

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency (Ohio EPA)

Regulation/Package Title: Construction and Demolition Debris

Rule Number(s): 3745-400-01 amend, 3745-400-03 retain without change, 3745-400-04 retain without change, 3745-400-05 retain without change, 3745-400-06 retain without change, 3745-400-07 amend, 3745-400-08 amend, 3745-400-09 amend, 3745-400-10 amend, 3745-400-11 amend, 3745-400-12 amend, and 3745-400-15 amend.

Date: June 3, 2014

Rule Type:

- New
 Amended

- 5-Year Review
 Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Ohio Administrative Code (OAC) Chapter 3745-400 includes the regulations pertaining to construction and demolition debris (C&DD) facilities. Under section 3714.02 of the Revised Code

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(ORC), the director of Ohio EPA has the authority to adopt rules governing construction and demolition debris facilities to ensure that the facilities will not create a nuisance, fire hazard, or health hazard or cause or contribute to air or water pollution.

Ohio EPA has reviewed the identified twelve effective rules in accordance with ORC 119.032 and has made the determination to amend eight rules and retain four rules without change. The amendments contained in these rules do not create any new obligations but primarily incorporate December 2005 statutory changes, Legislative Service Commission grammatical changes, and provide clarity and consistency with other rules that became effective in August 2012 and January 2013.

Rule Number	Rule Title	Preliminary Five-Year Rule Review Determination
3745-400-01	Definitions.	Amend
3745-400-03	Facility exclusions.	Retain without change
3745-400-04	Authorized, limited, and prohibited construction and demolition debris disposal methods.	Retain without change
3745-400-05	Clean, hard fill.	Retain without change
3745-400-06	Prohibited locations for construction and demolition debris facilities.	Retain without change
3745-400-07	Facility design requirements and construction specifications.	Amend
3745-400-08	Construction and final closure certification.	Amend
3745-400-09	Site characterization.	Amend
3745-400-10	Ground water monitoring.	Amend
3745-400-11	Operation of facilities.	Amend
3745-400-12	Final Closure of Facilities.	Amend
3745-400-15	Modifications and exemptions.	Amend

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Ohio EPA has the authority for this rulemaking through ORC 3714.02.

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

No. Federal laws and regulations are different than Ohio law and regulation regarding construction and demolition debris. Under federal law, construction and demolition debris is included in the federal definition of solid waste. While U.S. EPA has not adopted federal requirements specific to construction and demolition debris landfills, there is a federal prohibition against open dumping and federal minimum standards for solid waste disposal facilities which includes construction and demolition debris landfills.

There are no federal requirements for states to adopt or to enforce in the federal *Criteria for Classification of Solid Waste Disposal Facilities and Practices* (40 CFR part 257) under the authority

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of sections 1008(a)(3) and 4004(a) of subtitle D of Resource Conservation and Recovery Act (RCRA). 40 CFR part 257 establishes overall regulatory direction by providing minimum nationwide standards for protecting human health and the environment and provides technical standards to states for planning and developing their own environmentally sound waste management practices. 40 CFR part 257 is enforced by means of federal citizen suit.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable. There are no federal requirements for states to adopt or to enforce in the federal Criteria for Classification of Solid Waste Disposal Facilities and Practices (40 CFR part 257) under the authority of sections 1008(a)(3) and 4004(a) of subtitle D of Resource Conservation and Recovery Act (RCRA).

Note: In Ohio law, construction and demolition debris is regulated under ORC Chapter 3714 and is distinct from regulation as a solid waste under ORC Chapter 3734. The proposed rules seek to implement the requirements of ORC Chapter 3714.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

Ohio EPA has a statutory obligation to regulate C&DD facilities in accordance with Ohio Revised Code Chapter 3714. The public purpose of this rulemaking expressed in ORC Chapter 3714 includes adoption of rules governing construction and demolition debris facilities and the inspection of and issuance of licenses for those facilities. The rules shall ensure that the facilities will not create a nuisance, fire hazard, or health hazard or cause or contribute to air or water pollution [ORC 3714.02].

This 5-year rule review package results from Ohio EPA's determination to amend eight rules and retain four rules without change. The amendments contained in these eight rules do not create any new obligations but primarily incorporate December 2005 statutory changes and provide clarity and consistency with other rules that became effective in August 2012 and January 2013.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

The Agency will measure success of the regulations through continued compliance with the rules and a reduction in violations of environmental laws. Success will be measured by the results of ground water monitoring at C&DD facilities, maintenance of public health and safety, and protection of the environment.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

Ohio EPA outlined the 5-year rule review process, which rules were under review, and the Division of Materials and Waste Management's (DMWM) preliminary determinations with representatives of the

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C&DD industry and approved health departments during December 2013 and meetings in January and February 2014. On January 14, 2014, Ohio EPA posted an Early Stakeholder Outreach outlining the preliminary determinations and established a 30-day period seeking stakeholder input. Email notice of the availability of this Early Stakeholder Outreach was provided to stakeholders who subscribe to Ohio EPA'S electronic Interested Parties C&DD listserv. There are over 800 email addresses registered on the listserv with individuals able to subscribe or unsubscribe at their discretion.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

DMWM received suggestions and comments from the Construction and Demolition Association of Ohio. These comments were discussed with representatives of Construction and Demolition Association of Ohio and incorporated into the interested party draft rules where appropriate. The Agency will continue to consider stakeholder input throughout the rulemaking process.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

Scientific data was not used in the development of this rules package. Where the rules are proposed for amendment, the changes are primarily to incorporate December 2005 statutory changes, Legislative Service Commission grammatical changes, and provide clarity and consistency with other rules that became effective in August 2012 and January 2013.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

Alternative regulations suggested by stakeholders were considered. Some stakeholder suggestions, such as making the ground water monitoring parameters and the leachate sampling parameters consistent within OAC Chapter 3745-400, were explored, deemed needing further evaluation, and not included in this 5-year rule review determination. These suggestions may be part of separate future rule review efforts. Other stakeholder suggestions, such as allowance of the use of test pads to model construction methods for recompacted soil liners and caps, were also considered. The mentioned test pad example was eventually viewed by stakeholders as unlikely to be used due to cost considerations and not included as an amendment in this 5-year rule review package. The general conclusion is that use of the licensing authority's case specific ORC 3714.04 exemption authority would offer appropriate case-specific flexibility.

Ohio EPA has included amendments to OAC Rules 3745-400-07 and 3745-400-08 to provide a stakeholder suggested alternative to meeting soil grain size specifications if the facility operator chooses to alternatively demonstrate attainment of the permeability performance standard.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

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Yes. Ohio EPA has included amendments to OAC Rules 3745-400-07 and 3745-400-08 to provide a stakeholder suggested alternative to meeting soil grain size specifications if the facility operator chooses to alternatively demonstrate attainment of the permeability performance standard.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

Ohio EPA reviewed our own regulations and performed a search of regulations from other agencies to determine if duplication was being made. To our knowledge, Ohio EPA is not duplicating another existing Ohio regulation. Ohio EPA included a number of amendments to rules included in this 5-year rule review to better clarify and ensure consistency between rules.

13. Please describe the Agency’s plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

Ohio EPA will provide notice of the rule amendments to stakeholders, facility operators, and Ohio EPA approved local health departments responsible for issuing annual licenses and inspecting C&DD facilities. This notice will invite questions and provide contacts. Prior to rule amendments becoming effective, Ohio EPA will discuss any implementation concerns and request that stakeholders and health departments identify additional needs for outreach and specific guidance.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

These C&DD disposal facility regulations have a direct impact on all owners and operators of construction and demolition debris disposal facilities in the state of Ohio. OAC Rule 3745-400-05 regarding clean hard fill has a direct impact on any person using clean hard fill in legitimate fill operations.

The nature of the adverse impact on the owners and operators of construction and demolition debris disposal facilities associated with these rules include the annual licensing of facilities, facility construction, facility operations, ground water monitoring, and final closure.

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Although a cost of compliance exists with these rules, any estimate must account for a range of significant variables. The cost will naturally vary depending on the landfill size, design, location, and underlying geology. It is important to note that many of these costs are incurred over the life of the facility which is determined by the owner and operator depending on operational practices and landfill capacity and is dependent upon the owner and operator's need to expand or modify the facility. With the input of the C&DD industry, Ohio EPA developed the [C&DD Facility – Financial Assurance Cost Estimating \(FACE\) Tool – Version 2.1b](#) that includes Ohio EPA's best professional judgment estimation of likely costs for various components of closure & post-closure activities. These "reference costs" are neither minimum or maximum estimates but are intended to provide a practical frame of reference for itemized activities necessary for construction of final cap, ground water monitoring, and various reports. The proposed amendments of the rules identified under Question 1 of this document are not expected to change these estimated "reference costs".

Depending on whether the license application is a renewal application, a license application to modify the facility, or an application to establish a facility, the degree of the adverse impact associated with preparation of the annual license application will vary greatly. Preparation of a license application to establish a C&DD disposal facility would involve significant initial costs of site evaluation, facility design, and design and implementation of a ground water monitoring system. The higher range of potential costs for a license application to establish a C&DD disposal facility may approach \$750,000 to \$1,000,000 for engineering and \$250,000 to \$1,000,000 for hydrogeological investigations. However, preparation of a simple annual renewal application can reference the siting, design, closure, and ground water monitoring plan documentation contained in the previous year's license application. The cost of preparing a simple annual renewal license application may be in the range of \$4,000 similar to the FACE reference cost for an annual report. There is no license application fee or annual license fee for C&DD disposal facilities. The proposed amendments of the rules identified under Question 1 of this document are not expected to change these estimated costs.

The rules proposed for amendment included in this package primarily incorporate December 2005 statutory changes, updated citations, and changes to provide clarity and consistency with other rules that became effective in August 2012 and January 2013. While the scope of these amendments are applicable to all owners and operators of C&DD disposal facilities, the rule amendments included in this 5-year rule review package do not create any new obligations and do not represent any significant change any current costs, hours to comply, or other adverse impacts. Ohio EPA has included amendments to OAC Rules 3745-400-07 and 3745-400-08 that may reduce some of cost of compliance with soil grain size specifications if the facility operator chooses to alternatively demonstrate attainment of the permeability performance standard.

The proposal to retain OAC Rule 3745-400-05 without change will continue the existing direct impact on any person using clean hard fill in legitimate fill operations. The nature of the adverse impact under OAC Rule 3745-400-05 will continue to be submittal of a Notice of Intent to Fill to the appropriate licensing authority at least seven days prior to filling. This notice is to state the nature of the fill material, location of site(s) to be filled, dates filling will begin and end, and phone number of the notifier.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

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The Agency is required to adopt rules pertaining to construction and demolition debris facilities under section 3714.02 of the Revised Code that protect human health, safety, and the environment. The obligation to fulfill the statute justifies the adverse impact on the regulated community.

This 5-year rule review package results from Ohio EPA's determination to amend eight rules and retain without change four rules. The amendments contained in these eight rules do not create any new obligations but primarily incorporate December 2005 statutory changes, Legislative Service Commission grammatical changes, and provide clarity and consistency with other rules that became effective in August 2012 and January 2013.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

Any person, including the owner or operator of a construction and demolition debris facility, subject to the regulations contained in Ohio Administrative Code 3745-400 may be issued an exemption by the licensing authority under the authority of ORC section 3714.04. This exemption authority provides the licensing authority a case-specific basis to consider and establish alternative means of compliance.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The director or the approved health department will evaluate the applicability of ORC section 119.14 to construction and demolition debris landfills regulated under OAC Chapter 3745-400 when assessing fines and penalties for paperwork violations and first-time offenders.

The director or the approved health department will evaluate the applicability of ORC section 119.14 to persons using clean hard fill under OAC Rule 3745-400-05 when assessing fines and penalties for paperwork violations and first-time offenders.

18. What resources are available to assist small businesses with compliance of the regulation?

Ohio EPA's Division of Materials and Waste Management (DMWM) and approved local health departments offer general C&DD regulatory assistance. DMWM staff offer technical assistance to license applicants and facility owners or operators. DMWM maintains numerous documents and resources through an extensive DMWM website.

In addition, Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP) is a non-regulatory program that provides information and resources to help small businesses comply with environmental regulations. OCAPP also helps customers identify and implement pollution prevention measures that can save money, increase business performance and benefit the environment. Services of the office include a toll-free hotline, on-site compliance and pollution prevention assessments, workshops/training, plain-English publications library and assistance in completing permit application forms. Additional information is available at: <http://epa.ohio.gov>.

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