Item B: Radioactive Materials Enforcement
Attachment 3: Rulemaking Advice
Oregon Energy Facility Siting Council
Radioactive Materials Enforcement Rulemaking Advisory Committee
Meeting #1 Summary

**Date:** Wednesday, July 15, 2020  
**Time:** 8:30 am – 12:00 pm  
**Place:** Remote Meeting (Webex)

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

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

**Public Comment:** Mike McArthur

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

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

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

Staff provided an opportunity for public comment.

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

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

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

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

• Staff explained that, under OAR 345-029-0030, a penalty may not be assessed unless staff finds the violation is repeated, resulted from the same cause or problem as a previous violation, is willful, or results in a significant adverse impact on public health and safety or the environment.
  o Most RAC members agreed that the Department should have some discretion to assess a penalty for an initial violation.
  o Some RAC members stated that a penalty for an initial violation would not always be appropriate, especially when the responsible party was not aware of the violation, or when the responsible party takes appropriate corrective actions.
• Several RAC members recommended that the criteria specifying that a penalty is allowed when a violation “results in a significant adverse impact on the health and safety of the public or on the environment” should be amended to allow a penalty when there is a potential for harm.
  o RAC members suggested this was important because identifying specific damages can be difficult, but accumulation of radioactivity in the environment over time increases overall risks and is difficult to remediate.
• RAC members discussed the criteria allowing a penalty for an initial violation that is found to be willful.
  o Mr. Smith suggested that the criteria should be amended to allow a penalty when “a person should have reasonably known” that a violation was likely to occur.
  o Dr. Weathers suggested there should be more focus on what options exist to hold a waste generator and/or transporter accountable since they may have more familiarity with the contents of waste than a waste facility operator. Staff responded that it was difficult to apply rules to waste generators/transporters because division 050 only applies to persons holding or storing waste materials.
• RAC members discussed how prior violations should be considered in classifying a violation.
  o Staff explained that the current rules allow a penalty when the same person has been noticed for a previous violation of the same rule, or if the violation stems from the same underlying cause as a previous violation.
  o RAC members suggested the rule should specify whether the Department will look at all previous violations, or just previous violations of the same rule.
• Several RAC members suggested that OAR 340-012-0053, and additional guidance provided in the DEQ’s Enforcement Guidance Internal Management Directive (IMD), provided a good example for determining how to classify a penalty, when a penalty should be allowed, and how to address prior violations.
  o Ms. Wheeler explained that the DEQ’s IMD provides a table for every program area and prescribes an enforcement action based on the factors of the case, such as the level of risk (e.g. location, amount, and type of waste) and history of noncompliance. If the violation is low risk and is a first instance of noncompliance, DEQ issues a Warning Letter. If not, DEQ will issue a pre-enforcement notice which can be converted to a Notice of Violation and Civil Penalty Assessment.
  o Mr. Denson noted that in addressing prior violations, the DEQ solid waste rules look at all violations in the 36 months prior to the violation in determining whether or not to issue a warning letter or pre-enforcement notice. Sarah Wheeler added that DEQ rules also consider previous violations in the calculation of penalty amounts.

**Issue #3: Staff requested the RAC’s advice on whether the rules should provide additional options or requirements for responses to a notice of violation rather than simple admission or denial of an alleged violation.**
• Most RAC members agreed that it was reasonable to allow the responsible party to propose or agree to corrective actions to resolve an alleged violation without admitting responsibility.
  o Mr. Rowe explained that this issue came up because legal counsel from Waste Management requested the ability to propose corrective actions without admitting to a violation, which is prohibited by current rules.
Ms. Wheeler explained that under DEQ rules, a responsible party must admit or deny any alleged violations and provide any affirmative defenses in a request for a contested case hearing on an Order imposing a penalty order, but may settle the issue through other means without doing so. She mentioned that some final orders may contain clauses stipulating that the responsible party does not admit to any of the alleged violations.

Some RAC members suggested that the goal of enforcement actions should be to address the impact of violations through corrective actions, and that allowing more flexibility to reach a settlement would help facilitate that.

- Dr. Weathers asked if there could be a problem with enforcing a settlement order when there is a responsible party that denies responsibility and refuses to complete the corrective actions. Staff responded that the Department would likely retain the ability to assess a penalty if the corrective actions were not completed.
- Staff committed to reviewing procedural requirements of ORS chapter 183 and bringing a recommendation back to the RAC.

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

- RAC members generally agreed that it would be appropriate to determine the amount of penalty based on the date of violation, but that some discretion should be maintained.
- Staff noted that because the date of discovery is the date that the responsible party becomes aware of conditions or circumstances that may violate a rule or law, it is often difficult to establish a date. Unless a responsible party acknowledges an earlier date, the date staff first contacts the responsible party about an alleged violation is the de facto date of discovery.
  - Mr. Smith suggested that the exemption pathways for radioactive wastes can be difficult to apply, and that it may be difficult to establish that a person “should have known” a violation would occur on the date an action was taken.
- Staff asked if there should be a limitation on how far back to look, or if there should be a cap on the total amount.
  - Ms. Saylor stated that some EPA regulations cap penalty amounts based on the type of violation, or based on a specific time period related to the statute of limitations.
  - Ms. Atkins recommended maintaining some discretion in how far back to look because it may not be appropriate to penalize a responsible party for a violation that occurs without their knowledge if the responsible party reports the violation and commences corrective action when they become aware.
  - Some RAC members recommended looking at DEQ rules, which have factors for duration and then an overall cap, but also allow for the option to consider each day a separate violation if necessary.
Issue #5: Request for input on what the appropriate base penalty amount should be?

- RAC members recommended that staff should research rulemaking history to determine why penalties were set at $100 per day of violation.
  - Some RAC members recommended that $100 was likely not sufficient, but thought more information about the intent of the rules and other data would be helpful.
  - Ms. Saylor suggested the $25,000 per day maximum in statute may have been intended to align with the maximum penalty under the federal Resource Conservation and Recovery Act. They noted the maximum for these penalties was recently increased to $37,500.

- RAC members were generally supportive of a cap on the total amount of penalty that could be assessed for a single violation, as long as the cap was high enough to still incentivize compliance and corrective actions. Some RAC members were concerned that if a cap was too low, penalties could just be seen as a “cost of doing business.”
Oregon Energy Facility Siting Council
Radioactive Materials Enforcement Rulemaking Advisory Committee
Meeting #2 Summary

Date: Wednesday, August 26, 2020
Time: 1:00 to 3:00 pm
Location: Remote Meeting (Webex)

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

ODOE Staff: Ken Niles, Jeff Burright, Todd Cornett, Maxwell Woods, Christopher Clark, Michiko Mata, Patrick Rowe (DOJ), Cindy Condon (EFSC)

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

Staff presented a matrix containing concepts for a classification structure and penalty amounts for violation of Division 050 based on DEQ and OHA rules (see Appendix 1 to the Issues Document) and requested the RAC’s feedback.

- Staff explained that the proposed matrix classified violations based on the level of risk.
  - One committee member asked how the violation at the Arlington landfill would have been treated under the proposed matrix. Staff speculated that it would likely have been treated as a moderate “Class II” violation because the waste at the landfill was buried, reducing risk of exposure at the surface.
  - A committee member explained that DEQ classifies penalties based on the type of violation and that the penalty formula contains a modifier for magnitude of the impact or risk of impact to public health or the environment. Some committee members recommended the Council adopt a similar approach.
  - Several committee members asked for clarification on how the
    - A committee member asked if staff’s proposal was intended to allow waste that was illegally disposed of to remain in place if the risk of exposure was sufficiently mitigated by the responsible party. Staff responded that the proposed rule was not intended to preclude additional corrective actions.
A committee member asked if the Department would change the classification of the penalty after the notice of violation is issued if additional corrective actions were taken. Staff responded that it would generally only consider corrective actions taken before the initiation of a compliance investigation when classifying a violation. Staff noted that the penalty amount could still be reduced later in the process if the responsible party took appropriate corrective actions.

- A committee member asked if the intent of actions to control exposure should be considered when classifying a penalty less severely based on a reduced level of risk.
- A committee member recommended that the classifications should not be overly specific because it would be impossible to anticipate all scenarios.

- Staff explained that the penalty amount could be modified if the violation was found to be intentional or the result of willful, reckless, or negligent behavior.
  - A committee member recommended that terms should be clearly defined to minimize disputes in the enforcement process.
  - Several committee members recommended that mitigating factors also be considered in the rule.
- Staff explained that the penalty amount could be modified if the violation was found to be irreversible.
- A committee member asked how the Department would calculate a per day penalty for an ongoing violation that was irreversible.
  - Staff explained the proposed penalty matrix contained a cap on total penalty amounts for less severe violations.
  - A committee member commented that rather than imposing a cap, the Department could establish limitations by policy, or 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.
  - A committee member commented that not placing a cap on penalties could disincentivize the department from taking prompt action.
- Staff asked for the committee’s feedback on the proposed penalty amounts.
  - RAC member recommended that the penalty amounts should be generally consistent with other agency’s penalties.
  - Several committee members suggested that violations involving unlawful disposal of material or a release of radioactivity should be penalized at a much higher amount than penalties that are truly administrative.

**Staff asked for feedback on its proposed classifications for violations of OAR chapter 345, division 060.**

- Several committee members recommended including a catch-all provision to address unclassified provisions.
• The committee did not raise any concerns with the specific classification proposed.

Staff asked for the committee’s feedback on whether or not economic benefit should be addressed in the proposed rules.

• A committee member commented that the EPA economic benefit model is imperfect and does not address things like illegal profit, but it is good at estimating avoided costs of compliance and is well suited for use in enforcement of environmental regulations for that reason. The committee member stated it is effective at compelling compliance because the economic benefit penalty can be reduced based on expenditures related to corrective or preventative actions.

The committee discussed the procedures used for issuing a notice of violation, assessing penalties.

• A committee member asked about the process for issuing penalties. They stated that DEQ issues a Pre-Enforcement Notice that initiates the process and allows for additional fact finding prior to the determination of what corrective actions will be required and the assessment of any penalty amounts. The committee member recommended that the Department consider a similar approach.

• Another committee member noted that the in addition to the PEN, if there is no penalty available DEQ may issue a Warning Letter with or without an opportunity to correct.

• A committee member asked if any penalty assessed under the Council’s rules would be a contested case. Staff confirmed, but noted that the contested case and appellate pathway would be different from the process for site certificate decisions.

Staff asked for the committee’s feedback on the process for determining appropriate corrective actions.

• A committee member commented that there should always be a compliance order if there is a requirement for corrective actions.

• A committee member recommended that there should be some consideration given to a responsible party that proposes to take effective corrective actions in its response to the Notice of Violation, but the Department should be able to require corrective actions if the responsible party does not provide an adequate response.

• A committee member recommended the rules include opportunities for education and not always result in assessment of a penalty.

• Several RAC members suggested that violations related to radioactive materials and wastes should generally be addressed through the formal enforcement process whether or not there is a penalty assessed. Others suggested that allowing for compliance orders outside of the formal enforcement process may be appropriate to address lower level violations.
Oregon Energy Facility Siting Council
Radioactive Materials Enforcement Rulemaking Advisory Committee
Meeting #3 Summary

Date: Monday, November 2, 2020
Time: 2:00 to 5:00 pm
Location: Remote Meeting (Webex)

RAC Members: Lisa Atkin, Gilliam County; Danial Couch, PCC Structurals; Jim Denson, Waste Management; Hillary Haskins, OHA; Erin Saylor, Columbia Riverkeeper; Dave Smith; Shirley Weathers, League of Women Voters of Oregon; Sarah Wheeler, DEQ

Staff: Maxwell Woods, Jeff Burright, Christopher Clark, Patrick Rowe (DOJ)

Public Comment: Commissioner Jim Doherty, Morrow County

Staff explained that its draft proposed rules would establish a new series of rules for enforcement of violations involving radioactive materials or wastes, and that the draft proposed rules would maintain the basic structure of the existing rules while incorporating some elements of the DEQ rules discussed at earlier meetings.

A RAC member asked if the Enforcement Conference offered under the existing and proposed rules would be during the formal phase of the enforcement process.

- Staff explained that the opportunity for a pre-enforcement conference is provided after a pre-enforcement notice is issued but before a notice of enforcement action is issued. He explained that it was not intended to be part of the formal enforcement action but that it would still be on the record.
- A RAC member explained that in the DEQ process, there may be an opportunity for conference with the responsible party during the fact finding and investigation, but there is not a similar opportunity after a pre-enforcement notice is issued but there may be some benefits to the approach in the proposed rules.
- A RAC member asked if the pre-enforcement conference would be the first opportunity for the responsible party to directly communicate with the Department.
- Staff commented that it was expected that there would be some opportunities for informal discussion in the fact finding and investigation phase, particularly when the responsible party has voluntarily reported the circumstances or conditions surrounding the potential violation. The pre-enforcement notice is more intended to provide a final opportunity to discuss mitigating factors and corrective actions before the enforcement action is taken.
A RAC member asked if the Department had weighed the pros and cons of having two separate processes for enforcement of different types of violations within the same chapter.

- Staff responded that the Department had considered the implications of having two separate sets of procedures in the rules but felt that appropriate measures had been taken to clarify the applicability of the two sets. Staff explained that the Council had only authorized rule changes to address violations involving radioactive materials and wastes, but that the Council may consider additional changes to harmonize the process for enforcement of site certificate violations in the future.

Staff explained that the draft proposed rules would specify that the Director, and not the Council, would implement rules for enforcement of violation involving radioactive materials and wastes.

Staff explained that the draft proposed rules would be subject to a new classification scheme and that a penalty would be available for each class of violation.

- One RAC member suggested putting boundaries on provision to classify violation at variance with rules, such as only allowing variance for repeated or severe violations.

The RAC discussed the requirement for the responsible party to provide a written response to a pre-enforcement notice.

- One RAC member asked what the consequence of failing to provide the response would be and suggested that if the response is intended to be an opportunity for the responsible party to provide information that may improve its case, the “must” in the rule should be a “may.”
- One RAC member thought that it was reasonable for the Department to expect a response and needed a timeframe to know when it could proceed with its enforcement options.
- Another RAC member suggested, as a compromise, that providing the response should be optional but should have a solid deadline associated with it.

A RAC member recommended clarifying timeframe for amending or withdrawing a notice after finding information was inaccurate.

A RAC member noted that the rules should differ significantly for the rules for enforcement of hazardous waste, noted that waste that is hazardous for other reasons often poses a much larger risk to public health and safety than some low-level radioactive wastes.

One RAC member recommended that there needs to be better mechanisms for identifying and preventing illegal disposal of radioactive materials and wastes, not just harsher penalties.

The Department asked for feedback on its recommendation that all enforcement actions be subject to a contested case hearing conducted under the authority of the Director.

- One RAC member generally agreed with delegating implementation of the rules to the Director as long as it is allowed under ORS chapter 469. The RAC member thought that the Council should retain some role in the Contested Case process, even that is just to inform them.

The RAC discussed the two alternative penalty structures presented in staff’s draft proposed rules.
• Several RAC members commented that they thought consideration of economic benefit was appropriate, but that the penalty amounts produced under the alternate model were too low. Several members recommended considering a cap on total penalty amounts rather than relying on a modifier for duration.
• One RAC member suggested that considering ability to pay was another option for capping total penalty amounts.
• One RAC member suggested limiting consideration of prior violations to the 36 months before the Pre-enforcement Notice is issued.

**One RAC member recommended defining “intentional” and “reckless”. Another RAC member suggested further defining “potential risk” and “prior violation.”**

One RAC member commented that the risk assessment conducted by the responsible party was a necessary part of determining the risk to public health and safety from the waste disposed at Arlington. They asked how the Director would make a determination of risk to be used in the penalty calculation if a detailed risk assessment was not part of the process.

• Staff responded that the Director would need to conduct fact finding to determine the magnitude of risks at the outset, and that the responsible party could provide additional information in its written response or at the pre-enforcement conference if it believed the Director’s assessment was incorrect.
• Staff acknowledged that the rules did not include an explicit requirement for a risk assessment, and that it wasn’t clear if the resources would be available for the state to conduct the same level of analysis as part of its pre-enforcement investigation. Staff committed to considering options to include risk assessment in the process.
• A RAC member suggested that a moderate risk could be assumed without a full analysis of potential impacts.

**A RAC member asked why the rules disallowed the consideration of mitigating factors when a aggravating factor had been applied. Staff explained that this is a provision of existing rule.**

**The Department asked for comments from members of the public in attendance.**

• Commissioner Jim Doherty from Morrow County stressed the importance of the rulemaking project and voiced concerns over risks to first responders and other members of the public from materials being transported through his jurisdiction without notification.

**The Department requested RAC members provide any additional written feedback on the draft proposed rules by November 20. The draft proposed rules and feedback are attached to this document.**
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.
DIVISION 29 - NOTICE OF VIOLATION, CIVIL PENALTIES, REVOCATION OR SUSPENSION

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 Department 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) 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) 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 program established by the responsible party to evaluate and ensure compliance with applicable rules, statutes, or site certificate 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 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 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:
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(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 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 345-027-0050(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?
(42) 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 II violations:
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(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 II violation. Factors the Department may consider in escalating a Class I violation to Class II 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 II, the Department must find that the violation meets one of the following criteria:

(a) It is a repeated violation. The Department shall 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 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 II violation, the Department of Energy shall 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 confirm or amend the classification of the violation and 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 II violation. The Department shall 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

   (DB) $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
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(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.
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(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

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 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 469.085, 469.470, 469.607 & 469.992

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

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

(1) "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.

(2) "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.

(3) "Director" means the Director of the Oregon Department of Energy, or Department staff authorized to implement these rules under the Director’s authority.
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) Immediately 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) The immediate actions the responsible party intends to take to correct or mitigate conditions or circumstances, whether the actions will prevent a violation from occurring, and when the actions are expected to be completed; and
   (D) A statement explaining whether the conditions or circumstances were discovered as a 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; and

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

(a) A discussion of the cause of the reported conditions or circumstances;

(b) The estimated time when the conditions or circumstances began;

(c) A description of immediate actions taken to correct or mitigate the conditions or circumstances; 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. In deciding whether or not to issue a Pre-Enforcement Notice, the Director must consider the following:

(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) Has the violation in question been cited by any other state agency having jurisdiction?
(e) Are the conditions or circumstances within the control of the responsible party?

(2) The Director must serve the Pre-Enforcement Notice upon the responsible party by personal service or by first class, certified or registered mail. The Pre-Enforcement Notice 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 its determination, including the alleged date of discovery;
(c) The date by which the responsible party must respond to the Pre-Enforcement Notice under section (3) of this rule. The date must be at least 30 days after the date of issuance of the Notice;
(d) 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.
(e) A statement of any mitigating or aggravating factors, including, but not limited to:
   (A) Whether the responsible party reported the conditions or circumstances related to the alleged violation under OAR 345-029-0510;
   (B) The performance of the responsible party in taking necessary or appropriate action to correct or prevent the violation;
   (C) A history of similar or related violations by the responsible party;
   (D) Any known or potential adverse impact of the violation on public health and safety;
   (E) Whether the Director finds the violation was intentional or the result of reckless behavior; and
   (f) 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)(c) 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;
(d) If the responsible party cannot provide all the information required under subsection (a) to (c) of this section, a date by which the responsible party will submit any additional required information; and

(e) A statement that the responsible 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) If the Director finds the violation alleged in the Pre-Enforcement Notice did not occur, the Director must amend or withdraw the Pre-Enforcement Notice, as appropriate, within 30 days.

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

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

(a) Class I Violations include:
   
   (A) Any violation of ORS 469.525 or OAR chapter 345, division 050;
   
   (B) A failure to immediately report an incident as required by OAR 345-060-0030;
   
   (C) A failure to comply with an order of the Director or Council;

(b) 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 obtain an Oregon Radioactive Waste Material Transport Permit as required by ORS 469.605 or OAR 345-060-0004;
   
   (B) A failure to give notice for inspection or schedule change as required by OAR 345-060-0005;
   
   (C) A failure to maintain packaging, placarding, labeling, or shipment documentation as required by OAR 345-060-0025.

(2) The Director may, if special circumstances warrant, determine a classification at variance from section (1) of this rule.

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 are 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, as calculated under OAR 345-029-0560, if any;

(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;

   (b) The responsible party has taken prompt and effective action to correct the violation and ensure that it will not be repeated; or

   (c) That the responsible party reported the conditions or circumstances of the violation as a result of a compliance audit.

(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

[NOTE: The Department has provided two alternate versions of a proposed penalty calculation methodology. The first provides a new schedule of penalty amounts, but otherwise follows a similar methodology as the existing rules. The second “A” version incorporates a factor for duration and an additional amount for economic benefit, similar to DEQ’s penalty calculation methodology in OAR chapter 340, division 012. The Department will only adopt one version of the rule, although either version may be amended after receiving feedback from the RAC.]

345-029-0560 – Calculation of Civil Penalty Amount

The Director must calculate the amount of civil penalty by applying the factors under section (2) of this rule to the base penalty amount under section (1). For the purposes of calculating the amount of civil penalty, each day of violation is considered a separate violation.

(1) The base penalty amount for a violation is based on the classification and severity of the violation.

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

   (b) The severity of a Class I or Class II violation will 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 caused a significant adverse impact on public health and safety if not for the responsible party’s actions to control potential exposure.

(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.

(2) The base penalty for each violation or each day of violation is:

(a) For Class I violations:
   (A) $10,000 for a major violation;
   (B) $5,000 for a moderate violation;
   (C) $1,000 for a minor violation;

(b) For Class II violations:
   (A) $5,000 for a major violation;
   (B) $2,500 for a moderate violation;
   (C) $500 for a minor violation; and

(c) For Class III violations, $500.

(3) The Director may increase the penalty amount up to a maximum allowed under ORS 469.992 by multiplying the base penalty by one or more of the following factors:

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

(b) 2.5, if the violation was repeated, or resulted from the same or similar underlying actions, conditions, or circumstances as a previous violation, regardless of whether the Director or Council ever pursued an enforcement action for a prior violation;

(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;

(4) If the Director did not apply any of the factors under section (3) of this rule, the Director may reduce the penalty amount by multiplying the base amount by one or both of the following factors:

(a) 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

(b) 0.8, if the responsible party voluntarily reported the conditions or circumstances of the violation under 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.

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

345-029-0560A – Calculation of Civil Penalty Amount (Alternate)

(1) The amount of civil penalty for a violation described under OAR 345-029-0503 shall be calculated by:
   (a) Determining the appropriate base penalty under section (2) of this rule;
   (b) Determining the penalty multiplier under section (3) of this rule;
   (c) Determining the economic benefit that resulted from the responsible party’s noncompliance under section (4) of this rule; and
   (d) Adding (c) to the product of (a) and (b).

(2) The base penalty amount for a violation is based on the classification and severity of the violation;
   (a) The classification of violation is as provided in OAR 345-029-0530;
   (b) The severity of a Class I or Class II violation will 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 caused a significant adverse impact on public health and safety if not for the responsible party’s actions to control potential exposure;
      (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.

(3) The Penalty Multiplier is 1 unless modified by the Director. The multiplier may be modified by:

(a) Adjusting for aggravating factors by increasing the multiplier by one or more of the following:

(A) 0.5, if the Director finds the violation was intentional or was the result of reckless behavior;

(B) 0.25, if the violation was repeated, or the Director finds the current violation resulted from the same underlying problem as a prior violation, regardless of whether the Director or Council ever pursued enforcement of the prior violation;

(C) 0.25, 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;

(b) Adjusting for mitigating factors by decreasing the multiplier by one or both of the following:

(A) 0.25, 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 corrective action plan that the Director finds adequate to minimize the possibility of recurrence; and

(B) 0.25, if the responsible party voluntarily reported the conditions or circumstances of the violation under 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; and

(c) Adjusting for the duration of the violation by multiplying the sum of (a) and (b) by one of the following:

(A) 1 if the violation occurred on a single day;

(B) 2 if the violation continued for more than one day, but less than seven days;

(C) 5 if the violation continued for seven or more days, but less than 30 days; or

(D) 10 if the violation continued for 30 days or more.

(4) The 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 section (1), the Director’s calculation may not result in a civil penalty for a violation that exceeds the maximum civil penalty allowed by ORS 469.992.

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.085 & 469.992
On behalf of Columbia Riverkeeper, I submit the following informal comments regarding the Draft Proposed Rules circulated to RAC members on October 27, 2020:

- I understand this rulemaking effort is focused on the enforcement authorities specifically applicable to violations of the regulations governing the transport or disposal of radioactive materials or waste—however, since Division 29 is currently open for revision I suggest making the following edits to the earlier sections of Division 29 that address violations of the siting rules:

  o Under OAR 345-029-0020 (Notice of Violation):
    - I recommend listing the factors in subsection 1 as statements rather than questions. I also suggest using “violation” or “alleged violation” rather than “conditions and circumstances” throughout the subsections. Some specific suggested language:
      - (a) whether the responsible party reported the violation(s) in a timely manner,
      - (b) whether the violation(s) related to a reporting requirement,
      - (c) whether the violation(s) was the result of ambiguous language in the requirement in question,
      - (d) whether the violation resulted from a change to the design, construction, operation, or retirement of a facility for which a site certificate has been issued where the certificate holder determined—pursuant to the criteria in OAR 345-027-0350—that no amendment was required and documented that determination in a written evaluation as required by OAR 345-027-0355,
        - Note that the current draft language of subsection (1)(d) references OAR 345-027-0050(2). I believe this is an outdated reference and the number is now OAR 345-027-0350. I also suggest that the reference be to -0350 generally—right now it references subsection (2) which only addresses laws and regulations adopted after the site certificate was issued.
      - (e) whether the violation in question has been cited by any other state agency having jurisdiction,
• (f) whether the responsible party had control over the conditions and circumstances that led to the violation.

- I suggest revising OAR 345-029-0020(2) to include reference to the factors described in subsection (1). As currently drafted, it is not clear what role the factors listed in subsection (1) play. The Department may want to consider flipping subsection (1) and (2) to put the Department’s authority to issue a notice of violation first followed by the discussion of the factors the Department is to consider when deciding whether to issue a notice.

- In OAR 345-029-0020(c), I suggest making the written response an option rather than a requirement. During the November 2, 2020, RAC meeting, the group discussed that having the written response as a requirement raises a number of questions about what happens if the responsible party fails to provide a response. Alternatively, the Department should consider including in OAR 345-029-0040 a section addressing what happens if the responsible party fails to submit this response.

- I strongly suggest revising OAR 345-029-0030(2)(d) (Classification of Violations) to read “(d) The violation results in a significant adverse impact or the potential for significant adverse impact on the health and safety of the public or on the environment.”

- I have concerns that the way OAR 345-029-0030 through 345-029-0060 is written there is essentially no penalty if an entity violates the terms of a site certificate, Council order or applicable law unless one of the aggravating factors applies to bump it up to a Class I.

- I strongly suggest revising OAR 345-029-0090 to include a documentation requirement. As currently written, that provision states that the penalty may be reduced “upon a showing” of financial hardship – there needs to be some specific parameters around what qualifies as a financial hardship and what documentation the responsible party must show to prove that hardship.

- With respect to OAR 345-029-0510 and OAR 345-029-0510 (Report by a Responsible Party), I suggest revising (1)(a)(C) to read “The immediate actions the responsible party has taken to correct...” It is currently drafted to say “intends to take” which doesn’t fit with the word “immediate” earlier in the sentence. “Intends to take” implies that the action will be taken at some point in the future while “immediate” suggests that the actions were taken at the moment of discovery.

- My comments with respect to OAR 345-029-0520 (Pre-Enforcement Notice) largely mirror my comments above with respect to OAR 345-029-0020:
  - I strongly recommend listing the factors in subsection 1 as statements rather than questions. I also suggest saying “alleged violation” rather than “conditions and circumstances” throughout the subsections. Some specific suggested language:
• (a) whether the responsible party reported the alleged violation(s) in a timely manner,

• (b) whether the alleged violation(s) relate to a reporting requirement,

• (c) whether the alleged violation(s) was the result of ambiguous language in the requirement in question,

• (d) whether the alleged violation in question has been cited by any other state agency having jurisdiction,

• (e) whether the responsible party had control over the conditions and circumstances that led to the alleged violation.

  o In OAR 345-029-0520(2)(c), I suggest making the written response an option rather than a requirement. As I explain above, as currently drafted the regulations provide no explanation for what happens if the responsible party fails to provide this response. Alternatively, the Department should include in OAR 345-029-0520(3) a section addressing what happens if the responsible party fails to submit this response.

- With respect to OAR 345-029-0530:

  o In subsection (1), I strongly suggest moving “failure to obtain an Oregon Radioactive Waste Material Transport Permit” up to a Class I violation. The requirement to obtain a permit is a fundamental requirement of the regulatory program.

  o I have some concerns about the lack of specificity in subsection (2). What “special circumstances” would warrant a change in classification? Would the Director be able to grant a variance in classification upward, downwards, or both? In the absence of a stand-alone enforcement policy outside of the regulations, I strongly suggest including some factors here that the Director would consider in making a variance determination.

- With respect to OAR 345-029-0555(7)(a) (Enforcement Actions), I strongly suggest including more specific language specifying what documentation a responsible party must submit to make a “showing” of economic/financial hardship. Some examples would be three years of tax returns, profit/loss statements, etc. An entity should not be given an economic hardship reduction based on their word alone.

- Under OAR 345-029-0560 (Calculation of Civil Penalty Amount), the draft language recognizes in the first paragraph that each day of violation is considered a separate violation so I suggest revising subsection (2) to say simply “The base penalty for each violation is…” and delete “or each day of violation.” If the intent is that some violations
would not be per day, I suggest including that information under OAR 345-029-0530 (Classification of Violations).

- For example, if the Department accepts my suggestion to reclassify “failure to obtain a [transport permit]” from Class III to Class I, the Department may consider classifying that as a one-day violation for penalty calculation purposes.

  - Between the two penalty calculation options, Riverkeeper would prefer the alternate option under OAR 345-029-0560A. Proper disposal and handling of radioactive waste is expensive, which creates a strong incentive for entities to attempt to avoid the requirements. The ability to penalize those entities for the costs they saved in violating the law is an important deterrent. It is conceivable that the civil penalties calculated under these rules would be less than what it would have cost an entity to properly handle/dispose of its waste, which incentivizes those entities to break the law. An economic benefit component, however, makes it harder for companies to treat potential civil penalties as part of the cost of doing business.
Thank you for the opportunity for Rules Advisory Committee (RAC) members to comment informally on the draft rules following our discussion as a group on November 2, 2020. I have several concerns, as well as some questions. I want to preface my comments by saying that this has been an interesting and thought-provoking experience. The overall response of the Department, from acknowledging the seriousness of the events that occurred at the Arlington Landfill to issuing a Notice of Violation to Chemical Waste Management to setting about to address statutory and regulatory limitations and deficiencies, is to be commended. It’s been a pleasure to be part of the RAC designated to tackle part of the necessary work. Staff, invited resource persons, and RAC members have all worked hard and contributed a great deal to laying the groundwork to allow Oregon to move forward on the task at hand:

... to ensure that the rules for enforcement of laws and rules governing the transport and disposal of radioactive materials and waste are sufficient to protect public health and safety and the environment by incentivizing prevention measures to ensure that radioactive materials or wastes are no improperly transported or disposed of in Oregon, and to require appropriate mitigation when a violation occurs.

I have wound up developing three documents as part of my informal comments on the draft rules. 1) This narrative explanation with some detail to note concerns and suggestions. 2) A copy (in Word) of the draft rules with comments (and some suggested edits) in the margin. 3) My attempt at a hybrid of the two versions of 345-029-0560 that were included in the draft rules. As I understand it, some of the issues still outstanding will require statutory fixes (that will then require their own regulatory processes to implement). I will raise some of those in these comments anyway for the record. Others, though, appear to me to be still within reach via Division 29 rules. I’ve tried to cover them in a helpful way here.

1. **The draft rules do not appear to add any new mechanisms that could facilitate detection/discovery of illegal TENORM waste that is en route to a site in Oregon.** The Arlington affair—where discovery was only achieved via a “tip” received at the end of three years of illegal shipments—demonstrates that Oregon current lacks adequate mechanisms to detect or discover such waste after crossing state lines while en route to an intended disposal site. Rules or procedures of ODOT don’t suffice. Since neither placarding of such loads or and Oregon Radioactive Materials Transport Permit required, that base is still not covered, leaving the state vulnerable in that regard. This wasn’t really discussed by the RAC so I’m not sure what kind of solution might be devised, other than perhaps the installation of sensing devices at weigh stations (very costly to the state) or implementation of random spot checks from a mobile device at weigh stations (significantly less costly) that could detect lower level radioactivity. In any case, such measures would not appear to be useful without effective attention to the following issue (#2).

2. **The draft rules do not add any new ability to penalize brokers and transporters of illegal TENORM waste.** While the draft rules at 345-029-0530 and elsewhere appear to give ODOE the ability to more effectively disincentive landfill managers who break the law and accept such waste, I firmly believe a key to prevention is to soundly disincentivize transport, as well. It seems
undeniable that illegal TENORM dumping is not a problem for Oregon unless transporters want to bring it here.

As I understand it, the draft rules at 345-029-0530 do not apply to brokers and transporters who dispose of this type of waste within Oregon. Fortunately, OAR 340-093-0040(1) and (4), the bases for the Notice of Civil Penalty Assessment and Order DEQ issued to OWL, Inc., allows that Department to disincentivize transporters in some way, but it seems appropriate and necessary for ODOE to have the ability to act against such violations, as well, especially since it doesn’t appear that DEQ’s rule allows the fine to be escalated on the basis of any of duration (in the Arlington case, three years of violations), number of separate violations (64), or total amount of waste deposited. If we truly wish to stop efforts to dispose of fracking waste here, we need to have in place mechanisms to make transporters view Oregon as too risky and costly to target. I’m also told that legislation that would enable changes to rules in Division 50 would be needed to do that and that the Department is working with legislators with the intent of making that happen. This is welcome news and I will watch for that.

3. At OAR 345-029-0555 in the draft, it is said that the Director must calculate the penalty on the basis of classification and severity. How is severity to be determined without the benefit of a detailed Risk Assessment like the one CWM was required to provide in the Notice of Violation they were issued? I raised this concern during the November 2 meeting and suggest in these comments that a requirement for the same type of Risk Assessment specified in the NOV issued to CWM should be added to the draft rules as a component of the Pre-Enforcement Notice (PEN) as an additional component at 345-029-0520(2). I presume ODOE already has statutory authority to make such a requirement and, if it were added to the PEN, it would allow determination of severity on the basis of information provided by the RP, as well as other evidence available to the Director.

4. The draft rules appear to miss an important opportunity to prevent illegal entry into the state of illegal TENORM waste and its disposal here that was proposed by CWM as part of its Corrective Action Plan. The details of CWM’s role in the violation for which they’ve been cited are largely unknown to the public, but we’re all no doubt grateful for their willingness to take action to prevent recurrence. For one thing, they proposed a new internal, systematic procedure whereby all shipping application paperwork will be referred to ODOE if TENORM appears to be involved. One could argue that CWM could have requested help recognizing illegal levels of radioactivity in waste in that paperwork sooner, but assuming adoption of their CAP and subsequent compliance, future violation of this type at the Arlington Landfill or any other facility managed by CWM would be unlikely. For purposes here, if this same procedure were to be incorporated in the draft regulations to apply to all landfills statewide, the additional staff workload could well be worth it to accomplish the state’s (and the RAC’s) goals. I deliberately stress all landfills—not just those licensed for hazardous waste—because all are vulnerable due to the enormous quantity of this type of waste at the same time as there are relatively few licensed landfills. The health and safety risks could be significantly more serious if this type of waste were to be unknowingly accepted by a municipal landfill. The present RAC process has resulted in what appear to be some important improvements across Division 29, we should not
walk away from this task with “a tip” the only hope we have for discovery of this type of violation.

5. The Arlington affair and CWM’s response to the Notice of Violation offers an additional disincentivizing mechanism for illegal TENORM acceptance not currently in the draft rules—requiring violators to include installation of a radioactivity sensor at a facility’s gate in their Corrective Action Plan. Again, CWM appears to have volunteered to take that step, but incorporation into the draft rules of such a requirement would constitute the potential for an increase in workload on the Department, but it would unquestionably provide one detection and prevention mechanism. Turning to the second discovery mechanism CWM included in their CAP, I would suggest that requiring all permitted landfills to install some type of radioactivity sensor (that would produce data records to allow monitoring) at their entrances would not be reasonable; however, I would suggest that, in finalizing draft rules, the Department consider making this measure a requirement for all corrective action plans developed in response to a Pre-Enforcement Notice or at least a requirement in a Notice of Enforcement Action (NOEA) under the new rules. In my view, CWM, in their zeal to assure the state of Oregon that this will never happen again at their landfill, has gone some distance towards providing at least a partial solution to the lack of detection measures in the draft rules by preventing a violation to happen twice at the same site. (Please see a margin comment in the draft rules I marked up regarding my recommendation at 345-029-0520 for a requirement in all PENs for a Corrective Action Plan, per se.)

6. There seemed to be consensus during the November 2 RAC meeting to develop a hybrid of 345-029-0560 and Alternative (A). My attempt at this is attached.

7. Neither RAC issues discussions nor the draft rules address measures that might engage state government processes in generating states in preventing Oregon from being targeted for illegal TENORM shipments. Question: Since North Dakota is not a member of the Northwest Compact on Low-Level Radioactive Waste Management, why was waste from North Dakota shipped here instead of to the Southwestern Compact? This has not come up during the RAC’s tenure and is unlikely to be able to be made a priority under the current circumstances, here or nationally, but perhaps it could be kept on a list somewhere to be dealt with at a later time.

8. Should the draft rules include provisions designed to encourage or even mandate reporting of attempts by TENORM waste generators, brokers, or transporters to bring such waste into the state? For example, permittees could be required to report to ODOE if they believe they’ve been approached to accept illegal TENORM waste. Oregon waste management permittees and owners of other potential dumping sites, as well as the public, could be provided with a well-publicized “hotline” or other mechanism to report suspected attempts at illegal TENORM waste dumping within the state, similar to ODFW’s “poaching hotline?”

9. Once the rules for Division 20 are finalized, I encourage ODOE to consider implementing some kind of publicity campaign or roll-out. This could serve at least three purposes: 1) To assure the public that effective steps have been taken to address at least one part of this shocking situation
at the Arlington Landfill that surfaced earlier this year. At least the near community has been aggrieved and irreparably harmed. Future steps, including legislation and further rulemaking, could be outlined, as well. 2) To give all landfill permit holders and others fair notice what illegal TENORM waste is, the potential that they may be approached to accept it, what steps they should take if that occurs, and what the consequences of violating pertinent laws and regulations are. 3) To give notice to generators and transporters of such waste in other states of Oregon’s updated approach to this matter.
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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 underlined, language proposed to be deleted is shown in strikethrough.
DIVISION 29 - NOTICE OF VIOLATION, CIVIL PENALTIES, REVOCATION OR SUSPENSION

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 Department 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:
NOTICE OF VIOLATION, CIVIL PENALTIES, REVOCATION OR SUSPENSION

(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) 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) 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 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 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 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:

DIVISION 29 -
(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 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 345-027-0050(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?
NOTICE OF VIOLATION, CIVIL PENALTIES, REVOCATION OR SUSPENSION

(1) 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 serve the notice of violation by personal service or by first class, certified or registered mail.

(2) In the notice of violation, the Department shall 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 345-0290060; 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 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 II violations:

DIVISION 29 -
(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 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 II violation. Factors the Department may consider in escalating a Class I violation to Class II 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 II, the Department must find that the violation meets one of the following criteria: 

(a) It is a repeated violation. The Department 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 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
NOTICE OF VIOLATION, CIVIL PENALTIES, REVOCATION OR SUSPENSION

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 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 confirm or amend the classification of the violation and shall 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 345-0290040, and any enforcement conference, the Department of Energy may assess a civil penalty for a Class I violation. The Department shall 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:
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(A) 3.0 if the Department finds the violation was intentional or reckless; or 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 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 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 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 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.
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 469.085 & 469.992

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

(1) "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.

(2) "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.

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

Statutory/Other Authority: ORS 469.470 & 469.605
Statutes/Other Implemented: ORS 469.085 & 469.540

Commented [SW1]: My comments below are, in part, offered with the responsible party or the public in mind as two important “audiences,” so e.g., they may be a bit wordier in hopes of being a little more clear for them.

Commented [SW2]: RAC members have suggested adding definitions for “prior violation;” “potential” as in, for harm including in future; “willful;” intentional;” and “reckless.” Some of these are dealt with in subsequent parts of the rule and some may have challenging legal connotations, but should they also be included here?

Commented [SW3]: This term, used in the draft rules, is not something I recall being discussed in connection with landfill operators’ acceptance of illegal TENORM waste. I understand that Division 29 draft rules don’t include anything pertaining to brokers or transporters of this type of waste, but I assume the reference to “Radioactive Materials Transport Permit requirements” makes sense to include here anyway. Is that correct?
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) Immediately 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) The immediate actions the responsible party intends to take to correct or mitigate conditions or circumstances, whether the actions will prevent a violation from occurring, and when the actions are expected to be completed; and

(D) A statement explaining whether the conditions or circumstances were discovered as a 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 and

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

(a) A discussion of the cause of the reported conditions or circumstances;

(b) The estimated time when the conditions or circumstances began;

(c) A description of immediate actions taken to correct or mitigate the conditions or circumstances; and

(d) A description of actions taken or planned to minimize the possibility of recurrence of the conditions or circumstances.

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. In deciding whether or not to issue a Pre-Enforcement Notice, the Director must consider the following:

(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?

Commented [SW4]: Edit—comma not needed.

Commented [SW5]: Suggest insert “and how” after “whether.”

Commented [SW6]: Again, I may have missed something about landfill operators being subject to any kind of compliance audit. But in any case, wouldn’t the Department actually want to know in this initial report by the responsible party what led to the discovery, no matter how it came about? It seems like this request should perhaps be more generic, whether “compliance audit” is retained or not. I’ve also addressed the broader issue of “discovery” in my narrative comments.

Commented [SW7]: Consider ending with a period and deleting “and” because (2) is so far removed from the intro of (1). See also just below.

Commented [SW8]: If you decide to consider my proposed edit just above, you would complete the change by inserting “the responsible party must” before “submit.” Just looking for perhaps a layperson-friendlier structure. This one seems to go on and on so takes extra focus to sort through.

Commented [SW9]: Replace with “date?”

Commented [SW10]: Based on the Arlington episode (which, for this type of violation could be expected to be somewhat common due to the difficulty of discovery), perhaps after “began” add “or the date of the first occasion of the potential violation, if more than one occurred”

Commented [SW11]: Insert “and dates” before “of”

Commented [SW12]: At 8/26 meeting, DEQ [after whose approach this was modeled] clarified that the PEN indicates that a penalty is coming. Should that be specified somewhere in this rule so there’s no mistake about what receipt of a PEN means? I had the impression from some of the early discussion that some thought it might operate more like a warning or invitation to correct a problem to stave off a penalty.

Commented [SW13]: I’m unclear about the meaning of “must consider” here. To what end? Where is this consideration process recorded or reflected, how much weight does it have, etc? Do “yes” or “no” answers necessarily result in anything? Seems ambiguous. 2) Might there be other issues the Director should consider at this point—soon after discovery of a particular incident? E.g., have there been prior occasions of this/these violation(s) by this RP? Does it appear at this time that there may be significant health and safety risks associated with the violation(s)? In other words, why at all? I may have missed something associated with the violation(s) in my narrative comments.

Commented [SW14]: What are the implications if answers to these questions are yes or no? What if the situation came to light in some other way, i.e., they didn’t report it at all? It seems the means of discovery is pretty...
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(d) Has the violation in question been cited by any other state agency having jurisdiction?

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

(2) The Director must serve the Pre-Enforcement Notice upon the responsible party by personal service or by first class, certified or registered mail. The Pre-Enforcement Notice 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 its determination, including the alleged date of discovery;

(c) The date by which the responsible party must respond to the Pre-Enforcement Notice under section (3) of this rule. The date must be at least 30 days after the date of issuance of the Notice;

(d) 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 a conference under OAR 345-029-0550 before the Director issues a Notice of Enforcement Action under OAR 345-029-0555.

(e) A statement of any mitigating or aggravating factors, including, but not limited to:

(A) Whether the responsible party reported the conditions or circumstances related to the alleged violation under OAR 345-029-0510;

(B) The performance of the responsible party in taking necessary or appropriate action to correct or prevent the violation;

(C) A history of similar or related violations by the responsible party;

(D) Any known or potential adverse impact of the violation on public health and safety;

(E) Whether the Director finds the violation was intentional or the result of reckless behavior; and

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

(e) 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) If the Director finds the violation alleged in the Pre-Enforcement Notice did not occur, the Director must amend or withdraw the Pre-Enforcement Notice, as appropriate, within 30 days.

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

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

(a) Class I Violations include:

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

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

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

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

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

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

(2) The Director may, if special circumstances warrant, determine a classification at variance from section (1) of this rule.

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 are 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, as calculated under OAR 345-029-0560, if any.

(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.
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(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,

(b) The responsible party has taken prompt and effective action to correct the violation and ensure that it will not be repeated; or

(c) That the responsible party reported the conditions or circumstances of the violation as a result of a compliance audit.

(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

[NOTE: The Department has provided two alternate versions of a proposed penalty calculation methodology. The first provides a new schedule of penalty amounts, but otherwise follows a similar methodology as the existing rules. The second “A” version incorporates a factor for duration and an additional amount for economic benefit, similar to DEQ’s penalty calculation methodology in OAR chapter 340, division 012. The Department will only adopt one version of the rule, although either version may be amended after receiving feedback from the RAC.]

345-029-0560 – Calculation of Civil Penalty Amount

The Director must calculate the amount of civil penalty by applying the factors under section (2) of this rule to the base penalty amount under section (1). For the purposes of calculating the amount of civil penalty, each day of violation is considered a separate violation.

(1) The base penalty amount for a violation is based on the classification and severity of the violation.

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

(b) The severity of a Class I or Class II violation will 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 caused a significant adverse impact on public health and safety if not for the responsible party’s actions to control potential exposure.

(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.

(2) The base penalty for each violation or each day of violation is:

(a) For Class I violations:
   (A) $10,000 for a major violation;
   (B) $5,000 for a moderate violation;
   (C) $1,000 for a minor violation;

(b) For Class II violations:
   (A) $5,000 for a major violation;
   (B) $2,500 for a moderate violation;
   (C) $500 for a minor violation;

(c) For Class III violations, $500.

(3) The Director may increase the penalty amount up to a maximum allowed under ORS 469.992 by multiplying the base penalty by one or more of the following factors:

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

(b) 2.5, if the violation was repeated, or resulted from the same or similar underlying actions, conditions, or circumstances as a previous violation, regardless of whether the Director or Council ever pursued an enforcement action for a prior violation;

(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;

(4) If the Director did not apply any of the factors under section (3) of this rule, the Director may reduce the penalty amount by multiplying the base amount by one or both of the following factors:

(a) 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

(b) 0.8, if the responsible party voluntarily reported the conditions or circumstances of the violation under 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
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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.

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

345-029-0560A – Calculation of Civil Penalty Amount (Alternate)

(1) The amount of civil penalty for a violation described under OAR 345-029-0503 shall be calculated by:
   (a) Determining the appropriate base penalty under section (2) of this rule;
   (b) Determining the penalty multiplier under section (3) of this rule;
   (c) Determining the economic benefit that resulted from the responsible party’s noncompliance under section (4) of this rule; and
   (d) Adding (c) to the product of (a) and (b).

(2) The base penalty amount for a violation is based on the classification and severity of the violation:
   (a) The classification of violation is as provided in OAR 345-029-0530;
   (b) The severity of a Class I or Class II violation will 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 caused a significant adverse impact on public health and safety if not for the responsible party’s actions to control potential exposure;
      (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.

(3) The Penalty Multiplier is 1 unless modified by the Director. The multiplier may be modified by:

(a) Adjusting for aggravating factors by increasing the multiplier by one or more of the following:
   (A) 0.5, if the Director finds the violation was intentional or was the result of reckless behavior;
   (B) 0.25, if the violation was repeated, or the Director finds the current violation resulted from the same underlying problem as a prior violation, regardless of whether the Director or Council ever pursued enforcement of the prior violation;
   (C) 0.25, 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;

(b) Adjusting for mitigating factors by decreasing the multiplier by one or both of the following:
   (A) 0.25, 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 corrective action plan that the Director finds adequate to minimize the possibility of recurrence; and
   (B) 0.25, if the responsible party voluntarily reported the conditions or circumstances of the violation under 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 in the independent context of any investigation or inquiry of the Director or Council, or whether the conditions or circumstances were reported as a result of a compliance audit; and

(c) Adjusting for the duration of the violation by multiplying the sum of (a) and (b) by one of the following:
   (A) 1 if the violation occurred on a single day;
   (B) 2 if the violation continued for more than one day, but less than seven days;
   (C) 5 if the violation continued for seven or more days, but less than 30 days; or (D) 10 if the violation continued for 30 days or more.

(4) The 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.
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.

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.

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.

Notwithstanding section (1), the Director's calculation may not result in a civil penalty for a violation that exceeds the maximum civil penalty allowed by ORS 469.992.

Statutory/Other Authority: ORS 469.470
Statutes/Other Implemented: ORS 469.085 & 469.992
The following is Shirley Weathers’s DRAFT proposal for the Hybrid we discussed for OAR 345-029-0560. (Part 3 of 3)

345-029-0560 – Calculation of Civil Penalty Amount

(1) The amount of civil penalty for a violation described under OAR 345-029-0503 shall be calculated by:
   (a) Determining the appropriate base penalty under section (2) of this rule;
   (b) Determining the penalty multiplier under section (3) of this rule;
   (c) Determining the economic benefit that resulted from the responsible party’s noncompliance under section (4) of this rule; and
   (d) Adding (c) to the product of (a) and (b).

(2) The base penalty amount for a violation is based on the classification and severity of the violation:
   (a) The classification of violation is as provided in OAR 345-029-0530;
   (b) The severity of a Class I or Class II violation will 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 caused a significant adverse impact on public health and safety if not for the responsible party’s actions to control potential exposure;
      (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;
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(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.

(3) The Penalty Multiplier is 1 unless modified by the Director. The multiplier may be modified by:

(a) Adjusting for aggravating factors by increasing the multiplier by one or more of the following:

(A) 0.5, if the Director finds the violation was intentional or was the result of reckless behavior;

(B) 0.25, if the violation was repeated, or the Director finds the current violation resulted from the same underlying problem as a prior violation, regardless of whether the Director or Council ever pursued enforcement of the prior violation;

(C) 0.25, 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;

(b) Adjusting for mitigating factors by decreasing the multiplier by one or both of the following:

(A) 0.25, 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 corrective action plan that the Director finds adequate to minimize the possibility of recurrence; and

(B) 0.25, if the responsible party voluntarily reported the conditions or circumstances of the violation under 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; and

(c) Adjusting for the duration of the violation by multiplying the sum of (a) and (b) by one of the following:

(A) 1 if the violation occurred on a single day;

(B) 2 if the violation continued for more than one day, but less than seven days;

(C) 5 if the violation continued for seven or more days, but less than 30 days; or

(D) 10 if the violation continued for 30 days or more.
(a) The 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 section (1), the Director’s calculation may not result in a civil penalty for a violation that exceeds the maximum civil penalty allowed by ORS 469.992.

Commented [SW18]: Alternatively, this could be moved up to section (1) to become (e).
From: Denson, Jim  
Sent: Friday, November 20, 2020 12:49 PM  
To: CLARK Christopher * ODOE  
Cc: BURRIGHT Jeff * ODOE; WOODS Maxwell * ODOE  
Subject: Suggestions on Proposed DOE penalty rulemaking

Follow Up Flag: Follow up  
Flag Status: Flagged

Chris:

I apologize in advance for the lengthy discussion here, and sincerely appreciate the opportunity to provide some thoughts on the DOE’s redlined rulemaking package on radioactive materials enforcement that was presented to the Rulemaking Advisory Committee on November 2, 2020 (redlined rulemaking package).

From a high-level point of view, we support the alternate methodology for the calculation of civil penalties proposed in OAR 345-029-0560A of the redlined rulemaking package. As I have indicated previously, we also generally support an enforcement framework from DOE that would closely resemble the existing enforcement framework used by the Oregon Department of Environmental Quality (DEQ) in OAR Chapter 340, Division 012. I believe it is important from a regulatory and policy perspective for the two departments to undertake enforcement in a similar and consistent manner for the activities under their respective jurisdictions. The alternate methodology provides for such regulatory consistency while also reasonably balancing DOE’s priorities of deterrence, prevention, and corrective action for violations of the laws governing the transport and disposal of radioactive materials in Oregon.

For similar reasons, we recommend revising and adding definitions for certain important terms used in the redlined rulemaking package, in order to provide further clarity and to parallel the same terms used by DEQ in enforcement proceedings.

We appreciate the hazardous waste industry being represented on the Rulemaking Advisory Committee, and it is my intention to contribute to the development of a clear and reasonable program for enforcement. We also appreciate DOE’s thoughtful effort to clarify its enforcement rules for radioactive materials violations. We’re submitting these comments to address two specific concerns with the redlined rulemaking package.

1. **The final rule must provide clear definitions for terms used in the calculation of the penalty amount for violations.**

The redlined rulemaking package includes two methodologies for the calculation of a penalty amount. Both of these methodologies begin the calculation with a base penalty amount that is based, in part, on the severity of the violation deemed as “major,” “moderate,” or “minor.” Each of these terms are defined in the redlined rulemaking package – under the proposed OAR 345-029-0560(1)(b)(A)-(C) for the first penalty calculation methodology alternative, and under the proposed OAR 345-029-0560A(2)(b)(A)-(C) for the alternative. These identical terms also apply to DEQ’s determination of the magnitude of violations under its jurisdiction; however, the definitions used by DEQ vary from those proposed for use by DOE.
The redlined rulemaking package broadly describes the severity determinations in manner that I believe is unintentionally open-ended and ambiguous, creating uncertainty in how they may be applied. In particular, use of the word “includes” in the definitions expands the meaning of the terms to encompass not only the written description, but also allows the inclusion of unwritten and unknown activity that may be placed in violations. When faced with a potential violation, a responsible party would have no clear way of knowing whether the activity will be treated as a major, moderate, or minor violation. The terms of severity should be clear for purposes of implementation and provide certainty for both DOE and its regulated entities to understand what conduct falls within the purview of each classification and what does not.

The redlined rulemaking package also proposes a severity determination that appropriately accounts for the known adverse outcomes from a violation, but also provides for all “potential” outcomes that may or may not arise directly from a violation. Including these “potential” future outcomes in a calculation of the severity of present conduct is speculative and makes it impossible for a regulated entity to understand how an alleged violation may be treated. This theoretical aspect included in the definitions in the redlined rulemaking package do not exist in the parallel DEQ regulations and my recommendation would be to remove this concept from the proposed rules.

Finally, while the terms define the outcome associated with each classification of severity, they do not include the factors that DOE would consider in making its determination. Incorporating consideration factors would help regulated entities understand how a severity classification will be assessed, as well as guide their submission of relevant facts and information to aid DOE in its determinations.

**Suggested clarifications:** We propose that terms of severity in DOE enforcement regulations be defined in the same way as in DEQ enforcement regulations. For “major violation” and “minor violation,” the language proposed below parallels the existing definitions from DEQ found in OAR 340-012-0130(3) and (4). As “moderate violation” is not specifically defined in DEQ regulations, we propose a definition that uses a similar structure as the definitions for “major” and “minor.” These definitions would replace the terms in the redlined rulemaking package under the proposed OAR 345-029-0560(1)(b)(A)-(C) for the first penalty calculation methodology alternative, and under the proposed OAR 345-029-0560A(2)(b)(A)-(C) for the second penalty calculation methodology alternative:

**Major Violation:** “The severity of the violation is major if DOE finds that the violation had a significant adverse impact on human health and safety, or the environment. In making this finding, DOE will consider the degree of deviation from applicable statutes, DOE rules, standards, permits, and orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, DOE may consider any single factor to be conclusive.”

**Moderate Violation:** “The severity of the violation is moderate if DOE finds that the violation had a material adverse impact on human health and safety, or the environment. In making this finding, DOE will consider the degree of deviation from applicable statutes, DOE rules, standards, permits, and orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation.”
**Minor Violation:** “The severity of the violation is minor if DOE finds that the violation had no more than a de minimis adverse impact on human health and safety, or the environment, and posed no more than a de minimis threat to human health and safety or the environment. In making this finding, DOE will consider the degree of deviation from applicable statutes, DOE rules, standards, permits, and orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation.”

**Suggestion No. 2:** The redlined rulemaking package allows for an increase in penalty amount by a specified multiplier if the violation was “intentional” or was the result of “reckless” behavior. These provisions are located in proposed OAR 345-029-0560(3)(a) for the first penalty calculation methodology alternative, and in the proposed OAR 345-029-0560A(3)(a) (A) for the alternative. As discussed previously, it is imperative that “intentional” and “reckless” are defined in the rules so that regulated entities understand the meaning of the behavior referenced and how it could factor into a penalty calculation, and so that application of the terms is clear and consistent. If left undefined, application of the multiplier could conceivably be left entirely to the discretion of DOE.

**Suggested Language:** We propose that undefined terms in the final rule be defined in the same way as the identical terms in the DEQ enforcement regulations. “Intentional” is defined in OAR 340-012-0030(13) and “reckless” is defined in OAR 340-012-0030(20). The definitions proposed below would be added to the definitions section of the rule package in proposed OAR 345-029-0505:

"Intentional" means the responsible party acted with a conscious objective to cause the result of the conduct.

"Reckless" or "reckless behavior" 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.

2. The penalty calculation methodology that is adopted should: (a) contain a maximum cap on the duration factor that may apply to a violation; and (b) distinguish violations that result from the same underlying cause or event from violations that result from multiple causes or events.

**Concern No. 1:** The redlined rulemaking package provides two alternatives for a proposed penalty calculation methodology. Under the first alternative, each day of a “violation” is considered to be a separate violation, and the base penalty, multiplied by any aggravating and mitigating factors, is assessed for each day the violation exists, without any cap on the total number of days or total penalty that may be assessed. This lack of an upper limit beyond the statutory daily cap may result in the potential for an extraordinary total penalty amount regardless of the nature of the violation or the culpability of the alleged violator. As earlier noted in these suggestions, we support the alternate methodology, which provides a reasonable upper limit of thirty days for a multi-day violation. We believe that the alternate methodology reasonably balances the priorities of deterrence, prevention, and corrective action that the first method fails to do.
**Suggested Revision:** Adopt the alternate calculation of civil penalty methodology proposed in OAR 345-029-0560A of the redlined rulemaking package, with the clarification described in the suggested revision to concern No. 2 below.

**Concern No. 2:** The redlined rulemaking package treats violations that result from the same underlying cause or event but which continue over a period of time, effectively the same as violations that result from distinct causes or events and continue over a period of time. The redlined rulemaking package requires that each day of a violation triggered by a single cause or event is counted as a separate violation; that each violation resulting from the same or similar underlying actions be increased by a certain multiplier; and that each violation calculate an additional multiplier for duration. The total penalty assessed could thus include an additional, new penalty amount for each succeeding day of a violation resulting from a single cause or event, until that single cause or event is corrected. We believe that duration is already accounted for as a potential aggravating factor in the penalty assessment. Stated differently, we believe that in cases where multiple violations result from a single transgression by a regulated entity, those violations should be assessed a single penalty (with duration as an appropriate factor). This would be in contrast to a situation where multiple violations result from multiple transgressions (or distinguishable causes or events), where multiple penalty calculations per violation may be appropriate. Making this important distinction would produce a more equitable penalty calculation.

As presented, this proposed rule does not account for violations that are undiscovered, or that cannot be swiftly corrected, or that may be the subject of reasonably different rule interpretations. As a simple example, if a regulated entity neglects to file a required notice and does not discover that it was required to file the notice for thirty days, the rules would allow the DOE to assess thirty separate civil violations (and thus thirty separate penalties), each having an aggravating factor for duration being already applied. Similarly, if a regulated entity neglects to obtain a permit for the transport of radioactive materials, but otherwise complies with all laws and regulations governing the transport of radioactive materials, if the unpermitted transport continues for thirty days, under the redlined rulemaking package each one of those thirty days would be a new and separate violation for which thirty separate civil penalties may be calculated.

If one action, or inaction, results in a violation of continued duration, the civil penalty should be calculated based on a single violation, using the duration aggravating factor proposed under OAR 345-029-0560A(3)(c). Stacking additional violations resulting from a single occurrence or event is not necessary when under the proposed alternate penalty calculation methodology, the single violation already takes duration into account.

**Suggested Revision:** Clarify under the proposed OAR 345-029-0560A(3)(a)(B) that multiple violations resulting from the same underlying cause or event will be treated as a single violation for purposes of the penalty calculation. The duration factor under the proposed OAR 345-029-0560A(3)(c) would still be available to account for the additional days of violation.

I appreciate the opportunity to provide input on the redlined rulemaking package and hope this assists in creating a rule that is clear and equitable.

Have a Safe and Healthily Thanksgiving holiday
Recycling is a good thing. Please recycle any printed emails.
Oregon Energy Facility Siting Council
Radioactive Materials Enforcement Rulemaking
Public Workshop Summary

Date: Monday, December 7, 2020
Time: 5:00 to 7:00 pm
Location: Remote Meeting (Webex)

Staff Presenters: Maxwell Woods, Jeff Burright, Christopher Clark, Todd Cornett

Public Comment: Chris Jackson

Staff explained that its draft proposed rules would establish a new series of rules for enforcement of violations involving radioactive materials or wastes, and provided an overview of the new rules.

One attendee, Chris Jackson, a retired Senior Environmental Assessor for City of Portland, provided oral comments at the meeting:

- Mr. Jackson commented that the proposed rules did not consider future economic/value impacts to properties located near the site of an unlawful disposal. He expressed concern that if radioactive waste was not removed, or operator declined to remove the waste, citizens in the vicinity could be impacted.
- Mr. Jackson asked if the proposed rules considered risks, or the legal dead end, if responsible party is a shell company or series of shell companies located in other jurisdictions, where Department would not be able locate or find the entity responsible in order to issue a civil penalty.
- Mr. Jackson stated that these rules address materials with similar levels of radioactivity as coal ash asked if the applicable requirements for remediation of coal ash piles, such as the coal ash pile located at the site of the Boardman Coal Plant could be evaluated and potentially used to inform the rulemaking. The Department responded that specific requirements for disposal and remediation of radioactive wastes were outside of the scope of this rulemaking, but that this would be considered in future rulemaking.