SPC Guiding Case No. 130: The People’s Government of Chongqing Municipality and Chongqing Liangjiang Volunteer Service Development Center v. Chongqing Cangjin’ge Property Management Co., Ltd. and Chongqing Shouxu Environmental Protection Technology Co., Ltd. (Ecological Environment Damage Compensation and Environmental Civil Public Interest Litigation)

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Keywords

Civil; ecological environment damage compensation litigation; environmental civil public interest litigation; entrustment of pollutant discharge; joint tort; ecological environment restoration costs; virtual treatment cost method.

Holding

1. An enterprise that has obtained a pollutant discharge permit bears the statutory obligation to ensure that its pollutant treatment facilities operate normally and that discharged pollutants meet national and local discharge standards. Where the enterprise entrusts another entity with the treatment, it shall perform its supervisory obligation over the entrusted entity. Where it clearly knows that the entrusted entity is discharging pollutants unlawfully and fails to stop it, or even provides facilitation, it shall bear joint and several liability for the environmental pollution damage.

2. Where a polluter discharges pollutants into waters and causes damage to the ecological environment, and the ecological environment restoration costs are difficult to calculate, the damage consequences may be quantified by adopting the virtual treatment cost method pursuant to the relevant provisions of the environmental protection authorities on the appraisal and assessment of ecological environment damage, and the quantified amount of ecological environment damage may be calculated based on factors such as the type of unlawfully discharged pollutants, the discharge volume, and the exclusivity of the pollution source.

Basic Facts

The Chongqing Cangjin'ge Electroplating Industrial Park (also known as the Cangjin'ge Electroplating Industrial Center) is located within the Gangcheng Industrial Park in Jiangbei District, Chongqing. It is the only electroplating industrial park in that industrial park, and a number of electroplating enterprises operate within it. Chongqing Cangjin'ge Property Management Co., Ltd. (hereinafter "Cangjin'ge Company") provided property management services to the enterprises in the park and was responsible for treating the wastewater generated by those enterprises. Cangjin'ge Company held a pollutant discharge permit and owned wastewater treatment facilities and equipment.

On December 5, 2013, Cangjin'ge Company signed a four-year "Entrusted Operation Contracting Management and Operation Agreement for Electroplating Wastewater Treatment" (hereinafter the "Entrusted Operation Agreement") with Chongqing Shouxu Environmental Protection Technology Co., Ltd. (hereinafter "Shouxu Company"). Shouxu Company undertook the wastewater treatment project of the Cangjin'ge Electroplating Industrial Center; the wastewater of the electroplating industrial center was handed over by Cangjin'ge Company to Shouxu Company for treatment using the wastewater treatment equipment owned by Cangjin'ge Company.

On April 21, 2016, during an on-site inspection of the wastewater treatment station of Cangjin'ge Company, law enforcement officers of the Chongqing Municipal Environmental Supervision Detachment discovered that two total-chromium reactors and one comprehensive reactor at the wastewater treatment station were not in operation, and that production wastewater was being discharged into the external environment without treatment. Between April 22 and April 26, 2016, sampling and monitoring analysis by law enforcement officers found that the discharged wastewater exceeded heavy metal limits: the total chromium concentration was 55.5 mg/L, the total zinc concentration was 2.85×10^2 mg/L, the total copper concentration was 27.2 mg/L, and the total nickel concentration was 41 mg/L, exceeding the standards prescribed by the Discharge Standard of Pollutants for Electroplating (GB 21900-2008) by 54.5 times, 189 times, 53.4 times, and 81 times respectively, causing serious impact and damage to the ecological environment.

On May 4, 2016, law enforcement officers conducted another on-site inspection and discovered that heavy-metal-containing wastewater in the No. 1 comprehensive wastewater regulating tank of the Cangjin'ge wastewater treatment station was being directly discharged through a 120 mm-diameter pipeline on the tank wall into the external environment without normal treatment, and flowing into the municipal pipe network of the Gangcheng Industrial Park and then into the Yangtze River. Monitoring showed that the hexavalent chromium concentration in the wastewater leaking from the No. 1 tank was 6.10 mg/L and the total chromium concentration was 10.9 mg/L, exceeding the national standards by 29.5 times and 9.9 times respectively. From September 1, 2014 to May 5, 2016, the total volume of unlawfully discharged wastewater was 145,624 tonnes.

It was also found that in August 2014, Cangjin'ge Company converted the former waste acid collection tank into the No. 1 comprehensive wastewater regulating tank, and changed the wastewater conveyance from an underground pipe network to an elevated pipe network. The tank wall originally had one 110 mm-diameter pipeline and one 120 mm-diameter pipeline; during the conversion, only the 110 mm-diameter pipeline was sealed off, while the 120 mm-diameter pipeline was not, and that unsealed pipeline was a concealed pipe buried underground. Beginning in September 2014, Shouxu Company, fully aware that there was a 120 mm-diameter pipeline in the tank that could connect to the external environment, continuously used that pipeline to directly discharge untreated heavy-metal-containing wastewater into the external environment.

Entrusted by the People's Government of Chongqing Municipality, the Chongqing Research Academy of Environmental Sciences appraised and assessed the ecological environment damage caused by the unlawful discharge of excessive wastewater by Cangjin'ge Company and Shouxu Company, and issued an Appraisal and Assessment Report in April 2017. That report stated: the pollution conduct in this incident was clear, the pollutant migration path was reasonable, the pollution source and the pollutants in the wastewater unlawfully discharged into the external environment were of common origin, and the pollution source was exclusive. The pollution conduct lasted from September 1, 2014 to May 5, 2016, with a total of 145,624 tonnes of wastewater unlawfully discharged; its principal pollutant factors were hexavalent chromium, total chromium, total zinc, and total nickel, causing serious damage to the waters of the Yangtze River. The Appraisal and Assessment Report adopted the virtual treatment cost method recommended by the General Outline of the Technical Guidelines for Appraisal and Assessment of Ecological Environment Damage and the Recommended Methods for Environmental Damage Appraisal and Assessment (2nd Edition) to quantify the ecological environment damage. Taking the actual treatment cost of RMB 22 per tonne as the unit virtual treatment cost and multiplying it by the volume of unlawfully discharged wastewater, the virtual treatment cost was calculated as RMB 3,203,728. The unlawful discharge point was in the main urban reach of the Yangtze River's main stream; the applicable functional category was a Class III water body. According to the principles for determining pollution restoration costs under the virtual treatment cost method, the multiplier range for a Class III water body is 4.5–6 times the virtual treatment cost; this assessment selected the lowest multiplier of 4.5 times, ultimately assessing the quantified amount of ecological environmental pollution damage caused by the two defendants' unlawful discharge as RMB 14,416,776 (i.e., RMB 3,203,728 × 4.5 = RMB 14,416,776). The Chongqing Research Academy of Environmental Sciences was an appraisal and

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assessment institution confirmed in the Ministry of Environmental Protection's Notice on Issuing the Recommended Institution List for Environmental Damage Appraisal and Assessment (First Batch).

On June 30, 2016, the Chongqing Municipal Environmental Supervision Detachment, on the grounds that from September 1, 2014 to May 5, 2016, Cangjin'ge Company discharged heavy-metal-containing wastewater through the 120 mm-diameter pipeline in the No. 1 comprehensive regulating tank directly into the municipal wastewater pipe network of the Gangcheng Industrial Park and into the Yangtze River without passing through the main discharge outlet of the wastewater treatment station, rendered an administrative penalty decision, imposing a fine of RMB 5,807,200 on Cangjin'ge Company. Cangjin'ge Company refused to accept the decision and applied for administrative reconsideration; the Chongqing Municipal Environmental Protection Bureau rendered a reconsideration decision upholding the administrative penalty decision. Cangjin'ge Company then sued in the Yubei District People's Court of Chongqing, seeking to revoke the administrative penalty decision and the administrative reconsideration decision. On February 28, 2017, the Yubei District People's Court of Chongqing rendered Administrative Judgment (2016) Yu 0112 Xing Chu No. 324, dismissing Cangjin'ge Company's claims. After the judgment, Cangjin'ge Company did not appeal, and the judgment became legally effective.

On November 28, 2016, the Yubei District People's Procuratorate of Chongqing initiated a public prosecution before the Yubei District People's Court of Chongqing, charging Shouxu Company and Cheng Long (the legal representative of Shouxu Company) and others with the crime of environmental pollution and requesting that criminal liability be pursued in accordance with law. On December 29, 2016, the Yubei District People's Court of Chongqing rendered Criminal Judgment (2016) Yu 0112 Xing Chu No. 1615, finding Shouxu Company, Cheng Long and others guilty of the crime of environmental pollution. After the judgment, no protest or appeal was filed, and the judgment became legally effective.

Judgment

On December 22, 2017, the Chongqing No. 1 Intermediate People's Court rendered Civil Judgment (2017) Yu 01 Min Chu No. 773:

1. Defendant Chongqing Cangjin'ge Property Management Co., Ltd. and Defendant Chongqing Shouxu Environmental Protection Technology Co., Ltd. shall jointly and severally compensate RMB 14,416,776 in ecological environment restoration costs, to be paid into the special account of the Chongqing Municipal Finance Bureau within ten days after the judgment takes effect, to be used by Plaintiff the People's Government of Chongqing Municipality and its designated departments, together with Plaintiff Chongqing Liangjiang Volunteer Service Development Center, for alternative restoration in light of the ecological environment damage in this region;

2. Defendant Chongqing Cangjin'ge Property Management Co., Ltd. and Defendant Chongqing Shouxu Environmental Protection Technology Co., Ltd. shall, within ten days after the judgment takes effect, publicly apologize to the public through media at or above the provincial level;

3. Defendant Chongqing Cangjin'ge Property Management Co., Ltd. and Defendant Chongqing Shouxu Environmental Protection Technology Co., Ltd. shall, within ten days after the judgment takes effect, pay Plaintiff the People's Government of Chongqing Municipality appraisal fees of RMB 50,000 and attorney's fees of RMB 198,000;

4. Defendant Chongqing Cangjin'ge Property Management Co., Ltd. and Defendant Chongqing Shouxu Environmental Protection Technology Co., Ltd. shall, within ten days after the judgment takes effect, pay Plaintiff Chongqing Liangjiang Volunteer Service Development Center attorney's fees of RMB 80,000;

5. The remaining claims of Plaintiff the People's Government of Chongqing Municipality and Plaintiff Chongqing Liangjiang Volunteer Service Development Center are dismissed.

After the judgment, none of the parties appealed within the statutory period, and the judgment became legally effective.

Reasoning

The effective judgment of the court held that, pursuant to the Pilot Plan for Reforming the Ecological Environment Damage Compensation System, the People's Government of Chongqing Municipality had the right to initiate an ecological environment damage compensation lawsuit, and the Chongqing Liangjiang Volunteer Service Development Center had the lawful standing to institute environmental public interest litigation; the two plaintiffs each enjoyed their own right of action under different provisions, and both should be protected in accordance with law. Given that the two cases were brought by the plaintiffs based on the same pollution facts against the same defendants, with substantially identical claims, the two cases were consolidated for trial.

The disputed issues in this case were:

I. Whether the type of pollutants, the exclusivity of the pollution source, the measurement of the unlawfully discharged wastewater, and the quantified amount of damage as determined in the Appraisal and Assessment Report were accurate.

First, regarding whether the type of pollutants, the exclusivity of the pollution source, and the measurement of the unlawfully discharged wastewater as determined in the Appraisal and Assessment Report were accurate. The type of pollutants, the exclusivity of the pollution source, and the measurement of the unlawfully discharged wastewater had all been directly or indirectly confirmed by Administrative Judgment (2016) Yu 0112 Xing Chu No. 324, and in this case the two defendants did not produce contrary evidence to overturn that judgment; therefore, the above environmental pollution facts relied upon by the Appraisal and Assessment Report were confirmed. Specifically: first, on the issue of the type of pollutants. In addition to the total chromium and hexavalent chromium found in the effective criminal judgment, the wastewater unlawfully discharged by the two defendants also contained heavy metals such as total zinc and total nickel, a fact confirmed by the environmental monitoring reports issued by the Jiangbei District Environmental Monitoring Station and the Chongqing Municipal Environmental Monitoring Center, as well as by Administrative Judgment (2016) Yu 0112 Xing Chu No. 324, and also confirmed by Cheng Long, the legal representative of Shouxu Company, during investigation and questioning. Second, on the issue of the exclusivity of the pollution source. The two defendants argued that sampling points W4 and W6 identified in Analysis Report No. JD009 of the Jiang Huan (Jian) Zi [2016] issued by the Jiangbei District Environmental Monitoring Station were located higher than the Cangjin'ge wastewater treatment station, and therefore the excessive pollutants detected at those two points could not have been caused by the two defendants' conduct. Since the polluted waters are fluid and possess a self-purification function, and the water quality had recovered to a certain extent, it was objectively no longer possible for the appraisal institution, at the time of appraisal, to collect wastewater samples discharged during the period when the unlawful discharge conduct was ongoing from around the wastewater treatment station; therefore, it could only conduct the appraisal based on the samples of unlawfully discharged wastewater secured through sampling by the environmental administrative law-enforcement authorities when investigating and handling the two defendants' unlawful conduct. In the course of environmental law enforcement regarding the wastewater treatment at Cangjin'ge, several rounds of monitoring and sampling were carried out at multiple sampling points. In addition to Analysis Report No. JD009 of the Jiang Huan (Jian) Zi [2016], the Jiangbei District Environmental Monitoring Station and the Chongqing Municipal Environmental Monitoring Center also issued several monitoring reports, and the administrative penalty decision of the Chongqing Municipal Environmental Supervision Detachment and the reconsideration decision of the Chongqing Municipal Environmental Protection Bureau were made on the basis of a comprehensive assessment of the above monitoring reports, rather than solely on the basis of any single analysis report or monitoring report. The legality and reasonableness of the environmental protection authorities' conduct throughout the administrative law enforcement, including the preliminary enforcement

stages such as sampling, had been confirmed by the effective administrative judgment. At the same time, the above monitoring and analysis results showed that the pollutants in the wastewater were heavy-metal wastewater discharged by the electroplating industry; the evidence on record confirmed that the Cangjin'ge Electroplating Industrial Park was the only electroplating industrial park in the area involved, and the environmental monitoring results were consistent with the type of wastewater unlawfully discharged by the Cangjin'ge wastewater treatment station. These facts demonstrate that the wastewater discharged at the above sampling points could only have come from the Cangjin'ge wastewater treatment station, and it could therefore be determined that the source of the pollutants was exclusive. Third, on the issue of the measurement of the unlawful discharge. Based on the confirmation in the effective criminal and administrative judgments, and in combination with the investigation and questioning records in the administrative law-enforcement process, the basic fact could be determined that the wastewater in the chromium regulating tank entered the No. 1 comprehensive wastewater regulating tank, and the 120 mm-diameter pipeline installed in the No. 1 tank was used to directly discharge the heavy-metal-containing wastewater into the external environment and into the municipal pipe network. As ascertained at trial, the Appraisal and Assessment Report, synthesizing the evidence, calculated the volume of unlawfully discharged wastewater by subtracting the consumed volume, sludge water content, online discharge volume, and holiday discharge volume from the total water consumption; the evidence and facts on which it relied had either been acknowledged by the defendants or confirmed by effective judgments, or the relevant administrative acts had passed legality review through the administrative litigation process, and the measurement method it adopted was scientific and reasonable. In sum, the objections raised by Cangjin'ge Company and Shouxu Company regarding the type of pollutants, the volume of unlawfully discharged wastewater, and the exclusivity of the pollution source could not be sustained.

Second, regarding whether the quantified amount of damage as determined in the Appraisal and Assessment Report was accurate. The plaintiffs entrusted the Chongqing Research Academy of Environmental Sciences to appraise and assess the ecological environment damage in this case, and it issued the Appraisal and Assessment Report, which determined that the quantified amount of ecological environment damage caused by the two defendants' unlawful discharge was RMB 14,416,776. As verified, the Chongqing Research Academy of Environmental Sciences was an appraisal and assessment institution established in the Ministry of Environmental Protection's Notice on Issuing the Recommended Institution List for Environmental Damage Appraisal and Assessment (First Batch). Entrusting it to conduct the appraisal and assessment of ecological environment damage in this case complied with the provisions of the judicial interpretation, and it possessed the corresponding appraisal qualifications. Under the General Outline of the Technical Guidelines for Appraisal and Assessment of Ecological Environment Damage and the Recommended Methods for Environmental Damage Appraisal and Assessment (2nd Edition) formulated by the Ministry of Environmental Protection, the appraisal and assessment may adopt the virtual treatment cost method to quantify the ecological environment damage caused by an incident, and the quantification result may serve as the basis for ecological environment damage compensation. Given that the unlawful discharge in this case lasted a long time and involved a large discharge volume, and that the waters of the Yangtze River were in a flowing state, making it difficult to directly calculate the ecological environment restoration costs, it was not improper for the Appraisal and Assessment Report to adopt the virtual treatment cost method to quantify the damage result. The Appraisal and Assessment Report determined the unit actual treatment cost at RMB 22 per tonne on the basis of the Chongqing Municipal Environmental Supervision Detachment's on-site verification of Cangjin'ge Company's financial vouchers, in combination with the investigation and questioning records of Sun Qiliang, the legal representative of Cangjin'ge Company. Under the Recommended Methods for Environmental Damage Appraisal and Assessment (2nd Edition), the principle for determining the restoration costs of Class III surface water pollution is 4.5–6 times the virtual treatment cost; in light of the pollution facts of this case, taking the minimum multiplier of 4.5 times, the Appraisal and Assessment Report calculated the quantified damage amount as RMB 3,203,728 × 4.5 = RMB 14,416,776, which was likewise not improper.

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In summary, the appraisal institution and appraisal personnel of the Appraisal and Assessment Report were duly qualified, the entrustment procedure for the appraisal and assessment was lawful, the person in charge of the appraisal and assessment project appeared in court to answer questions as required by the court, the facts relied upon in the appraisal and assessment were supported by effective legal instruments, and the calculation method and conclusions adopted were scientific and well-founded. Accordingly, the Appraisal and Assessment Report and the related evidence on which it relied were admitted.

II. Whether Cangjin'ge Company and Shouxu Company constituted a joint tort.

Shouxu Company was the direct actor that, knowing of the existence of the 120 mm-diameter pipeline on the wall of the No. 1 wastewater regulating tank, deliberately used it to discharge pollutants unlawfully; it should bear liability for the damage consequences, and there was no doubt about this. The core issue in this dispute was how to evaluate the conduct of Cangjin'ge Company and whether it constituted a joint tort with Shouxu Company. The court held that Cangjin'ge Company and Shouxu Company constituted a joint tort and should bear joint and several liability.

First, China implements a pollutant discharge permit system, which is a means by which the state effectively administers polluters. An enterprise that has obtained a pollutant discharge permit is a pollutant-discharging entity and bears the obligation to discharge pollutants in accordance with law; otherwise, it will bear corresponding legal liability. Cangjin'ge Company held a pollutant discharge permit and was obliged to ensure that it discharged in accordance with the provisions and requirements of the permit. Cangjin'ge Company's arrangement, in the form of an entrusted operation agreement, to hand over wastewater treatment to Shouxu Company, which specialized in environmental governance (including industrial wastewater operation), was not prohibited by law. However, whether discharging itself or entrusting others to discharge, Cangjin'ge Company was obliged to ensure that its wastewater treatment station operated normally and that the discharged pollutants met national and local discharge standards; this was the statutory responsibility of an enterprise holding a pollutant discharge permit, which could not be discharged through a civil agreement. To elaborate, Cangjin'ge Company, as the polluting entity, bore the statutory responsibility to supervise Shouxu Company's lawful discharge, and under the Entrusted Operation Agreement it also bore the obligation to supervise Shouxu Company's day-to-day discharge; the unlawful discharge in this case lasted one year and eight months, and Cangjin'ge Company clearly failed to fulfill its supervisory obligation.

Second, whether as the owner of the discharge equipment and the polluting entity with statutory responsibility, or under the agreement between the parties, Cangjin'ge Company was obliged to ensure that the wastewater treatment facilities and equipment were normal and intact. In August 2014, when Cangjin'ge Company converted the waste acid tank into the No. 1 wastewater regulating tank and changed the underground pipe network to an elevated pipe network, it failed to seal off the 120 mm-diameter concealed pipe in the tank in accordance with normal treatment methods; nor did Cangjin'ge Company prove the reasonableness and legality of not sealing off the concealed pipe. It was precisely through that concealed pipe that Shouxu Company carried out the unlawful discharge. In other words, Cangjin'ge Company knowingly left, in the wastewater treatment equipment it provided to Shouxu Company, a pipeline through which unlawful discharge could be carried out. On this basis, it could be determined that Cangjin'ge Company had unlawful intent and objectively provided the conditions for the completion of the unlawful discharge.

Third, the wastewater to be treated was provided to Shouxu Company by Cangjin'ge Company, so Cangjin'ge Company knew the volume of wastewater to be treated. At the same time, as the polluting entity, Cangjin'ge Company was responsible for paying pollutant discharge fees to the environmental protection authorities, and it also knew the volume of lawfully discharged wastewater. Furthermore, as the property management department, it was also clear about the actual water consumption of the enterprises in the park. Combining these data, one could readily determine the existence of the unlawful discharge. It could therefore

be determined that Cangjin'ge Company knew that Shouxu Company was carrying out unlawful discharge, yet it allowed Shouxu Company to continue discharging unlawfully while also continuing to hand wastewater over to Shouxu Company for treatment. This could be regarded as Cangjin'ge Company having formed a tacit understanding with Shouxu Company, with joint tortious intent, jointly causing the pollution consequences.

Fourth, environmental tort cases are characterized by the composite nature of the infringing conduct, the complexity of the infringement process, and the concealed and long-term nature of the infringement consequences. It is difficult to prove such cases, especially the subjective intent of a polluting enterprise's unlawful discharge, and this case also involved harm to the environmental public interest. Therefore, full consideration should be given to the special characteristics of such cases, and responsibility evasion and harm to the public interest should be avoided through an accurate grasp of the burden of proof and the principles of liability attribution. In sum, based on the facts and evidence of this case, the evidence establishing that Cangjin'ge Company and Shouxu Company constituted a joint tort of environmental pollution had reached the high-probability civil standard of proof. It should be determined that Cangjin'ge Company and Shouxu Company had subjective joint intent and objective joint conduct in the unlawful discharge, and the two defendants constituted a joint tort and should bear joint and several liability.

(The judges of the effective judgment: Qiu Xiaoyin, Jia Ke, and Zhang Li.)

Relevant Legal Provisions

Article 8 of the Tort Liability Law of the People's Republic of China.

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