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Via First Class Mail and Email

February 27, 2020

Ms. Janine Benner
Oregon Dept. of Energy
550 Capitol St. NE
Salem, OR 97301

Re: Oregon Department of Energy's Notice of Violation to Chemical Waste Management of the Northwest, Inc.

Dear Ms. Benner:

On February 13, 2020, the Oregon Department of Energy ("Department") issued a Notice of Violation ("NOV") to Chemical Waste Management of the Northwest, Inc. ("CWM"), alleging violations of Oregon law pertaining to the disposal of hazardous wastes. Specifically, the Department found that CWM violated ORS § 469.525 and OAR § 345-050-0006 on several occasions between 2016 and 2019 by accepting and disposing of approximately 1,285 tons of Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) at its facility in Arlington, Oregon.

I write to you on behalf of the Power Past Fracked Gas Coalition, Stand Up to Oil Coalition, Columbia Riverkeeper, Oregon Physicians for Social Responsibility, 350 PDX, Stop Fracked Gas PDX, 350 Seattle, Portland Harbor Community Coalition, Cathy Sampson-Kruse, Oregon Conservancy Foundation, Northwest Environmental Defense Center, RE Sources for Sustainable Communities, Rogue Climate, Washington Physicians for Social Responsibility, The Lands Council, Friends of the Earth, Friends of the San Juans, Center for Sustainable Economy, Sustainable Energy & Economy Network, Neighbors for Clean Air, Friends of the Columbia Gorge and Sierra Club to express our frustration with the leniency with which the Department has treated CWM, in particular the Department's decision to classify CWM's repeated violations as Class I violations and its failure to impose any civil penalty. The Department's lax enforcement approach runs the risk of incentivizing future noncompliance by CWM and other similarly situated entities. We urge the Department to reconsider its classification of CWM's violations and to take stronger action to protect public health and the environment.

A. The Department Must Classify CWM's Violations as Class II Violations

The Department's NOV reflects its analysis of the violation classification factors set forth in the Department's regulations, which state as follows:

> Factors the Department may consider in escalating a Class I violation to Class II 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 II, the Department must find that the violation meets one of the following criteria:
> (a) It is a repeated violation. The Department shall 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.

OAR § 345-029-0030(2). However, the NOV makes clear that the Department misapplied factor (a) when it determined that CWM's violations are not "repeated."

As the NOV itself explains, the violations alleged by the Department were "repeated" by CWM on multiple occasions during 2016-2019. The violations at issue pertain to the placement of "discarded or unwanted radioactive material for more than seven days at any geographical site in Oregon[.]" OAR § 345-050-0006. In its NOV, the Department acknowledges that CWM "provided disposal authorization on three separate occasions over the course of three years" but goes on to find that CWM's violations were not "repeated" because the Department's NOV "is the first formal violation[.]" NOV at 6. This statement makes no logical sense; the mere issuance of an NOV does not define what is or is not a violation—formal or otherwise. The Department's position flies in the face of extensive case law holding that each discrete incident of hazardous or radioactive waste disposal is a *separate* violation. *See, e.g.*, *ALM Corp. v. U.S. E.P.A., Region II*, 974 F.2d 380, 382 (3d Cir. 1992) (discussing an EPA-issued compliance order for violations of the Toxic Substances Control Act (TSCA) in which EPA alleged that each of the violator's nine shipments of a regulated substance was a separate violation of TSCA, and assessing a penalty for each such violation); *United States v. WCI Steel, Inc.*, 72 F. Supp. 2d 810, 827 (N.D. Ohio 1999) (holding that "each day" that the defendant "continued accepting hazardous wastes" at its disposal facility was a "separate violation" of applicable RCRA regulations). The Department must therefore find that CWM's violations are "repeated" for purposes of OAR § 345-029-0030(2)(a).

The Department should promptly correct this error and issue a revised NOV, finding that CWM's violations have been repeated and therefore should be treated as Class II violations.

B. The Department Should Assess an Appropriate Civil Penalty for Each of CWM's Past, Repeated Violations

Upon re-classifying CWM's violations as Class II violations, the Department should next calculate and assess an appropriate civil penalty against CWM that is sufficient to deter future violations by it and other regulated entities.

The Department is authorized to assess a civil penalty for Class II violations. *See* OAR § 345-029-0060(1). Under these circumstances, a base penalty of $2,000 per day from the date of discovery of the violations is appropriate, given that "substantially the same violation occurred" on multiple occasions during an approximately three-year period. *Id*. § 345-029-0060(1)(a)(A). The Department should then multiply the base penalty by a factor of 5.0, because the violations were clearly both "reckless" and "involved a requirement relating to public health, safety or the environment[.]" *Id*. § 345-029-0060(1)(b)(B).

Importantly, the "date of discovery" of each violation for purposes of the civil penalty calculation is neither the date it was finally reported to the Department nor the date the NOV was issued. To the contrary, the Department should apply the well-known "discovery rule" to conclude that the date of discovery of each of CWM's violations is the date upon which CWM knew, or reasonably should have known, that the violations had occurred. *See, e.g.*, *Berry v. Branner*, 245 Or. 307, 316 (1966). Indeed, the Department's explicit use of the phrase "date of discovery" as opposed to, for example, the "date of accrual" or "date of reporting" makes clear that it intended the triggering date to be tied to the violator's self-monitoring and reporting obligations under Oregon hazardous waste laws.

As the Department notes in the NOV, the documentation provided by the radioactive waste transporter, Oilfield Waste Logistics, to CWM along with each unlawful shipment of radioactive waste "clearly show that the samples exceeded the concentration-based exemption limits for radium-bearing materials . . . and thorium-bearing materials . . . in all three waste profiles submitted in 2016, 2017, and 2019." NOV at 4. Upon receiving that documentation, CWM reasonably should have known that a violation of the prohibition in ORS § 469.525 and OAR § 345-050-0006 had occurred. Therefore, the date of discovery of each violation should be the date upon which those waste profiles were received by CWM.

It is clear that a significant civil penalty, properly calculated under OAR § 345-029-0060(1), is both warranted under the circumstances and necessary to incentivize future compliance with Oregon's hazardous and radioactive waste prohibitions. We urge the Department to reclassify CWM's violations as Class II violations and to impose the necessary penalty that will protect public health and the environment.

Sincerely,

James N. Saul

On behalf of:

Stand Up to Oil Coalition
Power Past Fracked Gas Coalition
Oregon Physicians for Social Responsibility
Columbia Riverkeeper
Portland Harbor Community Coalition
Stop Fracked Gas PDX
350 PDX
The Lands Council
The Oregon Conservancy Foundation
RE Sources for Sustainable Communities
Friends of the Earth
Cathy Sampson-Kruse
Northwest Environmental Defense Center
Friends of the San Juans
Rogue Climate
Washington Physicians for Social Responsibility
Center for Sustainable Economy
Sustainable Energy & Economy Network
Oregon Chapter Sierra Club
Neighbors for Clean Air
Friends of the Columbia Gorge

Copied by Email:

Attorney General Ellen Rosenblum
Jason Miner, Natural Resources Director, Governor Kate Brown
Julie Carter, Policy Analyst, Columbia River Intertribal Fish Commission