TITLE: **VAP Eligibility of Unlicensed, Unpermitted Solid Waste Disposal Facilities**

DATE EFFECTIVE: August 2003

HISTORY: Update of VA30002.03.002 - Revision was necessary to reflect changes in rule citations that became effective in March 2009. However, the archived TDC document remains accurate under the 1996 VAP rules.

KEYWORDS: Solid waste facility, closure, licensed, open dumping

RULE/ AUTHORITY: OAC 3745-300-02(B)(5)(a); ORC Section 3746.02(A)(2)

QUESTION: Are unlicensed, unpermitted solid waste disposal facilities necessarily ineligible for the VAP?

ANSWER: No. Properties where closure of a solid waste facility is required are ineligible for the VAP, pursuant to OAC 3745-300-02(B)(5) and ORC Section 3746.02(A)(2). Such properties include licensed, permitted, or registered solid waste facilities subject to closure requirements established by rule. Therefore, unlicensed, unpermitted solid waste facilities, including open dumps, are not necessarily ineligible for the VAP. However, disposal of solid waste at an unlicensed, unpermitted facility is a violation of ORC Section 3734.03, and Ohio EPA retains the discretion to enforce solid waste violations and seek civil penalties where appropriate.

BACKGROUND:

I. ORC 3734.02(A)(2) & OAC 3745-300-02(C)(5)(a)

Ohio Revised Code ("ORC") Section 3746.02 and Ohio Administrative Code ("OAC") Chapter 3745-300-02 govern the eligibility of properties for the Voluntary Action Program ("VAP"). ORC Section 3746.02(A)(2) states that nothing in Chapter 3746 applies to "[t]hose portions of property where closure[1] of a

[1] *Closure* is defined, in pertinent part, to mean: "the time at which a ... solid waste facility will no longer accept solid wastes for transfer or disposal ... or the effective date of an order revoking the ... registration certificate, permit or license for a solid waste facility, as applicable. 'Closure' includes measures performed to protect public health or safety, to prevent air or water pollution, or to make the facility suitable for other uses, if any, including ... the establishment and maintenance of a suitable cover of soil and vegetation over cells in which ... solid wastes are buried ...." ORC Section 3734.01(O).

hazardous waste facility or solid waste facility[2] is required under Chapter 3734 of the Revised Code or rules adopted under it." Therefore, this aspect of the VAP eligibility provision depends upon when closure of a facility is required under ORC Chapter 3734.

OAC 3745-300-02(B)(5), which clarifies the ineligibility of property where closure is required under ORC Chapter 3734 or rules adopted thereunder, sets forth, by way of illustration, several examples of facilities that have solid waste closure obligations:

(i) Any solid waste facility licensed pursuant to Chapter 3734 of the Revised Code and the Administrative Code rules adopted thereunder;

(ii) Any solid waste facility for which a plan approval, permit-to-install, registration, or other authorization has been issued pursuant to Chapter 3734 of the Revised Code and the Administrative Code rules adopted thereunder;

(iii) Any solid waste facility, for which closure activities have been completed in accordance with Chapter 3734 of the Revised Code, during the term of any applicable post-closure care period required by Chapters 3745-27, 3745-29, and 3745-30 of the Administrative Code;

(iv) Any other solid waste facility for which closure is required by Chapters 3745-27, 3745-29, and 3745-30 of the Administrative Code.

OAC 3745-300-02(B)(5)(a).[3] The rule is followed by a comment that properties on which "open dumping" has occurred would be eligible for participation in the VAP provided that all other eligibility requirements are met.

[2] *Facility* is defined, in pertinent part, as "any site, location, tract of land, installation, or building used for ... sanitary landfilling, or other methods of disposal of solid wastes ...." ORC Section 3734.01(N).

[3] The rule further provides that the term, "'[s]olid waste facility' includes but is not limited to a sanitary landfill facility, municipal solid waste disposal facility, residual waste landfill facility, industrial solid waste landfill facility, solid waste transfer facility, scrap tire facility, solid waste incineration or energy recovery facility, or solid waste composting facility."

II. Licensed Facilities vs. Open Dumps

The solid waste statute recognizes a distinction between disposal[4] of solid wastes: i) via a license; and ii) via open dumping. ORC Section 3734.03 provides that "[n]o person shall dispose of solid wastes by ... open dumping, except as authorized[5] by the director of environmental protection in rules adopted in accordance with ... section 3734.02 ...." The proscriptions of open dumping set forth in ORC Section 3734.03 and OAC 3745-27-05 clarify that the methods to be used to dispose of solid waste can only be utilized at facilities licensed and permitted in accordance with Ohio law. This is evidenced by the definitions of "open dumping" set forth in ORC Section 3734.01(I)[6] and OAC 3745-27-01(B)(21)(a).[7] The former distinguishes open dumps as those disposal sites that are "not licensed as a solid waste facility," while the latter distinguishes open dumps from solid waste facilities "operated in accordance with" ORC chapter 3734 and OAC chapters 3745-27 and 3745-37.

III. Solid Waste Facility Closure

ORC Chapter 3734 is a comprehensive framework for regulation of the universe of solid and hazardous waste facilities. The General Assembly left many of the specifics to the administrative rule writing process, but the result is a statutory and regulatory framework that imposes specific legal requirements based on the "status" of a particular entity or site. In the solid waste universe, one important legal "status" is that of "facility," which status ultimately necessitates "closure."

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[4] *Disposal* is defined as "the discharge, deposit ... dumping, spilling, leaking, emitting, or placing of any solid wastes ... into or on any land or ground or surface water or into the air ...." ORC Section 3734.01(F).

[5] No rule in the Administrative Code "authorizes" open dumping. Indeed, OAC 3745-27-05(C) provides that "[n]o person shall conduct, permit, or allow open dumping."

[6] The term, *open dumping,* is statutorily defined to mean "the depositing of solid wastes into a body or stream of water or onto the surface of the ground at a site that is <u>not licensed</u> as a solid waste facility under section 3734.05 of the Revised Code...." ORC Section 3734.01(I) (emphasis added).

[7] The term, *open dumping,* is defined by rule to mean "[t]he deposition of solid wastes, other than scrap tires, into waters of the state, and also means the final deposition of solid wastes on or into the ground at any place <u>other than</u> a solid waste facility <u>operated in accordance with</u> Chapter 3734. of the Revised Code, and Chapters 3745-27 and 3745-37 of the Administrative Code." OAC 3745-27-01(B)(21)(a) (emphasis added).

ORC Chapter 3734 and OAC Chapter 3745-27 establish a framework of solid waste regulation built upon the premise that solid waste is to be disposed only by certain methods and in certain locations. This is evidenced by OAC 3745-27-05(A), which prescribes the options for proper disposal of solid waste,[8] and by the open dumping proscriptions. These provisions make it clear that solid waste is only to be disposed at regulated "facilities" and nowhere else.

An examination of the closure requirements set forth in the Administrative Code leads to the conclusion that closure is required at sites within the regulated facility universe. The solid waste rules define the various types of "facilities" that are regulated under 3745-27.[9] These include "sanitary landfill facility," "scrap tire facility," "scrap tire collection facility," "scrap tire monocell facility," and "solid waste transfer facility." Substantive solid waste requirements, such as closure, are variously referenced in the definitions of specific facilities. For example, the sanitary landfill closure requirements set forth in OAC 3745-27-11 are specifically linked to "sanitary landfill facilities."[10] When the term, "sanitary landfill facility" is used, it means a facility that is operating in compliance with the regulatory framework of OAC Chapters 3745-27 and 3745-37, i.e., having a permit to install, in accordance with OAC Rule 3745-27-06, and a license, in accordance with OAC 3745-37-02.

The application of the closure requirement to regulated facilities is further substantiated by an examination of when mandatory closure is to occur. OAC 3745-27-11(C) lists numerous "triggers" that

[8] "Solid wastes shall be disposed of only by the following methods or combination thereof: (1) Sanitary Landfill, or (2) Incineration, or (3) Composting, or (4) Methods not mentioned by paragraphs (1) through (3) above and not prohibited by this Chapter, 3745-27 (EP-20), provided that such methods are demonstrated to the satisfaction of the Director to be capable of disposing of solid wastes without creating a nuisance or a health hazard ...." OAC Rule 3745-27-05(A).

[9] Industrial solid waste landfill facilities, regulated pursuant to OAC Chapter 3745-29, and residual waste landfill facilities, regulated pursuant to OAC Chapter 3745-30, are types of sanitary landfill facilities whose closure obligations are set forth under those chapters respectively. While the focus of this analysis is on closure obligations under OAC Chapter 3745-27, the substantive analysis is the same under Chapters 3745-29 and 3745-30.

[10] *Sanitary landfill facility* means "an <u>engineered</u> facility where the final deposition of solid waste on or into the ground <u>as practiced in accordance with Chapters 3745-27 and 3745-37 of the Administrative Code</u> ...." OAC Rule 3745-27-01(C)(4) (emphasis added).

necessitate closure at a sanitary landfill. In each instance, the "trigger" is tied to events or conditions that are a part of the general regulatory framework of Chapter 3745-27.

The conclusion that Chapter 3734 closure requirements are relegated to licensed/ permitted facilities is further supported by the fact that "closure," when used in the statute to prescribe instances in which it is applicable, appears only in the context of regulated facilities. Specifically, the terms, "closure" and "post closure care," as used in ORC Section 3734.02(A), appear in a context that presupposes the creation of a "regulated universe." The statute[11] largely leaves the issue of closure to the Director's rule making authority. See OAC Chapter 3745-27.

IV. Enforcement Discretion

Disposal of solid waste at an unlicensed, unpermitted facility constitutes a violation of ORC Section 3734.03, i.e., open dumping of solid waste, and OAC 3745-27-05(C), i.e., the establishment of a solid waste facility without first obtaining a solid waste facility permit or license. As contemplated by the applicable statute and rules, the law favors clean closure of any open dump. The eligibility of an unlicensed, unpermitted solid waste facility[12] to participate in the VAP, even if accompanied by the issuance of a No Further Action letter[13] by a Certified Professional and the issuance of a

[11] "The director of environmental protection ... shall adopt and may amend, suspend, or rescind rules having uniform application throughout the state governing solid waste facilities ... in order to ensure that the facilities will be located, maintained, and operated, and will undergo closure and post-closure care, in a sanitary manner so as not to create a nuisance, cause or contribute to water pollution, create a health hazard ...." ORC Section 3734.02(A) (emphasis added). See also ORC Section 3734.12(D)(8).

[12] An unlicensed, unpermitted solid waste facility that is the subject of an enforcement letter from the Director relating to a release or threatened release of hazardous substances or petroleum on, underlying or emanating from the property which poses a substantial threat to public health or safety or the environment would not be eligible for the VAP, pursuant to ORC Section 3746.02(A)(5) and OAC 3745-300-02(B)(8), unless sufficient evidence of entry and participation in the VAP is demonstrated pursuant to OAC 3745-300-02(C).

[13] Voluntary actions under ORC Chapter 3746 and OAC Chapter 3745-300 "shall be undertaken in compliance with all applicable laws of this state and rules adopted under them and with applicable ordinances, resolutions and rules of political subdivisions of this state." ORC Section 3746.10(D). ***Such applicable laws and rules may include ORC Section 3734.02(H) and OAC Rule 3745-27-13, which prohibit the filling, grading, excavating, building, drilling, or mining on land where a solid waste facility was operated without prior authorization from the Director of Ohio EPA.***

covenant not to sue[14] by the Director, does not preclude Ohio EPA from pursuing enforcement, including civil penalties, for violations of ORC Chapter 3734 and the solid waste rules adopted thereunder which may have occurred at the facility. Such enforcement may include pursuit of injunctive relief to obtain removal of any solid waste that may have been open dumped. Ohio EPA retains the discretion to pursue enforcement of any such violations and seek civil penalties where appropriate.

V. Conclusion

In conclusion, properties where closure of a solid waste facility is required include licensed, permitted or registered solid waste facilities subject to closure requirements established by rule. Unlicensed, unpermitted solid waste facilities, including open dumps, are not necessarily ineligible for the VAP. However, Ohio EPA retains the discretion to enforce solid waste violations and seek civil penalties where appropriate.

SUMMARY: Properties where closure of a solid waste facility is required are ineligible for the VAP, pursuant to OAC 3745-300-02(B)(5) and ORC Section 3746.02(A)(2). Such properties include licensed, permitted, or registered solid waste facilities subject to closure requirements established by rule. Therefore, unlicensed, unpermitted solid waste facilities, including open dumps, are not necessarily ineligible for the VAP. However, disposal of solid waste at an unlicensed, unpermitted facility is a violation of ORC Section 3734.03, and Ohio EPA retains the discretion to enforce solid waste violations and seek civil penalties where appropriate.

OHIO EPA CONTACT: For further information regarding this issue, please contact the VAP Staff at (614) 644-2924.

[14] A covenant not to sue shall contain "[a] provision releasing the person who undertook the voluntary action from all civil liability to this state to perform additional investigational and remedial activities to address a release of hazardous substances or petroleum . . ." ORC Section 3746.12(A)(1) (emphasis added). Thus, a VAP covenant would not constitute a release of liability for violations of the solid waste requirements of ORC Chapter 3734 and applicable rules.