

Radioactive Materials Enforcement (R195)
Issues Analysis Document
August 18, 2020

At its May 21, 2020 Council Meeting, the Energy Facility Siting Council approved the use of a Rules Advisory Committee (RAC) to assist in the development of proposed rules for its Radioactive Materials Enforcement Rulemaking Project. The project will focus on rules in OAR chapter 345, division 029 that provide for the enforcement of laws and rules governing the transport and disposal of radioactive materials and waste in Oregon.

This document provides a summary of the Department's analysis and recommendations for issues included in the project. The document and any associated draft rules are for information only, and are not notice of rulemaking action by the Energy Facility Siting Council. The analysis within is subject to change based on input from the Council, staff, and stakeholders.

OAR 345-029 – Procedures for the enforcement of laws and rules related to the transportation or disposal of radioactive materials.

Issue Description: Procedures for the Council's enforcement of laws and rules related to energy facility siting and site certificate conditions may not be appropriate for the enforcement of laws and rules related to the transportation or disposal of radioactive materials.

Issue Summary: Currently, OAR 345-029 applies to certificate holders, radioactive materials transport permit holders, and any other persons who are otherwise subject to the requirements of ORS chapter 469 or OAR chapter 345. The rules also apply to a broad set of violations, including violations of the laws and rules related to energy facility siting, violations of site certificate conditions, and violations of laws and rules related to the transportation or disposal of radioactive materials.

While the Council's civil penalty authority for violations of ORS 469.300 to 469.619 and 469.930 is found in ORS 469.990, there are some important differences between the provisions relating to siting (i.e. ORS 469.320 to 469.441), provisions related to radioactive wastes and nuclear plant operations (i.e. ORS 469.525 to 469.562), and provisions related to the transportation of radioactive material (i.e. ORS 469.603 to 469.619.)

One important difference is that while the enforcement of laws and rules related to siting and site certificates themselves are largely implemented by the Council or its staff, much of the responsibility for enforcing the provisions related to the transportation or disposal of radioactive materials or wastes is vested in the Director of the Department of Energy and implemented through the Department's Nuclear Safety & Emergency Preparedness Division. Importantly, ORS 469.540(3) authorizes the Director to order compliance or impose other safety conditions on the transport or disposal of radioactive materials or wastes if the director believes those laws or rules are being violated or are in danger of being violated.

Another difference is that while site certificate holders have regular contact with staff and are subject to ongoing monitoring and reporting obligations in order to maintain compliance the site certificate, other persons subject to rules and laws related to the transport or disposal of radioactive materials or wastes may not have the same incentives to monitor and mitigate for potential violations and promptly report violations when they occur.

Finally, because the nature of risks to public health or the environment associated with violations of the rules governing the transportation and disposal of radioactive materials differ significantly from risks associated with the construction and operation of energy facilities, it may be appropriate to establish a different framework for deterrence, prevention, and corrective action.

Alternatives:

- Establish provisions specific to the enforcement of all laws and rules related to the transportation or disposal of radioactive materials or wastes under the existing framework in OAR 345-029.
- Establish a new framework for enforcement of laws and rules related to the transportation of radioactive materials, and to the enforcement of laws and rules related to the disposal of radioactive wastes.

Discussion: The RAC discussed this issue at its July 15, 2020 meeting. 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. Several RAC members suggested looking at the DEQ rules in OAR 340-012 as a model for proposed rules.

OAR 345-029-0030 –Classification of violations involving radioactive materials and wastes

Issue Description: The current rules only allow for the imposition of penalties for Class II violations.

Issue Summary: Under OAR 345-029-0030(1) any violation of ORS chapter 469 or OAR chapter 345-050 or 345-060 is considered to be a Class I violation. The department may consider a number of factors, including whether or not the responsible party reported the violation or took corrective actions, and the duration and impacts of the violation, when deciding whether or not to escalate to a Class II violation, but the violation may only be escalated if the Department finds that the violation meets one of the following criteria:

- It is a repeated violation that could reasonably have been prevented by the responsible party by taking appropriate corrective actions for a prior violation;
- It resulted from the same underlying cause or problem as a prior violation;
- It is a willful violation; or
- The violation results in a significant adverse impact on the health and safety of the public or on the environment.

Because violations involving radioactive materials or waste may result in long lasting risks to the health and safety of the public and the environment without creating an immediate significant adverse impact, staff believes that there may be some instances where a penalty for a first violation is warranted. It may also be appropriate to consider factors not listed in the current rule, such as whether or not a violation is reversible (e.g., whether disposed waste may be feasibly removed), when classifying violations involving radioactive materials.

Alternatives:

- No Action
- Establish that any violation involving radioactive materials or wastes may be escalated to a Class II Violation based on consideration of factors in rule.
- Establish additional factors for consideration when classifying violations involving radioactive materials or wastes.
- Establish a separate classification scheme for violations involving radioactive materials or wastes.

Discussion: The RAC discussed this issue at its July 15, 2020 meeting. Most RAC members agreed that the Department should have some discretion to assess a penalty for an initial violation radioactive materials, but

some RAC members stated that a penalty 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.

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. The 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 violation is low risk and first instance of noncompliance, DEQ issues Warning Letter. If not DEQ will issue a pre-enforcement notice which can be converted to a Notice of Violation and Civil Penalty Assessment.

OAR 345-029-0030 – Convention for classifying violations.

Issue Description: Rules do not follow convention that lower numbers indicate more severe violation.

Issue Summary: The rules provide for two classes of violation, with Class II being more severe than Class I. It is more typical in Oregon law for Class I Violations to be the most severe, with subsequent classes reflecting less severe violations. Staff believes it may be appropriate to reverse the order of the classifications in rule to be consistent with other state statutes and rules. If a change were made, it would be applicable to all types of violations.

Alternatives:

- No Action
- Reverse order of violation numbering

Discussion: At the July 15, 2020 meeting, one RAC member commented that both regulators and the regulated community benefit from consistency between agencies and cited this issue as an example of how inconsistency between agencies can be confusing for regulated industry.

OAR 345-029-0040 – Response to Notice of Violation

Issue Description: The current rule requires that a party receiving a Notice of Violation must either admit or deny a violation.

Issue Summary: Under the current rule, a party receiving a Notice of Violation must respond either admitting or denying that the violation has taken place. There may be situations wherein a party neither admits nor denies an alleged violation but is willing to take responsibility for corrective action. Furthermore, the rule currently does not require an identified party to provide a reason for denying a violation. Additional response options or requirements may be appropriate.

Alternatives:

- Take no action
- Add additional an additional response option similar to a “no contest” response that allows a party to complete corrective action without admitting the violation.

- Establish a requirement that identified parties who received a Notice of Violation must provide explanation or justification for a denial of the violation in the written response.

Discussion: The RAC discussed this issue at its July 15, 2020 meeting. 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. RAC members commented 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 a penalty order, but may settle the matter without doing so and may stipulate that the responsible party does not admit to any of the alleged violations. Some RAC members thought that allowing more flexibility to reach a settlement would help facilitate the goal of addressing the impact of a violations through corrective actions. We note that providing additional guidance for settlement of enforcement orders is also discussed in the issue on OAR 345-029-0090 below.

OAR 345-029-0060(1)(a)(B) – Penalty amounts for violations of OAR 345-050

Issue Description: Penalty amounts allowed by rules may not be sufficient to incentivize prevention and mitigation of violations of OAR 345-050.

Background: ORS 469.085(6) requires the Director or Council to adopt a schedule of civil penalty amounts for particular violations by rule. The penalty for a violation of ORS 469.300 to 469.619 or rules adopted pursuant to those sections may not exceed \$25,000 per day of violation under ORS 469.992.

Under OAR 345-029-0060(1)(a)(B), the base penalty for the improper storage or disposal of radioactive waste in Oregon under ORS 469.525 and OAR 345-050-0006 is \$100 per day from the date of discovery of the violation. The base penalty amount may be increased by up to 500% if the Department finds that the violation was intentional or reckless, and involved a requirement relating to public health, safety, or the environment.

Alternatives:

- Maintain the current base penalty amount of \$100 per day
- Establish a new base penalty amount for all violations of OAR 345-050
- Establish a schedule of penalty amounts for violations of OAR 345-050 based on the type or severity of the violation, or other factors.

Discussion: At the July 15, 2020 meeting Staff requests the RACs advice on whether the base penalty of \$100 per day is appropriate for these types of violations. While the RAC did not have a specific recommendation on penalty amounts, some felt that the current amount of \$100 per day was not sufficient to deter future violations or incentivize mitigation when a violation occurs. Given the general direction from the RAC to look to rules in OAR 340-012 as a model for proposed rules, staff has developed a proposed penalty matrix based on the magnitude of the violation, similar to that used for penalties under OAR 340-012-0130. The matrix has been included in Appendix 1 for the RAC's consideration.

OAR 345-029-0060(1)(a)(B) - Date of Discovery for a Violation.

Issue Description: Penalty amounts based on date of discovery of a violation may not adequately incentivize evaluation and monitoring of radioactive materials.

Issue Summary: Under OAR 345-029-0060(1)(a)(B), the base penalty for a violation of OAR 345-050 is \$100 per day from the date of discovery of the violation. Effectively, this provision limits the imposition of a penalty for a person who unknowingly disposes of radioactive materials at a site in Oregon, or who knowingly disposes

of radioactive materials that does not meet the definition of radioactive waste under ORS 469.300 based on incorrect or invalid information.

While some limitations on penalty amounts for violations that are not willful may be appropriate, the Department is concerned that the rule may not adequately incentivize persons who may accept materials that could contain radioactive waste to properly monitor or evaluate materials those materials to ensure no violation will occur.

Rather than calculating penalty amounts from the date of discovery of a violation, it may be more appropriate to calculate the penalty amount from the actual date of violation, with or without a cap on the total penalty amount. A second option would be to establish a schedule of per violation penalty amounts of not more than \$25,000 for violations of OAR 345-050. An additional per day amount from the date of violation or discovery could also be added to further incentivize monitoring of disposal sites and prompt reporting of potential violations.

Alternatives:

- Make no changes
- Amend rule to establish that penalties for violations of OAR 345-050 will be calculated from the date of violation.
- Amend rule to establish a schedule of per violation penalty amounts for violations of OAR 345-050; and
 - Set no additional per day amount
 - Set an additional per day amounts from the date of discovery.
 - Set an additional per day amounts from the date of violation.

Discussion: The RAC discussed this issue at its July 15, 2020 meeting. The RAC 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. When asked if there should be a limitation on how far back to look, or if there should be a cap on the total amount, some RAC members suggested that these limitations may be appropriate, and suggested staff review the DEQ rules, which have factors for duration and then an overall cap, but also allow for option to consider each day a separate violation if necessary.

OAR 345-029-0060(1)(a)(C) – Penalty amounts for violations of OAR 345-060

Issue Description: Penalty amounts allowed by rules may not be sufficient to incentivize prevention and mitigation of violations of an Oregon Radioactive Materials Transport Permit.

Issue Summary: ORS 469.085(6) requires the Director or Council to adopt a schedule of civil penalty amounts for particular violations by rule. The penalty for a violation of ORS 469.300 to 469.619 or rules adopted pursuant to those sections may not exceed \$25,000 per day of violation under ORS 469.992.

Under OAR 345-029-0060(1)(a)(C), the base penalty for failure to provide to provide specific shipment information for a shipment traveling under an Oregon Radioactive Materials Transport Permit as required by OAR 345-060, the penalty is \$250 for the first violation and \$500 for each subsequent violation in a calendar year.

The base penalty amount may be increased by up to 500% if the Department finds that the violation was intentional or reckless, or involved a requirement relating to public health, safety, or the environment.

Alternatives:

- Maintain the current penalty amount of \$250 for the first violation and \$500 for each subsequent violation in a calendar year.
- Establish a new penalty amount for all violations of OAR 345-060
- Establish a schedule of penalty amounts for violations of OAR 345-060 based on the type or severity of the violation, or other factors.

Discussion: Given the general direction from the RAC to look to rules in OAR 340-012 as a model for proposed rules, staff has developed a proposed penalty matrix based on the magnitude of the violation, similar to that used for penalties under OAR 340-012-0130. The matrix has been included in Appendix 1 for the RAC's consideration.

OAR 345-029-0090 – Remittal or mitigation of penalties

Issue Description: Rules do not provide for imposition of terms and conditions for the remittal or mitigation of penalties for violations involving radioactive materials or wastes.

Issue Summary: ORS 469.085(8) authorizes the Council or Director to impose terms and conditions for the cancellation or reduction of a civil penalty. The law also requires the Council or Director to consider the economic and financial condition of the responsible party when determining if a penalty should be cancelled or reduced upon the request of the responsible party.

Under OAR 345-029-0090, the Council may rescind or reduce a civil penalty upon a showing that (1) the penalty would be an unreasonable economic and financial hardship to the responsible party, (2) that the responsible party has taken prompt and effective action to correct the violation and ensure that it will not be repeated, or (3) that the responsible party reported the conditions or circumstances of the violation as a result of a routine audit conducted as part of an ongoing comprehensive compliance audit program.

The rules do not explain how the Council will determine when an action under (2) is considered to be effective, or if the Department or Council may specify what additional actions must be taken for a penalty to be reduced or cancelled when the actions implemented by the responsibility are found to be insufficient. It may be appropriate for the rule to explicitly provide a mechanism for the Council or Department to impose additional terms and conditions, such as remediation of contaminated areas or implementation of additional monitoring programs, that must be satisfied for a penalty to be reduced or cancelled. Staff notes that such terms and conditions are likely authorized under ORS 469.540(3), as discussed further in the next issue.

As an example, the rules under OAR 340-012 separately provide DEQ with the authority to reduce a penalty based on inability to pay under OAR 340-102-0162, or to settle a civil penalty based on a number of factors, including the introduction of new information, the effect of the settlement on deterrence, and whether the responsible party has or is willing to employ extraordinary means to correct the violation or maintain compliance. The Council could adopt a similar rule explaining that the Council may settle or reduce a penalty based on the responsible party's willingness to take corrective or preventative actions acceptable to the department, or other similar factors.

Alternatives:

- Take no action
- Establish that the Department or Council may impose additional terms or conditions for the reduction or cancellation of penalties for violations involving radioactive materials or wastes.

Discussion: Staff notes that in discussion of rules requiring an admission or denial of a violation in the response to violation required under OAR 345-029-0040 on July 15, 2020, several RAC members stated that allowing flexibility in the settlement process may help obtain corrective actions and facilitate the goals of the compliance program. Staff requests the committee's advice on whether the rules should provide for the imposition of additional terms or conditions for the reduction or cancellation or penalties.

New Rule – Imposition of Compliance or Safety Conditions

Issue Description: The rules do not appear to contemplate the Department's authority to impose additional compliance or safety conditions for violations involving the transport or disposal of radioactive materials or wastes under ORS 469.540(3).

Issue Summary: OAR 345-029-0040 provides that in a response to a notice of violation, the responsible party must state whether or not it can identify suitable corrective action and describe both the immediate corrective action taken and additional actions the responsible party plans to take to minimize the possibility of occurrence. The rules make no mention of the Department's authority to impose additional compliance or safety conditions on the transport or disposal of radioactive materials or wastes under ORS 469.540. Importantly,

While no rule is required for the Department to take these actions, describing a process for ordering compliance or imposing conditions authorized by statute, and clarifying how such orders and conditions may affect other steps in the compliance program under OAR 345-029 may improve the transparency and effectiveness of the rules.

Alternatives:

- Make no changes, rely on statute.
- Adopt new rule for ordering compliance or imposing conditions under ORS 469.540(3).

Discussion: Staff requests the committee's advice on whether or not a new rule implementing ORS 469.540(3) should be adopted, and if so, what should be included in such a rule.