



Oregon

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To: Energy Facility Siting Council

From: Christopher M. Clark, Rules Coordinator

Date: May 8, 2020

Subject: Agenda Item C (Action Item):
Radioactive Materials and Wastes Enforcement Rules (R195) - Council Initiation
of Rulemaking for the May 21-22, 2020 EFSC Meeting

STAFF RECOMMENDATION

The Council's enforcement program rules are in OAR 345-029. Staff recommends Council initiate rulemaking to revise rules in OAR 345-029 related to the enforcement of rules and laws governing the transport or disposal of radioactive materials and wastes in Oregon. Staff recommends that Council authorize use of an advisory committee to assist in the development of proposed rules and provide input on the potential fiscal impacts.

BACKGROUND

In its 2020-2022 Rulemaking Schedule, Council approved a rulemaking project to evaluate the current regulatory landscape and body of evidence related to the disposal of wastes containing naturally occurring radioactive materials and identify potential updates to the Council's rules under OAR 345-050, which govern radioactive waste materials. Due to statutory limitations on changes that can be made to some of those rules, staff believe legislative action may be required to fully address these issues.¹ Staff have, however, identified a number of additional issues related to the enforcement of rules and laws governing the transport and disposal of radioactive materials and wastes in Oregon under OAR 345-029 which could likely be addressed under the Council's current statutory authority. Staff recommends Council initiate rulemaking proceedings to address these issues related to OAR 345-029.

Staff notes that the proceedings may include information gathering for the issues related to OAR 345-050, but that no changes to those rules are anticipated at this time. If the legislature provides the Council with additional authority to amend rules under OAR 345-050, Staff may request Council initiate separate proceedings to address the outstanding issues related to that division.

¹ In *Forelaws on Board v. Energy Facility Siting Council*, 306 Or 205 (1988), the Oregon Supreme Court found that ORS 469.300(23)(a) limits Council's authority to modify OAR 345-050-0020, 345-050-0025, and 345-050-0035 to "revisions 'for the purpose of adding additional isotopes which are not referred to in OAR 345-50 as presenting no significant danger to the public health and safety.'"

The results of Staff's preliminary research on the enforcement of laws and rules related to the transportation and disposal of radioactive materials and wastes, and recommendations for the conduct of the rulemaking process to amend OAR 345-029 are discussed further below. Specifically, we will discuss:

- The need and authority to adopt rules;
- The recommended scope and objectives for the rulemaking proceedings, including the policy issues the project will address;
- The potential impacts on stakeholders and recommended method for obtaining stakeholder input; and
- The projected timeline for the rulemaking process.

We will conclude with a request for Council to initiate the rulemaking process. Please note that the Council is not being asked to consider proposed rule amendments or the adoption of permanent rules at this time.

Need and Authority for Rules

With some exceptions, ORS chapter 469 prohibits radioactive materials from being held or placed at any site in Oregon. Specifically, ORS 469.525 prohibits the establishment, operation, or licensure of any radioactive waste disposal facility. Under ORS 469.300(23)(a), "radioactive waste" includes any material which is discarded, unwanted, or has no present lawful economic use and contains mined or refined naturally occurring isotopes, accelerator produced isotopes, or special nuclear material, source material or by-product material. Materials containing isotopes and concentrations identified in OAR 345-050 are not considered to be "radioactive waste materials" under the meaning of the law. While the Council's authority to further restrict the isotopes and concentrations subject to regulation under OAR 345-050 is limited, the Council and the Department continue to carry responsibility for the interpretation and application of the rules.

ORS 469.605 similarly prohibits the transportation of any radioactive materials that are identified by rule as posing a significant hazard to public health and safety or to the environment without an Oregon Radioactive Materials Transport Permit issued under OAR 345-060. While some aspects of the permit program have been delegated to the Oregon Department of Transportation, the Council retains rulemaking authority to adopt procedures and requirements for the issuance and enforcement of these permits.

ORS 469.992 authorizes the Council and the Department to impose civil penalties of up to \$25,000 per day for violations of ORS chapter 469 or the Council's rules. The requirements for the assessment of penalties are described under ORS 469.085 and 183.475. The Council has adopted rules under OAR 345-029 which further describe the procedures and requirements for the assessment of penalties for several categories of violations, including but not limited to, violations of ORS chapter 469 and OAR chapter 345, site certificate conditions, Council orders, or the terms of a Radioactive Materials Transport Permit. The rules provide procedures for classifying violations and options for mitigation of penalty amounts which apply to all violation categories as well as the schedule of penalty amounts for specific categories.

Generally, the Department prefers to resolve potential violations without taking formal compliance actions, but this is not always appropriate. For example, in February 2020, the Department determined that the operator of a hazardous waste landfill had failed to properly analyze waste that contained radioactive materials before it was disposed. The Department issued a Notice of Violation requiring the responsible party to develop a corrective action plan to prevent a reoccurrence. The Department determined there was no continuing threat to landfill workers, the public, or the environment from the waste and no penalty has been assessed to date, but the process underscored the need to conduct rulemaking to ensure that the enforcement program adequately ensures compliance with the rules and orders of the Council, and protects the health and safety of the public and the environment through prevention and prompt correction of violations.

Objectives and Scope

Consistent with the need and authority for rules discussed above, Staff recommends that the objective of these proceedings be to ensure that the procedures and sanctions authorized by rule are sufficient to protect public health and safety and the environment by incentivizing preventative measures to ensure that radioactive material or waste is not improperly transported or disposed of in Oregon, and to require appropriate mitigation when a violation occurs.

Staff recommends that the scope of this project include any issues identified by the Council, the Department, or members of the public, related to enforcement of laws and rules governing the handling and disposal of radioactive materials and wastes in Oregon. Specific issues that may be considered in these proceedings include:

- Whether separate procedures are needed for the Department's enforcement of laws and rules related to the transportation or disposal of radioactive materials.
- Whether new provisions regarding the classification of violations involving radioactive materials should be established.
- Whether penalty amounts allowed by rules are sufficient to incentivize prevention and mitigation of violations involving radioactive materials.
- Whether the current rules allow the Department to set appropriate terms and conditions for the remittal or mitigation of penalties for violations involving radioactive materials.

If staff determines that rulemaking is needed to address these issues, it will also develop policy alternatives and recommended draft proposed rule language for Council's consideration. While these proceedings would focus on OAR 345-029, staff notes that conforming changes in other divisions of OAR chapter 345 may also be proposed.

Potential Impacts on Stakeholders

Because the rules in OAR 345-029 govern enforcement of existing requirements, Staff recommends that the proposed rules would not result in direct economic or other impacts on agencies, local governments, or members of the public unless a violation or potential violation of the rules and laws related to the transportation or disposal of radioactive materials or wastes

occurred. Staff notes that the rulemaking could indirectly result in some increased costs to responsible parties who take additional steps to improve monitoring or mitigation of materials containing radioactive elements to ensure compliance with the law. Staff believes these costs would likely be less than the potential costs associated with damages to the health and safety of the public and the environment if a violation were to occur.

Method for Obtaining Public Input

Because this project is considering broad policy issues, is likely to generate a high level of public interest, and may result in some fiscal impacts, staff recommends Council authorize use of an advisory committee made up of regulated entities, public interest groups, state agencies, local governments, tribal governments, and members of the public for this project. Staff does not make recommendation as to the specific organizations or individuals to be appointed to the RAC, and instead requests that Council delegate management of the advisory committee to Ken Niles, the Department’s Assistant Director for Nuclear Safety and Energy Emergency Preparedness.

Projected Rulemaking Timeline

Staff estimates that these proceedings will be completed by the end of 2020. The timeline below describes the steps that would be needed to adopt permanent rules at the Council’s November meeting.

Permanent Rulemaking Steps	Completion Date
Council initiates permanent rulemaking process.	May 21, 2020
Staff convenes advisory committee stakeholders	Jun – Aug, 2020
Council considers Proposed Rules and authorizes Notice of Proposed Rulemaking	Sep 24-25, 2020
Staff issues Notice of Proposed Rulemaking	Oct 2, 2020
Public Comment Period	Oct 2 – Nov. 19, 2020
Rulemaking Hearing	Nov 19, 2020
Council considers public comments adopts permanent rules	Nov 20, 2020
Staff files permanent rules with Secretary of State	Nov 25, 2020

Consistency with Executive Orders Related to COVID-19

Consistent with Executive Order 20-16, any advisory committee meetings or public hearings associated with this rulemaking will be conducted by telephone or other electronic means, as allowed under ORS 192.670, for the duration of the COVID-19 emergency period.

RECOMMENDED COUNCIL ACTION

Staff recommends that Council initiate rulemaking proceedings to evaluate changes needed to ensure that the Council’s rules in OAR 345-029 related to the disposal of radioactive waste materials sufficiently protect the health and safety of the public and the environment.

Staff further recommends that Council authorize use of an advisory committee to assist in the development of proposed rules and associated statements of need and fiscal impacts. Staff recommends that Council delegate management of the advisory committee to Ken Niles, the Department’s Assistant Director for Nuclear Safety and Energy Emergency Preparedness.