal Public Security Bureau arrested the fugitive Li A and transferred him to the Public Security Bureau of Boluo County, Guangdong Province.

31. *Wildlife Species Appraisal Opinion* (Xiang Dong Zhi Jian 〔2015〕 Dong Jian Zi No.8) issued by Hunan Province Wildlife Judicial Appraisal Center, and *the Evidence Appraisal Statement* (Xiang Gong Wu Jian (Li Hua) Zi 〔2015〕 No.100) issued by Hunan Provincial Public Security Office Forensic Center have proved that the 63 migratory birds seized on the spot by the law enforcement died of poisoning. In particular, 12 cygnets and five white spoonbills were wild animals under state protection (Category II); there were grey herons, tadornaferrugineas, eurasian wigeons, anaspoecilorhynchas, and nocturnal herons, 46 in total, which were all beneficial wild animals with important economic and scientific research value under state protection.

32. On－site interrogation video tapes have showed interrogations of the 7 defendants by the public security authority.

33. Residential Surveillance Decision [Han Gong (Zhi) Jian Ju Zi 〔2014〕 No.0200] of Hanshou County Public Security Bureau has proved that the defendant Li Qiang was put under residential surveillance on November 15, 2014 for illegally hunting, catching, transporting and selling endangered and rare wildlife.

34. The map of the functional zone of Hunan East Dongting Lake National Nature Reserve and certificate of State－owned Forest of Hunan Province has shown the scope of the East Dongting Lake National Nature Reserve and the ownership of the property.

35. *The Measures for Collecting Fees of Terrestrial Wildlife Resources Protection and Management* (Lin Hu Zi 〔1992〕 No.72), the *Charging Standard for Catching and Hunting National Key Protected Wildlife* and *the Notice on How to Determine the Value of Wildlife and Related Product in Wildlife Protection Cases*(Lin Ce Tong Zi〔1996〕No.8) issued by the Ministry of Forestry have proved that the value for national grade－two protected terrestrial wildlife shall be set 16.7 times the protection and management fee. The management fee thereof for cygnet is 80 CNY each, and white spoonbill 250 CNY each.

36. *License for Domesticating and Breeding National Key Protected Wildlife* and *License for Domesticating and Breeding Provincial Key Protected Wildlife in Hunan* have proved that YueyangXingguo Waterfowl Domestication and Breeding Farm obtained the permits to raise swan goose, white－head goose, whooper swan, cygnet, mandarin duck, mallard duck, green－winged duck, pintail duck, painted duck, kenaf ducks, spot－billed duck, grey goose, coot, heron, etc.

37. Business License of Wildlife and Related Products of Hunan Province has proved that YueyangXingguo Waterfowl Domestication and Breeding Farm obtained the permits to raise and sell grade－3 and below national protected wildlife (farmed waterfowl).

38. Evidence provided by YueyangXingguo Waterfowl Domestication and Breeding Farm has proved that during the second half of 2014 to January 2015, the price of kenaf duck was CNY 600 each, heron CNY 400 each, red－necked duck CNY 300 each, and spot－billed duck CNY 260 each, and nocturnal heron 50 CNY each.

39. Household registration information of the defendants He Jianqiang, Zhong Dejun, Fang Jianhua, Li Qiang, Long A, Long B, and Long C has showed that the defendant He Jianqiang was born on August 12, 1970, the defendant Zhong Dejun on December 22, 1965, the defendant Fang

Jianhua on March 25, 1976, the defendant Li Qiang on August 9, 1990, the defendant Long A on November 9, 1963, the defendant Long B on January 15, 1987 and the defendant Long C on October 6, 1968. All the 7 defendants had reached the minimal age of criminal responsibility by the time the crime was committed.

The court holds that the defendant He Jianqiang, in collusion with the defendants Zhong Dejun and Fang Jianhua, illegally poisoned cygnets and white spoonbills and other grade－2 national protected wild species and other wild migratory birds at Hunan East Donting Lake Nature Reserve Lake; the defendant Li Qiang assisted the defendant He Jianqiang in purchasing pesticide and was responsible for the resale of poisoned wild migratory birds throughout the whole process. The behavior of the defendants He Jianqiang, Zhong Dejun, Fang Jianhua and Li Qiang has constituted a particularly serious crime of illegally killing endangered wildlife. The prosecution against the defendants He Jianqiang, Zhong Dejun, Fang Jianhua, and Li Qiang for committing the crime of illegally killing endangered is based on facts and the defendants above are all found guilty. The defendants Long A, Long C, and Long B, incited by the defendant He Jianqiang, killed wild migratory birds at the National Nature Reserve with pesticide, causing severe damage to wildlife resources. Their behavior has constituted a serious crime of illegal hunting. The defendants Long A, Long C, and Long B, though adopting the laissez－faire approach to the behavior of poisoning birds, didn't involve in the killing of endangered wildlife. According to the principle of consistency between subjectivity and objectivity, the court shall not support the prosecution against the defendants Long A, Long C and Long B. In this joint crime, the defendants He Jianqiang, Zhong Dejun, Fang Jianhua and Li Qiang committed a joint crime of killing endangered wildlife. The defendants He Jianqiang, Zhong Dejun and Fang Jianhua played a leading role and were the principals; the defendant Li Qiang played less significant roles and was the accessory offender, a situation where mitigation of punishment shall apply. In the meantime, the criminal acts of He Jianqiang and Zhong Dejun constituted a crime of illegal killing of rare and endangered wildlife and a crime of illegal hunting. They shall be convicted and punished according to a heavier crime, namely, the crime of illegal killing of rare and endangered wildlife. After the occurrence of the crime, the defendants He Jianqiang, Zhong Dejun, Long A, and Long B turned themselves in, confessed the criminal deeds and plead guilty in court, hence constituting voluntary surrender. Therefore, their punishment shall be mitigated. Also, during detention, the defendant He Jianqiang reported the fugitives' whereabouts to the public security authority, which eventually led to the arrest of several defendants on the run, hence the meritorious act. Given the reasons above, the defendant He Jianguo shall also be subject to a reduction of punishment.

The court supports the defense attorney in the opinion that the defendant He Jianqiang voluntarily turned himself in and rendered meritorious service, holding that it is consistent with the facts and the law. However, the court has rejected the mitigation plea among other defense opinions. The defendants Fang Jianhua, Li Qiang and Long B confessed their criminal deeds and pled guilty in court and shall be subject to mitigation of punishment. The defendants Long B and Long C copied the acts of defendant He Jianqiang and others to place poison. The defendant Long B turned the defendant He Jianqiang down when the latter pitched him the idea of poisoning birds for the first time. When the second time they poisoned birds, the defendants Long B and Long C were involved incited by the defendant He Jianqiang. Although the defendant He Jianqiang asked the defendant Long C to poison and kill the wild migratory birds, the defendant Long C and Long B took no part in selling poisoned wild migratory birds to the defendant He Jianqiang or others.

Therefore, given the minor circumstances and repentance showed by the defendants Long C and Long B, the court has held that applying suspension of sentence to the two defendants will cause no significant damage to the community where they live. In addition, the criminal acts of the defendants He Jianqiang, Zhong Dejun, Fang Jianhua, Li Qiang, Long A, Long B, and Long C have caused the national wildlife resources and national property suffer from losses, all parties should assume the compensation liability. Of the CNY 35，535 worth of claim sought by the plaintiff in the incidental civil action, the court has verified the value of 63 wild migratory birds worth CNY 44，617. However, the claim of the remaining loss of CNY 8，936 has been rejected by the court due to lack of evidence. The above compensation of CNY 44，617 shall be assumed by the 7 defendants based on the specific role of each defendant in the crime. The loss of 10 cygnets worth CNY 13，360 shall be on the defendant Fang Jianhua and the fugitive Yu A, the loss other 2 cygnets worth CNY 2， 672 on the defendants He Jianqiang, Zhong Dejun and Li Qiang, the loss of 5 white spoonbills worth CNY 20，875 on the defendants He Jianqiang, Zhong Dejun, Li Qiang and the fugitive Zhang A; the loss of 2 herons, 3 kenaf ducks, 3 red－necked ducks, 11 spot－billed ducks, and 27 nocturnal herons worth CNY 7， 710 in total shall be jointly recovered by the defendants Long A, Fang Jianhua, Long B, Long C and the fugitive Tu A in proportion of 30%, 10%, 5%, 5%, and 50% respectively. Among the total loss, the defendant Fang Jianhua shall be liable for CNY 771, the defendant Long ACYN 2，313, the defendant Long CCYN 385.5, and the defendant Long BCYN 385.5; for the remaining 50% of the loss totaled CNY 3，855, the defendants He Jianqiang, Zhong Dejun and Li Qiang shall bear the joint liability given that Tu A is still at large. The defendants He Jianqiang, Zhong Dejun and Li Qiang shall also bear joint liability for all losses mentioned above. Regarding the defendant He Jianqiang under Clause 1 of Article 341, Clause 1 of Article 25, Clause 1 and 4 of Article 26, Clause 1 of Article 67, and Article 68 of *the Criminal Law of the People's Republic of China,* regarding the defendant Zhong Dejun under Clause 1 of Article 341, Clause 1 of Article 25, Clause 1 and 4 of Article 26, Clause 1 of Article 67 of *the Criminal Law of the People's Republic of China,* regarding the defendant Fang Jianhua under Clause 1 of Article 341, Clause 1 of Article 25, Clause 1 and 4 of Article 26, Clause 3 of Article 67 of *the Criminal Law of the People's Republic of China,* regarding the defendant Li Qiang under Clause 1 of Article 341, Clause 1 of Article 25, Article 26, Clause 3 of Article 67 of *the Criminal Law of the People's Republic of China,* regarding the defendant Long A under Clause 2 of Article 341, Clause 1 of Article 25, Clause 1 and 4 of Article 26, Clause 1 of Article 67 of *the Criminal Law of the People's Republic of China*， regarding the defendant Long B under Clause 2 of Article 341, Clause 1 of Article 25, Article 27, Clause 3 of Article 67, Clause 1 of Article 72, Clause 2 and 3 of Article 73 of *the Criminal Law of the People's Republic of China,* regarding the defendant Long C under Clause 2 of Article 341, Clause 1 of Article 25, Clause 1 and 4 of Article 26, Clause 1 of Article 67, Clause 1 of Article 72, Clause 2 and 3 of Article 73 of *the Criminal Law of the People's Republic of China* and additionally under Article 1, 4 and 11 of *the Interpretation of the Supreme People's Court on the Relevant Issues regarding the Application of Law in the Trial of Criminal Cases of Destructing Wildlife Resources,* Article 4, Clause 2 of Article 106 of *the General Principles of the Civil Law of the People's republic of China,* Article 49 of *the Property Law of the People's Republic of China,* it is ordered as follows:

1. The defendant, He Jianqiang, guilty of illegally killing endangered wildlife, be sentenced to 10 years of imprisonment and a fine of CNY 10,000.

(Fixed－term imprisonment shall be counted from the date the judgment begins to be executed;

if the criminal is held in custody before the execution of the judgment, one day in custody shall be considered one day of the term sentenced, i．e., the term shall start on January 19, 2015 and end on January 18, 2025. The fine shall be paid within 30 days after the judgment comes into effect; compulsory collection shall be executed by the court if the defendant fails to pay on time.)

The defendant, Zhong Dejun, guilty of illegal killing endangered wildlife, be sentenced to 10 years of imprisonment and a fine of CNY 10,000.

(Fixed－term imprisonment shall be counted from the date the judgment begins to be executed; if the criminal is held in custody before the execution of the judgment, one day in custody shall be considered one day of the term sentenced, i．e., the term shall start on January 19, 2015 and end on January 18, 2025. The fine shall be paid within 30 days after the judgment comes into effect; compulsory collection shall be executed by the court if the defendant fails to pay on time.)

The defendant, Fang Jianhua, guilty of illegal killing endangered wildlife, be sentenced to 12 years of imprisonment and a fine of CNY 10,000.

(Fixed－term imprisonment shall be counted from the date the judgment begins to be executed; if the criminal is held in custody before the execution of the judgment, one day in custody shall be considered one day of the term sentenced, i．e., the term shall start on April 8, 2015 and end on April 7, 2027. The fine shall be paid within 30 days after the judgment comes into effect; compulsory collection shall be executed by the court if the defendant fails to pay on time.)

The defendant, Li Qiang, guilty of illegal killing endangered wildlife, be sentenced to 6 years of imprisonment and a fine of CNY 5,000.

(Fixed－term imprisonment shall be counted from the date the judgment begins to be executed; if the criminal is held in custody before the execution of the judgment, one day in custody shall be considered one day of the term sentenced, i．e., the term shall start on September 23, 2015 and end on September 22, 2021. The fine shall be paid within 30 days after the judgment comes into effect; compulsory collection shall be executed by the court if the defendant fails to pay on time.)

The defendant, Long A, guilty of illegal hunting, be sentenced to two years of imprisonment.

(Fixed－term imprisonment shall be counted from the date the judgment begins to be executed; if the criminal is held in custody before the execution of the judgment, one day in custody shall be considered one day of the term sentenced, i．e., the term shall start on March 1, 2016 and end on February 28, 2018.)

The defendant, Long B, guilty of illegal hunting, be sentenced to 1 year of imprisonment and the sentence be suspended for 2 years.

(The period of sentence suspension shall be counted from the date the judgment is confirmed.)

The defendant, Long C, guilty of illegal hunting, be sentenced to 1 year of imprisonment and the sentence be suspended for 2 years.

(The period of sentence suspension shall be counted from the date the judgment is confirmed.)

2. The criminal act of the defendants He Jianqiang, Zhong Dejun, Fang Jianhua, Li Qiang, Long A, Long B, and Long Mou C has caused the nation a total of CNY 44，617 in losses. The defendants shall be jointly liable for the compensation claim sought by Yueyang Municipal Forest Bureau, the plaintiff in the incidental civil action. Of the overall compensation, CNY 14，131 shall be paid by the defendant Fang Jianhua, CNY 2，313 by the defendant Long A, CNY 385.5 each by the defendants Long B and Long C respectively, and the remaining CNY 27，402 jointly by He Jianqiang, Zhong Dejun and Li Qiang; the defendants He Jianqiang, Zhong Dejun and Li Qiang shall be jointly liable for the total loss of CNY 44，617.

The above compensation shall be paid within10 days after the judgment comes into effect.

If any party refuses to accept the Judgment, it or he may, within 10 days after the Judgment is served upon, it the party, shall submit a written appeal to the Court or appeal to the to the Yueyang Intermediate People's Court of Hunan Province. In the case of a written appeal, 1 original copy and 2 duplicates of the appeal shall be submitted.

Presiding Judge: Xiao Bingfeng

Judge：Li Lin

People's Assessor：Wen Jianshe

March 2, 2016

Court Clerk: Yang Huan

Notice：Unsatisfied with the judgment, He Jianqiang, Zhong Dejun, Fang Jianhua, Li Qiang, and Long lodged an appeal. On August 3， 2016, Yueyang Intermediate People's Court of Hunan Province rendered a criminal judgment (2016) Xiang 06 Xing Zhong No.73, deciding that the appeal should be dismissed and the original judgment should be affirmed.

Case 3: Taizhou Environmental Protection Federation v. Taixing Jinhui Company on Water Pollution

Civil Ruling

The Supreme People's Court of the People's Republic of China

(2015) Min Shen Zi No.1366

Retrial applicant (Defendant in first instance, appellant in second instance): Taixing Jinhui Chemical Company. Domicile: No.× Xingang Road, Economic Development Zone, Taixing, Jiangsu Province

Legal Representative: XU Jiangbo, Chairman of the Board of the company

Attorney: ZHAO Bing, lawyer, Jurisino Law Group

Respondent (Plaintiff in first instance, appellee in second instance): Taizhou Environmental Protection Federation. Domicile: No.× Yonghui Road, Taizhou, Jiangsu Province.

Legal Representative: TONG Ning, Secretary General of the Federation

Attorney: CHEN Xiaojun, lawyer, Jiangsu Jianghao Law

Attorney: ZHANG Wencan, lawyer, Jiangsu Tianzi Law Firm

Defendant in first instance, appellant in second instance: Jiangsu Changlong Agrochemical Co., Ltd. Domicile: No.× Tuanjiehe Road, Economic Development Zone, Taixing, Jiangsu Province.

Legal representative: WANG Weihua, General Manager of the company

Defendant in first instance, appellant in second instance: Jiangsu Shimeikang Pharmaceutical Company. Domicile: No.10－×， Xingang Nanlu, Economic Development Zone, Taixing, Jiangsu Province

Legal representative: WANG Junhua, Chairman of the Board of the company

Attorney: Zhang Yabin, lawyer, Jaingsu Hengqiao Law Firm

Defendant in first instance, appellant in second instance: Taixing Shenlong Chemical Co., Ltd. Domicile: No.×， Shugang Road, Economic Development Zone, Taixing, Jiangsu Province

Legal representative: JIANG Desheng, Vice General Manager of the company

Defendant in first instance: Taixing Fu'an Chemical Co., Ltd. Domicile: No.×， Zhonggang Road, Economic Development Zone, Taixing, Jiangsu Province

Legal representative: QIN Taohan, Chairman of the Board of the company

Attorney: YU Xinsheng, lawyer, Jiangsu Youfang Law Firm

Defendant in first instance: Taixing Zhenqing Chemical Co., Ltd. Domicile: No.×， Shugang Road, Economic Development Zone, Taixing, Jiangsu Province

Legal representative: YANG Jiqun, manager of the company

Retrial applicant Taixing Jinhui Chemical Company (hereinafter referred to as “Jinhui”) has applied to this Court for a retrial against the respondent, Taizhou Environmental Protection Federation (TEPF) due to dissatisfaction with the Su Huan Gong Min Zhong Zi No.00001 (2014) by Jiangsu High People's Court concerning the pollution tort dispute between TEPF and Jinhui together with defendants in first instance and appellants in second instance Jiangsu Changlong Agrochemical Co., Ltd. (hereinafter referred to as “Changlong”), Jiangsu Shimeikang

Pharmaceutical Company (hereinafter referred to as "Shimeikang") and Taixing Shenlong Chemical Co., Ltd., defendants in first instance Taixing Fu'an Chemical Co., Ltd. and Taixing Zhenqing Chemical Co., Ltd. In accordance with relevant laws, this court established a colligate panel to review the case. The review has now been completed.

In the retrial application, Jinhui claimed that:

1. The court of the second instance erred in the determination of the amount of acid by－products dumped by Jinhui through Jiangzhong.(1) According to the statement by DAI Weiguo etc., 653.08 tons of acid by－products produced by Jinhui was dumped by Taizhou Jiangzhong Co., Ltd. (hereinafter referred to as"Jiangzhon").(2) According to the transportation invoice issued by the Taixing branch of Xinghua Xieyu Transportation Co., Ltd. (hereinafter referred to as "Xieyu Taixing"), Jinhui provided 1702.27 tons of acid by－products to be transported. Given the court of the second instance deemed the transportation cost as equal to the cost of compensating for dumping, the amount of acid by－products involved should be determined based on the amount shown on the transportation invoice.(3) According to the records of sales invoice, DAI Weiguo etc. started dumping acid by－products sold from Jinhui to Jiangzhong since August 2012. Prior to that, Jinhui had invoiced to Jiangzhong 3822.2 tons of acid by－products. The 455.42 tons of acid by－products invoiced on December 29th， 2011 was recorded in 2012, rather than dumped in 2012. These two figures (i.e. 3822.2 tons and 455.42 tons) should not be counted in the total amount of acid by－products sold by Jinhui to Jiangzhong, and therefore the correct amount should be either 653.08 tons or 1702.27 tons.

2. There is no factual grounding for the judgement in the second instance to rule that Jinhui should pay for environmental restoration costs.(1) The rivers involved in the case do not need to be restored and compensated. Before the pollution took place, the water quality of Rutai Canal and Gumagan River was classified as Class III. By 2013, the rivers had purified themselves and the water quality remained class III. TEPF did not submit any evidence arguing that the pollution had caused any losses to any persons or properties, so Jinhui should not be liable for environmental restoration costs or compensating for any losses.(2) The judgement of the second instance did not confirm or assess the actual ecological damage to the rivers involved in the case. There is no factual or legal grounding for calculating ecological damage of these rivers based on water pollution remediation costs.(3) The method used in determining and calculating restoration costs was wrong.*Recommended Methods of Assessing Environmental Pollution Damages*(1*st Edition*) (hereinafter referred to as "*Recommended Methods*") issued by Chinese Academy for Environmental Planning of Ministry of Environmental Protection recommended three methods for assessing environmental damage costs—the "actual remediation expenses" method, the "virtual management costs" method and the "virtual remediation costs" method. The *Technical Report of Environmental Damage Assessment for Waste Acid Dumping Incident in Taixing Gumagan River & Rutai Canal on December* 19 (hereinafter referred to as *Technical Assessment Report*) determined the unit cost for water quality restoration with reference to the "virtual remediation costs" method prescribed by Article 4.5.2 of *Recommended Methods* 1*st Edition*. The report used chemical oxidation method for water quality restoration, whose unit cost, according to the *Recommended Methods,* stands at CNY 700 per ton. Furthermore, according to the *Recommended Methods,* the environmental sensitivity coefficient for the water category is 1.4－1.6. As a result, the total environmental restoration cost should be over CNY 50 million, among which CNY 8，757，855 should be the liability of Jinhui. In addition, in the first instance, TEPF argued that the six

defendants shall compensate for the water pollution damage, not restoration costs. Therefore, the judgment of the second instance exceeded the plantiff's claim by ruling the six defendants to pay for restoration costs.

3. The judgement of the second instance erred in the application of relevant laws.(1)The first edition of *Recommended Methods* had expired by the time of the second instance. According to the second edition, which should have been applied to reassess damages, there are two approaches to restore natural environmental damage－environmental remediation and ecological restoration, both based on the happening of actual ecological and environmental damage.However, there are no such ecological or environmental damage involved in the present case, so remediation/restoration is unnecessary.(2) Jinhui paid due care to the sales of acid by－products. Jinhui established contracts with the buyer and agreed on the payment of transportation costs. This is in accordance with *Contract Law of the People's Republic of China* but not with *Tort Law*.

4. TEPF does not have the standing to bring the present environment public － interest litigation (EPIL), so the judgement of the second instance erred in deeming it as an eligible party.

5. Jinhui should not be the liable party in the present case, because Jinhui did not discharge, dump or release any pollutants, neither did it incite another party to do so. Jinhui had nothing to do with how Jiangzhong disposed of the acid by－products it had purchased. There is no connection of intention between Jinhui and Jiangzhong. Therefore, Jinhui should not be liable for polluting the environment.

6. The judgement of the second instance erred in the application of law because the judgement referred to affirmation rules as prescribed in Article 170, Paragraph 1, Subparagraph 1 of *the Civil Procedure Law of the People's Republic of China* (hereinafter referred to as “CPL”), but in fact amended the judgement of the first instance.

7. The judgement of the second instance infringed upon the autonomy of Jinhui by ruling that the environmental protection authorities shall have the decision power over the execution of section four of the main text of the judgement, which should have been the autonomy of Jinhui.

8. TEPF did not file litigations against other chemical companies involved in polluting the environment. Meanwhile, the court eccepted EPILs brought by Friends of Nature, Chaoyang District, Beijing against other local companies, which may affect the amount of compensation that Jinhui shall be liable for. As a result, in accordance with Article 200 Subparagraph 2, subparagraph 6 and subparagraph 11 of CPL, Jinhui submitted the retrial application.

TEPF responded as follows：

1. As one of “relevant organizations” prescribed in Article 55 of CPL, TEPF is an qualified party and has the standing to file civil EPILs.

2. The “sales” of acid by－products by Jinhui was illegal disposal of waste materials, and the causality between its behavior and environmental pollution can be established.(1) Employees of Jinhui admitted that the so－called “sale” of its acid by－products was equal to abandoning them and did not fit any features of any contract of exchange of goods.(2) Jinhui had or should have had the knowledge that Jiangzhong was not qualified or capable of disposing of acid by－products, as was confirmed by both DAI Weiguo and YAO Xueyuan according to documentary evidence recorded on April 24th, 2013.(3) There was causality between the transfer of acid by－products from Jinhui to Jiangzhong and environmental pollution. Although Jinhui did not discharge, dump or release any pollutants by itself, it knew or should have known that Jianghzong et al. were not qualified or capable of disposing of acid by－products. In addition, Jinhui was aware that the

payment it made to Jiangzhong was not enough to dispose of acid by－products without causing any damages. By transferring the acid wastes which was of no use to itself, Jinhui provided both sources of pollution and illegal benefits for Jiangzhong.

3. The court of the second instance did not mistaken the amount of Jinhui's acid by－products dumped by Jinagzhong.(1) The figures claimed by Jinhui in the retrial application were all based on DAI Weiguo's accounting records, but the time and facts contained in the records were not complete.(2) Jinhui garbled the statements by defendants of the criminal case. ①DAI Weiguo and YAO Xueyuan confimed on August 8th, 2013 that they had dumped 19，361.16 tons of acid by－products for Changlong and Jinhui.②The actual dumping took place in late 2011, not in August 2012 as was argued by Jinhui by extracting statements of the criminal defendants.(3)YANG Jun, Vice General Manager of Jinhui, clarified on October 10th, 2013 that DAI Weiguo and YAO Xueyuan balanced the books by providing transportation receipts or gasoline coupons for Jinhui. Therefore, the amount of acid by－products shall not be determined solely by transportation invoice.

4. There was a reasonable and legal grounding for the judgement of the second instance to use "virtual remediation cost" method.(1) The polluted rivers involved in the case must be restored because large amounts of acid by－products being dumped into the rivers posed severe damages to the water quality, aquatic organisms, the riverbed and the rest of the aquatic system. The water quality inspection report released by the local government showed that the government only conducted regular water quality inspections and did not cover the overall water quality. The water quality where the acid by－products were dumped cannot not represent the damages to the river as a whole.(2) The "virtual remediation costs" method adopted in the judgement of the second instance was the correct method to be used. The "experimental value" method adopted in *Technical Assessment Report* concerned only the costs of reducing the harm of the pollution source, i．e. balancing the acid pollution using water from the Yangtze River. However, the cost of restoring the environment was not included. Precisely because of the difficulty of calculating the actual restoration expenses, the "virtual remediation costs" method was adopted in accordance with *Recommended* Methods.(3) The second edition of *Recommended Methods* was issued until after the conclusion of the first instance, so at the time when the damages occurred, only the first edition was available. In the second instance, Jinhui never claimed invalidity of *Technical Assessment Report* or applied for a reassessment on the ground that *Technical Assessment Report* had expired. In addition, the second edition of the *Recommended Methods* continued to promote the "virtual remediation/restoration costs" method as the most commonly used approach to environmental evaluation.

5. The judgement of the second instance did not err in the application of Article 170, Paragraph 1, Sub－paragraph 1 of CPL as the procedure law for the judgement.(1) The judgement of the second instance was based on the consideration that the judgement of the first instance "was essentially correct and applied the law correctly". This was consistent with Article 170, Paragraph 1, Subparagraph 1 of CPL which stated "…the facts were clearly ascertained, and the law was correctly applied". (2) The judgement of the second instance affirmed the parties responsible for environmental restoration, items to be compensated and the amount of restoration costs as were ruled in the judgement of the first instance. It only posed additional conditions regarding the payment and the deduction of restoration costs. These were not changes to the essential judgement and the application of law of the first instance. Instead, they were innovative methods adopted by

the court of the second instance with the purpose of preventing and controlling environmental pollution from the root, combining the precautionary principle and judicial punishment.(3) Jinhui contradicted itself by claiming that the deduction conditions as ruled in the judgement of the second instance lack legal grounding on one hand, while accepting that 40% of restoration costs can be replaced by technology upgrading costs. In fact, Jinhui has already applied for deductions during the enforcement of the judgement.

6. Jinhui did not establish the correct understanding of the deductions. Jinhui regarded the deductions as a violation of its autonomy, but the procedures set out in the judgement of the second instance were designed to encourage companies to upgrade their technology, convert wastes into assets and recycle in order to reduce or avoid damages of acid by－products to the environment.

7. The inclusion or omission of any other polluting entities in the present case shall not affect the justice of the judgement. Environmental restoration costs in the present case were not determined based on the overall damage of the pollution but were determined based on the category and amount of pollutants dumped by each individual polluting entity. The findings of the judgement did not remove or reduce responsibilities of other potential polluting entities, nor did it increase liabilities of the six defendants. TEPF therefore maintained that the retrial application made by Jinhui should be rejected for lack of factual and legal grounding.

In the meeting before the trial convened by this Court, Jinhui confirmed that it had applied for a retrial based on Article 200, Subparagraph 1, Subparagraph 2, Subparagraph 6 and Subparagraph 11 of CPL. It submitted the following new evidence to this court: (1)Criminal judgement Tai Zhong Huan Xing Zhong Zi No. 00001 from the Intermediate People's Court of Taizhou, Jiangsu Province (2014), which was intended to prove the wrong calculation of the amount of the acid by－products.(2) Civil Ruling Tai Zhong Huan Gong Min Su Chu Zi No. by the Intermediate People's Court of Taizhou, Jaingsu Province (2015) with the intention to prove the involvement of Jiangsu Zhongdan Chemical Engineering Technology Co., Ltd. in the pollution incident.(3) Civil Ruling Su Huan Gong Min Su Zhong Zi No. 00001 by Jingsu High People's Court (2015), which was intended to prove that the environmental restoration costs to be assumed by Jinhui was wrong.

In response to the above evidence, TEPF made the following reply: (1) Criminal judgement Tai Zhong Huan Xing Zhong Zi No. 00001 from the Intermediate People's Court of Taizhou, Jiangsu Province (2014)provided by Jinhui was consistent with the second instance judgment of the present case and cannot prove the wrong calculation of the amount of acid by－products.(2) Civil Ruling Tai Zhong Huan Gong Min Su Chu Zi No. by the Intermediate People's Court of Taizhou, Jaingsu Province (2015) and Civil Ruling Su Huan Gong Min Su Zhong Zi No. 00001 by Jingsu High People's Court (2015) are rulings on procedural issues of the present case but not rulings on the essence of the case. Even if there were other entities polluting the segment of water involved in the case at the same time－which was difficult to find out－the amount ruled in the present case shall not be affected. As a result, the new evidence provided by Jinhui cannot be used in the retrial investigation.

This court finds that the present case is a case for civil retrial review. According to Article 200 of CPL and Article 395 of *the Interpretation of the Supreme People's Court on the Application of the Civil Procedural Law of the People's Republic of China,* this Court shall examine if the cause for retrial alleged by the retrial applicant shall be supported. Therefore, the examining of the issues No.1, No.2, No.5 and No.7 raised by Jinhui were about whether Jinhui's allegations in these issues were in accordance with Article 200 Paragraph 6 of CPL; No.3, No.4 and No.5 shall be examined

in accordance with Article 200 Section 2 of CPL. In addition, in response to the new evidence provided by Jinhui and the issue that the judgement of the second instance exceeded the claim of the plaintiff, this court shall make judgements in accordance with Article 200 Paragraph 1 and Paragraph 11 of CPL.

1. On the eligibility of TEPF as the plaintiff in the present case

Article 55 of CPL stated, "For conducts that pollute the environment, infringe upon the lawful rights and interests of vast consumers or otherwise damage the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court". TEPF is a social organization registered at Taizhou Municipal Civil Affairs Bureau on February 25th，2014. With the role of a bridge between the government and the society, it aims to protect the environment of Taizhou and protect the entire humankind by bringing the idea of sustainability into practice, following a scientific approach to development, achieving the environmental protection goals set by the government of Taizhou and protecting environmental public interest. TEPF is licensed to advice on environmental decision－making and technical policy－making, protect environmental public interests and carrying out environment－related education activities. TEPF is fully eligible by law to file the present EPIL case on August 4th, 2014 in accordance with Article 55 of CPL. *Environmental Protection Law of People's Republic of China* (hereinafter referred to as "EPL") enacted on January 1st，2015 is not applicable in the present case. This court finds against Jinhui's groundless claim that TEPF is not an eligible party as the plaintiff of the present case.

2. On the causality between the sales of acid by－products by Jinhui and the pollution in Gumagan River and Rutai Canal

Jinhui and Jiangzhong agreed in the Contract of Purchase and Sales of Industrial and Mining Products signed by the two parties that Jinhui shall sell monthly 800 tons of acid by－products at market rate to Jiangzhong. According to the interrogation records of YAO Xueyuan and DAI Wiguo of Jiangzhong and inquiry records of Vice General Manager YANG and DAI Jiandong (responsible for safe production) of Jinhui, in the context of a sluggish acid by－product market, Jinhui sold the acid by－products at one CNY 1/ton but pays CNY 20 per ton of transportation subsidies to Jiangzhong to dispose of the acid as soon as possible. The payments were settled based on the actual amount of acid by－products transported by Jiangzhong. The nature of a Sales Contract is that the seller delivers goods and the buyer pays for the goods. In this case, Jinhui as the seller sold acid by－products at as low as CNY 1/ton but in reverse paid CNY 20/ton to Jiangzhong for transportation and/or compensated Jiangzhong in various forms, indicating that the Contract did not meet the features of a regular sales contract.

Acid by－products are hazardous chemicals which must be produced, sold, transported, stored and disposed of in compliance with set rules. According to Article 29, Paragraph 1 of *Water Pollution Prevention and Control Law of People's Republic of China,* it is prohibited to discharge oil, acid, alkaline or highly toxic waste liquids into waters. Acid by－products are produced alongside useable chemicals and cannot enter the market. They should be disposed of by qualified entities in accordance with laws and regulations. Producers of dangerous chemicals and chemical products should have comprehensive knowledge of the risks and polluting potential of its products and by－products. They should make sure that the production, sales, transportation, storage and disposal of the products and by－products are compliant with the law to avoid damages or risks of damages to the ecology and the environment. The acid by－products produced by Jinhui falls into the category of hazordous chemical, so Jinhui should have paid close attention to the disposal of

them. According to the interrogation records of DAI Weiguo and YAO Xueyuan, who dumped the acid by－products, and the inquiry records of YANG Jun and DAI Jiandong, Jinhui was fully aware of the dumping but did not stop it. Although Jinhui was not engaged directly in the dumping, it provided Jiangzhong, a company without qualification to handle hazardous chemicals, with acid by－products which can only be disposed of at high expenses due to the sluggish market. In addition, Jinhui did not intervene in the vast pollution in Rutai Canal and Gumagan River caused by the acid by－products, harming the public's social and environmental interests. Therefore, Jinhui should be responsible for the pollution caused by its behaviors.

3. On the grounding of the judgement on whether Jinhui shall be liable to restore the ecology and environment.

Although rivers have certain self－purification capacity, the total environmental capacity is limited. Dumping large amounts of acid by－products will inevitably cause serious damages to the water quality, aquatic life, riverbed, river bank, and the ecology and the environment downstream. Without immediate remediation, the pollution will accumulate to a level that exceeds the environmental capacity and eventually result in irreversible damages. Therefore, the defendants' liabilities cannot be relieved just because of the segment of the water body where the waste acid was dumped has been restored.

TEPF submitted an application to invite Professor Lv Xiwu from School of Energy and Environment of Southwest University to be present as an expert assessor at the court of the first instance to advise on the assessment opinions and technical issues involved in the case. Professor Lv said that dumping hazardous wastes into the water poses direct damages to ecological functionality and natural resources. The cost to restore the damaged part of the Yangzte River system far exceeds the cost of disposing of the pollutants directly, and so does the cost of human interference to reduce the risks of the pollution to an acceptable level. In addition, the appraiser He Qihuan, Professor of Nanjing University of Science and Technology, also said in court that the “virtual restoration cost” method can be adopted if it is impossible or difficult to calculate the actual costs of human intervening activities.

The liquidity of the water means that once pollutants enter the water, the site of the pollution cannot be restored to its original state. According to the first edition of *Recommended Methods,* “virtual restoration cost” methods can be adopted in this case because the restoration costs were “difficult to calculate”. In addition, the first edition and the second edition did not differ in the description of “virtual restoration cost” methods. It was correct for the judgement of the second instance to calculate the restoration expenses by multiplying the remediation costs and the amount of dumped acid by－products as set out in *Technical Assessment Report* by 4.5 times, the lower limit in the recommended sensitivity multiple for Type III Surface Water at 4.5－6.

The investigation found that in the indictment of the first instance, TEPF described compensations for water pollution in its claims, while it actually meant restoration costs as clarified in the facts and reason it submitted. The ruling of the second instance did not go beyond TEPF's claims by deciding that Jinhui must pay for the restoration costs.

4. On the factual grounding of the determination of 5，460.18 tons of acid by－products

The acid by－products were dumped straight after being received by Jiangzhong from Changlong and Jinhui without any records of how much acid by－products were delivered by the two companies respectively. Nevertheless, the amounts were recorded by Changlong and Jinhui in the form of VAT invoice. DAI Weiguo and YAO Xueyuan had reported the total amounts from the

two companies. The amounts of acid by－products sold by Changlong and Jinhui respectively and the amount dumped by Jiangzhong must first be clarified to identify the exact amount of acid by－products from Jinhui. Based on the VAT invoice and the interrogation records of DAI Weiguo, YAO Xueyuan and Ding Jingguang, the judgement of the second instance determined that Changlong sold 17，598.92 tons of acid by－products to Jiangzhong and Jinhui sold 8，224.97 tons. Then Jiangzhong sold 7，170.71 tons of the combined amount with invoice, and another 1，508.92 tons without invoice. As a result, Jiangzhong dumped a total of 17，143.86 tons of acid by－products. Since Jiangzhong dumped the mixed acid by － products from Changlong and Jinhui, it is impossible to know the exact amount of acid by－products from each company. Alternatively, the judgement of the second instance calculated on a*pro rata* basis and concluded that Jiangzhong dumped 11， 683.68 tons from Changlong and 5， 460.18 tons from Jinhui. This method is reasonable.

Jinhui's determination of the amount of acid by－products dumped by Jiangzhong based on partial interrogation records of DAI Weiguo's and YAO Xueyuan's statements and partial transportation invoice is erroneous and cannot be supported.

Criminal Judgement Tai Zhong Huan Xing Zhong Zi No. 00001 by the Intermediate People's Court of Taizhou, Jiangsu Province (2014) provided by Jinhui in the retrial application confirmed the crime committed by DAI Weiguo and YAO Xueyuan or together with Jiang Qiaohong who collected 5，460.18 tons of acid by－products from Jinhui and dumped them into Rutai Canal and Gumagan River. The amount of the acid by－products was consistent with the amount confirmed in the judgement of the second instance of the present case. Inconsistent with the scenarios set out in Article 387 and Article 388 of *the Interpretation of the Supreme People's Court on the Application of Civil Procedure Law of People's Republic of China,* the above－mentioned criminal judgement cannot prove that the judgement of the second instance of the present case erred in facts or evidence, nor can it overturn the judgement of the second instance.

5. On the violation of Jinhui's autonomy

In the present case, a social organization aiming to protect the environment and public interest has filed an EPIL to identify pollution and damages to the ecology to approach environmental governance through litigation and to resolve disputes in environmental protection through the rule of law. The courts of the first and second instance carried through the concepts set out in EPL by prioritizing ecological protection and environmental restoration. Damages to the ecology was ascertained, and restoration expenses was calculated with reference to *Technical Assessment Report* and expert opinions. In addition, the courts used innovative methods to encourage the enforcement of the payment of the restoration costs，using judicial wisdom to balance the interests of different parties. After the judgement of the second instance took effect, three out of six defendants fully carried out the ruling of the judgment. Shimeikang and Changlong eventually withdrew their applications for retrials. In particular, Changlong confirmed that the judgement of the second instance was consistent with Changlong's long － term development goals of protecting the environment and public interest. To avoid pollution from the root, Changlong invested CNY 47 million into environment projects, such as acid by － product recycling, which have passed inspection, received approval and are now in operation. By now, Changlong has performed all its liabilities and recognized that the negative impact of the litigation on the company has been transformed into motivation for it to correct the wrong and protect the environment. It can be seen that the judgement of the second instance did not violate the autonomy of companies. Instead, it has

played a guiding role of EPILs to encourage polluting entities to make technological innovations and upgrades and to perform the corporate responsibility of protecting the environment.

The fourth section of the main text of the judgement of the second instance ruled that 40% of restoration costs can be deducted if the defendant can submit certificate to prove that it has abided by environmental laws, or environmental assessment and acceptance documents upon the completion of construction of a project, or technology upgrading investment audit report issued by qualified agencies. The purpose was simply to ensure that Jinhui has upgraded its technology, not to violate its autonomy or set approval barriers. Jinhui should assume its responsibilities as a corporate and an environmental protection entity, bringing the idea of sustainability into practice and prioritize environmental protection in production by carrying out activities as per the judgement and upgrading technologies to reduce environmental risks.

6. On reduced liability of Jinhui given EPILs against other polluting entities filed by Friends of Nature, Chaoyang District, Beijing

Jinhui submitted Civil Ruling Tai Zhong Huan Gong Min Su Chu Zi No. 00001 (2015) by Jingsu Taizhou Intermediate People's Court, Civil Ruling Su Huan Gong Min Su Zhong Zi No. 00001(2015)by Jiangsu High People's Court with the intention to prove that the calculation of environmental restoration amounts that Jinhui was ruled to be liable for in the judgement of the second instance was wrong. The EPIL filed by Friends of Nature, Chaoyang, Beijing on the pollution of Gumagan River and Rutai Canal at Intermediate People's Court of Taizhou, Jiangsu Province is under trial. The judgement of the second instance of the present case did not involve any overlapping of liabilities with other polluting entities in terms of the restoration costs that Jinhui should be liable for. Therefore, this court finds the Civil Ruling Tai Zhong Huan Gong Min Su Chu Zi No. 00001 (2015) by Jingsu Taizhou Intermediate People's Court, Civil Ruling Su Huan Gong Min Su Zhong Zi No. 00001(2015)by Jiangsu High People's Court provided by Jinhui not admissible because they do not affect Jinhui's liabilities deemed in the judgement of the second instance and do not count as new evidence in the retrial examination.

7. On the application of Article 170, Pargraph 1, Subparagraph 1 of CPL in the judgement of the second instance

According to Article 170, Paragraph 1, Subparagraph 1 of CPL, “if the facts were clearly ascertained and the law was correctly applied in the original judgment, the appeal shall be rejected in the form of a ruling or judgment and the original judgment shall be affirmed”. The judgement of the second instance adjusted the timeline and conditions for Jinhui to pay for restoration expenses while upholding decisions of the first instance. It was not an amendment to the errors made in the judgement of the first instance, so the application of law was not wrong. The judgement of the second instance can encourage companies to improve technologies and lower environmental risks to reduce pollution from the root. This court will not support Jinhui's groundless claim that the judgement of the second instance erred in the application of Article 180, Paragraph 1, Subparagraph 1 of CPL.

In summary, Jinhui's retrial application is not compliant with Article 200, Subparagraph 1, Subparagraph 2, Subparagraph 6 and Subparagraph 11. Under Article 204, Paragraph 1 of CPL，

This court rejects the retrial application made by Taixing Jinhui Chemical Company.

Presiding Judge LIN Wenxue

Judge WEI Wenchao

Judge LIU Xiaofei

Judge WANG Zhanfei
Acting Judge WU Kaimin
January 31st, 2016
Judge Assistant LIU Huihui
Clerk RAO Yun
Clerk LIU Yanan

Case 4: China Biodiversity Conservation and Green Development Foundation v. Ningxia Ruitai Science and Technology Company on Tengger Desert Pollution

Civil Ruling

The Supreme People's Court of the People's Republic of China

(2016) Zui Gao Fa Min Zai No.47

Retrial Applicant (plaintiff of the first instance, appellant of the second instance): China Biodiversity Conservation and Green Development Foundation

Domicile：No.×， Xigexinli, Yongdingmenwai, Dongcheng District, Beijing

Legal Representative: Hu Deping, Chairman of the Foundation

Attorney: Wang Haijun, lawyer, Beijing DHH Law Firm

Attorney: Wang Xiao, lawyer, Beijing DHH Law Firm

Unsatisfied with the civil ruling (2015)Ning Min Gong Li Zhong Zi No.6 by the High People's Court of Ningxia Hui Autonomous Region for the environmental pollution lawsuit it brought against Ningxia Ruitai Science and Technology Co., Ltd. (hereinafter referred as "Ruitai"), China Biodiversity Conservation and Green Development Foundation (hereinafter referred as the "Foundation"), the Retrial Applicant, applied to this Court for a retrial. After ordering to bring up the present case for trial, this Court formed a panel in accordance with law, and tried the present case.The trial has now been completed.

The Foundation complained to the Intermediate People's Court of the Zhongwei City, Ningxia Hui Autonomous Region: Ruitai unlawfully made direct discharge, in the process of production, of waste water above standards into the evaporation pond, caused serious pollution of the Tengger Desert, and failed to complete its rectification by the time this lawsuit was brought. It was requested that Ruitai be ordered to：

1)Terminate its conduct of illegal pollution of environment；

2)Eliminate the danger of pollution caused to the environment；

3)Restore the ecology and environment or establish an earmarked fund for desert rehabilitation and engage a qualified third party to conduct the rehabilitation；

4)Have the court organize the plaintiff, technical experts, legal experts, deputies to the people's congress and representatives of the people's political consultative conference to inspect and accept the matters requested under item 2) and 3)；

5)Compensate for the ecological function lost before the environment is rehabilitated；

6)Make public apology on media of nationwide distribution；

7)Bear the evaluation fees, travel expenses, attorney fees and other reasonable costs expended by the Foundation; and

8)Bear the litigation costs of the present case.

The court of the first instance believed that: The Foundation cannot be deemed as a social organization that "specifically engages in public－interest activities of environmental protection" as set forth in Article 58 of *the Environmental Protection Law of the People's Republic of China* (hereinafter referred as "EPL") because although the Foundation's purpose and business scope are

to safeguard the public interest of the society, its charter fails to task it to "engage in public－interest activities of environmental protection" as set forth in Article 4 of *the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law to the Trial of Environmental Civil Public － Interest Litigation Cases* (hereinafter referred as the "EPIL Interpretation"), and the business scope as defined in the Foundation's registration certificate fails to include the business of environmental protection. The court of the first instance refused to entertain the lawsuit brought by the Foundation in accordance with Article 58 of EPL, Article 4 of the EPIL Interpretation and Article 123 of *the Civil Procedural Law of the People's Republic of China* (hereinafter referred as "CPL").

Unsatisfied with the order by the court of the first instance, the Foundation appealed to the High People's Court of Ningxia Hui Autonomous Region, and claimed that: the court of the first instance failed to correctly understand the concepts of "environment" and "environmental protection", and therefore erred in concluding that the Foundation's purpose and business scope failed to include "engage in public－interest activities of environmental protection". The appeal requested that: 1) The order of the first instance be set aside; and 2) the lawsuit brought by the Foundation be entertained in accordance with law.

The court of the second instance believed that: The Foundation's appeal was inconsistent with the provisions in Article 58 of EPL, Article 4 and 5 of the EPIL Interpretation, and the grounds of appeal invalid. In accordance with Item 1 of Subclause 1 of Article 170, Article 171 and Article 175 of CPL, the court of the second instance rejected the Foundation's appeal and affirmed the order of the first instance.

Unsatisfied with the order of the second instance, the Foundation applied to this Court for retrial and claimed that: 1) The order of the second instance failed to contain the content required for civil orders and was inconducive to the effective implementation of the EPIL system, by finding the Foundation's grounds for appeal inconsistent with Article 58 of EPL and Article 4 and 5 of the EPIL Interpretation, without clearly stating the facts and grounds of the order or conducting legal analysis of the appellate opinions. 2) The order of the first instance failed to correctly understand the concepts of "environment' and "environmental protection" and erred in concluding that the Foundation's purpose and business scope did not include "engage in public－interest activities of environmental protection". In the contrary, "Protecting biodiversity", "the cause of green development", "developing ecological civilization", "harmony between the mankind and nature", "beautiful home" and other expressions in the Foundation's charter all belong to the category of environmental protection. The order of the first instance found the Foundation not engaging in public － interest activities of environmental protection, on the sole ground that the wording of "public － interest activities of environmental protection" is absent. This is a mechanical understanding of statutory provisions, which shall be corrected. 3) The Foundation's actual engagement in public－interest activities of environmental protection has also corroborated its purpose and business scope of "public－interest activities of environmental protection" as prescribed in the Foundation's charter. Article 4 of the EPIL Interpretation eased the scrutiny standard of social organizations specifically engaging in public － interest activities of environmental protection" and embodied the judicial orientation to encourage social organizations to bring environmental civil public － interest litigations in accordance with law. Since its establishment, the Foundation had always been engaging in public－interest activities relating to environmental protection. The order of the second instance erred in understanding the above

mentioned provisions of the EPIL Interpretation and applying the law. It was requested that: 1) the orders of the first and the second instance be set aside; and 2) the lawsuit brought by the Foundation be entertained in accordance with law.

This Court has found that: During the first instance, the Foundation submitted its foundation legal person registration certificate, which shows that the Foundation is a foundation legal person registered with the Ministry of Civil Affairs of the People's Republic of China; submitted the proof of its pass of the annual inspections from 2009 to 2013, which shows that the Foundation passed annual inspections for five years in a row; and submitted its declaration of non－violation of law, which stated that the Foundation had not been subject to administrative or criminal penalty due to conducting business activities in violation of the provisions of laws or regulations within five years. During the second instance, the Foundation submitted photos of such events as "Campus Tour for Ecological Education", "EPIL Case Studies Workshop", "China Management Workshop on the Sustainable Development of Natural Reserves", "China－US Clean Air Conference" and "Save Acer Pentaphyllum in Yajiang", which show that the Foundation organized or participated in the relevant public－interest activities of environmental protection. During the retrial, the Foundation submitted its brief of historical evolution, which shows that China Elk Foundation, the Foundation's predecessor, was founded in 1985, and long engaged in the protection and breeding of elk population; submitted seven notices of case entertainment such as Hai Zhong Fa Huan Min Chu Zi No.1 (2015) issued by the Intermediate People's Court of the Haikou City, Hainan Province and Qing Hai Fa Hai Shi Chu Zi No.117 (2015) issued by the Qingdao Maritime Court, which show that many of the EPILs brought by the Foundation had been entertained; and submitted the proof of the Foundation's pass of the annual inspection of 2014.

This Court believes that: The present case is a public－interest litigation of environmental pollution brought by a social organization. The Foundation, the Retrial Applicant, believes that the court of the first and second instance erred in the application of law by refusing to entertain the Foundation's case after finding the Foundation not to be a social organization that "engages in public－interest activities of environmental protection". Therefore, the trial of the present case shall focus on whether the Foundation is a social organization that specifically engages in public－interest activities of environmental protection.

In order to ensure orderly public participation in environmental governance, establish and remedy the environmental rights and interests of the public and pursue the legal liabilities of tortfeasors in accordance with law, Article 55 of CPL provides for the EPIL system, and makes it clear that the organs and relevant organizations prescribed in the law may bring EPILs. Since the environmental interest of the public is universal and shared in nature, and no person has a direct and specific interest in the legal sense, it is necessary to encourage, guide and regulate social organizations to bring EPILs in accordance with law, so as to fully leverage the function of EPILs. Article 58 of EPL provides that: For an act polluting the environment or causing ecological damage in violation of public interest, a social organization which satisfies the following conditions may bring a lawsuit to a people's court: 1) It has been legally registered with the civil affairs department of the people's government at or above the level of a districted city; and 2) It specifically engages in public－interest activities of environmental protection for five consecutive years or more without any recorded violation of law. A people's court shall, in accordance with the law, entertain a lawsuit brought by a social organization that satisfies the provisions of the preceding paragraphs." Article 4 of the EPIL Interpretation further clarifies the criteria for social organizations to satisfy the test of

“specifically engage in public－interest activities of environmental protection”， by providing that a social organization may be found to ‘specifically engage in public－interest activities of environmental protection' set forth in Article 58 of EPL if “a social organization's purpose and scope of main business as prescribed in its charter are to safeguard the public interest of the society and it engages in public－interest activities of environmental protection. The public interest of the society concerned in the lawsuit brought by the social organization shall be relevant to its purpose and business scope.” Thus, the assessment of the Foundation's eligibility to bring the present case as a social organization that “specifically engages in public－interest activities of environmental protection” shall focus on three aspects, namely whether its purpose and business scope include safeguarding the environmental interest of the public, whether it actually engages in public－interest activities of environmental protection, and whether the environmental interest of the public it safeguards is relevant to its purpose and business scope.

1． Whether the purpose and business scope prescribed in the Foundation's charter include safeguarding the environmental interest of the public

There are diverse manifestations for the common interest of the public in surviving and thriving in a healthy, comfortable and beautiful environment. In order to determine whether a social organization's purpose and business scope include safeguarding environmental interest of the public, the judgment shall be made according to their connotation, rather than simple reliance on their literal expressions. The purpose and business scope shall be found to include the environmental interest of the public even when the social organization's charter fails to clearly spell out the safeguarding of the environmental interest of the public, but its content of work belongs to the category of protecting the various natural elements, original or human－altered, affecting the subsistence and development of the mankind, including the protection of environmental elements and their ecosystems such as atmosphere, water, ocean, land, minerals, forests, grasslands, wetlands, wild life, natural heritage, cultural heritage, natural reserves, scenic sports, cities and countryside.

As noted in *the Convention on Biological Diversity* which China signed in 1992, biological diversity means the variability among living organisms from all sources including, *inter alia,* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems. As provided in Article 30 of EPL, “In the development and utilization of natural resources, the development shall be rational to protect biological diversity and ecological safety, and the relevant ecological protection and rehabilitation management plans shall be developed and implemented in accordance with the law. In the introduction of alien species and the research, development, and utilization of biotechnologies, measures shall be adopted to prevent any damage to biodiversity.” Thus, biodiversity protection is an important content of environmental protection and an essential component of safeguarding the environmental interest of the public.

As clearly stated in its charter, the Foundation's purpose is to “extensively mobilize the whole society to care about and support the protection of biodiversity and the cause of green development, protect the country's strategic resources, promote the development of ecological civilization and the harmony between the mankind and nature, and build a beautiful home of the mankind.” This meets the requirement for biodiversity protection under *the Convention on Biological Diversity* of the United Nations and EPL. Meanwhile, “promoting the development of ecological civilization”， “harmony between the mankind and nature”， “building beautiful home of the mankind” and other content match the philosophy of green development, closely relate to environmental

protection and belong to the category of safeguarding the environmental interest of the public. Therefore, the Foundation's purpose and business scope shall be found to include safeguarding the environmental interest of the public.

2． Whether the Foundation actually engages in public－interest activities of environmental protection

Public － interest activities of environmental protection include not only planting trees, preserving endangered species, saving energy, reducing emission, rehabilitating the environment and other activities that directly improve the ecology and environment, but also environment－related publicity, education, research, training, academic exchanges, legal aid, public － interest litigations and other activities that help to improve the system of environmental governance, increase the capacity of environmental governance, and facilitate the building of broad consensus throughout the society on environmental protection. The brief of historical evolution, photos of public－interest events, notices of EPIL case entertainment and other relevant evidentiary materials submitted by the Foundation during the first instance, second instance and retrial, though not cross －examined， sufficient to show that since its founding in 1985, the Foundation has actually long engaged in environmental protection activities, including hosting environmental protection workshops, organizing ecological field trips, conducting publicity and education on environmental protection and bringing EPILs. This satisfies the provision of EPL and the EPIL Interpretation. Moreover, such evidences also prove that the Foundation has engaged in public－interest activities of environmental protection for at least five years, and met the requirement under Article 58 of EPL, namely a social organization shall have engaged in public － interest activities of environmental protection for five years and more.

3． Whether the public interest of the society concerned in the present case are relevant to the Foundation's purpose and business scope

According to Article 4 of the EPIL Interpretation, the environmental interest of the public concerned in the EPILs brought by social organizations shall have certain relevance to their purpose and business scope. This requirement aims to cause the environmental public － interest matters sued by social organizations for protection to be corresponding or relevant to their purpose and business scope, so as to ensure that the social organizations have the commensurate litigious capacity. Therefore, even though the matters sued by a social organization does not correspond with its purpose and business scope, it shall also be deemed to be an eligible party based on the test of relevance if such matters are somehow related to the environmental elements or ecosystem it protects. The EPIL of the present case was brought against the pollution of the Tengger Desert. The desert biocenosis and the complicated yet vulnerable desert ecosystem arising from the interactions between such biocenosis and its environment particularly need the mankind to cherish, make good use of, and take good care of. The Foundation claimed that Ruitai discharged waste water above standards into the evaporation pond, and seriously damaged the already vulnerable ecosystem of the Tengger Desert. The environmental interest of the public safeguarded hereby belong to the purpose and business scope of the Foundation.

In addition, as shown by the foundation legal person registration certificate submitted by the Foundation, it is a foundation legal person registered with the Ministry of Civil Affairs of the People's Republic of China. As shown by evidentiary documents on the annual inspections from 2010 to 2014 submitted by the Foundation, it passed the annual inspections in the five years before the present public － interest ligation was brought. The Foundation also submitted, in accordance

with Article 5 of the EPIL Interpretation, its declaration of non－violation of law that it was never subject to administrative or criminal penalty due to conducting business activities in violation of the provisions of laws or regulations. Thus, the Foundation meets the other requirements, under Article 58 of EPL and Article 2, 3 and 5 of EPIL Interpretation, for a social organization to bring an EPIL, and is an eligible party to bring an EPIL.

In view of the above, it was improper understanding of EPL, the EPIL Interpretation and the connotation of environmental protection that caused the orders of the first and second instance for the present case to conclude that the Foundation was ineligible to bring an EPIL. This is a wrong application of law, which shall be corrected. The Foundation's retrial requests are valid and supported by this Court. In accordance with Article 58 of EPL, Subclause 1 of Article 207 and Item 2 of Subclause 1 of Article 170 of CPL, Article 1 of the EPIL Interpretation and Subclause 2 of Article 407 and Article 332 of *the Interpretation of the Supreme People's Court on the Application of the Civil Procedural Law of the People's Republic of China,* it is ordered as follows：

1． (2015) Civil Order (Ning Min Gong Li Zhong Zi No.6) by the High People's Court of Ningxia Hui Autonomous Region and (2015) Civil Order (Wei Min Gong Li Zi No.6) by the Intermediate People's Court of the Zhongwei City, Ningxia Hui Autonomous Region be set aside; and

2． The present case be filed and entertained by the Intermediate People's Court of the Zhongwei City, Ningxia Hui Autonomous Region.

This order is final.

Presiding Judge,,Liu Xiaofei
Acting Judge,,Wu Kaimin
Acting Judge,,Ye Yang
28 January，2016
Clerk,,Wei Ran

Case 5: Friends of Nature & Fujian Green Home v. Xie, Ni, Zheng on Deforestation

Civil Judgement
Fujian High People's Court

(2015) Min Min Zhong Zi No.2060

Appellant (defendant of the first instance): Xie Zhijin, Male, DOB: 10/27/1963, Han Chinese, Self－employed, residing in Cangshan District, Fuzhou, Fujian

Appellant (defendant of the first instance): Ni Mingxiang, Male, DOB: 03/28/1965, Han Chinese, Farmer, residing in Fuqing, Fujian

Appellant (defendant of the first instance): Zheng Shijiang, Male, DOB: 04/04/1966, Han Chinese, Farmer, residing in Fuqing, Fujian

Attorney of the three appellants above: Xie Changling，Chen Yanmin，Zhong Yin (Fuzhou) Law Firm.

Appellee (plaintiff of the first instance): Friends of Nature (FON)

Domicile: Room A×××， Building ×， No.12 Yumin Road, Chaoyang District, Beijing

Legal Representative: Zhang Hehe, Deputy Director－General

Entrusted Agent: Ge Feng, Female, Director of Legal and Policy Affairs of FOA, residing in Wuchang District, Wuhan

Attorney: Liu Xiang, Golden Diamond Law Firm

Appellee (plaintiff of the first instance): Fujian Green Home Environment－friendly Center

Domicile：××， Buidling ×， Hot Spring Park, Yingji Road No.××， Gulou District, Fuzhou, Fujian

Legal Representative: Lin Meiying, Director

Attorney: Wu Anxin, Hubei Longzhong Law Firm

Defendant of the First Instance: Li Mingshuo, Male, DOB: 12/16/1968, Han Chinese, Farmer, residing in Taishun County, Zhejiang

Attorney: Qiu Shuhua, Fujian Quanxin Law Firm

Third Party of the First Instance: Yanping District Land Resources Bureau of Nanping Municipal Land Resources Bureau

Domicile: Shengli Street No.×××， Yanping District, Nanping, Fujian

Legal Representative: Huang Ge, Director－General

Attorney: He Jianhua, Fujian Shunning Law Firm

Third Party of the First Instance: Yanping District Forestry Bureau of Nanping Municipal Forestry Bureau

Domicile: Chaoyang Street No.××， Yanping District, Nanping, Fujian

Legal Representative: Wang Chengxu, Director－General

Attorney：Guo Dehui, Fujian Minyue Law Firm

Entity supporting the litigation of the first instance： Research and Service Center for Environmental and Resources Law at the China University of Political Science (also known as “Center for Legal Assistance to Pollution Victims at the China University of Political Science ad

Law")

Domicile: Room ××× ， Runbo Conference Hotel，×× Xitucheng Lu, Haidian District, Beijing

Head of the Center: Wang Canfa, Director

Attorney: Zhu Wenhe, Junyong Law Firm

Unsatisfied with the civil ruling (2015)*Nan Min Chu Zi No*.38 by the Intermediate People's Court of Nanping for civil environmental tort lawsuit brought against them by Friends of Nature (hereinafter referred as "FON") and Fujian Green Home Environment－friendly Center (hereinafter referred as the "Fujian Green Home"), with Yanping District Land Resources Bureau of Nanping Municipal Land Resources Bureau (hereinafter referred as "Yanping District Land Resources Bureau"), and Yanping District Forestry Bureau of Nanping Municipal Forestry Bureau (hereinafter referred as "Yanping District Forestry Bureau") as the third parties, appellants Xie Zhijin, Ni Mingxiang and Zheng Shijiang appealed to this court. This court formed a panel in accordance with law, and tried the present case openly on December 7, 2015. Appellants Xie Zhijin, Ni Mingxiang and Zheng Shijiang and their attorney Chen Yanmin, Ge Feng, the entrusted agent of the appellee Friends of Nature and the attorney Liu Xiang, Lin Meiying, the legal representative of Fujian Green Home Environment－friendly Center and the attorney Wu Anxin, Qiu Shuhua, the attorney of the defendant of the first instance Li Mingshuo, Guo Dehui, the attorney of the third party Yanping District Forestry Bureau and Zhu Wenhe, the attorney of the entity supporting the litigation of the first instance, Research and Service Center for Environmental and Resources Law at the China University of Political Science appeared in court to participate in the legal proceedings. The trial now has been completed.

The court of the first instance found that: affiliated to Chinese Academy of Culture, a non－government organization, the Green Culture Sub－Academy (known as Friends of Nature)was registered with Ministry of Civil Affairs on May 8, 2003 and has been engaged in environmental activities for public interest in the name of "FON". On June 18, 2010, the plaintiff FON was officially registered with Chaoyang District Civil Affairs Bureau and founded as a non－enterprise private entity, namely a NGO engaged in non－profit social service activities. According to its Charter, the purpose of the organization is to promote ecological civilization, conduct environmental research and work towards sustainable development; the business scope covers research on technology and policy related to solid waste treatment, research on solid waste's impact on ecological environment, educational programs to promote the science and research findings about solid waste. The organization passed the annual inspection in 2010, 2011, 2012 and 2013. It submitted to the court of the first instance the annual work reports between 2009 and 2014 featuring its involvement in public－interest activities including surveys on environmental issues, environmental protection and environmental education and claimed no recorded violation of law since founding.

The plaintiff Fujian Green Home was officially registered with Fujian Civil Affairs Department and founded as non－enterprise private entity, namely a NGO engaged in non－profit social service activities. According to its Charter, the purpose of the organization is to raise the public awareness of environmental protection, conserve the ecological environment and maintain the ecological balance; its business scope covers environmental protection, eco－friendly culture promotion and relevant academic and technological exchanges. The organization passed the annual inspection between 2009 and 2013. It submitted to the court of the first instance the annual work

reports between 2009 and 2013 featuring its involvement in public－interest activities including surveys on environmental issues, environmental protection and environmental education and claimed no recorded violation of law since founding.

On May 18， 2005, with the approval of the third party Yanping District Land Resources Bureau, the defendant Li Mingshuo obtained the mining license No. 350702052×××× which granted him the mining right over Hengxing Stone Factory at Yanping District, Nanping, valid from April 2005 to August 2008. The mining area was 0.0039 square kilometers, the rock type being granites and operating depth ranging from 282m to 252m below the surface. Li Mingshuo was also the holder of the business license of the factory.

On June 3，2008, with the approval of the third party Yanping District Land Resources Bureau, the defendant Li Mingshuo obtained the mining license No. 350702082××××， valid from June 2008 to August 2008. The operating depth ranged from 520m to 483m below the surface. The prospector, the coverage of mining area, the name of the mine and the type of substance being mined were consistent with the descriptions on the license No. 350702082××××. On May 28， 2008, the defendant Li Mingshuo paid CNY10,000 upfront to Yanping Land Resources for restoration of ecological environment. The defendant Li Mingshuo failed to obtain the permit to occupy the forestland for mining operations in accordance with the law.

In November 2008, Fujian Design Institute of Metallurgical Industry issued *Development and Utilization Programme for Decorative－facing Granite at Shajiyang* (*Hengxing*) *Mining Area in Yanping District* to plan the work regarding soil and water conservation, land reclamation and closure of mine site in the mining area.

On July 28, 2008, the defendant Li Mingshou and the defendant Xie Zhijin signed the *Mining Rights Transfer Contract*. On July 29, 2008, the defendant Li Mingshou signed another contract with the same content with the defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang, agreeing that the mining area Li Mingzhao was to transfer to them was located in Hulushan Village, Taiping Town, Yanping District, Nanping City, Fujian. The mine was called Yanping Hengxing Stone Factory with a mining area of 0.0039 square kilometers and the rock material being decorative－facing granite. The mining right was extended to the whole area of the top of mountain where the present mining site was situated. The mining license registered under the name of Li Mingshuo was No. 350702052××××.Li Mingshuo was responsible for renewing license for another ten years and the area of the mine site was extended to the whole area of the mountaintop. Upon the receipt of the approval of renewing the mining license, Li Mingshuo should hand over the mining right to the new holder Xie Zhijin. Li Mingshuo was responsible for building a road connecting the foot of the mountain to the top. At the end of the contract, it was noted that the former contract signed on July 28, 2008 between the defendant Li Ming and the defendant Xie Zhijin was void. The contract signed on July 29, 2008 between the defendant Li Mingshuo and the defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang was a valid one which also specified the amount of payment, the liability for breach of contract and so on. The contract was not submitted to the competent authorities for approval. After dicussion, the defedants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang decided that Xie Zhijin would be in charge of the mining operations at the site.

Failing to legally obtain the permit to occupy forestland for mining operation and get the approval of mining license extension, the defedants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang, changed the original operating site which had belonged to Li Mingshuo and started quarrying by removing the top of the mountain and dumped waste materials downhill. The operation didn't stop

until early 2010, resulting in severe damage of the forest. The defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang, also built a masonry－concrete structure under the new operating site to shelter workers. Despite orders from the Ministry of Land and Resources to halt operations, the defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang continued to send an excavator to build roads at the pit slope and expanded the operating area in June 2011, seriously damaging the local forest. Fujian Tianxiang Judicial Identification Center identified that the defendants Xie Zhijin, Ni Mingxiang and Zheng Shijiang set up the operating sites at the smaller sub－compartment No.040 and the larger sub－compartment No.08 under the compartment No.005, the smaller sub－compartment No.050 and the larger sub－compartment No.02 under the compartment No.013, covering the forestland of 10.54 mu. The waste rocks were dumped at the smaller sub－compartment No.020 and the larger sub－compartment No.02 under the compartment No.013, burying an area of 8.62 mu. The worker's shed was built at the smaller sub－compartment No.070 and the larger sub－compartment No.08 under the compartment No.005, taking up an area of 0.28 mu. In total, the defendants illegally appropriate 19.44 mu of forestland. The old operating site owned by the defendant Li Mingshuo was situated at the smaller sub－compartment No.020 and the larger sub－compartment No.02 under the compartment No.013, the smaller sub－compartment No. 050 and the smaller sub－compartment No. 070, covering an area of 8.89 mu. The occupied forestland was used for quarrying and housing waste rock and earth, which led to serious damage to the local forest. The defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang were found guilty of illegal appropriation of agricultural land and sentenced to imprisonment for one year and six months, one year and four months, and one year and two months respectively by the Yanping District People's Court on July 28, 2014. Unsatisfied with the decision, the three defendants appealed to the Nanping Intermediate People's Court which rejected the appeal and upheld the original decision.

On March 26, 2010, the defendant Li Mingshou issued a power of attorney entrusting the defendants, Xie Zhijin, Ni Mingxiang, and Zheng Shijiang, to handle the procedures related to compensation for removal of the mining site under the mining license No. 350702052××××.

On November 13, 2014, the third party Yanping District Land Resources Bureau issued "Notice on the Payment for the Restoration of Ecological Environment at the Mining Site" to the Hengxing Stone Factory registered by the defendant Li Mingshou, requiring a payment of CNY 252,000 for the restoration and treatment of the ecological environment of the mining area.

During the investigation into the wrongdoings of illegal appropriation of agricultural land of the defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang, Yanping District Forestry Bureau and Nanping Public Security Bureau produced an additional record of on－site inspection on January 20，2014, stating "Xie Zhijin, Ni Mingxiang, and Zheng Shi Jiang dumped the waste rock downhill, which overlapped part of the operating site of the former owner Li Mingshuo. That is to say the former operating site owned by Li Mingshuo was partially buried by the waste rock. On January 22, 2014, according to the on－site confirmation of the defendant Xie Zhijin's records, "the old operating site built by the former owner Li Mingshuo has been buried by the waste rocks and earth from the mining operations at the top of the mountain."On February 12, 2014, the second additional record of the on－site inspection stated "the former owner Li Mingshuo confirmed on －site that the part of his old quarry that he identified today has been partially covered by waste earth and rock from Xie Zhijin, Ni Mingxiang, and Zheng Shijiang's mining operations".

During the lawsuit, plaintiff FON commissioned China Forestry Appraisal Co., Ltd. to conduct

an environmental damage assessment. The company later produced an assessment report, stating that the total cost of ecological restoration project on the base date of assessment was CNY 1.1019 million; the damages value, i． e. the interim losses of ecological service function during the restoration, was CNY 1.34 million. The total amount of losses could be broken down into CNY 50,000 worth of loss from damaged trees, CNY 20,000 worth of loss caused by prolonged maturity of the trees, and CNY 1.27 million loss of ecological value caused by carbon release as a result of vegetation destruction, the loss of ecological service during the destruction of the forest and loss of ecological service during the restoration.

Plaintiff FON paid CNY 6,000 in assessment fee, CNY 96,200 in attorneys fee, and CNY 31,308 in other reasonable expenses for the case (including CNY 22,840 in reasonable transportation fee, CNY 4,148 in reasonable accommodation expenses. Expenditure on urban transportation and meals was determined to be CNY 4,320 with reference to “Management Measures of Business Travel Expenses for Central and State Government Officials” and actual needs); the plaintiff Fujian Green Home paid attorneys fee CNY 2,5261 and other reasonable expenses CNY 7,393,5 for the case (including transportation fee CNY 4,513.5and accommodation CNY 400. Expenditure on urban transportation and meals was determined to be CNY 2,480 with the reference to “Management Measures of Business Travel Expenses for Central and State Government Officials ” and the reality)

The court of the first instance held that there were five key issues in deciding the case：

1. Whether plaintiffs FON and Fujian Green Home were qualified as social organizations “being specialized in environmental protection public interest activities for five or more consecutive years” to bring such an EPIL? 2.Whether the defendants Xie Zhijin, Ni Mingxiang, Zheng Shijiang, and Li Mingshou, should bear the tort liability for damaging the environment and what are the forms and degree of liability? 3. Whether the damage of interim losses of service functions during the recovery of ecological environment stipulated in *the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law to the Trial of Environmental Civil Public － Interest Litigation Cases* (hereinafter referred as the “EPIL Interpretation”) could be applied to this case? 4. How to evaluate and determine the cost, attorneys fees, and other reasonable litigation fees? 5. Whether the Yanping District Land Resources Bureau and the Forestry Bureau should bear the civil liability for organizing the restoration work.

1．Plaintiffs' Eligibility：

Article 58 of the new Environmental Protection Law (hereinafter referred as the “EPL”) provides that Chinese social organizations can bring suits on behalf of the public interest in situations involving pollution or ecological damage if the organizations: (1) registered with the civil affairs departments at or above the municipal level within the district; and (2) specialized in environmental protection public interest activities for five or more consecutive years. Even though plaintiff Friends of Nature (FON), registered as a non－enterprise private entity with Chaoyang District Civil Affairs Department on June 18 2010, had not technically been registered for five years when it first filed the case, the court held it had standing because FON had been engaged in environmental protection public interest activities prior to registering and reached the five－year threshold by the time of the lawsuit with no recorded violations of the law. Therefore, it met the qualification of being engaged in environmental public－interest activities for at least five years to lodge an EPIL.

Plaintiff Fujian Green Home, registered as a non－enterprise private entity with Fujian

Provincial Civil Affairs Department on November 7， 2006, had been engaged in environmental protection public interest activities for five years with no recorded violations of the law by the time of the lawsuit. In conclusion, both plaintiffs can bring suits on behalf of the public interest in situations involving pollution or ecological damage under Article 58 of the EPL.

2．Defendants' Liability, the Form and the Degree:

The defendants Xie Zhijin, Ni Mingxiang and Zheng Shijiang illegally took a total of 19.44 mu of forestland and should be liable for the restoration of the damaged forest in accordance with the law. Although the defendant Li Mingshuo signed a contract for the transfer of mining right with the defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang, the contract was ineffective without the approval of the competent authorities. Moreover, without renewing the soon－to－be expired mining license, the defendant Li Mingshuo expanded the mining rights to the whole area of the top of the mountain where the original mining site was situated without authorization and transferred to defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang. Together with Xie Zhijin, Ni Mingxiang and Zheng Shijiang defendant Li Mingshuo is at fault of illegally occupying forestland and causing damages to vegetation. Therefore, the defendant Li Mingshuo shall jointly and severally liable for illegally occupying 19.44 mu of forestland. As 8.89 mu of the original operating site formerly belonging to the defendant Li Mingsao had been buried by the waste rocks and earth dumped by defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang, the extent to which each person is liable cannot be determined. So defendants Xie Zhijin, Ni Mingxiang, Zheng Shijiang shall jointly bear the liability for the restoration of this area. Article 18 of the *Forestry Law of the People's Republic of China* provides: “in prospecting and mining of mineral deposits and carrying out various construction projects, forestland shall not be occupied or the occupation shall be kept to the minimum level; in cases where forestlands have to be occupied or requisitioned, approval by the competent forestry administrative authority at or above the county level shall be obtained and review and approval procedures shall be handled in accordance with the laws and administrative regulations on land administration, and the entity that uses land shall pay for the restoration of forest in accordance with the relevant provisions of the State Council.” The defendant Li Mingshuo and the defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang illegally took a total of 28.33 mu of forestland for mining activities without the approval of the competent authority, constituting ecological destruction harming the public interest.

The defendant Li Mingshuo failed to provide evidence for his statement that the mining site he operated on had long existed since 1995. According to Article 24 of the Regulations on the Protection of the Mining Geo－environment issued by the Ministry of Land and Resources, “where the mining rights are transferred, the obligations of protection, treatment and restoration of the geological environment of mines shall be transferred at the same time. The transferee of mining rights shall, in accordance with this regulation, fulfill the obligations of protecting, treating and restoring the geological environment of the mine.” That is to say, when the mining rights are transferred, the obligation of restoration is also transferred. In conclusion, defendants Xie Zhijin, Ni Mingxiang, Zheng Shijiang, and Li Mingshuo, shall jointly assume the liability for forest restoration according to the law. In case of failure to comply with the court order within the time limit specified in the judgment, the defendants shall pay CNY 1.1019 million for restoration.

3．About whether the EPIL Interpretation can be applied to this case：

where a lawsuit is brought to the people's court prior to the implementation of the relevant laws and regulations because of the disputes over any civil act or event, if there is no explicit

provision in any law, regulation or judicial interpretation effective at that time, such case shall be governed by the new relevant law. Article 21 of the EPIL Interpretation officially effective on January 7, 2015 stipulates: “a people's court may support the plaintiff's claim for damages for interim losses of service functions during the recovery of ecological environment.” The case was heard on January 1, 2015 and the EPIL Interpretation was enacted and enforced in the course of the first trial. So the judicial interpretation on the losses of service functions during the recovery of ecological environment can be applied to this case. Therefore, the plaintiffs' claim for the damages for the loss of service function during the restoration period should be supported by the court. The actual damages sought by the plaintiffs for trees totaling CNY 1.34 million, including CNY 50,000 for the destruction and CNY 20,000 for the prolonged maturity, should not be deemed as the loss of ecological services function.Rather, the actual damages could only be claimed by the local collective that had use rights to the forest. The court therefore dismissed the claim but supported the remaining claims for damages for losses of ecological public service function, including the carbon release caused by the destruction of vegetation and the interim losses of ecological services during the restoration, totaling CNY 1.27 million.

4．Attorneys Fees and Costs：

In accordance with Article 22 of *the Civil Procedural Law of the People's Republic of China* (hereinafter referred as “CPL”), the plaintiff FON's claims for assessment fees of CNY 6,000, attorneys fees of CNY 96,200 and litigation costs of CNY 31,308 are reasonable and not contradicted by any applicable law and should be supported. The plaintiff Fujian Green Home's claims for attorneys fees of CNY 25,261, charged in accordance with relevant rules with a rate of 1% of the value of the subject matter of the litigation, are also within a reasonable range and should be supported.

5．Third Parties' Responsibilities：

The court held that the district land and resource bureau and the forestry bureau were not responsible for supervising the restoration work because they have no civil legal relationship to the case. Although they are charged with enforcing forestry and land protection laws and regulations in their jurisdiction, they only have administrative authority.

In view of the above, in accordance with Article 117 and 130 of CPL, Article 58 of EPL and Article 18, Article 20, Article 21 and Article 22 of the EPIL Interpretation, the defendants were ordered to：

1． remove the existing sheds, equipment and waste rocks and earth from the quarry site at Hengxing Stone Factory in Hulushan at Yanping, Nanpin, restore the function of the damaged forestland of 28. 33 mu by planting new trees in accordance with the standards of the Technical Regulations for Afforestation (DB35/T84 — 2005) and the local requirements for plantation techniques and tend the newly—planted trees for three years (starting from the date of acceptance) within five months after the decision took effect；

2． pay CNY 1.1019 million to a special account designated by the Nanping Intermediate People's Court for site remediation if the defendants Xie Zhijin, Ni Mingxiang, Zheng Shijiang, and Li Mingshuo fail to comply with the court order；

3．be liable for CNY 1.27 million in ecological interim losses to be paid into a remediation account designated by the Nanping Intermediate People's Court for ecological restoration projects.

4．pay the plaintiff FON the assessment fee of CNY 6,000, the attorneys fees of CNY 96,200 and other reasonable litigation costs of CNY 7,393.5, a total of CNY 133,508 within 10 days after

the decision takes effect.

5．pay the plaintiff Fujian Green Home the attorneys fees of CNY 25,261 and other reasonable litigation costs of CNY 7,393.5， a total of CNY 32,654.5 within 10 days after the decision takes effect

6．Other claims sought by the plaintiffs FON and Fujian Green Home were dismissed.

If the payments above mentioned fail to be made within the time limit specified in the judgement, double interest on the debt for the belated payment shall be paid under Article 253 of CPL. Of the case acceptance fees of CNY 26， 335 and preservation fees of CNY 5,000, the defendants Xie Zhijin, Ni Mingxiang, Zheng Shijiang, and Li Mingshuo should assume CNY 30， 775 and the plaintiffs FON and Fujian Green Home should assume CNY 560. The court then approved plaintiffs' application for a waiver of the payment.

After the sentence at the first instance, the defendants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang, appealed to this court against the decision of the court of the first instance on the grounds that：

1．The court of the first instance failed to find facts needful to sustain the conclusion that the appellants' act constitutes a tort and did not make any finding on the policies enacted by the local authorities as well as their violations of administrative laws and negligence. Instead, the court pinned the liability that shall be assumed by the authorities on the appellants. The ruling was unfair and unjust.

2. The assessment opinions on the restoration fees and interim losses of ecological service functions during restoration should not be used as evidence in determining ecological damages.

3. The interim losses of service functions during the recovery of ecological environment provided by the Supreme People's Court's EPIL Interpretation could not be applied to this case. The original judgement was incorrect.

4. The plaintiff FON had not been registered for five years when it first filed the case, that is， specialized in environmental protection public interest activities for less than five consecutive years. So the plaintiff FON was not an eligible party to bring such a suit. The defendants lodged an appeal for setting aside the original judgment and dismissing the claims of plaintiffs in the first instance on the grounds that the court failed to find facts needful to sustain its conclusion of the law, the laws were applied incorrectly and the procedure was illegal.

The appellees FON and Fujian Green Home contended that：

1．The appellants were clearly at fault when carrying out mining activities without approval. There was no direct link between the policies enacted by the local authorities as well as the authorities' violations of administrative law or negligence and the appellants' tortious liability for damages caused to environment.

2． The assessment opinion was provided by capable experts who provided professional opinions on the cost of ecological environment restoration and the interim losses of service function and appeared in court for inquiry. The opinions should be accepted.

3．Both the *Tort Law of the People's Republic of China* and the *General Principles of the Civil Law* provide for forms of bearing civil liabilities such as restitution, compensation for losses, etc. and interim losses of service functions during the recovery of ecological environment should be included. The interim losses of service functions during the recovery of ecological environment provided by Supreme People's Court's EPIL Interpretation can be applied to this case.

4． FON has been engaged in environmental public interested activities for more than five

consecutive years, making it an eligible party to bring an EPIL.

In conclusion， the facts were clearly ascertained, the evidence for the act was conclusive, the application of laws was correct and the procedure was legal. The appellees requested that the appeal be rejected and the original decision be upheld.

One defendant of the original trial, Li Mingshuo agreed with the claims of the appellants, and requested that the case should be retried and the claims the appellees sought against him should be rejected.

The third party Yanping District Forestry Bureau contended that the original court held that the bureau had no civil legal relationship to the case as it was only responsible for enforcing forestry and land protection laws and regulations and only had administrative authority. Therefore, the bureau should not bear the liability as the third party. In conclusion, the facts were clearly ascertained, the evidence for the act was conclusive, the application of laws was correct and the procedure was legal. The third party requested that the original decision be upheld by the court of the second instance.

As an entity supporting the litigation, the Research and Service Center for Environmental and Resource Law at the China University of Political Science submitted a statement that the appellants' act of destroying the ecological environment constituted a gross violation of the laws and regulations on environmental protection and caused serious damage to the public interest. The appellees had been specialized in environmental public interest activities for years and met the qualification for lodging an environmental civil public－interest litigation. The center therefore supported the appellees in bringing an EPIL.

In the trial of the second instance, the appellants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang supplemented the following five pieces of evidence to this court：

1．A copy of “Letter on Coordinating the Solution to Mineral Overlapping Caused by Newly－built Hefei to Fuzhou Railway Passing Through Nanping” (Document No. [2009] of Preparatory Group of Hefei to Fuzhou Railway 〈Fujian－Jiangxi〉 Company)；

2．A copy of “Letter on Forwarding the ‘Letter of Preparatory Group of Hefei to Fuzhou Railway (Fujian－Jiangxi) Company on Coordinating the Solution to Mineral Overlapping Caused by Newly－built Hefei to Fuzhou Railway Passing Through Nanping' ” (Document No. [2009] of the Office of Nanping Municipal People's Government of Fujian Province)；

3．A copy of “Meeting Notes on Studying the Mineral Overlapping Issue Caused by Beijing－Fuzhou High－Speed Railway Running through Yanping District” (Document No. 10 [2010] of Nanping Yanping District Railway Construction Headquarter)；

4．A copy of “Meeting Notes of Beijing－Fuzhou Fujian－Jiangxi Company and Nanping Land Appropriation Headquarter for Hefei－Fuzhou Railway Construction on Coordinating the Solution to Mineral Overlapping Caused by Beijing－Fuzhou High－Speed Railway Running through Yanping District”.

The above evidence was submitted to legitimize the appellants' unpermitted mining: the appellants failed to obtain the license because of the suspension of government service as a result of the railway construction efforts.

5．A copy of the electricity consumption record of Hengxing Stone Factory between October 2008 and October 2010 to prove that the mining activities took place between November 2008 and July 2009 and have stopped since August 2009.

The appellees FON and Fujian Green Home confronted that none of the five pieces of

evidence submitted by the appellant was new given the time they were obtained. The first four pieces were irrelevant to the case. The last piece failed to prove that the appellants had suspended production since August 2009. In the opinion of this court, the five pieces of evidence submitted by the appellant had been obtained before the first instance. The appellants should have submitted such evidence within the evidence－adducing period in the trial of the first instance, and had exceeded the evidence－adducing period for it to adduce evidence after the trial of second instance began. Also the evidence does not belong to the category of new evidence, hence having no effect on ascertaining the appellants' infringement fact and determination of liability assumption in the original judgement. Therefore this court shall not admit it.

Through trial, the facts found at the trial of the first instance are clearly ascertained and confirmed by this court.

Regarding the FON's ineligibility of bringing and EPIL brought up by the appellants Xie Zhijin, Nimingxiang and Zheng Shijiang, it was found that even though plaintiff FON, registered as a non－enterprise private entity with Chaoyang District Civil Affairs Department on June 18，2010, had not technically been registered for five years when it first filed the case, it still had standing because FON had been engaged in environmental protection public interest activities prior to registering. Therefore the judgment of the first instance was not inappropriate in determining that the plaintiff FON was eligible in bringing an EPIL under Article 58 of EPL. The grounds of appeal of the appellants were untenable and should not be supported.

Regarding the grounds of appeal that the appellants Xie Zhijin, Ni Mingxiang and Zheng Shijiang should not bear the tort liability, it was found that the appellants Xie Zhijin, Ni Mingxiang and Zheng Shijiang illegally took land for mining operations without the approval of the authorities, causing severe damages to the forest of a total of 19.44 mu and should bear liability for environmental tort in accordance with the law. In addition to the injury to the forest, the appellants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang dumped the waste rocks and earth from mining activities onto the original operating site formerly belonging to the defendant of the first instance Li Mingshuo, burying an area 8.89 mu. As a result, the extent to which each person is liable cannot be determined. They should bear joint and several tort liabilities. The defendant of first instance Li Mingshuo, without the approval of the administrative authorities, expanded the mining right to the whole area of the top of the mountain where the original mining site was situated without authorization and transferred to appellants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang. Damages were caused to 19.44 mu of forest due to the joint error of defendants Xie Zhijin, Ni Mingxiang and Zheng Shijiang and defendant Li Mingming and joint and several liabilities should be borne.

The act of illegal appropriation of forestland and forest destruction of the appellants Xie Zhijin, Ni Mingxiang, Zheng Shijiang and the defendant of the first instance Li Mingshuo has constituted an infringement upon the forest resources, not minerals. Under Article 18 of the *Forestry Law of the People's Republic of China,* having illegally taken the forestland for mining activities without the approval of the competent authority, the appellants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang and the defendant of the first instance Li Mingshuo, shall bear the liability for forest restoration. Whether there is violation of administrative law or negligence on the part of the local authorities does not affect the tort liability assumption on the part of the appellants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang and the defendant of first instance Li Mingshuo. In conclusion, the fact about the appellants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang and the defendant of the first instance Li Mingshuo shall bear joint and several tort liabilities for harming 28.33 mu of forest

was well－founded in the judgment of first instance. The grounds of appeal of the appellants were untenable and should not be supported.

Regarding the grounds of appeal that the assessment opinion on the cost of ecological environment restoration and the interim losses of service function couldn't be accepted as evidence in determining ecological damages facts, it was found that the report was produced by a certified assessment institute, China Forestry Appraisal Company. Although the company didn't provide the appraisers' qualifications specifically related to assessment, most of them were either professors of ecology or holders of PhD in ecology, including Li Zhenji, a professor of ecology and ecological PhD holders Wu Dongdong and Jing Jianping, all from Xiamen University. They also appeared in court to accept inquiry. Their opinions should be considered opinions from experts. Moreover, the appellants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang and the defendant of first instance Li Mingshuo didn't submit a request for reassessing the cost of ecological environment restoration and the interim losses of service function, Under Article 23 of EPIL Interpretation, the judgment of first instance referring the opinion as expert opinion to determine the reasonable cost of ecological environment restoration and the interim losses of service function was not contradicted by any law. The grounds of appeal of the appellants therefore were untenable and should not be supported.

With regard to the grounds of appeal that the interim losses of service functions during the recovery of ecological environment supported by the EPIL Interpretation could not be applied to this case, it was found that where a lawsuit is brought to the people's court prior to the implementation of the relevant laws and regulations because of the disputes over any civil act or event, if there is no explicit provision in any law, regulation or judicial interpretation effective at that time, such case shall be governed by the relevant new law. The *Tort Law of the People's Republic of China* and *General Principles of the Civil Law* provide that the infringing parties shall be held liable for torts but specify no compensation matters. The case was first heard on January 1，2015. The EPIL Interpretation has been enacted and enforced on January 7，2015, which was during the trial of first instance. Under Article 22 of the EPIL Interpretation, the plaintiff's claim damages for interim losses of service functions during the recovery of ecological environment can be supported by a people's court. Therefore, under the EPIL Interpretation, losses of service functions during the recovery of ecological environment belong to the compensation matters, hence applicable to this case. The activities of occupying forestland of appellants Xie Zhijin, Ni Mingxiang, and Zheng Shijiang and the defendant of the first instance Li Mingshuo constituted ecological destruction harming the public interest for which they should not only bear joint and several tort liabilities but also the joint responsibilities for the interim losses of service functions during the recovery of ecological environment. In conclusion, the grounds of appeal of the appellants therefore were untenable and should not be supported.

In view of the above, this court held that the grounds of appeals of the appellants Xie Zhijin, Ni Mingxiang and Zheng Shijiang and the answer of the defendant Li Mingshuo of first instance lacked factual and legal basis, which were untenable and should not be supported. The opinions of the appellees FON and Fujian Green Home and the third party Yanping Distric Forestry Bureau were tenable and should be supported. The facts were clearly found and the law was correctly applied in the original judgment which should be sustained.

In accordance with Item 1 of Subclause 1 of Article 207 of *the Civil Procedural Law of the People's Republic of China,* it is ordered as follows：

1．The appeal be rejected and the original judgement be sustained; and

2．The acceptance fees for the trial at second instance of CNY 26，335 be jointly assumed by appellants Xie Zhijin, Ni Mingxiang and Zheng Shijiang.

This order is final.

Presiding Judge,,Zhu Changlin

Judge,,Li Heping

Acting Judge,,Lin Jinbin

,,

14 December，2015

Clerk,,Lin Hui

Case 6: Xuzhou People's Procuratorate v.
Hongshun Paper Company on Water Pollution

Civil Judgment
Jiangsu High People's Court

(2016) SuMinZhongNo. 1357

Appellant (defendant in the original trial): Xuzhou Hongshun Paper Co., Ltd. Address: Zhaozhuang Village, Liuxin Town, Tongshan District, Xuzhou City, Jiangsu Province.

Legal representative: Shang Aiping, Manager of Xuzhou Hongshun Paper Co., Ltd.

Entrusted agent: Zhou Xiaotian, staff of Xuzhou Hongshun Paper Co., Ltd.

Attorney: Meng Qiu, Jiangsu Huaihai Zhengda Law Firm.

Appellee (××): People's Procuratorate of Xuzhou City, Jiangsu Province. Address: No. 128, Xi'an South Road, Xuzhou City.

Legal representative: Han Xiaoyun, Chief Procurator of the People's Procuratorate of Xuzhou City, Jiangsu Province.

Unsatisfied with Xuzhou Intermediate People's Court's (2015) Civil Judgement on the environmental pollution damages dispute (Xu Huan Gong Min Chu Zi No.6) with the appellee Xuzhou Municipal People's Procuratorate, Jiangsu Province, the appellant Xuzhou Hongshun Paper Co., Ltd. (hereinafter referred to as Hongshun) appealed to this court. A collegial panel was formed under the law after the case was filed on November 7, 2016. Since the parties involved did not submit new facts, evidence or reasons, the collegial panel held that there was no need for the court hearing. The case was not publicly heard in accordance with the Article 169 (1) of the *Civil Procedure Law of the People's Republic of China*. Now the trial has been concluded.

The appellant Hongshun Company requested that the first－instance judgement be rejected and the claim by the public prosecutor be dismissed or the payment for ecological restoration be reduced to CNY 45,000. The appellate grounds and defenses raised by the appellant Hongshun Company were：

(1) The claim of the public prosecutor did not meet the conditions for acceptance and should be dismissed; the court of the first instance rendered a judgement irrelevant to the public prosecutor's claim and the trial procedure should be deemed illegal. The amount of tort damages claimed by the public prosecutor to Hongshun Company was three to five times the baseline of CNY 269,100, which was a round number. The claim was unclear and should be dismissed according to the law. The original judgment's decision on the payment for ecological restoration, a claim that the public prosecutor didn't file in the original trial, was irrelevant to the claim. Therefore, the trial procedure should be deemed illegal.

(2) Hongshun Company should not bear the cost of ecological restoration. Despite the fact that Hongshun Company illegally discharged the wastewater, the contents of the discharged wastes were mainly organics, lignin and cellulose and there were very few toxic and hazardous substances such as heavy metals. Since the water body could purify itself, the water quality of the Subei River was barely affected, hence the discharge of wastewater causing no ecological damages.

(3) The coefficient of 2.035 times used to decide the damages of environmental damages in

the original judgment was too high. Hongshun Company reused waste paper to produce the corrugated paper. The wastewater generated during the manufacturing process was mainly from pulping, filtration, flotation and papermaking, different than that from de－inking or bleaching which had a much higher pollutant load. Therefore, the ecological restoration should be relatively easy in this case. Therefore, the court should have taken the coefficient 1.5 times within the range of 1.5 times－3 times for ecological damages compensation stipulated in the Virtual Disposal Cost Method to decide the environmental damages.

(4) The court of first instance took 3 to 5 times the base of CNY 264,455 to calculate the cost for ecological restoration fee and loss of ecological service， which lacked legal basis. The identification of losses of ecological service lacked factual basis. With the ability of self－purification as a result of the fluidity of water, the water quality of Subei River had already been recovered, thus no loss of the ecological function incurred.

(5) In the original judgment, no deduction of the payment for restoration and service function losses was considered, though Hongshun Company had paid a fine of CNY 150,000 before. The Environmental Protection Bureau of Tongshan District had imposed a fine on Hongshun Company under the Water Pollution Prevention and Control Act. The legislative purpose of the Act was to prevent and control water pollution and to protect and improve the environment. The fine paid by the Company should be used to improve the environment, which was consistent with the purpose the compensation claims in this case. The amount of the fine already paid by the company should be deducted from the compensation fee.

The appellee, Xuzhou Municipal People's Procuratorate, did not submit a written reply after receiving the appeal.

Xuzhou Municipal People's Procuratorate instituted an action to the court of first instance to request that Hongshun Company restore the environment of the Subei River to the original condition and compensate for the interim losses of ecological service function during the restoration; if Hongshun Company failed to restore the environment to the original condition, the procuratorate would requested an order that the company pay directly three to five times the base of CNY 269,100 in compensation under the Opinion of the Environmental Pollution Damage Advisory. Besides, the consulting fee of the expert advisor in this case, which was CNY 3,000 in total, should be borne by the Company.

The action was instituted based on the grounds and facts as follows：(1)Hongshun Company released untreated wastewater into the river through a hidden outfall respectively on April 27, 2013, April 5－6, 2014, and February 24－25, 2015. 2， 600 tons of wastewater were released without permission from April 5 to 6, 2014 and February 24 to 25, 2015. Hongshun company polluted the environment and should therefore pay for the ecological restoration and the loss of ecological service functions. (2) The company should bear the tort liability by paying for the restoration and ecological service function losses in the amount determined by the *Virtual Disposal Cost Method*. (3) The Company laid a hidden outfall to discharge untreated wastewater from industrial activities for three consecutive years with the volume increasing each year. It was reasonable to assume due to the dysfunction of the pollution prevention and control equipment between 2013 and 2015, volume of wastewater discharged should stand over 2， 600 tons. A cost of CNY 269,100 for restoring environment damaged by 2,600 tons of wastewater should be used as a base and should be multiplied by 3 to 5 to determine the ecological and environmental damages.

Hongshun Company contended in the first instance that as a civil welfare enterprise dedicated

to the recycling of the waste materials, Hongshun Company was willing to pay for theecological damages it had caused. However, it held that: (1) the sample taken from the Subei River showed that the pollutants discharged didn't exceed the limit too much, hence very limited influence on irrigation. With the capacity of the self－purification, the water quality of Subei River had reached the V－class quality standard, so the Company should not bear the responsibility for restoring it to original condition. (2) Hongshun Company agreed to determine the restoration fee in accordance with the "Virtual Disposal Cost Method" and also agreed that restoration expenses should be determined between 1.5 to 3 times the virtual disposal cost. Since the contents of the wastewater discharged by Hongshun's were mainly organic matter and there were very few toxic and hazardous substances such as heavy metals. The ecological damage it caused was limited and restoration was relatively easy. Therefore, the coefficient used to determine the ecological restoration cost should be 1.5. In addition, there was no analysis on the quality of the 600 tons of wastewater discharged by the Company in 2014. Considering that the customer's price was lower then, the calculation coefficient should be lower than that of the 2015. (3) The public prosecutor's request that Hongshun Company be liable for a cost of ecological restoration three to five times the base CNY 261,100 should be deemed groundless; the service function loss claimed by the public prosecutor was not supported by evidence and thus untruthful. (4) Hongshun Company had already paid a total of CNY 150,000 in two administrative penalties, which should be used for environmental treatment and be deducted from the amount of damages for ecological restoration.

The court of first instance held that：

On August 20, 2008, Xuzhou Municipal Environmental Protection Bureau issued *the Reply on the Environmental Impact Report for the High － strength Corrugated Paper Technology Improvement with an Annual Production of* 60,000 *Tons Project of Hongshan Paper Mill in Tongshan County* (Xu－Huan－Xiang [2008] No. 75 (hereinafter referred to as the Technology Improvement Project Report). In December 2014, Jiangsu Provincial Environmental Protection Department issued a pollutant discharge permit to Hongshun Company, requiring the Company to implement the discharge standard for "enterprises of the joint production of pulp and paper" as stipulated in the Table 2 of *the Standard for the Discharge of Water Pollutants in Pulp and Paper Industry*(GB3544－2008). The limit of discharged wastewater were 195,000 tons per year, and the wastewater can only be reused for recycling or irrigation and cannot be discharged into surface water. From 2013 to 2015, Hongshun's production project of 60,000－ton of high－strength corrugated paper technical improvement had been running as planned.

On April 27, 2013, the Liuxin Environmental Inspection Detachment of the Environmental Protection Bureau of Tongshan District, Xuzhou City, found that in the production project of 60,000－ton of high－strength corrugated paper technical improvement, Hongshun Company laid a hidden outfall to release untreated waste water and its sewage treatment equipment was dysfunctional.

From April 5th to 6th, 2014, Hongshun Companylaid a hidden outfall to release 600 tons of untreated waste water into the Subei River. On April 18, 2014, the Environmental Protection Bureau of Tongshan District of Xuzhou City issued *the Tong Huan Ze Gai Zi* 〔2014〕 *No*. 21 *Decision on Correcting Environmental Violations* to order the Company to dismantle the hidden outfall immediately. On May 12, 2014, the Environmental Protection Bureau of Tongshan District of Xuzhou City issued *the Tong Huan Fa Zi* 〔2014〕 *No*. 25 *Administrative Penalty Decision* and imposed a fine of CNY 50,000 on Hongshun Company. On August 14, 2014, Hongshun Company

paid the fine of CNY 50,000.

From February 24 to 25, 2015, Hongshun Company laid a temporary iron outfall 20 centimeters in diameter to discharge the untreated wastewater into the Subei River from the south of the Company's sewage treatment plant. There was a total of 2,000 tons of wastewater released. On February 25, 2015, the Environmental Monitoring Station of Tongshan District of Xuzhou City took samples from the wastewater and found that "the chemical oxygen demand (COD) was 1180 mg/L, ammonia nitrogen 28.2 mg/L, and total phosphorus 1.60 mg. /L", which were 12.1 times, 2.5 times, and 1 time respectively higher than the limits set by *the Standard for the Discharge of Water Pollutants in Pulp and Paper Industry* (GB3544 — 2008). On March 12, 2015, the Environmental Protection Bureau of Tongshan District of Xuzhou City issued *the Tong Huan Fa Zi* 〔2015〕 *No*. 6 *Administrative Penalty Decision,* imposing a fine of CNY 100,000 on Hongshun Company. On April 27, 2015, Hongshun Company paid a fine of CNY 100,000.

The Subei River enters the Bu Lao Section of the Beijing－Hangzhou Canal via Shun River. The Canal is one of the main rivers for irrigation and drainage. The public prosecutor paid an expert consultation fee of CNY 3,000 for evidence collection.

The court of first instance held that：

(1) Hongshun should bear the tort liability for restoration. Hongshun violated the *Water Pollution Prevention and Control Law of the People's Republic of China* and other laws and regulations by illegally discharging wastewater in 2013, 2014 and 2015. The untreated wastewater in 2014 and 2015 was released into the Subei River, causing environmental pollution. Hongshun should bear the liabilities according to the law. Though the effluent discharged by Hongshun was gradually diluted, it could not be considered that it only caused very limited or no damages to the environment. As the river flows, the pollution spreads downstream. The improvement of the water quality at the discharging point couldn't serve as an indicator of the restoration of the regional water ecological environment and the ecological environment was still in dire need of restoration. Even though the water quality of the Subei River had reached the standard, alternative schemes were still needed to restore the regional ecological environment, a liability Hongshun should assume. Given that Hongshun explicitly stated it was beyond its capability to restore the environment or even propose a restoration scheme, according to Article 20 of *the Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations* (*hereinafter referred to as SPC's EPIL Interpretation*), Hongshun should bear the ecological restoration cost as an alternative to restoring the ecology and environment to the original condition.

(2) The technical experts from both the public prosecutor and Hongshun agreed that the ecological restoration cost of this case could be determined using Method of Virtual Disposal Costs in accordance with the *Opinions on the Environmental Pollution Damage Assessment and Evaluation* (*China Council for International Cooperation on Environment and Development* 〔2011〕 *No*.60) and the *Recommended Methods for Environmental Damage Identification and Evaluation* (*Second Edition*) (hereinafter referred to as the "Recommended Methods"); both parties agreed on the price of CNY 50 per ton for the treatment of wastewater in 2014 and 2015. Having had taken into account factors such as the content of pollutants and severity of ecological damage, the court decided to take the mean value of the coefficient suggested by the technical experts of both parties, which was 2.035 times. Since the production techniques and the gravity of environmental pollution caused by Hongshun Company in 2014 were not vastly different from

those in 2015. Plus, Hongshun failed to prove that there was a substantial difference between the two discharges. Therefore, the approach applied to determine the value of damages of ecological environment caused by the discharge of 600 tons of wastewater in 2014 should be the same with that in 2015. In 2014 and 2015, Hongshun illegally discharged 2，600 tons of wastewater, so the total ecological restoration cost should be 2600×50×2.035＝264550 (CNY) according to Method of Virtual Disposal Costs.

(3) Hongshun's EIA report of the project and the environmental protection acceptance application forms upon the completion of the construction indicated that each day the production equipment in operation could generate up to 960 tons of wastewater, leading to the annual discharge volume as high as 195,000 tons. Although the court made an explicit explanation, Hongshun still failed to provide evidence regarding recent years' output, annual volume of the discharged wastewater and installment and operation of pollutant prevention and control equipment to prove that its illegal wastewater discharge didn't exceed 2，600 tons. According to Article 108 of the SPC's EPIL Interpretation, it is highly probable that the actual volume of wastewater discharged by Hongshun was way above the maximum level of 2，600 tons. The operating cost of pollution prevention and treatment facitities, which was CNY 50 per ton of wastewater, meant that the company could harvest hefty ill－gotten gains from illegal discharges. Hongshun was found guilty of illegally discharging pollutants through a hidden outfall three times for three years in a row. It continued and even ramped up wastewater discharge after receiving inspection advice from the environmental protection department and being fined, the company's subjective fault was evident. Since the environmental tort and its implications are complicated, persistent, hard to identify and migrating to wider areas, behavior will have damaging and expansive impact, making it hard to fix evidence. Therefore, determining Hongshun's liability for the damages just based on the fact that it discharged 2,600 tons of wastewater was not well－grounded. The facts of the case and related impact should be taken into consideration to determine the cost of ecological environment restoration.

Under the Article 21 of the SPC's EPIL Interpretation, where the plaintiff requests the defendant to pay expenses for the loss of service functions from the period when the ecological environment is damaged to the restoration thereof, the people's court may support such a request in accordance with law. The technical experts whose appearance in court was applied by the public prosecutor suggested that the inflow of wastewater with high concentration of pollutants into the river would cause the quality of the water to drop below the irrigation standard and further impact the water quality of the Beijing－Hangzhou Grand Canal. In view of the complexity of the polluted environment and the diversity of its ecological functions in this case, the objective existence of the loss of service function should be factored in when determining the liability for damages even though it was hard to calculate the loss accurately.

Based on the found pollution facts, the severity of violation of the law and subjective faults, the operating costs of pollution prevention and control environment, the operation of Hongshun Company, the illicit gain from discharging wastewater without permit, the range the environment polluted and the gravity, the difficulty of restoring the ecological environment, and the loss of ecological service function, etc., the court determined, as appropriate, that the ecological environment restoration costs and the interim loss of service function during restoration that should be CNY 1.0528 million and, together with the CNY 3,000 paid by the public prosecutor for the cost of experts, be assumed by Hongshun Company.

(4) The fact that Hongshun had been punished by the administrative organ violation of administrative law should not affect the assumption of the civil liabilities thereof. Hongshun's proposal of deducting the fines already paid from the damages lacked legal basis. However, in determining Hongshun's liability for environmental damage caused by pollution incidents, the fact that it had paid an administrative fine of CNY 150,000 should be taken into account.

Under Articles 15 (5), (6) and 65 of the *Tort Liability Law of the People's Republic of China,* Articles 13, 15 and 20, Article 21, Article 22, Article 23 of the SPC's Interpretation of EPIL, Articles 2, 3 and 4 of the *Measures for the Implementation of the Pilot Program of Trial by People's Courts of Public Interest Litigation Cases Instituted by People's Procuratorates,* and Article 108 of *the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China,* the court of first instance rendered a judgment that: 1. within 30 days after the decision took effect, Hongshun should pay a total of CNY 1,058,200 for the restoration of ecological environment and the interim loss of service function during the restoration. The payment should go to the account of Xu Zhou Public Welfare Fund for Environmental Protection; 2. within 10 days after the decision took effect, Hongshun should pay the public persecutor CNY3,000, a reasonable expense in the case. The case acceptance fee of CNY14,324 should also be assumed by Hongshun.

This court holds that that the appeal of Hongshun shall be dismissed on grounds that：

(1) The claim of the Xuzhou Municipal People's Procuratorate is clear, and the original judgment is made with regard to the public prosecutor's claim. Article 23 of *the Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations* stipulates: "Where the expenses for restoring the ecological environment can hardly be determined or the identification expenses for determining the specific amount is evidently too high, the people's court may reasonably determine the aforesaid expenses in light of the extent and degree of environmental pollution and ecological destruction, the scarcity of the ecological environment, the difficulty to restore the ecological environment, the operating cost of pollution prevention and control equipment, the benefits obtained by the defendant out of the tortious act, the extent of fault, and other factors, and may refer to the opinions of the department assuming environmental protection supervision and administration functions, and expert opinions, among others. "Usually discharge of wastewater is hard to find and it takes time to show the consequences. But according to the article above, the judge shall make discretionary decisions about the cost of ecological environment restoration. In exercising discretion, the judge shall determine a number within appropriate range after weighing both subjective and objective factors in the case. The public prosecutor requested that Hongshun pay three to five times the base of CNY 269,100 in compensation. The starting and ending points are clear and specific and the request by nature is to ask for discretionary decisions with regard to the claim filed by the procuratorate. If Hongshun holds that the request shall be dismissed, it is allowed to produce evidence to suggest otherwise during the trial. The claim made by Xuzhou People's Procuratorate is filed in accordance with Article 119(1) of *the Civil Procedure Law of the People's Republic of China*.

The Xuzhou Municipal People's Procuratorate filed an EPIL to request Hongshun restore the environment of Subei River it polluted back to original condition and compensate for the interim loss of ecological service functions during the trial. Since Hongshun clearly stated in the trial of the first instance that it was unable to restore the environment nor could it work out a restoration

scheme, the court of first instance directly ruled in accordance with Article 20 of *the SPC's Interpretation of EPIL* that Hongshun Company should assume the expenses for restoring the ecological environment, an alternative to performing the obligation of environmental restoration. The judgment was made regarding the claims filed by Xuzhou Municipal People's Procuratorate.

(2) The fact that quality of environment at the discharge point has met the standard cannot serve as an argument against bearing the cost of ecological environment restoration. Because the wastewater related to Hongshun's production activities, once discharged in large volume, would have hazardous effect on the environment, the Environmental Protection Department of Jiangsu Province explicitly prohibited Hongshun from discharging production wastewater into the surface water when issuing EIA permit. However, Hongshun still laid a hidden outfall to release the wastewater in which the chemical oxygen demand (COD), ammonia nitrogen, and total phosphorus were 12.1 times, 2.5 times, and 1 time respectively higher than the limits. It was found guilty of discharging 2，600 tons of wastewater in 2014 and 2015 alone. The above behavior of Hongshun certainly has caused pollution to the Subei River.

Since river flows, the quality of water at the pollution discharge points may improve as a result of pollution migration. But that also means the pollution was bound to reach the downstream area and spread farther. The pollutants still exist in the ecological system which is still in need of restoration. Even the ecosystem can purify itself and the total amount of pollutants may decrease or even disappear altogether as time progresses, the overall quality of the environment has dropped during self－purification, hence undermining the carrying capacity of the ecological environment. During self－purification, the declining quality of water for irrigation will take a toll on agricultural production, damage the water ecology downstream, and cause losses of ecological service function. According to Article 65 of *the Tort Liability Law of the People's Republic of China*，Hongshun should be liable for infringement damages, restore the damaged ecological environment or find an alternative to restoration, and compensate for the loss of service functions.

(3) The court of first instance's decision to take 2.035 times virtual treatment costs to determine the expenses for restoring the ecological environment was not inappropriate. The pollutants spread as the river flows, making it impossible to calculate the actual cost of restoration. The Method of Virtual Disposal Costs in the *Recommended Methods for Environmental Damage Assessment and Evaluation* (2*nd Edition*) by Ministry of Ecology and Environment shall be applied to determining the expenses of ecological restoration. In the first trial of this case, both Hongshun Company and Xuzhou People's Procuratorate agreed on using the said method to determine the ecological restoration cost and on the virtual treatment cost of CNY 50 for each ton of wastewater, hence taking 1.5 times to 3 times virtual treatment costs to determine the expenses for restoring the ecological environment.

Article 23 of the SPC's EPIL Interpretation stipulates if the expenses for restoring the ecological environment can hardly be determined, the people's court may reasonably determine the aforesaid expenses in light of the extent and degree of environmental pollution and ecological destruction, the scarcity of the ecological environment, the difficulty to restore the ecological environment, the operating cost of pollution prevention and control equipment, the benefits obtained by the defendant out of the tortious act, the extent of fault, and other factors, and may refer to the opinions of the department assuming environmental protection supervision and administration functions, and expert opinions, among others. In this case, factors such as the consequences of pollution, the polluter's extent of subjective fault, etc. should be considered to in

determining the coefficient. The Subei River flows into the Beijing－Hangzhou Grand Canal via the Shun River, which flows through the main river for irrigation and drainage. The water quality of Subei River will not only affect that of the Beijing－Hangzhou Canal as a whole but also the quality of water for agricultural irrigation. The wastewater discharged by Hongshun into the Subei River has evident hazardous impact on the ecological environment. Hongshun has repeatedly discharged wastewater through a hidden outfall, making it hard to discern. The subjective fault was serious as the company continued with the discharge after being caught and punished by the environmental protection authorities. It would cost Hongshun CNY 50 to treat 1 ton of wastewater, so the company benefited significantly from the illegal discharging act. The court of first instance, considering the contents of the wastewater discharged by Hongshun were mostly organic and degradable matters, took 2.035 times the virtual disposal cost, a number within the range of 1.5 to 3, to calculate the ecological environment restoration cost of 2， 600 tons of wastewater. The coefficient was selected within a reasonable range and there was no evidence suggesting the coefficient be set too high. Hongshun's claim of taking 1.5 times to determine the cost of ecological environment restoration lacks factual basis. Thus, this court shall not grant support.

(4) Taking four times the amount of wastewater discharged by Hongshun to calculate the cost of ecological environment restoration has factual and legal basis. Xuzhou Municipal People's Procuratorate claimed that the CNY 269,100 should be used as a basis and multiplied by a coefficient between 3 to 5 times to determine the company's liabilities for damages of ecological environment and losses of ecological service functions on grounds that the actual amount of wastewater discharged by the company must have had exceeded 2,600 tons as Hongshun illegally discharged wastewater multiple times under the pretext of failure of pollution prevention and control equipment. Hongshun could generate up to 960 tons of wastewater per day and the disfunction of pollution prevention and treatment equipment could date back to 2013. The company was found to have released wastewater through a hidden outfall for three consecutive years, with the amount of wastewater discharged increasing each year. The above facts are sufficient to prove that the claim by the Xuzhou Municipal People's Procuratorate is highly probable.

Hongshun is capable of proving the actual volume of discharge wastewater. Article 42 (3) of the *Environmental Protection Law of the People's Republic of China* stipulates that Pollutant discharging entities under intensified supervision shall install and use monitoring equipment in accordance with the relevant provisions of the state and the monitoring norms, ensure the normal functioning of monitoring equipment, and preserve the original monitoring records. As a key discharger, Hongshun installed the pollutant discharge monitoring device as early as September 2009, proving that it is fully capable of proving the actual volume of wastewater related to its production activities and providing financial evidence on the actual cost of purifying the wastewater. Moreover, discharging pollutants is undertaken solely and stealthily by the enterprise, Hongshun shall assume the burden of proof of the actual volume of wastewater discharged by the company and bear the legal consequences of impossibility of adduction of evidence. After the court of first instance made relevant explanation, Hongshun was still unable to submit relevant evidence to overturn the claim of Xuzhou Municipal People's Procuratorate. According to Article 13 of the SPC's Interpretation of EPIL, the Xuzhou Municipal People's Procuratorate's claim of taking 3 to 5 times the found 2,600 tons of wastewater to determine the actual volume of wastewater discharged by Hongshun should be supported. The court of first instance's decision of taking 4 times the found 2,600 tons of wastewater discharged to calculate the tort damages was not inappropriate.

(5) The fines that Hongshun already paid shall not be deducted from the cost of ecological restoration. According to Article 4 of the *Tort Liability Law of the People's Republic of China*, where a tortfeasor shall assume administrative liability or criminal liability for the same conduct, it shall not prejudice the tort liability that the tortfeasor shall legally assume. The penalty imposed by the environmental law enforcement agency on Hongshun is the liability the company shall bear for violating the administrative law. The penalty was imposed to punish Hongshun's behavior of illegally discharging wastewater and serve as a deterrence to any attempt at violating the environmental law. The procuratorate's request for the payment of ecological restoration cost by Hongshun is requiring the company to bear the responsibility for restoring the environment it damaged, which falls into the category of civil tort liability. The functions of the two legal liabilities are completely different. Hongshun applied for deduction of the infringement compensation lacks legal basis.

Hongshun shall assume the liability for ecological restoration after illegally discharging wastewater related to production activities and for polluting the Subei River. the ecological restoration cost determined in the original judgment was well－grounded and the calculation method is legal and appropriate; the claim filed by the public prosecutor is clear and specific, and the trial procedure of the original trial is legal.

In view of the above, the appeal request of Hongshun shall not be supported and shall be dismissed； The facts are clearly found and the law is correctly applied in the original judgment which shall be sustained. In accordance with the section 1.2 of the Article 170 under the *Civil Procedure Law of the People's Republic of China,* it is ordered that：

The appeal be dismissed and the original judgment sustained.

The case acceptance fee of CNY 14,324 of the second instance be borne by Hongshun Company

This judgement is final.

Presiding Judge Chen Ying

Judge Zang Jing

Judge Zhao Li

December 23, 2016

Court Clerk Yu Lu

Case 7：All China Environment Federation v. Zhenhua Company on Air Pollution

Civil Judgement
Intermediate People's Court of Dezhou, Shandong Province

(2015) De Zhong Huan Gong Min Chu Zi No.1

Plaintiff: All 一 China Environment Federation. Address: Level 6, Huabiao Building, Qingniangoudong Road, Hepingli No.14，Chaoyang District, Beijing.

Principal: XIE Yuhong, Deputy Secretary General of the federation.

Attorney: ZHANG Meng, lawyer, Shandong Kangqiao Law Firm.

Attorney: LI Shusen, lawyer, Shandong Kangqiao Law Firm.

Defendant: Dezhou Jinghua Group Zhenhua Decoration Glass Co., Ltd. Address: 55 Hubinnan Road, Decheng District, Dezhou, Shandong.

Legal representative: WANG Jinping, General Manager of the company.

Attorney: ZHANG Shunhua, lawyer, Shandong Tongjing Law Firm.

Attorney: LIU Hongzan, lawyer, Hebei Heming Law Firm.

The plaintiff All China Environment Federation (ACEF) filed a public 一 interest litigation against Dezhou Jinghua Group Zhenhua Decoration Glass Co., Ltd. (hereinafter referred to as "Zhenhua") over air pollution. This court accepted the case on March 24, 2015 and announced the acceptance on March 25, 2015. No application for joining the litigation was received from any other public authorities or social organizations during the announcement period. In accordance with the law, this court established a collegiate panel which heard the case publicly on June 24, 2016. The attorneys of ACEF, LI Shusen and ZHANG Meng, as well as the attorneys of Zhenhua, ZHANG Shunhua and LIU Hongzan, were present in the litigation. The trial has now been completed.

The plaintiff ACEF made the following complaints to this court: Zhenhua used to have three production lines of float glass. Line 1# was shut down in 2011, but line 2# and line 3# remained in use due to special technique requirements of glass production and for heating in winter. Although investment was made in dedusting and desulfurization facilities for the two remaining lines, Zhenhua continued to discharge excessive loads of pollutants, causing serious air pollution and affecting residents nearby. Despite repeated sanctions by environmental protection authorities, Zhenhua never took rectification measures and continued to discharge pollutants against the limit. In accordance with *the Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations* (hereinafter referred to as "EPIL Interpretation"), ACEF brought the present litigation and requested Ruihua be ordered to:

1. Terminate excessive emission of pollutants immediately and expand its air pollution prevention facilities. Production and operations must be suspended until the acceptance of its air pollution prevention facilities by competent environmental protection authorities and have been put into use. 2. Compensate for the damage caused by its excessive emission of pollutants in the amount of CNY 20.4 million as (calculation based on the amount of investment needed for air

pollution prevention facilities and operation costs for the facilities). 3. Be liable for CNY 7.8 million of compensation for the damage caused by its repeated failure to reduce the excessive emission of pollutants to be within the limit(CNY 100,000 penalty per day from January 1, 2015 to March 19, 2015). 4. Apologize to the public through media at provincial or higher levels. 5. Bear the litigation expenses, lawyers fees and all expenses incurred by onsite inspections, damage assessments, expert witness， etc. The compensations in the second and third requests shall be paid to a dedicated account of the local government for controlling air pollution in Dezhou city. The plaintiff later modified the compensation amount in the second request to CNY 27.46 million.

Zhenhua the defendant made the following responses: 1. It had already ceased the infringements. 2. The causal relationship between its emission and air pollution was difficult to establish. Due to the liquidity of air pollution, it was impossible to determine that the defendant company was the only cause for the air pollution. 3. The environmental damage assessment results were provided unilaterally by the plaintiff and were not recognized by the defendant. There was no factual grounding for the plaintiff to request the foregoing amounts of compensation or public apologies. The plaintiff should have taken account of the operating costs of existing pollution prevention facilities invested by the defendant when claiming the requested compensation. 4. The defendant accepted the request that the compensations should be paid to a dedicated account of the local government.

This court has found that: the plaintiff ACEF was registered on April 22, 2005 with the Ministry of Civil Affairs. It aims to serve as a bridge between the government and the public in implementing the sustainable development strategy, achieving national objectives on protecting the environment and protecting the environment rights of the public. It promotes the development of a resource－conserving and environmental－friendly society, contributing to a better environment in China and the world at large. ACEF's work include: organizing forums on environment and development as well as introduction and promotion of environmental protection technologies; hosting exhibitions entrusted by the government or based on environmental priorities, contributing to an environmental－friendly and resource－conserving society; organizing research and activities on protection of environmental rights, promoting legislation and law enforcement of environmental rights, establishing and improving a system for safeguarding environmental rights, providing legal assistance for disadvantaged groups affected by environmental damages; leading, facilitating and building the platform for public participation and supervision in environment issues; providing advisory and consultant services on environmental policies, laws, regulations and technologies; Organizing education programs and awareness campaigns on protecting the environment and environmental rights to raise the public's awareness; promoting international people－to－people communication on environmental issues; carrying out international environmental cooperation programs entrusted by competent government authorities; carrying out environmental public－interest activities and other activities entrusted by the government. Annual inspections conducted by the Ministry of Civil Affairs showed that ACEF's operations reached the highest standard in 2009, 2010 and 2013, and the second highest standard in 2011 and 2012. ACEF also submitted their annual reports of each year from 2009 to 2013, demonstrating their work in environmental issue surveys, environmental consultancy, undertaking national projects, hosting seminars and workshops on theoretical issues and etc. ACEF also declared no records of law－violations since its founding.

The defendant Zhenhua was founded in 2000 and is involved in power generation, plate glass manufacturing, glass block manufacturing, deep processing of glass and glass products

manufacturing. The company's 600T/D premium ultra － thick glass project passed the environmental impact assessment (EIA) in December 2002 and the “three simultaneous” assessment in November 2003. Its premium auto float glass project passed the EIA in November 2007 and the “three simultaneously” assessment in February 2009.

According to Dezhou Environmental Monitoring Center, Zhenhua did not reached emission standard for waste gas in March, May, August, December of 2012 and in January, May and August of 2013, but discharged excessive loads of sulphur dioxide, nitrogen oxide, smoke and dust in November 2013, January, May, June, November of 2014 and February 2015. Zhenhua received administrative fines of CNY 100,000 each time from Dezhou Environmental Protection Bureau in December 2013, September and November 2014 and February 2015, and from Shandong Environmental Protection Department in December 2014. On March 23, 2015, Dezhou Environmental Protection Bureau ordered Zhenhua to suspend production until April 1, 2015 and stop excessive emission of pollutants. After being sued by ACEF, Zhenhua terminated all lines of production and selected a new site in Yangma Village to the north of Tianqu Industrial Park, Decheng District, ready for relocation.

During the trial of the case, to prove the damage caused by excessive emission of Zhenhua, ACEF signed a technical consultant agreement with the Chinese Academy for Environmental Planning (CAEP) in December 2015, entrusting CAEP to evaluate the losses to public and private properties caused by the pollution, including direct property losses and actual reduced value of the properties, as well as the costs for necessary measure to be taken to prevent the expansion of the pollution and to eliminate the pollution. Based on the evidence acquired by this court and cross－examined by both parties, CAEP Environmental Risk and Damage Assessment Center provided the following assessment results in May 2016: Zhenhua was located in Decheng District in the inner city of Dezhou, surrounded by residential buildings. It used to have three production lines of float glass. Line 1# was shut down in October 2011, while line 2# (600T/D premium ultra－thick glass) and line 3# (400t/dpremium auto float glass) remained in use. 1. Pollutants: Pollutants emitted by Zhenhua were mostly smoke, dust, sulphur dioxide and nitrogen oxide. According to the Report of Execution of Rectification Measures of Zhenhua, as of March 17, 2015, denitration and desulfurization facilities had not been installed or running on line 2#. Dedusting and desulfurization facilities on Line 3# had been in use since September 2014. 2. Period of non－compliance: It was verified that Zhenhua emitted excessive amount of sulphur dioxide for 68 days from June 10, 2014 to August 17, 2014; excessive emission of nitrogen oxide lasted for 327 days from November 5, 2013 to June 23, 2014 and from October 22, 2014 to January 27, 2015; excessive emission of smoke and dust lasted for 230 days from November 5, 2013 to June 23, 2014. 3. Emission loads: During the assessment period, 255 tons of sulphur dioxide was emitted directly into the air due to the absence of desulfurization facilities; the absence of denitration facilities caused direct emission of 589 tons of nitrogen oxide into the air; 19 tons of smoke and dust was emitted directly into the air due to the absence or insufficient capacity of dedusting facilities. 4. Unit disposal cost: According to database information, the unit disposal cost for sulphur dioxide is CNY 5,600/ton, nitrogen oxide—CNY 6,800/ton, smoke and dust－CNY 3,300/ton. 5. “Virtual restoration cost”: According to *Ambient Air Quality Standards, Recommended Methods of Assessing Environmental Pollution Damages* (2*nd Edition*) and *Technical Specifications of Environmental Damage Assessment in Emergency Response to Environmental Accidents,* the site involved in this case falls under Category II environmental function zones, whose sensitive coefficient range shall be 3－5

times the base virtual restoration cost. Taking a coefficient of 5 in the present report, the virtual restoration cost for the damage caused by excessive sulphur dioxide emission is CNY 7.13 million, that of nitrogen oxide is CNY 20.02 million and that of smoke and dust is CNY 310,000. The conclusion of the assessment is as follows: In total, 255 tons of sulphur dioxide, 589 tons of nitrogen oxide and 19 tons of smoke and dust have been discharged against the limit; The unit disposal costs of the three pollutants are determined at CNY 5,600/ton, CNY 6,800/ton and CNY 3,300/ton, respectively. In conclusion, virtual restoration costs for the damage caused by the three pollutants are CNY 7.13 million, CNY 20，02 million and CNY 310,000 respectively, amounting to CNY 27.46 million in total.

During the hearing, this court has allowed ACEF to invite WU Qiong, an expert from CAEP to attend the trial to advise on the damages caused by excessive emission of sulphur dioxide, nitrogen oxide, smoke and dust, including the length non－compliance period, loads of the excessive emission, unit disposal costs, virtual restoration costs, the amount of ecological damage compensation and whether the operating facilities have an effect on virtual restoration costs. WU believes that sulphur dioxide, nitrogen oxide, smoke and dust may lead to the formation of acid deposition. Excessive emission of these substances will undoubtedly cause damages to properties, people's health, air quality and the eco service function of ambient air. The site involved in the case is environmentally sensitive because it is surrounded by residential buildings. Therefore, the highest coefficient, 5, was chosen in the assessment report to calculate virtual restoration costs for the environmental damage. The calculation has already taken into consideration of the existing pollution prevention facilities in use and the current amount does not include any punitive compensations.

In addition, the plaintiff ACEF paid CNY 100,000 for technical consultancy. Furthermore, according to the attorney agreement made and entered into force on April 20, 2016 between ACEF and Shandong Kangqiao Law Firm, the attorney fee was set at CNY 436,100, based on the value of the subject matter of the litigation at CNY 27.46 million. However, no payment evidence or invoice was submitted to this court. ACEF also acknowledged that the fee has not been paid up until the date of this court session. ACEF claimed another CNY 10,000 for transportation and accommodation expenses incurred by the litigation but did not provide any payment evidence.

This court has also found that the defendant Zhenhua established construction or sales contracts with Dezhou Fengcheng Hydraulic Machinery Co., Ltd., Zhangjiagang Jinming Environmental Protection Engineering Equipment Co., Ltc., and Dezhou Haishan Utilities Equipment Installation Co., Ltd. for the supply, construction, installation and manufacturing of desulfurization and dedusting facilities on line 2# and line 3#. The total costs agreed in these contracts amount to CNY 18.15 million, which the defendant claimed should be deducted from the due compensation.

The foregoing facts can be proved by ACEF Articles of Association, ACEF announcements, ACEF annual reports from 2009 to 2013, EIA report and EIA approval on Zhenhua's 600t/d premium ultra－thick glass production line, EIA report and EIA approval on Zhenhua's auto float glass project, environmental inspection report and approval upon the completion of Zhenhua's upgrading project for its 600t/d glass production line involving energy conservation facilities to replace oil with gas, environmental inspection report and approval upon the completion of the premium auto float glass project, Zhenhua's waste gas monitoring report, administrative penalty decision on Zhenhua by Dezhou Environmental Protection Bureau, Technical Consultant

Agreement, environmental damage assessment opinions and contracts, investigation records, pre－sessional meeting records, inquisition records and court records.

Through reviewing the claims and the responses of the two parties, this court believes the trial of the present case shall focus on two aspects: 1. Are the plaintiff and the defendant eligible entities in the litigation? 2. What civil liabilities shall Zhenhua the defendant bear and how shall the amount of compensations be calculated?

Focus 1: Are the plaintiff and the defendant eligible entities in the litigation?

According to Article 58 of *Environmental Protection Law of China,* "For activities that cause environmental pollution, ecological damage and public interest harm, social organizations that meet the following conditions may file litigation to the people's courts: (1) Have their registration at the civil affair departments of people's governments at or above municipal level with sub－districts in accordance with the law; (2) Specialized in environmental protection public interest activities for five consecutive years or more, and have no law violation records. The plaintiff, ACEF, is a social organization registered at Ministry of Civil Affairs on April 22, 2005, which is more than five years before the date of the litigation. ACEF has been involved in environmental public － interest activities for more than five years with no records of violation of law. In the trial, the defendant Zhenhua did not raise objection to the standing of ACEF as an environmental public － interest organization. Therefore, the plaintiff ACEF is an eligible entity in the present case.

According to Article 1 of EPIL Interpretation, "Where an authority or relevant organization as prescribed by law files a lawsuit against any conduct that pollutes the environment and damages the ecology, which has damaged the public interest or has the major risk of damaging the public interest, in accordance with the provisions of Article 55 of the Civil Procedure Law, Article 58 of the Environmental Protection Law, and other laws, if the provisions of item (2), (3) or (4) of Article 119 of the Civil Procedure Law are complied with, the people's court shall accept the lawsuit." According to Article 18 of EPIL Interpretation, "For any conduct that pollutes the environment and damages the ecology, which has damaged the public interest or has the major risk of damaging the public interest, the plaintiff may request the defendant to assume the civil liabilities including but not limited to the cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration to the original state, compensation for losses, and apology." This court finds that discharging pollutants above emission limits or the emission quota for key pollutants under the cap emission scheme can be perceived as serious threats to social public interests. Excessive loads of sulphur dioxide, nitrogen oxide, smoke and dust discharged by Zhenhua weakened the eco－service function of the air. Furthermore, acid deposition, which can be caused by excessive loads of sulphur dioxide and nitrogen, as well as reduced visibility and compromised air quality caused by excessive loads of smoke and dust, would cause damages to properties and people. Since November 2013, Zhenhua has been discharging excessive loads of sulphur dioxide, nitrogen oxide, smoke and dust into the air for multiple times. Despite repeated administrative penalties, Zhenhua did not take rectification measures. This is an action that "harms the public interests". Therefore, Zhenhua is an eligible defendant in the present case.

Focus 2: What civil liabilities shall the defendant Zhenhua bear and how should the amount of compensations be calculated?

According to Article 18 of EPIL Interpretation, the plaintiff may request the defendant to assume the civil liabilities including but not limited to the six following ways: "the cessation of the tortious act, removal of the obstruction, elimination of the danger, restoration to the original state,

compensation for losses, and apology.” There is a legal grounding for the plaintiff to request that the defendant immediately stop discharging excessive loads of pollutants and apologize publicly on media at provincial level or above. This court has ascertained that the defendant has already shut down production and the original production site on March 27, 2015, which can be perceived as cessation of the tortious act. Environmental interests are public interests. In economics, environmental resources are a type of property. In aesthetics, recreation in nature is good for human body and soul. It is justified to request Zhenhua to apologize in public because its excessive emission harms the public's interests in enjoying a healthy and pleasant environment.

On the amount of compensation for ecological damages: the plaintiff ACEF entrusted CAEP to assess the amount of compensations based on the evidence presented by the two parties and the evidence acquired by this court from environmental protection authorities. The conclusion of the assessment is as follows: sulphur dioxide unit disposal cost: CNY 5,600/ton, excessive emission against limit: 255 tons, virtual restoration cost: 1.428 million(5,600×255); nitrogen oxide unit disposal cost: CNY 6,800/ton, excessive emission against limit: 589 tons, virtual restoration cost: CNY 4.0052 million(6,800×589); smoke and dust unit disposal cost: CNY 3,300/ton, excessive emission against limit: 19 tons, virtual restoration cost CNY 62,700(3300×19). This court finds: 1. Although the assessment report was unilaterally submitted by ACEF, the assessor is legally qualified to conduct such assessment; the subject of the assessment is relevant to the facts to be proved in court; the reasoning for the conclusion of the assessment has been cross－examined by the plaintiff and the defendant and has been proven to be true, objective and relevant; the defendant did not present any evidence overthrowing the assessment report. Therefore, this court accepts the report as valid evidence to prove the findings of fact. 2. In accordance with the *Opinions on EIA Standards in the Case of Zhenhua Premium Auto Float Glass, Ambient Air Quality Standards* (GB3095－2012), *Recommended Methods of Assessing Environmental Pollution Damages* (2*nd Edition*) and *Technical Specifications of Environmental Damage Assessment in Emergency Response to Environmental Accidents,* the environmental damages calculated by the “virtual restoration cost” method can be applied to determine the amount of compensations for ecological damages. The ambient air zone where Zhenhua is in is a Category II zone. Accordingly, the ecological compensation should be 3－5 times the virtual restoration cost. This court decides to adopt the coefficient of 4 to calculate the ecological compensation and the result is: CNY 21.9836 million(1.428 million×4 ＋ 4.0052 million×4 ＋ 62,700×4). 3. According to Article 66 of *Tort Law of the People's Republic of China,* “where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm.” According to Article 7 of *Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts,* “Where the polluter provides evidence to prove any of the following circumstances, the people's court shall determine that the polluter's pollution has no causal relationship with the damage”. (1) The discharged pollutants could not possibly have caused the damage.(2) The discharged pollutants that may cause the claimed damage have not reached the place where the damage occurred.(3) The damage has occurred before the discharge of the claimed pollutants.(4) Any other circumstance under which it can be proven that there is no causal relationship between the pollution and the claimed damage.” The defendant Zhenhua maintained that it had already invested desulfurization facilities, whose operational costs of CNY 18.15 million

shall be deducted from the total compensation. However, this court believes that the current compensation claim in the assessment report has already taken account of Zhenhua's existing desulfurization and dedusting facilities, hence the defendant's request does not meet the criteria of waiving or reducing liabilities. Therefore, this court does not support the defendant on this issue.

On the plaintiff's claim requesting the defendant to pay CNY 7.8 million for the damages caused by excessive emission of pollutants: This court believes that the plaintiff's claim was based on Article 99 of *Law on Preventing and Controlling Air Pollution of the People's Republic of China* and Article 59 of *Environmental Protection Law of the People's Republic of China*. These two provisions are targeted at administrative penalties rather than civil liabilities. In addition, EPIL Interpretation did not mention any punitive compensations. Therefore, this court will not support the plaintiff on this issue for lack of legal grounding.

On the plaintiff's claim to request the defendant to "expand air pollution prevention facilities" and that to "suspend production and operations until its air pollution prevention facilities have been inspected and approved by environmental protection authorities and put into use": The claim does not fall into any forms of assuming liabilities prescribed in EPIL Interpretation. Furthermore, considering the fact that Zhenhua has already shut down production and the original site and is ready for relocation, this court will not support the plaintiff on this claim.

On assessment fees, attorney fees and other litigation costs: According to Article 22 of EPIL Interpretation, "where the plaintiff requests the defendant to assume the inspection and identification expenses, reasonable attorney fee and other reasonable expenses for litigation, the people's court may support such a request in accordance with law". This court supports the reasonable cost of CNY 100,000 for the assessment as claimed by the plaintiff. However, the plaintiff admitted that the attorney fees of CNY 400,000 has not been paid and that there was no payment evidence for other litigation costs of CNY 10,000. Therefore, this court does not support these two claims.

In conclusion, in accordance with Article 124 of *General Principle of the Civil Law of the People's Republic of China,* Article 66 of *the Tort Law of the People's Republic of China,* Article 58 of *Environmental Protection Law of the People's Republic of China,* Article 8 of *Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts,* and Articles 1, 2, 18, 20, 22 and 23 of *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations,* this court made the following judgements:

1. The defendant Zhenhua shall pay CNY 21.9836 million to the dedicated account of Dezhou Municipality as the compensation for the damages caused by excessive emission of pollutants to help restore the air quality of Dezhou.

2. The defendant Zhenhua shall apologize to the public on media at provincial level or above.

3. The defendant Zhenhua shall reimburse the plaintiff ACEF CNY 100,000 for the assessment fees within ten days as of the date of this Judgement taking effect.

4. Other claims made by the plaintiff ACEF are rejected.

In accordance with Article 253 of the *Civil Procedure Law of the People's Republic of China,* where the defendant fails to perform any obligation of pecuniary payment within the period specified in this judgment, it shall pay double interest for the debt for the period of deferred performance.

Litigation fees incurred in this trial of 182,000 shall be assumed by Zhenhua the defendant.

If the parties concerned are not satisfied with this Judgment, an appellate petition may be submitted to this Court with copies as per the number of people of the other party or its representatives within 15 days as of the date when this Judgement is delivered to appeal to the High People's Court of Shandong Province.

Presiding Judge: LIU Libing

Acting Judge: ZHANG Xiaoxue

Acting Judge: GAO Xiaomin

July 18, 2016

Clerk: WANG Jie

Note: The two parties in this case did not appeal. The judgement of the first instance is now effective.

Case 8: Lingang Company v. Jinhe Company on Mineral Rights

Civil Judgment

The Supreme People's Court of the People's Republic of China

(2015) Min Er Zhong Zi No.167

Appellant (Defendant in the first instance, plaintiff in counterclaim): Xinjiang Lingang Resources Investment Co. Ltd.Domicile: Room 1, 35th Floor Zhongtian Square, No. 165 Xinhua Beilu, Tianshan District, Urumqi, Xinjiang Uyghur Autonomous Region.

Legal representative: XU Xiangdong, Chairman of the Board of the Company.

Attorney: LI Yong, lawyer, Beijing JunHe Law Firm.

Attorney: ZHENG Yuejie, lawyer, Beijing JunHe Law Firm.

Appellee (Plaintiff in the first instance, defendant in counterclaim)：Sichuan Jinhe Mining Co. Ltd. Domicile: Longtan Industrial Park, Section 2, East 3rd Ring Road, Chenghua District, Chengdu, Sichuan Province.

Legal Representative: PAN Yanghui, general manager of the company.

Appointed Representative: LIU Bing, employee of the company.

Attorney: DENG Xueqiang, lawyer. Sichuan Mingju Law Firm.

Unsatisfied with the civil judgement (2014)Xin Min Chu Zi No.13 by High People's Court of Xinjiang Uyghur Autonomous Region for the lawsuit concerning contractual dispute between Xinjiang Lingang Resources Co. Ltd. (henceforth Lingang Co.) and Sichuan Jinhe Mining Co. Ltd. (henceforth Jinhe Co.), Ligang Co., the appellant, appealed to this court against Jinhe Co., the appellee. In accordance with the relevant law, this court established a collegiate panel, and tried the case publicly on August 8, 2015. XU Xiangdong, the legal representative of Lingang Co., and its attorneys LI Yong and ZHENG Yuejie, as well as LIU Bing and DENG Xueqiang, the appointed representative the attorney of Jinhe Co. were present in the litigation. The case has now been completed.

Through trial, the court of the first instance found that: On October 10, 2011, Lingang Co. (Party A) signed a *Cooperation Agreement on joint prospecting and exploration of the Uruke Pb－polymetallic Mine, Taxkorgan County, Xinjiang Autonomous Region* (henceforth "Joint Prospecting and Exploration Agreement") with Jinhe Co. (Party B), which stipulated the following: upon compensation of CNY 35 million from Party A, Party B shall transfer its prospecting and exploration rights on the Uruke Pb－polymetallic of Xinjiang Taxkorgan County (henceforth "mineral rights") to a project company co－established by Party A and Party B in accordance with the consideration and other rules and terms stipulated under the agreement. With Party A agreeing to pay in cash and Party B agreeing to contribute its mineral rights, the provisional registered capital of the joint project company shall be CNY 10 million, with Party A owning 80% of the venture, and Party B owning 20% of the venture. Party A shall then fund the prospecting, general exploration and exploration of the mine, and the outcome as well as the risks thereof shall be owned and borne by the project company.

Prior to the official transfer of mineral rights, Party A shall entrust Party B to hold the mineral

rights. Should all conditions for the transfer of mineral rights be met, Party B shall transfer its mineral rights to the project company. Prior to the official completion of the rights transfer, Party B shall be responsible to ensure that its mineral rights are effective and legal, including but not limited to actions such as renewal of the exploration permit, passing annual inspections and submission of required documents to competent government departments. After the agreement takes effect, Party A shall fund the subsequent prospecting, general exploration and exploration of the mine, and Party B shall no longer be contributing funds until completion of the mine exploration. All outcomes from the exploration funded by Party A shall be owned by the project company. According to the agreement, the fulfillment of Party A's obligation, including compensation to Party B for its transfer of mineral rights and funding to the project company for subsequent exploration, and the fulfillment of Party B's obligation, i. e., transfer of mineral rights to Party A, are preconditions for each other. Within fifteen (15) days after the signature of the agreement, Party A shall make a lump sum payment of CNY 35 million to the account provided by Party B as earnest money. Upon completion of rights transfer to the project company, the earnest money shall then be officially deemed as compensation from Party A to Party B for the price of the mineral rights under the cooperation agreement. Both parties agreed to pay respective taxes incurred in connection with the signing and execution of the agreement. All expenses incurred by the preparation, signing and execution of the agreement as well as other non－tax expenses and payments associated with the mineral rights referred to under the agreement shall be equally shared by both Parties.

Party B guaranteed and promised to Party A the following: It first received its permit for reconnaissance rights for the Uruke Pb－polymetallic Mine in Taxkorgan County from the Land Resoures Bureau of the Xinjiang Uyghur Autonomous Region on December 30, 2008. On January 26, 2011, the right was renewed and was upgraded to the right for prospecting, ie., the “prospecting right for the Uruke Lead Polymetallic Mine in Taxkorgan County, Xinjiang Uyghur Autonomous Region.”， for which the Permit for Prospecting was granted, whose registration number was T65120081202022682. The permit covered a mining area of 31.28 sq.km with valid period from January 26, 2011 to January 26, 2013. Party B also undertook that the ownership of the aforementioned permit for prospecting was clear, complete and without dispute, and that there was no mortgage or collateral associated with it. Furthermore, Party B undertook that the permit was obtained in accordance with relevant laws and regulations, and that it carried with it legal rights and authorization afforded at both the national and local levels, and that it did not carry with it any of the conditions for withdrawal by the Land Resources Management Authorities, including being located in a glacier protection area, national reserve or scenic area that may affect the exploration of the mine.

Party A guaranteed and promised Party B the following: It would accelerate prospecting work at the mine after the signing of the agreement, and that it would provide all finances toward the subsequent prospecting, general exploration and exploration. All funds needed after the completion of the exploration work shall be provided in proportion to the size of share in the venture.

An offending party would be considered to be in breach of agreement under any of the following situations: should one party violate any of the clauses of the agreement; should one party breach any statement, guarantee or promise made in the agreement, or should the party make a false, erroneous or misleading statement, guarantee or promise in the agreement; should one party directly or indirectly sell the mineral rights to a third party without prior consent from the other

party to the agreement; should one party be in breach of the agreement, the other party shall have the right to request immediate termination of the agreement，and/or request the other side to assume legal liability and provide compensation for all damages (including, but not limited to litigation and attorneys' fees).

The agreement may be terminated or canceled for any of the following reasons: upon written agreement by both parties on the termination of the contract in a situation of force majeure; upon mutual agreement by both parties to terminate the contract; should one party be in breach the agreement and affect the ability of the other party to achieve its goals under the agreement, the complying party may request termination of the agreement. In addition, both parties have reached consensus regarding secrecy, notification and other issues relating to the agreement. The agreement shall come into force upon written signature by both parties.

On October 25, 2011, Lingang Co. paid Jinhe Co. in the amount of CNY 35 million through bank transfer, for which Jinhe Co. provided receipt.

On April 28, 2012, Lingang Co. signed a *Contract for Geological Prospecting Project* with the Sichuan Provincial Institute of Nuclear Geology (henceforth Geology Institute), which stipulates the following: Lingang Co. would entrust the Geology Institute to conduct a geological survey of the Uruke iron polymetallic mining site in Taxkorgan, and provide a final written report, original materials, results, photographs and graphics and electronic copies to Lingang Co., rights to all of which belong to the Lingang Co. The reports shall not be shared with a third party. The contract shall be effective from December 20, 2011 to December 30, 2012, and the total amount of the contract shall be CNY 10,960,500. The contract also contains stipulations regarding settlement and payment of accounts, technical standards, potential breach of contract, changes to the contract as well as dispute settlement mechanisms. The contract was carried out as stipulated.

On July 1, 2013, the Lingang Co. signed another *Contract for Geological Prospecting Project* with the Geology Institute, stipulating the following: that the Lingang Co. would entrust the geology institute to conduct a geological survey of the Uruke iron polymetallic mining site in Taxkorgan, Xinjiang Autonomous Region and provide a final written report, original materials, results, photographs and graphics and electronic copies to Lingang Co., rights to all of which belong to Lingang Co. The reports shall not be shared with a third party. The contract shall be effective from January 1, 2013 to December 30, 2013, and the total amount of the contract shall be CNY 10,484,200. The contract also contains stipulations regarding settlement and payment of accounts, technical standards, potential breach of contract, changes to the contract as well as dispute settlement mechanisms. On July 23, 2013, the Taxkorgan County Jinhe Kunlun Resources Investment Co. Ltd. (henceforth the Project Company) was established.

On November 22, 2013, Lingang Co. submitted to Jinhe Co. a *Letter on the termination of the "Cooperation Agreement on joint prospecting and exploration of the Uruke Pb－polymetallic Mine, Taxkorgan County, Xinjiang Autonomous Region"* (*henceforth the Letter on Termination*). The letter stated the following: that recently, Lingang Co. was shocked to learn from relevant authorities that the site of the Uruke mine project was located in the central part of the Xinjiang Taxkorgan Wildlife Nature Reserve (henceforth Nature Reserve), a fact which, up to that point, Jinhe Co. had not informed Lingang Co. According to Articles 6 and 7 of the Joint Prospecting and Exploration Agreement, this constitutes a breach of agreement by Jinhe Co. By then, Lingang Co. has made the down payment for cooperation of CNY 35 million in accordance with the agreement, and the investment of around CNY 17 million for the construction of roads, mining equipment,

geological prospecting. Other relevant expenses by Lingang Co. have added up to nearly CNY 10 million. Through deliberation, Lingang Co. decided to terminate the agreement with the expectation that Jinhe Co. would assume legal liability in accordance with the contract.

On December 30, 2013, Jinhe Co. submitted an official *Response to Lingang Co.'s Letter on the termination of the "Cooperation Agreement on joint prospecting and exploration of the Uruke Pb—polymetallic Mine, Taxkorgan County, Xinjiang Autonomous Region"* (henceforth referred to as the Response). The Response stated the following: Jinhe received the Letter on Termination from Lingang Co.. Through consultation with relevant authorities, Jinhe learned that the Reserve had been established well before Jinhe acquired its permit for mineral rights for the first time on December 26, 2008. Between December 30, 2008 and January 26, 2011, the mineral rights passed the annual inspections carried out by the Land Resoures Bureau of the Xinjiang Uyghur Autonomous Region, and were upgraded to general exploration (rights). The mineral rights were again renewed on April 9, 2013, which was after the signing of the Joint Prospecting and Exploration Agreement and the start of the cooperation between both parties on exploration. It had been approximately five years since Jinhe acquired the permit (during which the partnership between Lingang Co. and Jinhe Co. had lasted for over two years). During this period, no authorities notified Jinhe Co. of the issue of the mining site's location in a nature reserve, and cooperation between the two companies was never affected. Hence there was no indication of Jinhe Co.'s knowingly withholding information regarding the mine's location in a nature reserve to Lingang Co.

It was because Jinhe Co. was unaware of the aforementioned situation that it signed the agreement with Lingang Co. with the language in Article 6 concerning "statements and guaranties." Because of information failure concerning the existence of the Nature Reserve, and because that the mineral rights were acquired and renewed legally by Party B, the two sides signed the joint prospecting and exploration agreement unaware of the aforementioned situation. Jinhe Co. did not knowingly withhold information from Lingang Co., or made an unfavorable guarantee to Lingang Co. Moreover, the mining permit was obtained and renewed legally and passed all annual inspections. Thus, even if the mine was located in a protected area, as long as both sides followed local rules and regulations, it would not affect the partnership between Jinhe and Lingang. In the two years of amicable cooperation between the two companies since the signing of the agreement, Jinhe was committed to ensure the mineral rights for Uruke mine were legal and effective in good faith, and in April 2013 the rights were renewed with approval from relevant authorities. In addition, the response argued that Jinhe Co., as promised, paid the CNY 2 million for the establishment of the project company, which was then operational and running smoothly. The objective of the agreement between the two parties was to engage in mining development —neither party received any prohibitory notices from government authorities, and that therefore, the two sides shall continue the mining exploration in friendly cooperation.

On December 6, 2013, the Wildlife and Nature Reserve Administration Bureau of Xinjiang Taxkorgan County (henceforth Nature Reserve Bureau) produced documentation confirming the following: that the Nature Reserve Bureau mapped the location of the mine site according to the information provided by Jinhe Co. from Xinjiang Bureau of Surveying, Mapping and Geoinformation, which they found to be located within the Nature Reserve.

It was also revealed that Lingang Co. paid CNY 200,000 in attorney fees for this litigation.

Jinhe Co. filed a suit at the court of first instance, claiming the following: After Lingang Co.

signed the Joint Prospecting and Exploration Agreement with Jinhe Co., they found that the mine site's location in a Nature Reserve violated Article 6.2.3 of the Agreement, which stated that the mining site shall not be located in a glacier protection area, nature reserve or scenic area. Jinhe Co. argued that the Agreement was signed in good faith by both parties, and the project had already materialized, and that therefore Lingang Co.'s request for termination of the agreement has no grounding. Jinhe Co. therefore requested：1) that Lingang Co.'s termination of the Joint Prospecting and Exploration Agreement be nullified; and 2) and that because the agreement was still valid, Jinhe Co. was not obligated to return the CNY 35 million paid by Lingang to Jinhe. It also requested that Lingang cover all costs related to this litigation.

Lingang Co. responded with the following: Jinhe Co.'s lawsuit had no legal grounding, and should be rejected by the court. It maintained that based on the clear language of Articles 6 and 7 of the Joint Prospecting and Exploration Agreement, the condition for termination of the agreement had been satisfied and that Lingang's request for termination of the agreement had solid legal grounding. Lingang also maintained that the second claim made by Jinhe was legally groundless, i.e. that because Lingang Co. had already exercised the right of termination in accordance with the agreement, Jinhe shall reimburse the CNY 35 million in full, and that the liable party for litigation fees shall be determined by the court in accordance with the law.

Lingang Co. filed a countersuit in the court of the first instance claiming the following: After signing the Joint Prospecting and Exploration Agreement, Lingang Co. acted in full compliance with the provisions of the Agreement, but that Jinhe Co. had not kept, in good faith, its commitment and guarantees. In 2013, Lingang Co. received notice that the site(s) of mining exploration were located entirely within the Nature Reserve. According to Article 7.1.2. of the Agreement, “if either party breaches a promise, commitment or guarantee, or if the party makes a false, inaccurate or misleading commitment or guarantee，” the other party, according to Article 7.2, shall have the right to terminate the contract and, furthermore, the violating party shall be required to pay compensation for any economic losses incurred. Jinhe Co. should therefore be required to reimburse Lingang for losses incurred.

Lingang Co. requested Jinhe Co. to: 1) officially terminate the Joint Prospecting and Exploration Agreement signed by the two parties; 2) return to Lingang Co. the compensation payment for price of the transfer of mining rights in the amount of CNY 35 million; 3) compensate Lingang in the amount of CNY 3,288,150 for prospecting costs, CNY 5,538,600 for the cost of road construction, losses in the amount of CNY 1.5 million for road maintenance, as well as project and management costs amounting to CNY 5,538,600; 4)compensate interests accrued by Lingang Co. in the amount of CNY 10,843,256.77; 5) reimburse Lingang Co. CNY 429,161.32 in attorney fees, and CNY 700,000 as security for litigation fees. In total, Jinhe Co. should pay CNY 63,001,425.09 to Lingang Co. as compensation. Lingang Co. also maintained that Jinhe Co. should pay all costs associated with litigation.

Following the trial of the first instance Lingang Co. changed its request for compensation of interests from CNY 10,843,256.77 to CNY 9,465,104.15. They also removed their claim for reimbursement of CNY 700,000 in security for litigation fees.

Jinhe Co. responded as follows: 1). Termination of agreement is a private remedy, which should be dealt with privately between parties. It was not appropriate in procedure for Lingang Co. to make this claim for judicial remedy in court. 2) The facts and reasons for Lingang Co.'s request for termination of the agreement were neither objective, nor sufficient. Their claims shall not be

established in court. The reasons were as follows: 1.Both parties had performed obligations under the agreement for 2 years and a half since it took effect, bringing substantial changes to the mine site. It would not be reasonable or fair for Lingang Co. to terminate the agreement at this stage; 2) the parties had already established a project company, which had taken over the mine, bearing all rights and risks associated with the mine; 3) Lingang Co. had read documents related to the mine and done their research prior to signing the agreement, and thus it should have been aware of everything about the situation of the mine before signing the agreement; 4)Jinhe Co.'s mineral rights were legal and valid. The mine site was not located in the area that may affect exploration and development of the mine and hence did not affect the execution of the Agreement; 5) The information had been available to all that the Nature Reserve was established well before the signing of the joint prospecting agreement. Hundreds of companies own mining rights and mining exploration rights till today within the Nature Reserve, hence there are no policies in place that may affect mining activities in the reserve; 6) Jinhe Co. did not seriously breach the agreement and there existed no fundamental breach of the agreement. The fulfillment of Lingang Co.'s goals of the Agreement was not affected and it had no grounding to terminate contract. Its request to terminate the agreement based on Article 7.2 of the agreement was incorrect; 7) Lingang Co.'s intention to terminate the agreement was motivated by factors such as shirking of iron ore market, drop of iron price and etc. It was improper and should not be supported by the court; 8) the consistency of the Agreement should be upheld given that the agreement involved in the case was effective and legal; 9) Lingang Co. signed the agreement voluntarily, knowing fully its rights and relevant facts that was disclosed to the public and did not take this issue to court until 2 years and a half after signature, and thus its claim should not be admissible in court as it was no longer within the two－year litigation time limitation in accordance with relevant laws; 10) Lingang Co.'s request for termination of the agreement happened 2 years and a half after the agreement took effect, which had exceeded the time limit for such rights to be performed and hence shall not be protected.

The first instance court believed that: the Joint Prospecting and Exploration Agreement between Lingang Co. and Jinhe Co. was legal and effective as it was signed with genuine intention and was made in accordance with relevant binding and prohibitive requirements prescribed in the *Mining Resources Law of the People's Republic of China* and other relevant laws. The agreement had already taken effect—Lingang Co. had already paid the CNY 35 million to Jinhe Co., and the project company had been established, namely the Taxkorgan County Jinhe Kunlun Resources Co. Ltd, and Lingang Co. had entrusted the Geology Institute with geological surveys of the mining site. Lingang Co. had not provided any evidence demonstrating that their mining activities was affected. Before the lawsuit, the agreement had been executed for 2 years and a half since signature by both parties.

1．Concerning the question of whether the Joint Prospecting Agreement should be terminated, Lingang Co. was, according to the agreement, required to fund the prospecting, general exploration, and exploration on the mine after the agreement took effect. It promised that it would accelerate exploration and prospecting of the mine after the signing of the agreement and it would ensure all subsequent funding for prospecting, general exploration, and exploration in place. Jinhe Co. committed that the mine would not be located in a glacier protection area, nature reserve, scenic area, or any area that may affect mining activity. According to the Agreement, its termination due to force majeure shall be effective upon written confirmation by both parties; Should one party be in serious breach of this agreement and have resulted in the other party's failure in achieving its goal

of this agreement, the other party shall have the right to terminate this agreement. According to the evidence provided by the Nature Reserve Bureau on December 6, 2013, all mining sites relating to the case were located in the nature reserve. Both Jinhe Co. and Lingang Co. confirmed the facts that the mine was within the nature reserve and that the nature reserve had been established prior to the signing of the agreement. In the meantime, information concerning the establishment of the Nature Reserve was publicly available information disclosed by the competent authority, which both parties could voluntarily access. Therefore, both sides could be understood to have had full knowledge of the fact that the mine was within the nature reserve prior to signature of the agreement. Although the mine was located in a nature reserve, Lingang Co. did not raise this issue with Jinhe Co. until 2 years and a half of execution of the Agreement， and provided no evidence of its prospecting being affected by this fact. Neither side made clear what action would constitute “may affect” the mining work in Article 6 of the agreement. Further, according to Article 11 of the Agreement, “in a situation of force majeure, the agreement enters termination upon mutual confirmation by both parties; if one party seriously breaches contract and affects the ability of the other to achieve its goals under the agreement, the complying party may request termination of the Agreement.” Jinhe Co. did not commit a serious breach of the agreement to the extent that the Agreement could not be executed. It was hence clear that there were no grounds for termination of the agreement in this situation. Therefore, the court of the first instance decided in favor of the claim by Jinhe Co. tha Lingang Co.'s termination of the agreement was invalid, and decided against the counterclaim filed by Lingang Co. in support of the termination of the joint prospecting agreement.

2． Concerning the issue of the CNY 35 million involved in the case, Jinhe Co. provided confirmation of its receipt of the CNY 35 million payment from Lingang Co. The payment should be understood as compensation for mining rights transfer under the Agreement. Although Article 4 of the Agreement stipulates that this was understood to be earnest money, Lingang Co.'s record of the transfer of the funds revealed no record of it being earnest money. Neither records of the bank transfer provided by Lingang Co. nor the confirmation of receipt by Jinhe Co. indicated that this was earnest money. Furthermore, the second request in Lingang Co.'s counterclaim clearly referred to the payment as compensation, not earnest money. Thus, the court of the first instance believed that this payment to be compensation by Lingang Co. for the transfer of mining rights from Jinhe Co, and that the present Agreement was not terminated and that therefore Jinhe Co. was not legally obligated to return the CNY 35 million to Lingang Co. Jinhe Co.'s claim that it need not return the CNY 35 million was included in its claims to the court to confirm the invalidity of Lingang Co.'s request of agreement termination, and did not need to be additionally furnished. The court therefore provided no further detailed discussion of this matter.

3．Concerning Lingang Co.'s claim for CNY 3，288，150 for prospecting costs, as well as CNY 5,538,600 for the cost of road construction; losses in the amount of CNY 1.5 million for road maintenance costs, as well as construction and management costs amounting to CNY 5,702,257l; interest lost in the amount of CNY 9,465,104.15; loss in attorney fees amounting to CNY 429,161.32, these claims were based on the validity of the agreement termination. Because the agreement was not been terminated, the court of the first instance did not award these fees to Lingang Co.

In summary, according to Articles 8 and 60 of the *Contract Law of the People's Republic of China,* article 152 of the *Civil Procedure Law of the People's Republic of China* and article 2 of the

Provisions of the Supreme People's Court on Evidence in Civil Procedure , the first instance court ruled as follows: 1) that Lingang Co.'s termination of the joint prospecting agreement was invalid and that Lingang Co. and Jinhe Co. shall continue to execute the joint prospecting and exploration agreement signed on 10, Oct 2011 and; 2) that Lingang Co.'s countersuit could not be accepted in the court. The court processing fee of CNY 100 for the case, as well as processing fee for the counterclaim of CNY 356,807.13, were to be borne by Lingang Co.

Unsatisfied with the judgement by the court of the first instance, Lingang Co. appealed to this court and claimed that: 1) Jinhe Co. breached the Joint Prospecting and Exploration Agreement, and that because of Jinhe Co.'s breach, Lingang Co. was not able to achieve its goals under the agreement. According to the *Contract Law of the People's Republic of China* and the Joint Prospecting and Exploration Agreement, Lingang Co. had the right to terminate the Agreement. The first instance court erred in its judgment that Jinhe Co. did not commit a breach of the agreement and did not affect the execution of the agreement to the extent that its purpose cannot be realized, and that this judgement shall be set aside; 2) Because Lingang Co. had the right to terminate the contract, Jinhe Co. should return the funds paid by Lingang Co. and provide compensation for its relevant losses. The court erred in its decision not to uphold Lingang Co.'s claims, and the decision shall be corrected;

Lingang Co. requested that: 1. The item 1 and 2 of the Judgement Xin Min Er Chu Zi No.13 (2014) be set aside; 2. Correct the judgment to uphold the termination of the joint prospecting and exploration agreement between the two parties; 3. Correct the judgement to request Jinhe Co. to return the compensation payment of CNY 35 million for the transfer of the mining rights; 4. Correct the judgement to request Jinhe Co. to compensate to Lingang Co. CNY 3,288,150 for prospecting costs, CNY 5,538,600 for the cost of road construction, the losses in the amount of CNY 1.5 million for road maintenance costs, as well as construction and management costs amounting to CNY 5,702,257; 5. Correct the judgemen to request Jinhe Co. to pay for the compensation for interests loss of Lingang Co.. The interest loss for the CNY 35 million payment shall be calculated in accordance with the interest rates of the same type of bank loan over the same period, dating from the actual payment receipt date of Jinhe Co. (Oct 25, 2011) till the date when the compensation payment is returned; As for other items of compensation, the interest loss shall be calculated over the period dating from the date when Lingang Co. proposed to terminate the agreement (November 22, 2013) till the compensation is made. 6. Correct the judgement to request Jinhe Co. to reimburse Lingang Co. in the amout of CNY 200,000 for attorney fees in the first instance case. 7. Correct its judgment to request Jinhe Co. to reimburse Lingang Co. in the amount of CNY 500,00 for attorney fees in the second instance case; 8. Require Jinhe Co. to bear all litigation costs incurred by the trials of the first and the second instance.

Jinhe Co. responded as follows: 1.Jinhe Co. was not at fault, had not made a serious breach of the agreement, and had not caused an adverse impact on the realization of the goal of the Joint Prospecting and Exploration Agreement. Lingang Co. had no rights for terminating the agreement. The judgement in the first instance was reasonable, fair and should be upheld; 2.Lingang Co. shall continue to fulfill its obligations under the agreement, and that its claims against Jinhe Co. for return of the compensation for the transfer of the mining rights and for the so－called losses were not legally valid, and that the court should reject the appeal made by Lingang Co.

Lingang Co. provided the following new evidence to the court of the second instance: 1. A plan and a satellite map of the nature reserve and the mine exploration area, which served to

indicate that the mine is located within the nature reserve. 2.*Attorney Contract* and the invoice of amount of CNY 500,000 paid in lawyers' fees for the case of the second instance. 3. A CD containing a video and the transcript of the interview in the video demonstrating that the establishment of mine development companies in Taxkorgan county has been prohibited since 2012.

Jinhe Co. responded to the new evidence provided by Lingang Co.: the coordinates of the mine exploration area provided in the new evidence 1 was different from the location information of the area held by Jinhe Co. The actual location of the mine exploration area shall be based on the coordinates provided by the mineral right permit and the official website of the Land Resoures Bureau of the Xinjiang Uyghur Autonomous Region; the attorney fees paid by Lingang Co. constituted unilateral civil action, to which Jinhe Co. was not liable for reimbursement. Jinhe Co. also questioned the reliability of the third piece of evidence, namely the video, claiming that the source of the evidence was uncertain and was not in accordance with relevant requirements, so the evidence was not suitable for the facts to be affirmed as it did not meet the criteria of the three principles of admissible evidence (being authentic, legal and relevant).

Jinhe Co. provided the following new evidence during the second instance proceedings: 1. The Permit for Prospecting Rights for the Uruke Iron Mine in Taxkorgan County, Xinjiang Uyghur Autonomous Region (Registration No. T65120081202022682), which appeared to prove that mineral rights for the mine had been legally renewed and would be valid until May 19, 2017; 2. A *Notice Release on Task Projects of Survey and Appraisal on Qualified Mining Cites to be Refunded by the Central Government for the Costs for Mine Prospecting Right and Mine Exploitation Right in* 2015 (*Phase I*) from the Land Resources Bureau of Xinjiang Uyghur Autonomous Region, with the intention to prove that the Central Government and the Xinjiang Autonomous Region were continuing to promote investments and projects of mine prospecting and development within nature reserves, and that the Geology Institute was continuing to undertake the tasks of survey and appraisal in the region. 3. A zoning plan of the Nature Reserve and the distribution of mining sites within the area with clarification notes, intending to demonstrate the existence of hundreds of mine prospecting and exploitation sites throughout the Nature Reserve. It also alleged that Lingang Co. held other purchased mineral rights in the same area, while the sites involved in this case covered under the Joint Prospecting Agreement were located in “experimental” and “buffer” areas of the Reserve, which did not affect cooperation in prospecting and development of the mine. 4.Several photographs of the site, with the intention to demonstrate the progress in road construction and machine operation since the signing of the Agreement, and that the joint prospecting agreement had already been in execution for over two years.

Lingang Co. responded to the new evidence provided by Jinhe Co. with the following: Lingang Co. acknowledged the authenticity of the first piece of evidence but questioned its legality and its suitability for the facts that it intended to affirm, as typically no mine prospecting or development activity is allowed within a nature reserve. Lingang Co. also expressed doubts over the appropriateness of the competent authority's issuing of the Permit. Regarding the second piece of evidence, Lingang Co. noted it was difficult to confirm its authenticity and questioned its relevance to the case and the suitability for the facts that it intended to affirm. It noted that the document did not refer to the mineral rights in question in this case, and also noted that the refund by central fiscal budget for prospecting and exploitation of mining resources did not necessarily imply that the mineral rights were obtained legally. Regarding the third piece of evidence, Lingang

Co. commented that it was prepared unilaterally by Jinhe Co. and that there was no way to confirm its authenticity and its suitability for the facts that it intended to affirm. The location of the mine sites, whether in a buffer zone or experimental area required confirmation from a third party. Regarding the fourth piece of evidence, i. e. the eight pictures submitted by Jinhe Co., Lingang Co. expressed doubts over their authenticity, noting that the first photograph was taken prior to the signing of the Agreement, and that the photographs reflected the poor working environment on the site and were also indicative of the losses for which Lingang Co. was seeking compensation.

This court finds as follows regarding the new evidence presented by Lingang Co.: the plan and satellite map of the mining sites submitted by Lingang Co. were produced and presented unilaterally by Lingang Co. and were not recognized by Jinhe Co. The court questions their credibility and considers them inadmissible. Concerning the second piece of evidence regarding the attorney contractand evidence of attorney fees paid, Jinhe Co. has not doubted their authenticity and has not provided any evidence to render them inadmissible, thus this court finds the second piece of evidence admissible. Regarding the third piece of evidence, namely the video CD－rom and the transcript of the video, the court calls into question their authenticity and considers them inadmissible.

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This court finds as follows regarding the new evidence presented by Jinhe Co.: The court considers the first piece of evidence, namely the Permit of Mine Prospecting Rights, admissible given its authenticity was not doubted by Lingang Co.. Regarding the second piece of evidence, the court finds the documentation from the local land resources bureau irrelevant and therefore inadmissible. Regarding the third piece of evidence, the court observes that it was produced unilaterally by Jinhe Co. and was not recognized by Lingang Co. The court therefore questions the authenticity and objectivity of this piece of evidence and therefore considers it inadmissible. Finally, regarding the fourth piece of evidence, the court finds it impossible to confirm the authenticity of the photographs, and therefore considers this piece of evidence inadmissible.

This court upholds the findings of the first instance court. This court finds the focal point of the dispute between the two parties in the second instance trial to be as follows: 1) whether the joint prospecting and exploration agreement between Lingang Co. and Jinhe Co. shall be terminated and 2) whether Lingang Co.'s claim for Jinhe Co. to return the compensation for the price of the transfer of the mineral rights and to compensate for the Lingang's losses incurred by its investment is valid.

1. On whether the Joint Prospecting Agreement shall be terminated

The mieral rights referred to under the Joint Prospecting and Exploration Agreement are located in the Xinjiang Taxkorgan Nature Reserve. The nature reserve was established prior to Jinhe Co. obtaining mining rights for the site. According to Article 6.2.3 of the joint prospecting agreement, "Party B commits that the mineral rights referred to in this agreement are not located in a glacier protection area, nature reserve or scenic spot that may have an impact on mining activity." Both parties to the agreement either knew or should have known that mining activity shall not be carried out in a nature reserve.

According to Article 26 of the *Regulations of the People's Republic of China on Nature Reserves,* "in nature reserves, such activities as felling of trees, grazing, hunting, fishing, gathering medicinal herbs, reclaiming, burning, mining, stone quarrying and sand dredging, shall be prohibited." Jinhe Co. maintains that while its activities were located within the nature reserve, they were in the buffer zone and experimental area and therefore were permissible. According to

Article 18 of the *Regulations of the People's Republic of China on Nature Reserves,* "Nature reserves may be divided into three parts: the core zone, buffer zone and experimental zone. The intact natural ecological systems and the areas where precious rare and vanishing wildlife species are concentrated within nature reserves shall be delimited as the core zone into which no units or individuals are allowed to enter. No scientific research activities are allowed in this zone except for those approved according to Article 27 of these Regulations. Certain amount of area surrounding the core zone may be designated as the buffer zone, where only scientific research and observation are allowed. The area surrounding the buffer zone may be designated as the experimental zone, where activities such as scientific experiment, educational practice, visit, tourism and the domestication and breeding of precious, rare and vanishing wildlife species may be carried out." Jinhe Co. maintains that its activities fall into the category of the "such activities" referred to in Article 18.

This court finds mining to be one of the activities prohibited in Article 26 of the *Regulation of the People's Republic of China on Nature Reserves,* and not one of the exceptions listed under Article 18. Jinhe Co's arguments therefore lack legal grounding. Therefore, the Joint Prospecting and Exploration Agreement signed by both parties was in violation of the prohibitions under the *Regulation of the People's Republic of China on Nature Reserves*. Continuation of the Agreement and continued activity under the Agreement would damage the ecology and the environment and harm public interests. Furthermore, in accordance with paragraph 4 and 5 of Article 52 of the *Contract Law of the People's Republic of China,* the Joint Prospecting Agreement signed by the two parties shall be considered void. This court believes that the first instance court erred in ruling the agreement to be valid and requesting both parties to continue the execution of the agreement. It was an erroneous application of the law and shall be corrected by this court. Void agreements have no legally binding force and hence cannot be terminated as such, therefore this court upholds neither the claim by Jinhe Co. that Lingang Co. shall not terminate the contract, nor the counterclaim by Lingang Co. that the joint prospecting agreement shall be terminated.

2. On the validity of Lingang Co.'s claim for repayment and compensation

Under Article 58 of the *Contract Law of the People's Republic of China,* "The property acquired as a result of a contract shall be returned after the contract is confirmed to be null and void or has been revoked; where the property can not be returned or the return is unnecessary, it shall be reimbursed at its estimated price. The party at fault shall compensate the other party for losses incurred as a result therefrom. If both parties are fault, each party shall respectively be liable." As the Joint Prospecting and Exploration Agreement is confirmed void, Jinhe Co. shall return the compensation of CNY 35 million for the price of the transfer of mining rights made by Lingang Co.. During the execution of the Joint Prospecting and Exploration Agreement, Lingang Co. signed a *Project Contract on Road Construction for the Prospecting Project at the Uruke Mine in Taxkorgan, Xinjiang* and a *Supplemental Agreement* with the Kashgar Prefecture Road and Bridge Construction Co. Ltd., entrusting the latter with the road construction for the project. The road now has been materialized as an asset of the mining site, for which Jinhe Co. shall provide compensation. This courts believes that the receipt in the amount of CNY 2.5 million with a bank stamp serves as sufficient proof of payment made by Lingang Co for the road construction project and therefore shall be upheld.

Evidence of other costs borne by Lingang Co.， including the amount of CNY 3,038,600 for road construction along with CNY 3,288,150 for prospecting, as well as CNY 150,000 for road

maintenance were electronic receipt printed by Lingang Co. itself and were not confirmed by a bank. Jinhe Co. maintained during the first instance trial that Lingang Co. could print an electronic receipt itself, but that it should have the receipt stamped at the bank that had processed the payment transfer, and did not acknowledge the authenticity of the receipt. Lingang Co. has provided no further evidence of the payment during the second instance trial, thus this court considers the authenticity of these receipts uncertain and these claims inadmissible.

The amount of CNY 5,702,257 claimed by Lingang Co. as losses of construction and management fees were borne by the Project Company, which was invested by both parties. Lingang Co. shall not claim these losses as solely their own and they shall be settled upon liquidation of the Project Company.

Because Lingang Co. did not carry out a full investigation of the mining site before entering into the cooperation agreement, it bears fault with making a void joint prospecting agreement. This court finds, therefore, that Lingang Co. shall bear the loss of interests incurred by their own faults, and thus does not support its claim for CNY 6,653,300 in interest losses.

The claim by Lingang Co. for the compensation of attorney fees was evidenced by Artilce 7.2. of the joint prospecting agreement, which is now confirmed void. Lingang Co. shall therefore bear the cost of its own attorney fees.

The mineral rights remain under Jinhe Co., and therefore no returning of such rights is involved. Lingang Co. shall return the rights of management and operation of the mine to Jinhe Co.

For any losses borne by Jinhe Co. that were incurred by the invalidity of the agreement, Jinhe Co. may pursue their rights by filing another case.

In summary, the findings of the first instance court was essentially correct, but there was a wrong application of the law, which shall be corrected. Under Article 170, paragraph 1, subparagraph 2 of the *Civil Procedure Law of the People's Republic of China,* this court orders as follows：

1. The civil judgement of the Xin Min Er Chu Zi No.13 (2014) by the People's High Court of the Xinjiang Uyghur Autonomous Region shall be set aside.

2. The *Cooperation Agreement on joint prospecting and exploration of the Uruke Pb－polymetallic Mine, Taxkorgan County, Xinjiang Autonomous Region* signed by Xinjiang Lingang Resources Investment Co. Ltd. and Sichuan Jinhe Mining Co. Ltd. is void.

3. The Sichuan Jinhe Mining Co. Ltd. shall return the compensation of CNY 35 million for the price of the mining rights to Xinjiang Lingang Resources Investment Co. Ltd. within 10 days since this judgment takes effect

4. The Sichuan Jinhe Mining Co. Ltd. shall compensate Xinjiang Lingang Investment Co. Ltd. in the amount of CNY 2.5 million for losses associated with road construction.

5. This court rejects claims made by the Sichuan Jinhe Mining Co. Ltd.

6. This court rejects other claims made by the Xinjiang Lingang Resource Investment Co. Ltd.

In accordance with Article 253 of the *Civil Procedure Law of the People's Republic of China,* if the party against whom enforcement is sought fails to perform any obligation of pecuniary payment during the period specified in this judgment, the party against whom enforcement is sought shall pay double interest for the debt for the period of deferred performance.

Litigation fees incurred in the first instance trial of CNY 100, as well as CNY 356,807.13 incurred in the countersuit shall be paid in equal amounts of CNY 178，453.565 respectively by both Jinhe Co. and Lingang Co.. Litigation fees incurred in the second instance of CNY 333,711.54

shall be paid in equal amounts of CNY 166,855.77 respectively by both Jinhe Co. and Lingang Co.

This judgment is final

Presiding Judge WANG Jijun
Acting Judge YAN Jing
Acting Judge ZHU Jing
November 14, 2015
Clerk FENG Zheyuan

Case 9: Taipinhe Company v. Huajin Company
on Compensation for Property Loss

Civil Ruling
Guizhou Qingzhen People's Court

(2015) Qing Huan Bao Min Chu Zi No.16

Plaintiff：Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd

Domicile: Gaojiazhai group, Damochong Village, Wangzhuang Town, Qingzhen City, Guizhou province.

Legal Representative: Chen Huiju, Chairman of the Board.

Entrusted Agent: He Wenhua, Male, DOB: 03/21/1970, Han Chinese, Legal Counsel of the Taipinhe Company; Agent Authority of Power: Special Authorization

Defendant：Guizhou Huajin Aluminum Co., Ltd.

Domicile: Government Office Building, Wangzhuang Town, Qingzhen City, Guizhou province.

Legal Representative: Leng Zhengxu, Chairman of the Board.

Entrusted Agent: Li Jiping, Male, DOB: 03/15/1964, Manager of General Department of the Huajin Company, residing in Yunyan District, Guiyang City

Attorney： Yang Bo, Guizhou Hongfeng Law Firm, Agent Authority of Power: Special Authorization

The plaintiff Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd (hereinafter referred to as "Taipinhe Company") brought a lawsuit against the defendant Guizhou Huajin Aluminum Co., Ltd. (hereinafter referred to as "Huajin Company") for compensation for financial losses. This court heard the case on August 31 2015 and formed a panel in accordance with law to openly try the case on November 3, 2015. Chen Huiju, the legal representative of the plaintiff Taipinhe Company, He Wenhua, the entrusted agent of the plaintiff, Li Jiping and Yang Bo, the entrusted agent and the attorney of the defendant Huajin Company, appeared in court to participate in the legal proceedings. The trial now has been completed.

The plaintiff Taipinhe Company alleged that as a breeding enterprise, the plaintiff had been taking water from the major groove in Gejiazhai for sturgeon farming. Since it was put into operation in March 2013, the plaintiff had purchased a total of 82，440 sturgeon fries three times from Guizhou Yuping Chengduan Company and Zunyi Suiyang Furong Company for CNY 187，380. In 2014, the defendant launched the alumina project in Tangzhai Industrial Park in Wangzhuang Town. Since the Gejiazhai Reservoir had not been completed then, the Qingzhen Municipality gave the defendant the permission to temporarily take water from the upper reaches of the reservoir under the condition that the latter went through all the required procedures relevant to environmental protection, construction, safety, water conservation and conservation in accordance with the law. Since April 20, 2015, the defendant had begun to store water on a large scale by almost shutting down the floodgates completely, resulting in a significant decrease of water volume in the lower reaches of the barrage and arousing multiple disputes with local farmers over irrigation. At 3：00 pm on April 21, 2015, the workers at the plaintiff's fishery rang up to report that the water

volume in the river channel was getting less and less, making it difficult to get enough water for fish farming. The plaintiff asked around and learned that the defendant's water storage activity had shut off the water supply to the farm. The plaintiff lodged a complaint to the Qingshui Water Affairs Bureau, requesting for a release of water needed for the production. At 10 o'clock that night, the workers once again called to report that it was so difficult to get water into some breeding ponds that some stunned fish started floating belly up. The plaintiff once again informed relevant personnel of the defendant company of the emergency, warning that if they refused to open the floodgate, the entire fishery would be cut off from water supply and also reported to the police station at Wangzhuang Town. On the midnight of the 21st, the person－in－charge of the plaintiff company rushed to the scene to find out that the amount of water was 1/3 less than usual, and some breeding ponds had ran out of water. At about 1 am on the 22nd, the person－in－charge of the plaintiff company talked to the on － site management personnel of the defendant company, requesting the latter to open the floodgate, but to no avail. The staff of the defendant company said that authorization from the leadership was needed for them to open the floodgates. The "Demonstration Report on Water Resources in Gejiazhai Reservoir Construction Project" recommended that the minimum water flow of the reservoir for irrigation and ecological use of water downstream should be 0.288 m^3 per second. Under the *Water Law of the People's Republic of China, Regulation of the People's Republic of China on the Administration of River Courses, Regulation of Guizhou on the Administration of River Courses* and other relevant regulations, the minimum distributed flow is statutory. No entity or individual, except due to special reasons, shall intercept or draw the water. However, by April 23, 2015, the volume of water discharged from the defendant's barrage was about 12L per second, only 1/25 of the legal level for irrigation and ecological basic flow downstream, which eventually led to severe deficiency of water and oxygen and killed the sturgeons in large numbers from April 21－23.

Among the deaths, 24,579,2 jin (500g) were juvenile fish each weighing less than 1jin, and 20,982.2 jin adult fish each weighing 3 － 5 jin, resulting in a total loss of CNY 86,726,36. In accordance with the *Water Law, General Principles of the Civil Law,* and the *Tort Law* and other relevant laws and regulations, the defendant who was engaged in construction with the knowledge that it would adversely affect the water supply, should have taken measures of remediation. However, without informing the water users downstream of any countermeasure, the defendant stored water and shut off water supply without permission, causing the plaintiff's fish to die in large numbers due to the lack of oxygen. The defendant should compensate the plaintiff for financial losses in accordance with the law and bear the civil liability for damaging the legitimate rights and interests of the plaintiff by intercepting and storing water. Therefore, the plaintiff pursued the following claims:

1．The defendant should be ordered to compensate the plaintiff for the financial loss of CNY 86,726,36；

2．The litigation costs of the case should be solely borne by the defendant.

In support of its claims, the plaintiff provided the following evidence to this court. The defendant issued cross－examination opinions on the evidence：

1．Business license, tax registration certificate, organization code certificate, license for water drawing, license for domestication and breeding of aquatic wildlife, license for management and utilization of aquatic wildlife, and certificate for aquaculture production in a water area or beach were submitted to prove that the plaintiff was eligible to pursue the claim and it had undergone all

the necessary formalities. The defendant raised no objection to this set of evidence；

2． Ten invoices for fish purchases between November 6, 2013 and September 2014 were submitted to prove that the plaintiff had more than 80,000 fish fries at the beginning of production. By 2013, the fries had grown into 3－5 jin each in weight, a level ready for sales and the fish fries later purchased was about 1 jin each. The defendant requested that the companies from which the plaintiff purchased the fries should provide the fishery business license to verify the authenticity. Although the invoices provided by the plaintiff confirmed the number of 80,000 of fries purchased by the plaintiff, no evidence was presented to prove that all the fries were bred with success. The possibility that other causes contributed to the fish deaths should not be ruled out. In view of the above, defendant claimed that this set of evidence was irreverent to the case；

3．Meeting minutes of the Qingzhen municipal special coordination meeting (Qingfu Special〔2015〕No. 86) on the fish deaths of Taipinhe Company was submitted to confirm the fact of fish deaths. The defendant had no objection to the authenticity of the meeting notes, but believed that this piece of evidence couldn't service the plaintiff's purpose of proving, in that the evidence only established the fact of fish deaths but failed to link the deaths to the defendant；

4． A statistical overview on the death of farmed fish of Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd issued by the government of Wangzhuang Town confirmed the number and size of dead fish on site. The defendant believed that this piece of evidence was not signed by statisticians or any personnel participated in the surgery, and the statistics of the fish size were incomplete and the calculation of deaths was not notarized by the notary department. No on－site recordings or films were provided, apart from the confirmation of fish deaths in writing；

5．Explanation of the market price of sturgeon, the price provided by Yuqiao Warehousing and Distribution Center for Aquatic Products over the past two days, and the price certificate were provided to clarify the variety of sturgeon and its price, i．e. the wholesale price. As a matter of fact, the plaintiff must have sold the fish for a higher price. The defendant raised objection to the authenticity on grounds that the investigator from Qingzhen Fishery Administrationmwas unqualified to address the inquires on the fish price. Plus, the seal on the price certificate provided by the Warehousing and Distribution Center was from another logistics company. Neither of the two companies issuing price certificates submitted their business licenses and the prices provided conflicted with each other.

6．The investigation report on the abnormal deaths of sturgeon of Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd on April 23 was issued by the Qingzhen Fishery Administration, establishing the fact of fish deaths and boiling down the cause of death to the lack of water and oxygen, not poisoning, pollution or other man－made errors；

7．Letter of entrustment and power of attorney on identifying the cause of abnormal deaths of sturgeon of Guizhou Taipinhe Co., Ltd., pictures of the fishery, analysis report on the abnormal deaths of sturgeon of the company, list of the analysis panel members and their professional qualifications were submitted to confirm that the massive fish deaths were caused by water and oxygen shortage and other possibilities like poisoning, pollution or man － made errors, and violence should be ruled out. Having had visited the fishery, the panel reached the conclusion that the barrage built by the defendant for water interception caused the sturgeons to die；

8． The Qingzhen Water Affairs Bureau issued an investigation report on the massive fish deaths of the Taipinhe Ecological Aquaculture Development Co., Ltd caused by the reduction in the amount of undercurrent water, proving that the Water Affairs Bureau performed its duties in

accordance with the meeting notes and looked into the cause of fish deaths；

9． The approval letter from the Water Conservancy Department of Guizhou Province on the “Demonstration Report on Water Resources in Gejiazhai Reservoir Construction Project” and the demonstration report itself were submitted to confirm the panel's finding that the water volume up from the defendant's barrage was 2.5 times the ecological basic flow. However, that of the downstream was only one－fifth of the minimum basic level；

10. The analysis report on the deaths of fish of Gejiazhai ecological breeding project in Wangzhuang Town in April 2015 and the qualification certificate of issuing demonstration report on water resources were provided to confirm that the water flow should have been maintained at the statutory level.

The defendant's attorney published a cross－examination opinion on the evidence No.6 to No.10. The evidence No. 6 was to prove that lack of water in some breeding ponds caused the deaths of fish. But the defendant raised objections to this set of evidence on grounds that the fishery administration was not an appraisal agency. For evidence No.7, the analysis report was based on the plaintiff's statement which was not true, and the appraisal entity didn't have the qualification for judicial authentication. The appraisers should come from the same appraisal institution and possess the qualification of conducting appraisals as such. So the panel wasn't qualified to conduct judicial appraisals. For Evidence No.8, the plaintiff's water drawing certificate allowed for a daily drawing volume of 4，989 square meters. The flow of the undercurrent river was just a fraction of that of the previous years, which confirms that the reduction of the water volume at the plaintiff's aquaculture fishery was caused by natural elements. Theoretically, the volume should be enough to satisfy the water demand from life and production. For Evidence No. 9, the report was not objective, in that the approval letter mentioned the Gejiazhai Reservoir, from which the plaintiff did not take the water for production. So, the evidence had no relevance to the case, so did the Evidence No.10；

11． 12 photos of the fishery scene were provided to prove that the water volume was reduced, causing fish to die; films taken when Guizhou Huajin Aluminum Co., Ltd. cut off the water, 26 phone calls and 2 recordings were provided to prove that the plaintiff had been looking for the cause of water shortage and no water was released by the defendant even after the Water Affairs Bureau contacted the defendant that afternoon. The video confirmed that on the same day, the locals were protesting and the plaintiff learned that the defendant had started intercepting water since the 20th. The defendant ignored the plaintiff's request of releasing water, thus causing losses to the plaintiff. The defendant believed that the pictures showed there was still some water left in the ditch and by taking immediate measures, the plaintiff could have cut the loss；

12． The plaintiffs applied to the court to ask the three experts who participated in the investigation, namely Yan Hong, Zhang Jinfang and Yang Heng, to testify in court. The three experts confirmed that they were invited by the Qingqing Agricultural Bureau to investigate the death of the fish of Taipinhe Company and found that there had been no water coming in though the inlet of the fishery where the type of sturgeons bred required a large amount of water. Three sturgeons were dissected and it was concluded that they didn't die of illness, but of lack of oxygen. The defendant believed that the testimonies from the three experts were inconsistent. It wasn't clear how many fish were dissected alive and how many were dead. Also it was untenable for experts to reach the conclusion that the harm was done by Huajin Company without visiting the barrage.

The defendant Huajin Company contended that the defendant was not eligible to lodge the suit. At the upper reaches of the plaintiff's fishery, water stations like Weicheng and Wangzhuang also

took water from the same rive. Irrigation activities peaked in April which happened to be the dry season. The defendant had drawn a total of 2000m^3 water since April 3, which took up only 3% of the flow. The defendant always made sure there was enough water for irrigation, so it was impossible to result in significant reduction of water flow downstream. 2. The defendant's water－drawing activity was permitted by the competent authority and constituted no infringement upon the plaintiff's rights. The defendant had reached an agreement with the Qingshui Water Hydraulic Engineering Administration over the water drawing project and obtained the approval of the government. Its water drawing activity was not against the law. 3. There was no causal link between the deaths of the plaintiff's fish and the defendant's water drawing activities. (1)The "Analysis Report on the Causes of Abnormal Deaths of Sturgeons of Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd." provided by the plaintiff could not be used as a basis to try the case. First, the three experts who testified in court contradicted each other on the information regarding fish dissecting and none of them went to the barrage area for on－site investigation. Second, the report was issued by Guizhou Aquaculture Technology Promotion Station, which had no qualification for judicial appraisal. Also the technical personnel of the Station was not registered at local bureau of justice, which left the authenticity of the report disputable; third, without vising the site of water drawing, the three experts managed to produce a report anyway and assumed that the losses should be borne by the entity engaged in the construction; fourth, no sample of the dead fish dissected was kept, nor did the report indicate the location where the authentication took place, the condition (alive or dead) and the source of the fish. The defendant found the result of authentication report unacceptable. In addition, no consideration was given to other factors such as water drawing activity of the water station and agricultural irrigation at the upper reaches. (2) The "Analysis Report on River Water Flow" provided by the plaintiff lacked authenticity and objectivity. First, the source of the report data was unknown. Second, the report failed to factor in the climate of this year, which led to a river flow volume of only 26.98% of that of the previous years, i．e. 0.7m^3 per second, and the daily flow of 60，480m^3. In contrast, the defendant only took 9，600m^3 of water and released 50，880m^3 to the downstream every day. The plaintiff's daily water intake was 5，027 m^3, only about 10% of the amount of water released. The amount of water discharged by the defendant was 84.13% of the reasonable level and 10% above the legal ecological basic flow. And the data in the report were about the Gejiazhai Reservoir, irrelevant to this case. In addition, according to the investigation by the Qingzhen Water Affairs Bureau, the amount of water coming in to the fishery was about 0.015 m^3/s when deaths occurred, adding up to the daily water intake of about 1，296 m^3. The plaintiff's water drawing permit stipulated that the daily water intake was 4958.9 m^3, but the actual water intake was 26.13% of what was required on the permit, which was consistent with the fact that this year's river flow was 26.98% of the level of the previous years. It was indicated that the reduction in the water inflow into the plaintiff fishery was caused by nature elements and had nothing to do with the defendant. (3) The price certificates of the aquatic product provided by the plaintiff were obtained after the plaintiff consulted the market. But in accordance with the law, price certificates can be used as a basis to try the case only when they are verified by an appraisal agency or a price authority (4) The statistical overview on fish deaths issued by the Wangzhuang Town Government lacked authenticity and objectivity for the following reasons: first, the evidence was not signed or sealed by statisticians; second, the statistics were only about the category and left out the number of deaths; third, the statistics only covered the dead fish weighing 1 jin or 3－5jin. The statistics obviously were incomplete and unobjective. Fourth, the evidence

weren't notarized and no supporting audio and video recordings were submitted. Fifth, the evidence failed to prove that the deaths were caused by Huajin Company and was irrelevant to the case; sixth, the evidence did not indicate the disposal of dead fish, i．e., lone evidence which was unacceptable as uncorroborated evidence. (5) When the incident took place, the defendant went to the scene to check and found that the water flow was normal and paralleled with the plaintiff ditch, which meant the plaintiff could have cut the channel to divert water. Instead, the plaintiff took no measures. Therefore, the defendant found the plaintiff's claims void of facts and legal basis and appealed to this court for the rejection of the plaintiff's claims.

After the defendant provided the following evidence to the court to support its cross－examination opinions, the plaintiff also confronted the defendant on the evidence：

1． The defendant's business license, organization code certificate, and copy of the legal person's ID card were provided to confirm the identity of the defendant. The plaintiff had no objection to this set of evidence；

2．The construction contract and the project completion acceptance certificate were provided to confirm that the defendant's barrage had been completed before the fish deaths occurred. The plaintiff believed that the completion of the barrage was not relevant to the case, for there was no direct link between the completion of the project and closing the floodgate for water storage；

3．Design plan was provided to confirm the legitimacy of the defendant's project. The plaintiff questioned the authenticity and believed that the problem didn't lie in the water drawing activity but in the sudden water interception that caused damage to the plaintiff；

4．A total of 30 photos were submitted to prove that the production downstream remained business－as－usual.

Upon the defendant's request, this court visited the water stations of Xindian, Wangzhuang and Weicheng to find facts on water drawing. Wangzhuang Town took water as usual (about 2200m^3 per day), while the other two villages did not take water from the same river. The defendant believed that during the interception of water, the use of water for life and production was secured. The plaintiff believed that the evidence could not achieve the defendant's aim of proving. The fact that Wangzhuang Town had begun to take water from the river before the barrage was built could not serve as the reason for the reduction in water volume. The plaintiff's entrusted agent had no objection to the authenticity of the evidence obtained by the court, but believed that the evidence could not achieve the aim of proving.

After the trial, the defendant submitted other evidence to the court, including 1 page of “Agreement on the Use of Water by Guizhou Huajin Aluminum Co., Ltd. Qingzhen for the Alumina Project ” signed between Huajin and Qingzhen Hydraulic Engineering Administration, 2 pages of approval letter from the Guizhou Water Conservancy Department on Demonstration Report on Water Resources in the Alumina Project of Guizhou Huajin Aluminum Co., Ltd. (Qian Shui Zi Han 〔2015〕 No. 39), 13 pages of water drawing license(Qian Sheng Zi 〔2015〕 No. 000014). The three pieces of evidence showed that the defendant had obtained permission from provincial, municipal and county governments to take water with the volume agreed in the agreement. The meeting notes also clarified that before the completion of the Gejiazhai Reservoir, water could be taken from the upper reaches of the reservoir. Therefore, the defendant did not take water illegally. The water drawing activity was approved by the municipal government and relevant procedures had been handled along the way.

The plaintiff agreed to cross－examine the evidence submitted by the defendant and issued

opinions on that: 1. The plaintiff had no problem with the legality and authenticity of the “Agreement on the Use of Water by Guizhou Huajin Aluminum Co., Ltd. Qingzhen for the Alumina Project” signed between Huajin and Qingzhen Hydraulic Engineering Administration. However, as a management agreement signed between the municipal hydraulic engineering administration and the defendant, the document was unable prove that it was legal for the defendant to take water at a time when the defendant was operating without the water drawing permit; 2. As for the approval letter from the Water Conservancy Department (Qian Shui Zi Han 〔2015〕 No. 39), it was issued on June 8, 2015. The fish deaths occurred between in the 20th and the 23rd of April, 2015, ahead of the approval. Not until June 20, 2015 that the application for the permit was submitted to the Water Conservancy Department and not until July 21, 2015 that it was approved. Not until then that the department informed that there should be remedial measure and compensation should be made for loss of water resources during operation. The defendant failed to prove that the water was taken in accordance with the law when the incident took place. On the contrary, it proved the fact that the defendant did not go through the necessary procedures when taking water, hence taking no remedial measures and causing the ecological flow to drop and the fish to die.

The plaintiff submitted the wholesale price of sturgeon during the trial. The defendant, refusing to recognize the price, also failed to prove otherwise. For prudence's sake, the court looked up online the prices of sturgeon and fry between April 21 and 23 this year and took a field trip to the wholesale market for aquatic products in Guiyang. The court learned that the wholesale sturgeon's price in Guiyang around April 21－23 this year was CNY13 to 15, the fry's price slightly higher than that. The plaintiff believed that the loss of value should be calculated based on the market price. But the defendant believed that the price learned by the court was inconsistent with that provided by the plaintiff.

It was found that the plaintiff Taipinhe Company as a breeding enterprise had been taking water from the major groove in Gejiazhai for sturgeon fisherying. Since it was put into operation in March 2013, the plaintiff had purchased a total of 82，440 sturgeon fries from Yuping and Suiyang in November 2013, December 2013, September 2014 respectively. In July 2014， the defendant signed the “Investment Agreement on Huajin Alumina Project in Qingzhen” as Party B with Qingzhen Municipal Government as Party A, planning to start an alumina project in Tangzhai Industrial Park at Wangzhuang Town. Item 5 regarding the supporting measures for the project under Article 4 of the Agreement specified the use of water use, which is Party A speeds up the construction of the Gojiazhai Reservoir to guarantee water supply to Party B. If the progress of the construction of the Gojiazhai Reservoir cannot keep up with the pace of Party B's production, it is agreed that Party B can set up a makeshift facility to take water from the upstream section of the Reservoir to meet the water demand from production. The Agreement also specified Party B's responsibilities and obligations:

1. Party B's construction project shall be carried out in accordance with the regulatory plan of Qingzhen Economic Development Zone and relevant environmental and industrial regulations. The construction plan cannot be executed before being reviewed and approved by Party A or competent authorities.

2． In accordance with the law, Party B shall undergo all the required formalities on environmental protection, construction, safety, water conservation and conservation before carrying on with the construction. Party B shall strictly implement the acceptance check rules for

“simultaneous design, construction and use” of environmental protection facilities. The water intake project was completed and put into use in March 2015 (No EIA was conducted for the project).As the fish fisheryed by the plaintiff were hybrid sturgeons which demanded for high concentration of oxygen dissolved in the water, the plaintiff had to report to the Qingzhen Water Affairs Bureau on the afternoon of April 21 in the hope that the bureau could persuade the defendant to open the floodgate to release the water needed for production. At 10 o'clock that night, some fish in the breeding ponds were stunned. The plaintiff once again informed the defendant of the critical situation, asking for release of water and reported to the police station at Wangzhuang Town. At 1 o'clock on the morning of the 22nd, the person in charge of the plaintiff once again negotiated with the defendant's management personnel on site over opening the floodgate, but to no avail. Eventually, a large number of sturgeons at the plaintiff's fishery died of severe water shortage and hypoxia from April 21－23. Later, upon the plaintiff's request, the Qingzhen Government, together with the Economic Development Zone, the Water Affairs Bureau, the Ecological Bureau, the government of Wangzhuang Town, the Agricultural Bureau, the Taipinhe Company, and the Huajin Company, conducted an investigation on April 23 and held a coordination meeting for division of work: 1. The Wangzhuang Town Government would take lead in verifying the size, class and quantities of dead fish. The Taiping River Company, the Agriculture Bureau and the Water Affairs Bureau would support the government by hiring a certified third－party appraisal agency to carry out judicial authentication. 2.Led by Wangzhuang Town Government and supported by the Taipinhe Company and the Agricultural Bureau, the disposal of dead fish should be properly handled after the third－party appraisal agency got the sample. 3. The two companies shall have their respective liabilities for the accident identified and confirmed through judicial channels upon the conclusion of the authentication report. 4. Huajin Company should ensure the water supply for production and life downstream. 5. The Water Affairs Bureau would investigate the hydrological regime, and the Agricultural Bureau would investigate the dead fish and inform the companies of the results by April 24. Li Jiping, Yang Quanchang from Huajin Company and Chen Huiju, the legal representative of Taipinhe Company, attended the meeting. After the meeting, all parties began to undertook the work according to the division of work in the meeting minutes as agreed during the coordination meeting:

1. The government of Wangzhuang Town weighed the dead fish, finding that 24，579，2 jin (500g) were young fish with each weighing less than 1 jin, and 20,982.2 jin adult fish with each weighing 3－5 jin.

2. The plaintiff Taipinhe Company and Qingzhen Agricultural Bureau jointly commissioned the analysis and identification of the cause of death to the Provincial Aquaculture Technology Promotion Station which spearheaded the assignment by organizing a panel of 5 experts from Guizhou Provincial Fisheries Bureau, Guiyang Aquaculture Station, Guizhou University and Guizhou Institute for Fisheries Research on April 24 to conduct a field investigation and dissected 3 fish (2 were dead；1 was alive). The panel concluded that sudden massive deaths of sturgeon should be caused by shortage of oxygen and other factors such as lethal concussion, poisoning, diseases could be ruled out.

3. After receiving the complaint from the Taipinhe Company on April 22, the Qingzhen Water Affairs Bureau also did the investigation into the reduction of water in the undercurrent river between the 22nd and 23rd. The preliminary investigation showed：

(1) The Huajin Company closed the floodgate to speed up water storage on the 20th to

guaranteed the operation on the 29th and failed to notify the downstream users to take countermeasures;

(2) The barrage at Gejiazhai Main Groove at Damo Village in Wangzhuang kept all the water from the river to the Main Groove with a flow volume of about 0.02 m^3 per second. The Taipinhe Company completely intercepted the water from the river and diverted it into the fishery. As a result, there was no water flowing into the downstream of the river from the barrage；

(3) The recent water inflow was 0.75 m^3 due to the dry weather, but the amount was enough to basically meet the water demands from the Huajin Company, the Xindian Water Plant, the Taipinhe Company and from downstream irrigation；

(4) The Huajin Company's water storage activity contributed to the decrease of water volume in the downstream reaches.

4. Also, the Taipinhe Company and the Qingzhen Water Affairs Bureau jointly commissioned Guiyang Design and Prospecting Institute for Water Conservancy and Hydropower to analyze and calculate the volume of water running through the inlets, to measure the volume of water discharged to the downstream and its impact on the downstream water intake activities. The Institute later issued the “Analysis Report on the River Water Volume” on May 7, 2015, concluding that the minimum flow discharged from the Gejiazhai Reservoir was 0.288 m^3 per second in accordance with the relevant laws and regulations. It was statutory, meaning no entity or individual, except due to special reasons, should engage in any interception or water drawing activities. The prospecting results showed that the flow rate of the river channel around the barrage beneath the river tunnels 4 km away from the upper stream of the defendant's barrage was about 0.75 m^3 per second. The amount of the inflow was about 2.5 times that of the level set by the competent authorities. The ecological water flow at the temporary barrage site of the Huajin Company was about 12L/s, only 1/25 of the approved minimum level for downstream irrigation activities and for securing ecological basic flow. It was difficult to meet the water demand from the downstream. Based on that, the plaintiff believed that the minimum flow discharged from the Gejiazhai Reservoir should be 0.288 m^3 per second according to the “Demonstration Report on Water Resources in Gejiazhai Reservoir Construction Project” so as to meet the water demand from downstream irrigation and ecological water use. In accordance with the *Water Law of the People's Republic of China, the Regulation of the People's Republic of China on the Administration of River Courses* and *the Regulation of Guizhou on the Administration of River Courses,* the minimum discharged volume was a statutory level, meaning no entity or individual, except due to special reasons, should engage in any interception or water drawing activities. However, until April 23, 2015, the amount of ecological water discharged from the defendant's barrage was only about 12 liters/second, only 1/25 of the approved minimum level for downstream irrigation activities and securing enough ecological flow. In accordance of the *Water Law, General Principles of the Civil Law,* and the *Tort Law* and other relevant laws and regulations, the defendant who was engaged in construction with the knowledge that it would have adverse impact on the original source of water supply, should have taken measures of remediation. However, without informing the water users downstream to take countermeasures, the defendant stored water and shut off water supply without permission, causing the plaintiff's fish to die in large numbers due to the lack of oxygen. The defendant should give the plaintiff the financial compensation in accordance with the law and bear the civil liability for damaging the legitimate rights and interests of the plaintiff by intercepting and storing water. Therefore, the plaintiff brought the lawsuit to this court and sought claims above

mentioned.

It was also found that the makeshift barrage built by the defendant the Huajin Company was in the same area of Qingzhen Gejiazhai Reservoir construction project. According to the approval letter of the Guizhou Water Conservancy Department on the "Demonstration Report on Water Resources in Gejiazhai Reservoir Construction Project", there should be 0.288 m^3 per second of water discharged from the reservoir to secure the downstream ecological basic flow. At the lower reaches of the defendant's barrage, the Wangzhuang water station also took water from the same river with a volume of about 2，200 tons per day.

According to the Qingzhen Fishery Administration's investigation records provided by the plaintiff, between 21st－23rd, the price of the sturgeon fry in Guiyang was CNY18－20 per jin, the adult fish CNY 15－18 per jin. This court found that the adult fish were priced at CNY 13－15/jin in Guiyang and fries slightly more expensive after consulting the aquatic product market and looking up online.

This court believes that the focus of this case shall be on the following aspects：

1．Could the "Analysis Report on the Causes of Abnormal Deaths of Sturgeons of Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd." issued by the Guizhou Aquaculture Technology Promotion Station be used as a basis to try the case?

2．Was there any subjective fault on the defendant's part?

3．Was there a causal link between the fish deaths and the water drawing activities of the defendant? Should the defendant be held liable?

4．What was the value of the dead fish?

Having conducted on－site inspection and dissected the dead samples, the panel consisting of 5 experts from entities including Guizhou Institute for Fisheries Research produced an analysis report on the causes of abnormal deaths of sturgeons, concluding that the sudden massive deaths of sturgeon should be resulted from shortage of oxygen and other causes such as lethal concussion, poisoning, diseases could be ruled out.

Although the defendant contended that other causes could not be ruled out, it failed to provide relevant evidence to support its statement. The defendant also questioned the legality, objectivity and authenticity of the report. The court believed that regarding objectivity, the report was commissioned to an independent third party by the competent government department and the plaintiff. The third party spearheaded the production of report by bringing in experts from different institutions to conduct on－site inspection, dissected the dead samples and draw a conclusion based on that. It should be an undeniable fact. The experts involved had no interest in the matter and the conclusion drew from the dissection result was based on science, which obviously leaving the objectivity undisputable. As for the discrepancies in the expert testimony on the number of sturgeons dissected alive (1 or 2？), it was understandable given the investigation had been carried out several months earlier and the memory could get fuzzy over time. The anatomy details were well documented in the report. The errors of memory had no substantial impact on the analysis of cause of death. The objectivity of the analysis should not be denied just because of that. Regarding legality, this court believed that the report was commissioned to a specialized agency by the Agriculture Bureau and the plaintiff in accordance with the coordination meeting notes. The panel consisted of fishery and aquatic experts from different institutions. The investigation was conducted at a time when the litigation had not been filed yet. Therefore, no law stipulates that the report at that stage should be issued by a certified judicial authentication agency nor does it require the

appraisal personnel to file the record to a judicature administrative department. Plus, all the three experts involved in the investigation appeared in court to accept inquiries from both parties. The defendant did not submit any evidence to suggest otherwise during the trial, so its opinion that the report was illegal was untenable. In conclusion, the "Analysis Report on the Causes of Abnormal Deaths of Sturgeons of Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd." could be used as a basis to try the case.

Regarding whether there was subjective fault on defedant's part, this court held that although under the "Investment Agreement on Huajin Alumina Project in Qingzhen", the Qingzhen Municipal Government gave permission to the defendant to set up a makeshift water intake facility at the upper reaches of the Gejiazhai Reservoir to meet the water demand from production, the Agreement also specified that Party B (i.e. the defendant) shall undergo all the required formalities on environmental protection, construction, safety, water conservation and conservation before carrying on with the construction and shall strictly implement the acceptance check rules for "simultaneous design, construction and use" of environmental protection facilities. That is to say, the defendant was allowed to take water on condition that the following procedures should be handled in accordance with the laws:

1. Article 48 of the Water Law of the People's Republic of China: "The entities and individuals that collect water resources directly from rivers, lakes, or underground shall, in accordance with the provisions of the water collection license system and the system of paid use of state water resources, apply to the water administration departments or watershed authorities for a water collection license, pay the water resource fees and thus obtain the right to collect water. However, collection of a small amount of water for household use, raising livestock in pens, etc. shall be excepted."

2. Article 2 of the *Regulation on the Administration of the License for Water Drawing and the Levy of Water Resource Fees:* "Any entity or individual that draws water resources shall, except for the circumstances prescribed in Article 4 of the present Regulation, apply for a license certificate for water drawing, and pay water resource fees". Therefore, it is required to apply for the license to competent authorities in order to obtain the rights to draw water.

3. Article 11 of the Regulation: "where water drawing is needed in a construction project, the applicant shall, in addition, submit the water resource argumentation report on the construction project. The argumentation report shall include the source of water drawing, the rationality of using water, and the impacts to the ecology and environment, etc."

4. Article 14 of the Regulation: "the licenses for water drawing shall be subject to hierarchical examination and approval"

5. Article 21 of the Regulation: An applicant may not build water drawing engineering structures or facilities until its application for water drawing has been approved by the approval organ. For a construction project in need of state approval or ratification, the project administrative department shall not approve or ratify the construction project before the applicant obtains the approval document for the application for water drawing".

In accordance with the laws above, the defendant the Huajin Company should obtain the approval from the competent department before setting up a makeshift barrage to take water from the river in question.Not until June 20, 2015 that the application for the permit was submitted to the Water Conservancy Department and not until July 21, 2015 that it was approved. It was obvious that the defendant was operating without the permission when the incident occurred. The defendant

built a barrage for water intake against the law. Secondly, the defendant failed to fulfil the duty of care in the construction of the barrage and harmed the legitimate rights and interests of downstream users by bringing down the water volume below the level of the ecological basic flow. The river ecological flow, a concept that first appeared in the 1940s, refers to the minimum downstream flow needed to secure the river's ecological function and the sustainable development and utilization of water resources without causing the ecological environment to deteriorate. The ecological basic flow can guarantee the self－purification of the river and the minimum amount of water essential for the balance of the aquatic ecosystem. It also provides guarantee for water quality and quantity required for the aquaculture industry around the reservoir and ensures there is no major change to hydrodynamic force. Although in China there is no specific laws for ecological basic flow, there are rules for practice, such as setting a minimum discharging capacity for hydropower plants to secure the minimum ecological basic flow. The *Action Plan for Prevention and Control of Water Pollution* effective on April 2, 2015 has laid out rules such as

1．“Strengthening water dispatch and management in rivers, lakes and reservoirs. To perfect water dispatch plans. To take measures such as gate－dam combined dispatch and ecological water compensation, make reasonable arrangements for gate－dam discharging capacity and time frame, maintain basic ecological water demand on rivers and lakes, and emphasize on guarantee of ecological basic flow in dry seasons”

2.“Scientifically measuring ecological flow. To set up pilot projects in the Yellow River basin, Huaihe River basin, etc. and measure ecological flow (water level) by stages and batches to provide important reference for basin water dispatch”. It is very important to maintain river ecological flow.

As far as this case was concerned, theoretically, the water use for life and production and the ecological basic flow downstream could have been secured had the defendant monitored and managed the water drawing activities in accordance with relevant regulations and rules imposed by competent departments. However, the defendant began to take water without permission with a daily volume of 9，600 $m^{3,}$ according to its attorney. The “Analysis Report on the Volume of the River Water” issued by Guiyang Design and Prospecting Institute for Water Conservancy and Hydropower showed that the volume of water discharged from the defendant's barrage was about 12L per second, only 1/25 of the legal level for irrigation and ecological basic flow downstream. In addition, the defendant failed to notify the downstream users of the water drawing activities, so defendant was at fault.

The defendant the Huajin Company contended that the minimum level of 0.288 m^3 only applied to the water discharged from the Gejiazhai Reservoir, hence bearing no correlation with the defendant's water intake. It was found that the defendant's barrage was built in the area of the proposed Gejiazhai Reservoir, to be more specific, at the upstream of the reservoir. It is a common sense that the higher up the dam is located, the more likely the minimum discharging flow can be secured. Given the actual spot where the defendant took water, it was not inappropriate using the minimum discharging volume in the area of the Gejiazhai Reservoir as a reference. Therefore, the defendant's opposing opinions were untenable. There was a subjective fault for the defendant in taking water without permission, building a dam without conducting the EIA and failing to inform the downstream users of the activities.

Regarding whether there was a causal link between the fish deaths and the water storage activities of the defendant, the defendant used a set of calculations to prove that the water intake did not affect the downstream water use and the decrease in water volume, as a matter of fact, was a

natural result of the dry season, denying the causal link between the fish deaths and water storage.

This court held that according to the investigation findings from the Water Affairs Bureau, this year's water inflow was 0.75 m^3 per second, slightly lower than average but still enough to basically meet the water demands from the Huajin Company, the Xindian Water Plant, the Taipinhe Company and from downstream irrigation. The "Analysis Report on the Volume of the River Water" issued by Guiyang Design and Prospecting Institute for Water Conservancy and Hydropower confirmed the flow volume at the upstream of the defendant's barrage was 0.75 m^3 per second, about 2.5 times that of the level set by the competent authorities. However, the water discharged from the outlet of the barrage was about 12L/s, only1/62.5 of the pre－interception level and 1/25 of the approved ecological basic flow. It was evident that the water drawing activities of the defendant resulted in the reduction of the downstream flow volume.

The defendant's attorney did a simple calculation at the trial, assuming the defendant's daily water intake was 400 m^3 × 24 = 9600 m^3; the amount of inflow was 0.7 m^3 × 60 × 60 × 24 = 60,480 m^3; the amount of water discharged per day was 60，480 m^3 － 9,600 m^3 = 50,880 m^3; it could be concluded that the water discharged by the defendant was 84.13% of the total flow volume of the river, 10% above the approved level for water consumption downstream. At the same time, the Wangzhuang water station's water intake activity was presumably unaffected, indicating that the water demand downstream could be met; the actual amount of water drawn by the defendant per day was 0.015 m^3×60×60×24＝1,296 m^3 in comparison with the permitted volume of 4,958.9 m^3. The ratio of the two was 26.13%, close to the percentage of the river flow volume reduction of 26.98% this year. It could be concluded that the reduction of water volume in the plaintiff's fishery was caused by natural factors and had nothing to do with the defendant. In fact, the defendant's calculation method grossed deviated from the fact that the defendant intercepted water with a barrage that just allowed a small amount of flow discharged downstream. The water discharged from the barrage was only 12L/s according to the investigation, not 400 m^3 per hour as claimed by the attorney. Nor was the water in excess discharged downstream. A simple calculation could be made regarding the amount of water discharged by the defendant (the calculation could only be used as a simple model and the actual state should not be considered exactly that way): the amount of water discharged by the defendant was only 0.012 × 60 × 60 × 24 = 1036.8 m^3 / day, an amount that could not meet the required volume of 4958.9 m^3/day as stated on the plaintiff's permit, let alone the demand for water from the water stations and famer users at the upstream of the plaintiff's fishery. The water station downstream had been taking water every day and never caused water shortage at the plaintiff's fishery. The reduction of the water volume at the fishery didn't occur until the defendant set out to store the water. Therefore, this court held that the defendant's unpermitted water intake resulted in a decrease in downstream water volume, hence the reduced amount of inflow to the plaintiff's fishery and massive fish deaths of lack of oxygen. There was a causal link between the death of the carp and the water storage of the defendant.

The defendant's claim that the reduction of water inflow into the decrease was resulted from less rainfall was found inconsistent with the fact and would not be accepted by this court. Under Article 28, "no entity or individual shall, while channeling, storing, or discharging water, infringe upon public interests or the lawful rights and interests of other people." The defendant illegally should bear civil liability for drawing water against the law, hence eventually reducing the water volume and cause losses on the plaintiff's part.

On how should the plaintiff's losses be calculated, under the “Regulations on Method of Calculating Fishery Losses in Water Pollution Incidents of the Ministry of Agriculture”， the value of lost aquatic products ＝ local market price × the amount of loss. To work out the losses of the plaintiff, two basic elements in the equation, namely the amount of loss and the local market price, should be set. Having had weighed the dead fish, the Wangzhuang Town Government concluded that there were a total of 24，579.2 jin dead smaller sturgeon, weighing 1 jin each and a total of 20，982.2 jin bigger ones weighing 3－5 jin each. The defendant's attorney raised doubts over the data: the defendant found the result unacceptable, in that the dead fish was grouped into only two categories: weighing 1 jin each and weighing 3－5 jin each, which was against the common sense. The court believed that the Wangzhuang Town Government weighed the dead fish as agreed at the Qingzhen Municipal Government's coordination meeting, acting as a third party not as a represent of the plaintiff. The result should be considered objective. As for the categorization (1 jin each and 3－5 each) of the dead fish, the plaintiff stated that it purchased the sturgeon fries in three batches. Before the incident, the fries bought earlier had grown into adult fish, and those bought later remained juvenile. The statement was supported by the evidence submitted by the plaintiff, confirming that the first two batches of fish, purchased in November and December 2013, had basically grown into adult fish before the incident that occurred one year and a few months later while those purchased in September 2014 remained juvenile then. In conclusion, the plaintiff's statement was in line with the fact. Of course, the growth of different fries from the same batch could not be entirely synchronized. It was possible that there were a small number of sturgeons weighing 1 － 3 jin each. However, statistically, categorizing fish this way was acceptable, especially in the case where tens of thousands of pounds of fish died. It was clearly unrealistic or unnecessary to work out the number of dead fish strictly based on each weight level. This court accepted the weighing results provided by the Wangzhuang Town Government. Regarding the price of sturgeon, the defendant's attorney argued that the Qingzhen Fishery Administration was not a certified institute to address inquiries on fish price. The seal on the fish price certificate provided by the Yuqiao aquatic product market was from a different logistics company. Also the sturgeon price certificate was not attached with business licenses of the two companies and the prices given by the two companies were contradictory. This court held that no legal provisions stipulated that the sturgeon price certificate should be submitted with the business license. Under the *Regulations on Calculating the Fishery Losses in Water Pollution Accidents of the Ministry of Agriculture,* the loss of aquatic products should be calculated according to the retail price of the local market at that time.

The prices of adult and juvenile sturgeon submitted to the court were not set by the plaintiff, but learned by the Qingzhen Fishery Administration from the local market. It was not the plaintiff's own pricing. There should be objectivity to the prices. The defendant disapproved of the price, but did not provide evidence to prove otherwise. For prudence's sake, the court looked up online the prices of sturgeon and fry and took a field trip to the aquatic product wholesale market in Guiyang. Combining its findings, the court decided the plaintiff's loss based on the price of fry for CNY18 /jin and that of adult fish for CNY 15 / jin. Therefore, the plaintiff's loss is: 24，579.2×18＝ CNY 442，425.6 for sturgeons weighing 1 jin each or less and 20,982.2×15＝ CNY 314,733 for adult fish, adding up to the loss of CNY 757,158.6 in total. The defendant should be liable for compensation.

In accordance with Article 6 of the Tort Law－－“one who is at fault for infringement upon a

civil right or interest of another person shall be subject to the tort liability”， Item 6 of Article 15 “The methods of assuming tort liabilities shall include compensation for losses” , Article 28 of the Water Law and Item 1 of Article 64 of the *Civil* Procedure *Law of the People's Republic of China*—“A party shall have the burden to provide evidence for its claims” and Article 2 of *Some Provisions of the Supreme People's Court on Evidence in Civil Procedures*— “ The parties concerned shall be responsible for producing evidences to prove the facts on which their own allegations are based or the facts on which the allegations of the other party are refuted. Where any party cannot produce evidence or the evidences produced cannot support the facts on which the allegations are based, the party concerned that bears the burden of proof shall undertake unfavorable consequences”， it is ordered as follows：

1． The defendant Guizhou Huajin Aluminum Co., Ltd., within 15 days after the judgment comes into force, pay the plaintiff Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd. CNY 757,158.6 in compensation；

2． The rest of claims of the plaintiff Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd. be rejected.

Of the case acceptance fees of CNY12,492.64, the defendant Guizhou Huajin Aluminum Co., Ltd. shall assume CNY 10,881.52 and the plaintiff Guizhou Taipinhe Ecological Aquaculture Development Co., Ltd shall assume CNY 1,611.12

If a party fails to perform the obligation of monetary payment within the time limit as prescribed in this judgment, the party shall double pay the debt interest incurred during the period of delayed performance in accordance with Article 253 of *the Civil Procedure Law of the People's Republic of China*.”

If any party refuses to accept the Judgment, within 15 days after the Judgment is served upon, the party, shall submit a written appeal to the Court, provide the photocopies thereof in the number of the other parties or in the number of representatives of the other parties, and appeal to the Intermediate People's Court of Guiyang, Guizhou Province.”

Presiding Judge,,Luo Guangqian
Acting Judge,,Li Yunhe
Acting Judge,,Zhang Qi
,,
18 December, 2015

Clerk,,Luo Chaojuan

Notice: Unsatisfied with the judgment, the defendant Guizhou Huajin Aluminum Co., Ltd. lodged an appeal. On May 5, 2016, the Intermediate People's Court of Guiyang, Guizhou Province rendered a civil judgment (No. 01 〔2016〕， Final, Civil Division, IPC, Guiyang) that the appeal should be dismissed and the original judgment should be affirmed.

Case 10: Sangde Water Company v. Danzhou Environmental Protection Bureau on Disputes over Administrative Penalty

Administrative Judgment
Hainan No.2 Intermediate People's Court of Hainan Province

(2016) Qiong 97 Xing Zhong No.34

Appellant (defendant in the original instance): Danzhou Municipal Bureau of Ecological and Environmental Protection.

Legal representative: Meng Xiaoming, Director－general of the Bureau.

Entrusted agent: Tang Fuli, Chief of Regulation and Supervision Section of Danzhou Municipal Bureau of Land Resources.

Appellee (plaintiff in the original instance): Hainan Sangde Water Co., Ltd.

Legal representative: Sun Lin, General manager.

Attorney: Yang Lusheng, Hainan Hai Da Ping Zheng Law Firm.

Unsatisfied with the administrative judgement (2015)*Dan Xing Chu Zi No*.2 by Danzhou People's Court for the disputes over the environmental administrative punishment decision with the appellee Hainan Sangde Water Co., Ltd (hereinafter referred as "Sangde Water"， Danzhou Municipal Bureau of Ecological and Environmental Protection (hereinafter referred as "Danzhou Environmental Protection Bureau"), the appellant, appealed the case to this court. This court formed a collegiate panel in accordance with the law, and the case was publicly heard on June 1, 2016. Tang Fuli, the entrusted agent of the appellant Danzhou Environmental Protection Bureau, and Yang Lusheng, the attorney of the appellee Sangde Water, attended the proceedings. The trial has now been concluded.

The court of first instance found: According to the Qiong Huan Jian Zi 〔2013〕 No. 153 "Monitoring Report" (hereinafter referred as "Monitoring Report No. 153") issued by Hainan Environmental Monitoring Center Station on June 5, 2013, the wastewater discharged from the outfall of Nada sewage treatment plant No.2 of Sangde Water on May 22, 2013 had an average PH value of 7.03, average BOD5 3.0mg/L, average value of total phosphorus 1.02mg/L, and an average value of CODCr at 16mg/L. The colorimetric value of the wastewater discharged was 2 times the average, and its mercury content averaged 0.00004L, cadmium averaged 0.003L, chromium averaged 0.01L, hexavalent chromium averaged 0.004L, arsenic averaged 0.0011mg/L, lead averaged 0.05L, suspended solids averaged 12mg/L, LAS averaged 0.09mg/L, fecal coliform averaged 2.9 × 105/L, ammonia nitrogen averaged 3.54mg/L, total nitrogen averaged 9.30mg/L, petroleum averaged 0.03mg/L, animal and vegetable oil averaged 0.08 mg/L, and alkyl mercury averaged 0.00003 L. Based on the above－mentioned "Monitoring Report No. 153"， the Danzhou Municipal Bureau of Land, Environment and Resources found that the Nada sewage treatment plant No.2 of Sangde Water was suspected of being involved in illegal discharge of water pollutants and the case was placed on file for investigation on September 1, 2013. On Nov 29 of the same year, an "Advance Notice on Administrative Punishment Decision" was sent to Danzhou Branch of Hainan Sangde Water Co., Ltd. (hereinafter referred to as Sangde Water Danzhou Branch). On November 29 of the same year, Sangde Water Danzhou Branch filed a defense in writing to the

Bureau and requested a hearing. On December 17, the “Notice on the Hearing for the Administrative Punishment Decision” was delivered to Sangde Water Danzhou Branch, informing it of the time and place of the hearing. Due to the absence of Sangde Water Danzhou Branch in the hearing, the Bureau of Land, Environment and Resources terminated the hearing on the grounds that Sangde Water Danzhou Branch was absent from the hearing without justifiable reasons. The Bureau then issued Dan Tu Huan Zi Fa Jue Zi 〔2014〕 No. 3 “Administrative Punishment Decision” on January 7, 2014, stating that it found the wastewater discharged by Sangde Water Danzhou Branch on May 22, 2013 contained 2.9×105 fecal coliform bacteria per liter and the concentration of total phosphorus of the wastewater was 1.02mg/L, exceeding 28 and 0.02 times respectively of the Class 1－Standard B limit of the Pollutant Discharge Standard of Urban Sewage Treatment Plant (GB18918－2002). It was thus in violation of the provisions of Article 9 of the *Law of the People's Republic of China on Prevention and Control of Water Pollution* as illegal discharge of pollutants. In accordance with the provisions of the first paragraph of Article 74 of the Law, the Bureau of Land, Environment and Resources fined Sangde Water Danzhou Branch CNY 177，719.00, twice the due sewage discharge fees for May 2013. On January 10 of the same year, the Letter of Administrative Punishment Decision was delivered to the Branch. On March 31 of the same year, the Bureau applied to the court for enforcement on the grounds that Sangde Water Danzhou Branch did not perform the punishment decision, and then withdrew the enforcement application on the grounds of improper target of punishment. On April 16, 2014, the Bureau made the Dan Tu Huan Zi 〔2014〕 No.117 “Notice on the Revocation of the Administrative Punishment Decision” on the grounds that the original subject of the punishment did not have legal personality, and revoked the above－mentioned Dan Tu Huan Zi Fa Jue Zi 〔2014〕 No. 3 “Administrative Punishment Decision”. On April 16, 2014, Danzhou Municipal Bureau of Land, Environment and Resources proposed to impose an administrative punishment on Sangde Water on the grounds of the above－mentioned illegal discharge, and delivered the “Administrative Punishment Notice” to Sangde Water before making the punishment. Sangde Water did not file an application for representation, defense or hearing within the statutory time limit. On June 16 of the same year, the Bureau made the disputed Dan Tu Huan Zi Fa Jue Zi 〔2014〕 No. 47 “Administrative Punishment Decision” (hereinafter referred to as the “Punishment Decision No. 47”) to fine Sangde Water CNY 177，719.00, twice the due sewage discharge fee for May 2013, and delivered the decision to Sangde Water, who refused to accept the punishment and made an application for administrative reconsideration. After reconsideration by Danzhou People's Government, “The Letter of Decision on Reconsideration” Dan Fu Fu Jue Zi 〔2014〕 No. 25was issued on October 31, 2014, stating that the Punishment Decision No. 47 was maintained. Unsatisfied with the reconsideration decision, Sangde Water appealed to this court on the grounds that the factual findings of Punishment Decision No.47 were wrong, and the procedures were illegal, requesting the revocation of the Punishment Decision No. 47.

In addition, it was found that Danzhou Municipal Bureau of Land, Environment and Resources also issued Dan Tu Huan Zi Fa Jue Zi 〔2014〕 No. 50 “Administrative Punishment Decision” (sued in another case) for Sangde Water's excessive discharge on January 14, 2013 (the number of fecal coliform bacteria exceeded 31 times the standard) , imposing a fine of CNY 19，1298.00; and Dan Tu Huan Zi Fa Jue Zi 〔2014〕 No. 54 “Administrative Punishment Decision” (sued in another case) for Sangde Water's excessive discharge of pollutants on January 7, 2014 (suspended matter exceeded 0.15 times the standard), imposing a fine of CNY 5,745.35 under

Qiong Huan Jian Zi〔2013〕No. 024 "Monitoring Report" by Hainan Environmental Monitoring Center Station and Dan Huan Jian Zi 〔2014〕 No. 08 "Monitoring Report" by Danzhou Environmental Resources Monitoring Station on the same day as it issued Punishment Decision No. 47. It was also found that Hainan Baichuan Water Co., Ltd. made a change of registration as Hainan Sangde Water Co., Ltd. on April 2, 2013 with the approval of the industry and commerce administration.

The court of first instance held that Danzhou Municipal Bureau of Land, Environment and Resources, as the competent administrative authority for environmental protection in the city, has the statutory power of administrative punishment for illegal discharge of water pollution within its jurisdiction under the provisions of the first paragraph of Article 8 of the Law of the People's Republic of China on Prevention and Control of Water Pollution. The main disputes of the parties involved in the case were：

1. whether the "Monitoring Report No. 153" can be used as a basis for punishment；

2．whether the punishment procedures were legal; and

3．whether the punishment was appropriate.

1．On whether the "Monitoring Report No. 153" can be used as a basis for punishment.

The court of first instance held that the key evidence for the defendant to make the Punishment Decision No. 47 was the "Monitoring Report No. 153"， which was produced by Hainan Environmental Monitoring Center Station based on the samples sent by Danzhou Environmental Resources Monitoring Station for monitoring and analysis. Sangde Water argued that the defendant's sampling procedure was illegal and the monitoring results were not true. In this regard, the defendant shall bear the burden of proof in accordance with the law. According to Article 34 of the Measures for Environmental Administrative Punishment of the Ministry of Environmental Protection, "Where a sampling is necessary, sampling records shall be made or the sampling process shall be included in the on－site inspection (investigation) records. The sampling may be recorded by photographing, video recording and other means." Accordingly, sampling was a necessary procedure for monitoring in this case. However, the defendant failed to provide relevant evidence such as sampling records or sampling procedures, and could not prove that the sampling procedure was legal, and thus could not prove the authenticity of the samples submitted, which directly affected the authenticity of the monitoring results. At the same time, the first page of the "Monitoring Report No. 153" states that the the entrusted unit who collected the samples is only responsible for the monitoring data of the submitted samples, not the source of the samples. According to Article 46 of the Measures for Environmental Administrative Punishment by the Ministry of Environmental Protection, the defendant shall, in case examination, review whether the facts of violations are clear, whether the evidence is irrefutable, and whether the investigation and gathering of evidence conform to the legal procedures. In the case, the defendant determined that Sangde Water discharged wastewater with pollutants exceeding the limits solely based on the "Monitoring Report No. 153" issued by the Hainan Environmental Monitoring Center Station without collecting irrefutable evidence to confirm the authenticity of the sample source. The key evidence was insufficient.

2．On whether the punishment procedures were legal.

The court of first instance held that the general procedures for environmental administrative punishment were case filing, investigation and gathering of evidence, case examination, notification and hearing, and decision making according to the third chapter of the Measures for

Environmental Administrative Punishment by the Ministry of Environmental Protection. The defendant decided to file a case to investigate Sangde Water after finding out that the company was suspected of discharging in exceedance of standards based on relevant monitoring report. Before making the punishment decision, the defendant informed Sangde Water in accordance with the law of the facts of its violations, the reasons for punishment, the basis for the decision and Sangde Water's legal rights in representation, defense and hearing. The procedures were legal. According to the provisions of Article 11 of the Measures, when the competent environmental protection authority imposes an administrative punishment, it shall timely give an administrative order forcing the party concerned to make correction or do so within a prescribed time limit. Where the time limit for ordered correction expires and the party concerned fails to make correction as required, and the violation is continuous or recurrent, it may be deemed as a new environmental violation. That is to say, before imposing any punishment, continuous or recurrent violation shall be dealt with as one case of violation. Only when the party concerned fails to make correction within the time limit as required, can the case be deemed as a new environmental violation. In the case, the defendant found that the number of fecal coliforms discharged from Sangde Water on January 14 and May 22, 2013 exceeded the standard according to the monitoring report. Such monitoring data indicated that Sangde Water's excessive discharge of pollutants was in a continuous state. If it was to be punished, it should be punished once as one violation. Only when Sangde Water did not made correction after the penalty was imposed and the deadline for correction was expired, it could be deemed as a new violation and the party could be punished again. However, on June 16, 2014, the defendant imposed a second punishment on Sangde Water's excessive discharge on January 14 and May 22, 2013. Such procedures were illegal.

3．On whether the punishment was appropriate.

The court of first instance found that in the case of excessive discharge of water pollutants, the polluters shall be ordered to make corrections within a prescribed time limit and be imposed a fine according to Article 74 of the *Law of the People's Republic of China on Prevention and Control of Water Pollution*. According to the provisions of Article 11 of the Measures for Environmental Administrative Punishment by the Ministry of Environmental Protection, when the environmental protection administrative department imposes an administrative punishment, it shall timely give an administrative order forcing the party concerned to make correction or do so within a prescribed time limit. However, the Punishment Decision No.47 only imposed a fine on Sangde Water, but did not order it to make corrections within certain time limit. The administrative punishment was hence obviously improper. In addition, according to Article 74 of the *Law of the People's Republic of China on Prevention and Control of Water Pollution,* where any entity, in violation of this Law, discharges water pollutants beyond the state or local standards for the discharge of water pollutants or by exceeding the allowed total discharge volume of major water pollutants, the administrative department of environmental protection under the people's government at or above the county level shall, according to its power, order it to treat the pollution within a certain time limit and impose a fine of not less than twice the amount of pollutant discharge fee it should pay but not more than five times the amount. That is to say, the target of punishment for exceeding the discharge standard is the polluter; the standard for punishment is whether the water pollutants are discharged beyond the standard； and the reason for exceeding the water pollutant discharge does not matter. Therefore in the case, Sangde Water's claim that it should not assume the administrative punishment for excessive discharge on the grounds that the third－party sewage treatment plant had design flaws,

and that the supporting facilities and equipment were not perfect, were not valid.

In conclusion, the court of the first instance held that the key evidence of Punishment Decision No. 47 was insufficient, the procedures were illegal, the punishment was improper, and it should be revoked in accordance with the law. According to Article 70 (1), (3) and (6) of the *Administrative Procedure Law of the People's Republic of China,* the following judgement was made：

1．The Dan Tu Huan Zi Fa Jue Zi 〔2014〕 No. 47 "Administrative Punishment Decision" made by Danzhou Municipal Bureau of Land, Environment and Resources on June 16, 2014 shall be revocated.

2．The acceptance fee of this case, CNY 50, shall be borne by the Bureau.

The appellant Danzhou Environmental Protection Bureau appealed and claimed the following：

1．The judgment of the first instance stating that the "Monitoring Report" cannot be used as a basis for punishment lacks factual basis and legal basis. It was not objective that the first－instance judgment found that "(the defendant) … could not prove that the sampling procedure was legal …， which directly affected the authenticity of the monitoring results" based on Article 34 of the Measures for Environmental Administrative Punishment by Ministry of Environmental Protection, which provided that "Where a sampling is necessary, sampling records shall be made or the sampling process shall be included in the on－site inspection (investigation) records. The sampling may be recorded by photographing, video recording and other means". It was not perfect that the sampling process of Danzhou Environmental Resources Monitoring Station was not recorded, but it did not affect the legality of the sampling procedure. Furthermore, the sampling form was signed by the person in charge of the appellee unit, which proved the objectivity of the appellee's environmental violations. There was no legal basis in the first－instance judgment that "the defendant … determined that Sangde Water discharged wastewater with pollutants exceeding the limits solely based on the 'Monitoring Report No. 153' issued by the Hainan Environmental Monitoring Center Station. The key evidence was insufficient". Hainan Environmental Monitoring Center Station has statutory monitoring qualifications, and the "Monitoring Report" made by it is naturally legally binding and can be used as a basis for punishment. If the appellee was dissatisfied with the result, the appellee might apply for re－inspection, otherwise it would be deemed as to have acknowledged the inspection result. In summary, the "Monitoring Report No. 153" issued by Hainan Environmental Monitoring Center Station can be used as the basis for the appellant to impose punishment on the appellee.

2．The appellant notified the appellee to make corrections within a prescribed time limit, hence the appellee's continuous excessive discharge despite the time limit requested by the appellant constituted a new environmental violation. According to Article 11 of the Measures, "When the environmental protection administrative department imposes an administrative punishment, it shall timely give an administrative order forcing the party concerned to make correction or do so within a prescribed time limit. Where the time limit for ordered correction expires and the party concerned fails to make correction as required, and the violation is continuous or recurrent, it may be deemed as a new environmental violation."， environmental violation continued to exist after the correction deadline can be identified as a new violation and shall be punished in accordance with the law. Upon revealing of the excessive discharge of pollutants by the appellee according to the Qing Huan Jian Zi 〔2013〕 No. 024 Monitoring Report by the Hainan Enivornmental Monitoring Center Station, The appellant delivered a notice to the appellee on July 12, 2013, ordering it to make correction within certain time limit, stating that "its rectification shall be complete before October

15, 2013". However, the plant did not make corrections within the time limit and continued to discharge beyond standard, which constituted a new violation. Therefore, the appellant's continued punishment for the plant was legal and there was no violation of the principle of non－repeated penalty. 3.Punishment Decision No.47 was appropriate. The decision only involved a fine on the appellee, which was in line with the first paragraph of Article 74 of the *Law of the People's Republic of China on Prevention and Control of Water Pollution,* which stipulated that "where any entity, in violation of this Law, discharges water pollutants beyond the state or local standards for the discharge of water pollutants or by exceeding the allowed total discharge volume of major water pollutants, the administrative department of environmental protection under the people's government at or above the county level shall, according to its power, order it to treat the pollution within a certain time limit and impose a fine of not less than twice the amount of pollutant discharge fee it should pay but not more than five times the amount." The law did not specify that "The polluter shall be ordered to correct within a prescribed time limit and be imposed a fine at the same time" as stated in the first－instance judgment. Hence, the judgment that "the administrative punishment was obviously improper" had no legal basis.

In summary, the appeal claims of Danzhou Municipal Bureau of Environmental Protection were as follows：

1．Revoke the (2015) Dan Hang Chu Zi No. 2 Administrative Judgment by Danzhou People's Court；

2．Amend the original judgement to dismiss the appellee's lawsuit or litigation request.

The appellee Sangde Water made the following defense：

1． Since the sampling and inspection process of Danzhou Municipal Bureau of Land, Resources and Resources was seriously illegal, the monitoring report made based on such sampling results shall not be used as the basis for administrative punishment. While the Bureau did not submit the evidence to prove that the monitoring report was legal, it shall bear the legal consequences of the inability to provide evidence.

2． The administrative punishment in dispute was illegal throughout the entire process. Danzhou Bureau of Land, Environment and Resources of violated the relevant provisions of the Measures for Environmental Administrative Punishment in case filing, investigation and gathering of evidence, sampling and inspection, time for making punishments, and delivery.

In summary, the appellee requested this court of second instance to reject the appeal and maintain the original judgment.

The evidence submitted by the parties in the first instance was transferred to this court with the case and has been re－examined in the trial of the second instance. The cross－examination and verification of the evidence of both parties by the court of first instance were compliant with the law and is supported by this court.

Through trial, the facts ascertained by this court were consistent with the facts ascertained in the first instance judgment, and were supported by this court. It was also found that in the course of the second trial of this case, due to the administrative institutional adjustment, Danzhou Municipal Bureau of Land, Environment and Resources of was divided into the Bureau of Land and Resources and the Bureau of Ecological and Environmental Protection. The seals of the two bureaus were activated on April 1, 2016, and the seal of Danzhou Municipal Bureau of Land, Environment and Resources was abolished. On June 24, 2016, Danzhou Municipal Bureau of Land and Resources and Danzhou Municipal Bureau of Ecological and Environmental Protection

respectively issued a letter to the court, namely, Dan Guo Tu Zi Han 〔2016〕 No. 166 "Danzhou Municipal Bureau of Land and Resources on the renaming of the defendant in the series of cases against Hainan Sangde Water Co., Ltd.", and Dan Huan Han 〔2016〕 No. 92 "Danzhou Municipal Bureau of Ecological and Environmental Protection on the renaming of the defendant in the series of cases against Hainan Sangde Water Co., Ltd.", informing the court that the legal consequences of the environmental punishments made by the Original Danzhou Municipal Bureau of Land, Environment and Resources were hereafter borne by the Municipal Bureau of Ecological and Environmental Protection according to the departmental functions.

This Court believes that the focus of the dispute in this case is whether the Punishment Decision No.47 made by the Municipal Bureau of Land, Environment and Resources was legal in terms of its basis of authority, facts verification, application of law, punishment procedures, and punishment decisions.

On whether Danzhou Municipal Bureau of Land, Environment and Resources had the basis for its authority. According to the provisions of the first paragraph of Article 8 of the *Law of the People's Republic of China on Prevention and Control of Water Pollution,* the Municipal Bureau of Land, Environment and Resources, as the administrative department in charge of environmental protection in Danzhou, has statutory power to make administrative punishments for the act of illegal discharge of water pollutants within its jurisdiction.

On whether the facts of the administrative punishment in dispute were clear. In this case, the Municipal Bureau of Land, Environment and Resources determined that the basis of environmental violations of the appellee Sangde Water was the "Monitoring Report No. 153". Therefore, the legality of the report determines whether the factual finding of the alleged administrative punishment was clear. Article 34 of the Measures for Environmental Administrative Punishment clearly provides: "Where a sampling is necessary, sampling records shall be made or the sampling process shall be included in the on－site inspection (investigation) records. The sampling may be recorded by photographing, video recording and other means." In the process of environmental monitoring, the procedures or processes must be legal. In this case, because Danzhou Municipal Bureau of Land, Environment and Resources failed to provide relevant evidence such as sampling records or sampling procedures in the first instance, it was unable to prove that the sampling procedure was legal; therefore, the "Monitoring Report No. 153" was not legal. It cannot be used as the key evidence for proving the facts of the environmental violations of the appellee Sangde Water. Therefore, the key evidence of the Punishment Decision No. 47, based on which Sangde Water's environmental violations were found, was insufficient.

On whether the administrative punishment in dispute was in line with legal procedures. According to the Chapter Three of the Measures for Environmental Administrative Punishment, the general procedures for environmental administrative punishment include filing, investigation and gathering of evidence (or investigation and evidence collection, supplementary filing), case examination, notification and hearing, decision making and cervice. In this case, although the Municipal Bureau of Land, Environment and Resources informed Sangde Water of its facts of its violations, the reasons for punishment, the basis for the decision and Sangde Water's legal rights in representation, defense and hearing in accordance with the law, the procedure for making Punishment Decision No.47 was illegal based on the third chapter of the Measures, combined with the evidence submitted by the Bureau in the first instance. First of all, judging from the "Approval of the Case Filing" and the "Record of the Case Review" submitted by the Bureau in the first

instance, it had already formed an opinion on how to handle the case at the same time when they were collectively deliberating on whether to file the case or not, violating Article 5 of the Measures for Administrative Punishment on the separation of investigation and punishment. Secondly, the Bureau determined that there were facts of environmental violations by the appellee Sangde Water. However, except for the "Monitoring Report No. 153", there was no other evidence to prove that it conducted any other investigations into the party concerned or inquired any witnesses or relevant personnel. Third, the on－site inspection sampling procedure violated the provisions of Article 34 of Measures for Environmental Administrative Punishment, and thus the sampling procedure was illegal. Therefore, the judgment of the first instance, where it found Punishment Decision No.47 made by Danzhou Municipal Bureau of Land, Environment and Resources of was legal, was incorrect and should be corrected. In addition, the appellant claimed in the appeal that the Municipal Bureau of Land, Environment and Resources had issued a notice to order corrections by the appellee within a prescribed time limit, and its continued punishment after the time limit was expired was legal. However, the Bureau did not submit the notice to this court as evidence in this case. After verification in the second trial, the Bureau submitted Dan Tu Huan Zi Huan Zi 〔2013〕 No. 25 "the Notice of Danzhou Municipal Bureau of Land, Environment and Resources on Ordering Rectification by the Nada Sewage Treatment Plant No.2 of Danzhou Branch of Hainan Sangde Water Co., Ltd. within a Prescribed Time Limit" to the first－instance court in the case (2015) Dan Hang Ch Zi No. 5, and the appellant should bear the unfavorable legal consequences in this case.

On whether the application of law was correct and the punishment decision was appropriate in Punishment Decision No.47 made by Danzhou Municipal Bureau of Land, Environment and Resources. The application of the law shall be based on the factual finding. Since the key evidence to prove the factual basis for the punishment decision was insufficient, as mentioned above; therefore, the application of law was also wrong when the Bureau applied the provisions of the first paragraph of Article 74 of the *Law of the People's Republic of China on Prevention and Control of Water Pollution* to punish the appellee Sangde Water based on facts that were unclear. In addition, the first paragraph of Article 74 of the Law states: "Where any entity, in violation of this Law, discharges water pollutants beyond the state or local standards for the discharge of water pollutants or by exceeding the allowed total discharge volume of major water pollutants, the administrative department of environmental protection under the people's government at or above the county level shall, according to its power, order it to treat the pollution within a certain time limit and impose a fine of not less than twice the amount of pollutant discharge fee it should pay but not more than five times the amount." The second paragraph of Article 12 of the Environmental Administrative Punishment Measures provides, "In accordance with the provisions of the Supreme People's Court on the types of administrative acts and regulating the causes of action of administrative cases, an administrative order is not an administrative punishment. The provisions on the administrative punishment procedures shall not apply to administrative orders." According to the above provisions, although "fines" is one of the types of environmental administrative punishment, "ordering the party concerned to undertake treatment within a prescribed time limit" is an administrative order, not an administrative punishment, so it should not be made in the Punishment Decision. Although the Bureau of Land, Environment and Resources should make an administrative order of "ordering it to undertake treatment within a prescribed time limit" before or at the same time when making a punishment

decision in accordance with the above provisions, but it was proper not “ ordering the party concerned to undertake treatment within a prescribed time limit” in Punishment Decision No. 47. In view of this, the judgment in the first instance, where it was found that the administrative punishment in dispute was obviously improper, was wrong and should be corrected.

In conclusion, this courts holds that the Punishment Decision No.47 made by Danzhou Municipal Bureau of Land, Environment and Resources should be revoked as the key evidence used to prove the facts was insufficient, the procedures were illegal, and the application of law was wrong. The fact finding confirmed in the first－instance judgment was basically clear. Although the application of law was partially improper, the original judgment was not inappropriate and should be upheld. The appeal claims of the appellant, Danzhou Municipal Bureau of Environmental Protection, cannot be established and are not supported by this court. In accordance with the provisions of first paragraph of Article 89 of the *Administrative Procedure Law of the People's Republic of China,* the judgment is as follows：

The appeal is dismissed and the original judgment shall be upheld. The case acceptance fee of CNY 50 of the second instance be borne by the appellant, Danzhou Municipal Bureau of Ecological and Environmental Protection.

This judgement is final.

Presiding Judge Zhang Dexiong
Judge Wen Kuixing
Judge Liu Xia

June 27, 2016
Court Clerk Guan Na