



# Oregon

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## Oregon Energy Facility Siting Council Radioactive Materials Enforcement Rulemaking Advisory Committee Meeting #1 Summary

**Date:** Wednesday, July 15, 2020

**Time:** 8:30 am – 12:00 pm

**Place:** Remote Meeting (Webex)

**RAC Members:** Lisa Atkin, Gilliam County; Erin Saylor, Columbia Riverkeeper; Shirley Weathers, League of Women Voters of Oregon; Damon Motz-Storey, Oregon Physicians for Social Responsibility; Jim Denson, Waste Management; Sarah Wheeler, DEQ; Hillary Haskins, OHA; Daryl Leon, OHA; Mason Murphy, Confederated Tribes of the Umatilla Indian Reservation; Dave Smith, former ODOE staff

**ODOE Staff:** Ken Niles, Jeff Burrigh, Todd Cornett, Maxwell Woods, Patrick Rowe (DOJ), Christopher Clark, Michiko Mata

**Public Comment:** Mike McArthur

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**RAC members and staff introduced themselves and discussed their interest in the rulemaking.**

**Staff asked if there were any issues RAC members would like to raise that were not identified in the issues document provided by staff.**

- Mr. Murphy suggested the RAC should look at waste manifests and should look at definition of TENORM.
- Staff noted the suggestion and clarified that the definitions were outside of the scope of this rulemaking due to constraints imposed by statute.

**Staff provided an opportunity for public comment.**

- Mike McArthur, representing Les Ruark a landowner from northern Gilliam County, requested confirmation that the Department had received a letter they had submitted.
- Staff confirmed, and explained that in response to concerns that some interested members of the public may not be able to fully participate in the RAC process due to timing conflicts with agricultural production, the Department had committed to holding a public workshop for interested members of the public to provide input on any draft proposed rule prior to their being considered by Council.

- Mr. Clark also confirmed that staff was open to including an additional public representative from Gilliam County and would work with Mr. Ruark and Mr. McArthur.

**Issue #1: Staff requested the RACs advice on whether or not the establishment of separate procedures for enforcement of laws and rules related to the transportation or disposal of radioactive materials is warranted.**

- The RAC generally agreed that differences between the regulations governing the transport and disposal of radioactive materials and wastes, the nature of the potential violations and impacts that may occur, and the responsible parties involved warrant the establishment of separate procedures.
  - RAC members generally agreed that separate procedures may improve the clarity and predictability of the rules.
  - Several RAC members pointed out that, unlike energy facility site certificate holders, persons that may transport and dispose of radioactive materials and wastes subject to regulation under ORS 469 do not have an ongoing contractual or regulatory relationship with the Department and may operate much differently than power producers and utilities.
- Several RAC members suggested looking at the DEQ rules in OAR 340-012 as a model.
  - Ms. Wheeler explained that that DEQ has one set of procedures that accommodates multiple types of violations and responsible parties, but that the classification of rules, consideration of mitigating and aggravating factors, and calculation of penalty amounts vary depending on the type of violation.
  - Mr. Denson recommended that both the regulated community and the public benefit when processes are aligned across agencies.

**Issue #2: Staff requested the RAC's advice on whether or not changes should be made to the way violations involving radioactive materials or wastes are classified.**

- Staff explained that, under OAR 345-029-0030, a penalty may not be assessed unless staff finds the violation is repeated, resulted from the same cause or problem as a previous violation, is willful, or results in a significant adverse impact on public health and safety or the environment.
  - Most RAC members agreed that the Department should have some discretion to assess a penalty for an initial violation.
  - Some RAC members stated that a penalty for an initial violation would not always be appropriate, especially when the responsible party was not aware of the violation, or when the responsible party takes appropriate corrective actions.
- Several RAC members recommended that the criteria specifying that a penalty is allowed when a violation “results in a significant adverse impact on the health and safety of the public or on the environment” should be amended to allow a penalty when there is a potential for harm.
  - RAC members suggested this was important because identifying specific damages can be difficult, but accumulation of radioactivity in the environment over time increases overall risks and is difficult to remediate.

- RAC members discussed the criteria allowing a penalty for an initial violation that is found to be willful.
  - Mr. Smith suggested that the criteria should be amended to allow a penalty when “a person should have reasonably known” that a violation was likely to occur.
  - Dr. Weathers suggested there should be more focus on what options exist to hold a waste generator and/or transporter accountable since they may have more familiarity with the contents of waste than a waste facility operator. Staff responded that it was difficult to apply rules to waste generators/transporters because division 050 only applies to persons holding or storing waste materials.
- RAC members discussed how prior violations should be considered in classifying a violation.
  - Staff explained that the current rules allow a penalty when the same person has been noticed for a previous violation of the same rule, or if the violation stems from the same underlying cause as a previous violation.
  - RAC members suggested the rule should specify whether the Department will look at all previous violations, or just previous violations of the same rule.
- Several RAC members suggested that OAR 340-012-0053, and additional guidance provided in the DEQ’s Enforcement Guidance Internal Management Directive (IMD), provided a good example for determining how to classify a penalty, when a penalty should be allowed, and how to address prior violations.
  - Ms. Wheeler explained that the DEQ’s IMD provides a table for every program area and prescribes an enforcement action based on the factors of the case, such as the level of risk (e.g. location, amount, and type of waste) and history of noncompliance. If the violation is low risk and is a first instance of noncompliance, DEQ issues a Warning Letter. If not, DEQ will issue a pre-enforcement notice which can be converted to a Notice of Violation and Civil Penalty Assessment.
  - Mr. Denson noted that in addressing prior violations, the DEQ solid waste rules look at all violations in the 36 months prior to the violation in determining whether or not to issue a warning letter or pre-enforcement notice. Sarah Wheeler added that DEQ rules also consider previous violations in the calculation of penalty amounts.

**Issue #3: Staff requested the RAC’s advice on whether the rules should provide additional options or requirements for responses to a notice of violation rather than simple admission or denial of an alleged violation.**

- Most RAC members agreed that it was reasonable to allow the responsible party to propose or agree to corrective actions to resolve an alleged violation without admitting responsibility.
  - Mr. Rowe explained that this issue came up because legal counsel from Waste Management requested the ability to propose corrective actions without admitting to a violation, which is prohibited by current rules.

- Ms. Wheeler explained that under DEQ rules, a responsible party must admit or deny any alleged violations and provide any affirmative defenses in a request for a contested case hearing on an Order imposing a penalty order, but may settle the issue through other means without doing so. She mentioned that some final orders may contain clauses stipulating that the responsible party does not admit to any of the alleged violations.
- Some RAC members suggested that the goal of enforcement actions should be to address the impact of a violations through corrective actions, and that allowing more flexibility to reach a settlement would help facilitate that.
- Dr. Weathers asked if there could be a problem with enforcing a settlement order when there is a responsible party that denies responsibility and refuses to complete the corrective actions. Staff responded that the Department would likely retain the ability to assess a penalty if the corrective actions were not completed.
- Staff committed to reviewing procedural requirements of ORS chapter 183 and bringing a recommendation back to the RAC.

**Issue #4: Staff requested the RAC’s advice on whether a penalty should be based on date of discovery or the date of the actual violation instead.**

- RAC members generally agreed that it would be appropriate to determine the amount of penalty based on the date of violation, but that some discretion should be maintained.
- Staff noted that because the date of discovery is the date that the responsible party becomes aware of conditions or circumstances that may violate a rule or law, it is often difficult to establish a date. Unless a responsible party acknowledges an earlier date, the date staff first contacts the responsible party about an alleged violation is the de facto date of discovery.
  - Mr. Smith suggested that the exemption pathways for radioactive wastes can be difficult to apply, and that it may be difficult to establish that a person “should have known” a violation would occur on the date an action was taken.
- Staff asked if there should be a limitation on how far back to look, or if there should be a cap on the total amount.
  - Ms. Saylor stated that some EPA regulations cap penalty amounts based on the type of violation, or based on a specific time period related to the statute of limitations.
  - Ms. Atkins recommended maintaining some discretion in how far back to look because it may not be appropriate to penalize a responsible party for a violation that occurs without their knowledge if the responsible party reports the violation and commences corrective action when they become aware.
  - Some RAC members recommended looking at DEQ rules, which have factors for duration and then an overall cap, but also allow for the option to consider each day a separate violation if necessary.

**Issue #5: Request for input on what the appropriate base penalty amount should be?**

- RAC members recommended that staff should research rulemaking history to determine why penalties were set at \$100 per day of violation.
  - Some RAC members recommended that \$100 was likely not sufficient, but thought more information about the intent of the rules and other data would be helpful.
  - Ms. Saylor suggested the \$25,000 per day maximum in statute may have been intended to align with the maximum penalty under the federal Resource Conservation and Recovery Act. They noted the maximum for these penalties was recently increased to \$37,500.
- RAC members were generally supportive of a cap on the total amount of penalty that could be assessed for a single violation, as long as the cap was high enough to still incentivize compliance and corrective actions. Some RAC members were concerned that if a cap was too low, penalties could just be seen as a “cost of doing business.”