

**Radioactive Materials Enforcement Rulemaking
Draft Proposed Rules
October 27, 2020**

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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 underline, language proposed to be deleted is shown in ~~strikethrough~~.

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**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:

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(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;~~

~~(e)b~~ (b) 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)c~~ (c) 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~~ must 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 in 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~~ must:

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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~~ must 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?

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(12) 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 I 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 ~~I~~ violation. Factors the Department may consider in escalating a Class ~~I~~ violation to Class ~~I~~ 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 ~~I~~, the Department must find that the violation meets one of the following criteria:

- (a) It is a repeated violation. The Department ~~shall~~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 ~~shall~~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

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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~~ must 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~~ must confirm or amend the classification of the violation and ~~shall~~ 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 I violation. The Department ~~shall~~ must 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:

(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 & 469.992-99

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 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 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 469.440

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

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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?

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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 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;

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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 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

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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.

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(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

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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;

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(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.

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(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