



Oregon

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To: Oregon Energy Siting Council

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

Date: February 12, 2021

Subject: Agenda Item B (Action Item):
Radioactive Material Enforcement Rulemaking, Review of Public Comments and
Consideration of Permanent Rules for the February 26, 2021 EFSC Meeting

Attachments: 1: Notice of Proposed Rulemaking
2: Public Comments
3: Staff Issues Evaluation & Recommendations

STAFF RECOMMENDATION

Oregon Department of Energy (Department) staff recommend Council adopt permanent rules after fully considering all written and oral comments provided on the proposed rules and revising as needed to reduce significant adverse economic impact on small businesses, consistent with public health and safety.

BACKGROUND & PROCEDURAL HISTORY

At its May 21, 2020 meeting, the Energy Facility Siting Council (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 also facilitated 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. Council reviewed and approved the proposed rules at its December 18, 2020 meeting.

Staff filed the Notice of Proposed Rulemaking with the Secretary of State on December 18, 2020, the Notice is included as **Attachment 1** to this report for reference. The Notice was provided to members of the legislature specified under ORS 183.335(15) and members of the RAC on December 22, 2020. Consistent with direction provided by Council at its December 18, 2020 meeting, Notice was provided to persons on the Council's rulemaking mailing lists and other persons specified under OAR 345-001-0000 by email on January 4, 2021 and by regular mail on January 5, 2021.

SUMMARY OF PROPOSED RULES

The proposed rules would create a new series of rules 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 Oregon 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 (Department).
- 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 Department Director's ability to require a responsible party to provide additional information in response 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 clarity and consistency of rules, revisions to the existing rules for the enforcement of site certificates and laws and rules governing energy facilities were mostly limited 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.

CONSIDERATION OF PUBLIC COMMENTS

The Notice of Proposed Rulemaking requested public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative

economic impact of the rule on business. The Notice specified that all written comments must be submitted by 5:00 pm on February 10, 2021 to be considered. The Council also provided an opportunity for oral comment at a rulemaking hearing on the proposed rules on January 22, 2020. The Council must consider fully all written and oral comments provided before the deadline before adopting permanent rules. A summary of the comments and significant issues raised within is provided below. Staff's evaluation of the issues and recommendations for responses will be provided in **Attachment 3**.

Summary of Rulemaking Hearing

The rulemaking hearing was conducted as Agenda Item B of the Council's January 22, 2021 meeting. The meeting was held via webinar. The Council's rules coordinator, Christopher Clark, served as the presiding officer for the hearing.

After providing a summary of the proposed rules and explaining how the hearing would be conducted, Mr. Clark opened the hearing for public comments at 9:31 a.m. Four persons provided testimony at the hearing. Their testimony is summarized in the draft meeting minutes for the January 22, 2021, Council meeting, and a brief summary of issues raised in the testimony of each hearing participant is provided below:

- Darren Creason, Gilliam County resident
Mr. Creason expressed concerns about radioactive wastes being disposed of at the Arlington Landfill due to the potential for groundwater contamination and the uncertain and long-term nature of health risks.
- Daniel Serres, Columbia Riverkeeper
Mr. Serres expressed appreciation for Mr. Creason's testimony, and for the Council's rulemaking process and the enforcement procedures included in the proposed rules. Mr. Serres stated that more effective enforcement of rules and laws governing the transport and disposal of radioactive materials and wastes will better protect people and families.
- Shirley Weather, League of Women Voters of Oregon
Dr. Weathers explained that she was a member of the Rulemaking Advisory Committee for this project and expressed support for the actions taken by the Oregon Department of Energy to address the situation at the Arlington Landfill and the Council's rulemaking. She stated that the proposed changes to division 029 were a step in the right direction and that she was looking forward to the additional rulemakings planned on this subject.
- Christopher Jackson
Mr. Jackson expressed concerns that the rules may not effectively deter verbal agreements between transporters of radioactive materials and disposal facilities. He also stated that he believed the rules should require radioactive wastes that are improperly disposed of in Oregon to be excavated or removed at the responsible parties' expense. He stated that he would also like to see the rules include the option to use state law enforcement.

Mr. Clark closed the hearing at 9:45 a.m.

Summary of Written Comments

The Council received four written comments in response to the Notice of Proposed Rulemaking before the close of the public comment period at 5:00 pm on February 10. Attachment 2 contains exact copies of all the written comments, and a brief summary of issues raised in each submission is provided below:

- Jim Kreutzbender
Mr. Kreutzbender expressed frustration with the lack of consequences for persons that improperly dispose of radioactive wastes.¹

- Rebecca Gladstone and Shirley Weathers, League of Women Voters of Oregon
The League of Women Voters of Oregon expressed support for the proposed rules as written and urged the Council to adopt them as permanent rules. The League also commended the Department's actions to address the disposal of radioactive waste at the Arlington Landfill, and the Council's rulemaking process. The League noted its interest in subsequent phases of this rulemaking to ensure that the rules governing the transport and disposal of radioactive materials and waste are sufficient to protect communities, public health and safety, and the environment.

- Jim Denson, Waste Management
Waste Management expressed appreciation for the Council's efforts to establish a clear and reasonable program for enforcement that balances deterrence, prevention and corrective action for violations of the laws governing the transport and disposal of radioactive materials in Oregon. Waste Management raised three issues with the proposed rules for Council's consideration:
 - **OAR 345-029-0560(1)(b)(A) to (C):** Waste Management 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. Waste Management provided suggested language.

 - **OAR 345-029-0560(3)(c):** Waste Management raised concern that the proposed rules do not provide a cap on the adjusted base penalty 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. Waste Management recommended the Council set a maximum penalty amount for major violations based on historical penalty amounts assessed in Oregon.

¹ Staff notes that Mr. Kreutzbender's testimony was submitted by electronic mail and that the comment, which appears in the subject line, appears to have been truncated during transmission.

- **OAR 345-029-0560(3)**: Waste Management expressed concern that by not limiting the number of days of violation a civil penalty may be assessed for, the proposed rules could result in an extraordinary total penalty amount regardless of the nature of the violation or the culpability of the alleged violator. Waste Management recommended that the Council establish a 30-day limit on the number of days of violation a civil penalty may be assessed for.
- Erin Saylor, Columbia Riverkeeper
Columbia Riverkeeper expressed appreciation for efforts to strengthen the Council’s enforcement authorities for violations relating to the transport and disposal of radioactive materials and wastes. Riverkeeper provided a number of comments related to specific provisions of rule, including identification of a numbering error in the proposed OAR 345-029-0520, and support for the inclusion of specific provisions in OAR 345-029-0555(7), and 345-029-0560(4). In addition, Riverkeeper raised the following issues for the Council’s consideration:
 - **OAR 345-029-0560(1)(d) and (2)(b)**: Riverkeeper raised concern that references to “multiple violations” in the proposed rule create ambiguity regarding the assessment of civil penalties for violations that occur over more than one day. Riverkeeper provided suggested language.
 - **OAR 345-029-0560(2)(e)**: Riverkeeper raised concerns that the proposed rule language specifying how the Director will determine if a 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 after the violation was identified by a member of the public. Riverkeeper provided suggested language.

STAFF RECOMMENDATION

Staff recommends Council adopt permanent rules after fully considering all written and oral comments provided before the public comment deadline. A document providing the Department’s evaluation of the significant issues raised in public comments, including recommended revisions to the proposed rules, will be provided as **Attachment 3**.

The Council may make other revisions, including any revisions needed to reduce significant adverse economic impact on small businesses or ensure the protection of public health and safety, to the proposed rules in response to public comments.