



**November 7, 2022**

**Summarized Questions and Comments Received on New Field Notice of Alleged Violation (NOAV) Form and Process**

- 1. We would ask that in the future, NDEP, provide additional time to review for such comments and reach out to more associations and industries. Please provide a meeting, workshop, or hearing so that industry can understand the scope of the proposal and comment on the impacts.*

Response: The NDEP greatly appreciates the comments and suggestions on the proposed field NOAV and recognizes how difficult it was to form a consensus response in a two-week period. We honored any requests we received for more time to review this information. In the future, the NDEP will consider providing additional time to respond to proposals such as this. NDEP is providing these comments and responses to the air notices list serve, all facility Responsible Officials as are currently listed, list of interested consultants, and interested associations that we are aware of (NvMA and Associated General Contractors) with an informal workshop and additional time for review of the responses before implementation of the field NOAV.

The NDEP is not proposing to revise regulations, so a meeting, workshop, or hearing was not required, but NDEP appreciates the suggestion of the further outreach. NDEP is looking to shorten the administrative process, resolve compliance issues quicker, and prevent minor issues from becoming more serious. If we gain compliance while the violation is minor (in the field at the time it occurs), it also prevents the facility from facing a major violation. If there are still concerns or you would like to be added to a contact list, please reach out to Chad Myers (cmyers@ndep.nv.gov). In the future, NDEP plans to share with interested parties how the updated process is working along with any lessons learned.

- 2. We are assuming that NDEP and its counsel have concluded that its authority to implement the field NOAV program is contained in its broader statutory authority. We request that NDEP identify the specific statutory authority that it is relying on for advancing the field NOAV proposal. Additionally, in light of the recent U.S. Supreme Court ruling in West Virginia vs. EPA, we question whether or not NDEP BAPC has the ability to implement this program without express statutory authority in the Nevada Revised Statutes (NRS). The Nevada Legislature has not delegated the authority to NDEP to create a field citation program, and without that clear direction, we do not believe this program would be enforceable.*



Response: NDEP management and legal counsel reviewed NRS and NAC Chapter 445B and found that NDEP has clear and explicit statutory and regulatory authority to issue an NOAV for the regulatory violations identified in the draft document and to direct the person receiving the NOAV to pay penalties specifically identified in NAC 445B.281 if the person receiving the NOAV does not exercise its right to appeal. See NRS 445B.450 (granting the Division authority to issue an NOAV when it believes a statute or regulation for the prevention, abatement, or control of air pollution has been violated); NRS 445B.640(1) (providing that a person who violates any provision of NRS 445B.100 to 445B.450, 445B.470 to 640, or any regulation in force pursuant thereto is guilty of a civil offense and shall pay an administrative fine); NRS 445B.640(2) (stating that the Commission shall by regulation establish a schedule of administrative fines not exceeding \$2,000 for lesser violations of NRS 445B.100 to 445B.450, 445B.470 to 640, or any regulation in force pursuant thereto); NAC 445B.281 (identifying and providing the specific penalties for lesser offenses). Further, NDEP does not find that the holding in *West Virginia v. EPA* is applicable to this action.

- 3. We request the NDEP confirm our understating that the field NOAV program would apply only to Class II sources – and not Class I sources. Additionally, and assuming that our understanding is correct, we request that NDEP include a notation on the final NOAV form that clearly states that it applies only to Class II sources. Also, why is the proposal targeted only at Class II operators?*

Response: Pursuant to NAC 445.281(2), the field NOAV will only apply to Class II sources. The NDEP has revised the field NOAV. The field NOAV is now titled Notice of Alleged Violation for Class II Source. To further clarify the applicability of the field NOAV to only Class II sources, “Facility” was changed to “Class II Facility” near the top of the form under Investigation Time.

It is not NDEP’s intention to target Class II facilities. The purpose of the field NOAV is to shorten the NOAV administrative process, resolve compliance issues quicker, and prevent minor issues from becoming more serious while following regulations.

- 4. Would NDEP consider an enforcement conference prior to seeking a hearing before the SEC? One option would be for NDEP to issue a preliminary or draft field NOAV and allow the source to request and enforcement conference. Should an enforcement conference be declined, NDEP could then proceed with issuing a final field NOAV which include the option to request a hearing before the SEC.*



For the penalties listed under NAC 445B.281, the violations are typically easy to determine such as fugitive dust in a location. If there are cases where the NDEP will allow more time (ie. unforeseeable circumstance where records are not available), NDEP will discuss that the concern (ie. lack of records) must be provided within a specified time (ie. 15 days after the inspection) through email to the Responsible Official. If it is not provided, the final NOAV will be sent to the Responsible Official after the required timeframe.

- 5. Based on communications with NDEP, we understand that the Agency's intent is that a field NOAV will not be considered to have been issued to the facility until it is subsequently transmitted by NDEP to the facility's Responsible Official. However, this is not clear from the field NOAV form. Because the issue date of the field NOAV will trigger applicable time frames – whether it be to request an enforcement conference or appeal to the SEC – we think it important to clarify when the field NOAV will be deemed to have been issued.*

Response: The field NOAV will be deemed to have been issued when it is submitted to the facility's Responsible Official. On the revised field NOAV, below the table of alleged violations and fine amounts, it now states, "The amount of the specified fine ... must be submitted within 10 days after service of the notice upon the violator. As it pertains to this NOAV, the facility's Responsible Official (RO) is deemed the violator." On the bottom of the revised field NOAV, it now states, "Appeals must be received within ten (10) days of receipt of this Notice of Alleged Violation by the facility's Responsible Official (RO) pursuant to NRS 445B.340."

- 6. The draft NOAV form suggests that the maximum penalty exposure under this procedure would be capped regardless of the extent of a particular violation. For example, should NDEP seek to resolve violations of recordkeeping requirements through the field NOAV process, it appears that a source would be subject to a maximum penalty of ... regardless of systems involved or the number of days of violation.*

The NDEP interprets the minor violations for Class II sources as listed in NAC 445B.281 for each offense as an opportunity for the facility to learn of the violation and correct it for the future. If the violation continues to the 4th Offense, the information including the number of systems and days in violation will be sent to the enforcement team to review for other penalty methods and for the facility to appear for show cause with enforcement discretion. As mentioned above, items of concern which the compliance team will allow more time in certain cases (ie. unforeseeable circumstance where records are not available) will be communicated to the Responsible Official and followed up with the final NOAV as applicable.



- 7. We believe the training requirements for compliance officers should be detailed in this proposal. It has been the experience of our membership that the same trainings and certifications required of operators are not required of the compliance officers, causing confusion in the field and sometimes, unwarranted citations.*

Response: Each member of the Bureau of Air Pollution Control (BAPC) compliance team has a Bachelor of Science Degree in a field of engineering, related science field, or equivalent experience as required by the State of Nevada employment. All compliance staff have a thorough understanding of the Air Quality Operating Permits, and the reporting, monitoring, and recordkeeping requirements contained within the permits or will be accompanied by an experienced staff member if they are training. Compliance staff continuously attend EPA classes to enhance their knowledge of air pollution control regulations. Additionally, all compliance staff are trained every six months to perform visible emissions observations. The compliance branch has also created standard operating procedures for this process to ensure compliance officers are equipped to fill out the forms and proceed properly.