



# Hearing Summary

Rule Package: Construction and Demolition Debris (C&DD) Rules

Original filing date: October 12, 2017

Public comment start date: October 12, 2017

Public comment end date: November 15, 2017

Public hearing date: November 15, 2017

List of Rules: 3745-400-13, 3745-400-14, 3745-400-16, 3745-400-17, 3745-400-18,  
3745-400-20, and 3745-400-25

Were there any participants in this public hearing beyond Ohio EPA staff or JCARR staff?

☐ Yes

☒ No

Were there comments received during the public comment period outside of those presented at this hearing?

☒ Yes

☐ No

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This hearing summary has been compiled to meet the requirements of Section 119.03 of the Revised Code.

This hearing summary includes this cover sheet and the following attachments:

1. **Attachment A** - A copy of the public notice for this hearing.
2. **Attachment B** - A copy of the script read into the record to begin and end the hearing.
3. **Attachment C** - A copy of the response to comments.

Ohio EPA's response to comments document includes the comments received, who commented, the agency response to comments, and a statement of whether or not the rule was changed due to the comments.

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Ohio EPA digitally records all public hearings for rules. The digital recordings are available upon request in a WAVE (.wav) file format. These recordings may be sent out for transcription if necessary.

**Attachment A: Public Notice**

**BEFORE THE  
OHIO ENVIRONMENTAL PROTECTION AGENCY**

**Public Notice**

**Proposed Rulemaking Governing**

**Construction and Demolition Debris (C&DD) Rules**

Notice is hereby given that the Director of Environmental Protection, under the authority of Section 106.03 of the Ohio Revised Code and in accordance with Chapter 119 of the Ohio Revised Code, proposes to original file the following rules of the Ohio Administrative Code:

<b>Rule Number</b>	<b>Rule Title</b>	<b>Action</b>
3745-400-13	Financial assurance for construction and demolition debris facility final closure.	Amend
3745-400-14	Wording of the financial instruments.	Amend
3745-400-16	Post-closure care of a construction and demolition debris facility.	Amend
3745-400-17	Procedures for issuance of an order extending the post-closure care period.	Amend
3745-400-18	Financial assurance for post-closure care of construction and demolition debris facilities.	Amend
3745-400-20	Leachate sampling and analysis and additional requirements to monitor ground water for leachate parameters.	Amend
3745-400-25	Five-year transition for final closure and post-closure care financial assurance for construction and demolition debris facilities.	Rescind

These rules address requirements on the disposal of C&DD and the regulatory program for C&DD landfills.

The purpose of this rule making is to satisfy the five-year rule review requirements of Section 106.03 of the Ohio Revised Code.

The public comment period will run until November 15, 2017. A public hearing on this proposed rulemaking will be held to consider public comments in accordance with Section 119.03 of the Ohio Revised Code. This hearing will be held on November 15, 2017 at 10:30 a.m. at Ohio EPA, Lazarus Government Center, 50 W. Town Street, Suite 700, Columbus, Ohio.

To facilitate the scheduling of oral presentations, persons intending to give testimony at the hearing should notify the Ohio EPA Public Interest Center, P.O. Box 1049, Columbus, Ohio 43216-1049, (614) 644-2160. Prior registration will ensure that registrants are heard ahead of those individuals who register at the hearing. Oral testimony may be limited to five minutes, depending on the number of persons testifying. All interested persons

are entitled to attend or be represented and to present oral and/or written comments concerning the proposed rulemaking.

Written testimony should be sent to the attention of [Michelle Mountjoy](#) at the Division of Materials and Waste Management P.O. Box 1049, Columbus Ohio 43216-1049. Written comments may also be submitted to the Hearing Officer at the public hearing. Written testimony will receive the same consideration as oral testimony. All testimony received at the hearing or by close of business on November 15, 2017 will be considered by Ohio EPA prior to final action on this rulemaking proposal. Written comments submitted after this date may be considered as time and circumstances permit.

Questions regarding this rule package should be directed to Michelle Mountjoy, at the Division of Materials and Waste Management at (614) 728-5372.

To receive a copy of the proposed rules, please contact the DMWM receptionist at (614) 644-2621. In addition, full copies of all proposed rules are available for review at any Ohio EPA district office and at the Ohio EPA central office. The proposed rules are also accessible on DMWM web page at <http://epa.ohio.gov/dmwm/dmwmnonhazrules.aspx>.

**Attachment B: Hearing Script**

My name is Mary McCarron. I am with the Public Interest Center. I will be presiding over today's public hearing.

The purpose of the hearing today is to obtain comments from any interested person regarding Ohio EPA's proposed rules.

Ohio EPA Division of Materials and Waste Management is proposing to original file the following rules of the Ohio Administrative Code 3745-400-13, 14, 16, 17, 18, 20 and 25. These rules address requirements on the disposal of construction and demolition debris and the regulatory program for C&DD landfills.

These rules have been filed with the Joint Committee on Agency Rule Review.

All interested persons are entitled to attend or be represented, and to present oral and/or written comments concerning the proposed rules.

To be included in the official record, written comments must be received by Ohio EPA by the close of business, today, November 15, 2017.

Seeing no requests for testimony, we will go off the record until 11:00 a.m.

The time is now 11:00 and this hearing is adjourned.

## Attachment C: Response to Comments



## Division of Materials and Waste Management

### Response to Comments

**Rule:** Construction and Demolition Debris (C&DD) Rules, Ohio Administrative Code (OAC) 3745-400

**OAC Rule 3745-400-13:** Financial Assurance for C&DD Facility Final Closure

**OAC Rule 3745-400-14:** Wording of the Financial Instruments

**OAC Rule 3745-400-16:** Post-closure Care of a C&DD Facility

**OAC Rule 3745-400-17:** Procedures for Issuance of an Order Extending the Post-Closure Care Period

**OAC Rule 3745-400-18:** Financial Assurance for Post-Closure Care of C&DD Facilities

**OAC Rule 3745-400-20:** Leachate Sampling and Analysis and Additional Requirements to Monitor Ground Water for Leachate Parameters

**OAC Rule 3745-400-25:** Five-year Transition for Final Closure and Post-Closure Care Financial Assurance for C&DD Facilities

### Agency Contact for this Package

Division Contact: Michelle Mountjoy, DMWM, (614) 728-5372, [michelle.mountjoy@epa.ohio.gov](mailto:michelle.mountjoy@epa.ohio.gov)

Ohio EPA held a public hearing on November 15, 2017 regarding the C&DD rules. This document summarizes the comments and questions received at the public hearing and during the associated comment period, which ended on November 15, 2017.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

### 3745-400-13 and 3745-400-18

#### **Comment 1:**

The CDAO appreciates all of the effort the Ohio EPA has made in discussing and drafting beneficial language changes to Rules 3745-400-13 and 3745-400-18 in an effort to decrease confusion. These changes do add some clarity; however, they may not be practical in all cases. The CDAO has done some additional research on the subject of an Engineer's Estimate and has found that estimating is, in fact, part of the practice of engineering in Ohio. Ohio Revised Code 4733.01(E) defines the practice of engineering as including "any professional service, such as consultation, investigation, evaluation, planning, design, or inspection of construction...required to protect the public welfare

or to safeguard life, health, or property.” It goes on to direct that “[n]either this state, nor any of its political subdivisions, nor any municipal corporation shall engage in the construction of any public work involving the practice of professional engineering or professional surveying, for which plans, specifications, and estimates have not been made by, ... a licensed professional engineer ....” O.R.C. 4733.17 (emphasis added). Thus the practice of engineering includes estimating under Ohio law. The Ohio Administrative Code further defines how the activities of a Professional Engineer must be performed through Chapter 4733-35 (Code of Ethics). O.A.C. 4733-35-03 outlines a Professional Engineer’s “responsibility to the public,” which includes to “protect the safety, health and welfare of the public in the performance of professional duties...” O. A.C. 4733-35-04 deals with “public statements and certifications,” which would include a stamped or certified Engineer’s Estimate. It mandates in essence that all statements of an engineer must rest on a solid factual foundation, reflect the engineer’s technical knowledge and training, and be made in good faith. As such it guarantees that a signed and stamped Engineer’s Estimate or other formal submittal may be relied upon as true and accurate. Sections (B) and (C) of the rule state:

(B) The engineer or surveyor will publicly express no opinion on an engineering or surveying subject unless it is founded upon adequate knowledge of the facts in issue, upon a background of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of his or her testimony.

(C) The engineer or surveyor shall decline to sign and/or seal any form of certification, warranty, or guaranty that

(1) Relates to matters beyond his or her technical competence,

(2) Involves matters which are beyond the scope of services for which he or she was retained, or

(3) Relates to engineering or surveying work for which he or she does not have personal professional knowledge and direct supervisory control and responsibility.

In light of these rules, we would suggest the following be added to O.A.C. 3745-400-13 as new subsection (A)(5)(d):

(d) a cost estimate prepared and certified by a Professional Engineer that the estimate has been prepared in accordance with O.A.C. 3745-400- 13(A)(1).

We would also suggest the following be added to O.A.C. 3745-400-18 as new subsection (A)(1)(d):

**(d) a cost estimate prepared and certified by a Professional Engineer that the estimate has been prepared in accordance with O.A.C. 3745-400-18(A)(1). (Leslie Wolf, Construction and Demolition Association of Ohio)**

**Response 1:** Ohio EPA previously contacted the Engineers and Surveyors Board (Board) and asked whether third-party costs estimation is considered the “practice of engineering” under ORC 4733.01(E). At that time, Board staff indicated that such cost estimation would not constitute the practice of engineering. In light of the CDAO’s comment, Ohio EPA has contacted the Board to seek additional clarification regarding this issue. Ohio EPA also met with the CDAO on November 29, 2017 to discuss its concerns. During that meeting, the CDAO and Ohio EPA agreed to address this issue at a later date. No changes were made in response to this comment.

3745-400-17 Procedures for issuance of an order extending the post-closure care period.

**Comment 2:** The CDAO is concerned about the Ohio EPA’s proposed deletion of a category of information that must be included in an order extending the post-closure care period. Subsection (B)(8) of Rule 3745-400-17 required any order to include “[a] termination date or termination provisions.” The Ohio EPA has proposed deleting this requirement. The CDAO does not recall there being any discussion of such a deletion in any of the stakeholder meetings during the five-year review process. It is possible the Ohio EPA believes subsection (B)(8) is no longer necessary in light of its proposal to add new sections (F) and (G). The CDAO believes an order under O.A.C. 3745-400-17(A) should include a firm termination date. Although subsection (B)(4) requires an order extending the post-closure care period to state “[t]he length of the extended post-closure care period established by the order,” this is not equivalent to including a specific “termination date.” It is unclear whether (B)(4) requires a specific time period, or whether it could be satisfied by providing a generalized description of the duration of the extended period, or even by defining the length of time based on collecting a certain quantity or quality of monitoring data. Either way, disagreements between the agency and an owner or operator of a closed facility with respect to calculating the precise date the order expires are likely to arise. We would request that the deleted subsection (B)(8) be retained. (Leslie Wolf, Construction and Demolition Association of Ohio)

**Response 2:** In response to comments submitted during the interested party period, Ohio EPA met with the CDAO to discuss this rule. As a result, a draft noting rule changes to be proposed to the Joint Committee on Agency Rule Review (JCARR), including this deletion, was distributed to the CDAO on June 27, 2017 for comment and review. No concerns regarding the deletion were raised at that time.

Ohio EPA met with the CDAO on November 29, 2017 to seek clarification regarding its concerns with the proposed rule. Because paragraphs (F) and (G) call for the review of an order extending post-closure care every five years and allow the owner or operator to

request early termination of the order, Ohio EPA determined that paragraph (B)(8) was no longer necessary. No changes were made in response to this comment.

**Comment 3:**

The CDAO is concerned about the language in proposed Section (G) which outlines procedures for requesting the termination of an order issued under O.A.C. 3745-400-17. Although the proposed new section incorporates the standard in (A) to be applied to a decision to grant or deny a request to terminate an order issued under the rule, the standard is not being applied consistently in the proposed amendments. Specifically, proposed subsections (G)(1)(b) and (G)(4) require the owner or operator requesting termination to prove a negative -- that "the termination of the order would not adversely impact public health, safety, or the environment." (Emphasis added.) This is a forward-looking standard that focuses on the risk of an adverse impact developing in the future, rather than whether one exists today. Not only could this standard be very difficult to satisfy, it is contrary to Ohio law. O.R.C. 3714.02(K) specifies that the extension of the post-closure care period be based on situations that "are" happening -- that is, conditions at a facility that "are impacting" public health or safety or the environment or ground water assessment and corrective measures that "are required" to be conducted. The standard as drafted in (G) would allow an extension order to continue if the Director or licensing authority believes that such conditions "would" or "could" occur in the future, and does not even set a standard for how high the risk must be to justify a denial. Moreover, if the original extension order was not based on conditions "impacting public health or safety or the environment" but instead was based on the need to conduct "ground water assessment and ground water corrective measures," the party asking to terminate the order should not have to demonstrate the non-existence of such conditions. They should only be required to demonstrate that the ground water assessment and ground water corrective measures have been fully performed. Accordingly, the CDAO believes it would be appropriate for Section (G) to set forth the same standard for determining a request to terminate an order extending the post-closure care period as used in proposed Section (F) for the five-year review of such an order. We would suggest making the following revisions to the Ohio EPA's proposed subsections (G)(1)(b) and (G)(4):

(G) The owner or operator may request to terminate an order extending the post-closure care period at any time after issuance.

(1) A request to terminate shall be submitted in writing to the director or health commissioner of the licensing authority and include the following:

(a) A demonstration that all obligations in the order have been satisfied.

(b) A description of how the termination of the order would not adversely impact public health, safety, or the environment continuation of the order is no



longer appropriate or that the standards set forth in paragraph (A) are no longer met.

(2) The director or health commissioner of the licensing authority shall send the owner or operator a written acknowledgment of receipt of the termination request not later than fourteen days after the request is received.

(3) The director or health commissioner of the licensing authority shall notify the owner of any deficiencies in the termination request not later than sixty days after receipt.

(4) The director or health commissioner of the licensing authority may terminate an order issued pursuant to this rule if the termination request demonstrates to the satisfaction of the director or health commissioner of the licensing authority that termination of the order would not adversely impact public health, safety, or the environment continuation of the order is no longer appropriate or that the standards set forth in paragraph (A) are no longer met.

**Response 3:**

Ohio Revised Code section 3714.02(K) gives Ohio EPA the authority to extend the length of the post-closure care period “if conditions at a facility are impacting human health or safety or the environment or if ground water assessment and corrective measures are required to be conducted at the facility.” Upon determination that an impact is present or that further ground water monitoring is required, Ohio EPA can extend the post-closure care period for an amount of time necessary to address the conditions at the facility. This extension would require continuance of monitoring as well as other post-closure care requirements at the facility up to the end of the specified timeframe. Paragraph (G) of this rule was added in response to interested party comments to provide greater flexibility by allowing the owner or operator to request termination of the order before the completion of the established timeframe.

Ohio EPA met with the CDAO on November 29, 2017 to seek clarification on the comments submitted. CDAO expressed that paragraphs (G)(1)(b) and (G)(4) were unclear and difficult to comply with. After further consideration, paragraphs (G)(1)(b) and (G)(4) have been amended to better represent the intent of the rule.

**End of Response to Comments**