

APPENDIX B

PROCESSING NOTICES OF VIOLATION (NOVs) OR NONCOMPLIANCE (NONs) UNDER ENVIRONMENTAL LAWS AND REGULATIONS

1 Framework

Various environmental laws subject Federal facilities to Federal, State, and local substantive and procedural requirements. Accordingly, activities in those jurisdictions may receive notices of violation (NOVs) or notices of noncompliance (NONs). In general, Federal facilities must comply with substantive and procedural requirements imposed by Federal, State, interstate, and local authorities. Where regulators detect suspected violations of those requirements, Federal EPA officials may issue NONs; State and local officials may issue NOVs. The Federal Facility Compliance Act authorizes the EPA to seek monetary penalties from Federal installations for violation of hazardous waste management laws and regulations.

In addition, State regulatory agencies may seek monetary penalties for various environmental media violations. This appendix applies to the investigation of violations of, or noncompliance with, environmental laws and regulations by Navy activities and subsequent payment of fines or penalties, where warranted. Before honoring requests for payment of fines and penalties for violation of environmental laws and regulations CO's of facilities shall seek the advice of legal counsel. NOVs and NONs may trigger formal legal proceedings with specific deadlines, procedures and consequences. Accordingly, facilities shall seek early consultation with legal counsel in determining how to respond.

2 Responsibilities

2.1 Legal assistance is available from Major Claimants, regional environmental coordinators (RECs), and COMNAVFACENGCOM Engineer-

ing Field Divisions (EFDs). Upon receipt of any such NOV, NON, warning letter, citizen suit notice, warning notice, consent order, or any other such notice of deficiency of Federal, State, interstate, or local environmental control laws or regulations, the commanding officer of the cited facility shall:

a. Inform Chief of Naval Operations (CNO), the chain of command and the Navy REC by message, with information copies to the Navy Judge Advocate General (JAG), Navy Office of Assistant General Counsel (Installations and Environment) (OAGC(I&E)), appropriate COMNAVFACENGCOM Engineering Field Division (EFD) and Naval Facilities Engineering Service Center (NFESC) Port Hueneme, CA.

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(1) Send the initial message upon receipt of the written citation and conform to the format described in paragraph 2.2 of this appendix.

(2) When the NOV or other notice is promptly resolved, the activity may report receipt and closure in a single message.

(3) Send a follow-up message containing additional details when the information requested in paragraph 2.3 is known, or within 6 months of receipt of the NOV, whichever occurs first. In the final follow-up message for a specific NOV, the facility should state that all issues are resolved, and that the issuing agency considers the action complete.

(4) If the NOV or other notice, etc. has potential for significant adverse public relations, inform CNO, the chain of command and the Navy REC within 24 hours of receipt.

b. Request that attorneys with special environmental law expertise in the area provide support and representation to ensure the most favorable outcome where: (1) shutdown of operations is threatened; (2) a significant penalty is possible; (3) the action involves significant DON legal precedent. Upon receipt of any oral, informal, or formal notice of noncompliance, the commanding officer shall seek technical and legal support from the command environmental technical personnel and from the assigned Staff Judge Advocate (SJA) or Office of General Council (OGC) command counsel. If no attorney is assigned, seek advice from counsel advising the *chain of command or from counsel at the servicing EFD.*

c. Conduct a preliminary inquiry into the facts and circumstances of the violation, obtain legal and technical support, and take corrective action. Upon request for payment of a fine or penalty, prepare a written investigative report per procedures established by the Major Claimant or delegated representative. Commands should consult with counsel to ensure that when the investigation is convened, it is structured and conducted in such manner to give maximum benefit to the command's defense and is privileged from disclosure to regulators. Include in the investigative report the facts and circumstances of the incident, such documents, statements, photographs, claims for damage, notice of fine or penalty, and further data as may be required in the particular case. *Format the report as either a JAG Manual investigation or letter report.* Forward the investigative report to the Major Claimant via the chain of command with copies to CNO(N457), Shore Compliance Branch, Navy OAGC(I&E), NFESC, the regional environmental coordinator, and the appropriate COMNAVFACENGCOM EFD.

d. Prepare responses to regulatory agencies per policies provided in this manual.

e. *Consult with on-site or command counsel, and if no factual or legal defense exists, negotiate the lowest possible amount of penalty. Prepare a penalty analysis and develop a negotiation strategy before negotiation. Suggested elements of the penalty analysis and negotiation strategy would include:*

ANALYSIS OF VIOLATIONS

Report of violation (assertion by the regulatory agency)

BACKGROUND

1. Applicable regulations
2. Responsible agency
3. Direct supervisor (if known)
4. Specific circumstances
5. Date of corrective action
6. Description of corrective action

OPINIONS

1. Did the violation occur?
 - a. Is this a repeat violation?
 - b. Is Federal Facility Compliance Act applicable?
2. Liability of responsible agency or individual?

FINE OR PENALTY ANALYSIS

Class of Violation (as defined by regulatory agency)

FACTORS ASSOCIATED WITH THE VIOLATION

1. Determine the actual or potential harm associated with the violation (classification such as Major, Moderate or Minor as defined by regulatory agency schedule of penalties.)
 - a. Characteristics of the substance involved:
 - (1) Hazardous Material (HM) or Hazardous Waste (HW)
 - (2) Characteristics (Corrosive, toxic, ignitable, reactive, etc.) Listed or Characteristic waste? Extremely Hazardous? Carcinogen?
 - (3) Degree of hazard? (classification such as Major, Moderate, or Minor as defined by regulatory agency schedule of penalties.)
 - b. Amount of material involved:

Based on the characteristics, does regulatory agency consider the amount large or small?
 - c. Specific situation:
 - (1) Was human life or health threatened? Extent?
 - (2) Were natural resources threatened? Extent?
 - (3) Was the environment threatened? Extent?
 - (4) Were water supplies or resources threatened? Extent?
 - (5) Can potential damage be minimized or prevented?
2. Determine extent of deviation from regulatory standards (classification such as Major, Mod-

erate, or Minor as defined by regulatory agency schedule of penalties).

3. Calculate initial penalty or fine from regulatory agency schedule of penalties.
4. Calculate multi-day penalties if applicable.
5. Calculate base total penalty.
6. Adjust penalty for factors associated with the violator, for economic benefit of non-compliance, and all other adjustments allowed by regulatory agency schedule of penalties.

RECOMMENDATION

1. Recommended settlement amount:
2. Recommended corrective action:
3. Recommended disciplinary or personnel action: If there is a defense, forward the investigative report to the Major Claimant via the chain of command with a copy to Navy OAGC(I&E) and recommend that the fine or penalty be contested. In cases where the recommendation to contest the violation or noncompliance is not accepted, follow procedures outlined in paragraph 2.1d.

2.1.1 NOV Close-out Procedures

Major Claimants shall maintain a current listing of all NOV's or other notices, etc. received by activities under their command. The chain of command shall closely monitor the resolution status of each. After a Navy activity has completed all action necessary to correct the circumstances surrounding an enforcement action, the activity shall take one of the following actions:

1. Contact the regulatory agency in person or by telephone and discuss the corrective action taken and request regulator concurrence that the NOV or other notice, etc. is considered closed.

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OPNAVINST 5090.1B, CH-2
9 September 1999

Follow up with a memorandum to the regulator confirming the communication.

2. Address a letter to the regulatory agency detailing the corrective action taken and requesting regulator concurrence by return receipt mail. Include a statement such as, "We will consider this matter closed and remove it from the active database if we do not receive a reply from you within the next 60 days." Activities may accept telephonic/oral confirmation from the regulatory agency that the action is closed. If the regulator responds by telephonic/oral communication, follow up with a memorandum to the regulator confirming the communication.

3. In cases where the regulator acknowledges in the NOV or other notice that no further action is required by the activity, then report the NOV or other notice as closed without additional coordination with the regulator.

4. Negotiate and enter into a compliance agreement with the regulatory agency. A compliance agreement may be used as justification to close out associated NOV's or other notices, etc. Activities will follow the close-out procedures described in this paragraph for this subsequent compliance agreement. An enforcement action received later for similar circumstances is considered a separate instance of non-compliance.

R) **2.2 Required Initial Information on NOV's**

CNO requires initial information for each NOV, written citation, etc. received. Submit the information using the following message format and include a brief title for each item in the message:

FM: NAVY ACTIVITY/SHIP//CODE//

TO: CNO WASHINGTON DC//N45//
CHAIN OF COMMAND
NAVY REGIONAL ENVIRONMENTAL
COORDINATOR//JJJ//

INFO: LEGSVCSUPPGRU OGC WASHING-
TON DC//OAGC(I&E)//
NFESC PORT HUENEME CA//424//
NAVFACENGCOM EFD//JJJ//
NAVY JAG ALEXANDRIA VA//012//

//UNCLAS //N05090//

SUBJ: RECEIPT OF NOTICE OF ENVIRON-
MENTAL VIOLATION/NONCOMPLI-
ANCE

MSGID/GENADMIN/ORIGINATOR//CODE//
REF/A/DOC/OPNAVINST 5090.1B//
RMKS/

1. Activity or ship name in violation.
2. Navy Unit Identification Code (UIC) number.
3. Activity address/ship homeport.
4. City (for ships, where violation occurred).
5. State (use 2 letter State abbreviations).
6. County.
7. Point of contact for additional information.
8. Point of Contact (POC) telephone number.
9. EPA region.
10. Was an NOV received (yes or no); if so, how many? For this purpose, an NOV is any formal written notification by the EPA or an authorized State or local environmental regulatory agency of a

violation or violations of law or regulation, which applies to the regulatory agency's first level of enforcement action. Warning letters or notices of deficiencies are not NOV's, but include them on line 11.

One written notice, regardless of the number of individual violations, findings or citations counts as one NOV. Do not include on line 10 items found to be out of compliance by a regulator, but not set forth in writing.

If the NOV cites violations in more than one media (see NOV Table C-1), count it as multiple NOV's, one under each of the applicable media categories. Only one message is required, however, include the specific information in this message separately for each media. Generally, make lines 1 through 14 of this message the same for the different media violations that result from a multimedia inspection. Repeat lines 15 through 24 for each cited media.

11. Violation description, other than NOV (e.g., NON, Warning letter, Regulatory agency Inspectors Report identifying deficiencies, oral inspection outbriefs). Handle violations involving more than one media in the same manner as NOV's (see line #10).

12. Name of issuing agency and violation number(s).

13. Date of notification (mm/dd/yy). The date the regulatory agency initiated the NOV, etc., (preferably the date on the letterhead).

14. Date of inspection (mm/dd/yy). The date of the inspection during which the violation was detected. If the inspection took several days use the date noted on the NOV, etc., or, if none, then use the date the inspection started.

15. Media (refer to Table B-1). The law under which the violation was issued. If a State or local

violation is received, report under the applicable Federal statutes from which the State law or local regulation was derived.

16. Regulation or act cited (with specific section).

17. Permit numbers related to violation.

18. Total number of individual findings issued by regulatory agency. A finding is a specific violation with citation of environmental law or regulation.

19. List each violation separately and classify into one of the following (list should equal total in item 18):

Class A. Releases to the environment

Class B. Violations with the potential to cause a release or damage

Class C. Administrative violations. A specific violation, citation, or finding that occurs as a result of improper paperwork, report filings, or labeling. This does not include paperwork associated with permit applications.

If NOV cites violations for more than one media, then indicate, for each violation, the media that is applicable.

20. Was a fine assessed or requested?

21. Dollar amount of fines assessed. Total dollar amount of the fine assessed.

22. Total report fees/reimbursable costs paid to a regulatory agency. Reimbursable costs are those dollars paid to a regulatory agency (above assessed fines) for required reimbursement of regulatory agency costs in conducting regulatory and enforcement activities.

23. Summary of demand for payment.

OPNAVINST 5090.1B, CH-2
9 September 1999

24. Was a compliance agreement, Supplemental Environmental Projects (SEPs), negotiation, or agreement requested by the regulatory agency?

25. Summary of Proposed Agreements, SEPs, or schedule.

26. Nature of response required and date due to the regulatory authority (e.g., Answer to complaint is due 25 September 01).

27. Have corrective actions been completed?
Y or N

28. Is the NOV resolved? Y or N

29. Date of NOV resolution.

30. Has issuing agency concurred with resolution of the issues? Y or N

31. Date of concurrence (mm/dd/yy).

32. Date of last annual or Major Claimant Environmental Compliance Evaluation (ECE), nature of the ECE (i.e., annual or Major Claimant) and whether the discrepancy cited was noted on the ECE (e.g., last annual ECE conducted 5 JAN 02 did not disclose cited violations).

33. Additional information (i.e., unusual circumstances or events leading to NOV).

R) **2.3 Required Follow Up Information on NOVs.** A follow up message is required for each open NOV, written citation, etc. for which an initial message was sent under paragraph 2.2. As with the initial message, use one message if desired to report on more than one media as a result of multimedia inspections and violations. Use the following format and include a brief title for each item in the message:

FM: NAVY ACTIVITY/SHIP//CODE//

TO: CNO WASHINGTON DC//N45//
CHAIN OF COMMAND
NAVY REGIONAL ENVIRONMENTAL
COORDINATOR//JJJ//

INFO: LEGSVCSUPPGRU OGC WASHING-
TON DC//OAGC(I&E)//
NAVFACENGCOM EFD//JJJ
NFESC PORT HUENEME CA//424//
COMNAVFACENGCOM//40//
NAVY JAG ALEXANDRIA//012//

UNCLAS//N05090//

SUBJ: FOLLOW-UP REPORT OF NOTICE OF
ENVIRONMENTAL VIOLATION/
NONCOMPLIANCE

MSGID/GENADMIN/ORIGINATOR//CODE//
REF/A/DOC/OPNAVINST 5090.1B//
REF/B/DTG OF INITIAL MESSAGE/
VIOLATION NUMBER//RMKS/

1. Activity or ship name in violation.
2. Navy UIC number.
3. Activity address/ship homeport.
4. City (for ships, where violation occurred).
5. State.
6. County.
7. Point of contact for additional information.
8. POC telephone number.
9. EPA region.
10. Date of original notification. The date the regulatory agency initiated the NOV.

11. Was a fine paid? Y or N
12. Dollar amount of fine paid.
13. Defense Environmental Restoration Account (DERA) paid. Total dollar amount of fines disbursed out of the Defense Environmental Restoration Account for Compliance Environmental Response, Compensation and Liability Act (CERCLA) violations.
14. Was compliance agreement, Supplemental Environmental Project (SEP), negotiation, or schedule accepted? Y or N.
15. Date of agreement (mm/dd/yy).
16. Is the compliance agreement closed? (Compliance Agreement resolved to the satisfaction of the issuing agency).
17. Financial obligation, past and planned, resulting from the Compliance Agreement.
18. Fiscal year(s) for which the financial obligations have been incurred.
19. Dollar amount and appropriation of projected costs resulting directly from Compliance Agreements.
20. Is the NOV resolved? Y or N. For final resolution, an NOV requires the satisfaction of the issuing agency. Note that all individual findings, violations, or citations within the NOV must be resolved for the NOV to be considered resolved. Have all issues of the NOV or other enforcement notice been resolved?
21. Date of resolution (mm/dd/yy).
22. Has the issuing agency concurred with resolution of the issues and removed the violation from their active files? Y or N
23. Date of concurrence (mm/dd/yy). The date on which the regulatory agency confirms that all findings are resolved. Notification may be in formal written form or documented conversation.
24. Expected completion date for issues not yet corrected (mm/dd/yy).
25. Summary of reasons for not resolving the issues.
26. Is a compliance project required to achieve compliance with NOV?
27. Has project/Environmental Protection Requirement (EPR) exhibit been submitted to the Major Claimant? If Military Construction (MIL - CON) is required, provide project number and program year.
28. EPR project number. The unique identification number assigned to the project in the EPR Project Report Form.
29. Additional information.
30. Original Naval Message Number (Date/Time Group) day, zulu time, month, and year (Example - 171300Z MAR 02)

MEDIA TYPES

Applicable law	Code
Clean Air Act	A
Clean Water Act	B
Safe Drinking Water Act	C
Resource Conservation and Recovery Act	
Subtitle C: Hazardous wastes	D
Subtitle D: Non hazardous solid wastes	E
Subtitle I: Underground storage tanks	F
Toxic Substances Control Act	G
Comprehensive Environmental Response Compensation, and Liability Act	H
Federal Insecticide, Fungicide, and Rodenticide Act	I
Endangered Species Act	J
Historic Preservation Act	K
Archaeological Protection Act	L
Other	Z

Table B-1