



Exemptions for Construction and Demolition Debris Disposal

THIS POLICY DOES NOT HAVE THE FORCE OF LAW

Applicable Rules

C&DD: OAC 3745-400-15(D)

DMWM Cross-Reference internal operating procedure:

#565 *File of Information for Exemptions and Licenses*

Purpose

The Ohio EPA recognizes the importance of a fair and responsive exemption process which provides flexibility to the C&DD program, and is effective in addressing the diversity of circumstances and situations involving C&DD disposal. This policy provides standards for evaluating exemption requests regarding construction and demolition debris (C&DD) disposal as authorized by Ohio Administrative Code (OAC) 3745-400-15(D).

Applicability

This policy is intended to aid health departments and the Ohio EPA in administering the C&DD program.

The information may be useful to applicants requesting exemptions as well.

Background

Ohio Revised Code (ORC) Section 3714.04 authorizes the Director and local boards of health with authority to license C&DD facilities (collectively the "licensing authorities") to grant, by order, exemptions from any provisions of ORC Chapter 3714, and rules promulgated thereunder, other than division (B) of Section 3714.03 or division (E) of Section 3714.13. The Director has incorporated this exemption authority into OAC 3745-400-15(D), which states as follows:

(D) Exemptions.

- (1) General exemption criteria. The licensing authority may by order exempt any person disposing of or proposing to dispose of construction and demolition debris in such quantities or under such circumstances, in the determination of the licensing authority, as are unlikely to adversely affect the public health or safety or the environment, or create a fire hazard, from any provision of Chapters 3745-400 or 3745-37 of the Administrative Code or Chapter 3714 of the Revised Code or order issued pursuant to either chapter, except for those circumstances stated in paragraph (E) of this rule; and
- (2) Floodplain exemption criteria. The licensing authority may grant an exemption from the one-hundred-year floodplain restriction stated in paragraph (B)(1) of rule 3745-400-06 of the Administrative Code if the licensing authority finds that the establishment of a new construction and demolition debris facility in the one hundred-year floodplain would not result in an increase of more than one foot in the elevation of that flood stage of the watercourse upstream or downstream from the proposed facility.

The language of OAC 3745-400-15(D) is consistent with, but does not elaborate on, the language of ORC Section 3714.04.

Conceptually, the authority and criteria for C&DD disposal exemptions are parallel to the authority for exemptions and variances for solid waste facilities provided by ORC 3734.02(A) & (G).

Procedure

NECESSARY INFORMATION FOR C&DD EXEMPTION REQUESTS:

Any person may request, in writing to the licensing authority, an exemption pursuant to OAC 3745-400-15(D)(1). The request for an exemption should:

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- (1) Identify the party making the request,
- (2) Identify the activity for which the exemption is requested,
- (3) Contain information regarding the reason and justification for the exemption, and
- (4) Contain any other pertinent data or evidence regarding the request which is required to demonstrate to the licensing authority that disposal of C&DD material in such quantities or under such circumstances as proposed is unlikely to adversely affect the public health or safety or the environment, or create a fire hazard. Such data or evidence should be substantiated by an expert/professional where warranted by the specific exemption request.

EVALUATING C&DD EXEMPTION REQUESTS:

The following guidelines may be followed by the licensing authority when evaluating and responding to C&DD exemption requests. These guidelines are intended to assist licensing authorities in determining when the disposal of C&DD is "unlikely to adversely affect the public health or safety or the environment, or create a fire hazard."

(1) The licensing authority may approve an exemption request under OAC 3745-400-15(D) if reliable evidence is presented which demonstrates that it is unlikely that the disposal of construction and demolition debris in the manner proposed by the applicant will adversely affect the public health or safety or the environment, or create a fire hazard. Evidence which may be appropriate includes geologic and hydrogeologic information or data; computer modeling and analysis (including fate and transport models and groundwater flow models); risk analysis; and/or site-specific evidence relating to the applicant's C&DD material, facility location, facility design, engineering controls, and/or operational controls.

(2) In determining what constitutes an adverse effect to public health, safety, or the environment, the licensing authority should consider standards which have been developed under other federal or state laws and regulations, including, without limitation, environmental laws governing air, water, and waste disposal. Such standards may include, by way of example, risk-based standards developed under other laws or rules to determine when a threat to human health, safety, or the environment exists.

Where necessary and appropriate, the licensing authority may seek the assistance of another government agency in reviewing and assessing evidence submitted in support of an exemption. Ohio EPA district offices will be available to assist health departments in this regard and will not contest the final decision of any health department.

RESPONDING TO C&DD EXEMPTION REQUESTS:

There are three possible responses to exemption requests: granting an exemption, refusing to grant an exemption, or requesting additional information. Exemption requests should be handled in a timely manner and the licensing authority is responsible to the person making the request to identify the time schedule for consideration. Until an exemption is granted, the person making the request must continue to comply with the statute and rules.

The following procedures should be followed for responding to C&DD exemption requests:

- 1) In granting an exemption, the licensing authority should make findings that:
 - a. Identify the provision(s) of the C&DD statute or rules for which the exemption is granted,
 - b. Evaluate the information presented by the party requesting the exemption to confirm that the disposal of C&DD is unlikely to adversely affect the public health or safety or the environment, or create a fire hazard.
 - c. State any terms and conditions imposed upon the applicant in accordance with the statute and rules, and
 - d. Specify the time period for which the exemption is granted by indicating an ending date or the completion of an activity, if applicable, and provide for an extension of the exemption if the situation warrants.

A typical exemption format used by the Ohio EPA in the solid waste program is attached.

- 2) In refusing to grant an exemption request, the licensing authority should identify the provision(s) of the C&DD statute or rules for which the exemption is refused. The licensing authority should also state with specificity the basis for the refusal.

Refusal to grant an exemption can take the form of a letter from the licensing authority. The typical letter format used for this purpose by the Ohio EPA in the solid waste program is attached.

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- 3) If the licensing authority determines that a request for an exemption lacks sufficient information, the applicant should be notified, in a timely manner, of the nature of any deficiency and of the need for additional information to evaluate the request. No exemption request with insufficient information should be refused without giving the applicant the opportunity to provide the additional needed information.

FILE OF INFORMATION:

The licensing authority must maintain a file of information regarding written justifications with related material for all exemption orders issued (and for each special condition or term added to the licenses issued). During the Director's annual review of licensing authorities, this file of information may be reviewed for completeness pursuant to OAC 3745-37-08(D)(12). See the Internal Operating Procedure #565, *File of Information for Exemptions and Licenses*.

DEFENDING C&DD LICENSING AUTHORITY ACTIONS:

Because the C&DD rules were adopted by the Ohio EPA, actions by approved health departments in regard to these rules, as well as actions by the Ohio EPA, may be appealed to the Environmental Review Appeals Commission (ERAC) pursuant to ORC 3745.04. Appeals must be filed with the EBR within 30 days of the action and the appellee will be notified by the EBR within 3 days of the filing. Because exemptions are appealable orders, it is recommended that "appeal rights" language be included in the cover letter to the granted exemption. Example appeal rights language used by the Ohio EPA follows:

"You are hereby notified that this action of the [Board of Health] is final and may be appealed to the Environmental Review Appeals Commission pursuant to Section 3745.04 of the Ohio Revised Code. The appeal must be in writing and set forth the action complained of and the grounds upon which the appeal is based. It must be filed with the Environmental Review Appeals Commission within thirty (30) days after notice of the [Board of Health's] action. A copy of the appeal must be served on the [Board of Health] within three (3) days of filing with the Environmental Review Appeals Commission. An appeal may be filed with the Environmental Review Appeals Commission at the following address: Environmental Review Appeals Commission, 77 South High Street, 17th Floor, Columbus, Ohio 43215."

While exemptions and orders have been appealed to the EBR in the past, letters documenting refusals to grant exemptions have never as yet been appealed.

A board of health would be represented at an appeal to the EBR by their local prosecutor's office and would be required to prepare evidence or testimony. Similarly, the Ohio EPA would be represented by the attorney general's office. If an appellant did not get the remedy sought from the EBR, an appellant could appeal the EBR decision to the Franklin County Court of Appeals.

Note that exemptions can be granted by health departments only in regard to the C&DD statute and rules. If any exemption is issued by a health department for other statutes or rules administered by the Ohio EPA, such as a solid waste rule, the exemption is unlawful and the Ohio EPA may appeal that exemption.

STANDARD EXEMPTIONS:

The Ohio EPA may, from time to time, provide additional guidance to licensing authorities on the interpretation and application of OAC 3745-400-15(D) in commonly encountered situations. Licensing authorities may also, from time to time, notify the Ohio EPA of commonly received exemption requests, and the Ohio EPA may provide guidance on how to respond to such common exemption requests.

Contact

If you have questions regarding this document or would like additional information, please contact:

Central District Office DMWM Supervisor (614) 728-3778

Northeast District Office DMWM Supervisor (330) 963-1200

Northwest District Office DMWM Supervisor (419) 352-8461

Southeast District Office DMWM Supervisor (740) 385-8501

Southwest District Office DMWM Supervisor (937) 285-6357

Central Office Authorizing Actions and Engineering Unit (614) 644-2621

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Disclaimer

This document is intended for guidance purposes only. Completion of the activities and procedures outlined in this document shall not release an owner or operator from any requirement or obligation for complying with Ohio Revised Code (ORC) Chapter 3734 or 3714 if appropriate, the OAC rules adopted thereunder, or any authorizing documents or orders issued thereunder, nor shall it prevent Ohio EPA from pursuing enforcement actions to require compliance with ORC Chapter 3734 or 3714, the OAC rules or any authorizing documents or orders issued thereunder.

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ATTACHMENT: Typical Exemption Format

Issuance Date: _____

Effective Date: _____

BEFORE THE OHIO ENVIRONMENTAL PROTECTION AGENCY

In the Matter of _____ :
 _____ :
 [Name] _____ :
 [Address] _____ : Director's Final Findings
 _____ : and Orders
 _____ :
 _____ :

Pursuant to Chapter 3714 of the Ohio Revised Code (ORC), the [Director of Environmental Protection (Director) or Health Commissioner] hereby makes the following Final Findings and issues the following Orders.

FINDINGS

1. _____ (the Applicant) is the owner, operator, and licensee of [CDD facility name], located in _____ Township, _____ County, Ohio. The _____ facility is a construction and demolition debris facility as that term is defined in Ohio Administrative Code (OAC) Rule 3745-400-01.
2. On _____, the Applicant was issued License No. _____ for the construction and operation of the [Facility Name].
3. [Summarize facts leading up to exemption request and statute, rule, license, or order requirement for which an exemption was requested.]
- 4.
- 5.
6. On _____, the Applicant submitted a request to _____ for an exemption pursuant to ORC Section 3714.04 that...
7. Ohio Administrative Code (OAC) Rules 3745-400-_____ states...
8. Ohio Revised Code Section 3714.04 states in pertinent part that "The director of environmental protection or the board of health having territorial jurisdiction may by order exempt any person disposing of or proposing to dispose of construction and demolition debris in such quantities or under such circumstances that, in the determination of the director or the board of health, are unlikely to adversely affect human health or safety or the environment , or to create a fire hazard, from any provision of this chapter or a rule adopted or order issued under it..."
11. An exemption, subject to the conditions described below, from the requirements of OAC Rules 3745-400-_____ is unlikely to adversely affect human health or safety or the environment, or to create a fire hazard.

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ORDERS

1. The Applicant is hereby issued an exemption from the requirements of OAC Rules 3745-400-_____. This exemption is subject to and contingent upon the following conditions:

a.

b.

2. Nothing in these Findings or Orders shall be construed to authorize any waiver from the requirements of Chapter 3714 or the regulations promulgated thereunder, except for the requirements expressly varied in Order No. 1, above, and only for the term of the exemption. These Findings and Orders shall not be interpreted to release the Owners or Operators of this facility from responsibility under ORC Chapters 3704, 3714, 3734, or 6111 or under the Federal Clean Water Act or Comprehensive Environmental Response, Compensation, and Liability Act, and other applicable state or federal laws, or for remedying any conditions resulting from any release of contaminants to the environment.

IT IS SO ORDERED:

[Director or Health Commissioner

Date

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ATTACHMENT: Typical Format for Letter Documenting Refusal to Grant an Exemption

[Date]

[Name of Requestor]

[Address]

RE: Request for Exemption Pursuant to ORC Section 3714.04, from the Requirements of ORC Section(s) _____ and OAC Rule(s) _____.

Dear :

On _____, you submitted a request for an exemption pursuant to ORC Section 3714.04 from the requirements of ORC Section(s) _____ and OAC Rules _____ to [brief summary of requirements]. Specifically, the [Requestor/Facility Name] requests that [more detailed explanation of requirements].

ORC Section 3714.04 provides in pertinent part that "The director of environmental protection or the board of health having territorial jurisdiction may by order exempt any person disposing of or proposing to dispose of construction and demolition debris in such quantities or under such circumstances that, in the determination of the director or the board of health, are unlikely to adversely affect human health or safety or the environment , or to create a fire hazard, from any provision of this chapter or a rule adopted or order issued under it..."

[Insert discussion/summary of information submitted with request, deficiencies, reasons why justification is inadequate, why request cannot be granted, etc.]

At this time, I decline to issue an order granting _____ an exemption from the requirements of ORC Section(s) _____ and OAC Rule(s) _____.

Sincerely,

[Director or Health Commissioner]

cc Health Department
OEPA District Office