

## Radioactive Materials Enforcement (R195)

### Issues Analysis Document

October 30, 2020

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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.

**Staff Recommendation:** Establish a new series of rules specific to the enforcement of rules and laws governing the transport and disposal of radioactive materials or wastes. Staff’s draft proposed rules are presented as OAR 345-029-0503 through 345-029-0560 in the draft proposed rules provided to the committee.

The rules would utilize some aspects of the DEQ rules in OAR chapter 340, division 012 while maintaining the basic structure of the current rules. For example, rather than issuing a Notice of Violation at the initiation of the enforcement process, the new rules require the Department to first issue a Pre-enforcement Notice, followed by a Notice of Enforcement Action, but the rules retain the opportunity for the responsible party to respond and provide information at an enforcement conference. New applicability rules have been proposed under OAR 345-029-0003 and 345-029-0503 to clarify the scope of each section of rules.

Because the technical staff within the Department with subject matter expertise over radioactive materials and wastes generally operate under the Director’s authority, staff recommends the rules specify that implementation of the new proposed rules will be delegated to the Director as well, except in cases where the responsible party is an energy facility site certificate holder.

## **OAR 345-029-0030, 345-029-0530 –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 involving 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.

**Staff Recommendation:** Adopt a separate classification scheme for violations involving the transport or disposal of radioactive materials or wastes. Staff’s proposed scheme would categorize violations based on the rule or statute violated and then classify them to generally correspond with the potential for impacts to public health and safety. The draft proposed rules provide the Director with discretion in whether or not to assess a civil penalty but make a penalty available for all violations.

**OAR 345-029-0030, 345-029-0530 – 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.

**Staff Recommendation:** Reverse the order of violation numbering throughout OAR chapter 345 so that Class I violations are those that generally present the greatest potential for impacts to public health and safety and are therefore subject to greater sanctions.

**OAR 345-029-0040, 345-029-0520 – 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 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.

**Staff Recommendation:** Maintain requirement for responsible party to provide a written response to a Notice of Violation (now a “Pre-Enforcement Notice” in the draft proposed rules), but remove requirement for response to admit or deny alleged violation to allow flexibility at this point of the process. Instead, the draft proposed OAR 345-029-0520(3) provided to the committee requires the response to include a statement of facts relevant to the Director’s determination that a violation occurred.

## **OAR 345-029-0060, 345-029-0560 – 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 developed the proposed penalty matrix in Appendix 1 which based classification on the magnitude of the violation.

The RAC reviewed the matrix at its August 26, 2020 meeting. Some committee members recommended the rules classify penalties based on the type of violation and use a modifier for magnitude to reflect the size of impact or risk of impact to public health or the environment, similar to the methodology DEQ uses to determine penalty amounts. RAC members did not raise concerns with the proposed penalty amounts, but some did comment that the penalties for violations involving the actual or potential release of radioactivity into the environment should be significantly higher than penalties for other types of violations.

**Staff Recommendation:** Establish a new schedule of base penalty amounts based on the type of violation and allow for modification based on other factors as provided in the draft proposed OAR 345-029-0560/A provided to the committee.

## **OAR 345-029-0060, 345-029-0560 - 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:**

- Maintain a per day penalty for violations of OAR 345-050, with the total penalty amount calculated from the date of discovery.
- Amend rule to establish a per day penalty for violations of OAR 345-050, with the total penalty amount calculated from the date of violation.
- Amend rule to establish a per violation penalty amount for violations of OAR 345-050, with a factor to adjust for duration.
- Amend rule to establish a per violation penalty amount for violations of OAR 345-050, with a factor to adjust for duration and an additional amount for “economic benefit.”

**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 an adjustment factor for duration and then an overall cap, but also allow for option to consider each day a separate violation if necessary.

In discussion at the August 26, 2020 RAC meeting, one committee member suggested that rather than imposing a cap, the Department could pursue the total available penalty amount and then reduce the amount through the settlement or disposition of the penalty as appropriate. The member also said ongoing violations could be addressed by stipulating that no further penalties would be levied if appropriate corrective action is taken. Another committee member commented that not placing a cap on penalties could disincentivize the department from taking prompt action.

The department also requested the committee’s feedback on whether the Department should consider whether or not “economic benefit” should be considered in its penalty calculation, noting that Oregon DEQ’s penalty formula uses EPA’s BEN model to estimate avoided costs of compliance. A committee member commented that the model is not perfect and does not capture some benefits such as illegal profits, but is effective at compelling compliance because the economic benefit penalty can be reduced based on expenditures related to corrective or preventative actions. Staff notes that if economic benefit was considered, it would still be subject to the \$25,000 per day of violation limit on penalties imposed by statute.

**Staff Recommendation:** Establish that penalties for violations involving radioactive materials and wastes may be calculated for “each day of violation.” This is intended to allow a penalty to be calculated from the date of violation, while leaving some discretion for staff to develop guidelines for addressing ongoing violations which extended over longer periods of time.

Staff have also provided alternative rule language which establishes a per violation penalty amount with a factor to adjust for duration, similar to the DEQ rules. The alternative language also includes a consideration for economic benefit. The Department will only adopt one version of the rule, although either version may be amended after receiving feedback from the RAC.

## **OAR 345-029-0060, 345-029-0560 – 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 developed the proposed penalty matrix in Appendix 1 which based classification on the magnitude of the violation.

The RAC reviewed the Matrix at its August 26, 2020 meeting. Some committee members recommended the rules classify penalties based on the type of violation and use a modifier for magnitude to reflect the size of impact or risk of impact to public health or the environment, similar to the methodology DEQ uses to determine penalty amounts. RAC members did not raise concerns with the proposed penalty amounts, but some did comment that the penalties for violations involving the actual or potential release of radioactivity into the environment should be significantly higher than penalties for other types of violations.

**Staff Recommendation:** Establish a new schedule of base penalty amounts based on the type of violation and allow for modification based on other factors as provided in the draft proposed OAR 345-029-0560/A provided to the committee

## **OAR 345-029-0070, 345-029-0555 – Jurisdiction for Contested Cases**

**Issue Description:** New rules should specify whether the Director or Council will be responsible for conducting contested case proceedings on a Notice of Violation.

**Issue Summary:** The current rules require the Council to conduct a contested case proceeding when a hearing on an order assessing a civil penalty is requested, in accordance with ORS 469.085 and 183.475. The contested case hearing is conducted under the applicable provisions of OAR chapter 345, division 015.

While these rules are adopted under the Council's authority, it may be more appropriate for a contested case hearing on an order issued under the Director's authority to be conducted by the Director, and not Council. While procedurally, the contested case would be conducted in largely the same manner, there could be some important differences based on which agency conducts the contested case.

EFSC is exempt from using Administrative Law Judges from the Office of Administrative Hearings (OAH) to conduct its contested cases, whereas the Director is not. As a result, the option to appoint a Hearing Officer would not be available for a contested case conducted by the Director and the hearing would likely be required to be conducted under OAH's model rules. In either case, the final order in the contested case would be subject to judicial review by the Court of Appeals under ORS 183.482. If the contested case is conducted by the Council, there may be additional procedural steps required to accommodate the Council's public meeting requirements and decision-making process.

In addition to determining which agency will conduct the contested case, it may be necessary to specify what types of orders are considered contested cases under the rules. ORS 469.085 and 183.475 require the opportunity for a contested case hearing on a civil penalty order, but it is not clear if such an opportunity is required for enforcement actions that do not include a penalty.

**Alternatives:**

- Specify that the Council will conduct contested case hearings on all orders assessing a civil penalty
- Specify that the Council will conduct contested case hearings on all orders issued under OAR chapter 345, division 029.
- Specify that that the Director will conduct contested case hearings on its own orders assessing a civil penalty for a violation involving radioactive materials or wastes
- Specify that the Director will conduct contested case hearings on all orders related to violations involving radioactive materials or waste.

**Discussion:** Because these rules are adopted under the Council's authority, it may be appropriate for the Council to retain a role as referee in the event that a hearing is requested, however it may be confusing for a responsible party to navigate a jurisdictional split if a proposed order is issued by the Director. If the rules specify that implementation of the new rules is delegated to the director, it may be appropriate to specify that the director is also responsible for conducting the contested case hearings.

**Staff Recommendation:** Specify that the Director will conduct contested case hearings on all orders related to violations involving radioactive materials or waste.

**OAR 345-029-0090, 345-029-0555 – 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 340-012-0162, 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:** 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.

At its August 26, 2020 meeting, the RAC discussed this issue further. Several committee members raised concerns about potentially changing the violation classification based on corrective actions taken after the enforcement process had begun, but generally agreed that it would be appropriate to reduce penalties in a disposition or settlement of a penalty based on the responsible party's cooperation and performance of corrective actions.

**Staff Recommendation:** Establish that the Department may order compliance or corrective actions in its notice assessing a penalty and authorize settlement of penalty amounts, as provided in the draft proposed OAR 345-029-0555 provided to the committee. Maintain existing provisions to allow mitigation or reduction of penalty amounts in a Final Order after a contested case.

**Radioactive Materials Enforcement (R195)**  
**Issues Analysis Document - Appendix 1**  
**Civil Penalty Structure Concepts**  
**8/18/20**

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This document was generated for the purpose of stimulating discussion among the RAC, and does not reflect a preference or position of the Oregon Department of Energy or the Energy Facility Siting Council. The analysis and recommendations within are subject to change based on input from the Council, staff, and stakeholders.

The general structure of the table took inspiration from the following examples:

- OAR 333-124 (Civil Penalties related to violations of Oregon Health Authority rules on radioactive licensing) <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=1319> and
- OAR 340 Division 12, DEQ Civil Penalty structure <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=1433>

Table 1 provides a possible penalty structure for violations of OAR 345, Division 050. Violations are classified based on severity of the impact or potential impact on public health and safety or the environment. Severity would be determined based on factors including, but not limited to location of the disposed waste, the amount of area affected, the composition and inherent radioactivity of the waste, and how accessible the waste is to public. Base penalty amounts apply to each day of violation, and may be increased upon the Department or Council's finding that the violation was willful or reckless, repeated, or was irreversible. A cap on the total amount of civil penalty that can be imposed is provided for lower level violations.

Table 2 provides a possible penalty structure for violations of OAR 345, Division 060. Specific rule violations are classified based on the potential for harm to public health and safety or the environment. Base penalty amounts apply to each violation, and may be increased upon the Department or Council's finding that the violation was willful or reckless, or repeated.

Mitigation of penalty amounts, or non-enforcement options are discussed elsewhere in the issues analysis, however staff recommends that Class 3 violations in both tables could be resolved with a warning if the violation is corrected without impact to health or environment.

**Table: Division 50 Penalty Matrix**

<b>Class</b>	<b>Base Penalty (Per Day)</b>	<b>Willful or reckless</b>	<b>Repeated</b>	<b>Irreversible</b>	<b>Maximum Penalty</b>
Class 1 – Violation resulting in significant adverse impact to health or environment or reasonable expectation of significant adverse impact if corrective action is not taken to limit exposure.	\$10,000	2.5	X2.5	X2.5	\$25,000 per day of violation
Class 2 – Violation resulting in no adverse impact on health or environment, but there is reasonable expectation of low or moderate impact if exposure was not controlled (e.g., by being buried or isolated somehow).	\$1,000	X5	X2	X2.5	\$25,000 per day of violation, up to \$1,000,000
Class 3 – Violation resulting in no more than a minimal adverse impact on health or environment, with no reasonable expectation of additional impact to health or environment.	\$500	X5	X2	X2.5	\$12,500 per day, up to \$500,000

**Table 2: Division 60 Penalty Matrix**

<b>Class</b>	<b>Violations</b>	<b>Base Penalty (Per Violation)</b>	<b>Willful or reckless</b>	<b>Repeated</b>
Class 1	Failure to immediately report an accident involving a radioactive material shipment that results in a spill or release of radioactivity	\$10,000	X2.5	X2.5
Class 2	Failure to follow an appropriate route Failure to immediately report an accident involving a radioactive material shipment that does not result in a spill or release or radioactivity	\$1,000	X5	X2
Class 3	Transporting radioactive material without an Oregon permit Transporting radioactive material without reporting the shipment Failing to pre-notify the state to inspect certain shipments Failure to pay transport fees Failure to properly mark/placard a shipment	\$500	X5	X2

## Reference Comparison: DEQ Penalty Structure

### Formula for calculating civil penalty

Under OAR 340-012, DEQ determines the amount of civil penalty using the following formula:

$$BP + [(0.1 * BP) * (P + H + O + M + C)] + EB^1$$

Where:

- **BP** equals the Base Penalty for the violation. (See discussion below)
- **P** equals a value from 0 to 10 based on the number of prior violations cited in formal enforcement actions against the responsible party, adjusted for the severity and recency of the violations.<sup>2</sup>
- **H** is a value from -2 to 0 based on the responsible party's history of correcting prior violations.<sup>3</sup>  
**O** is a value from 0 to 4 based on the number of occurrences of a repeated or ongoing violation.<sup>4</sup>
- **M** is a value from 0 to 10 based on the "mental state" of the responsible party, such as whether the violation was a result of negligent, reckless, or flagrant conduct.<sup>5</sup>
- **C** is a value from -5 to 2 based on the responsible party's efforts to correct or mitigate the violation.<sup>6</sup>
- **EB** equal the economic benefit gained and costs avoided as a result of the responsible party's noncompliance. This calculation is typically made using models produced by the US Environmental Protection Agency.<sup>7</sup>

### Base Penalties under OAR 340-012

Using the DEQ formula, a Base Penalty may be increased by up to 260% or decreased by up to 70% based on the mitigating and aggravating factors described above. The Base Penalty is determined based using a matrix of penalty amounts based on the classification and magnitude of the violation. The \$12,000 matrix, shown in the table below, applies to violations of rules, laws, and permits governing solid waste and hazardous waste:

**Table 3: DEQ \$12,000 Penalty Matrix, OAR 345-012-0140(2)**

	Class III	Class II	Class I
Minor	\$1,000	\$1,500	\$3,000
Moderate	\$1,000	\$3,000	\$6,000
Major	\$1,000	\$6,000	\$12,000

<sup>1</sup> OAR 340-012-0045

<sup>2</sup> OAR 340-012-0030(19); 340-012-0145(2)

<sup>3</sup> OAR 340-012-0145(3)

<sup>4</sup> OAR 340-012-0145(4)

<sup>5</sup> OAR 340-012-0145(5)

<sup>6</sup> OAR 340-012-0145(6)

<sup>7</sup> OAR 340-012-0150

The Magnitude of a violation is determined based on the degree of deviation from applicable statutes or commission and rules, standards, permits or orders; the extent of actual or potential effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. Certain categories of violations have specific thresholds for the magnitude of a violation, for example a violation involving the improper disposal of more than 55 gallons or 330 pounds of hazardous waste is considered a major violation, where a violation involving less 55 gallons or 330 pounds is considered moderate.<sup>8</sup> If no specific threshold is given, a violation is moderate unless it is found to have resulted in a significant adverse impact on human health or the environment, in which case it is considered to be a major violation; or it is found to have had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or the environment, in which case it is a minor violation.<sup>9</sup>

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<sup>8</sup> OAR 340-012-0135(4)(b)

<sup>9</sup> OAR 340-012-0130