

You Received an NJDEP Notice of Violation. What Should You Do Next?

October 6, 2026
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Receiving a Notice of Violation (“NOV”) from the New Jersey Department of Environmental Protection (“NJDEP”) can raise immediate concerns for a business. An NOV means that NJDEP has determined that a violation occurred, typically identifies the alleged violation, and indicates a deadline for achieving compliance. An NOV does not itself carry a civil administrative penalty and generally cannot be appealed. However, failure to address an NOV may result in additional enforcement action.

For companies receiving an NOV, their first priority should be to understand the alleged violation and determine the appropriate response.

Review the Allegations and Preserve the Record

The company should first identify the statute, regulation, permit condition, or other requirement that NJDEP claims was violated. It should also determine what corrective action NJDEP is requiring and identify any applicable response or compliance deadlines. While the compliance deadline is sometimes set forth directly in the NOV, you should always refer to the applicable law to be sure of the compliance deadline.

The underlying facts should then be reviewed. Depending on the matter, relevant materials may include permits, monitoring reports, inspection records, photographs, sampling results, operating logs, manifests, maintenance records, emails, and communications with environmental consultants.

These records can be important in determining whether NJDEP has accurately described the violation and, if the matter escalates, in responding to a later enforcement action.

Companies should also avoid assuming either that NJDEP is necessarily correct or that the alleged violation should automatically be disputed. Some violations are straightforward. Others may depend on technical issues, regulatory interpretation, sampling methodology, or facts that NJDEP did not have when it issued the NOV.

Address Compliance and Enforcement Separately

If the NOV identifies an ongoing compliance issue, the company should evaluate what steps are necessary to correct it.

Corrective action, however, does not necessarily resolve the enforcement issue. Sometimes, remedying the issue will prevent NJDEP from pursuing additional enforcement, but sometimes the violation is so significant that NJDEP may pursue additional enforcement regardless of any prompt corrective actions.

Additionally, a company may take corrective action without agreeing with every legal or factual conclusion in an NOV.

Companies should carefully consider whether to engage with NJDEP regarding any disagreements. An NOV is not a final order, so it may not be challenged directly, but companies can informally discuss the NOV with NJDEP. Still, it is sometimes easier to simply take corrective action and doing so does not constitute an admission of fault or liability.

NJDEP states that an NOV may form the basis for additional enforcement if compliance is not achieved. NJDEP may also issue more formal enforcement documents, including an Administrative Order, Notice of Civil Administrative Penalty Assessment, or an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA"). Those documents can carry different legal consequences and appeal rights.

Conclusion

Many NOVs involve both technical and legal issues.

Environmental consultants, engineers, and facility personnel may be best positioned to evaluate the underlying environmental condition and determine the appropriate corrective measures. Legal counsel may become more important where the alleged violation is disputed, penalties could be significant, the company has prior enforcement history, operations or permits could be affected, or additional enforcement appears likely.

Coordination is particularly important. A technical response to NJDEP may also contain factual statements or conclusions that become relevant if the matter later develops into a penalty case.

Not every NJDEP NOV becomes a significant enforcement matter. In many cases, correction of the violation may end the matter. But the NOV stage is also an important opportunity to understand NJDEP's concerns, evaluate the facts, address any compliance issue, and develop an appropriate response before the matter potentially escalates.