



Common Sense Initiative

Mike DeWine, Governor
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Business Impact Analysis

Agency, Board, or Commission Name: Ohio Environmental Protection Agency

Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

Construction and Demolition Debris Co-located Processing Facilities

Rule Number(s): Amending the following: 3745-400-01, 3745-400-02, 3745-400-07, 3745-400-11, 3745-400-12, 3745-400-13, 3745-400-26, 3745-500-02, 3745-501-02, 3745-501-05, 3745-501-10, 3745-501-12, 3745-501-15

Date of Submission for CSI Review: 1/27/2022

Public Comment Period End Date: 2/28/2022

Rule Type/Number of Rules:

New/ <u> </u> rules	No Change/ <u> </u> rules (FYR? <u> </u>)
✓ Amended/ 13 rules (FYR? Yes)	Rescinded/ <u> </u> rules (FYR? <u> </u>)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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Reason for Submission

- 1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

Which adverse impact(s) to businesses has the agency determined the rule(s) create?

The rule(s):

- ✓ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**
- ✓ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**
- ✓ **Requires specific expenditures or the report of information as a condition of compliance.**
- ✓ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

- 2. 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 regulations pertaining to construction and demolition debris (C&DD) landfills and C&DD processing facilities. Ohio EPA has drafted regulations for C&DD processing facilities co-located at licensed C&DD landfills. Key provisions of these regulations include design and construction requirements, operation requirements, financial assurance, and final closure requirements. Ohio EPA has also amended select multi-program and licensing rules to make them applicable to co-located C&DD processing facilities. Ohio EPA drafted separate regulations for “standalone processing facilities” that are not associated with a C&DD landfill and released those rules for interested party comment in October 2021. That rule package excludes processing facilities located wholly within the facility boundary of a licensed C&DD landfill.

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Summary of the rules in the package:

3745-400-01 Definitions.

Amendments to this rule include the definition of “co-located processing facility.”

3745-400-02 General obligations.

This rule was created with the standalone processing facility regulations and establishes general obligations related to C&DD disposal and processing. Amendments with this package include the insertion of the term co-located processing facility where appropriate.

3745-400-07 Design requirements and construction specifications.

This rule outlines design and construction specifications for C&DD landfills. Amendments include the incorporation of co-located processing facility design and construction requirements and minor updates to satisfy the five-year rule review requirements of ORC 106.03.

3745-400-11 Operations.

This rule identifies operational requirements for C&DD landfills. Amendments include the incorporation of co-located processing facility operational requirements, clarification of how the owner or operator identifies the unloading zone at the C&DD landfill, and minor updates to satisfy the five-year rule review requirements of ORC 106.03.

3745-400-12 Final closure.

This rule specifies closure requirements for C&DD landfills. Amendments include the incorporation of co-located processing facility closure requirements and minor updates to satisfy the five-year rule review requirements of ORC 106.03.

3745-400-13 Financial assurance for final closure.

This rule specifies financial assurance requirements for C&DD landfills. The standalone processing facility rules package amended this rule to include financial assurance specifications for those facilities. Amendments made as part of this package include the incorporation of co-located processing facility financial assurance and minor updates to satisfy the five-year rule review requirements of ORC 106.03.

3745-400-26 Operator certification.

This rule specifies operator certification requirements for C&DD landfills. The standalone processing facility rules package amended this rule to include certification specifications for those facilities. Amendments made as part of this package include the incorporation of co-located processing facility certification requirements and minor updates to satisfy the five-year rule review requirements of ORC 106.03.

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The following “multi-program” regulations are being amended to make them applicable to co-located processing facilities:

3745-500-02 General administration - definitions.

3745-501-02 Licensing - definitions.

3745-501-05 Licensing requirements.

3745-501-10 License applications and application procedures.

3745-501-12 Additional criteria for C&DD license applications.

3745-501-15 Criteria for issuing or denying facility licenses.

3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

Ohio EPA has the authority for this rulemaking through ORC 3714.02, 3714.022, 3734.02, and 3734.12. The statutes that amplify that authority are 3714.01, 3714.02, 3714.022, 3714.051, 3714.06, 3714.062, 3714.07, 3734.01, 3734.02, 3734.03, 3734.05, 3734.06, 3734.07, 3734.09, 3734.12, and 3734.44.

4. 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 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 there are federal minimum standards for solid waste disposal facilities, which include construction and demolition debris landfills.

There are no federal requirements for states to adopt or 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 the Resource Conservation and Recovery Act (RCRA). Title 40 of the CFR part 257 establishes overall regulatory direction by providing minimum nationwide standards for protecting human health and the

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environment and provides technical standards to states for planning and developing their own environmentally sound waste management practices. Title 40 of the CFR part 257 is enforced by means of federal citizen suit.

5. 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 the Resource Conservation and Recovery Act (RCRA).

6. 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)?

As prescribed in ORC Section 3714.022, the public purpose of this rulemaking is to ensure that the co-located C&DD processing facilities will not create a nuisance, fire hazard, or health hazard or cause or contribute to air or water pollution. Key provisions of these regulations include licensing, design and construction requirements, operation requirements, financial assurance, and final closure requirements.

7. 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 compliance with the rules and by protecting public health and safety, and the environment.

8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?

If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

No.

Development of the Regulation

9. 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.

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Ohio EPA outlined the new rule review process, and which rules were under review, during the Division of Materials and Waste Management's (DMWM) preliminary meetings with representatives of the C&DD industry and approved health departments in December 2017, and January, March, and November 2018. On May 12, 2017, 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. An interested party draft was released June 25, 2020, for stakeholder input and comments were due on July 27, 2020. After reviewing the comments, the rules were revised and filed with the Joint Committee on Agency Rule Review (JCARR) on July 29, 2021. A public hearing was held on September 7, 2021, and upon consideration of the comments received Ohio EPA placed the rules in "To Be Refiled" (TBR) status. Ohio EPA subsequently split the rulemaking into two efforts to allow for more outreach to be conducted regarding co-located processing facilities prior to implementation of these new rules.

Ohio EPA held five stakeholder meetings with C&DD industry, solid waste industry, and health department representatives in November and December 2021. During these meetings, Ohio EPA provided draft concepts and rule language for stakeholder input to amend C&DD landfill rules to include key provisions for co-located C&DD processing facilities. Stakeholders included the Construction and Demolition Association of Ohio (CDAO), National Waste & Recycling Association (NW&RA), Ohio Environmental Health Association (OEHA), consultants, attorneys, and facility representatives.

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

In October 2021, Ohio EPA posted an Early Stakeholder Outreach outlining the rulemaking and establishing 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. Ohio EPA received no written comments.

Ohio EPA solicited stakeholder input during five stakeholder meetings held in November and December 2021. Stakeholders provided comments to Ohio EPA during these meetings. In response, Ohio EPA revised the draft rules to provide clarity and incorporate industry practices.

11. 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?

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Scientific data was used to develop these rules, including but not limited to C&DD composition data, historic leachate and groundwater quality data from C&DD landfills, and analytical data collected from residual material resulting from C&DD processing. This scientific data was utilized to help ensure these rules are protective of human health, safety, and the environment as well as to assist in determining design, construction, and operational standards to prevent health hazards, air pollution, and water pollution.

12. 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?

Initially, the Agency considered a global regulatory approach for C&DD processing facilities that did not include separate regulations for C&DD processing facilities located wholly within the facility boundary of a C&DD landfill and standalone C&DD processing facilities. In response to industry comment, Ohio EPA developed a separate regulatory approach for co-located C&DD processing facilities and standalone C&DD processing facilities. The alternative approach provides cost savings and promotes regulatory compliance to industry.

13. 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 considers these rules to be performance-based. The rules are written such that anyone proposing to own or operate a co-located C&DD processing facility may submit a license application where the applicant provides plan drawings for the design, construction, and operation of the proposed processing facility, as outlined by the rules. The operation regulations are also performance-based by defining the required outcomes of preventing water pollution, air pollution, nuisance and hazards while not dictating the process the regulated stakeholder must use to achieve compliance. For example, the regulated stakeholder must limit access to the facility by unauthorized personnel and prepare a fire contingency plan. The regulated stakeholder may choose the means to achieve the required outcome to prevent the hazards.

14. 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 the Agency's knowledge, Ohio EPA is not duplicating another existing Ohio regulation. Ohio EPA included a number of

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amendments to rules included in this rule package to better clarify and ensure consistency between rules.

15. 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 new rules and rule amendments to stakeholders, facility operators, and Ohio EPA-approved local health departments. Ohio EPA will host meetings with stakeholders to efficiently and effectively implement this new program as part of future license renewals for C&DD landfills. Prior to new rules and rule amendments becoming effective, Ohio EPA will discuss any implementation concerns and will request that stakeholders and health departments identify additional needs for outreach and specific guidance. When necessary, Ohio EPA will offer training to the approved local health departments to ensure that the regulations are applied consistently and predictably.

Adverse Impact to Business

16. 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; and**
- b. Identify the nature of all adverse impact (e.g., 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.

The regulations in this package have a direct impact on the owners and operators of C&DD landfills, including both the existing costs associated with landfill operations and the new costs that will be associated with the co-located C&DD processing facilities.

The nature of the package’s adverse impact includes the existing costs associated with C&DD landfill design, construction, licensing, operations, and closure as well as new costs to account for the co-located C&DD processing facility. New costs for co-located C&DD processing facilities include those to obtain authorizations for the co-located processing facility, update the design plan to include the co-located C&DD processing facility, and

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provide financial assurance for the co-located processing facility, as well as costs related to certification of operators, operations, and final closure.

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 owner's or operator's decisions related to the facility size, design, and location, and the maximum amount of material the owner or operator maintains onsite. 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 facility capacity, and are dependent upon the owner's and operator's decision to expand or modify the facility.

Costs to obtain authorizations for a co-located C&DD processing facility include an application fee of \$100 and a fee upon issuance of \$650. While C&DD landfills do not have fees associated with license submittal and issuance, existing law continued in this rules package requires that the application include certain plans, drawings, and information. Depending on whether the license application is an initial application, a renewal application, or an application to modify the landfill, the degree of the adverse impact associated with preparation of the application will vary greatly. Preparation of a license application to establish a C&DD landfill would involve significant initial costs of site evaluation, facility design, and design and implementation of a ground water monitoring system. Expenditures incurred through updating the design plan pursuant to OAC Rule 3745-400-07 is included in this evaluation since the design plan is required to be submitted with the license application. The higher range of potential costs for a license application to establish a C&DD landfill 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. These costs may be increased to varying degrees if the owner or operator chooses to have a co-located C&DD processing facility, including the costs to incorporate the co-located C&DD processing facility into the plans and drawings already required for the C&DD landfill license application.

Financial assurance to cover the cost of landfill closure is continued in this package and consists of those necessary to prepare and submit a closure cost estimate. C&DD landfills must prepare a cost estimate based upon a third-party conducting closure of the C&DD landfill. Ohio EPA developed the C&DD Facility – Financial Assurance Cost Estimating (FACE) Tool – that includes Ohio EPA's best professional judgment estimation of likely costs for various components of closure and post-closure care activities. These "reference costs" are neither minimum nor maximum estimates but are intended to provide a practical

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frame of reference for itemized activities necessary for construction of final cap, ground water monitoring, and various reports. The amendments to incorporate co-located C&DD processing facilities add a fixed rate of \$4.25/yd³ for mixed C&DD within the active licensed disposal area of the C&DD landfill and \$8.25/yd³ for mixed C&DD outside of the active licensed disposal area of the C&DD landfill. An owner or operator of a co-located C&DD processing facility may only use these numbers if the C&DD landfill has sufficient constructed and certified airspace to dispose of the maximum amount of mixed C&DD onsite. If the C&DD landfill cannot accommodate the maximum amount of mixed C&DD, the owner or operator must assign a fixed rate of \$35/yd³ for the mixed C&DD when calculating financial assurance. Costs to establish financial assurance are subject to several variables including the size of the facility, the owner's or operator's selection of a financial assurance instrument and financial institution, or the financial institution's evaluation of that business's creditworthiness. The cost of a standby trust agreement averages between \$500 to \$3,500.00 depending on the bank, and a funded trust can cost anywhere from 1% of the amount in the trust for deposits of \$250,000.00 or less to .7% of the amount for deposits up to \$1,000,000.00. For surety bonds, costs range from 2% to 4% of the penal sum of the bond depending on the creditworthiness of the applicant. There may be collateral required as well if the company's credit scores are not adequate. For the letter of credit, full collateral is usually required and some banks may also charge fees. The cost of insurance is variable depending on the insurer and the creditworthiness of the applicant.

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

The Agency is required to adopt rules governing C&DD processing facilities under ORC section 3714.022 that ensure these facilities will not create a nuisance, fire hazard, or health hazard and will not cause or contribute to air or water pollution. The obligation to fulfill the statute justifies the adverse impact on the regulated community. Ohio EPA has also engaged stakeholders throughout this rulemaking effort to lessen adverse impacts to the regulated business community.

Regulatory Flexibility

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

ORC Section 3714.04 provides the director and approved board of health authority to exempt a C&DD landfill owner or operator if, in the determination of the director or board of

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health, such circumstances are unlikely to adversely affect the public health or safety or the environment, or create a fire hazard.

19. 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 C&DD processing facilities and landfills regulated under OAC Chapter 3745-400 when assessing fines and penalties for paperwork violations and first-time offenders.

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

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>.