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As long as it's profitable to bring in radioactive waste, without consequences of any kind, then this will happen again and again. You have proven that this is just a wage earning job for you, going through the motions, but you haven't done anything ab...
February 7, 2021

To: EFSC Rules Coordinator
Oregon Department of Energy
550 Capitol St. NE
Salem, OR 97301 EFSC.rulemaking@oregon.gov

Re: Radioactive Materials Enforcement Rulemaking OAR 345-029—Comment in Support

The national League of Women Voters (LWV) believes that “natural resources should be managed as interrelated parts of life-supporting ecosystems. Resources should be conserved and protected to assure their future availability. Pollution of these resources should be controlled in order to preserve the physical, chemical and biological integrity of ecosystems and to protect public health.” And the League supports the rule of law and legislative action needed to ensure that the state can take effective action to prevent unlawful actions and respond effectively when they occur. It is on these bases that we offer these comments on proposed rules for OAR 345-029. We support the proposed rules for Division 29 as written. We will take this opportunity to remark on their importance to position Oregon to adequately resist future attempts at radioactive waste dumping in the 21st Century.

We preface our comments by saying that the overall response of the Department is to be commended. This extends from acknowledging the seriousness of the events that occurred at the Arlington Landfill to issuing a Notice of Violation to Chemical Waste Management, from setting about to address statutory and regulatory limitations and deficiencies to making open and transparent opportunities for public participation and input in related processes. We thank the Energy Facility Siting Council for approving and staffing the Rulemaking Advisory Committee (RAC) to facilitate this work. LWVOR was pleased to participate as a member.

The Department and Commission know that the trigger for the rulemaking process that generated these proposed rules was the 2019 discovery that since 2016, out-of-state entities had used the Arlington Landfill (Gilliam County) as a dumping ground for 2.5 million pounds of radioactive waste produced by fracking processes in the Bakken oil fields of North Dakota. Disposing of such waste is illegal in the state of origin and, in fact, in most states, including Oregon. In the process of the investigation of the incident—the first of its kind that has been discovered—ODOE determined that various statutory and regulatory updates and other fixes were needed to put the state in a position to disincentivize such actions and respond effectively if they were to occur in the future. These proposed rules, as well as SB 246 currently before the Oregon Legislature and which LWVOR also supports, are key parts of this effort.

It is appropriate to approach remedies to shortcomings in existing laws and rules with urgency. The type of radioactive waste that was illegally accepted at the Arlington Landfill over a three-year period is a danger to the environment, as well as harmful to public health and safety. The waste now buried in various places and at various levels within the hazardous waste Arlington is permitted to receive is almost certainly going to stay where it is. To exhume and transport it elsewhere would pose even greater risks. It has been wrenching to hear testimony from members of the community around the landfill express the multiple impacts—all negative—on them and their neighbors. They were innocent bystanders in the affair, yet they are paying a significant price as their community is now a permanent radioactive site. And there is reason for concern that, since that waste is already in the ground at the Arlington Landfill, there could in the future be pressure to redesignate that landfill to accept more radionuclide-bearing waste.
Would the community’s wishes and environmental and public health and safety concerns be honored in the face of aggressive lobbying effort by the industry?

We must not discount the prospect of such pressure, among other efforts that would bring more of this waste here. Fracking waste now buried at Arlington—primarily filter socks, but also pipe scalings and sludge—is produced by the oil and gas industry in phenomenal quantities. It must be disposed of somewhere and legal sites to receive and store it safely are in short supply. The Environmental Protection Agency’s (EPA) website provides no information about either current quantities of TENORM waste production from fracking or availability of disposal sites. In general, it is cursory and extraordinarily outdated on the topic of fracking waste. They post a Report to Congress dated 2000 (five years prior to the beginning of fracking proliferation in this country) stating that “Total amounts of TENORM wastes produced in the Untied (sic) States annually [in 1993] may be in excess of 1 billion tons.” It goes on to say that, “Nuclear Regulatory Commission (NRC) staff calculations show that the disposal of the annual production of TENORM in industrial landfills could easily exceed $100 billion.” And,

This situation causes a dilemma because of the high cost of disposing of radioactive waste in comparison with (in many cases) the relatively low value per ton of the product from which the TENORM is separated. In addition, relatively few landfills or other licensed disposal locations can accept radioactive waste. However, TENORM materials exempt from NRC regulation are routinely disposed of without being labeled “radioactive material.” Also, large quantities of TENORM are currently undisposed and may be found in many of the thousands of abandoned mine sites around the nation.

As noted, decades have passed, and a massive fracking boom has ensued since that Report. But it is clear that the amount of waste has increased astronomically, along with the cost of disposal. The development of appropriate disposal locations has not even remotely kept pace. Generators of that waste and the service chain that serves them face a challenge that will not go away as long as fracking continues. It is important that Oregon remains vigilant and takes all necessary steps to avoid falling victim to more of this waste than we are aware of at Arlington.

We are confident that the Department is working in that direction and we hope their efforts will be met with support and success all along the way. Passage of SB 246 this session is critically important, as is the rulemaking process that would follow to implement the statutory revisions. In the process, all of these conversations promise to surface additional issues for which solutions need to be found.

The League will continue to follow this issue through subsequent phases of this effort 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 communities, public health and safety, and the environment.

Thank you for the opportunity to discuss these proposed rules. We urge your adoption.

Rebecca Gladstone
LWVOR President

Shirley A. Weathers, Ph.D.
LWVOR Radioactive Waste Portfolio

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Mr. Clark:

We appreciate the opportunity to provide comment on the Oregon Department of Energy (“DOE”)’s rulemaking package regarding the transport and disposal of radioactive materials and wastes, issued on December 18, 2020 (the “Proposed Rules”). As a member of the regulated community, it is our hope with these comments to contribute to DOE’s development of a clear and reasonable program for enforcement that balances DOE’s priorities of deterrence, prevention and corrective action for violations of the laws governing the transport and disposal of radioactive materials in Oregon. I am submitting these comments to address three specific concerns with the Proposed Rules.

1. **Provide clearer definitions for terms used in the calculation of civil penalty amount.**

   We support an enforcement framework for DOE that would closely resemble the existing enforcement framework used by the Oregon Department of Environmental Quality (“DEQ”) in OAR Chapter 340, Division 012. From a regulatory and policy perspective, we believe it is important for the two departments to undertake enforcement in a similar and consistent manner for the activities under their respective jurisdictions. In support of this, we request that DOE revise certain definitions for important terms used in the Proposed Rules so that the terms are defined in a manner that provides clarity and parallels the terms used by DEQ in its enforcement proceedings.

   Under the Proposed Rules, the base penalty amount for Class I and II violations is calculated based on the violation’s classification and severity. The severity of a violation is to be determined by the Director and classified as a “major,” “moderate,” or “minor” violation. These severity terms are defined under the proposed OAR 345-029-0560(1)(b)(A)-(C). DEQ uses identical terms for its determination of the magnitude of violations under its jurisdiction. But there are important differences in the definitions used by DEQ and those proposed by DOE.

   The DEQ rules define the severity determinations in a manner that is clear and concise, thus creating certainty for regulated entities in how they may be applied. The proposed DOE definitions are not as clear and do not create a similar level of certainty for regulated entities. As an example, use of the word “includes” expands the meaning of the terms to encompass not only the written description, but also any unwritten and unknown activity that DOE in its discretion may determine.
The definitions also provide for all “potential” outcomes that may or may not arise directly from a violation to be included in the determination of severity. Unless significant work has been completed to assess all theoretical future outcomes, it is impossible to complete a reliable determination of their significance in a severity assessment. This creates uncertainty for a regulated entity on how a violation may be treated by DOE.

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. Adding such consideration factors would help regulated entities understand how the severity of a potential violation will be assessed. It would also help guide their submission of the relevant facts and information to assist DOE in making its determinations.

In summary, we believe that factors for what should be considered should be added, and the overly broad aspects of the definitions should be removed or clarified so that severity determinations are made based on the known deviations from permit and regulatory requirements, and the actual effect on human health and the environment. This will ensure both DOE and regulated entities understand what conduct falls within the purview of each classification and what does not.

We would like to offer the following suggested language on the definitions for “major,” “moderate,” and “minor” violations under the proposed OAR 345-029-0560(1)(b)(A)-(C):

**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.”

2. **Place a not-to-exceed amount for the adjusted base penalty for all violation classes.**

The Proposed Rules provide for DOE to adjust the base penalty amount based on certain aggravating or mitigating factors, provided that the penalty amount does not exceed the limits
provided under the proposed OAR 345-029-0560(3). That section directs the adjusted penalty for a moderate violation to not exceed $5,000,000; and for a minor violation to not exceed $25,000. In contrast, there is no maximum cap on the adjusted base penalty amount that a major violation could be assessed. A major violation, as currently drafted, could mean any violation having the potential to cause a significant adverse impact on public health, safety, or the environment, regardless of whether it actually has such impact. It requires no willful or even reckless conduct by the regulated entity—two factors that might in some instances merit a higher penalty for the purpose of deterrence.

With the goal of reasonably balancing DOE’s priorities of prevention, corrective action, and deterrence, the Proposed Rules should allow regulated entities a reasonable degree of certainty that there would be a maximum civil penalty amount available for violations that had only the potential to (but did not actually) cause significant adverse impacts, and which did not involve any willful or reckless conduct.

We suggest a maximum penalty amount that a major violation may be assessed be added to the proposed OAR 345-029-0560(3)(c). The maximum penalty amount should be established based on historical penalty amounts assessed in Oregon.

3. Place a maximum cap on the number of days that may be used in the civil penalty calculation for a multiple-day violation.

The Proposed Rules under OAR 345-029-0560(3) allow for DOE to assess an adjusted penalty amount for each day of an ongoing violation, up to the maximum amount established for moderate and minor violations. There is no cap on the total number of days that may be assessed. For major violations, there is no cap on the total number of days that may be assessed, and no cap on the total amount that may be assessed per day. This lack of an upper limit beyond the statutory daily cap leaves open the potential for an extraordinary total penalty amount regardless of the nature of the violation or the culpability of the alleged violator. We support a penalty methodology that provides a reasonable upper limit of thirty days for a multi-day violation.

We suggest the addition of a maximum daily limit of thirty (30) days for the potential number of days that a multiple-day violation may be assessed a civil penalty amount.

We appreciate DOE’s thoughtful effort to clarify its enforcement rules for radioactive materials violations and your careful consideration of these comments. We believe with these suggested changes, the rule package reasonably balance DOE’s priorities of prevention, corrective action, and deterrence for the Oregon regulated community. Thank you for the opportunity to provide input on the Proposed Rules.

Respectfully Submitted

James L. Denson Jr.
PNW/BC Environmental Protection Manager
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Waste Management
7227 NE 55th Ave.
Portland, OR 97218
February 10, 2021

Christopher Clark  
Rules Coordinator  
Oregon Department of Energy  
Energy Facility Siting Council  
550 Capitol St. NE  
Salem, OR 97031

RE: Comments on Proposed Rulemaking Regarding the Enforcement of Laws and Rules  
Governing the Transport and Disposal of Radioactive Materials and Wastes

Submitted via email to EFSC.Rulemaking@oregon.gov

Dear Christopher,

Please accept these comments submitted on behalf of Columbia Riverkeeper. We appreciate the Oregon Department of Energy’s (ODOE) efforts in undertaking this rulemaking to strengthen the Energy Facility Siting Council’s (EFSC) enforcement authorities for violations relating to the transport and disposal of radioactive materials and wastes. The unfortunate incident at Chemical Waste Management’s Arlington, Oregon facility that came to light last year demonstrated just how woefully inadequate EFSC’s existing penalty authorities are. Between 2016 and 2019, Chem Waste’s Arlington facility accepted and disposed of approximately 1,285 tons of Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM)—radioactive material that has since been detected in the landfill’s leachate at levels far above what was expected and far above EPA’s drinking water standards. These radioactive isotopes continue to pose a risk to workers and the nearby community through Chem Waste’s system of spraying the contaminated leachate on top of the landfill for dust suppression. Despite the risk posed by Chem Waste’s actions, ODOE determined it could not assess a civil penalty against the company under the agency’s existing penalty authority.

I was grateful for the opportunity to serve on the Rulemaking Advisory Committee (RAC) and was very pleased to see that many of the comments I submitted on behalf of Columbia Riverkeeper during the RAC process were considered and incorporated into the current version of the proposed rules. However, I have a number of additional comments based
on the current version of the proposed rules that I hope you will consider as you work to finalize the regulations:

1) In OAR 345-029-0520 (Pre-Enforcement Notice), subsection (2) appears to be missing.

2) Under OAR 345-029-0555 (Enforcement Actions), we were very pleased to see that subsection (7)—relating to ability to pay determinations—now includes a clear documentation requirement.

3) Under OAR 345-029-0560 (Calculation of Civil Penalty Amount), the current language creates some ambiguity regarding whether and under what circumstances penalties will be assessed per day. Subsection (1)(d) currently reads:

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

Does the phrase “multiple violations” refer only to violations of separate laws and regulatory provisions? Or is that phrase also meant to encompass violations that continue for more than one day (in other words, will violations that occur on more than one day—which could otherwise be treated as individual violations under the statute—be lumped together and penalized with a single penalty)? The current language in OAR 345-029-0560(3) indicates that ODOE “may assess” per-day penalties, but it is unclear exactly how subsections (1)(d) and (3) work together.

Riverkeeper recommends that ODOE revise OAR 345-029-0560(1)(d) to clarify that multiple violations of the regulations may be treated as a single violation for penalty calculation purposes. As it is currently written, subsection (1)(d) closes the door on the possibility that ODOE could ever calculate penalties for separate regulatory violations; meaning the agency could find itself in a situation where the penalties end up far lower than the agency or the public would like given the facts of a particular case. To avoid that situation, we recommend that ODOE maintain the authority to assess penalties for each violation stemming from the same “actions, conditions, or circumstances.”

The language in OAR 345-029-0560(1)(d) also creates some uncertainty regarding the aggravating factor described in section 2(b). That provision states that the penalty may be multiplied by 2.5 if the responsible party has a history of “similar or related violations,” which are defined as “violations that the Director determines to have resulted from the same or similar underlying actions, conditions, or circumstances” as
those at issue in the case at hand. If the base penalty amount is limited to the “highest classification and severity applicable to any of the violations,” as provided for under section (1)(d), then, pursuant to section (2)(b), any case involving more than one violation stemming from the same “actions, conditions, or circumstances” should have that base amount multiplied by 2.5. The result would likely be a much higher penalty than if ODOE had simply assessed a penalty for each separate regulatory violation where multiple regulatory violations stemmed from the same set of “actions, conditions, or circumstances.” To correct this issue, Riverkeeper recommends that OAR 345-29-0560(1) be revised to provide the agency with discretion to seek penalties for each regulatory violation that stemmed from the “same actions, conditions, or circumstances” and the aggravating factor in section (2)(b) be revised to apply to situations where the responsible party has a history of “similar or related violations” defined as “violations that the Director determines to have resulted from similar underlying actions, conditions, or circumstances” (in other words, remove the word “same” from section (2)(b)).

4) Under OAR 345-029-0560(2)(e), we recommend the language be revised to read:

   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 member of the public . . . .

The violations at Chem Waste’s Arlington facility were brought to ODOE’s attention through a citizen tip. If that citizen had chosen to go to the press first—prompting Chem Waste to conduct an internal investigation before ODOE had the opportunity—arguably under section (2)(e) the company would have gotten a break on their penalty even though its primary motivation for conducting the investigation was to address a public relations issue. The penalty mitigation factor in section (2)(e) should be limited to only those situations where the responsible party truly identified the issue on its own and promptly brought it to ODOE’s attention.

5) We are very pleased to see the addition of OAR 340-29-0560(4), which gives ODOE the authority to assess an additional penalty amount for Economic Benefit. This is an incredibly important aspect of civil penalty calculations that ensures that companies cannot treat potential civil penalties as just another cost of doing business.

Finally, 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 we
strongly suggest that the earlier sections of Division 29—those related to the siting provisions—also be revised to mirror many of the revisions made during this rulemaking with respect to the enforcement process. If this is not done during this rulemaking, we suggest it be completed through a stand-alone rulemaking in the near future. Not only will it be confusing for ODOE and EFSC to manage different processes for different violations, but the penalty amounts for potential siting violations could benefit from a similar update.

Thank you again for undertaking this rulemaking, and for giving us the opportunity to provide input though both the public comment period and through my participation on the RAC. We hope that these revised penalty authorities will ensure that a violator will never again get off scot free for violations that will continue to endanger the environment and human health for millions of years after the company, and all of us, have gone.

Sincerely,

Erin Saylor
Staff Attorney