



Oregon

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To: Energy Facility Siting Council

From: Christopher M. Clark, Siting Policy Analyst & Rules Coordinator

Date: December 4, 2020

Subject: Agenda Item B (Action Item):
Radioactive Materials Enforcement Rulemaking - Consideration of Proposed Rules for the December 18, 2020 EFSC Meeting

Attachments: Attachment 1: Draft Notice of Proposed Rulemaking (forthcoming)
Attachment 2: Issues Analysis (forthcoming)
Attachment 3: Rulemaking Advice (forthcoming)

STAFF RECOMMENDATION

The Oregon Department of Energy (Department or staff) recommends that the Energy Facility Siting Council (Council) initiate formal rulemaking proceedings to adopt revisions to OAR 345-029 related to the enforcement of rules and laws governing the transport or disposal of radioactive materials and wastes in Oregon by authorizing issuance of a Notice of Proposed Rulemaking, as presented in Attachment 1.

BACKGROUND

With some exceptions, ORS chapter 469 prohibits radioactive materials from being held or placed at any site in Oregon. Specifically, ORS 469.525 prohibits the establishment, operation, or licensure of any radioactive waste disposal facility. Under ORS 469.300(23)(a), “radioactive waste” includes any material which is discarded, unwanted, or has no present lawful economic use and contains mined or refined naturally occurring isotopes, accelerator produced isotopes, or special nuclear material, source material or by-product material. Materials containing isotopes and concentrations identified in OAR 345-050 are not considered to be “radioactive waste” under the meaning of the law.

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

ORS 469.992 authorizes the Council and the Department to impose civil penalties of up to \$25,000 per day for violations of ORS chapter 469 or the Council's rules. The requirements for the assessment of penalties are described under ORS 469.085 and 183.475.

The Council has adopted rules under OAR chapter 345, division 029 which further describe the procedures and requirements for the assessment of penalties for several categories of violations, including but not limited to, violations of ORS chapter 469 and OAR chapter 345, site certificate conditions, Council orders, or the terms of a Radioactive Materials Transport Permit. The rules provide procedures for classifying violations and options for mitigation of penalty amounts which apply to all violation categories as well as the schedule of penalty amounts for specific categories.

The rules rely, in part, on conditions and procedures for reporting and monitoring established in site certificates and Oregon Radioactive Materials Transport Permits to ensure compliance, and to resolve noncompliance when it occurs. When formal enforcement is pursued through a Notice of Violation, the rules only allow assessment of a civil penalty for violations that are repeated or willful, or violations that resulted in a significant adverse impact on the health and safety of the public or on the environment.

In February 2020, the Department issued a Notice of Violation to the operator of a hazardous waste landfill after determining that the operator had disposed of materials containing radioactive waste in violation of ORS 469.525 and OAR 345-050-0006. The Department determined there was no significant adverse impact to the health or safety of landfill workers, the public, or the environment from the waste, and no penalty was assessed. The operator has completed a Draft Risk Assessment and Corrective Action Plan as required by the Notice of Violation, which is currently under review by the Department.

In this case, the responsible party has been cooperative and willing to take steps to correct the violation and prevent recurrence, but the process highlighted differences between enforcement of laws and rules involving energy facilities, where there is a site certificate and regular contact with Siting Division staff, and enforcement of laws and rules involving the disposal of radioactive materials and wastes, where there is no such binding agreement in place to ensure compliance. To address these differences, the Department requested the Council initiate this rulemaking to evaluate the procedures for enforcement of laws and rules governing the transport and disposal of radioactive materials or wastes to ensure that the rules adequately ensure compliance and protect the health and safety of the public and the environment through prevention and prompt correction of violations.

PROCEDURAL HISTORY

At its May 21, 2020, meeting, the Council initiated a rulemaking project to update administrative rules in OAR chapter 345, division 029 that provide for the rules for enforcement of laws and rules governing the transport and disposal of radioactive materials and waste in Oregon. The objective for this rulemaking is to ensure that the rules are sufficient to protect public health and safety and the environment by incentivizing preventative measures, to ensure that radioactive materials or wastes are not improperly transported or disposed of in Oregon, and to require appropriate mitigation or penalties when a violation occurs.

The Council approved the formation of a Rulemaking Advisory Committee (RAC) made up of interested stakeholders to assist in the development of proposed rule revisions. The RAC met three times over the summer and fall of 2020. The Department will also facilitate a public workshop to provide an opportunity for the public to learn about the rulemaking project, and to provide informal input on the draft proposed rules on December 7, 2020.

SUMMARY OF DRAFT PROPOSED RULES

Consistent with the scope and objectives Council approved for this rulemaking, the Department has developed draft proposed rules intended to incentivize prevention of violations, to ensure that radioactive materials or wastes are not improperly transported or disposed of in Oregon, and to require appropriate mitigation or penalties when a violation occurs.

The draft proposed rules would create a new series of rules within OAR chapter 345, division 029 that establish separate procedures applicable to the enforcement of rules and laws related to the transport and disposal of radioactive materials and wastes. The new procedures are based, in part, on the Department of Environmental Quality's procedures for enforcement and civil penalties found in OAR chapter 340, division 012. Among other changes, the new procedures would:

- Specify that formal enforcement proceedings related to the transport and disposal of radioactive materials or wastes, including contested case proceedings, would be conducted under the authority of the Director of the Oregon Department of Energy.
- Establish new procedural requirements for the conduct of enforcement proceedings related to the transport and disposal of radioactive materials or wastes, including issuance of a Pre-Enforcement Notice and Notice of Enforcement Action in place of a Notice of Violation.
- Expand the Director's ability to require a responsible party to provide additional information in a responsible to a Pre-Enforcement Notice.
- Establish new classifications for violations involving the transport or disposal of radioactive materials or wastes.
- Make a civil penalty available for all violations involving the transport or disposal of radioactive materials or wastes and establish a new methodology for civil penalty calculation.

Except for minor editorial changes to improve the clarity and consistency of rules, staff limited revisions to the existing rules for the enforcement of site certificates and laws and rules governing energy facilities to changes that are necessary to enable the creation of the new procedures for enforcement of laws and rules governing the transport and disposal of radioactive materials or wastes.

The Department will provide a draft Notice of Proposed Rulemaking (Attachment 1) containing the draft proposed rules, as well the rule summaries and Statement of Need and Fiscal Impact required by ORS 183.355 after the December 7 public workshop. The Department will also provide a summary of the major policy issues discussed by the RAC and raised at the workshop

(Attachment 2), and RAC meeting notes as well as supplemental written advice provided by RAC members and the public (Attachment 3) prior to the December 18 Council meeting.

FISCAL AND ECONOMIC IMPACTS

Because the rules in OAR 345-029 govern enforcement of existing rule requirements, staff does not expect the proposed rules to result in direct economic or fiscal impacts on agencies, local governments, or members of the public, unless a violation or potential violation of the rules and laws related to the transportation or disposal of radioactive materials or wastes occurs. The proposed rules would increase the amount of civil penalty that may be assessed in the event that a violation occurs. Any additional civil penalties collected under the proposed rules would be deposited in the General Fund.

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

PUBLIC COMMENTS AND RULEMAKING HEARING

When an agency proposes to adopt, amend or repeal a rule, it must provide notice and give interested persons reasonable opportunity to submit data or views. To provide a reasonable opportunity to submit data or views, staff recommends Council conduct a rulemaking hearing at its January meeting, and accept written public comments on the proposed rule changes until February 10, 2021. This would allow the Council to consider all written or oral submissions at a subsequent meeting. The timeline below provides completed and projected rulemaking steps based on these recommendations.

Permanent Rulemaking Steps	Projected Completion Date
Council initiates permanent rulemaking process	May 21, 2020
Staff convenes advisory committee and develops draft proposed rules	June – November 2020
Council considers recommend rule changes and authorization of Notice of Proposed Rulemaking	December 18, 2020
Staff issues Notice of Proposed Rulemaking	December 21, 2020
Council conducts rulemaking hearing	January 22, 2021
Last day to submit written comments	February 10, 2021
Council considers public comments and testimony and adoption of permanent rules	TBD

RECOMMENDED COUNCIL ACTION

Staff recommends that Council initiate formal rulemaking proceedings to revise OAR chapter 345, division 029 to establish new procedures for the enforcement of laws and rules governing the transport and disposal of radioactive materials or wastes, and authorize staff to issue the draft Notice of Proposed Rulemaking, as presented in Attachment 1.