



Division of Solid and Infectious Waste Management

Response to Comments

Rule: Multi-Program Licensing Rules

Agency Contact for this Package

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This document summarizes the comments and questions received during the interested party comment period, which ended on November 1, 2006.

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.

Additional rules have been added to this rule package, therefore Ohio EPA is releasing all the rules for a new interested party period. After comments have been received a new response to comments will be created. Only new comments received will be addressed in that response to comments.

General/Overall Concerns

Comment 1: **Licensing: Following current practices for exempt waste facilities, this proposed rule does not require a license or license application for an industrial excluded waste facility and should remain so. (Gary Haney; First Energy Corporation)**

Response 1: This comment agrees with what was drafted in this rule. At this time Ohio EPA is not filing the industrial waste rules.

3745-501-01 Licensing – applicability. *(new rule)*

This rule was added to the second interested party draft to ensure that the applicability of this financial assurance chapter is clearly stated in the rules.

3745-501-01 Licensing - definitions; licenses required for solid waste facilities, infectious waste, treatment facilities, and construction and demolition debris facilities.

*The rule number and title of this rule has been change to:
3745-501-02 Licensing – definitions.*

No comments were received on this rule.

3745-501-02 Solid waste, infectious waste treatment, and construction and demolition debris facility license applications.

*This rule number has been changed to 3745-501-05 and the title has been changed to:
Licenses required for solid waste, infectious waste treatment,
and construction and demolition debris facilities.*

Comment 2: **Proposed rule OAC 3745-501-02(D)(1) explains that a license may only be considered for facilities that will continue operations if submitted on or before September 30th. OAC 3745-501-02(D)(2) states that any license renewal application not submitted by December 31st shall not be considered. These rules seem to oppose each other. Part two should be clarified to refer to new (initial) licenses. (See also OAC 3745-501-04 Appendix tables) (Mary Helen Smith, Mahoning County Health District)**

Response 2: This language that this comment is referring to has been changed, broken up, and moved to different locations throughout the rule to make it clearer that the owners and operators of all facilities are required to submit a license application by September 30th of each year. Because the statute specifies late fees for late submittals of solid and infectious waste license applications, this rule clarifies that those late license applications submitted by December 31st along with the applicable late fees are the license applications that may be considered by the licensing authority. Any license applications submitted after December 31st shall not be considered and the facility will be subject to all applicable closure requirements.

Comment 3: **Section (A)(1)(d) requires a public notice for new solid waste facility license applications. Doesn't this conflict with the requirement for solid waste facilities to public notice when they submit a permit to install application. The extra requirement for a license is not necessary. HB 397 does require a public notice for a new or expanded CDD facility initial license application. Please provide clarification. (Kathy Trent, Waste Management)**

Response 3: The public notice requirements for licenses have been removed from these rules.

- Comment 4:** Section (A)(2)(a)(ii)(c) has a comment that OAC 3745-501-03 requires an executed and funded financial assurance instrument to be established prior to the issuance of the license. Currently CDD facilities have a condition of the license to submit a funded and executed instrument within a number of days after license issuance. This seems reasonable and should be retained. (Kathy Trent, Waste Management)
- Response 4:** This language was moved to paragraph (A)(8) of rule 3745-501-15 of the Administrative Code. Since Ohio EPA is taking a multi-program approach, financial assurance for all types of facilities shall be established and maintained for closure and post-closure care, and documentation of the financial assurance has been submitted before the licensing authority can issue the license.
- Comment 5:** (A)(1)(b) The draft rule provides that if an applicant has not completed the application and resubmitted it to the licensing authority, following a determination that the application is incomplete, the licensing authority may deny the incomplete application. This provision should include some indication of the timeframe in which an applicant may complete and resubmit the application prior to a denial action by the licensing authority. For example, the phrase, “within a reasonable timeframe” could be added after “... resubmitted to the licensing authority...” Absent such language it would be plausible for a licensing authority to deny an incomplete application almost as soon as it notified the applicant that the application was incomplete. (Steve White, Allied Waste)
- Response 5:** This language was moved to paragraph (A) of rule 3745-501-20 of the Administrative Code. This rule does not require the licensing authority to deny an incomplete application. It would not be likely that the licensing authority would deny a license application immediately after providing notice of the incomplete nature of the application. In the event that the licensing authority did deny the application immediately after providing notice of incompleteness, the applicant would be able to utilize various due process appeal rights.
- Comment 6:** (A)(2)(b) The draft rule provides that if an applicant has not completed the application and resubmitted it to the licensing authority, following a determination that the application is incomplete, the licensing authority may deny the incomplete application. This provision should include some indication of the timeframe in which an applicant may complete and resubmit the application prior to a denial action by the licensing authority. For example, the phrase, “within a reasonable timeframe” could be added after “... resubmitted to the licensing authority...” Absent

such language it would be plausible for a licensing authority to deny an incomplete application almost as soon as it notified the applicant that the application was incomplete. (Steve White, Allied Waste)

Response 6: This language was moved to paragraph (A) of rule 3745-501-20 of the Administrative Code. This rule does not require the licensing authority to deny an incomplete application. It would not be likely that the licensing authority would deny a license application immediately after providing notice of the incomplete nature of the application. In the event that the licensing authority did deny the application immediately after providing notice of incompleteness, the applicant would be able to utilize various due process appeal rights.

Comment 7: **(A)(1)(b): The agency seems to try to further define the difference between complete and incomplete applications once submitted and or reviewed by a permitting authority. The regulation is currently written very subjectively and should be further elaborated to clarify that once an application is submitted a completeness review will be immediately conducted by the licensing authority and if the application is determined to be incomplete, it shall be immediately returned to the applicant prior to any technical review. If the application is submitted and determined to be complete then a technical review will begin by the permitting authority. Any subsequent deficiencies that require a response by the applicant, the application itself is not determined incomplete, but deficient. The regulation should also clarify how an application is to be reviewed for completeness (i.e. what information should be present within an application for it to be considered complete, whether that information is deficient or not). (Michael Stepic, URS Corporation)**

Response 7: This comment seems to be to a prior draft of this rule that included a “completeness review”, that was not preferred. This language has been moved to paragraph (A) of rule 3745-501-20 of the Administrative Code. Complete has been further clarified in the rule to be when all the statutorily and regulatorily enumerated and mandatory components of the application have been reasonably and fully answered, submitted, and addressed by the applicant and that any required attachments, exhibits, and appropriate data have been included.

Comment 8: **Solid Waste, Infectious Waste Treatment, and C&DD Facility License Applications: As written, this paragraph is specific to solid waste facilities and infectious waste facilities. Draft proposed OAC 3745-501-02(A)(2) is specific to construction and demolition debris facilities.**

This proposed OAC adds requirements on the Owner of a solid waste disposal facility to submit a license application above and

beyond the Annual Report that is now required for each facility. If a permitted facility is operating within its approved Permit to Install (PTI), the facility design plans should not need to be submitted each year as described by the application requirements.

Facility compliance with the authorizing documents should be based upon Ohio EPA inspections and Operating Records rather than the Owner's disclosure statements. (Karen Winters, Squire, Sanders, Dempsey, LLP)

Response 8: This language has been moved to (A)(3). It is clear in the rule that only construction and demolition debris facilities are required to submit this additional information found in the C&DD specific chapter. This language does not add any requirements to solid waste disposal facilities.

3745-501-03 Criteria for issuing, denying, revoking, suspending, or modifying solid waste, infectious waste treatment, or construction and demolition debris facility licenses.

This rule number has been changed to 3745-501-10 and the title has been changed to: License applications, application procedures, and remittal of fees after license issuance.

Comment 9: (C)(1) This rule seems to allow for suspension or revocation of the license for any violation. This is problematic in that a facility could be denied a license for a minor or questionable rule infraction.

We recommend that the rule be revised as follows:

The owner or operator consistently and flagrantly violates chapter 3714 or 3734 of the Revised Code or the rule promulgated thereunder.” (Christopher Cobel, Eagon and Associates, Inc.)

Response 9: This language has been moved to paragraph (A)(2) of rule 3745-501-40 of the Administrative Code. This language directly reflects the statute, therefore will not be changed due to this comment.

Comment 10: This section must be deleted and the current OAC 3745-37 should be retained. Several of the proposed sections appear to have been taken from internal agency enforcement guidance and do not belong in regulation.

Sections (A)(2)(a) and (A)(3)(a) both have a comment which suggests a license for any facility can be revoked if the owner or operator has caused actual exposure or the “substantial likelihood of exposure of waste, CDD or waste-derived or CDD derived constituents to the public or the environment”. This suggestion is very open ended.

Often agency staff may have a difference of opinion of technical information and there is no evidence to suggest there is an exposure. This comment should be deleted from the rule as it suggests the issuance of notice of violation can be grounds for a denial or revocation that is an inappropriate standard. The comment also states this may be the case regardless if the agency has issued “initiated or contemplated any kind of escalated enforcement procedures”. In short, if the agency thinks the facility has an environmental problem they can revoke or deny a license. This is not an acceptable legal standard for assuring a license that has been issued has certain rights associated with its issuance. (Kathy Trent, Waste Management; Steve White, Allied Waste)

Response 10: The comments have been removed from these rules.

Comment 11: Sections (A)(2)(b) and (A)(3)(b) allow a license denial or revoking when “any pending enforcement action based on any violation has occurred or is occurring on any of the rules”. In the past there have been notices of violation issued which have been later determined to be incorrect. For a long time the agency has determined that a notice of violation is a “method of communication” and not an enforcement action.

With the proposed rule any violation ever issued could result in a license denial.

Most of the notices of violations issued are considered administrative in nature, i.e. a date for submission of a report is missed. Should a license be issued for these violations when there is clearly no threat to human health or the environment? In addition, given the nature of the complexity and difficult nature of reading and understanding the proposed rules this will make it difficult to know what compliance is let alone meet the requirements. There is no due process allowed under this proposed rule. This section should be deleted in its entirety.

A comment states a “notice of violation is not considered an enforcement action” but the statements made in this rule imply otherwise. Therefore, the concept of denying a license based on a notice of violation should be removed. (Kathy Trent, Waste Management; Steve White, Allied Waste)

Response 11: “Enforcement action pending” has been defined in draft rule 3745-501-01 as the following:
“Enforcement action pending” means the director or the approved board of health, has issued an invitation to negotiate to the owner or operator to negotiate an administrative remedy for any violation, or that the director or

the approved board of health has referred the matter to the Ohio attorney general or local prosecutor, as appropriate, in order to pursue enforcement regarding such violations under Chapter 3704., 3714., 3734., or 6111. of the Revised Code.

The rules have been designed to clarify statutory reference that under 3714. and 3734. That the director or approved board of health may deny a license for violation of any section of those chapters or any rule adopted under those chapters. Here the rules aid regulators and operators by clarifying that a license cannot be issued to a facility that has an enforcement action pending and defines what that means. The comment also clarifies that an NOV is not an enforcement action pending.

Comment 12: **Section (B) states a license “may deny a license application if any of the criteria of paragraph (A) are not met”. This section should be deleted as it provides authority to deny just based on a notice of violation or a substantial likelihood of a release that is a vague standard.**

Response 12: The rule is clear that it is not a violation that causes the denial of a license, it is whether or not an enforcement action is pending. See response #11 for definition.

Comment 13: **Section (C) should be deleted because the standards are so broad that any facility could have its license revoked or suspended for any violation. The current OAC 3745-37 should be retained, as it is sufficient to provide rules for license suspension, revocation and denial. There is no need to add the suggested changes as it makes it impossible for an operator to know the license will remain in effect for a year. (Kathy Trent, Waste Management; Steve White, Allied Waste)**

Response 13: This language was moved to paragraph (A)(2) of 3745-501-40 of the Administrative Code. Ohio EPA is maintaining that a license may be suspended or revoked for any violation due to the nature of the statutory language.

For C&DD facilities, Ohio Revised Code section 3714.10 states:

The board of health of the health district in which a construction and demolition debris facility is located or the director of environmental protection may deny, suspend, or revoke a license for the facility under section 3714.06 of the Revised Code for violation of any section of this chapter, a rule adopted under it, or a term or condition of the facility's license.

For solid waste facilities and infectious waste treatment facilities, Ohio Revised Code section 3734.09 states:

The board of health of a health district in which a solid waste facility or an infectious waste treatment facility is located, or the director of environmental protection, may suspend, revoke, or deny a license for the facility for violation of any section of this chapter or any rule adopted under it.

Comment 14: (A)(2): The agency has inserted a comment beneath the regulation that seems to provide for a definition of substantial compliance. That definition in itself should be added to OAC 3745-500-01. (Michael Stepic, URS Corporation)

Response 14: This language has been removed from these rules.

Comment 15: (C)(3): States that owner/operator is not operating or constructing the facility in strict compliance with the authorizing documents. Suggested revising the word "strict" to "substantial." (Michael Stepic, URS Corporation)

Response 15: This language has been moved to paragraph (A)(3) of rule 3745-501-40 of the Administrative Code and now states that the facility is not being operated in substantial compliance with applicable provisions of Chapter 3704., 3714., 3734., or 6111. of the Revised Code and rules adopted under those chapters.

3745-501-04 Action by licensing authority; effective date, expiration date, licensing procedures, and terms and conditions of a license.

*This rule number has been changed to 3745-501-15 and the title has been changed to:
Criteria for issuing or denying facility licenses.*

Comment 16: A table is presented related to the completeness or incompleteness application, although this goes to further defining what is considered complete versus incomplete versus a complete application that is deficient. The table references that an incomplete application would be issued a notice of deficiency. The concern here is the application is actually complete, but deficient. That in the case where a deficiency letter is submitted, the application may not be deemed approvable because it is deficient, but it is complete. An incomplete application would be sent back to the applicant prior to a technical review for deficiencies. This regulation seems to contradict industry standard and operational standards that have been incorporated or interpreted by applicants and the agencies for the last 10+ years. Is

the agency proposing to change that general procedure guidelines that have been followed or interpreted for the past several years? (Michael Stepic, URS Corporation)

Response 16: This table has been removed from the rule. The contents of the table have been added to the rule language in paragraph (C) of rule 3745-501-20 of the Administrative Code. By doing so, Ohio EPA made it clear that the table does not define complete or incomplete; it provides the procedures for the licensing authority when responding to a license application.

Comment 17: **(A)(2): “The renewal of the license should not be considered for issuance or denial for a facility that the owner/operator is required to conduct closure requirements.” Under their own closure requirements they are stating that any area of phase that gets up to final grade, it has to be capped (i.e. the Phasing Plan requirements in the applicable proposed regulations). Due to the subjective nature of those regulations, it is believed that this could become an issue when the next license is sought. If the permitting authority takes extreme or strict interpretation of those previous regulations could become an issue for license renewal. (Michael Stepic, URS Corporation)**

Response 17: This language has been moved to paragraph (A)(6) of rule 3745-501-15 of the Administrative Code. This rule only applies to facilities where final closure of the entire facility is required, not for facilities that are still operating and are moving from phase to phase or putting final cap on only a part of the facility.

End of Response to Comments