

## 环境保护法律热点问题

### 环保专题系列（五） - 环境行政处罚的应对与听证策略

随着中央生态环境保护督察组于今年7月10日至7月15日陆续进驻上海、福建、海南、重庆、甘肃、青海等6个省（市）和两家中央企业开展督察，环保部门执法刮起了第二轮“环保风暴”。截至今年9月5日，督查组已责令8507家企业进行整改，立案查处企业2942家，处罚金额约壹亿八仟玖佰万元。伴随大批的罚单，环保部门处理的企业听证、申辩数量也大大增加。本文将从企业视角出发，简要介绍在环保行政案件中如何关注重点的风险并把握关键性的要点。

#### 一、山雨欲来风满楼——企业应自查执法部门历年检查重点及整改意见

在第二轮“环保风暴”的背景下，我们注意到执法部门对环境违法行为的查处力度在加大且“旧账新算”开出罚款单的情况也屡见不鲜。因此，除日常环保合规外，企业应特别重视排查此前执法部门现场调查中提出的整改建议或要求，保存好书面整改情况说明及与环保部门的书面沟通材料，以避免被认定为“表面整改”、“假装整改”或“敷衍整改”而被进一步罚款或者受其他行政处罚的风险。企业还应注意加强了解和管理内部人事纠纷和周边群众环境诉求，及时掌握潜在的举报或投诉的风险，从而排查和解决合规隐患。

#### 二、绝知此事要躬行——企业应及时应对拟处罚告知文书（包括听证告知书）

如我们在上一篇推文《环保专题系列（四） -

一 环保督察下企业面临的挑战与应对》中所述，企业应注意案件流程和时间点，及时提交听证和申辩意见。现实中企业在应对拟处罚告知文书的处理方式和态度的不同很可能导致最终处罚结果的不同。这里我们以A、B两家企业的真实经历为例，A企业在收到拟处罚告知文书时消极应对，置之不理，未申请听证，也未提交申辩意见；相反，B企业在收到拟处罚告知文书后高度重视，立刻申请了听证，法定代表人立即赶赴环保局参与约谈并做了申辩笔录；而在这份笔录中，缺乏经验的法定代表人披露了一些不完全准确的事实情况。A企业的消极应对使A企业错失了听证和申辩的机会，尽管其仍能够在有理有据的前提下通过行政复议及/或行政诉讼来保护自身权益，但从法律角度，其实际已经丧失了一次救济机会；而B企业的不实陈述为后续听证质证环节中的申辩带来不必要的麻烦。我们建议，企业在知悉行政案件后，应在第一时间结合自身的经验以及涉案的标的金额及难点等考虑是否聘请专业的环境律师介入及商议应对策略、起草申辩意见和参与听证。

需要提醒注意的是，除了上述拟处罚或听证告知文书，执法部门会同时发出《责令改正违法行为决定书》。如果责令改正期限届满，企业未及时按要求改正，违法行为仍处于继续或者连续状态的，很有可能触发连日处罚（现实中因此导致巨额罚单的情况并不少见）。因此，在企业确实存在违法事实的前提下，在准备申辩、听证的同时，企业应在收到《责令改正违法行为决定书》的第一时间停止

或改正涉嫌违法的行为并将整改的情况书面报告执法部门。

### 三、沙场秋点兵——企业参加听证程序要点

企业通常可委托1至2名代理参加听证并且代表企业发言（其他参与旁听者不得发言）。根据我们的实践经验，比较理想的代理组合是由一位了解企业运营的高管和一位环境律师组成，分别侧重事实和法律适用。听证前，企业应与律师确定好听证申辩的策略，即在质疑事实、对适用法律提出异议、申请不予处罚、免于、减轻处罚这些诉求之间进行组合和取舍。而听证的重中之重在于，严格围绕申辩策略展开听证发言，随时应对环保调查人员或听证主持人突如其来的问题，秉承准确、真实、相关和言简意赅的原则，在有理有据的基础上视情况争取不予处罚（或者免于、减轻处罚）。在企业和环境律师充分配合的情况下，实践中最终实现不予处罚或大大降低预期罚金数额的案例并不鲜见。

### 四、居安思危、未雨绸缪——企业应加强环境合规意识和风险控制

企业在经过努力后取得了不予处罚或者减免处罚的好结果，并不意味着企业在生产经营中从此高枕无忧。我们建议企业仍应当定期自查（必要的情况下聘请专业的第三方环境咨询机构或环境律师协助），以进一步排查合规隐患，从大的方面，比如：企业的生产运营中环保合规基本制度和管理

规范是否完善，制度和管理规范是否得到有效的落实，高管和员工是否具备环保合规意识，企业是否建立了完善的环保调查应对机制等。此外，企业也可以考虑对高管和员工进行定期的环保合规培训。

### 五、结语与建议

综上所述，在“污染防治攻坚战”和环保执法日渐加强的时代背景下，企业应在环保合规方面积极给自己“体检”，及时发现并处理任何潜在的合规风险点，在行政案件中第一时间判断是否需要专业的环境律师介入协助应对，并且通过正当的程序和有效的申辩来维护自身合法权益。从长远来看，企业只有持续地关注环保合规并不断提升企业环保合规的管理能力，方能未雨绸缪，在未来可预期的一轮又一轮的“环保风暴”中继续保持扬帆远航。如您有任何具体的问题，[欢迎邮件联系我们：ecoenvpro@junhe.com](mailto:ecoenvpro@junhe.com)。

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## Environmental Protection

### Environmental Protection Series No. 5: Countermeasures to Environmental Administrative Punishment and Hearing Strategies

With the visit of the Central Government's Environmental Compliance Inspection Committee ("Inspection Committee") to Shanghai, Fujian, Hainan, Chongqing, Gansu, Qinghai and two other central enterprises from July 10 to 15 this year, the environmental protection bureau ("EPB") has launched the second round of the "*Environmental Protection Storm*". As of September 5 this year, the Inspection Committee has ordered 8,507 enterprises to take corrective actions, investigated 2,942 enterprises and imposed a total penalty amount of around RMB 189 million. Following the large penalty amounts, the number of corporate hearings and appeals handled by the EPB has significantly increased. In this context, we will briefly introduce the key risks and issues in dealing with environmental administrative cases from a corporate perspective.

#### **I. Preparation – Enterprises should revisit the EPB's past inspection results and correction orders**

In the context of the second round of the "*Environmental Protection Storm*", the EPB

investigates environmental violations in a stricter way and imposes large penalties in light of enterprises' past environmental issues. Therefore, in addition to daily environmental compliance, enterprises should specifically revisit the correction suggestions and requirements raised by the EPB during on-site investigations, and preserve in writing the correction statements and correspondence with the EPB, in order to mitigate the risk of the correction being deemed a "superficial correction", a "pretend correction" or a "perfunctory correction" and therefore be penalized or be otherwise administratively punished. Enterprises should also be aware of and actively deal with internal personnel disputes and environmental claims from neighboring regions, in order to address and eliminate potential risks in connection with any potential complaints or claims.

#### **II. Learning from Experience – Enterprises should take prompt countermeasures to the proposed penalty notifications (including the hearing notifications)**

As our last article “*Environmental Protection Series 4– Challenges and Countermeasures regarding Environmental Compliance Inspections*” discussed, enterprises should submit hearing application and appeal letters in accordance with the relevant procedural and timeline requirements. Different approaches and countermeasures undertaken by enterprises to the penalty notifications may result in different penalties. For instance, say Company A and Company B have different practical experience. After receiving the proposed penalty notification, Company A takes an omission approach without applying for a hearing or submitting an appeal letter. On the contrary, Company B pays strict attention when it receives the proposed penalty notification and immediately applies for a hearing. The legal representative of Company B also makes an appointment with the EPB in the upcoming days and presents various facts and arguments, which are documented by the EPB in the appeal record. However, in this appeal record, the inexperienced legal representative discloses facts that are not completely accurate.

On the other hand, let’s say Company A misses the opportunity of a hearing and appeal by taking an omission, which would be deemed as a waste of a remedy opportunity from a legal perspective, despite the fact that Company A may still defend itself in an administrative review with superior EPBs or bring the dispute to the courts; in terms of Company B, the misrepresentation of Company B brings about unnecessary complications to its defense in the hearing. Therefore, it is advisable for enterprises that once they become aware of an administrative case, they should consider engaging professional environmental lawyers to discuss countermeasures and strategies as well as

prepare the appeal letter, participate in the hearing, taking into account their past experience, the likely penalty amount and the difficulties of the case.

Besides the above proposed penalty and/or hearing notifications, enterprises should also pay attention to the “Decision regarding the Correction Order of Violation Acts” issued by the EPB together with the notifications. In the event that the Decision specifies a time limit for correcting the violating acts but enterprises fail to correct such acts, daily accumulative penalties may be triggered and may lead to a large fine. Given this, if there are acts by enterprises which violate laws, enterprises should prepare for the appeal and hearing, and, cease or correct the suspected violation acts immediately after receiving the Decision and report the written correction statement to the EPB.

### **III. Attending The Hearing by the EPB – Key points for enterprises to participate in the hearing procedures**

Enterprises may usually appoint one or two representatives to participate in the hearing and expression on behalf of enterprises, while other participants in the hearing are not allowed to make any statements. According to our practical experience, a suggested representative combination would consist of a senior officer of the enterprise (who is familiar with the operation of the enterprise) and an environmental lawyer. The senior officer and lawyer would focus on the statement of facts and the application of laws respectively. Prior to the hearing, enterprises should determine the defense strategy of the hearing, i.e. to determine the combination and tradeoff between questioning the facts, challenging the law applications, and apply for a non-imposition, exemption or reduction of penalties. The key point for the hearing is to make statements strictly

following the defense strategy, and answer unexpected questions by investigators and moderators of the hearing in accordance with the principles of accuracy, truthfulness, relevance and conciseness, in order to achieve an outcome of non-imposition of penalties (or exemption or reduction of penalties) on a reasonable basis. If enterprises and their environmental lawyers fully cooperate, it is not uncommon that they would finally achieve an outcome of non-imposition of penalties or a significant reduction in the penalty amount.

#### **IV. Casting an anchor – Enterprises should improve their environmental compliance awareness and risk control ability**

Even if enterprises have achieved positive results of avoiding penalties or an exemption for or reduction of penalties, it does not mean that enterprises are able to rest easy. Enterprises are advised to conduct regular self-inspections (including engaging professional third-party environmental consultants or environmental lawyers where necessary) to identify compliance risks. For instance, enterprises should verify that their environmental compliance policy and management guidance of operations are comprehensive, that such compliance policies and management guidance are effectively implemented, that their senior officers and employees maintain environmental compliance awareness, and that they have established a comprehensive reaction mechanism against the EPB's environmental investigations. In addition, it is also suggested that enterprises

introduce regular environmental compliance trainings for their senior officers and employees.

#### **V. Conclusion and further suggestions**

In summary, under the background of the “*Pollution Control Battles*” and the strengthening of environmental administrative investigations, enterprises should actively self-inspect from an environmental compliance perspective to identify and timely deal with any potential compliance risk identified. They should determine if they need support from professional environmental lawyers as soon as possible, and protect their legal rights and interests through proper procedures and effective defense. In the long run, enterprises should be able to successfully survive future inspection rounds of the “*Environmental Protection Storm*”, as long as they pay close attention to their environmental compliance and improve their compliance management ability. If you have any queries please email: [ecoenvpro@junhe.com](mailto:ecoenvpro@junhe.com).

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