SPC Guiding Case No. 134: Chongqing Green Volunteers Association v. Enshi Autonomous Prefecture Jianshi Huangchangping Mining Co., Ltd. (Water Pollution Liability Civil Public Interest Litigation)

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil / environmental civil public interest litigation / cessation of infringement / resumption of production / conditions attached / environmental impact assessment

Holding

In environmental civil public interest litigation, where the people's court orders the polluter to cease the infringement, it may order the polluter to conduct a fresh environmental impact assessment; before the environmental impact assessment document is examined, approved, and accepted, and before the supporting environmental protection facilities have passed acceptance inspection, the polluter may not resume production.

Basic Facts

The plaintiff Chongqing Green Volunteers Association ("Chongqing Green Association") brought environmental civil public interest litigation against the defendant Enshi Autonomous Prefecture Jianshi Huangchangping Mining Co., Ltd. ("Jianshi Huangchangping Mining Company"), requesting an order that the defendant cease the infringement and bear responsibility for ecological and environmental restoration. The Second Branch of the Chongqing Municipal People's Procuratorate supported the litigation.

The court found upon trial that the Qianzhangyan Reservoir is located in the area bordering Wushan County and Fengjie County of Chongqing and Jianshi County of Hubei Province. The reservoir has a designed storage capacity of 4.05 million cubic meters, began construction in 2008, and was confirmed as a centralized drinking water source protection area by the Chongqing Municipal People's Government on December 6, 2013, supplying drinking and production water to more than 50,000 people in the surrounding area. Jianshi County of Hubei Province adjoins Wushan County of Chongqing. The defendant's ore-dressing plant is located in the state-owned Gaoyanzi Forest Farm, Guojiatang, Yezhou Town, Jianshi County, at a straight-line distance of about 2.6 kilometers from the Qianzhangyan Reservoir in Wushan County. The area is a karst mountainous region with numerous underground fissures and many underground rivers. The feasibility study report for the pyrite ore-dressing project of Jianshi Huangchangping Mining Company was prepared in 2009, and on April 23, 2010, it obtained the approval of the Enshi Tujia and Miao Autonomous Prefecture Development and Reform Commission. Environmental impact assessment work was carried out in July 2010, and on May 16, 2011, the company obtained the environmental impact assessment approval of the Enshi Tujia and Miao Autonomous Prefecture Environmental Protection Bureau. Construction began in 2012 and was basically completed in June 2014, but the water pollution prevention and control facilities and the like had not been completed. Since the production of pyrite at the company's ore-dressing plant involved the discharge of wastewater and tailings, it was a construction project discharging pollutants. The project's construction feasibility report expressly pointed out that the tailings pond area was a karst depression formed as a natural pond, with the karst in the pond area manifesting as karst fissures and caves. At the same time, the safety pre-assessment report for the tailings pond project stated: "It is recommended that the

assessment report make the following modifications and supplements: 1. assess the leakage of the pond area by units and propose countermeasures; 2. supplement the assessment of possible flood discharge and drainage problems after the tailings pond is put into operation." However, the company did not actually implement the modification and supplement measures.

On August 10, 2014, the ore-dressing plant of Jianshi Huangchangping Mining Company used about 500 tons of pyrite raw ore, ethyl sodium xanthate, and No. 2 oil to conduct unlawful production, and the wastewater and tailings generated were discharged, without treatment, into a nearby natural depression with developed caves and funnels. On August 12, 2014, villagers of Hongchun Township, Wushan County, reported abnormal water quality at the drinking water intake of the Qianzhangyan Reservoir, and Wushan County activated an emergency response plan for a major environmental incident. The emergency monitoring results showed that the polluted water body had no heavy metal toxicity but had organic toxicity, with COD (chemical oxygen demand) and Fe (iron) exceeding the standards by 0.25 times and 30.3 times respectively, and suspended solids reaching as high as 260 mg/L. The relevant Chongqing authorities sealed the polluted water body within the reservoir and implemented emergency measures such as chemical purification of the polluted water body.

After the Qianzhangyan Reservoir water pollution incident occurred, the Ministry of Environmental Protection made clear that the incident had constituted a major environmental incident. The Environmental Risk and Damage Appraisal and Assessment Research Center of the Environmental Planning Institute of the Ministry of Environmental Protection issued the Environmental Damage Assessment Report on the Environmental Incident at the Qianzhangyan Reservoir, Hongchun Township, Wushan County, Chongqing. The report assessed the pollutants involved in the environmental pollution, the direct economic losses caused by the incident, and the impact of the pollution on the reservoir's ecological environment, and concluded that the incident did not cause long-term adverse effects on the aquatic ecological environment of the reservoir, that no subsequent ecological and environmental restoration was needed, and that no further medium- or long-term damage assessment was needed. On September 4, 2014, the Hubei Provincial Environmental Protection Department issued an administrative penalty decision, finding that the water pollution prevention and control facilities of the pyrite ore-dressing project of Huangchangping Mining Company had not been completed, that it had put the project into production without authorization, and that it had unlawfully discharged and dumped the wastewater and tailings generated by production into the depression below the plant, causing the wastewater and waste residue to leak through fissures at the bottom of the depression and polluting the water body of the Qianzhangyan Reservoir. It ordered a cessation of production until acceptance inspection was passed, ordered that treatment measures be taken within a time limit to eliminate the pollution, and imposed a fine of RMB 1,000,000. After the administrative penalty decision was rendered, Jianshi Huangchangping Mining Company only paid the fine of RMB 1,000,000 but did not take effective treatment measures to eliminate the pollution.

On April 26, 2015, upon the plaintiff's application, the court entrusted Beijing Normal University to appraise the ecological restoration of the Qianzhangyan environmental pollution incident and its costs. Beijing Normal University opined that: (1) Jianshi Huangchangping Mining Company was the sole source of pollution in the ecological and environmental damage to the Qianzhangyan Reservoir, the responsible subject was clear, and the causal relationship of the environmental damage was clear; (2) it accepted the conclusion of the Environmental Damage Assessment Report that the incident had not caused long-term adverse effects on the reservoir's ecological environment, that no subsequent ecological and environmental restoration was needed, and that no further medium- or long-term damage assessment was needed; (3) as to the ecological and environmental damage assessment of the polluted soil, it found that after nine months the ethyl sodium xanthate in the soil of the incident area had degraded and would not cause further damage to the local ecological environment, but the Fe pollutant in the depression soil had not undergone natural degradation, exceeded the local ecological baseline, could not recover naturally in the short term, and would pose a potential pollution risk to the Qianzhangyan Reservoir and the surrounding ecological environment, requiring

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artificial intervention for ecological restoration; pursuant to the Recommended Methods for Environmental Damage Assessment in the Emergency Response Stage of Environmental Incidents (Huan Ban [2014] No. 118), the cost of ecological restoration of the depression soil calculated by the virtual treatment cost method was approximately RMB 991,000; and (4) it recommended that a more detailed ecological restoration plan be formulated subsequently, that the restoration of the ecological and environmental damage in the incident area be carried out, and that later-stage supervision be done well to ensure the drinking water safety of the Qianzhangyan Reservoir and the safety of the surrounding ecological environment. During the trial, the Chongqing Green Association applied for the appraiser to appear in court to be questioned on the ecological restoration and to provide opinions. Appraiser Professor Wang Jinsheng opined that the soil elements themselves were not controlling indicators; as to drinking water safety, the Fe in the depression soil was higher than the drinking water safety standard; and the area where the defendant's ore-dressing plant was located had many underground rivers and high precipitation, so the risk of polluting drinking water was relatively high.

Judgment

On January 14, 2016, the Wanzhou District People's Court of Chongqing rendered Civil Judgment (2014) Wan Fa Huan Gong Chu Zi No. 00001: (1) Enshi Autonomous Prefecture Jianshi Huangchangping Mining Co., Ltd. shall immediately cease its infringement of the drinking water source of the Qianzhangyan Reservoir in Wushan County, conduct a fresh environmental impact assessment, and shall not carry on production without approval or without acceptance inspection of its environmental protection facilities; (2) Enshi Autonomous Prefecture Jianshi Huangchangping Mining Co., Ltd. shall, within 180 days after the judgment takes effect, formulate a restoration plan for the depression soil of the ore-dressing plant in the state-owned Gaoyanzi Forest Farm, Guojiatang, Yezhou Town, Jianshi County, Enshi Autonomous Prefecture, and carry out ecological restoration, and if it fails to perform the restoration obligation within the time limit or the restoration fails to qualify, it shall bear the restoration costs of RMB 991,000 to be paid into the designated account; (3) Enshi Autonomous Prefecture Jianshi Huangchangping Mining Co., Ltd. shall make an apology in national-level media for its acts of polluting the ecological environment and harming the public interest; (4) Enshi Autonomous Prefecture Jianshi Huangchangping Mining Co., Ltd. shall pay the reasonable expenses and attorney fees incurred by the Chongqing Green Volunteers Association for this litigation, totaling RMB 150,000; and (5) the other claims of the Chongqing Green Volunteers Association were dismissed. After the first-instance judgment was pronounced, Enshi Autonomous Prefecture Jianshi Huangchangping Mining Co., Ltd. was dissatisfied and appealed. On September 13, 2016, the Chongqing Second Intermediate People's Court rendered Civil Judgment (2016) Yu 02 Min Zhong No. 77: dismissing the appeal and affirming the original judgment.

Reasoning

The court in its effective judgment held that one of the focal issues in this case was whether it was necessary to order cessation of the infringement and a fresh environmental impact assessment.

Environmental tortious acts often cause irreversible pollution of the environment and destruction of ecological resources; the polluted environment and destroyed ecological resources are in many cases difficult to restore, and mere ex post economic compensation is insufficient to make up for the loss caused to the ecological environment. Therefore, for environmental tortious acts, attention should be paid to preventing harm before it occurs in order to truly realize the purpose of environmental protection. In this case, Jianshi Huangchangping Mining Company had only temporarily ceased its production acts, and its unlawful circumstances, such as the serious delay in its "three simultaneous" work and the non-completion of environmental protection facilities, had not actually been eliminated, so it could resume unlawful production at any time. Because of the company's previous pollution acts, some ecological indicators in the soil of the relevant area exceeded the ecological baseline; given the high local precipitation, the karst mountainous terrain, the numerous fissures and caves, and the crisscrossing underground rivers, the water sources of

which were precisely the water-collecting source of the Qianzhangyan Reservoir, the pollution risk clearly existed. Considering that the company's unlawful circumstances had not been eliminated and that the geological and geographical conditions of the project area were complex and special, where it could not be ensured that resumption of production would not again cause environmental pollution, the company should be prohibited from resuming production, so as to effectively avoid the local ecological environment being polluted and damaged again, and also to avoid the risk that, should the company be found to have resumed unlawful production in the future, separate litigation would be needed, thereby reducing the parties' litigation burden and saving judicial resources. Therefore, although Jianshi Huangchangping Mining Company had already ceased production before the lawsuit was filed, it should still be ordered to cease its infringement of the drinking water source of the Qianzhangyan Reservoir.

In addition, the Qianzhangyan Reservoir began construction in 2008, while the environmental impact assessment work for the company's project was carried out in July 2010, and approval was obtained from the local environmental administrative department only on May 16, 2011. Article 23 of the Environmental Impact Assessment Law of the People's Republic of China provides: "Where a construction project may cause adverse environmental impact across administrative regions, and the relevant environmental protection administrative departments have a dispute over the conclusion of the environmental impact assessment of the project, the environmental impact assessment document shall be examined and approved by the common environmental protection administrative department at the next higher level." Considering the nature of the project, its relative position to the reservoir, and the special local geological and geographical conditions, the impact on the Qianzhangyan Reservoir should have been a key consideration in the environmental impact assessment of the project at the time, but because the two were located in different provincial-level administrative regions, the environmental impact assessment at that time did not involve the Qianzhangyan Reservoir; it is evident that that environmental impact assessment was incomplete and had obvious deficiencies. Because the Qianzhangyan Reservoir, a key environmental protection objective requiring consideration, had newly been added, the basis of the original environmental impact assessment had changed; under the reality that a major environmental incident had already occurred, the project in question clearly needed major changes in its measures for preventing pollution and preventing ecological damage. Pursuant to Article 24, paragraph 1 of the Environmental Impact Assessment Law of the People's Republic of China, which provides that, after the environmental impact assessment document of a construction project is approved, if the nature, scale, location, production process adopted, or measures for preventing pollution and preventing ecological damage of the construction project undergo major changes, the construction unit shall re-submit the environmental impact assessment document of the construction project for approval, and Article 17, paragraph 3 of the Water Pollution Prevention and Control Law of the People's Republic of China, which provides that the water pollution prevention and control facilities of a construction project shall be designed, constructed, and put into use simultaneously with the principal project, and that the water pollution prevention and control facilities shall pass acceptance inspection by the environmental protection administrative department, failing which the construction project may not be put into production or use, given the importance of the Qianzhangyan Reservoir, the environmental sensitivity of its status as a first-grade drinking water source protection area, and the potentially huge pollution risk of the project in question to the reservoir, where the reservoir, which should have been included in the environmental impact assessment of the construction project as a key environmental protection objective, was not so included and a major environmental incident had objectively been caused, and considering that the basis of the original environmental impact assessment had changed, for the protection of key environmental protection objectives and the safeguarding of the public interest, Jianshi Huangchangping Mining Company should re-conduct the environmental impact assessment of the project on the basis of considering the environmental impact on the Qianzhangyan Reservoir and perform the statutory approval procedures, and may not carry on production without approval or without acceptance inspection of its environmental protection facilities.

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Relevant Legal Provisions

1. Article 24, paragraph 1 of the Environmental Impact Assessment Law of the People's Republic of China.

2. Article 17, paragraph 3 of the Water Pollution Prevention and Control Law of the People's Republic of China.

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