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环境行政许可制度研究

HUANJING XINGZHENG XUKE ZHIDU YANJIU

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本书从近年来日益显著的环境污染问题入手，对我国现行的环境行政许可制度的特点、许可依据的法学原理、许可的程序、环境行政机关的监督、许可的救济以及许可制度的未来展望等问题进行详细而深入的分析与阐释，有助于廓清对环境行政许可的理解以及解决各种相关问题。

本书适合环境问题相关领域的研究者、学习者以及相关工作人员阅读。

责任编辑：刘　睿　　**责任校对**：韩秀天

特约编辑：孟　卿　　**责任出版**：卢运霞

执行编辑：文　茜

图书在版编目（CIP）数据

环境行政许可制度研究 / 白贵秀著. —北京：知识产权出版社，2012.1

ISBN 978-7-5130-0821-1

Ⅰ.①环… Ⅱ.①白… Ⅲ.①环境保护法：行政许可法－研究－中国 Ⅳ.①D922.684②D922.114

中国版本图书馆 CIP 数据核字（2011）第 189319 号

环境行政许可制度研究

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出版发行：知识产权出版社

社　　址：北京市海淀区马甸南村 1 号　　邮　　编：100088

网　　址：http://www.ipph.cn　　邮　　箱：bjb@cnipr.com

发行电话：010-82000860 转 8101/8102　　传　　真：010-82005070/82000893

责编电话：010-82000860 转 8113　　责编邮箱：liurui@cnipr.com

印　　刷：知识产权出版社电子制印中心　　经　　销：新华书店及相关销售网点

开　　本：880mm×1230mm　1/32　　印　　张：11.625

版　　次：2012 年 1 月第一版　　印　　次：2012 年 1 月第一次印刷

字　　数：257 千字　　定　　价：30.00 元

ISBN 978-7-5130-0821-1/D·1316（3721）

摘　要

近年来，环境污染问题加重，居民的生存环境日益受到威胁，环境规划以及环境执法的问题愈发受到公众的广泛关注，尤其是污染型项目开发的行政许可常常遭遇公众的强烈对抗，致使已经获得的行政许可被“叫停”，这以2003年“怒江开发事件”和2007年“北京六里屯垃圾焚烧发电厂开发事件”为典型代表。环境问题因关乎公民的人身健康、生活品质以及财产安全等，需要进行政府规制，尽管在环境问题上政府在管理方面有多种方式可采用，政府的直接管制——行政许可，在各个国家也都被视为有效的规制手段之一，然而，由于对行政许可理解的差异，在我国行政许可常常被简单理解为“行政审批”。实践中，行政部门教条地依赖《行政许可法》的规定，静态地审批环境许可问题，在要么许可要么禁止的选择中，作出非此即彼的判断。虽然从字面上看，“行政许可”与“行政审批”并无多大区别，但“行政审批”所体现的高权行政理念以及简单的“同意”与否，无法与体现政府规制的行政许可相提并论。行政许可并不是静态的同意与否，而是涵盖了许可前的限制、许可中的审查、许可后的监督等诸多环节的一个动态的过程，并且基于现代服务行政的行政理念，政府不应当仅仅是利益的裁判者，还应当充当利益的协调者，因此，以行政指导、柔性执法以及公众参与为中心的行政执法理念也应当体现在行政许可过程之中。因此，在行政过程论中把握环境行政许可，在

自由裁量之中广泛吸纳公众参与，并进行利益衡量，才能够避免和化解众多的群体性抗争事件。

虽然行政过程论，在学术界没有统一的概念界定，但我国学者大都认为行政行为并不是孤立的静态的行为，而是一种时间上的持续的动态的过程。因而，基于现代行政法治理念的要求，在这个动态的行政过程中，应体现行政主体与行政相对人的互动，以及信息公开和公众参与的环节。然而，从目前我国的行政许可制度来看，申请、受理、听证、监督等一系列过程中，体现公众参与、利益衡量的过程只在于听证程序之中，而这一程序的规定在实践操作中，也多有被歪曲的情形，常常被形式化，难以体现实质上的公正。其根本原因在于我国的《环境影响评价法》以及《行政许可法》等相关法律，对涉及公众切身利益的“公众参与”环节，仅有原则性规定，没有操作手段方面的具体规定。此种现状彰显出本选题的必要性和重要性。

本书包括导论部分和6章主体内容。导论部分主要阐述了笔者问题意识的产生，选题的由来，并对国内外研究现状和本书的全貌作出简单的概括。

第1章是对环境行政许可制度的概述，指出环境行政许可所具有的特点，即公益性、科技关联性、“决策于未知”、公众参与性和数量有限性等。对环境行政许可正当性的理解以及我国现行的环境行政许可现状所存在的问题进行概括与分析，为本书下一步的深入研究提供了前提。

第2章“环境行政许可标准论”对作为许可依据的环境标准从法学的视角进行了研究。长期以来，法律学者很少去研究环境标准的相关问题，一直由科技学者把关。然而，既

然环境标准是一项制度，就不能是纯粹的科技安排，它必须经过民主渠道、广泛参与以及综合性考量后方可形成最后的定论。因此，研究环境标准制度，无论从环境标准的制定主体、环境标准的制定程序以及环境标准的颁布生效，都离不开作为制度规范价值意义上的考量，因而离不开基于法学视角的检视。笔者在考察国外环境标准制定的过程之后，对我国环境标准的理性化设计作出一定的探讨，期望能够为实务部门提供参考。

第3章以环境影响评价的行政许可为例，探讨了环境行政许可的程序问题。之所以选择环境影响评价许可，主要是考虑实践中，凡大型污染型项目的投资设厂，皆需要环境影响评价，而针对此类项目的许可常常引发群体矛盾，招致公众抗议。环境问题所表现的高度的利益冲突性，决定无论是环境影响的评价过程还是行政许可的过程，都必须充分吸纳广泛的公众参与。而现行制度的安排，在环境影响评价过程中的公众参与仅仅流于形式，一切由开发商主导，选取的公众代表，听证会的主持人甚至专家的选取都由开发商决定。开发商常常基于回避矛盾和追求开发效率的动机，将公众参与简单化，注重在纸面上和形式上做文章，选取的专家都是支持者，选取的公众代表都是利益不相关的人。这时候，矛盾就推到政府的行政许可环节。而针对环境影响评价的行政许可中如果没有有效的公众参与和利益表达机制，就会在项目批准之后，引发群体性抗议，致使行政许可行为的公定力降低，损害政府的威信。为了提升决策理性，预防和化解由环境问题引发的群体性社会矛盾，政府的角色应当进行转换，从利益的裁决者转变为利益的协调者，应当是可探讨的路径。

因此，以给付行政的理念贯彻于环评过程中，通过行政指导，使污染型项目的开发者和周围居民签订环保协议书，使居民不仅能够充分了解和监督污染型企业的运行状况，同时也能从中获得一定的环境“补偿”，以消除污染型企业为当地居民带来的“不生鸡蛋，只拉鸡屎”的不公平现象，应当不失为一条解决问题的路径。根据“公共负担平等理论”，居民没有特别义务过多负担因公共利益而导致的损害，因此，居民理应得到相应的补偿。

第4章“环境行政许可监督论”，主要针对环境行政机关实施监督检查方面的问题进行研究，尤其是针对行政调查这一比较前沿的问题进行了专门的探讨。此外，协商性行政处罚也是一种相对新颖的思路。本章还对环境行政许可评价制度的建立予以特别的关注，虽然《行政许可法》规定了行政许可的设定机关应当定期对其设定的行政许可进行评价，然而，我国至今还没有建立起行政许可的定期评价制度，而在环境领域的行政许可评价方面也没有相应的制度和实践，本章的探讨，希望有抛砖引玉的作用，期望相应的制度能够尽早完善。

第5章探讨了环境行政许可的救济问题。特别对利害关系人的救济作了详细的分析，指出开发项目获得许可之后，哪些人有权申请撤销许可等问题。本章还对环境公益诉讼这一前沿问题进行了研究，同时对民意在审判中的考量也从学术研究的角度发表了笔者的观点。

第6章是环境行政许可制度的课题展望，主要交代了本文触及的但尚未解决的相关问题，需要日后进一步研究的内容。

Abstract

In recent years, with the environmental pollution aggravating, the living environment of residents is increasingly threatened, and the problems of environmental planning and environmental law's enforcement are concerned by wide public, especially that administrative licensing about development of the polluting project is often encountered strong public confrontation, which often results in that administrative licensing is called off, for example, as typical cases, the event of development of the Nu River in 2003 and the event of Beijing Liulitun waste incineration power plant in 2007. Environmental problems need to be regulated by the government, because they are related to citizen's personal health and the quality of life and property safety. Though there are many ways about the government regulation of environmental problems, the government's direct control, administrative license, is considered to be one of the most effective means of regulation in many countries. However, because of the different understandings of administrative licensing, administrative licensing in China is often simply understood as "administrative examination and approval". In practice, the executive branch regards dogmatically "Administrative Licensing" as a static conduct, thus when they decide to examine the application of the environmental permit issues, they often adopt to permit or to prohibit the options, to make one or the other judgments.

Although there is no much difference in the administrative licensing and the "administrative examination and approval", it embodies the meaning of high-power executive in "administrative examination and approval," as well as it can not reflect the course of the government regulation of the administrative licensing by a simple "yes" or "no". Administrative licensing should not be a static, to agree or not, it should be a process including restrictions, review, supervise, and many other sectors of the approval process. Moreover, based on the administrative concept of a modern Service Administration, the government should serve as not only a judge in disputes on interests but also a coordinator of interests, so it should also be reflected in the administrative licensing process such as administrative guidance, flexible enforcement and public participation. Therefore, the theory of the administrative process on the environmental administrative license, which has a wide range of public participation among the balancing of interests, should be considered to be able to avoid and resolve a large number of mass protests.

Although there is no uniform definition of the administrative process theory in the academic community, most scholars believe that the administrative action is not an isolated static behavior, but a dynamic process. Thus, based on the requirements of the concept of modern administrative law, in this dynamic administrative process, it should be reflected that the administrative body and administrative counterpart interaction, as well as information disclosure and public participation component. However only the hearing

process involves public participation and interests of measuring among the series of process such as the application, acceptance, hearings, and supervision in our administrative licensing system, though it is still difficult to embody substantive justice because the hearing often is formalized in practice, because there is only the principle but no the specific provisions of the operational means of "public participation" in the laws such as "Environmental Impact Assessment Law" and "Administrative Licensing Law" and other relevant laws involving the vital interests of the public. All these make the topics to be necessary and importance.

The article has a framework of a introduction and 6 chapters of the main content. The introduction gives the major problems consciousness of the subject and the origin of the topics and the related researches and papers at home and abroad and the simple summary of the whole picture.

Chapter 1 is an overview of environmental administrative licensing system, pointing out the characteristics of the environmental administrative license such as public welfare, scientific and technological relevance, "decision-making in the unknown", a limited number, public participation and so on. It discusses the legitimacy of the environmental administrative licensing, as well as the current problems of the administrative licensing in our country, which provides a premise for the paper next in-depth study.

Chapter 2, "Environmental standards on Administrative Licensing", as the basis of environmental license is studied from a legal perspective. Over years, environmental standards has been

grasping by the science and technology academics, and rarely been studied by legal scholars. However, The environmental standards which can not be purely scientific and technological arrangements should be examined through democratic channels, broad participation, and a comprehensive consideration before the last conclusion. Therefore, the study of the environmental standards, in terms of the subject or the procedures of the environmental standards formulated and the promulgation of the entry into force is inseparable from the normative value as a system and also inseparable from the perspective of law-based view. The course of setting environmental standards of foreign countries is studied so as to make some rational design on our environmental standards, which will provide a reference for the substantive departments.

Chapter 3 discusses the procedure of environmental administrative licensing by selecting the administrative license of the environmental impact assessment as the research object. The reason to chose the EIA permit is mainly because by the large-scale investment in pollution-related projects and factories almost requires EIA, and the permission for such projects often leads to group conflicts. Because of the character of conflict of interest in environmental problems, the process of a wide range of public participation must be included in the procedures of EIA or the process of administrative permit of EIA. But the current institutional arrangements about the public participation in the EIA process is only a formality, it is led by the developers, such as the selection of representatives from the public, and even the experts, as well as the host of the public

hearing, and because of the developers' motives of pursuit of development efficiency and avoiding some problems of contradiction, public participation will be simplified by selecting the experts who support the developers and irrelevant representatives from the public, and thus, the contradictions part is pushed to the process of the government's administrative license.

If there is absence of effective mechanisms for public participation in the process of the administrative license for EIA, it will trigger mass protests after the project approved, which leads to undermining the government's prestige.

In order to avoid group of social contradictions caused by environmental problems and to enhance rational decision-making the Government's role should be converted from the decision-maker on the interests into the coordinator, which should be the feasible method. Therefore, in the EIA process, the government reconciles developer and residents around polluting project to sign an agreement on environmental protection and "environmental compensation" by administrative guidance in order to eliminate the unfair phenomena of the polluting enterprises to local residents "no eggs, only excrement", it would be thought as a problem-solving path. According to "the theory of public burden of equality", there is no special obligation for the residents to burden environmental pollution for the public interest, therefore, the residents should receive appropriate compensation because of the environment damage caused by public interest.

Chapter 4, "On the Supervision of Environmental Administrative

Licensing", mainly discusses the issues of environmental administrative organs to supervise and inspect enterprise, especially the administrative investigation, as well as the negotiated administrative penalty is studied as a relatively new way of worthy of thinking. In addition, this chapter also discusses the issue of the evaluation system of administrative environment licensing. Although the " Administrative Licensing Law " points out that all administrative permission should be evaluated by the competent authorities termly, however, the system of evaluation has not yet been established in China until now, and no practices of the evaluation in the administrative environment license field either, all these discussions are to attract valuable opinions and to establish the system of administration evaluation as soon as possible.

Chapter 5 discusses the relief about the environmental administrative licensing, especially the relief of the stakeholders, pointing out who has the right to apply for revocation of permits and other issues after the development projects being permited. The chapter also discusses the environmental litigation for public interest, which is of cutting-edge research. At the same time, the considerations of public opinion in the trial are discussed from the perspective of academic research from the authors' personal point of view.

Chapter 6 is about the problem prospect of the environmental administrative licensing system, enumerating a number of questions which have not yet been resolved or touched in the article which need further study in future.

环境规制与公共利益的实现

（代序）

贵秀博士的首部学术专著《环境行政许可制度研究》即将付梓，这是一件让我非常高兴的大喜事！

作为贵秀博士在中国人民大学法学院攻读博士学位期间的指导教师，我为她在博士学位论文的基础上修改而成的本书即将付梓而非常高兴。

作为长期从事行政法学研究并关注环境法建设和环境保护的学者，我为贵秀博士推出以环境行政法研究为内容的阶段性成果而非常高兴。

我感到非常高兴，还因为该书本身体现了较强的新颖性：

强调了一种视角——行政过程论的视角，认为行政许可并不是静态的同意与否，而是涵盖许可前的限制、许可中的审查、许可后的监督等诸多环节的一个动态的过程；并且基于现代服务行政理念，政府不应当仅仅是利益的裁判者，还应当充当利益的协调者，较好地把握了政府在环境保护中的定位；

贯彻了一种理念——参与型行政的理念，注重在制度框架内确立行政过程论的视角，对其进行动态的把握，将参与理念贯穿于许可程序之中，贯穿于环境行政许可的标准论、程序论、监督论和救济论之中，体现出参与型行政的正当性和时代性；

探索了一种机制——利益衡量机制，认识到环境侵害后果的严重性与复杂性要求环境决策要防患于未然，但环境问题高度的科技关联性，使得环境决策常常表现出“决策于未知”这种特点，主张政府在环境决策方面必须采取审慎的态度和立场，环境行政许可应当为公民提供参与和表达意见的渠道；在行使行政许可权力的过程中，充分考虑被许可人以及因许可事项而受到影响的公民的利益，并进行适当的利益平衡，做到以行政过程论把握环境行政许可；在裁量过程中广泛吸纳公众参与，并对各种利益进行比较衡量；

架构了一种标准——环境行政许可标准论，明知这是一个很大的挑战，还是选择了标准论的架构，认识到唯有架构、完善了标准论，才能够在该领域较好地运用利益衡量机制，为利益衡量提供切实可行的公正性和公平性的支撑，最大限度地实现公共利益。

行政法涵盖的内容极为广泛，其调整的范围波及生活的方方面面，哪一个领域的所谓部门行政法研究成果都是值得高兴的。为什么对环境行政法方面的研究成果“非常”高兴呢？

这是因为我最近一直在关注行政规制与公共利益实现的问题，而环境规制与公共利益的实现这个命题，恰恰可以通过环境行政许可制度研究来完成。公共利益（公共福祉），意味着超越了每个人的权利、利益，是社会全体的利益。在这种意义上，环境恰是社会全体的利益（公共财）。于是，公共利益往往被作为制约企业活动和个人人权的根据来使用。企业的营业活动若会带来公害，则应当予以规制；政府若不实施相关规制，私人应当有权对该不作为请求复议或者提起

诉讼。环境规制和某些企业活动往往会形成对立，而为了环境保护所采取的应对措施与人权之间的对立情形，则是难以想象的，绝不应将必要的忍受义务理解为人权侵害。

近年来，环境问题日益严重，成为政府、社会和公民个人共同关注的课题，环境规制的正当性甚至合法性屡屡受到质疑，环境行政法学研究肩负着义不容辞的从理论上进行应答的使命。然而，这方面的研究远远没有完成这一使命。

贵秀博士的这部学术专著，针对现实中的问题提出了许多应对设想，比如，主张借鉴域外经验，以签订环保协议书的方式实施附条件的行政许可、运用协商性行政处罚等。这不仅对实务部门的执法实践具有一定的参考价值，而且对理论界关于行政行为的附款等的研究也具有一定的助推作用。此外，如前所述，该书具有诸多新颖性，尤其是对环境标准的论述，对于该领域具体机制的建构和完善具有重要的导向作用。主张在长期的专家立法惯势思维中引入公众参与的成分，使环境标准兼具科技性和社会学的内涵，体现出公众参与的必要性和正当性。这方面的主张虽然不能说具有新颖性，但相关论述对于环境行政法研究的方法论之完善，还是具有一定的参考意义。

尤其值得高兴的是，该书为环境行政法学研究全面完成从理论上回答环境规制正当性等问题的使命，提供了重要的思考素材和视角。

第一，环境规制与公共利益的实现问题亟需建立科学的利益衡量机制。

环境规制问题是目前我国理论研究的薄弱环节，更是环境保护行政实务中的重点难题之一。人们说现代社会处于构

造变动之中。由于全球化的推进，国家、社会和企业乃至个人在环境保护中的作用也发生了变化，新的课题堆积如山。或者可以反过来说，环境问题的蔓延扩展，也在相当程度上推进了全球化的进程。以气候变动政策为例，可以看出，在全球化的构造变动之中，地球环境政策的合意形成面临着各种各样的困境。正是为了冲出这重重困境，一系列气候变动框架条约乃至议定书相继问世，促成了国际协议和国内协议的形成。其中，关于国际制度的协议形成和运用，是通过国家间的交涉而决定的，但它并不仅仅受到其他国家的影响，而且还要受到各国内的制度及各种主体的影响。并且，20 世纪 80 年代后期以来，与环境问题相关的 NGO（环境 NGO）开始争取参与国际交涉，或者试图对国家层面的政策决定发挥影响，或者积极地向市民社会倾诉自己的价值。于是，在环境规制和公共利益的实现之间，如何衡量和把握诸多利益的问题变得异常突出，亟需建立一系列利益衡量机制。而环境许可制度的完善，必将为该领域利益衡量提供重要的标准和程序支撑，提供重要的机制和制度框架。

第二，解决环境保护的问题须从多维度审视。

近年来，许多公害、环境问题已突破了地域性，而是以地球规模凸显出来，要解决这些复杂的问题，除了宏观层面须强调国家间、区域间合作处理之外，在具体问题的应对层面，重要的是要重新审视既有环保理论和制度，要注重将法学（宪法学、行政法学、环境法学）、政治学和行政学的视点相结合，从多维度审视“环境保护”的问题，考察其自身规律，采取新的应对策略。

第三，解决环境保护的问题须确立权利义务关系。