February 26, 2021 Energy Facility Siting Council Meeting
Agenda Item B: Radioactive Materials Enforcement Rulemaking Project
Attachment 3: Staff Evaluation of Public Comments

This document summarizes the significant data, views, and arguments contained in the hearing record and create a record of the Department's recommendations to address the issues raised therein. A summary of oral testimony is provided in the meeting minutes for the January 22, 2021 Council meeting. In addition to oral testimony four persons provided written comments on the proposed rules before the close of the public comment period at 5:00 pm on February 10, 2021. Exact copies of written comments submitted are included in **Attachment 2** as follows:

Ex.	Name
1	Kreutzbender, J
2	League of Women Voters of Oregon
3	Waste Management
4	Columbia Riverkeeper

Where revisions to the proposed rule are discussed or recommended:

- Existing rule language is shown as plain text.
- Additions and deletions included in the proposed rules are shown in underline and ~~strikethrough~~.
- Suggested revisions to the proposed rules are shown in red underline or ~~strikethrough~~.

OAR 345-029 – Procedures for Energy Facility Siting Enforcement **Ex. 4**

Issue Summary: One commenter raised concerns that establishing a process for enforcement of violations related to the transport and disposal of radioactive materials and wastes that is different from the process for enforcement of violations related to energy facility siting could be confusing and difficult to manage. The commenter recommended the Council amend OAR 345-029-0003 through 345-029-0100 to reflect changes made in the proposed OAR 345-029-0503 through 345-029-0560, either as part of this rulemaking or through a separate rulemaking proceeding in the near future.

Discussion: In the development of proposed rules, staff recommended, and Council agreed, that the differences between violations relating to radioactive materials and wastes and violations relating to energy facilities justified the establishment of a separate set of rules specific to the enforcement of radioactive materials and wastes. To avoid confusion about which set of rules apply, the Council proposed to new applicability rules have been proposed under OAR 345-029-0003 and 345-029-0503 to clarify the scope of each section of rules, and we note that the new rules are intended to be implemented by Department's Nuclear Safety and Emergency Preparedness Division, rather than through the Siting Division's Compliance Program.

Staff acknowledges that the new set of rules contains a number of changes that are not specific to the enforcement violations involving radioactive materials or wastes, but rather, are

intended to make enforcement actions more clear, efficient, and effective. However, because the stakeholders likely to be affected by changes to the Council's enforcement program for energy facilities were not included in the Rulemaking Advisory Committee for this projects, and because the previous Notice of Proposed Rulemaking does not indicate that these changes could occur, staff recommends that significant revisions to the rules for enforcement of site certificates and siting regulations would not be appropriate at this time.

In the Issues Analysis Document dated December 12, 2020, which was provided to Council in support of the then draft proposed rules, staff recommended that Council consider conducting rulemaking to align the two sets of rules based on feedback received during the five-year review of the new radioactive materials enforcement rules is completed. Staff maintains this recommendation, however, if Council wished to consider changes to the energy facility siting enforcement rules sooner, it may be appropriate to consider these revisions as part of the Compliance Rulemaking project approved as part of the Council's rulemaking schedule for 2022.

Staff Recommendation: Staff recommends that additional substantive changes to the proposed OAR 345-029-0003 to 345-029-0100 are not appropriate at this time but should be considered based on feedback received during the 5-year review of the new radioactive materials enforcement rules.

OAR 345-029 – Support for Rules as Written **Ex. 2**

Issue Summary: One stakeholder recommends the Council adopt the rules as written.

Staff Recommendation: Staff recommends that Council limit changes to the proposed rules to those necessary to address issues raised by other commenters.

OAR 345-029-0520 – Numbering Error **Ex. 4**

Issue Summary: A commenter noted that section (2) of the proposed OAR 345-029-0520 appears to be missing.

Discussion: Staff has reviewed the proposed rule language and while it does not appear that any language was unintentionally omitted from the proposed rule, the we agree that there is a numbering error in the proposed rule.

Staff Recommendation: Correct the numbering error in OAR 345-029-0520 by making the following revisions to the proposed rules:

OAR 345-029-0520:

(1) * * * (e) The date by which the responsible party must respond to the Pre-Enforcement Notice under section (~~3~~2) of this rule and a description of the potential consequences of not responding. The date must be at least 30 days after the date of issuance of the Notice;

* * * *

(~~3~~2) The responsible party must provide, to the Director, a written response to the Pre-Enforcement Notice by the date specified under section (~~2~~1)(e) of this rule. The response must include:

* * * * *

(~~4~~3) The Director must amend or withdraw the Pre-Enforcement Notice, as appropriate, within 30 days of receiving information that the Director finds sufficient to demonstrate that the violation alleged in the Pre-Enforcement Notice did not occur.

OAR 345-029-0550:

If requested by the responsible party in its response to the Pre-Enforcement Notice provided under OAR 345-029-0520(~~3~~2), 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.

OAR 345-029-0555:

(1) After considering any information provided in the responsible party's response to the Pre-Enforcement Notice described under OAR 345-029-0520(~~3~~2), and any enforcement conference under OAR 345-029-0550, the Director may issue a Notice of Enforcement Action containing one or more enforcement actions, including, but not limited to, ordering compliance or corrective actions, imposing safety conditions, and imposing civil penalties.

OAR 345-029-0560(1)(b)(A) to (C) – Magnitude of Violations Ex. 3

Issue Summary: A commenter raised concerns that the proposed definitions for "major", "moderate", and "minor" violations are not clear, and are not consistent with the definitions of those terms used in rules used by the Oregon Department of Environmental Quality (DEQ). The commenter notes several differences between the Proposed Rule language and the DEQ rules which are discussed in more detail below.

The commenter provided suggested definitions for the three severity categories for the Council's consideration. To assist in the Council's review, the table on the next page shows the proposed rule language, the DEQ rule language, and the commenter's recommended rule language side by side.

	Proposed Rule	DEQ (OAR 340-012-0130)	Commenter Recommendation
Major	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.	The magnitude of the violation is major if DEQ finds that the violation had a significant adverse impact on human health or the environment. In making this finding, DEQ will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or commission and DEQ rules, standards, permits or 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, DEQ may consider any single factor to be conclusive.	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	Moderate violations include any violation determined by the Director to have caused, or having the potential to cause no more than a minimal adverse impact on public health and safety or the environment, but could have the potential to cause a significant adverse impact on public health and safety or the environment if the physical conditions of the disposal did not limit pathways of exposure to human health or the environment.	The appropriate magnitude of each civil penalty is determined by first applying the selected magnitude in OAR 340-012-0135. If none is applicable, the magnitude is moderate unless evidence shows that the magnitude is major * * * or minor * * *.	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	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	The magnitude of the violation is minor if DEQ finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or the environment. In making this finding, DEQ will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and DEQ rules, standards, permits or 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.	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.

Discussion: Rather than examining the language proposed by the commenter in whole, we discuss the three concerns raised by the commenter individually.

First the commenter asserts that the DEQ magnitude definitions in OAR 340-012-0130 establish clear criteria for categorizing the magnitude of a violation whereas the proposed rules allow for more discretion. The commenter explains that where OAR 340-012-0130(3) provides, "[t]he magnitude of the violation is major if DEQ finds that the violation had a significant adverse impact on human health or the environment…," the Council's proposed rule provides that "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." The commenter argues that "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 [the Department] in its discretion may determine."

Staff believes, like the DEQ rules, the provisions of OAR 345-029-0560(1)(b)(A) to (C) are intended to create a mutually exclusive and exhaustive set of categories, and that use of the word "includes" reflects the operational rather definitional nature of the provisions. While staff believes the rephrasing of the rule from "violations include" to "the magnitude of the violation is" suggested by the commenter is unnecessary, we agree that the phrasing recommended by the commenters is more consistent with the DEQ rule.

Next, the commenter asserts that the rules create uncertainty by considering potential adverse impacts on public health and safety that may arise from a violation in the determination of severity. The commenter states that it would be impossible to make a reliable determination of the significance of these potential impacts unless significant work has been completed to assess all theoretical future outcomes.

Staff agrees that the consideration of potential impacts in the determination of the severity of a violation would require an assessment of the potential impacts on public health and safety that may arise from a violation; however, because the impacts on public health and safety or the environment from violations involving radioactive materials or waste may not manifest immediately and are difficult to quantify. Therefore, the proposed severity definitions are based on a consideration of whether or not the conditions or circumstances of the violation resulted in a viable pathway for human or environmental exposure (e.g., are waste or materials directly publicly accessible as opposed to buried on private property) that creates a reasonable potential for a significant dose of radiation. Staff views the creation of such an exposure pathway, as a result of a violation, to be justify a major violation classification, regardless whether it can be demonstrated that a person or environmental receptor was actually exposed. To make the change the commenter proposes would place the burden of proof onto the state to demonstrate that an exposure had occurred, which itself could be a difficult and costly exercise.

In consideration of the above discussion, staff recommends that the consideration of potential impacts is appropriate. We also point out that the determination would likely be based on

information that would be made available through the enforcement proceedings, including data provided by the responsible party in its response to the Pre-Enforcement Notice or in an assessment or evaluation that was prepared in the development of a corrective action plan.

We further note that while the DEQ rules do not refer to potential impacts directly, they are addressed in DEQ's determination. DEQ only relies on the generic definitions of "major", "moderate" or "minor" violations in OAR 340-012-0130 when none of the selected magnitude categories under OAR 340-012-0135 apply. The selected magnitude categories use specific thresholds or benchmarks that reflect the extent to which the responsible party deviated from laws, rules, standards, permits or orders, and by extension the likelihood will result in a significant adverse impact to public health or the environment. Staff considered developing specific thresholds or benchmarks based on the requirements of OAR chapter 345 division 050 and 060, but after discussing the issue with the RAC determined that an impacts based analysis would allow more flexibility in addressing the case specific facts and circumstances around potential pathways of exposure to radiation that result from a violation involving the transport or disposal of radioactive materials or waste .

Finally, the commenter recommends that including the factors the Department would consider in making a severity determination, rather than just the criteria for impacts, would help regulated entities understand how the severity of a potential violation will be assessed and would help identify the facts and information that may be relevant to the determinations.

OAR 340-012-0130(3) and (4) provide that, in making its determination that a violation is "major" or "minor":

> "DEQ will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or commission and DEQ rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation."

The rule also provides that DEQ may "consider any single factor to be conclusive" in making a finding that a violation was major.

Staff agrees that most of the factors in the DEQ rules would be relevant to the Department's determination of severity. One exception is that the phrase "concentration, volume, or toxicity or the materials involved" is appropriate for a violation involving hazardous materials, and "concentrations, quantities, or radioactivity" would be more appropriate for violations involving radioactive materials or waste. We also note that the commenters recommended language only includes the factors and omits language in the DEQ rule that clarifies that the DEQ will consider all reasonably available information, and that the list of factors is intended to be inexhaustive.

Staff Recommendation: As described in the discussion above, staff believes that the proposed rules are clear and appropriately categorize the severity of violations based on the actual or

potential impacts on public health and safety or the environmental that may result from them. Staff does, however, agree that the rule language can be adjusted to more closely align with the language used by DEQ under OAR 340-012-0130 and to incorporate factors which will be used to make the determination. Accordingly, staff recommends the language in the proposed OAR 345-029-0560(1)(b) be revised as follows:

> (1) The Director must determine the base penalty amount for a violation based on the classification and severity of the violation, subject to the following * * *
>
> (b) No severity determination is needed for Class III violations. In making a severity determination for Class I or Class II violations, the Director will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes, rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, quantity, or radioactivity of the materials involved; the availability of potential pathways of exposure; and the duration of the violation. ~~The severity of a Class I or Class II violation must be determined as follows:~~
>
> > (A) ~~Major violations include any violation determined by~~ The severity of the violation is major if the Director ~~to have~~ finds the violation has caused, or ~~having~~has the potential to cause, a significant adverse impact on public health and safety, or the environment. In making this finding, the Director may describe any of the factors described in subsection (1)(b) to be conclusive.
> >
> > (B) ~~Moderate violations include any violation determined by~~ The severity of the violation is moderate if the Director ~~to have~~finds the violation has caused, or ~~having~~has the potential to cause no more than a minimal adverse impact on public health and safety or the environment, but could have the potential to cause a significant adverse impact on public health and safety or the environment if the physical conditions of the disposal did not limit pathways of exposure to human health or the environment.
> >
> > (C) ~~Minor violations include any violation having~~ The severity of the violation is minor if the director finds the violation has caused, or ~~having~~has the potential to cause, no more than a minimal adverse impact on public health and safety or the environment~~:~~.

OAR 345-029-0560(1)(d) and (2)(b) – Multiple Violations **Ex. 4**

Issue Summary: A commenter raised concern that the reference to "multiple violations" in the proposed rule creates ambiguity regarding the assessment of civil penalties for violations that occur over more than one day.

The proposed OAR 345-029-0560(1)(d) provides:

"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."

The commenter asserts that it is not clear if this subsection is intended to refer only to violations of separate laws and regulatory provisions or if it could also apply to violations that continue for more than one day. The commenter further states that it is not clear how that provision interacts with section (3) of the rule, which provides that the Director "may assess" per-day penalties, and subsection (2)(b), which provides that the Director may increase a penalty amount if Director determines the responsible party has a history of violations that the Director determines "to have resulted from the same or similar underlying actions, conditions, or circumstances."

To address the ambiguity, the commenter recommended that the Council revise the proposed OAR 345-029-0560(1) to provide the Director with discretion to seek penalties for each regulatory violation that stemmed from the "same actions, conditions, or circumstances" and that 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)).

Discussion: Staff notes that the language in the proposed OAR 345-029-0560(1)(d) was intended to reflect guidance provided in the DEQ's Enforcement Guidance for Field Staff, dated March 10, 2015. The Guidance directs DEQ's field staff to avoid citing duplicative violations (where the exact same conduct violated more than one law or rule), or cascading violations, (where a violation of one law necessarily results in a violation of another). For example, a duplicative violation could include failing to obtain a Radioactive Materials Transport Permit for a one-time shipment of radioactive materials and then failing to submit the required fee for a placarded shipment. The rule is intended to require duplicative violations to be treated as a single violation, with the base penalty amount determined by the violation associated with the highest civil penalty. The rule is not intended to preclude the Director from assessing a penalty amount for subsequent occurrences of a violation (i.e. the transporter transports a second shipment without a permit) or for assessing an additional penalty amount for subsequent days of violation for an ongoing multi-day violation, as provided in OAR 345-029-0560(3).

The aggravating factor in OAR 345-029-0560(2)(b) is intended to allow the Director to increase the base penalty amount for the current violation based on violations that occurred in the past and are outside of the scope of the Notice of Enforcement Action, even if those violations resulted from the same actions, conditions, or circumstances, as the current violation.

Staff Recommendation: Staff agrees that the proposed rule language could be interpreted in a manner that is not consistent with the intent described above. To clarify, staff recommends Council revise the proposed language in OAR 345-029-0560(1)(d) as follows:

For the purposes of ~~this section~~ determining the base penalty amount, ~~multiple~~ violations of more than one law, rule, permit, or order, 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.

Staff recommends that no changes to section (2)(b) of the rule are necessary.

OAR 345-029-0560(2)(e) – Voluntary Reporting **Ex. 4**

Issue Summary: A commenter raised concerns that the proposed rule language specifying how the Director will determine if voluntarily reported conditions or circumstances of a violation may allow for the reduction of a penalty when a responsible party reports the conditions or circumstances because the violation was identified by a member of the public.

The commenter suggested that the rule be amended to specify that "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"*

Discussion: Staff notes that it is possible that a responsible party could report a violation to the Department only after, or in anticipation of, a whistleblower or other member of the public disclosing the information to the press, and if that were to occur, the responsible party could argue that they voluntarily reported the information; however, the rule would not require the Director to apply the mitigating factor. The rule is intended to give the director the discretion to determine if application of the aggravating or mitigating factors would be appropriate based on the findings of fact associated with the proceeding. We further note that if a member of the public did report a potential violation to the media, this action would likely be sufficient basis for an inquiry or investigation by the Department or Council.

Staff Recommendation: Because the proposed rule language allows the Director with discretion in determining whether or not the mitigating factor for voluntary report should be applied, staff recommends no changes to the rule are necessary to account for a violation that is disclosed by a whistleblower or member of the public to the media or another third-party.

OAR 345-029-0560(3) – Cap on Days of Violation **Ex. 3**

Issue Summary: A commenter concern that by not limiting the number of days of violation for which a civil penalty may be assessed, the proposed rules could result in an extraordinary total penalty amount. The Commenter recommended that the Council establish a 30-day limit on the number of days of violation for which a civil penalty may be assessed.

Discussion: ORS 469.992 limits the amount of civil penalty that may be assessed for a violation of a provision of ORS chapter 469 or the Council's rules to no more than $25,000 per day for each day of violation. The proposed rules further limit the amount of penalty that may be

assessed by establishing lower base penalty amounts for all classes of violations and only allowing the statutory maximum to be assessed if one or more aggravating factors apply.

In the development of draft proposed rules, the Department considered additional options to limit the total number of days of violation that would be considered in the assessment of a penalty, but ultimately decided to provide the Department with the discretion to either limit the number of days considered or pursue the total available penalty amount based on the circumstances of the violation under consideration. As discussed further in the issue related to subsection (3)(c) of the rule, in lieu of a cap on the total number of days that could be considered, the proposed rules impose a cap on the total amount of civil penalty that may be assessed for moderate or minor violations; however a similar cap was not established for major violations to ensure the maximum deterrent for violations that could result in the potential for human or environmental exposure to radioactive materials or wastes and to allow for appropriate incentives for prompt corrective actions when a violation does occur.

Staff notes that, in addition to this discretion, the proposed rules also provide additional opportunities for penalty amounts to be reduced either through informal disposition or settlement of the penalty if appropriate corrective action is taken, or through the contested case process upon a showing that the imposition of the penalty would be an unreasonable economic and financial hardship on the responsible party.

Staff Recommendation: Staff recommends no further revisions to the rule are needed to address this issue because the proposed rules are consistent with the limitations on penalty amounts imposed by ORS 469.992 and because the rules already allow for the reduction of penalties if appropriate corrective action is taken or if the penalty would be an unreasonable economic and financial hardship on the responsible party.

OAR 345-029-0560(3)(c) – Cap on Total Penalty Amount **Ex. 3**

Issue Summary: A commenter raised concern that the proposed rules do not provide a cap on the total amount that may be assessed for a major violation, which could include 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. The commenter recommended the Council set a maximum penalty amount for major violations based on historical penalty amounts assessed in Oregon.

Discussion: ORS 469.992 limits the amount of civil penalty that may be assessed for a violation of a provision of ORS chapter 469 or the Council's rules to no more than $25,000 per day for each day of violation. The proposed rules further limit the total amount of penalty that may be assessed for moderate or minor violations by establishing a limit of $5 million and $25,000, respectively. A similar cap was not established for major violations to ensure the maximum deterrent for violations that could result in the potential for human or environmental exposure to radioactive materials or wastes and to allow for appropriate incentivizes for prompt corrective actions when a violation does occur.

The Department notes that there is a similar $25,000 limitation on the per-day civil penalty amount the DEQ may assess for many types of violations. While the DEQ rules limit the base amount for civil penalties to levels significantly lower than this statutory maximum, the rules allow an additional penalty amount to be added for the economic benefit the responsible party gained through its noncompliance. Like the Council's proposed rules, the DEQ rules impose no maximum on the total amount that may be assessed, other than that the penalty may not exceed the statutory maximum. Despite the lack of a cap, the largest civil penalty that has been assessed by DEQ to date was $1.43 million. While the proposed rules do provide the Department with the discretion to pursue larger civil penalties, the proposed rules do intend for staff to exercise some discretion in ensuring that civil penalties are reasonable, proportionate to the violation, and adequate to incentivize appropriate corrective actions.

In addition, as noted above, the proposed rules also provide additional opportunities for penalty amounts to be reduced either through informal disposition or settlement of the penalty if appropriate corrective action is taken, or through the contested case process upon a showing that the imposition of the penalty would be an unreasonable economic and financial hardship on the responsible party.

Staff Recommendation: Staff recommends no further revisions to the rule are needed to address this issue because the proposed rules are consistent with the limitations on penalty amounts imposed by ORS 469.992, are intended to produce reasonable, proportionate, and effective penalty amounts, and because the rules already allow for the reduction of penalties if appropriate corrective action is taken or if the penalty would be an unreasonable economic and financial hardship on the responsible party.