

DRAFT NOTICE OF PROPOSED RULEMAKING FILING

INCLUDING STATEMENT OF NEED & FISCAL IMPACT

Energy Facility Siting Council

OAR Chapter 345

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FILING CAPTION

Enforcement of Laws and Rules Governing the Transport and Disposal of Radioactive Materials and Wastes

Last Date and Time for Public Comment: Feb. 10, 2021, 5:00 pm

Jan 21-22, 2020	TBD	Remote Hearing	Christopher M. Clark
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Hearing Date	Time	Address	Hearings Officer
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RULEMAKING ACTIONS

ADOPT: 345-029-0003, 345-029-0505, 345-029-0510, 345-029-0520, 345-029-0530, 345-029-0550, 345-029-0555, 345-029-0560

AMEND: 345-029-0000, 345-029-0005, 345-029-0010, 345-029-0020, 345-029-0030, 345-029-0040, 345-029-0050, 345-029-0060, 345-029-0070, 345-029-0080, 345-029-0090, 345-029-0100

REPEAL: None

RULE SUMMARY *(Proposed, tracked changed text for each rule is attached at the end of this filing.)*

345-029-0000 – Removes provisions of rule related to applicability, which are moved to new OAR 345-029-0003, and Council Secretary’s discretion to issue Notice of Violation, which is moved to OAR 345-029-0020. Clarifies that Council’s enforcement program includes Orders of the Director issued under OAR chapter 345, Division 029.

345-029-0003 – Adopts new rule specifying that OAR 345-029-0005 through 345-029-0100 apply to violations involving energy facilities and provides examples of violations that may occur. Specifies that rules do not preclude Director or Council from taking actions authorized under ORS chapter 469.

345-029-0005 – Specifies applicability of definitions in rule. Specifies that “Responsible Party” means person subject to requirements of ORS chapter 469 or OAR chapter 345 related to energy facilities. Amends definition of “Compliance Audit” to align with usage in OAR 345-029-0060 and 345-029-0090.

345-029-0010 – Removes references to OAR chapter 345, divisions 050 and 060, and Oregon Radioactive Materials Transport Permits to align with revised applicability of rule under proposed OAR 345-029-0003. Makes editorial changes to improve clarity and consistency of rule.

345-029-0020 – Amends rule to include provision related to Council Secretary’s discretion to issue Notice of Violation previously located in OAR 345-029-0000(2). Specifies that Department, as staff to Council, has discretion to issue Notice. Removes references to Oregon Radioactive Materials Transport Permits and rules in OAR chapter 345, division 060 to align with revised applicability of rule under proposed OAR 345-029-0003. Makes editorial changes to improve clarity and consistency of rule.

345-029-0030 - Removes references to OAR chapter 345, divisions 050 and 060, and Oregon Radioactive Materials Transport Permits to align with revised applicability of rule under proposed OAR 345-029-0003. Amends rule to reverse order of violation designations, making “Class I” violations more severe than “Class II”, to be more consistent with other state laws and rules. Makes editorial changes to improve clarity and consistency of rule.

345-029-0040 - Makes editorial changes to improve clarity and consistency of rule.

345-029-0050 - Makes editorial changes to improve clarity and consistency of rule.

345-029-0060 - Removes references to OAR chapter 345, divisions 050 and 060, and Oregon Radioactive Materials Transport Permits to align with revised applicability of rule under proposed OAR 345-029-0003. Amends paragraph (1)(c)(B) to align with amended definition in OAR 345-029-0005. Makes editorial changes to improve clarity and consistency of rule.

345-029-0070 - Clarifies Council must conduct a contested case proceeding under the applicable provisions of OAR chapter 345, division 015. Makes editorial changes to improve clarity and consistency of rule.

345-029-0080 - Specifies that rule implements ORS 183.745.

345-029-0090 - Makes editorial changes to align use of term “compliance audit” with amended definition in OAR 345-029-0005, and other editorial changes to improve clarity and consistency of rule.

345-029-0100 - Makes editorial changes to improve clarity and consistency of rule.

345-029-0503 - Adopts new rule specifying that new rules in OAR 345-029-0505 through 345-029-0560 apply to violations involving the transport or disposal of radioactive materials and waste and provides examples of violations that may occur. Specifies that rules do not preclude Director or Council from taking actions authorized under ORS chapter 469.

345-029-0505 - Adopts new rule providing definitions for new rules in OAR 345-029-0503 through 345-029-0560.

345-029-0510 - Adopts new rule requiring a responsible party to provide written notice within 72 hours after discovering circumstances or condition that may constitute or result in a violation involving the transport or disposal of radioactive material or waste. Requires written report within 30 days after date of discovery identified in notice. Specifies requirements for notice and report.

345-029-0520 - Adopts new rule authorizing Director to issue a Pre-Enforcement Notice when the Director determines that a violation involving the involving the transport or disposal of radioactive material or wastes has occurred. Requires responsible party to provide a written response by deadline established in the Director's Pre-Enforcement Notice. Specifies requirements for Pre-Enforcement Notice and Response. Requires Director to withdraw Notice within 30 days after receiving information demonstrating that the alleged violation did not occur.

345-029-0530 - Adopts new rule classifying violations involving the transport or disposal of Radioactive Materials or Wastes.

345-029-0550 - Adopts new rule requiring Director to provide responsible party an opportunity to present information regarding an alleged violation and to discuss any corrective actions taken or proposed, if requested in the responsible party's response to a Pre-Enforcement Notice.

345-029-0555 - Adopts new rule authorizing Director to issue a Notice of Enforcement Action ordering compliance, imposing safety conditions, or imposing civil penalties, in consideration of responsible party's response to a Pre-Enforcement Notice and information presented at Enforcement Conference. Specifies that the Director will conduct a contested case hearing requested on a Proposed Order issued under OAR 345-029-0505 to 345-029-0560 and will issue the Final Order in the proceeding. Authorizes Director to enter into informal disposition or settlement of a contested case when consistent with Council's goals. Specifies conditions upon which Final Order may be entered by default. Specifies procedures for and factors that may be considered in rescinding or reducing penalty amounts. Specifies that civil penalty becomes payable 10 days after Order becomes final by operation of law.

345-029-0560 - Adopts new rule specifying methodology for calculation of civil penalty amounts for violations involving the transport or disposal of radioactive materials or waste based on classification and severity of penalty. Specifies aggravating and mitigating factors that may be considered when assessing a penalty. Authorizes assessment of an additional amount approximating economic benefit gained or costs avoided through noncompliance, up to maximum allowed under ORS 469.992.

STATEMENT OF NEED AND FISCAL IMPACT.

Need for Rule(s)

These rules are needed to ensure that the enforcement of laws and rules governing the transport and disposal of radioactive materials and wastes is sufficient to protect public health and safety and the environment by incentivizing preventative measures, to ensure that radioactive materials or wastes are not improperly transported or disposed of in Oregon, and to require appropriate mitigation or penalties when a violation occurs.

Fiscal and Economic Impact

Because the proposed rules apply to the enforcement of existing rule requirements, staff does not expect the proposed rules to result in direct economic or fiscal impacts on agencies, local governments, or the general public. The rules would not result in an economic or fiscal impact on regulated businesses unless a violation or potential violation of the rules and laws related to the transportation or disposal of radioactive materials or wastes occurred. The proposed rules would increase the amount of civil penalty that may be assessed in the event that a violation did occur. Penalties are intended to be used as a tool to obtain compliance, and are not expected to generate significant revenues, but any additional civil penalties that were assessed and collected under the proposed rules would be deposited in the General Fund. The proposed rulemaking could also indirectly result in some increased costs to businesses that voluntarily take additional preventative steps to improve monitoring or mitigation of radioactive materials.

Statement of Cost of Compliance:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The proposed rules would primarily apply to transporters of radioactive materials or wastes, and solid and hazardous waste disposal facility operators who may accept materials containing naturally occurring or technologically enhanced radioactive materials. Staff notes that while the rules do not establish any new requirements for compliance, the rulemaking could indirectly result in some increased costs to parties who voluntarily take additional preventative steps to improve monitoring or mitigation of radioactive materials. While we are unable to quantify these indirect costs, staff believes any expenditures to prevent noncompliance would likely be less than the potential costs associated with corrective actions to correct or mitigate impacts to the health and safety of the public and the environment if a violation were to occur.

(2) A small number (< 50) of transporters of radioactive materials or wastes subject to the proposed rules may be small businesses under ORS 183.310(10). Because the proposed rules provide procedures for enforcement, and do not impose new requirements for compliance, the proposed rules are not expected to result in any increased costs of compliance for small businesses.

Describe how small businesses were involved in the development of these rule(s)?

Small businesses were not specifically consulted in the development of the proposed rules.

Documents Relied Upon, and where they are available:

Staff Report and Attachments for Agenda Item B of the December 18, 2020 Energy Facility Siting Council Meeting
Meeting Minutes for Agenda Item B of the December 18, 2020 Energy Facility Siting Council Meeting

Documents are available at <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/Council-Meetings.aspx>, or from Department upon request.

Was an Administrative Rule Advisory Committee consulted? Yes or No? If not, why not?

Yes.

DRAFT

DRAFT PROPOSED RULES

December 11, 2020

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NOTE: This document provides draft proposed rule language prepared for the Council’s Radioactive Materials Enforcement Rulemaking Project. The draft proposed rules are provided for information only, and are not notice of rulemaking action by the Energy Facility Siting Council. Language proposed to be added to the existing rule is shown in underline, language proposed to be deleted is shown in ~~strikethrough~~.

345-029-0000 - Policy

~~(1) The purpose of the Council's enforcement program is to protect the health and safety of the public and the environment by ensuring compliance with the terms and conditions of site certificates, Department of Energy orders as described in OAR 345-027-0230, Radioactive Materials Transport Permits and applicable statutes, rules and orders of the Director and Council and by obtaining prompt correction of violations. The Department of Energy or the Council may impose a sanction for:~~

~~(a) A violation of any term or condition of a site certificate or a Radioactive Materials Transport permit;~~

~~(b) A violation of any applicable provision of ORS Chapter 469, any rule promulgated or administered by the Council, or any order of the Council;~~

~~(c) A violation of a Department of Energy order as described in OAR 345-027-0230; or~~

~~(d) A history of non-compliance by the certificate holder with applicable rules or license requirements of more than one other state agency having enforcement jurisdiction.~~

~~(2) The Council secretary has discretion to issue a notice of violation, except that the Council may instruct the secretary to issue a notice of violation. Factors the Council or Council secretary shall consider in deciding whether conditions or circumstances warrant issuing a notice of violation are:~~

~~(a) Did the responsible party report the conditions or circumstances in a timely manner?~~

~~(b) Are the conditions or circumstances limited to the possible violation of a reporting requirement?~~

~~(c) Are the conditions or circumstances the result of ambiguous language in the requirement in question?~~

~~(d) Are the conditions or circumstances the result of a change to the design, construction, operation or retirement of a facility for which a site certificate has been issued, and did the certificate holder decide that no amendment of the site certificate was required, based on a reasonable analysis of the criteria in OAR 345-027-0050(2)?~~

~~(e) Has the violation in question been cited by any other state agency having jurisdiction?~~

~~(f) Are the conditions or circumstances within the control of the responsible party?~~

Statutory/Other Authority: ORS 469.470, 469.607 & 469.992

Statutes/Other Implemented: ORS 469.085, 469.470, 469.607 & 469.992

345-029-0003 – Applicability of OAR 345-029-0005 through 345-029-0100

(1) OAR 345-029-0005 through OAR 345-029-0100 apply to violations or potential violations involving energy facilities, including:

(a) A violation of any term or condition of a site certificate;

(b) Except as described in OAR 345-029-0503, a violation of any applicable provision of ORS Chapter 469, OAR chapter 345, or an order of the Council;

(c) A violation of an order issued under OAR 345-027-0230; or

(d) A history of non-compliance by a certificate holder with applicable rules or license requirements of more than one other state agency having enforcement jurisdiction.

(2) No provision of these rules precludes the Director or Council from taking any actions authorized under ORS Chapter 469 to protect public health and safety or the environment, including, but not limited to the seeking of injunctive relief or the suspension or revocation of permits or site certificates.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.440, & 469.992

345-029-0005 – Definitions for OAR 345-029-0005 through 345-029-0100

As used in ~~this division~~ OAR 345-029-0005 through 345-029-0100, the following definitions apply:

(1) "Responsible party" means:

(a) A certificate holder;

~~(b) A radioactive materials transport permit holder;~~

~~(c)~~ (b) A person to whom the Council has granted an exemption from the site certificate requirement under OAR 345-015-0350 ~~to~~ through 345-015-0370; or

~~(d)~~ (c) Any person otherwise subject to the requirements of ORS chapter 469, or this chapter ~~OAR chapter 345, related to energy facilities.~~

(2) "Compliance audit" means an audit conducted as part of an ongoing comprehensive program established by the responsible party to evaluate and ensure compliance with applicable rules, statutes, or site certificate conditions ~~or Radioactive Materials Transport Permit requirements.~~

Statutory/Other Authority: ORS 469.470 & 469.605

Statutes/Other Implemented: ORS 469.085 & 469.440

345-029-0010 - Report by a Responsible Party

The responsible party ~~shall~~ must make reports as specified in these rules and in the site certificate ~~or Radioactive Materials Transport Permit.~~ Whenever a responsible party becomes aware of conditions or circumstances that may violate the terms or conditions of a site certificate, the terms or conditions of any order of the Council, or the terms or conditions of an a Department of Energy order as described in issued under OAR 345-027-0230, ~~the requirements of OAR 345 division 50 or the requirements of a Radioactive Materials Transport Permit,~~ the responsible party ~~shall~~ must:

(1) As soon as reasonably possible, notify the Department of the conditions or circumstances that may constitute a violation, giving all pertinent facts including an estimate of how long the conditions or circumstances have existed, how long they are expected to continue before they can be corrected, and whether the conditions or circumstances were discovered as a result of a regularly scheduled compliance audit.

(2) As soon as reasonably possible, initiate and complete appropriate action to correct the conditions or circumstances and to minimize the possibility of recurrence.

(3) Submit to the Department a written report within 30 days of discovery. The report ~~shall~~must contain:

- (a) A discussion of the cause of the reported conditions or circumstances;
- (b) The date of discovery of the conditions or circumstances by the responsible party;
- (c) A description of immediate actions taken to correct the reported conditions or circumstances;
- (d) A description of actions taken or planned to minimize the possibility of recurrence; and
- (e) For conditions or circumstances that may violate the terms or conditions of a site certificate, an assessment of the impact on the resources considered under the standards of divisions 22 and 24 of this chapter as a result of the reported conditions or circumstances.

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.440

345-029-0020 - Notice of Violation

(1) The Department has discretion to issue a notice of violation, except that the Council may instruct the Department to issue a notice of violation. Factors the Council or Department must consider in deciding whether conditions or circumstances warrant issuing a notice of violation are:

- (a) Did the responsible party report the conditions or circumstances in a timely manner?
- (b) Are the conditions or circumstances limited to the possible violation of a reporting requirement?
- (c) Are the conditions or circumstances the result of ambiguous language in the requirement in question?
- (d) Are the conditions or circumstances the result of a change to the design, construction, operation or retirement of a facility for which a site certificate has been issued, and did the certificate holder decide that no amendment of the site certificate was required, based on a reasonable analysis of the criteria in OAR 345-027-0350(2)?
- (e) Has the violation in question been cited by any other state agency having jurisdiction?
- (f) Are the conditions or circumstances within the control of the responsible party?

~~(12)~~ If the Department ~~of Energy~~ determines upon inspection as provided for in OAR 345-026-0050 ~~or 345-060-0007~~, upon receipt of a report from the responsible party under OAR 345-029-0010, or by other means that there has been a violation for which sanctions may be imposed as described in OAR 345-029-0003, the Department may serve a notice of violation upon the responsible party. The Department ~~shall~~must serve the notice of violation by personal service or by first class, certified or registered mail.

~~(23)~~ In the notice of violation, the Department ~~shall~~must include:

- (a) A reference to the statute, administrative rule, ~~Council order, Department of Energy order, or site certificate~~ term or condition ~~of a site certificate or Radioactive Material Transport Permit~~ violated as determined by the Department;

- (b) A statement of the facts upon which the Department based its determination that a violation occurred, including the date of discovery;
- (c) A requirement for the responsible party to provide a written response to the notice of violation within 30 days or other specified time;
- (d) A statement of the responsible party's right to a hearing as provided for in OAR 345-029-0070 if the Department later issues a notice of assessment of civil penalty as described under OAR 345-029-0060; and
- (e) The Department ~~of Energy~~'s classification of the violation, including a statement of the consideration given to the following factors:
 - (A) The performance of the responsible party in taking necessary or appropriate action to correct or prevent the violation;
 - (B) Any similar or related violations by the certificate holder ~~or Radioactive Material Transport Permit holder~~ in the previous 36 months;
 - (C) Any adverse impact of the violation on public health and safety; and
 - (D) For a violation of the terms or conditions of a site certificate, any adverse impact of the violation on resources protected by Council standards or site certificate conditions.

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.085, 469.440 & 469.992

345-029-0030 - Classification of Violations

The Department ~~of Energy shall~~ **must** determine the classification of a violation based upon severity and considering the guidelines in this rule. The Department may issue a notice of violation for Class I or Class II violations. The Department may, if special circumstances warrant, determine a classification at variance from the guidelines listed below:

- (1) In general, the following violations are classified as Class ~~I~~ violations:
 - (a) Violation of a term or condition of a site certificate ~~or Radioactive Material Transport Permit~~;
 - (b) Violation of an order of the Council;
 - (c) Violation of any applicable rule in divisions 22 through ~~60-27~~ of this chapter;
 - (d) Violation of a Department of Energy order as described in OAR 345-027-0230; or
 - (e) Violation of any applicable provision of ORS Chapter 469.
- (2) In general, the Department may escalate any Class ~~I~~ violation to a Class ~~I~~ violation. Factors the Department may consider in escalating a Class ~~I~~ violation to Class ~~I~~ include whether the responsible party reported the conditions or circumstances of the violation, the duration of the violation, whether the responsible party implemented prompt and effective corrective actions, the impact on public health and safety or on resources protected by Council standards, and the past performance of the responsible

party. To escalate a violation to Class I, the Department must find that the violation meets one of the following criteria:

- (a) It is a repeated violation. The Department ~~shall~~must consider whether the successive violation could reasonably have been prevented by the responsible party by taking appropriate corrective actions for a prior violation;
- (b) It resulted from the same underlying cause or problem as a prior violation;
- (c) It is a willful violation; or
- (d) The violation results in a significant adverse impact on the health and safety of the public or on the environment.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.440 & 469.992

345-029-0040 - Response to Notice of Violation

In the written response required by OAR 345-029-0020(2)(c), the responsible party ~~shall~~must include, as a minimum, the following:

- (1) Admission or denial of the violation;
- (2) If the responsible party admits the violation and can determine suitable corrective action:
 - (a) The corrective action taken, and results achieved;
 - (b) Corrective action that the responsible party plans to take to minimize the possibility of recurrence; and
 - (c) The date by which the responsible party expects to achieve full compliance; and
- (3) If the responsible party admits the violation and cannot determine suitable corrective actions within the 30-day or other time period specified in the notice of violation, a preliminary response that includes a date by which the responsible party will submit a final response that includes all information described in section (2).

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.440 & 469.992

345-029-0050 - Enforcement Conference

- (1) After issuing a notice of violation for a Class I violation, the Department ~~of Energy shall~~must provide the responsible party an opportunity for an enforcement conference to discuss the cause and consequences of the violation and to describe the corrective actions taken. The Department may use information discussed at the conference in determining the appropriate enforcement action.
- (2) Following the enforcement conference, if any, the Department ~~shall~~must confirm or amend the classification of the violation and ~~shall~~may issue an amended notice of violation, if appropriate.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.440 & 469.992

345-029-0060 - Civil Penalties

(1) Following the responsible party's response to the notice of violation described under OAR 345-029-0040, and any enforcement conference, the Department ~~of Energy~~ may assess a civil penalty for a Class I violation. The Department ~~shall~~ must determine the amount of the civil penalty, if any, as follows:

(a) Base amount:

(A) \$1000 per day from the date of discovery for a violation of site certificate terms or conditions or violation of a Department ~~of Energy~~ order as described in OAR 345-027-0230, or \$2000 per day from the date of discovery for such violation if the Department finds that substantially the same violation occurred within the preceding 36 months; or

~~(B) \$100 per day from the date of discovery of a violation of the rules of division 50 of this Chapter; or~~

~~(C) \$250 for the first violation, and \$500 for each violation afterwards during a calendar year for failure to provide specific shipment information for a shipment traveling under an Oregon Radioactive Material Transport Permit as outlined in division 60 of this Chapter. This information must be provided either by filling out a form at an Oregon Port of Entry or electronically within 48 hours after entering the state by using a form provided on the ODOT website; or~~

~~(D) \$2000 per day from the date of discovery for a violation of an enforcement order of the Council, or \$5000 per day from the date of discovery for such violation if the Department finds that substantially the same violation occurred within the preceding 36 months;~~

(b) The Department may multiply the base amount by a factor of:

(A) 3.0 if the Department finds the violation was intentional or reckless; or

(B) 5.0 if the Department finds the violation was intentional or reckless and the violation involved a requirement relating to public health, safety or the environment;

(c) The Department may multiply the base amount by either or both of the following factors:

(A) 0.75 if the responsible party corrected the violation within the time required to respond to the notice of violation and the responsible party has submitted a plan adequate to minimize the possibility of recurrence; and

(B) 0.8 if the responsible party reported the conditions or circumstances of the violation as a result of a routine compliance audit ~~conducted as part of an ongoing comprehensive compliance audit program~~; and

(d) The Department ~~shall~~ may not reduce the base amount under subsection (c) above if the Department determines an increase in the base amount is warranted under subsection (b).

(2) In a notice of assessment of the civil penalty, the Department ~~shall~~ must include:

(a) An analysis of the violation(s) in light of the criteria described in section (1);

(b) The amount of the assessment;

(c) A proposed order assessing the civil penalty; and

(d) A statement of the responsible party's right to a contested case proceeding as provided for in OAR 345-029-0070.

(3) The Department shall-must serve the notice of assessment of civil penalty by personal service and by certified or registered mail.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085 & 469.992

345-029-0070 - Contested Case Proceeding

(1) Within 20 days after the date of mailing of the notice of assessment of a civil penalty, the responsible party may submit to the Department ~~of Energy~~ a written request for a contested case proceeding. For the purpose of this rule, the request is submitted when it is received by the Department.

(2) If the responsible party requests a contested case proceeding within the time stated in section (1), the Council shall-must conduct the proceeding under the applicable provisions of OAR 345-015-0002 to 345-015-0085.

(3) If the responsible party does not request a contested case proceeding within the time stated in section (1), the Department ~~of Energy's~~ proposed order assessing a civil penalty, described under OAR 345-029-0060(2), automatically becomes final.

(4) If the responsible party requests a contested case proceeding but fails to appear, the Department ~~of Energy's~~ proposed order assessing a civil penalty, described under OAR 345-029-0060(2), becomes final upon a prima facie case made on the record of the Department.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 183.415, 469.085 & 469.992

345-029-0080 - Payment of Penalty

A civil penalty imposed under this division becomes due and payable 10 days after the order imposing the civil penalty becomes final by operation of law or on appeal. If the amount of the penalty is not paid within 10 days after the order becomes final, the order may be recorded with the county clerk in any county of this state. The clerk shall thereupon record the name of the person incurring the penalty and the amount of the penalty in the County Clerk Lien Record.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 183.745, 469.085 & 469.992-99

345-029-0090 - Council Consideration of Mitigating Factors

Notwithstanding OAR 345-029-0080, the Council in its order after a contested case proceeding initiated under OAR 345-029-0070 on a civil penalty imposed under this division may rescind or reduce ~~a the civil penalty imposed under this division~~ upon a showing by the responsible party incurring the penalty that imposition of the penalty would be an unreasonable economic and financial hardship, that the responsible party has taken prompt and effective action to correct the violation and ensure that it will

not be repeated, or that the responsible party reported the conditions or circumstances of the violation as a result of a routine [compliance](#) audit ~~conducted as part of an ongoing comprehensive compliance audit program.~~

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085 & 469.992

345-029-0100 - Revocation or Suspension of Site Certificate

The Council may revoke or suspend any site certificate after conducting a contested case proceeding on the revocation or suspension under the provisions of OAR 345-015-0012 through 0085. A majority vote of the Council or a request from the Department ~~of Energy~~ initiates a contested case proceeding on a revocation or suspension. The Council ~~shall~~ may base revocation or suspension on any of the following grounds:

- (1) The certificate holder made a material false statement in an application for a site certificate or in supplemental or additional statements of fact or studies required of an applicant when a true answer would have warranted denial of a site certificate by the Council;
- (2) The certificate holder failed to comply with a term or condition of the site certificate;
- (3) The certificate holder violated a Department ~~of Energy~~ order as described in OAR 345-027-0230;
- (4) The certificate holder violated any provision of ORS 469.300 to 469.570, 469.590 to 469.621, 469.930 and 469.992, any administrative rule adopted under those statutes, including but not limited to rules contained in OAR chapter 345, or any order of the Council; or
- (5) For a site certificate subject to ORS 469.410, having been executed prior to July 2, 1975, the certificate holder violated any the provision of ORS 469.300 to 469.520 or failed to comply with applicable health or safety standards.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.440

345-029-0503 – Applicability of OAR 345-029-0505 through 345-029-0560

(1) OAR 345-029-0503 through 345-029-0560 apply to violations involving the transport or disposal of radioactive materials or waste, including violation of:

(a) Any applicable provision of ORS 469.525 or OAR chapter 345, division 050; or

(b) Any applicable provision of ORS 469.603 through 469.619, OAR chapter 345, division 060, or any term or condition of a Radioactive Materials Transport Permit.

(2) No provision of these rules preclude the Director or Council from taking other actions to protect public health and safety or the environment, including, but not limited to the seeking of injunctive relief or the suspension or revocation of permits or site certificates, authorized under ORS chapters 183 or 469.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.470, 469.607 & 469.992

345-029-0505 - Definitions for OAR 345-029-0503 through 345-029-0560

As used in OAR 345-029-0503 through 345-029-0560, the following definitions apply:

(1) "Compliance audit" means an audit conducted as part of an ongoing program established by the responsible party to evaluate and ensure compliance with applicable rules, statutes, or Radioactive Materials Transport Permit requirements.

(2) "Director" means the Director of the Oregon Department of Energy, or Department staff authorized to implement these rules under the Director's authority.

(3) "Reckless" means the responsible party consciously disregarded a substantial and unjustifiable risk that the result would occur or that the circumstance existed. The risk must be of such a nature and degree that disregarding that risk constituted a gross deviation from the standard of care a reasonable person would observe in that situation.

(4) "Responsible party" means any person subject to the provisions of:

(a) ORS 469.525 or OAR chapter 345, division 050; or

(b) ORS 469.603 through 469.619 or OAR chapter 345, division 060.

(5) "Violation" means a transgression of any statute, rule, order, license, permit, permit attachment, or any part thereof and includes both acts and omissions.

(6) "Willful" means the responsible party had a conscious objective to cause the result of the conduct and the respondent knew or had reason to know that the result was not lawful.

Statutory/Other Authority: ORS 469.470 & 469.605

Statutes/Other Implemented: ORS 469.085 & 469.540

345-029-0510 – Report by a Responsible Party

(1) Whenever a responsible party becomes aware of conditions or circumstances that may constitute or result in a violation described under OAR 345-029-0503, the responsible party must:

(a) Within 72 hours after discovering the conditions or circumstances, provide written notice of the conditions or circumstances to the Director. The notice must include:

(A) A description of the conditions or circumstances;

(B) The date of discovery of the conditions or circumstances;

(C) A description of the immediate actions the responsible party has taken or intends to take to correct or mitigate conditions or circumstances. The description must explain whether and how the actions have prevented or will prevent a violation from occurring, and when any actions not yet taken are expected to be completed; and

(D) A description of how the conditions or circumstances were discovered, including whether they were discovered as the result of a regularly scheduled compliance audit; and

(b) As soon as reasonably possible, initiate and complete appropriate action to correct or mitigate the conditions or circumstances.

(2) Within 30 days after the date of discovery identified in paragraph (1)(a)(B) of this rule, the responsible party must submit a written report to the Director containing:

- (a) A discussion of the cause of the reported conditions or circumstances;
- (b) The estimated date when the conditions or circumstances first began;
- (c) A description of immediate actions taken to correct or mitigate the conditions or circumstances, including the dates each action was completed; and
- (d) A description of actions taken or planned to minimize the possibility of recurrence of the conditions or circumstances.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.540 & 469.992

345-029-0520 – Pre-Enforcement Notice

(1) If the Director determines that a violation described under OAR 345-029-0503 has occurred, the Director may issue a Pre-Enforcement Notice upon the responsible party. The Pre-Enforcement Notice must be served upon the responsible party by personal service or by first class, certified or registered mail and must include:

- (a) A description of the alleged violation, including a reference to the statute, administrative rule, order, or permit term or condition determined by the Director to have been violated and the classification of the violation under OAR 345-029-0530;
- (b) A statement of the facts upon which the Director based their determination, including the date or dates on which the violation is alleged to have occurred, or the date an ongoing violation was alleged to have begun;
- (c) A description of evidence supporting any mitigating or aggravating factors, including, but not limited to:
 - (A) Whether the responsible party voluntarily reported the conditions or circumstances related to the alleged violation in accordance with OAR 345-029-0510;
 - (B) The performance of the responsible party in taking necessary or appropriate action to correct the conditions or circumstances that led to the violation and to prevent the violation from recurring;
 - (C) A history of similar or related violations by the responsible party and the responsible party's efforts in taking all feasible steps or procedures necessary or appropriate to correct or prevent any violation;
 - (D) Any known or potential adverse impact of the violation on public health and safety;
 - (E) Whether the violation was willful or the result of reckless behavior; and
- (d) A statement explaining what additional information the Director requires to determine appropriate enforcement and corrective actions;

(e) The date by which the responsible party must respond to the Pre-Enforcement Notice under section (3) of this rule and a description of the potential consequences of not responding. The date must be at least 30 days after the date of issuance of the Notice;

(f) A statement explaining that the responsible party is entitled to the opportunity to present information regarding the alleged violation and any proposed corrective action at an enforcement conference under OAR 345-029-0550 before the Director issues a Notice of Enforcement Action under OAR 345-029-0555.

(g) An explanation that the Pre-Enforcement Notice does not entitle the responsible party to a contested case hearing.

(3) The responsible party must provide, to the Director, a written response to the Pre-Enforcement Notice by the date specified under section (2)(e) of this rule. The response must include:

(a) A statement of any facts relevant to the Director's determination that the violation has occurred;

(b) A description of any corrective actions taken or proposed to be taken to mitigate the impacts of the alleged violation and any corrective actions the responsible party proposes to take to minimize the possibility of recurrence;

(c) The date by which the responsible party expects to achieve full compliance with all applicable laws and rules;

(d) Any additional information requested by the Director in the Pre-Enforcement Notice;

(e) If the responsible party cannot provide all the information required under subsection (a) to (d) of this section, the date by which the responsible party will submit all additional required information;

(f) A statement that the responsible party does or does not request an enforcement conference under OAR 345-029-0550 to present information regarding the alleged violation and discuss any proposed corrective action at an enforcement conference under OAR 345-029-0550;

(4) The Director must amend or withdraw the Pre-Enforcement Notice, as appropriate, within 30 days of receiving information that the Director finds sufficient to demonstrate that the violation alleged in the Pre-Enforcement Notice did not occur.

Statutory/Other Authority: [ORS 469.470](#)

Statutes/Other Implemented: [ORS 469.085](#), [469.540](#) & [469.992](#)

345-029-0530 – Classification of Violations Involving the Transport or Disposal of Radioactive Materials or Wastes

Violations involving the transport or disposal of radioactive materials or wastes are classified as follows:

(1) Class I Violations include:

(a) Any violation of ORS 469.525 or OAR chapter 345, division 050;

(b) A failure to obtain an Oregon Radioactive Waste Material Transport Permit as required by ORS 469.605 or OAR 345-060-0004;

(c) A failure to immediately report an incident as required by OAR 345-060-0030;

(d) A failure to comply with an order of the Director or Council;

(2) Class II Violations include:

(a) A failure to route shipments of spent nuclear fuel or placarded shipments of radioactive materials as required by ORS 469.606 or OAR 345-060-0040;

(b) Any violation of OAR 345-060 or an Oregon Radioactive Materials Transport Permit not otherwise described in this rule; and

(c) Class III violations include:

(a) A failure to give notice for inspection or schedule change as required by OAR 345-060-0005;

(b) A failure to maintain packaging, placarding, labeling, or shipment documentation as required by OAR 345-060-0025.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.540 & 469.992

345-029-0550 - Enforcement Conference

If requested by the responsible party in its response to the Pre-Enforcement Notice provided under OAR 345-029-0520(3), the Director must provide the responsible party an opportunity for an enforcement conference to present information regarding the alleged violation and to discuss any corrective actions taken or proposed. The Director may use information discussed at the conference in determining the appropriate enforcement action.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.540 & 469.992

345-029-0555 – Enforcement Actions

(1) After considering any information provided in the responsible party's response to the Pre-Enforcement Notice described under OAR 345-029-0520(3), and any enforcement conference under OAR 345-029-0550, the Director may issue a Notice of Enforcement Action containing one or more enforcement actions, including, but not limited to, ordering compliance or corrective actions, imposing safety conditions, and imposing civil penalties.

(2) The Notice of Enforcement Action must include:

(a) The information described under OAR 345-029-0520(2);

(b) A statement assessing the responsible party's cooperativeness and effort to correct the violation.

(c) The amount of the penalty, if any, as calculated under OAR 345-029-0560;

(d) A proposed order assessing a penalty, if any, and ordering compliance or imposing other safety conditions under ORS 469.540(3), as appropriate; and

(e) A notice of the responsible party's right to a contested case hearing under OAR 137-003-0505, including:

(A) The date by which the Director must receive the responsible party's request for a contested case hearing. The date must be at least 20 days after the date of the Notice of Enforcement Action; and

(B) A statement explaining that if the responsible party does not request a contested case hearing by the date specified, or requests a contested case hearing and fails to appear at the hearing, the responsible party waives its right to hearing and the proposed order will become final by default;

(3) The Director must serve the Notice of Enforcement Action upon the responsible party by certified or registered mail.

(4) If the responsible party requests a contested case proceeding by the deadline specified in the Notice of Enforcement Action, the Director must conduct the proceeding in accordance with the applicable provisions of ORS chapter 183. The Director will issue the final order in the contested case.

(5) The Director may agree to an informal disposition or settlement of the contested case if the disposition would be consistent with the Council's goals of protecting public health and the environment and ensuring compliance with the laws, rules and orders of the Department and Council.

(6) If the responsible party does not request a contested case proceeding by the deadline specified in the Notice of Enforcement Action, or if the responsible party requests a contested case proceeding but fails to appear, the Director may issue a final order by default.

(7) Notwithstanding OAR 345-029-0560, the Director may, in its final order issued under this rule, rescind or reduce the amount of penalty upon a showing by the responsible party that:

(a) Imposition of the penalty would be an unreasonable economic and financial hardship on the responsible party, subject to the following:

(A) To make a showing of unreasonable economic or financial hardship, the responsible party must provide documentation determined by the Director to be sufficient to evaluate the responsible party's actual economic or financial condition. Documentation may include, but is not limited to, tax returns and financial statements; and

(B) The Director may consider the amount of a penalty issued by another state agency for a violation resulting from the same action, conditions, or circumstances, when evaluating whether the Director's penalty would result in an unreasonable economic or financial hardship on the responsible party;

(C) The Director may use the U.S. Environmental Protection Agency's ABEL, INDIPAY or MUNIPAY computer models to evaluate a respondent's financial condition or ability to pay the full civil penalty amount. Upon request of the responsible party the Director will provide the respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model; or

(b) The responsible party has provided all information required by the Director's Pre-Enforcement Notice and has taken or is willing to take prompt and effective action to correct the violation and ensure that it will not be repeated.

(8) A civil penalty imposed under this rule becomes due and payable 10 days after the order imposing the civil penalty becomes final by operation of law or on appeal.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085, 469.540 & 469.992

345-029-0560 – Calculation of Civil Penalty Amount

(1) The Director must determine the base penalty amount for a violation based on the classification and severity of the violation, subject to the following:

(a) The classification of violation is as provided in OAR 345-029-0530;

(b) No severity determination is needed for Class III violations. The severity of a Class I or Class II violation must be determined as follows:

(A) Major violations include any violation determined by the Director to have caused, or having the potential to cause, a significant adverse impact on public health and safety, or the environment.

(B) Moderate violations include any violation determined by the Director to have caused, or having the potential to cause no more than a minimal adverse impact on public health and safety or the environment, but could have the potential to cause a significant adverse impact on public health and safety or the environment if the physical conditions of the disposal did not limit pathways of exposure to human health or the environment.

(C) Minor violations include any violation having caused, or having the potential to cause, no more than a minimal adverse impact on public health and safety or the environment;

(c) The base penalty for each violation is:

(A) For Class I violations:

(i) \$10,000 for a major violation;

(ii) \$5,000 for a moderate violation;

(iii) \$1,000 for a minor violation;

(B) For Class II violations:

(i) \$5,000 for a major violation;

(ii) \$2,500 for a moderate violation;

(iii) \$500 for a minor violation; and

(C) For Class III violations, \$500; and

(d) For the purposes of this section, multiple violations that result from the same actions, conditions, or circumstances, will be treated as a single violation. The base penalty amount will be based on the highest classification and severity applicable to any of the violations.

(2) The Director may adjust the base penalty amount to account for aggravating or mitigating factors by multiplying the base penalty by one or more of the following factors:

(a) 5.0, if the violation was willful or was the result of reckless behavior;

(b) 2.5, if the responsible party has a history of similar or related violations. Similar or related violations are violations that the Director determines to have resulted from the same or similar underlying actions, conditions, or circumstances as the violations addressed in the Notice of Enforcement Action, regardless of whether the Director or Council ever pursued an enforcement action for the previous violations;

(c) 2.5, if the corrective actions taken or proposed to be taken by the responsible party are not sufficient to reverse the conditions or circumstances that constituted the violation;

(d) 0.75, if the responsible party corrected the violation within the time required to respond to the Pre-Enforcement Notice and the responsible party has submitted a plan adequate to minimize the possibility of recurrence; and

(e) 0.8, if the responsible party voluntarily reported the conditions or circumstances of the violation in accordance with OAR 345-029-0510. In determining whether the responsible party voluntarily reported the conditions or circumstances, the Director may consider if the conditions or circumstances were discovered and reported independently from any investigation or inquiry of the Director or Council, or whether the conditions or circumstances were reported as a result of a compliance audit.

(3) The Director may assess the adjusted penalty amount for each occurrence of a violation, or for each day of an ongoing violation, except that the total amount of penalty assessed may not exceed:

(a) \$5,000,000 for a moderate violation; or

(b) \$25,000 for a minor violation.

(4) In addition to the amount of penalty calculated under sections (1) through (3) of this rule, the Director may assess an additional amount for Economic Benefit. Economic Benefit is the approximate dollar value of the benefit gained and the costs avoided or delayed (without duplication) as a result of the responsible party's noncompliance. Economic Benefit will be determined using the U.S. Environmental Protection Agency's "BEN" computer model, subject to the following:

(a) The Director may make, for use in the model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent.

(b) Upon request of the responsible party, the Director will provide the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model.

(c) The model's standard values for income tax rates, inflation rate and discount rate are presumed to apply unless the responsible party can demonstrate that the standard value does not reflect the responsible party's actual circumstance.

(d) The Director may assume the economic benefit is zero if the Director makes a reasonable determination that the economic benefit is de minimis or if there is insufficient information to make an estimate under this section.

(5) Notwithstanding any provision of this rule, the total amount of civil penalty assessed may not exceed the maximum civil penalty allowed by ORS 469.992.

Statutory/Other Authority: ORS 469.470

Statutes/Other Implemented: ORS 469.085 & 469.992

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