

Tangling with the EPA: How to handle a notice of violation

September 26, 2017

The Ohio Environmental Protection Agency (Ohio EPA) has wide-ranging authority to oversee any actions that impact the environment in Ohio. This oversight extends to a number of activities under Ohio law. Chapter 3745 of the Ohio Revised Code generally covers the Ohio EPA's statutory authority and provides the Ohio EPA with broad authority to regulate activities impacting the following:

- Chemical emergency planning, community right-to-know and toxic chemical release reporting
- Cessation of chemical handling operations
- Prevention, control and abatement of air and water pollution
- Public water supply
- Comprehensive water resource management planning
- Products containing mercury
- Disposal and treatment of solid wastes, infectious wastes, construction and demolition debris, hazardous waste, sewage, industrial waste and other wastes

Whether you are a public entity operating a wastewater treatment plant with a National Pollutant Discharge Elimination System (NPDES) permit, an entity responsible for the public water supply or an owner engaging in a construction project requiring a storm water pollution prevention plan, or you engage in activities impacting any of the other areas listed above, the Ohio EPA has the authority to perform an inspection at any time to ensure compliance with the applicable environmental rules. The Ohio EPA may set up these inspections in advance, but an inspector could also show up to the site unannounced. A savvy party involved in these activities should always be ready for a possible inspection.

If an inspector from the Ohio EPA does show up, what happens? This article walks through the standard steps of an Ohio EPA inspection and what occurs if the inspector then alleges that you are responsible for violations of environmental rules or regulations.

After inspecting the work and the condition of the site, if the inspector determines that the applicable environmental regulations are not being followed, the inspector will prepare and issue a Notice of Violation (NOV). A NOV contains factual details of the inspection (the date the inspection occurred, conditions of the site, what work the inspector observed, etc.) and will identify the regulations that the inspector believes are being violated.

After receiving a NOV, the next step for a cited party is to respond to the NOV in writing. This response should (1) acknowledge receipt of the NOV; (2) explain how the party intends to correct the violations observed and noted by the inspector; and (3) refute any violations that the party feels are incorrect. If the party believes the inspector is incorrect that certain rules were violated, the party needs to be prepared to back up its beliefs with documented evidence. Often, involving an attorney at this point can be helpful to ensure that the potential violations raised in the NOV are being properly addressed.

Then, the Ohio EPA may choose to work with the cited party to ensure that the violations observed on site are corrected. This typically depends on the severity of the observed violations. However, if the Ohio EPA disagrees with any of the party's objections and feels that the observed violations are continuing and/or becoming more severe, the director of the Ohio EPA will typically

issue findings and orders to the cited party. These findings and orders propose firm deadlines by which the party must correct the observed violations and often include civil fines.

What many parties who receive citations do not realize is that for most violations, the Ohio EPA has no authority to unilaterally set these deadlines or to issue fines and cannot unilaterally collect any penalties directly. (If the Ohio EPA wishes to collect these penalties, it must refer the case to the Ohio Attorney General's office, which will prepare litigation against the party; this process is discussed in more detail below.) Because the Ohio EPA cannot directly collect funds from a cited party, the Ohio EPA is often willing to negotiate proposed resolutions to the alleged violations. For this negotiation process, consulting with an attorney is strongly recommended. Being well-prepared for any negotiation is essential; a party should investigate other findings and orders issued by the Ohio EPA for similar violations and get a good sense of whether the financial penalties issued are equivalent to how the Ohio EPA has treated similar violations in the past. In addition, it is necessary for a party to discuss any alleged violations and proposed deadlines with the contractors, architects/engineers or other parties that may be involved. A party cannot agree to an Ohio EPA-proposed deadline that cannot be realistically achieved.

While we recommend attempting to negotiate findings and orders with the Ohio EPA, it is important to keep in mind that a friendly working relationship with the Ohio EPA should be maintained during the negotiation process. If no amicable agreement can be reached between the parties, the Ohio EPA will likely refer the matter to the Ohio Attorney General, who may choose to file litigation. Litigation costs can be expensive, and, often, the attorney general will seek higher penalties than those proposed in its findings and orders to cover the cost of litigation for the State. Generally, the Ohio EPA will try to negotiate the findings and orders for about six months before passing the matter along to the attorney general. Once the attorney general is involved, the attorney general will handle the matter internally for another estimated six months before deciding whether to pursue litigation. If litigation does proceed, a resolution may not be achieved for a few years. And perhaps most importantly, litigation could slow down the project or, in rare cases, even cause work on the project to be halted until the litigation is resolved.

Ultimately, any party who receives a NOV needs to proceed with some caution. It is very important to respond to the NOV and maintain a good relationship with the Ohio EPA during the process. If a cited party plans on objecting to some or all of the violations contained in the NOV, the party should begin collecting documentation supporting its positions. Even if findings and orders are issued, the party may still be able to negotiate the penalties involved. However, a responsible party should weigh the threat of potential litigation, if a resolution is not reached, with the financial penalties proposed by the Ohio EPA. Receiving a NOV is never pleasant, but the process can be managed if the cited party is prepared and understands the potential outcomes involved.

Authors
