



## What to Do If You Get a Notice of Intent to Sue from an eNGO

*Most federal environmental statutes grant citizens broad authority to bring lawsuits against companies where there is alleged noncompliance. Before they can do so, however, they must provide a Notice of Intent (NOI) to sue. As we recently [reported](#), we expect environmental non-governmental organizations (eNGOs)– better funded and better staffed than ever– to bring more citizen suits to supplement the anticipated reduction in EPA enforcement actions. If you receive an NOI, here are some steps to take.*

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### 1. An NOI Is Jurisdictional – Don't Ignore It.

The NOI is a statutory notice requirement that an eNGO must provide to prospective defendants (i.e., agency and/or company) before filing suit. This notice ensures, as Congress intended, that citizen suits supplement, not supplant agency enforcement. The mandatory notice period allows companies to come into compliance and time for agencies to initiate enforcement actions. Such agency enforcement can strip jurisdiction for the citizen suit.

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### 2. The Notice Period Is Short – Act Quickly.

Most statutes require at least 60 days' notice prior to filing suit, although RCRA provides 90 days for certain claims. As a practical matter, it can be difficult to do much within these short timeframes, but consider how to maximize the use of the time available. Remember that one of your operation sites may receive an NOI. It is a good practice to develop a procedure to immediately identify and route NOIs to your Legal Department.



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### **3. Come Into Compliance As Soon As Possible.**

Citizens can only sue for “repeated” or “ongoing” violations. Compliance is the best defense against a citizen suit, and compliance with proper documentation may preclude a citizen suit altogether. Nevertheless, courts have broadly interpreted “ongoing violations” to include both continuous violations and those that are intermittent – i.e., may have ceased but have a continuing likelihood of recurring. It is best to address noncompliance well before a possible citizen suit – for example, through self-auditing. If you become aware of a [FOIA request](#) for one of your facilities, you may have an idea about what the NOI and a subsequent citizen suit allege.

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### **4. Determine Whether Enforcement Already Covers the NOI Allegations.**

A citizen suit cannot proceed when the government initiates and actively enforces actions against the alleged noncompliance. This is the so-called “diligent prosecution” defense. Note that administrative enforcement may not satisfy the “diligent prosecution” defense, and the enforcement proceeding may need to take place in a court of law. Analyze an existing judicial Consent Decree with stipulated penalties to determine whether it covers some of the alleged violations and serves as a possible avenue for diligent prosecution.

If the government has not brought an enforcement case, consider asking an agency to bring enforcement for the violations. As a

practical matter, it may be challenging for an agency, even one willing to bring suit, because their enforcement action must be filed before the end of the notice period to bar the citizen suit. Some agencies will not have the resources to bring a timely case that covers the scope of a citizen suit.

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### **5. Consider Reaching Out to the eNGO to Determine Their Objectives.**

Many eNGOs will have objectives motivated by specific policy campaigns to disrupt, prevent, or shut down a business – such as “keep it in the ground.” Any settlement demand at the NOI stage will likely be highly unrealistic. Even so, you lose little when reaching out to eNGOs. Understanding their motivations early on can help inform litigation strategy and manage company expectations about the likely trajectory of a suit. eNGO counsel may drop some claims might be dropped following a productive exchange. Citizen suit provisions have fee-shifting provisions for eNGO attorneys for litigation costs (including attorneys and expert witness fees). While there may be a policy motivation to bring the suit, there is likely a financial motivation for the attorneys representing the eNGOs to run up attorneys’ fees or use the case to support fundraising.

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### **6. Begin Preparing Defenses to a Likely Citizen Suit.**

Carefully read the NOI and begin to prepare other key defenses to a potential citizen suit – e.g., lack of or deficient notice, standing, and mootness. The NOI must allege specific noncompliance so that a defendant



understands what corrective action it needs to undertake. An NOI that fails to accomplish this fundamental specificity is insufficient and can be a basis for dismissal for lack of notice. Evaluate the NOI for possible standing infirmities (injury-in-fact, causation, and redressability) – though recognize that even

aesthetic value alone can be enough and not just harm to the environment. Determine the corrective actions already taken and those still needed, and begin developing documentation to support mootness claims to limit efforts to obtain injunctive relief.

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*Beveridge & Diamond focuses on environmental and natural resource law as applied to business strategy, regulatory compliance, transactions and project development, litigation, and dispute resolution. We help clients around the world resolve environmental and sustainability issues relating to facilities, products, and operations.*

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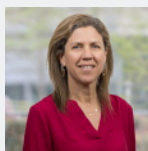
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