SPC Guiding Case No. 127: Lü Jinkui and 78 Others v. Shanhaiguan Shipbuilding Heavy Industry Co., Ltd. (Marine Pollution Damage Liability Dispute)

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Keywords

Civil; marine pollution damage liability; pollutant discharge standards.

Holding

Under the relevant provisions of the Marine Environmental Protection Law and other laws, "pollutants" in marine environmental pollution are not limited to substances expressly listed in national or local environmental standards. Where a polluter discharges wastewater containing iron and other components that are not included in national or local environmental standards into sea waters, causing damage to the aquaculture of fishery producers, the polluter shall bear environmental tort liability.

Basic Facts

On the morning of August 2, 2010, the seawater in the eastern sea area of Laolongtou, Shanhaiguan, Qinhuangdao, appeared abnormal. At 11:30 that day, the Qinhuangdao Municipal Environmental Protection Bureau received a report and arranged environmental supervision and monitoring personnel, together with the deputy secretary of the Party committee and the secretary of the discipline inspection commission of Bohai Township, Shanhaiguan District, Qinhuangdao, and other relevant personnel, to arrive at the scene and inspect the coastal situation. Based on the on-site inspection, the seawater appeared reddish-brown and turbid. The staff of the Qinhuangdao Municipal Environmental Protection Bureau also collected samples of the seawater for monitoring, and on August 3 issued a Monitoring Report analyzing the seawater quality. The analysis results showed the seawater had a pH of 8.28, suspended solids of 24 mg/L, petroleum of 0.082 mg/L, chemical oxygen demand of 2.4 mg/L, nitrite nitrogen of 0.032 mg/L, ammonia nitrogen of 0.018 mg/L, nitrate nitrogen of 0.223 mg/L, inorganic nitrogen of 0.273 mg/L, reactive phosphate of 0.006 mg/L, and iron of 13.1 mg/L.

The Maritime Judicial Appraisal Center of Dalian Maritime University (hereinafter the "Judicial Appraisal Center") was entrusted by the court to appraise the pollution condition of the sea area involved and the aquaculture losses caused by the pollution. The main contents of the Appraisal Opinion were: (I) On the appraisal of sea area pollution. 1. The appraisers used satellite remote sensing technology, selecting two images from the NOAA satellite taken at 5:44 and 9:51 Beijing time on August 2, 2010. The 5:44 image showed an abnormal polluted seawater zone near the sea area of Shanhaiguan Shipbuilding Heavy Industry Co., Ltd. (hereinafter "Shanchuan Heavy Industry Company"), with an area of about 5 square kilometers; the 9:51 image showed an abnormal polluted seawater zone about 4 kilometers south of Shanchuan Heavy Industry Company, with an area of about 10 square kilometers. 2. By analyzing the pollution source and ruling out pollution accidents such as red tides and large-scale marine oil spills, it was determined that the abnormal polluted seawater zone in the satellite images must have been caused by the discharge or leakage of wastewater from a large enterprise. Based on the fact that Shanchuan Heavy Industry Company was the only large enterprise adjacent to the sea near Laolongtou, Shanhaiguan, that ship repair and construction would produce large amounts of wastewater, that the rust-removal wastewater from the dock had a high iron content, and that any leakage would seriously pollute the nearby sea area, it was inferred that the source of the polluted seawater was Shanchuan Heavy Industry Company, and the leakage time was approximately between 00:00 and 04:00 Beijing time on August 2, 2010. 3. By analyzing the polluted seawater in the

aquaculture area, the geographic coordinates of the aquaculture areas of 21 persons including Wang Lirong were determined, and the geographic coordinates of the aquaculture areas of those parties and the geographic coordinates of the polluted waters were displayed together on an electronic chart, leading to the conclusion that the polluted waters covered the entire aquaculture area. (II) On the analysis of aquaculture losses. The appraisers evaluated the water quality environment and concluded that the suspended solids, iron, and petroleum contents in the seawater of the sea area involved were relatively high, far exceeding the Fishery Water Quality Standard and the Sea Water Quality Standard; the most serious pollution factor was iron, which was relatively harmful to fishery and aquaculture waters. At the same time, it was determined that Lü Jinguo and others had suffered aquaculture losses.

Shanchuan Heavy Industry Company submitted cross-examination opinions on the aquaculture loss portion of the Appraisal Opinion, the main content being that the determination that the seawater was polluted by excessive iron content had no factual basis or appraisal basis whatsoever. 1. The only basis for the appraisers' evaluation of the water quality environment of the aquaculture area was the Monitoring Report issued by the Qinhuangdao Municipal Environmental Protection Bureau, but that report did not comply with the requirements of the Marine Monitoring Norms in format and content, and the standard used to analyze iron content was a provision applicable to surface water, groundwater, and industrial wastewater; the Monitoring Report had no evidentiary force regarding the pollution facts. 2. The Fishery Water Quality Standard and the Sea Water Quality Standard adopted by the Appraisal Opinion contained no provisions or limits on the iron content in seawater, so iron content was not an indicator for judging marine fishery water quality standards. Even if iron content were one of the indicators, there was no relevant standard for what level would constitute pollution damage.

It was further found that one of the appraisers of the Appraisal Opinion submitted an Analysis Report during the court's trial, the main contents being: (I) Introduction of the analysis method. (II) Analysis of the wastewater pollution accident in the sea area involved. 1. Analysis and interpretation of the satellite images of the Laolongtou sea area of Shanhaiguan. 2. Analysis of the drift and diffusion of the polluted seawater. 3. Analysis of the pollution source. Because the grayscale value of the abnormal polluted seawater zone in the satellite images was slightly lower than the surrounding seawater, the possibility of a marine red tide was ruled out; because there was no oil well platform in the Laolongtou sea area of Shanhaiguan, and no large-scale ship collision or grounding/stranding accidents occurred around August 2, the possibility of a marine oil spill was ruled out. Accordingly, it was inferred that the polluted seawater zone must have been caused by the discharge or leakage of wastewater from a large enterprise. Shanchuan Heavy Industry Company was the only large enterprise adjacent to the sea near Laolongtou, Shanhaiguan; ship repair and construction would produce large amounts of wastewater; the rust-removal wastewater from the dock had a relatively high iron content; and leakage to the outside would cause serious pollution to the nearby sea area. 4. Analysis of the polluted seawater in the aquaculture area. The geographic coordinates of the aquaculture area and the geographic coordinates of the polluted waters were displayed together on an electronic chart, leading to the conclusion that the polluted waters covered the entire aquaculture area.

Lü Jinkui and 78 others sued in court, requesting that Shanchuan Heavy Industry Company be ordered to compensate them on the grounds that the large amount of red wastewater discharged by Shanchuan Heavy Industry Company caused the mass death of scallops and caused them significant economic losses.

Judgment

On December 9, 2013, the Tianjin Maritime Court rendered Civil Judgment (2011) Jin Hai Fa Shi Chu No. 115:

1. The claims of the 50 plaintiffs including Lü Jinkui are dismissed;

2. The claims of the 29 plaintiffs including Lü Jinguo are dismissed.

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After the judgment was pronounced, Lü Jinkui and 78 others appealed. On November 11, 2014, the Tianjin Municipal High People's Court rendered Civil Judgment (2014) Jin Gao Min Si Zhong No. 22:

1. Civil Judgment (2011) Jin Hai Fa Shi Chu No. 115 of the Tianjin Maritime Court is revoked;

2. Shanhaiguan Shipbuilding Heavy Industry Co., Ltd. shall, within fifteen days from the date of service of this judgment, compensate the 21 persons including Wang Lirong a total of RMB 1,377,696 in aquaculture losses;

3. The remaining claims of Lü Jinkui and 78 others are dismissed.

Reasoning

The effective judgment of the court held that Article 66 of the Tort Liability Law of the People's Republic of China provides that where a dispute arises from environmental pollution, the polluter shall bear the burden of proof regarding the circumstances under which it does not bear liability or bears mitigated liability as provided by law, and regarding the absence of a causal relationship between its conduct and the damage. Lü Jinkui and 78 others should bear the burden of proof regarding the facts that Shanchuan Heavy Industry Company engaged in polluting conduct and that such conduct caused damage to them, and should submit preliminary evidence of the possible causal relationship between the polluting conduct and the damage. Shanchuan Heavy Industry Company should bear the burden of proof regarding the circumstances under which it does not bear liability or bears mitigated liability as provided by law, and regarding the absence of a causal relationship between its conduct and the damage.

Regarding whether Shanchuan Heavy Industry Company engaged in polluting conduct. To prove that the pollution facts occurred, Lü Jinkui and 78 others submitted the Appraisal Opinion, the Analysis Report, the Monitoring Report, and letters issued by the Qinhuangdao Municipal Environmental Protection Bureau. Regarding the evidentiary force of the above evidence for the pollution facts involved, the court of first instance entrusted the Judicial Appraisal Center to conduct the appraisal based on the application of Lü Jinkui and 78 others. The business scope of that Judicial Appraisal Center included maritime judicial appraisal, and all three appraisers had the corresponding appraisal qualifications; the qualifications of the appraisal institution and the appraisers were confirmed. Moreover, the Analysis Report could corroborate the statements made by the Shanhaiguan District of Qinhuangdao in the Inquiry Records and the letters issued by the Qinhuangdao Municipal Environmental Protection Bureau, and the above evidence could prove the fact that pollution occurred in the Laolongtou sea area of Shanhaiguan, Qinhuangdao on August 2, 2010. Article 95, Item 1 of the Marine Environmental Protection Law of the People's Republic of China provides: "Marine environmental pollution damage means the harmful effects of directly or indirectly introducing substances or energy into the marine environment, such as damage to marine biological resources, harm to human health, hindrance to fishery and other lawful activities at sea, impairment of the quality of seawater use, and degradation of environmental quality." Based on the phenomenon that the grayscale value of the abnormal polluted seawater zone was slightly lower than the surrounding seawater, the Appraisal Opinion ruled out the possibility of a marine red tide; through the facts that there was no oil well platform in the Laolongtou sea area of Shanhaiguan and no large-scale ship collision, grounding, or stranding occurred on August 2, 2010, it ruled out the possibility of a marine oil spill; and further, based on the monitoring results in the Monitoring Report that the seawater was reddish-brown and turbid with an iron content of 13.1 mg/L, it reached the inference that the pollution accident involved was caused by serious wastewater discharge or leakage. At the same time, based on the facts that Shanchuan Heavy Industry Company was the only large enterprise adjacent to the sea near Laolongtou, Shanhaiguan, and that the company's main business was ship repair and construction, it reached the conclusion that the pollution was caused by Shanchuan Heavy Industry Company's leakage of rust-removal wastewater with a relatively high iron content during the repair and construction of large ships. Although Shanchuan Heavy Industry Company did not accept the above conclusions of the Appraisal Opinion, it failed to produce sufficient contrary evidence and reasons to refute them; therefore, the evidentiary force of the pollution source analysis portion of the Appraisal Opinion was

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confirmed, and on this basis it was determined that Shanchuan Heavy Industry Company had engaged in the polluting conduct of leaking wastewater with a relatively high iron content into the seawater.

Regarding whether Lü Jinkui and 78 others suffered damage. The sea area pollution appraisal portion of the Appraisal Opinion, on the basis of determining the aquaculture areas of the 21 persons including Wang Lirong, further reached the conclusion that the polluted seawater zone entirely covered the aquaculture area by displaying the geographic coordinates of the aquaculture areas and the geographic coordinates of the polluted seawater zone together on an electronic chart. Accordingly, it was determined that the 21 persons including Wang Lirong engaged in aquaculture and their aquaculture areas were polluted.

Regarding the causal relationship between the polluting conduct and the damage. After completing the above burden of proof, the 21 persons including Wang Lirong should also submit preliminary evidence proving the possible causal relationship between the polluting conduct and the damage. The Appraisal Opinion analyzed the water quality of the Laolongtou sea area of Shanhaiguan; based on the Monitoring Report issued by the Qinhuangdao Municipal Environmental Protection Bureau, it evaluated the water quality of that sea area as having relatively high contents of suspended solids, iron substances, and petroleum, with iron being the most serious pollution factor and relatively harmful to fishery and aquaculture waters. At this point, the 21 persons including Wang Lirong had completed their burden of proof in the marine pollution damage compensation dispute case. Shanchuan Heavy Industry Company claimed that it was not the infringer and should bear the burden of proof regarding the circumstances under which it does not bear liability or bears mitigated liability as provided by law, and regarding the absence of a causal relationship between its conduct and the damage. Shanchuan Heavy Industry Company argued that because the evaluation standards adopted by the Appraisal Opinion contained no provisions or limits on iron content in seawater, iron was not a standard for evaluating seawater quality; and that even if iron content were one of the standards, there was no relevant indicator for what level would constitute pollution damage. In this regard, the people's court held: First, the Marine Environmental Protection Law of the People's Republic of China expressly provides that so long as an actor introduces substances or energy into the ocean causing damage, it is deemed pollution; and Article 65 of the Tort Liability Law of the People's Republic of China likewise does not limit environmental pollution liability to discharge exceeding national or local standards. Therefore, regardless of whether national or local standards prescribe discharge control requirements for a certain type of substance, or whether the discharge complies with the standards prescribed by the state or locality, so long as it can be determined that the polluting conduct caused environmental damage, the actor must bear compensation liability. Second, the Fishery Water Quality Standard and the Sea Water Quality Standard, which are China's currently effective standards for evaluating seawater quality, have not been revised for a long time since their implementation, and the items listed therein are no longer sufficient to cover all substances that may cause pollution today. Accordingly, the Fishery Water Quality Standard and the Sea Water Quality Standard are not the sole basis for judging whether a certain type of substance causes pollution damage. Third, the Qinhuangdao Municipal Environmental Protection Bureau also stated in its Review Opinion that, because the state has not expressly prescribed pollutant discharge standards for iron content in seawater, whether it affects marine aquaculture requires further expert argument by the relevant departments. In this case, the appraiser who issued the Appraisal Opinion possessed professional knowledge of marine pollution appraisal; through analysis and judgment of the relevant background materials, the appraiser made the evaluation that iron substances in the water quality of the sea area involved were relatively harmful to fishery and aquaculture waters. This evaluation was scientific and should serve as the basis for determining that the sea area involved was polluted by iron substances.

(The judges of the effective judgment: Geng Xiaoning, Tang Na, and Li Shanchuan.)

Relevant Legal Provisions

1. Articles 65 and 66 of the Tort Liability Law of the People's Republic of China.

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2. Article 94, Item 1 of the Marine Environmental Protection Law of the People's Republic of China (2017 Amendment) (the version applied in this case was Article 95, Item 1 of the Marine Environmental Protection Law of the People's Republic of China as amended in 2013).

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