

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency (Ohio EPA)

Regulation/Package Title: Beneficial Use Rules, Ohio Administrative Code 3745-599

Rule Number(s): 3745-599-01, 3745-599-02, 3745-599-03, 3745-599-05, 3745-599-10,
3745-599-20, 3745-599-25, 3745-599-30, 3745-599-35, 3745-599-60, 3745-599-200, 3745-599-
210, 3745-599-220, 3745-599-310, 3745-599-320, 3745-599-330, 3745-599-334, 3745-599-335,
3745-599-340, 3745-599-345, 3745-599-350, 3745-599-360, 3745-599-370

Date: May 14, 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☐ Rescinded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.

This set of rules is applicable to specified waste types and their beneficial uses. These new beneficial use rules in Ohio Administrative Code (OAC) Chapter 3745-599 are the result of the Agency's effort to promote responsible beneficial use of materials otherwise managed as wastes.

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Businesses are increasingly interested in beneficially using industrial byproducts and reducing materials currently being disposed in landfills. The Agency has developed a regulatory program to authorize the use of certain industrial byproducts and materials more sustainably. The key provisions of OAC Chapter 3745-599 include:

- Applicable to specified waste types (Rule 3745-599-01):
 - o Foundry sands that are either a solid waste, industrial waste, or other waste.
 - o Material resulting from the treatment of a water supply for drinking or industrial purposes that are either a solid waste, industrial waste, or other waste.
 - o Solid waste, industrial waste, or other waste used as fuel or as an ingredient in a combustion unit.
 - o Dredged material resulting from harbor or navigation maintenance activities.
- Establishes three mechanisms tailored for authorizing beneficial uses:
 - o Authorized by rule (Rule 3745-599-10).
 - o Authorized by general permit (Rules 3745-599-200 through 3745-599-220).
 - o Authorized by individual permit (Rules 3745-599-310 through 3745-599-370).
- Establishes one beneficial use authorization for the specified waste types regardless of whether the waste is a solid waste, industrial waste, or other waste since OAC Chapter 3745-599 is adopted under the authority of both Ohio Revised Code 6111 and 3734. This one authorization will satisfy current obligations under those ORC Chapters to obtain a land application management permit (LAMP) or integrated alternative waste management plan (IAWMP) approval.
- Excludes waste types addressed by existing specific regulatory programs to avoid duplication (Rule 3745-599-05).
- Provides flexibility to address developing beneficial uses of different beneficial use byproducts under varying circumstances.
- Establishes state consistency with U.S. EPA's approach on waste as fuel or an ingredient in a combustion unit.
- Establishes mechanisms to evaluate and authorize beneficial uses of harbor dredged material.
- Acknowledgement of beneficial use byproducts as resources instead of waste.
- Facilitate market acceptance of alternative materials.
- Reduce or eliminate waste disposal costs for generators.
- Extend the capacity of landfills and conserve resources.
- Provide regulatory clarity for legitimate byproduct beneficial use while addressing potential abuses of speculative accumulation, abandonment, illegal disposal of wastes, or impacts to surface or ground waters.

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

ORC Section 3734.02 and Chapter 6111.

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.

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

Not Applicable.

- 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)?**

The purpose of this regulation is to provide a consistent regulatory program for the beneficial use of specified industrial byproducts and materials.

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

The Agency will measure the success of these regulations through use of the program, compliance with the rules, and a minimal adverse impact to surface waters of the state as a result of the beneficial use of industrial byproducts.

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.

The Agency contacted stakeholders on the beneficial use listserv lists. These interested parties were contacted via email notifying them of the Early Stakeholder Outreach Period (ESO) on February 23, 2012. The Agency also released conceptual rule language for stakeholder review as a secondary ESO period on May 24, 2013. An interested party draft was released for public comment prior to filing proposed rules.

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

The Agency received a significant amount of input through the ESO comment period. This included hosting several stakeholder meetings and discussions. Stakeholder input was valuable in understanding their concerns and interests. This input was used by the Agency to develop a conceptual draft of the rules. Subsequently after the secondary ESO comment period, an interested party draft of the rules was released for public comment. Based on stakeholder input, the interested party draft introduced an approach intended to alleviate stakeholder uncertainty about the impact of the rules on their businesses by limiting the applicability of OAC Chapter 3745-599 to specified materials. This limited approach would allow beneficial use authorizations for those materials that the Agency understands has significant stakeholder acceptance.

- 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?**

The Agency utilized numerous sources of scientific data to develop the beneficial use rules. The regulations are based on knowledge of similar authorizations approved through the current Integrated Alternative Waste Management Project (IAWMP) program under OAC 3745-27-05. The proposed

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rules are primarily administrative in establishing the regulatory framework of authorization by rule, individual and general permits, applicability, and exclusions. The rules do use USEPA established scientific representative sampling procedures to assess variability and characteristics of byproducts. The review of individual permits and development of general permits are intended to establish appropriate standards tailored to the byproduct and material characteristics and range of variability and the types of beneficial uses.

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?

The Agency considered the suggestions provided during early stakeholder outreach and how the regulations may be changed to better accommodate those who wish to beneficially use and industrial byproduct. Several significant alternative provisions were added to the rules based on interested party input, including authorizations by rule such as byproduct use as ingredients in market-established construction materials and use as fuel. The draft rules now provide greater permit flexibility to establish appropriate standards tailored to the byproduct characteristics and range of variability and the types of beneficial uses.

The Agency considered not adopting specific beneficial use rules and continuing to rely on existing authorizations such as land application management permits (LAMP) issued under the authority of ORC 6111 and Integrated Alternative Waste Management Program (IAWMP) authorizations issued under OAC 3745-27-05. The Agency continued to explore and draft beneficial use rules with the intent of facilitating beneficial use by replacing the existing two general programs with one tailored beneficial use byproduct regulatory program.

While the Agency found general stakeholder interest in this new program, some stakeholders expressed uncertainty whether they would want the beneficial use rules to apply to their materials. The interested party draft released for public comment introduced an alternative that would limit the applicability of OAC Chapter 3745-599 to specified materials. This alternative of limiting the applicability was intended to establish beneficial use rules and provide access to beneficial use authorizations for those materials the Agency understands has significant stakeholder acceptance.

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.*

The Agency considered performance-based regulations while drafting the beneficial use rules. The most prominent aspect is the determination of the beneficial use. Only those businesses interested in a beneficial use involving placement on the land of one or more of the specified materials or use as a fuel or ingredient in a combustion unit need comply with OAC Chapter 3745-599. Applicants identify their byproduct and desired beneficial uses. The rules establish a permit system tailored to evaluate the characteristics and variability of the byproduct and determination that the use does not constitute waste disposal and is unlikely to impact surface and ground water. Some beneficial uses are authorized directly by rule and do not require any permit. The legitimacy criteria rule is another example of a performance-based approach that seeks to distinguish the management of a valued material from abandonment or speculative accumulation.

It is envisioned that development of general permits under these rules will use performance-based requirements. Working with stakeholders, the Agency would develop general permits with sampling and standards tailored to known and previously characterized byproducts for specific types of beneficial uses. A business will know what the general permit conditions require and may voluntarily decide to obtain coverage under the general permit by submitting a "Notice of Intent" and then receiving a template-like authorization.

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. OAC 3745-27-05(A) currently contains the requirements for authorization for the land application of solid waste. The beneficial use byproduct rules in OAC 3745-599 are intended to satisfy both land application management permits (LAMP) under the authority of ORC 6111 and Integrated Alternative Waste Management Program (IAWMP) authorizations under OAC 3745-27-05 with one beneficial use byproduct permit. Ohio EPA is not aware of any duplication of other existing Ohio regulation.

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.

The Agency's plan for implementation will focus on educating stakeholders on the new beneficial use rules in Chapter 3745-599 and highlighting changes in the program. The Agency will offer web-based access to guidance documents and training to stakeholders to ease the implementation process and ensure the rules are applied consistently and predictably. The Agency intends to solicit stakeholder involvement in development of specific general permits.

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;

Ohio EPA encourages the business community to voluntarily and carefully assess the potential value of those materials that end up in the trash can. Ohio EPA supports a business' choice to reclaim and re-use spent material back into their or another company's manufacturing process. Ohio EPA promotes business decisions to both recycle material and use recycled content. Ohio EPA seeks to encourage efforts by industry to divert wastes from disposal to productive use.

Ohio EPA regulates waste under both ORC Chapters 6111 and 3734. Disposal of waste and protection of Ohio's surface waters and ground waters from pollution due are regulated activities under both ORC Chapters 6111 and 3734. Ohio EPA is proposing a narrow regulatory program focused on situations when the use of material diverted from a regulated disposal facility involves the placement on or into the ground or burned. The purpose is to distinguish beneficial use from unauthorized waste placement or disposal, protect Ohio's

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surface and ground waters, and acknowledge legitimate or beneficial use of byproduct materials.

The proposed regulatory program seeks to make this distinction by focusing only on those situations involving disposal or impacts to surface and ground water. The scope of the impacted business community is as variable as the material being diverted from disposal and directly dependent on whether the use involves placement on the ground or burning as fuel. For more than two years, Ohio EPA has hosted stakeholder discussions on the development of a beneficial use regulatory program. The stakeholders have included those creating the material, those seeking to use the material, and consultants. Discussions have focused on a number of key situations.

- Discerning when use of a waste material as fill material in a hole or depression merely is unregulated disposal or actually serves a beneficial use while being reasonably protective of surface and ground water.
- Broad direct placement on land or blending with other materials that may serve a beneficial agronomic use distinct from disposal.
- Discerning when the material directly substitutes for a virgin material as a construction base or subbase.
- Burning as a fuel versus incineration as a waste.

The interested party draft released for public comment introduced an alternative that limits the applicability of OAC Chapter 3745-599 to specified materials. This alternative significantly narrows the scope of the impacted business community from earlier drafts. Only businesses seeking to beneficially use the specified materials in a manner involving placement of waste on the ground or burning would need comply with OAC Chapter 3745-599. This may include foundries, businesses or communities with drinking or industrial water supply treatment facilities, businesses creating fuel or ingredient for combustion units, businesses involved with the management or beneficial use of harbor or navigation maintenance dredge material, or other businesses seeking a beneficial use of the specified materials.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

The nature of the adverse impact should be less than the adverse impact that exists under current regulatory programs. Land application management permits (LAMP) issued under the authority of ORC 6111 and Integrated Alternative Waste Management Program (IAWMP) authorizations issued under OAC 3745-27-05 are intended to be replaced with a single permit acknowledging the byproduct beneficial use. With adoption of OAC Chapter 3745-599, there would be one authorization and one application specific to byproduct beneficial use. Ohio EPA is proposing a \$350 permit fee for this combined authorization. The proposed rules also establish the director's authority to issue general permits that would offer businesses the opportunity of gaining permit coverage under the established general permit rather than submitting an individual permit needing Agency review and issuance.

The nature of the adverse impact upon some businesses is further reduced through authorization by rule. No permit application or general permit is required where the use of a byproduct as an ingredient for the manufacture of market-established construction materials, like concrete and asphalt, are often placed on the ground. Similarly, the use of byproduct as fuel or an ingredient in a combustion unit is authorized by rule.

A series of exclusions further narrow the applicability of the rules and the requirement to obtain a beneficial use byproduct permit. Beneficial uses and activities that are subject to other or similar requirements addressing the issues of disposal or beneficial use are excluded from the proposed regulations.

Because any specified material not excluded from regulation could potentially be a byproduct, adverse impacts involve sampling and analysis to determine the byproduct's chemical nature and degree of variability. There is the cost of additional sampling and analysis triggered by changes in the inputs or how the byproduct is generated. Some of this analysis may be available from the perspective of market acceptance. These sampling and analysis costs as well as the cost of preparing a permit application are highly dependent on the variability of the byproduct and the range and type of chemical analysis necessary to characterize the particular material. As this is a proposed program, the costs are difficult to estimate.

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.

Quantifying the expected adverse impact is difficult due to the wide range of potential ideas for beneficial use of byproducts. Differences among permit applications regarding the available information on the material, the size and complexity of the proposed use, and the types of locations and circumstances of the beneficial use will determine costs. Individual permit applications will vary:

- Applications which propose use of highly variable material will involve greater sampling and analysis costs.
- Applications which propose use of well-segregated and consistent material will have less sampling and analysis costs.
- If the material has characteristics at levels that pose a health or environmental impact, the locations and circumstances where beneficial use byproducts are land applied may be necessarily limited or restricted.
- There may or may not be available research studies or other experience regarding a material in a particular use. The availability of such studies or experience will lessen review time and possible costs.
- Some applications may involve large volumes of material that would increase characterization costs.
- Applications differ in the type of use and exposure and migration. Use of materials that meet construction specifications as an engineered fill or subbase for building or road construction pose less exposure and migration concern. Proposed uses as soil

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amendments and agronomic purposes for which academic and peer researched studies are available reduce review times and costs.

Based on current experience with LAMPs and IAWMP authorizations, a consultant has noted recent applications ranged widely from \$3,500-5,000 to \$30,000-\$40,000 to a high of \$150,000-200,000. Review time has also varied from 4-6 months to over 2 years. As noted in the paragraph above, the lower cost ranges and review times reflect proposals involving well-characterized material in a use that has the benefit of academic research or previous experience. The higher ranges reflect increased costs to characterize the material and/or complexity regarding the proposed site of use and possible health or environmental impacts. Reported annual costs have been in the range of \$1,000 to \$5,000. The Agency anticipates that the proposed regulatory program tailored to beneficial use byproducts and the opportunity for development of general permits will lessen the adverse impacts for the less complex proposals.

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

Based on the number and input of stakeholders and their experience obtaining authorizations issued under the existing LAMP and IAWMP programs, the Agency has determined that having a specific and consistent regulatory program justifies the adverse impact to the regulated business community. The interested party draft released for public comment introduced an alternative that would limit the applicability of OAC Chapter 3745-599 to specified materials. The costs associated with compliance with the rules contained in 3745-599 would provide regulatory clarity and a tailored beneficial use permit program for those applicants that choose to beneficially use the specified materials or industrial byproducts in lieu of disposal.

While the Agency found general stakeholder interest in a beneficial use program, some stakeholders expressed uncertainty whether they would want the beneficial use rules to apply to their materials. While the Agency considered a broad applicability to materials for beneficial use, the Agency limited the applicability to beneficial use authorizations for those materials that the Agency understands has significant stakeholder acceptance.

Regulatory Flexibility

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

The regulations primarily establish a framework for beneficial use byproduct permits and exclusions. The rules provide wide flexibility in the development and issuance of both individual and general permits to be tailored to the byproduct and its beneficial uses.

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?

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The director will evaluate the applicability of ORC section 119.14 to beneficial use authorizations under OAC Chapter 3745-599 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 Division of Environmental and Financial Assistance will offer general regulatory assistance and provide technical assistance. DMWM intends to provide access to information, documents, and other resources through an extensive DMWM website and listserv feature to provide email notice of newly available information. DMWM intends to work with interested stakeholders on development of general permits.

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>.