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# 环境行政处罚权研究

RESEARCH ON THE POWER OF  
ENVIRONMENTAL ADMINISTRATIVE PENALTY

李 铮 著

中国环境科学出版社

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## 摘 要

“权力”与“权利”之间的相互关系与动态平衡是法学研究永恒的主题。若将这对核心概念置于行政管理这一特定领域，则表现为“行政权”与“行政相对人权利”之间的博弈关系。现阶段，我国环境保护仍然为“行政主导”，表现在环境法治方面是一种以环境行政机关占主导地位的环境法律秩序结构，环境保护目标的实现在很大程度上取决于环境行政机关的权力运行状况。在当今时代环境法治和可持续发展的宏观背景下，本书选取环境行政权中最活跃、运用频率最高、最具代表性的权力形式，即“环境行政处罚权”为命题，从行政法法理和环境法法理的角度系统地论证环境行政处罚权的运行机理，并将其作为环境法研究的一个新的维度是十分必要而有意义的。本书对环境行政处罚权进行了静态和动态两个层面的分析。在静态层面，主要界定环境行政处罚权的基本范畴、探讨基本理论和价值追求，这是本书的总纲和展开论述的基础。在动态层面，论述了环境行政处罚权的三大核心要素的运行状况，即权力主体结构及权力配置、权力的实施和运行、权力的监督制约，各个构成要素本身必须进行完善，它们之间的关系才能优化并形成良性互动格局。

关于环境行政处罚权的基本范畴。环境行政处罚权属于行政权范畴，是一种具有惩戒性的“刚性”权力，指环境行政主管部门及法定授权组织对实施违反环境行政法律规范的公民、法人和其他组织依法给予制裁的权力。广义的“环境行政处罚权”不仅指环境行政处罚实施权，还包括环境行政处罚设定权。由于环境违法行为的特殊性以及盘根错节的利益关系等因素，使得环境行政处罚权具有

实施主体的广泛性、处罚对象的强势性、处罚手段的技术性、价值判断的复杂性等鲜明的个性特征。环境行政处罚权与同属于国家权力体系的环境立法权、环境司法权、环境管理权、环境执法权等权力联系密切,与各相关权力之间的监督制约和衔接配合的关系,能保证环境行政处罚权的有序性和高效性。环境行政处罚权来源于人民的授权,其运行需要行政相对人、行政相关人和公众等各个权利主体的参与和监督,其目的是保障行政相对人合法权利、维护行政相关人和公众的环境权、促进社会可持续发展。

关于环境行政处罚权的理论基础和价值追求。环境行政处罚权的确立有其行政法和环境法上的理论基础,并具有现实的正当性、必要性和迫切性。环境行政处罚权以理性原则和人性论作为其哲学基础;以人民主权和分权学说作为其政治学基础;以环境资源信托理论和理性经济人学说作为其经济学基础;以控权论与正当程序学说作为其法学基础。环境行政处罚权以实现环境正义、维护环境秩序、促进环境效率和为环境公益服务为基本价值追求,正是因为这些内在价值追求才使得环境行政处罚权的存在有了实质的意义,也使完善、重塑科学合理的环境行政处罚权体系有了明确的目标和方向。

关于环境行政处罚权的主体。环境行政处罚权的设定主体、实施主体的设置是否合理,主体之间的权力配置是否科学关系到整个环境行政权力体系的运行状况和效率高低。环境行政处罚权设定主体与实施主体的适度分离,体现了法治原则和控权理念,有助于实现法律的人本理念和公民环境权。现行《行政处罚法》及环境法律法规对环境行政处罚权的设定主体和实施主体作出了明确规定,但仍然存在各设定权之间冲突、设定的行政处罚力度不足、实施权配置不合理、基层组织实施能力偏弱等问题,应当从加大设定处罚的力度、加强对设定权限的审查监督、赋予环保部门更大的行政处罚决定权、保障地方环保部门的处罚实施权以及提升环境监察机构的执法能力等方面完善环境行政处罚权主体。

关于环境行政处罚权的运行。环境行政处罚权是否公正、规范、

有序地运行是衡量整个权力体系是否科学合理的关键，其主体权力配置是否科学、监督机制是否有效最终都靠环境行政处罚权的运行状况来体现。环境行政处罚权的运行除遵循依法、适当、公正公开行使权力、保障相对人权利和分权制约的原则外，由于环境问题的复杂性、环境影响的潜在性和长期性等因素决定了环境行政处罚权在环境保护领域的运行需要遵循一些特定原则和规则，如保障环境执法原则、及时性原则、教育与服务原则、比例原则等以保障环境行政处罚权正当、有效行使。由于地方政府干预、权力独立性差、权力运行保障机制无力以及社会环境不宽松等，导致环境行政处罚权在运行中还存在力度、广度、强度不足，运行不规范以及运行的部门化趋势等问题，因此，必须增强环境行政处罚权运行的力度、广度、强度和独立性，规范自由裁量权，建立完善环境行政处罚权的自我保障机制和与相关权力的衔接配合机制，创新权力的运行方式并加强规范化程度，改善权力的运行环境等。

关于环境行政处罚权的监督。对环境行政处罚权的监督与控制是主体间权力配置和权力有效运行的基本保障。我国环境行政处罚权的监督主体众多、形式多样、法律规定比较完备，但仍然存在缺乏针对性、非常态化、不稳定性以及监督机制结构不合理难以形成合力等缺陷，将对行政相对人合法权益造成威胁，对我国环境法治进程产生冲击。因此，必须构建权力监督、权利监督、程序监督、内部监督、社会监督、信息监督等全方位、多层次、多渠道的权力监督体系，使环境行政处罚权始终在法治化轨道上健康、有效运行。

综上，本书择取“环境行政处罚权”这一较小命题，论述涉及立法、执法、司法、守法等法律运行领域，跨越行政法、环境法等法律部门，兼顾实体法和程序法，厘清众多理论、学说、原则、体制、机制、制度等多层面问题，层层剥离各种利益纠葛，从“权力”与“权利”相互关系的维度界定了环境行政处罚权的性质和特征，系统探寻了环境行政处罚权的理论基础和价值追求，详细阐述了我国环境行政处罚权主体、运行和监督机制的现状，全面剖析了其存在的主要问题，并从学术角度提出了符合我国国情的完善建议，进

而构建一个“结构合理、配置科学、程序正当、运行有序、保障有力、监督有效”的环境行政处罚权体系，力图破解困扰环境行政执法的难题，进而保障行政相对人正当权利、维护环境公益和推动环境法治进程。

# Abstract

The relationship and dynamic balance between the “power” and “rights” is the eternal theme of legal studies. If we put these two core concepts into the particular area of administration, it manifests as the game between “the executive power” and “the right to administrative counterpart”. At this stage, the environmental protection in our country is still “executive-led”, expressed in the rule of environmental law is a legal order structure which is dominated by environmental administrative authorities. So the implementation of the environmental protection target largely depends on the operating condition of environmental administrative authorities’ powers. In the macro context of the present era of environmental nomocracy and sustainable development, this book selects “environmental administrative penalty power” as the proposition which is the the most active, the highest operating frequency, the most representative form in the environmental executive power. It proves the operational mechanism systematacially from the angle of legal principle theory about administrative law and environmental law, also it is very meaningful and necessary to put it as a new dimension in environmental law research. This book analyzes the “environmental administrative penalty power” on the static and dynamic level. From the static aspect, we mainly definite the basic category, elementary theory, value pursuit and it is the general programme and basis to discuss the view. From the dynamic aspect, we discuss the core



elements of the environmental administrative penalty power that include the subject structure and disposition of authority, the implementation and movement of authority, the supervision and restriction of authority constitute. Each integrant part itself must be perfect that can optimize their relations and form the benign interaction pattern.

About the basic category of environmental administrative penalty power. The environment administrative penalty power is one kind of exemplary rigid power which belongs to the category of executive power. It means the power that the environmental administrative organization and the legal authorized organization give the sanction legally to the citizen, the legal person and other organizations who violate the environmental administration legal. The generalized "environmental administrative penalty power" not only includes the environmental administrative sanction implementation power, but also includes the environmental administrative sanction enactment power. It has the distinct individual character because of environmental administrative counterpart's mighty feature, the particularity of environmental illegal activity and complicated interest relations. The environmental administrative penalty power is close with environmental legislative power, environmental jurisdiction, environmental authority and environmental law enforcement power which are also belong to the state power system. The mutual coordinated and restraint relationship with each related authority can guarantee the environmental administrative penalty power order and high efficiency. The environmental administrative penalty power is originated from people's authorization, its movement needs the participation and the surveillance of each subject of right, such as the administrative counterpart, the administrative related person, the public and so on. Its purpose is to safeguard the lawful right of administrative counterpart, to protect the environmental power of administrative related person and the public, also to promote

the sustainable development of society.

About the theory basis and value pursuit of environmental administrative penalty power. The establishment of environmental administrative penalty power has in its own basis on administrative law and environmental law, it has the realistic validity, necessity and urgency. The environmental administrative sanction power takes the rational principle and the theory of human nature as its philosophical basis, takes the popular sovereignty and the decentralization theory as its political foundation, takes the environmental resources trust theory and the rational economic man theory as its economic foundation, also takes the power controlling thesis and the right procedure theory as its legal basis. How to realize the environmental justice, maintain the environment order, promote the environment efficiency and serve for the environment common good is environment administrative penalty power's basic value pursuit. Because of these intrinsic value pursuits that enable the environment administrative penalty power to have the substantive significance to exist, also make the perfecting and establishing of the reasonable power system have the explicit goal and direction.

About the subject of environmental administrative penalty power. Whether the arrangement of enaction subject and implementation subject is reasonable and whether the disposition of power between different subjects is scientific that are all related to the operating condition and efficiency of the entire environmental executive authority system. Separating the enaction subject and implementation subject appropriately manifested the principle of rule of law and power controlling idea. It will help to realize the legal humanistic idea and civil environmental right. The existing *Administrative Penalties Law* as well as other environmental laws and regulations have stipulated enaction subject and implementation subject of environmental administrative penalty power explicitly, but also they have some problems just like it

has conflict between each right of institution , the power of administrative penalty is insufficient, the disposition of implementation power is unreasonable, the executive ability of organizations at the grass-roots level is weak. So we should improve the subject of environmental administrative penalty power from the aspects of increasing the punishment dynamics, strengthening the examination and surveillance for enacting limits of authority, giving the environmental protection department bigger decision-making power, safeguarding the local environmental protection department's punishment implementation power and promoting law enforcement ability of environmental monitoring organization.

About the operation of environmental administrative penalty power. The environmental administrative penalty power's fairly, canonically and orderly operation, which is crucial to judge whether the entire authority system is scientific and reasonable. Whether the disposition of subject authority is scientific and whether the supervision mechanism is efficiency finally depend on the operating condition of the environmental administrative penalty power. Besides of following the principle like exercising the power legally, suitably, fairly and openly, guaranteeing the relative person's right, decentralization of authority and restriction of power, because of the environmental problems are so complex, the environmental effect is potential and long-time, so that in the field of protecting the environment, the operation of environmental administrative penalty power should also follow some special rules and principles just like safeguarding environmental law enforcement principle, timeliness principle, education and service principle as well as proportion principle. Then it can guarantee the enforcement of environmental administrative penalty power proper and efficient.

Because the local authority intervenes the operation of power, the authority's independence is bad, the safeguard mechanism for authority

movement is incapable as well as the social environment is not very well, so that the dynamics, breadth and intensity of environmental administrative penalty power are insufficient, the operation is lack of standardization and has departmentalization tendency. We must strengthen dynamics, expand breadth, increase intensity and enhance independence of environmental administrative penalty power, standardize discretion, establish the perfect self-safeguard mechanism and coordination mechanism with related authority. Then we must innovate power's mode of operation and improve the environment for the operation of power.

About the supervision for environment administrative penalty power. The supervision and control of the environmental administrative penalty power is the basic safeguard to the subject authority disposition and efficient authority movement. The supervision subjects of environmental administrative penalty power are various and the legal rule is quite complete. But it still has some problems that it lacks a direction, it is too random and unstable as well as the supervising mechanism structure is unreasonable that can not form the joint power. It will threat the administrative relative person's legal rights and interests and impact our country's environmental process governed by law. Therefore, we must construct the omnibearing, multi-level, multi-channel authority surveillance system that includes authority surveillance, the right surveillance, the procedure surveillance, the internal surveillance, the social surveillance, the information surveillance and so on to make the environmental administrative penalty power operate healthily and effectively on the law ruled track all long.

Above all, the book chooses "environmental administrative penalty power" as a topic, the book involves the legislation, the law enforcement, the judicatory and obeying the law. It steps over the administrative law and environmental law, defines clearly numerous

theories, principles, systems, mechanisms and so on. This book peels each benefit entanglement layer upon layer, then defines the characteristic of environmental administrative penalty power from the aspect of the relationship between “power” and “rights”. It seeks the theoretical principle and value pursuit of environmental administrative penalty power systematically. Also it elaborates the present situation of subject, movement and supervising mechanism in detail about our country’s environmental administrative penalty power, then analyzes its main problems comprehensively, at last proposes the consummating suggestion tally with the national conditions from academic aspect. Further more, we can construct a environmental administrative penalty power system which has reasonable structure, scientific disposition, proper procedure, orderly function, powerful safeguard and effective supervision.

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# 导 论

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## 一、选题的动因

紫金矿业2010年因造成重大水污染事故被福建省环保厅处罚近千万元，这是依据2008年新修订的《水污染防治法》规定罚则计算出的最高限额罚款。就在环保部门为立法加大处罚力度、环境行政执法开出“史上最牛”罚单而欢欣鼓舞的时候，市场和公众却给环保部门泼了一头冷水——在紫金矿业10月7日公告此处罚信息后立即收获了一个涨停板，其10月8日的收盘价格比其“污染门”发生前高出了1/3。公众评论：“处罚决定出台，利空出尽导致股价飙升。”有人提出质疑：“看来违法排污是理性的选择。”<sup>①</sup>这种逆绿色潮流而动和超出人们理性判断的涨停，是对环境行政处罚权莫大的讽刺，也印证了“违法成本低，执法成本高”这一环境行政执法的痼疾仍

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① 详见原二军、张俊、李源：“汀江遭污染、企业被处罚、股价反上涨，紫金何以逆风飞飏？！”，载《中国环境报》2010年10月14日法制版。



然存在。这个现象发人深省：环境行政处罚权在我国法治进程和环境保护中到底扮演什么样的角色？其地位、作用是什么？环境行政处罚权的力度究竟多大算够、多大才能满足公众期许？环境行政处罚权如何行使才能实现正义、效率、可持续发展的理念？带着诸如此类的疑问，怀着对环境行政执法的些许忧虑和对未来执法状况的希望，怀着对法学所追求的正义、自由和秩序的无限憧憬，笔者开始了对环境行政处罚权问题的探究。

## 二、选题的背景与意义

### 1. 研究背景

我国正处于工业化中后期和城镇化加速发展的阶段，发达国家一两百年间逐步出现的环境问题在我国短期内集中爆发，呈现出结构型、压缩型、复合型特点，环境总体恶化的趋势尚未根本改变，压力还在加大。一些地区污染排放严重超过环境容量，突发环境事件高发频发，环境风险加剧。严峻的环境形势要求我们应从理论层面认识环境问题、破解环境难题。本书以环境行政处罚权作为研究对象，主要基于以下几点考虑。

首先，环境行政处罚权问题是研究环境法治的重要命题和逻辑起点之一。权利与权力之间的冲突与平衡问题是法学研究的永恒主题。在行政法领域表现为“行政权”与“行政相对方权利”这对核心概念之间的相互关系。行政法的重点在于“设权”与“控权”，即规定行政主体权力的配置、行政权力的运行、行政权力的监督等问题。本书将这一法学核心概念置于环境法学这一新兴研究领域，在当今时代行政法治和可持续发展、社会经济转型的宏观背景下，选取了环境行政权中最活跃、运用频率最高、最具代表性的表现形式，即“环境行政处罚权”为研究对象，通过对该命题的剖析，展示了环境行政处罚权的运行机理，“环境行政处罚权”与“环境行政处罚相对人权利”的相互关系，以及该权力的价值取向和社会作用。

其次，从行政法法理和环境法法理的角度系统地论证环境行政处罚权的运行机理，并将其作为环境法研究的一个新的维度是十分