

LITIGATING ACCESS TO ENVIRONMENTAL INFORMATION

A Case Study

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BACKGROUND

As part of China's move to transfer industrial capacity to Kazakhstan, Chinese investors have been investing in two projects to construct cement and tomato paste production facilities in Kyzylorda Region. The expected investment in the region totals some 72.8 billion tenge, as *Today.kz* learned from the Regional Office for Industrial and Innovation-based Development.

A joint venture was set up between Kazakhstan's DANAKE Corporation and the Chinese Gezhuba Shieli Cement Company to implement the first of the two projects, an oilwell cement production plant in Shieli District of Kyzylorda Region.¹ The project's total cost is estimated to be 64 billion tenge, and the facility is expected to employ some 260 specialists to achieve the production capacity of one million tons of M400 and M500 cement per year.² The plant's commissioning was scheduled for 2019, and China was named as its main target market, alongside the Eurasian Economic Union and Commonwealth of Independent States (CIS) countries. The project's business plan, feasibility study, and design specifications and estimates were produced, and a 50-hectare land plot was allocated in the Shieli District, including 46 hectares for the production facilities, and four hectares for social infrastructure and employee accommodation. According to Kyzylorda Region's akimat, the Chinese investor had already transferred the first installment of \$7.5 million toward the plant construction to the joint venture's account. In December 2017, public hearings on the cement plant construction were held with the local community in Shieli. Based on presentations about the planned construction, findings from a preliminary environmental impact assessment and other information about the project, the local residents' reaction was generally positive. The joint venture promised to give jobs to local residents, contribute substantially to the local budget, and enforce strict standards to avoid environmental damage.

ACTIONS TAKEN

Environmental activists decided to take a closer look at the documentation available for the project, *"The construction of a cement production plant with the capacity of 2500 tons of clinker per day by Gezhuba Shieli Cement Company,"* in Kyzylorda Region. In particular, the environmentalists were interested in the following documents:

- Report from the State Environmental Review
- Environmental Impact Assessment (EIA)

¹ State-owned Assets Supervision and Administration Commission of the State Council. Energy China Group-built Cement Project in Kazakhstan Put into Production. http://en.sasac.gov.cn/2019/11/01/c_2705.htm. Accessed 28 June 2021.

² Оскен Онір. «КОМПАНИЯ ГЕЖУБА ШИЕЛІ ЦЕМЕНТ» ТОМПАНАЖДЫ ЗАУЫТЫ. <https://osken-onir.kz/zhanalyk/6826-kompaniya-gezhuba-shieli-cement-tompanazhdy-zauyty.html>. Accessed 28 June 2021.

- Minutes of the public hearings

The project is on the list of 55 Chinese industrial investment projects implemented in Kazakhstan as part of the Intergovernmental Framework Agreement between the Republic of Kazakhstan and the People's Republic of China (PRC).³ By requesting the above documents, the environmentalists exercised their right to access environmental information. The Environmental Code of the Republic of Kazakhstan stipulates in Article 13(7) the right of every person to access timely, complete, and reliable environmental information from public authorities and organizations, and states further in Article 163 that environmental information must be publicly accessible, except in cases specified in the law of the Republic of Kazakhstan.⁴ Access to publicly accessible environmental information and data is provided to individuals and legal entities upon their request. Article 164 further states that individuals and legal entities enjoy free access to publicly available electronic information resources containing environmental information. Public authorities and officials, as well as individuals and legal entities providing environment-related services to the public on the basis of a public contract, must ensure free access to environmental information, including at the request of individuals and legal entities.⁵

The Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters⁶ stipulates the right of individuals and legal entities to access to environmental information, without necessarily stating their interest in a request for environmental information.

REQUESTS FOR DISCLOSURE

The environmentalists placed a request with the Kyzylorda Regional Department of Ecology to be provided with copies of the following: the environmental impact assessment (EIA) report, the minutes of the public hearings, and the report from the State Environmental Review for the cement plant construction project in Kyzylorda Region. The request was filed on 18 June 2020. The Department of Ecology forwarded the request to Gos-expertiza, an expert agency within the Republic of Kazakhstan's Ministry of Industry and Infrastructure's Housing and Utilities Committee, on 22 June 2020, #01-04/963.

³ Business and Human Rights Resource Centre. Kazakhstan government publishes list of 55 projects with Chinese investments. <https://www.business-humanrights.org/en/latest-news/kazakhstan-government-publishes-list-of-55-projects-with-chinese-investments-2/>. Accessed 28 June 2021.

⁴ Ministry of Justice of the Republic of Kazakhstan. Environmental Code of the Republic of Kazakhstan (Unofficial Translation). https://importlicensing.wto.org/sites/default/files/Environmental%20Code%20of%20the%20Republic%20of%20Kazakhstan%20No.212_09.01.2012.pdf. Accessed 28 June 2021.

⁵ Ibid.

⁶ Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, June 25, 1998. https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf. Accessed 28 June 2021.

There was no response from Gos-expertiza for a month, and the activists approached the agency directly on 30 July 2020 with the same request for environmental information. This time, Gos-expertiza replied on 14 August 2020, #19-01-01-02/0787, by refusing, on unsubstantial grounds, to disclose the requested information to the environmentalists. Additional requests for the same documents were placed with the Kazakhstani Ministry of Industry and Infrastructure and the Ministry of Ecology, Geology, and Natural Resources on 6 August 2020. Both Ministries refused to disclose the requested documents, stating that they contained confidential commercial information, but noted that this information was available to Gos-expertiza.

LITIGATION

Kazakhstan's law makes it possible to take a public authority to court over a refusal to provide environmental information or failure to provide full and accurate information.

COURT OF FIRST INSTANCE

In November 2020, a lawyer acting on behalf of the environmentalists prepared and filed a lawsuit with Esil District Court in Nursultan. She asked the court: to find illegal the refusals of the Ministry of Industry and Infrastructure and the Ministry of Ecology, Geology, and Natural Resources to disclose the requested environmental information; to order the Ministry of Industry and Infrastructure and of the Ministry of Ecology, Geology, and Natural Resources to disclose to the applicants the following environmental information:

- The report from the South Regional Branch of Gos-expertiza on their review of the cement plant construction project in Kyzylorda Region (without the details of external engineering networks and estimate documentation), of 3 March 2018, # 19-0087/18
- The Environmental Impact Assessment report of said project produced by SKM Group in 2017
- The minutes of the public hearings on the project's environmental impact assessment of 26 December 2017

The court proceedings were held online between December 2020 and 8 February 2021, with several representatives from each of the respondent public authorities in attendance.

The court asked the parties the following questions:

- What was the purpose of requesting the environmental information
- How would the party use this information, if provided
- Whether the respondent public authorities were allowed to disclose environmental information

- Whether the plant had already been constructed
- Who had prepared the requested documents, and some others

The court obtained the requested documents from the South Regional Branch of Gos-expertiza and added them to the case file. However, the parties were not able to access the case file, as the proceedings were held online and physically in a different location. The court dismissed the applicants' argument that the requested information could not be subject to confidentiality restrictions, because it concerned everyone's right to a healthy environment. The court also dismissed the argument based on the Aarhus Convention that the public authorities have an obligation, by default, to disclose environmental information in the public interest. The final court hearing with oral arguments was held on 8 February 2021, and on the same day, the court made the decision to refuse the applicants' claim.

In the reasoning part of its decision, the court held that *“during the proceedings, the applicants needed to prove a violation of their rights and freedoms by the [public authorities'] inaction and [the public authorities'] failure to comply with the legal requirements in responding to the [applicants'] requests.”* The court further concluded that *“there has been no violation of the rights and legitimate interests of [the plaintiffs] S.S. and N.V.”*

COURT OF APPEAL

The applicants appealed the district court's decision to Nursultan City Court in February 2021. In their appeal, they indicated a number of irregularities in the first-instance court's decision, such as a misinterpretation of pertinent substantive law resulting in substantive as well as procedural violations under the Code of Civil Procedure of the Republic of Kazakhstan. The appeal hearings were held between May and June 2021. However, the appellate court considered the case formalistically and dismissed the appellants' case, despite the fact that the case file actually contained the requested documents which the authorities had refused to disclose. The court refused the appeal, but the appellants have not yet received the text of the ruling and are therefore unaware of the court's reasoning.

OUTCOME

The outcome of this litigation reveals a number of problems with access to environmental information in Kazakhstan:

1. No single official database of environmental information by region.

2. No public authority or official responsible for disclosure of environmental information by region. According to Article 2 of the Aarhus Convention, "'Public authority' means a) Government at national, regional and other level."
3. Courts refuse to apply the right criteria for distinguishing between environmental information which can and cannot be exempt from disclosure for reasons of confidentiality – although according to Article 17 of the Kazakh Law on State Secrets of 15 March 1999, No. 349-I, environmental information cannot be subject to confidentiality restrictions.⁷
4. No mechanism to implement the requirement of maintaining the State Fund for Environmental Information.

The law says that the State Fund for Environmental Information must be maintained by an agency subordinate to the public environmental authority, and this agency should be responsible for collection, storage, processing, analysis, disclosure, and dissemination of environmental information for academic research, and for educating the public and the users of natural resources on environmental matters.

5. The executive authorities often refuse to disclose environmental information; therefore, cases must be taken to court.
6. Courts, in turn, often side with the public authorities and refuse to presume them responsible for disclosing such information unless proven otherwise.
7. Courts also refuse to give priority to human rights, in particular to the constitutional right to favorable living and environmental conditions.

Finally, this case illustrates the need to inform and educate regional executive authorities and judges about standards concerning public access to environmental information.

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⁷ Ministry of Justice of the Republic of Kazakhstan. On State Secrets. https://adilet.zan.kz/eng/docs/Z990000349_. Accessed 28 June 2021.

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