

环境保护法律热点问题

环保专题系列（四）— 环保督察下企业面临的挑战与应对

导言：自2016年刮起“环保风暴”——中央环保督察，时隔三年后，生态环境部于2019年启动了第二轮督察和“回头看”。此次督察围绕坚决打好污染防治攻坚战展开，目标是用三年左右时间完成第二轮中央生态环境保护例行督察，再用一年时间开展“回头看”。中央督察组于7月陆续进驻上海、福建、海南、重庆、甘肃、青海6省/市以及中国五矿集团有限公司和中国化工集团有限公司两家中央企业。在此背景下，企业更多地面临来自政府环保调查和处罚的现实问题。

新一轮的中央环保督察刚刚启动，7月8日，生态环境部针对企业最为关心的“一刀切”问题专门致函被督察省/市、集团公司，要求坚决禁止搞“一刀切”和“滥问责”；尽管如此，我们注意到企业在面对行政案件中仍然存在困惑，担心无法保护自身合法权益。我们将以此为背景简要介绍企业如何应对环境行政案件。

一、核实案件事实情况

企业在执法部门的行政调查中首先要结合环境执法部门主张的事实，比对是否符合环境管理的实际情况。如果认为执法部门主张的事实有误或有夸大的，应整理所有相关事实介绍、文件、照片和第三方报告等背景资料，进一步确认事实；待事实确认后，如有必要的，应向执法部门予以澄清。

二、注意案件流程和时间点

企业在收到执法部门文书时应注意案件的流程和时间节点。具体而言，在作出行政处罚决定前，执法部门应当告知当事人有关事实、理由、依据和当事人依法享有的陈述、申辩权利，而在作出责令停产停业、暂扣或吊销许可证、人民币5万元(适用于企业)以上的罚款和没收等重大行政处罚决定之前，执法部门应告知当事人有要求举行听证的权利。企业应及时提交听证和申辩意见。

三、与环境律师沟通论据

在适用听证申请的案件中，企业除了提交听证回执外，也可以提交一份书面申请，描述基本的事实，对执法部门认定的事实和法律适用提出质疑并提交证据。在听证申请和申辩意见中，对任何事实或法律适用的质疑需有理有据地展开，在与专业的环境律师充分沟通的基础上准备，以确保事实准确，理由明确，证据充分且论述切中要点，并避免描述无关内容或赘述帮助不大的内容。

四、进一步跟踪案件进程

环境保护行政处罚案件应当自立案之日起的3个月内作出处理决定（其中，听证、公告、监测、鉴定、送达等时间不计入期限）。实践中，执法部门在完成听证程序后，可能会联系企业就案件处理做进一步沟通，企业也可能有机会在指定期限内进

一步补充申辩意见。企业应及时跟踪案件发展进程，在执法部门自由裁量的空间内依法争取自身合法权益，同时通过与执法部门的沟通，也可进一步提升环保合规管理水平。企业在收到行政处罚决定书后，如确有必要，可采取行政复议或行政诉讼的方式依法争取自身合法权益。

五、结语与进一步建议

在当前国家加强环保督查的大背景下，企业在收到政府调查时可参考以上几点来应对。根据法律及我们的实务经验，申辩本身不会导致企业被加重处罚。此外，在生态环境部明确强调行政处罚自由裁量权的适用应遵循“合法、合理、过罚相当和公开公平公正”四大原则的背景下，我们认为企业完全可以在法律的框架下通过正当的程序和有效的

申辩来维护自身合法权益。即使在存在违法行为的情况下，也可以在法定情形范围内争取免于处罚或者在法定罚款区间内争取最低的罚款，而环境律师的介入可以在不同环节（如申辩、听证、行政复议或行政诉讼等）帮助企业实现这一目标。就如何应对行政案件，我们也将持续和大家分享。如您有任何具体的问题，**欢迎邮件联系我们：ecoenvpro@junhe.com**。

关于君合：君合是一家顶尖的中国综合性律师事务所，有约 800 名律师。它是中国环境法业务领域的先驱并且是中国最大的环境法律团队之一，为跨国公司客户在 EHS 领域提供全方位的法律服务，包括项目开发和设立合资公司，并购交易和生产型企业的日常运营，涉及 EHS 合规，政府调查，及相关处罚和罚款的行政复议和诉讼。

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Environmental Protection

Environmental Protection Series No. 4: Challenges and Countermeasures regarding Environmental Compliance Inspections

Introduction: Following the “*Environmental Protection Storm*”, the central government’s environmental compliance inspections initiated in 2016, the Ministry of Ecology and Environment (“MEE”) have now launched a second round of inspections in 2019. The inspections focus on the prevention and control of pollution and a goal of three years has been set for the next round of central government’s routine inspections regarding ecological and environmental protection and one year for an investigation into “identified issues”. The inspections happened in July and occurred in the provinces and cities of Shanghai, Fujian, Hainan, Chongqing, Gansu, Qinghai and included two state owned enterprises, China Minmetals Corporation and China National Chemical Corporation Ltd. Enterprises will face more and more challenges arising from governmental investigations into environmental protection...

These new rounds of central inspections regarding environmental protection have just begun. On July 8, MEE sent letters to various provinces, cities and companies that have been inspected with regard to a “One Size

Fits All” issue which the enterprises are most interests in, which prohibit absolute “One Size Fits All” and “Excessive Accountability”. Many enterprises are confused by these administrative cases and are concerned about the protection of their own legitimate rights and interests. In this context, we will briefly introduce some countermeasures that enterprises may adopt when facing environmental administrative cases.

1. Verification of the Case Facts

In an administrative investigation by a law enforcement department, enterprises should first compare the facts asserted by the environmental law department with the facts of their own environmental management. If the enterprise finds that the facts asserted by the law enforcement department are wrong or exaggerated, enterprises should prepare background materials, which should include, but not limited to, an introduction, documents, photographs and third-party reports. Upon the confirmation of facts, enterprises should ascertain clarification from the law enforcement department (if necessary).

2. Attention to Procedures and

Timelines

Businesses should pay attention to the procedures and timelines of the case when receiving documents from law enforcement departments. Specifically, the law enforcement departments, before deciding to impose administrative penalties, shall notify the party of the relevant facts, grounds and the right of the state to defend itself in accordance with the law. Law enforcement departments shall notify the concerned party of their right to request a hearing before making a decision on an administrative penalty that could involve an order for the suspension of production or the suspension of business, the temporary suspension or revocation of the business license and a fine, or the confiscation of more than RMB 50,000 (applicable to enterprises). Enterprises shall submit a statement for the hearing and their defense in a timely manner.

3. Communication with environmental lawyers

Where a hearing is applicable, in addition to the submission of the receipt of the hearing, enterprises may also submit a written application which contains the reasons they are questioning the facts of the case and/or the application of the law held by the law enforcement department, together with the evidence. In the application for a hearing and the defense statement, any questioning of the facts and the application of the law shall be well-grounded, and be prepared on the basis of sufficient communication with professional environmental lawyers, in order to ensure the accuracy of the facts. It shall be supported by sufficient evidence, and be free from irrelevant content or an emphasis on unhelpful information.

4. Tracing the Process of the Case Further

A decision on the administrative penalties for environmental protection shall be made

within three months after the case is placed on file (excluding the time of hearing, announcement, monitoring, examination, delivery, etc.). In practice, law enforcement departments may contact enterprises for further information after the hearing and enterprises may still have the opportunity to supplement defensive statements. Enterprises shall trace the process of the case and protect their own legitimate rights and interests within the parameters of the law enforcement departments' discretion. Moreover, enterprises may further improve their environmental compliance management through communication with the law enforcement departments. If necessary, enterprises may protect their own legitimate rights and interests by means of administrative reconsideration or an administrative lawsuit after receiving a formal decision for an administrative penalty issued by the law enforcement departments.

5. Conclusion and further suggestions

Regarding the state's strengthening of environmental compliance inspections, enterprises can refer to the several points above to undertake countermeasures for administrative investigation. According to the law and our practical experience, enterprises will not attract heavier penalties merely due to undertaking their defense. In addition, considering that the Ministry of Ecology and Environment explicitly states that the law enforcement departments, in giving administrative penalties shall follow the principles of being *"Reasonable, legitimate, open, fair and just and, that punishment is equal to the crime,"* we take the view that enterprises may protect their own legitimate rights and interests through due process and effective defense under the legal regime. Even in a case where the illegal act occurred, enterprises can strive for an exemption of the penalty under legitimate circumstances or apply for the lowest fine within the range

stated. The participation of environmental lawyers can help enterprises during different phases such as during the defense, hearings, administrative reconsideration, administrative lawsuits, etc. With regard to countermeasures for coping with administrative cases, we will continue to update you. If you have any specific questions, please e-mail: ecoenvpro@junhe.com.

About JunHe: JunHe is a premier full service PRC law firm with almost 800 lawyers. It has a pioneer environmental law practice and one of the largest environmental practice teams in China assisting multinational clients in all aspects of EHS matters during project development and joint venture formation, in M&A transactions and daily operation of manufacturing facilities in China as well as compliance, government investigation, administrative review and litigation relating to EHS fines and penalties.

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