

# Legal Problems and Countermeasures of Illegal Sand Mining into Criminal Law

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**Abstract:** Since the Interpretation of Several Questions Concerning the Application of Law in Criminal Cases of Illegal and Destructive Mining issued jointly by the Supreme People's Court and the Supreme People's Procuratorate in 2016, the crime of illegal mining has been convicted and sentenced for serious illegal mining, which has increased the intensity and power of cracking down on illegal mining. However, due to the short execution time of “two high” judicial interpretation and the lack of accumulated experience, there are still many problems and difficulties in the collection of evidence and the application of law in the case of sand mining. The article analyses these problems and puts forward corresponding countermeasures and measures.

## 1. Introduction

Sandstone resources are a limited national resource. In order to realize the orderly development and utilization of resources, the Water Law of the People's Republic of China implements a “permission system for sand mining in rivers”. In recent years, with the development of national economy and society, the acceleration of urbanization construction, the increasing demand of sand and stone resources market, leading to the soaring price of sand and stone, super-high profits lead to many people willing to take risks and join in illegal sand mining activities such as excessive mining and illegal mining. Therefore, how to effectively control illegal sand mining has undergone a transformation from administrative penalty to severe criminal sanction under the concept of governance in China.

## 2. Evaluating and Analyzing the Basis for Governing the Behavior of “Illegal Sand Mining”

Decline of administrative punishment governance. Since the 1980s, China has paid attention to strengthening river management and ensuring flood control safety. In 1988, the Regulations of the People's Republic of China on the Management of River Sand Mining were formulated, which stipulated that illegal sand mining was mainly punished by administrative penalties. This kind of sanction is convenient and quick to start, and has played a certain role in the control of illegal sand mining in practice. However, due to the limited ways and intensity of administrative sanctions, the commonly used punishment is fine, but in the face of high illegal sand mining profits, the illegal cost is significantly lower than the high profit return. Therefore, the administrative penalty as the only way to control illegal sand mining is obviously inadequate.

Punishment sanctions increase the power of rule of law. Because our country implements the principle of legality of crime, the criminal law has no explicit provisions on illegal sand mining in river courses which seriously affect flood control safety and ecological security, so administrative penalties can only be imposed, and criminal sanctions can not be imposed. This has led to a consequence: “illegal sand mining in rivers has low risk, low cost, high profit, repeated prohibitions, repeated attacks, and mostly involves violent resistance to the law, underworld crimes and other situations, high cost of law enforcement, difficult management, seriously affecting the flood control safety and social stability of rivers and lakes.” To this end, the Ministry of Water Resources actively promotes “illegal sand mining into prison” in order to strengthen the punishment for illegal sand mining. On November 28, 2016, the Supreme People's Court and the Supreme People's Procuratorate jointly issued the Interpretation of Several Questions Concerning the Application of Law in Criminal Cases of Illegal and Destructive Mining (Interpretation No. 2016) 25 (hereinafter

referred to as Interpretation), which clearly stipulates the conviction and punishment of illegal mining of sand within the scope of river management. Situation. So far, there are laws to investigate criminal liability for illegal sand mining in rivers. Imposing “illegal sand mining” into prison will break through the limitation of only relying on administrative means to crack down on illegal sand mining in the past, and crack down on illegal sand mining in rivers by means of penalty, which will have a strong deterrent force. It will curb illegal sand mining, protect sand and gravel resources, maintain flood control, ecological and shipping safety, stabilize river regime and navigation channels. To play a positive role.

### **3. Difficulties in the Judicial Application of Illegal Sand Mining**

#### **3.1 It is difficult to fix the evidence of illegal sand mining**

For illegal sand mining, the importance of evidence is self-evident. Without conclusive and sufficient evidence, it is difficult to convict and sentence. The difficulty of investigating and collecting evidence is manifested in:

It is difficult to enforce the law on the water surface and to fix the evidence. because of the long river shoreline and wide water area, it is difficult to find illegal sand mining. Illegal sand mining has strong liquidity and concealment. Although there is a 24-hour monitoring network, the clues of illegal sand mining mostly come from the reports of the masses. Secondly, the risk factor of law enforcement is high. Illegal sand mining is mostly carried out at night, coupled with strong winds and waves, law enforcement officers chase and escape illegal personnel through speedboats, slightly careless, with the risk of overturning and falling into the water, endangering the safety of life; at the same time, illegal sand mining personnel exist violent resistance to the law. Third, it is difficult to preserve and fix evidence. Because of the complexity and changeability of the river and lake environment and the instability of the case scene, the collection and preservation of evidence is more difficult than that on land.

Difficulty in identifying the value of sand and gravel and the damage to ecological environment. According to Articles 3 and 4 of the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate, the conviction standard of illegal sand mining requires that the value of sand resources reach a certain amount or cause serious damage to the ecological environment. The value of sandstone resources and the damage of ecological environment need to be scientifically identified. But in practice, it is difficult to determine the exact value of river sand because of the irregular shape and huge quantity of sand and gravel, the different price of coarse sand and fine sand, the different price of sand and gravel in different regions, and the difference of spot transaction price and market sale price.

#### **3.2 Difficulties in the application of imprisonment for illegal sand mining**

Difficulty in identifying “more than two administrative penalties” . Article 3, paragraph 3, of the Interpretation stipulates that if illegal mining has been subjected to more than two administrative penalties within two years and illegal mining has been carried out, the case shall be deemed to be “serious” as stipulated in Article 343, paragraph 1, of the Criminal Law, and shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance, together with or only a fine. However, water administrative law enforcement departments, public security organs and even procuratorial organs often have different opinions on the application of “two” in the interpretation clause. Some departments consider that “two” penalties are imposed on the same subject of crime as the calculation criterion, while others consider that “two” penalties have been imposed on ships illegally mining sand. Secondary penalty is the calculation standard. And for this punishment, in the end, only refers to the punishment given by the water administrative law enforcement department? Still, there is no final conclusion about the penalties imposed by the environmental protection and water transportation departments. Therefore, this clause seldom applies in practice.

Difficulty in determining the amount of “high salary”. Article 11 of the Interpretation stipulates

that: “Persons employed to provide services for illegal or destructive mining crimes shall not be punished as crimes except those who participate in profit sharing or receive high fixed wages, except those who have been punished for illegal or destructive mining.” In this article, there is no clear standard for the amount of high salary for the employee. The amount can be recognized as “high salary”. Standards are not uniform in different places. From the point of view of the research area, some people take twice the average monthly wage of the province as the criterion to determine the high amount. But in fact, the average wage of the staff working on board is high, and it is often difficult to convince them to take twice the average monthly wage of the province as the criterion for determining the high wage.

### **3.3 Difficulty in linking up illegal sand mining with sentencing**

At present, according to the “Provisions on Public Security Organs Accepting the Transfer of Suspected Crimes by Administrative Law Enforcement Organs”, water administrative law enforcement officers usually find suspected criminal acts in the process of investigating and dealing with illegal sand mining, and then transfer them to public security organs for investigation. However, the relevant provisions are too principled, and there are still some problems in the connection between administrative law enforcement and criminal law enforcement of illegal sand mining.

Transfer criteria. Transfer criteria include amount criteria and evidence criteria. According to the judicial interpretation of illegal sand mining, the value of sand and gravel constituting the crime of mining is 150,000 yuan. If the amount of illegal sand and gravel found in the stage of water administrative law enforcement does not meet the established standard, what criteria should be transferred to the public security organs to investigate their criminal responsibility? The standard of evidence transferred refers to the degree to which the evidence can be transferred to the public security organs for further investigation. At present, in practice, the public security organs refuse to accept the transfer on the grounds of insufficient evidence. As mentioned earlier, water law enforcement lacks in the collection and fixed evidence, and often fails to collect complete evidence to prove the crime. Because the water law enforcement departments and public security departments have different understanding of the evidentiary standards of the transfer, it is difficult to transfer illegal sand mining into prison.

Transfer time and transfer requirements. As mentioned earlier, due to the urgency and particularity of the collection of evidence for sand mining and sentencing, early intervention by public security organs is more effective in combating illegal sand mining crimes. Therefore, in general, when illegal sand mining activities are found on the spot, once there is evidence to preliminarily judge the suspected crime, it should be immediately transferred to the public security organs for investigation and punishment. However, according to the Provisions on the Transfer of Suspected Crime Cases by Administrative Law Enforcement Organs of Public Security Organs, the transfer requires the following materials, including the Transfer Letter of Cases, the Case Investigation Report, the List of Related Items, the Inspection Report or Expert Opinion with the Qualification Certificate of the Appraiser and the Certification Document of the Appraiser, and the Photo And other evidentiary materials. According to this requirement, water administrative law enforcement agencies can not be transferred on the spot, especially involving value appraisal, even after the event may not be able to transfer, thus unable to pursue criminal responsibility.

## **4. The Solution of the Difficulties in the Application of Illegal Sand Mining to Penalty**

### **4.1 Enhancing the construction of information technology and establishing professional appraisal institutions**

Increase investment, establish and improve the construction of video surveillance network. It is difficult to investigate, fix and preserve the evidence of illegal sand mining, which is caused by the special reason of illegal sand mining in big rivers and lakes. To solve this problem, the fundamental way is to increase investment in information technology, use high-tech means to find illegal clues,

and preserve fixed evidence. In order to crack down on illegal sand mining and collect evidence, monitoring points and video surveillance systems should be set up in key waters all over the country and connected with national surveillance systems, so as to solve the dilemma of illegal sand mining and collect evidence, and realize ecological control of rivers and lakes.

Establishment of an appraisal institution for the value of sand and gravel and the damage to aquatic ecosystem. In view of the problem of appraisal of the value of sand and gravel, corresponding committees have been set up in various parts of China to determine the value of sand and gravel resources and that illegal exploitation of sand and gravel endangers the safety of flood control. This committee should play an important role in determining the value of sandstone resources. As for the identification of ecological damage, in practice, there are only 29 environmental damage assessment agencies in China, and the average in the province is less than one, which can not meet the needs of the identification of ecological damage. Therefore, it is suggested that the qualifications and conditions of appraisal and evaluation institutions and their personnel should be combined with the software and hardware conditions of universities, environmental research institutions and general environmental scientific research institutions, and the classification and grading management of appraisal and evaluation institutions and appraisal and appraisal personnel should be carried out according to the actual needs of assessment work, so as to expand environmental damage. Scope of damage identification agencies [1].

#### **4.2 Improving the entry of illegal sand mining**

Define the standard of “more than two administrative penalties”. As mentioned earlier, Article 3, paragraph 1, paragraph 3, of the “two high” judicial interpretation stipulates that “in two years, illegal mining has been subjected to more than two administrative penalties, and illegal mining acts have been carried out”, which is deemed to be a “serious” situation. However, there is no clear subject and type of “administrative penalty” here, which leads to the divergence of understanding among the organs dealing with cases in practice. The dispute about “two or more administrative penalties” is essentially a dispute about whether to recognize a ship or a person. If we recognize “people”, there will be credit records in different places have just begun to build, information between regions has not been fully exchanged, and offenders often use different people to accept punishment and avoid it; if we recognize “ships” because a large number of ships are “three without vessels”, we can not determine the main responsibility. We believe that, generally speaking, people should be regarded as the standard. After all, the subject of crime is human rather than ship, and the purpose of punishment is to inflict pain on the offenders with “subjective will” and make them realize that illegal sand mining is not only morally wrong, but also too expensive.

Define the amount standard of “high salary”. Article 11 of the Interpretation defines the standard of “high salary” for the employee. In practice, the average wage of the staff working on the ship is generally high. The standard of the amount of wage for the employee who illegally excavates sand should be determined by referring to the average wage of the local staff working on the ship. In the survey, it is generally believed that if the wage of the employee exceeds one fifth of the average wage of the local staff on board the ship, it can be regarded as the “high wage” in the Interpretation. Because it is unreasonable that the salary of a certain post obviously exceeds the average level of the local post, a rational adult employee should check whether the employer is permitted to engage in sand mining activities.

#### **4.3 Improving the Cohesion Mechanism of execution**

To formulate the Provisions for Public Security Organs to Accept the Transfer of Suspected Crimes by Water Administrative Law Enforcement Organs, and to establish and improve the connection mechanism of execution of water-related and sand-related crimes. Among them, for the connection of execution of illegal sand mining, the followingshould be stipulated:

Clear Evidence Criteria for Transfer. In the final analysis, the criteria for the amount of transfers and the criteria for evidence are the problems of the criteria for evidence. Therefore, it is suggested to clarify the evidentiary criteria for the transfer of illegal sand mining into prison. It can be stipulated that if there is enough evidence to convince law enforcement officers that it constitutes a

crime, they can be transferred. This standard of proof corresponds to the western standard of proof of “justifiable reasons”, which applies to the issuance of warrants of arrest, arrest without warrant, search and detention, and the execution of arrests of citizens, etc. [2]. The evidential standard of illegal sand mining for transfer to prison does not need to meet the trial standard, or even the standard of prosecution.

Establishing on-the-spot transfer mechanism. For illegal sand mining, there are sufficient reasons to judge that it constitutes a crime, and improper transfer may lead to the escape of criminals or hide and destroy evidence based on the current situation. Water administrative law enforcement officers may transfer the evidence to public security organs on the spot, but they may not accept the Regulations on Public Security Organs Accepting the Transfer of Suspected Criminal Cases by Administrative Law Enforcement Organs. Restrictions stipulated in the Ding. However, the basic transfer procedures should be handled.

## **5. Conclusion**

The Interpretation provides the legal basis for illegal sand mining, but in the judicial application, it is difficult to form a unified standard for understanding and applying the standard of imprisonment and judging the circumstances of conviction, which leads to the predicament of judicial application. Based on the investigation on the spot, this paper establishes a Cohesion Mechanism in the transfer criteria and procedures for illegal sand mining, and establishes an ecological damage institution in the aspect of evidence fixation, so as to solve the difficult problems in application.

## **References**

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- [2] See Long Zongzhi, Relative Rationalism, China University of Political Science and Law Press, 301 (1999).