

## 环境保护法律热点问题

### 环保专题系列（六） - 重污染天气应急减排相关的合规注意事项

导言：重污染天气应急减排是大气污染防治的重要措施之一，实践中企业因重污染天气应急减排问题被调查甚至遭受行政处罚的情况并不鲜见。

日前，环保部印发《京津冀及周边地区 2019-2020 年秋冬季大气污染综合治理攻坚行动方案》，据此，进入秋冬季后全国多地区陆续发布重污染天气预警，启动应急响应措施，对企业应急减排落实情况进行了突击检查。实践中，由于重污染应急减排本身具有突发性、时效性、政策导向性等特点，在执行应急减排措施乃至面对突如其来的政府环保调查和处罚时，企业往往措手不及。在此背景下，我们将重污染天气应急减排的法规要求以及一些合规注意事项进行归纳和整理，以期帮助企业进一步提升重污染天气应急减排的合规意识并加强管理和防范风险。

#### 一、重污染天气应急减排的法律依据

续《中华人民共和国大气污染防治法》对重污染天气预警及应急减排做出了一些原则性规定，国务院和生态环境部分别于 2018 年颁布《打赢蓝天保卫战三年行动计划》、2019 年颁布《关于加强重污染天气应对夯实应急减排措施的指导意见》和《重污染天气重点行业应急减排措施制定技术指南》（“《技术指南》”），规定了较为细致的减排比例和减排措施。上述文件将重污染天气划分三个预警等级并规定了相应的减排比例要求：二氧化硫、氮氧化物、颗粒物、挥发性有机物等主要污染物的应

急减排比例在黄色（Ⅲ级）、橙色（Ⅱ级）、红色（Ⅰ级）预警期间应分别达到全社会排放量的 10%、20%、30% 以上。实践中，不同地方政府也可能调高前述比例。

#### 二、重点行业分级差异化管控要求

《技术指南》针对 15 个重点行业（钢铁、焦化、氧化铝、电解铝、碳素、铜冶炼、陶瓷、玻璃、石灰窑、铸造、炼油与石油化工、制药、农药、涂料、油墨等），根据相关指标（例如：工艺装备水平、燃料种类、污染治理技术、排放管控和限值、监测监控水平、运输方式清洁化程度等）将企业分为 A、B、C 三个绩效等级，就每个行业的不同级别的企业实行不同的减排措施和管控，A、B 级企业将在省级相关主管部门网站予以公布。该等绩效分级评定关系到企业在具体减排措施、检查频次等方面的差异化要求；一般而言，C 级企业面临的减排措施最为严格，而 A 级企业不作为减排的重点并减少检查频次。以铸造行业为例，A 级企业可结合实际自主采取减排措施，B 级企业在橙色以上预警期间停产所有涉气工序并禁止使用国四及以下重型载货车辆（含燃气）进行物料运输，C 级企业在黄色及以上预警期间停产所有涉气工序并禁止使用国四及以下重型载货车辆（含燃气）进行物料运输。此外，非重点行业企业也应进行差异化应急减排，但其进行减排的管控措施更多依赖地方监管部门的监管要求。

### 三、企业未落实应急减排措施的法律后果

上文所述之政策和指南主要是针对政府组织应急减排的角度提出要求，却较少对企业减排措施进行直接的规定。实践中，很多企业缺乏相关的合规认识和经验或存在认识偏差和经验不足，从而导致未能及时、准确地落实应急减排措施。近年来，政府部门对于应急减排的监督和执法力度仍在加强。针对“未落实应急减排措施”的企业，政府部门可能采取通报批评、降低企业绩效等级、计入企业诚信档案予以公开、行政处罚等多种监管手段，甚至可能导致刑事责任。就行政处罚而言，根据《中华人民共和国大气污染防治法》第96条和121条，拒不执行停止工地土石方作业或者建筑物拆除施工等重污染天气应急措施的企业可能面临1万元以上10万元以下的罚款。

### 四、企业如何防范应急减排的合规风险

企业首先应当深入学习和切实领会重污染天气应急减排的法律法规和监管要求，避免错误认识导致具体实施中出现不合规情况，应重视绩效分类评定，通过提升清洁生产水平等方式争取较高的管控评级，并应谨慎地制定“一厂一策”应急减排实施方案和填报减排措施清单，将具体应急减排实施方案在工厂内进行公示，同时在实际运营中严格落实应急减排实施方案和所填报的减排措施清单，以便应对政府部门不时的应急减排检查或调查。在政府检查或调查中，企业应积极澄清事实，避免可能误

会；且企业应在知悉政府检查或调查后第一时间结合自身经验以及涉案的标的金额及难点等考虑是否聘请专业的环境律师介入并商议应对策略。

### 五、结语与建议

在当前国家加强重污染天气防治和环保执法的背景下，总体上企业应加强对应急减排的法律法规和监管要求的认识；在面临政府检查或调查时，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（如情况说明，行政案件中的申辩、听证、行政复议或行政诉讼等）帮助企业实现这一目的；就此，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](mailto:ecoenvpro@junhe.com)。

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## Environmental Protection

### Environmental Protection Series No. 6: Compliance considerations relating to emergency emission reduction during heavily polluted weather conditions

Introduction: Emergency emission reduction during heavily polluted weather conditions is an important measure to prevent and control atmospheric pollution. In practice, it is not uncommon for enterprises to be investigated and imposed with administrative penalties due to problems in relation to emergency emission reduction during heavily polluted weather conditions.

The Ministry of Ecology and Environment of the People's Republic of China recently issued the *2019-2020 Autumn and Winter Comprehensive Treatment Action Plan in Beijing, Tianjin, Hebei Province and Surrounding Areas*. Many regions throughout the country then issued pre-warnings of heavily polluted weather conditions, initiated emergency measures and conducted inspections on enterprises' implementation of emergency emission reduction. Due to some of the characteristics of emergency emission reduction during heavily polluted weather conditions, such as the lack of warning, time constraints, and policy-orientation, enterprises are often unprepared when implementing emission reduction measures or when facing unexpected environmental investigation and

administrative punishment. Due to this, we have summarized and edited the regulatory requirements and compliance considerations in respect to emergency emission reduction during heavily polluted weather conditions, with the goal of helping enterprises further enhance their compliance awareness of emergency emission reduction, strengthen management and prevent risks.

#### **I. The legal basis for emergency emission reduction in heavily polluted weather conditions**

After the *Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution* made some principle regulations on heavily polluted weather pre-warnings and emergency emission reduction, the State Council and the Ministry of Ecology and Environment respectively promulgated *the Three-year Action Plan to Win the Battle for the Protection of Blue Skies* in 2018, *the Guiding Opinions on Strengthening the Countermeasures to Heavily Polluted Weather Conditions* and *Consolidating Emergency Emission Reduction Measures and the Technical Guidelines on Formulating Emergency Emission Reduction Measures of*

*Key Industries for Heavily Polluted Weather Conditions* (the 'Technical Guidelines') in 2019, specifying more detailed emission reduction proportions and emission reduction measures. The abovementioned documents divide heavily polluted weather conditions into three pre-warning levels and stipulate the corresponding requirements on emission reduction proportions: the emergency emission reduction proportions of major pollutants such as sulfur dioxide, nitrogen oxides, particulate matter and volatile organic compounds shall reach more than 10%, 20% and 30% of the emission amount of the whole society respectively during the pre-warning periods of yellow (Level III), orange (Level II) and red (Level I). In practice, different local governments may increase those proportions.

## **II. Differentiated management and control requirements on key industry grading**

The Technical Guidelines classify 15 key industries (iron and steel, coking, alumina, electrolytic aluminum, carbon, copper smelting, ceramics, glass, lime kilns, foundry, oil refining and petrochemical, pharmaceutical, pesticide, paint, printing ink) into three performance grades, i.e. Grade A, B, and C according to the relevant indicators (such as process equipment levels, fuel types, pollution control technology, emission control and limits, monitoring and control levels and cleanliness of transport methods). Different grades of enterprises in each industry are subject to different emission reduction measures and controls, and enterprises classified as Grade A and Grade B will be published on the website of the relevant authorities at provincial levels. Such performance grading evaluations are related to the different requirements imposed on enterprises in respect of specific emission reduction measures, the frequency of inspections and so on; in general, the

emission reduction measures for Grade C enterprises are the most stringent, while Grade A enterprises are not treated, as the focus and the frequency of inspection is reduced. Taking the foundry industry as an example, Grade A enterprises may undertake emission reduction measures at their discretion; Grade B enterprises shall stop all air-pollution-related production processes and are prohibited from using any heavy cargo vehicles (including gas) of national standard IV or below for material transportation during the pre-warning period of orange or above; Grade C enterprises shall stop all air-pollution-related production processes and are prohibited from using any heavy cargo vehicles (including gas) of national standard IV or below for material transportation during the pre-warning period of yellow or above. In addition, non-key industry enterprises shall also carry out differentiated emergency emission reduction, but the control measures for emission reduction shall rely more on the requirements of the local regulatory authorities.

## **III. Legal consequences of an enterprises' failure to implement emergency emission reduction measures**

The policies and guidelines above mainly focus on raising the requirements for the government to organize emergency emission reduction, but do not directly stipulate the emission reduction measures for enterprises to follow. In practice, many enterprises lack relevant compliance awareness and experience, or have cognitive bias and insufficient experience, which results in a failure to timely or accurately implement emergency emission reduction measures. In recent years, governmental authorities have continued to strengthen the supervision and enforcement of emergency emission reduction targets. With regard to enterprises

that 'fail to implement emergency emission reduction measures', government authorities may take various regulatory measures, such as issue a notice of criticism, decrease the performance grading of such enterprises, make a record in the enterprises' credit files and then disclose that information, and impose administrative penalties, or even subject an enterprise to criminal liability. In terms of administrative punishment, according to Article 96 and Article 121 of the Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution, enterprises that refuse to implement emergency measures for heavily polluted weather conditions (such as stopping soil and stone work on a construction site or halting building demolition),, may face fines of between RMB 10,000 and RMB 100,000.

#### **IV. How enterprises can prevent compliance risks of emergency emission reduction**

Firstly, enterprises should thoroughly study and understand the laws, regulations and regulatory requirements of emergency emission reduction for heavily polluted weather conditions, avoid any non-compliance occurring in the actual implementation caused by misunderstandings, and pay close attention to performance grading evaluations. They should strive for higher management and control grading evaluation by promoting a clean production level, and formulate a 'one factory one policy' emergency emission reduction plan. Enterprises should file the list of their emission reduction measures, and publicize specific emergency emission reduction implementation plans in their factories. Meanwhile enterprises should strictly follow the implementation plan, so as to prepare for any emergency emission

reduction inspections or investigations by government authorities that may happen from time to time. During the governmental inspection or investigation, enterprises should clarify the relevant facts to avoid any potential misunderstandings, and enterprises should, at the first instance of learning of a governmental inspection or investigation, consider whether to hire professional environmental lawyers and discuss countermeasures, taking into consideration the enterprises' own experience and the complexity of the subject matter involved.

#### **V. Conclusion and suggestions**

Under the current background of the state's strengthening of the prevention and control of heavily polluted weather conditions and the enforcement of environmental protection laws, in general, enterprises should strengthen their awareness of the laws, regulations and regulatory requirements on emergency emission reduction targets. When facing governmental inspection or investigation, enterprises may protect their own legitimate rights and interests through due process and effective defense under the law. Even in a case where an illegal act exists, enterprises can still strive for an exemption of penalty under legitimate circumstances or apply for the lowest fine within the stated range. The participation of environmental lawyers can help enterprises during different phases such as explanation, hearings, administrative review and administrative litigation. In this regard, we will continue to update you. If you have any specific questions, please e-mail: [ecoenvpro@junhe.com](mailto:ecoenvpro@junhe.com).

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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, governmental investigation, administrative review and litigation relating to EHS fines and penalties.

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