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中国环境法学 评论

2010年卷·总第6卷

徐祥民 主编

中国法学会环境资源法学研究会主办
中国海洋大学法政学院承办

CHINA ENVIRONMENT LAW REVIEW



科学出版社

中国环境法学评论

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北 京

内 容 简 介

《中国环境法学评论》第六卷收录了中外环境法研究者、司法机关工作人员、自然保护区管理人员、行政执法人员和数位律师的原创新作。

“全国年会论文选登”栏目,将2010年8月在东北林业大学召开的年会上提交的最能反映会议主题或最具代表性的论文集中登载。由此,中国法学会环境与资源保护法学研究会的年会和该研究会主办的《评论》更紧密地结合起来,形成会议和出版物之间的呼应关系。“博士论坛”栏目也是本卷的特色。两位海外留学的博士候选人和两位国内博士的新近作品以及他们各具特点的学术小传,展示着青年学人的勃勃生气、学识风采。精选编定的“海外来稿”传递出《中国环境法学评论》锐意实现国际化办刊的理念。本卷收录于“排污权交易研究”、“国外环境立法的启示”、“环境法理论与实务”栏目中的论文,都是中青年学人、律师原创首发的作品。

本刊不仅适合高校、科研院所的学者、研究生阅读,也适合所有关心环境法学研究、环境法制建设的智士贤达阅读、评论。

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中国环境法学评论

2010 年卷

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CHINA ENVIRONMENT LAW REVIEW

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中国环境法学评论

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Can the law play a role to stem the tide in relation to climate change?

Jaap Spier

A Human Rights Approach to Climate Change in Post-Copenhagen Agreement

Svitlana Kravchenko

On Several Legal Systems of Wetland

Cai Shouqiu

Wuhan University, Wuhan

Abstract: Some legal systems have been established in China concerning wetland protection, but special legal system on wetland is absent. For promoting and safeguarding sustainable development in the field of wetland protection, it is necessary to work up a series of wetland legal systems, especially the systems as below: the system of wetland planning, the system of paid use and compensations to cultivated land, the wetland investigation system, the supervision system and the information sharing system, the grading and classification system, the catalogue system, the system of wetland natural reserve, wetland park and wetland multi-purpose management, the wetland risk evaluation system, the wetland reasonable utilization system, the wetland ecosystem rehabilitation system, the wetland ecological compensation system.

Key Words: Wetland Legal System Protection

On the Compensation System of Ecological Benefit of Wetlands

Wang Fengyuan

Southwest University of Political Science and Law

Abstract: A system of compensation for ecological benefit of wetlands is a key measure ensuring sustainable development of wetland. In order to establish a complete wetland ecological compensation mechanism, in this paper, perspectives of the system, main parts, measures, standards and means are addressed based on in-depth analyses of the concept of wetland. Being aimed at the problems on this issue in China, some suggestions to perfect the ecological compensation system are further explored.

Key Words: Wetland Ecological benefit Compensation

Revision for Forest Law in the Historic Transformation of Forestry

Zhou Yuhua, Zhao Yingjie, Xin Xudong

Northeast Forestry University

Abstract: The formulation and revision of forestry in the planned economy system and our country enters the market economy in the different historical period after the forest resources protection, promote the development of forestry construction, especially in the forest ecosystem and wildlife type, nature reserve protection and management plays an active role. But along with the social progress and economic development, forestry and the implementing regulations of forestry already can not adapt to the needs of the historic transformation, so it must be modified.

Key Words: forestry historic transition forest law

Research on the Reform of State-owned Forest Resource Property Right System

Liu Wenyan

Northeast Forestry University

Abstract: As the record of Ecological Systems, forest breeds human being and promotes quantity of life. Forest resource as the base of development of human, plays the core role in obtaining economic benefits, social benefits and ecological benefits. However, because of various complicated causes, our forest resources are destroyed so heavily that forest reign society is in a dilemma, especially in state-owned forest region, "Two Crises" have directly affected the effects of reform and the building of the harmonious society. Tracing it to its cause, state-owned forest resource property right system not only is the key reason that causing problems, but also the starting point and the goal.

Institutional changes not only make a great contribution to development of forest economy, but also offer the prospective development space to property right institutional reform. Therefore, property right institutional reform has great reality, necessity and feasibility. Just because state-owned forest resource has these disadvantages, such as the scarcity of public goods, externalities, open-access, and indivisibility of property right, property right reform is the perfect way to solve such problems. At last, this paper offers diversified optional property right's innovation models and suggests differentiation of state-owned forest property rights.

Key Words: State-owned forest resource Property right Institutional changes Reform

Analysis on Collective Forest Rights of Natural Preserved Area

——Based on the Practical Analysis of Guangdong Province

Wang Wendian He Kejun Huang Shaofeng Bi Xiaofeng Wu Zihua

South China Normal University Nature Reserve of Guangdong

Abstract: In the eco-primary modern forestry development and the current practice of collective forest right system reform, it is necessary to emphasize the standard construction management on Natural Preserved Area. While promoting the protection and sustainable use of forest resources, it is also important to insure the living condition of peasants and therefore to start and stably promote the forest right reform in Natural Preserved Areas. Based on the specificity of collectively owned forests in Natural Preserved Areas, the policy adjustments on collectively owned forest are the mostly difficult in the reform and stable development. The key points in the reform rely in legally clearing the collective ownership to ease the interest conflicts. Therefore we should establish the law basis of the Natural Preserved Area's collective forest right and promote its management mechanism and thus form a reasonable policy framework for that. In the background of clear ownership, the forest owners may get direct compensation and thus fully enjoy the ownership interest through adjusting benefit relations. This is truly returning the rights and benefits to the owners and the managers of the forests. Combining Guangdong province's Forestry Reform policy and its construction experience as the Natural Preserved Area Example Province, this article analyzes on the basic policy thoughts in forestry reform by focusing on the supporting system and reform measures of the collectively owned forest policy adjustment under rules of law.

Key Words: Forestry reform of the natural preserved area Policy thoughts supporting measures Practical experience in Guangdong

On the Securitization of Pollution Discharge Right Trading

Yan Bin

Huazhong University of Science and Technology

Abstract: Pollution discharge right trading is attaching the growing attention from every aspect of the world. However, few scholars study the issue through the lenses of securitization. Pollution discharge trading and securitization, both new to China, are strong and powerful tools beneficiary to each other for people to handle the environment and market. It is very promising and interesting that both pollution discharge right trading and securitization could be combined together. The key issue is the construction or the institution of the securitization of pollution discharge right trading. Yet the financial market in China is not developed enough, there would be a lot of problems in China if we really begin to securitize the right of emission to the environment, so the author comes up with a few advices to the potential problems.

Key Words: Pollution discharge right Pollution discharge right trading Securitization

**Research on Legal Issues Concerning the Implementation of Emission
Trading around Kiaochow Bay**

Yu Haisheng, Wang Zhong, Wu Hao, Wu Li
Deheng Law Firm , Qingdao

Abstract: Kiaochow Bay is a semi-enclosed sea area with natural and unique shape “Ω”, and also is a virgin soil of high-tech industries under the strategy of “Protection & Development of Kiaochow Bay”. Supported by the advanced oceanography, emission trading would be the pilot project around Kiaochow Bay. However, there are some difficulties in the pilot project. With the experiences in other places and the reality of Kiaochow Bay, it is recommended that the pilot project would be commenced from the new enterprises, water pollution and sale transaction, and the specific implementary framework is also drawn. Meanwhile, it is not recommended being set up emission trading exchange or environment and energy exchange in Qingdao.

Key Words: Kiaochow Bay Emission trading Legal issues

Development of US Climate Legislation and Its Implication for China
Su Miaohan
Central University of Finance

Abstract: As the two biggest emitters of the world, both the US and China play crucial roles in the global climate politics. Every progress on the US domestic climate legislation has implications on China's climate policies and legislations. This article introduces the background and development of the US climate legislations since the 111st Congress. It also summarizes and analyzes the key components such as the carbon reduction targets and timelines, the carbon trading scheme, the carbon tax system, the supportive policies for technological development, policies to protect its competitiveness and avoid carbon leakages, and its relations to various state and regional programs. It provides an assessment of how the US climate legislation could affect China's participation in international climate negotiations and how the trade related measures in the legislation could affect China's economic development. The article ends with what China could learn from the US when developing our own climate policies.

Key Words: US Climate legislation Carbon cap and trade Carbon tax Trade provisions

**EU legislation on chemicals management practices of the
Enlightenment in China**

Wang Li

Henan University of Economics and Law

Abstract: There are many useful experience of EU legislation on chemicals management that worth learning from, such as the outstanding precautionary principle, the enhanced social obligations of corporation, complete risk control system on chemicals, and etc. However, the current Chinese legislation on chemicals still remains lots of problems, and bears a large room to improve. We could complete the related legislation by following key aspects: expanding the scope of the chemicals under controlled, clarifying the three basic principles of chemicals management, to establish unified chemicals risk control system, rational allocation of obligation for government and corporation, and etc.

Key Words: EU legislation for chemicals management practices Inspiration

Opening Remarks for the Doctoral Forum

**Reform and Reflection: A Law and Economic Review on Environmental
Liability Rules of Chinese Tort Liability Law**

Hu Weiqiang, Michael Faure

Erasmus University and Maastricht University

Abstract: based on the fundamental insights from Law and Economics, this essay analyzes the relevant provisions in the new Tort Liability Act of China concerning environmental tort in a systematical way. It confirms the changes made in this new act as a whole, but also points out some potential problems and possible solutions.

Key Words: Environmental tort Establishment of liability Law and economics

**The Legislative Competence for Environmental Protection in German Law-To
Water Protection as the Object**

Shen Baixin

School of Law, University of Leipzig, Germany

Abstract: In the reform of the federal system 2006, there was a great adjustment to the legislative competencies in the German Basic Law. Through the reform Framework legislative competence was abolished and rules of the concurrent legislative competence were adjusted. Particularly in the field of environmental law, the reform brought a profound impact. It created not only for the Federation a greater room of legislation and manipulation, but also provided the federal states "divergent legislation". The newly established legislative competence of "divergent state legislation" allows the Federal States to enact laws deviating from federal legislation in certain areas. But the reform has to be viewed rather critically. With the study to the reform of federal legislative competence

in German environmental laws, references would be got to the environmental protection and legislation in China.

Key Words: Water protection German basic law Divergent legislation

Risk Society Theory and the Construction of Environmental Law

Wu Xianjing

Huazhong University of Science and Technology

Abstracts: As the basic stores of modern risk, environmental risk diffuses heavily and there brings out a series of social problems, which makes environmental risk the elementary discourse of environment issues. Therefore, environmental risk is brought into the field of environmental law regulation. The cognition, definition, and distribution of environmental risk make some effects on how to regulate environmental risk and on how to revise environmental law theory.

Key Words: Risk society Environmental law construction Environmental risk environmental discourse

New Argumentation on object of Environmental Crimes

Jiang Difei

Kunming University of Science

Abstract: The article come to a conclusion that the object of the environmental crime is national management interests about environmental resources. This interests has three main elements: ① the country; ② legal utilization of resources and environmental benefit and ③ national administrative approval and routine supervision activities. If these three factors be influenced by crime act, so one of them or all of them will turn to be a object of the environmental crime. Water, air, soil and other “object” is targets of acts. Environmental crime should be classified as behavioral offence. The conductive act of environmental crime is illegal exploitation and utilization. The paper takes ‘caused a serious environmental pollution accident’ as a objective punishable conditions of environmental crime. So there is no usefulness to discuss a causal relationship of environmental crime.

Key Words: Environmental crime Constitutive requirement Criminal object

The Probing Analysis of the Development Path for the Environment Public Interest Litigation under the Philosophy of the Active Judicature

Li Yisong, Wang Yanan, Su Shengli

Hohai University

Abstract: The environmental public interest lawsuit is an important system of our country's environmental law, which can play the public and the judicature's active part

in protecting the environmental public interest, and so that the environment can be protected more effectively. But at present the relative legislation in our country is deficiency, which causes the practice of environmental public interest litigation fall into a difficult situation. The rise of active judicature provided a turning point for our country's advancement of environmental public interest litigation. The judiciary should keep the philosophy of the active judicature, and find legal basis in aspect of the environment right, the trial functions of environmental public interest litigation and the selection of the plaintiff qualification through the way of legal interpretation, and finally advance our country's environmental public interest litigation gradually.

Key Words: Environment public interest litigation Legal interpretation Plaintiff qualification

**On Legalization of Environmental Policy Under the Perspective of
Governing the Country in Accordance with Law**

Cui Dong Hu Min

Northeast Forestry University

Abstract: As a means of environmental protection, environmental policy plays an important role in our country environmental protection practice. Because of the lack of legal, environmental policy has many questions such as illegal, unscientific which seriously affected the function of environmental policy in practice, and conflict with the concept of the ruled by law. To be legitimate status of environmental policy must through legitimate way and in accordance with the statutory authority. To formulate (law of environmental protection policy) can regulate the environmental policy formulation, implementation, supervision and so on, which can achieve environmental policy ruled by law.

Key words: Governing the country in accordance with law Environmental policy
Legalization

**On the Current Situation of the Marine Ecological Security
and its Countermeasures**

Yang Zhenjiao

Law & Politics of Ocean University of China

Abstract: In recent years, the environment and environmental issues more and more aroused wide attention as the continuously growth of people's production and living activities. As an important component of national security, Marine Ecological Security is the key to achieve the strategic goal of sustainable development. Based on this, the article analysis the basic role of the Marine Ecological Safety, and discuss the current situation and its causes of the Marine Ecological Safety in order to put forward countermeasures to solve the Marine Ecological Safety. Tying to survey the current internation-

al relationship and nation safety in terms of the Marine Ecological Safety.

Key Words: Marine environmental safety Actuality and reasons National security International relationship Countermeasures

The Experience, Problems and Thinking of Comprehensive and Ecological Regulation to Dagu River

Yu Pengfei

Qingdao Municipal Water Conservancy Bureau

Abstract: The article analyzes the comprehensive regulation project of Dagu River and explores approaches for comprehensive management of river combining modern water conservancy project, landscape architecture, ecology, water pollution treatment and other multi-disciplinary areas, to broaden the scope of mind for the research of comprehensive water environment regulation.

Key words: Dagu River Comprehensive regulation Ecological river correction

Ponder of the Fuhai Ecological Park Case

Mei Hong Xu Xinxin

Law & Politics School of Ocean University of China

Abstract: Any crime has its economic root, As the typical case of criminal sanctions of the protection of resources, “the Fuhai Ecological Park Case “ has Guiding significance for the study of environmental criminal cases . In case of the analysis, we can see environmental crime in sentencing relatively light and of the government and the officials accountability is inadequate now in china.

Key words: Environmental crime Rent-seeking Accountability

2010 Annual Research Summaries of Environment and resources

law society of China law society

Zhang Hongjie Hu Zhonghua Yang Qunfang Shi Jun

Law & Politics School of Ocean University of China

Abstract: 2010 annual symposium hosted by environment and resources law society of China law society is the med with “ecological civilization and forestry governed by law”, and received approximately 200 papers. About 150 experts, scholars and representatives of concerned state organs who specialize in environmental law research attended the symposium. With all the papers submitted by the conferees and discussion during the meeting, this year’s annual symposium reflected new directions of environmental law research and displayed scholars’ new ideas and achievements. As always, this year’s annual symposium adopted the conventional format of speech delivering, group discussion and prior submission of papers. This year’s annual symposium also held discussions

on specific legal issues such as background and principle of modification of forest law, modification of forest law and reform of forest right, natural reserve legislation, wetland conservation legislation, and concerned laws on wildlife protection.

Key words: Forest legislation Wetland conservation legislation Laws on wildlife protection Natural reserve legislation

**The Promotion of China's Environmental Rule of Law and the Innovation
in the Environmental Law System and its Theory
—2009 China's Environmental Law Review**

Xiao Yanshan Liu Xiu Tu Jun Wu Tingting Jia Baojin
Law & Politics School of Ocean University of China

Abstract: In 2009, the research focus of domestic environmental law concentrated on the basic theory of environmental law, the local environmental legal system, the rule of law of the rural environment and the international environmental law, and so on. Environmental law scholars have summed up China's environmental rule of law and forecast the development trend of environmental jurisprudence. An important trend is that scholars are more concerned about implementation of environmental law than ever. The local environmental legal system and the rule of law of the rural environment have become two important areas in system of environmental law and its theory in 2009, which indicated China's environmental law research constantly open up new areas and pushed itself to the depth. Continuously based on focusing on the basic theory of environmental law, the system and theory research in China environmental law of 2009 reflected the refined, specialized, detailed characteristics. We combed through and summarized representative research results, generalized the innovative points of the system and the theory, and believed that the three schools — the school of obligations oriented, the rights oriented school and the ecological school of thought—were initially formed in China environmental law field.

Key words: Environmental jurisprudence Research and review Innovation of system and theory

卷 首 语

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转瞬间,《中国环境法学评论》(以下简称《评论》)创刊已经五年,第六卷即将出版。作为一个新生事物,五个年头是成长过程的一个重要阶段。在这五年中,有许多值得记忆的闪光时刻:

韩德培(已故)、金瑞林、马骧聪、曲格平、文伯平、肖乾刚等老一代学者,也是中国环境法学的创始者,欣然接受担任《评论》学术委员会顾问的邀请。他们给我们这些从事具体编辑工作的人以力量和信心。

《评论》自第一卷就设立了年度学术研究综述栏目,该栏目对上一年度的学术研究做出系统的总结概括,用简短的文字向读者呈现年度研究的盛况。制作年度学术研究综述是一件费力的事,同时也是一件很有意义的事。当读者把若干年的综述放在一起,或者把它们串联起来阅读时,会得到类似阅读一部学术史的收获。

《评论》先后由三家出版社(中国政法大学出版社、人民出版社、科学出版社)出版。三个著名的出版机构对《评论》的出版都投入了精干的编辑力量,在《评论》的封面、版式设计,甚至印刷用纸等方面都做了精雕细刻的工作,保证了出版印刷质量。

《评论》自第三卷开始,打破了只登载中文论文或由外文翻译为中文论文的传统,直接刊登用英语撰写的论文,这样既有利于保持作者思想的原貌,又省却了翻译的工夫。从本卷起,我们将加大英文稿件的采用量,这意味着更多的外国学者将成为本刊作者队伍中的成员,意味着本刊刊载论文的内容将更加丰富。

《评论》的名称经历了一次看起来细小但却富有学理意义的变化,即由起初的《中国环境资源法学评论》改为《中国环境法学评论》。

如果我们把这些点连成一条线,相信这条线会是一条持续上扬的优美弧线。