

环境保护法律热点问题

环保专题系列（二）— 企业环评及环保竣工相关的合规注意事项

导言：我国实行建设项目环境影响评价制度。建设对环境有影响的建设项目，从开工建设前到正式投入生产或使用的整个过程中，企业应当依法聘请有资质的第三方中介机构完成环评且向环保部门申请获得环评批复、进行环保设施建设并最终完成竣工验收后方可正式投入生产。而近年来，企业未经竣工验收投产的情况并不鲜见。

2017年7月16日，国务院发布了《国务院关于修改〈建设项目环境保护管理条例〉的决定》，修改了1998年发布的《建设项目环境保护管理条例》（以下简称“《条例》”）的部分规定。此次《条例》的修改将由环保部门进行“环保验收”调整为“自

主验收”。以下我们将在上述背景下讨论企业（尤其是生产型企业）新建或改扩建建设项目时所涉及的环评及环保竣工相关的合规注意事项。

一、建设项目可行性研究阶段的环评

在建设项目可行性研究阶段，企业应当聘请具备环境影响评价资质的第三方中介机构视建设项目，依据国务院环境保护行政主管部门公布的建设项目环境影响评价分类管理名录划分对环境的影响程度，编制环境影响报告书（以下简称“报告书”），环境影响报告表（以下简称“报告表”）或环境影响登记表（以下简称“登记表”）。具体而言：

| 建设项目对环境影响程度 | 应当编制的文书类型 |
|----------------------|-----------|
| 对环境可能造成重大影响的 | 报告书 |
| 对环境可能造成轻度影响的 | 报告表 |
| 对环境影响很小，不需要进行环境影响评价的 | 登记表 |

环评单位在编制相关环评文书时应根据建设项目的实际情况采用合理的标准，既应满足竣工验收的要求，又避免采纳不切实际的高标准，从而导致竣工验收难以顺利通过或者在日后运营中发现存在无法执行的问题。

二、就环评报告获得环保部门批复

《条例》修改前，无论建设项目对环境造成的影响程度，企业均应向环境保护行政主管部门就建设项目环评报批。但在《条例》修改实施后，只有在编制报告书和报告表的情形下，企业才需在开工建设前将报告书或报告表报环保部门审批；而应当编制登记表的建设项目，报建设项目所在地县级环保部门备案即可，无需再报环保部门审批。

环保部门对企业报批的报告书和报告表审批同意的，将颁发相应的环评批复。环评批复的本质是一种行政许可，《中华人民共和国环境影响评价法》对颁发环评批复的机关、流程、内容等做了明确的规定。

未取得环保部门环评批复的情况下，企业不得对相关建设项目开工建设。相比《条例》修改前，《条例》修改后总体上违法成本相应地提升了，企业未依法报批建设项目报告书、报告表擅自开工建设的，可能被环保部门责令停止建设。根据违法情节和危害后果，处建设项目总投资额百分之一以上百分之五以下的罚款，并可以责令恢复原状。对企业直接负责的主管人员和其他直接责任人员，依法给予行政处分。

三、环保设施建设及竣工验收

企业取得环评批复后应根据环评批复同时建设主体工程及环境保护设施，即应满足“三同时”（建设项目需要配套建设的环境保护设施必须与主体工程同时设计、同时施工、同时投产使用）的要求。若建设项目的性质、规模、地点、采用的生产工艺或者防治污染、防止生态破坏的措施发生重大变动的，企业还应当重新报批环评且向环保部门申请获得环评批复或备案证明，进行环保设施建设并最终完成竣工验收后方可正式投入生产。

修改后的《条例》不再要求企业向环保部门申请环保竣工验收（下一个段落提及的情况除外），但企业仍应当自行组织“自主验收”并按照环境保护部（现为生态环境部）发布的《建设项目竣工环境保护验收暂行办法》，以及各地方出台的具体验收标准或指引对配套建设的环境保护设施进行验收，编制验收报告。从信息公开的角度，除按照国家规定需要保密的情形外，企业应当依法向社会公开（包含网络公开的方式）验收报告，接受公众的监督。

与此相关，需要注意的是，建设项目需要配套

建设噪声或者固体废物污染防治设施的，在《固体废物污染环境防治法》（其修订草案还在征求意见稿阶段）、《环境噪声污染防治法》（目前尚未启动修订）完成相应修改前，仍应依法由环保部门对建设项目噪声或者固体废物污染防治设施进行验收。这意味着目前涉及固体废物和噪声排放的企业在环保设施验收时仍需环保部门进行审查。

针对未经竣工验收投产的项目，修改后的《条例》明确：治理设施未建成、未验收、验收不合格，投入生产使用，由环保部门责令限期改正，处20万元以上100万元以下的罚款；逾期不改正的，处100万元以上200万元以下的罚款；对直接负责的主管人员和其他责任人员，处5万元以上20万元以下的罚款；极端情况下甚至可能会被责令停止生产或者使用或被责令关闭。

四、《条例》修改的实践影响

总体而言，《条例》修改体现了环保部门监管思路的重大改变，一方面将提高事中事后监管效能，增加社会监督；另一方面也增加了违法成本。实践中我们了解到，《条例》修改实施前夕，部分地区的环保部门由于收到大量的环保竣工申请，从而使得需要申请竣工的企业“排队”的情形。这反映了《条例》修改促进了企业自主守法，积极落实企业环境保护主体责任的同时，也增加了效率。

五、结语

在当前国家加强环保督查的大背景下，开展建设项目的企业（特别是生产型企业）应当尤其注意环评及环保竣工相关的合规，现有企业也需要审查建设项目是否已适当通过环评和环保竣工相关的手续。如上所述，若建设项目的性质、规模、地点、采用的生产工艺或者防治污染、防止生态破坏的措施发生重大变动的，还应当确保重新办理环评及环保竣工相关的手续，从而避免相关合规风险。

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Environmental Protection

Series 2

Issues Concerning Legal Compliance with Environmental Impact Assessment and the Completion and Acceptance of Environmental Protection Facilities

Introduction

The Chinese Government is implementing changes to the environmental impact assessment system for construction projects. The assessment system applies to all stages of construction projects that may impact on the environment, from the start of the project through to commencement of production or usage. There are three main stages in the impact assessment system, with the relevant enterprise (most likely to be the owner of such project) required to: (i) hire a qualified agency to undertake an environmental impact assessment; (ii) apply to the competent environmental protection authority (the “EPA”) for environmental impact assessment approval (the “EIA Approval”); and (iii) on acceptance of the environmental protection facilities, formally commence construction.

In recent years, it has been not uncommon for construction projects to commence without the required approval. However, approval is mandatory and, as outlined below, if not followed, enterprises could be subject to severe punishment.

On July 16, 2017, the State Council issued its *Decisions of State Council on the Revision of the Administrative Regulations on Environmental Protection for Construction Projects* (“Revisions”), which includes revisions to several provisions of the *Administrative Regulations on Environmental Protection for Construction Projects* (“Regulations”) issued in 1998. Under the Revisions, the enterprise itself, and no longer the EPA, is now responsible for acceptance of the environmental protection facilities. In light of these regulatory changes, we provide our commentary on several issues of relevance to an enterprise’s (and in particular a manufacturer’s) legal compliance with environmental impact assessment and environmental protection completion and acceptance for new construction projects, refurbishment projects and expansion to existing construction projects.

I. Environmental Impact Assessment during the Feasibility Phase of a Construction Project

During the feasibility phase of a construction project, an enterprise shall hire a professional agency with environmental impact assessment

qualifications (the "Agency") to assist in preparing an environmental impact report ("Report"), an environmental impact statement ("Statement") or the required environmental impact registration forms ("Registration Form"). The aforementioned process is known as the "Environmental Impact Assessment" or "EIA", and the Report, Statement

and Registration Form are collectively the "EIA Documents". Which of the EIA Documents is required will depend upon the construction project's likely impact on the environment. This is based on the category of construction project for EIA as below, and published by the national EPA (the Ministry of Environmental Protection).

| Impact of Construction Project on the Environment | EIA Document |
|---|-------------------|
| May have significant impact on the environment | Report |
| May have slight impact on the environment | Statement |
| May have minimal impact on the environment and there is no need for EIA | Registration Form |

In preparing the EIA Documents, the Agency shall adopt reasonable and practicable standards based on the actual conditions of the construction project. It shall meet the requirements of completion and acceptance and shall not adopt unrealistically high standards, which might then result in the failure of completion and acceptance or other difficulties during the production in the future.

are likely to have a slight or significant impact on the environment will be required to lodge a Report or Statement with the EPA in order to obtain their necessary EIA approval document (the "EIA Approval"). The EIA Approval is essentially a type of administrative license. The authorities, procedures and contents for issuance are clearly defined in the Environmental Impact Assessment Law.

II. Environmental Impact Assessment needs to be approved by the EPA

Under the previous Regulations, all construction projects were required to apply to the EPA for approval of the EIA, even if the project was likely to have only minimal impact on environment. With the introduction of Revisions, in those cases of likely minimal environmental impact, the required Registration Form can be filed with the local, county level EPA, and the EIA does not need to be approved as such. Construction projects that

An enterprise shall not start construction without receiving the EIA Approval issued by the EPA or filing the Registration Form with the EPA, as appropriate. The Revisions increase the overall severity of administrative liabilities applied to any violation of the Regulations. If an enterprise starts construction without submitting the necessary Report or Statement for approval or prior to filing the Registration Form with the EPA, it may be ordered by the EPA to stop the construction, be subject to a fine ranging from 1% to 5% of the total cost of the construction project based on the

seriousness of the illegal act and the harm caused, and ordered to reinstate the site to its original condition. The responsible manager and other directly responsible personnel may receive administrative punishment.

III. Construction of Environmental Protection Facilities and Completion and Acceptance

After obtaining the EIA Approval, the enterprise shall simultaneously undertake both the main construction project and implement the environmental protection facilities. This is referred to as “Three at the same time”, meaning that the design, construction and operation of the main project should be undertaken at the same time as those for its associated environmental protection facilities. Where there is a significant change to the nature, scale, or location of the construction project, or the production techniques adopted by the construction project, or the measures to prevent pollution or ecological damage (“Significant Change”), the enterprise shall, as appropriate, re-file the Registration Form or re-submit their EIA Documents to the EPA for EIA Approval. Only on completion and acceptance of the environmental protection facilities can the project be formally put into production.

With the exception of certain situations detailed below, the Revisions no longer require an enterprise to apply to the EPA for completion and acceptance of the environmental protection facilities. The enterprise shall itself conduct the construction inspection and acceptance, in accordance with the *Provisional Provisions for the Environmental Protection Acceptance and Inspection of Construction Project Completion* issued by the national EPA and any specific

acceptance inspection criteria or guidelines issued by the local authorities to accept and inspect the ancillary environmental protection facilities. Having done so, the enterprise shall then prepare a completion and acceptance inspection report. Unless it includes information deemed to be confidential under national regulations, the enterprise shall disclose the completion and acceptance inspection report to the public, make it available on the internet, and also allow for public inspection.

Pursuant to the *Law on the Prevention and Control of Environmental Pollution Caused by Solid Wastes*¹ and the *Law on the Prevention and Control of Noise Pollution*², any associated noise or solid waste pollution prevention and control facilities required for a construction project are still subject to inspection and acceptance by the EPA. In practice, this means that any construction project discharging solid waste and/or noise is still required to apply to the EPA for inspection and acceptance of the environmental protection facilities.

The Revisions clearly stipulate that where the construction project is put into production or use without the ancillary environmental protection facility having been constructed, inspected or accepted, the EPA may order the enterprise to make correction within a stipulated period and impose a fine ranging from RMB200,000 to RMB1,000,000. Where the required correction is not made within the stipulated period, a further fine ranging from RMB1,000,000 to RMB2,000,000 may be imposed. Additionally, for each responsible manager or other directly responsible personnel, a fine ranging from

¹ Draft has been issued for public comments

² This Law has not as yet been revised

RMB50,000 to RMB200,000 may be imposed. Under extreme circumstances, production or use of the project may be suspended, or the project may be closed down.

IV. Impact of the Revised Regulations in Practice

Generally speaking, the Revisions reflect a major change in the regulatory approach of the EPAs. Post hoc regulatory supervision should improve, public supervision is being encouraged and there will be significant increases in penalties for non-compliance. Prior to the implementation of the Revisions, EPAs in many provinces were facing a large volume of applications for completion and acceptance of environmental protection facilities, resulting in long delays in the approval process. By setting out to encourage legal compliance on the part of enterprises and handing back responsibility for the environmental protection elements of their construction projects, the Revisions should improve the efficiency of the

construction project process.

V. Summary

Against the background of strengthening environmental protection supervision in China, any enterprise carrying out a new construction project needs to take steps to ensure it is in compliance with the laws and regulations on EIA and that it has the necessary completion and acceptance of the environmental protection facilities. Enterprises shall also inspect and confirm whether projects it is constructing and operating have been through the relevant approval procedures. In the case of any significant change, in order to avoid non-compliance, the enterprise shall ensure that the EIA and the completion and acceptance of the environmental protection facilities have been conducted again.

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