

PROCEDURE: ENFORCEMENT PROTOCOL AND GUIDANCE DOCUMENT

I. PURPOSE

This Enforcement Protocol and Guidance Document describes the enforcement procedures of the State Emergency Response Commission (SERC), Executive Committee, and the Ohio Environmental Protection Agency (Ohio EPA), Division of Air Pollution Control (DAPC).

Ohio EPA assists in administering the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C.A. 11001, et seq. (EPCRA) laws in Ohio, assists the SERC, and performs a technical advisory role for the Executive Committee for enforcement related issues and actions.

The procedures detailed in this document are intended for Ohio EPA and Executive Committee use in determining appropriate enforcement actions and proposed penalties. The procedures do not create substantive or procedural rights enforceable by any party in litigation with the State of Ohio.

II. GOAL

The goal of this enforcement document is to encourage statewide compliance with ORC 3750 through fair and equitable application of the laws and regulations to the regulated community, and provide for the swift resolution of SERC enforcement cases.

III. BACKGROUND

Ohio Revised Code (ORC) Chapter 3750 provides for administrative, civil and criminal enforcement of Ohio's Emergency Planning and Community Right-to-Know laws and rules. ORC Section 3750.18 authorizes the Executive Committee to issue enforcement orders to any person who has violated or is violating any provision of ORC Chapter 3750 or rules adopted or orders issued under it. Enforcement orders issued under ORC Section 3750.18 shall be issued in accordance with the procedures detailed in this Enforcement Protocol and Guidance Document. A majority vote of a quorum of at least three members is required to issue enforcement orders. Enforcement orders may be unilateral or negotiated. Issuance of an enforcement order under this section is not a condition precedent to bringing a criminal, or civil penalty action under section 3750.20 of the Revised Code.

ORC Section 3750.20(A) authorizes the Executive Committee to seek civil enforcement for violations of ORC Chapter 3750. Under this provision, the Executive Committee may request the Attorney General to bring an action for injunctive relief and/or civil penalties against persons who violate ORC Chapter 3750, rules adopted or orders issued under it. Resolution of this type of action will be through a judicial order from the court or consent order filed with the court of common pleas.

ORC Section 3750.99 provides for criminal prosecution of violations of Chapter 3750. The Local Emergency Planning Committee (LEPC) or fire department may request the county prosecutor or city law director to pursue enforcement for violations of Chapter 3750.

IV. ACTIONABLE OFFENSES

A. Release Reporting Requirements

ORC Section 3750.06(C) requires a facility owner or operator to verbally notify Ohio EPA (1-800-282-9378), the LEPC emergency coordinator, and the local fire department within thirty (30) minutes of knowledge or discovery of a release of a hazardous substance, extremely hazardous substance (EHS), or a discharge of oil in an amount exceeding the reportable quantity that leaves the facility's boundary. OAC Rules 3750-20-30, 3750-20-50 and 3750-25-20 detail chemical release reporting requirements and reportable quantities. Verbal release notification requirements are outlined in OAC Rule 3750-25-25.

ORC Section 3750.06 (D) requires a facility owner or operator to provide written follow-up emergency notice to Ohio EPA and the LEPC within thirty (30) days after the reportable release. If the release was from a vessel, the written report is sent only to Ohio EPA. Written release notification requirements are detailed in OAC rule 3750-25-25.

B. Notification and Identification Reporting Requirements

ORC Section 3750.05 (C) requires an owner or operator of a facility that uses, stores, or produces an extremely hazardous substance (EHS) in an amount equal to or exceeding the threshold planning quantity (TPQ) to notify the SERC and the LEPC within sixty (60) days after first acquiring the substance, and designate a facility emergency coordinator who will participate in the district's emergency planning process. Upon a request from the LEPC, a facility must provide information necessary for the LEPC to develop and implement the district chemical emergency response and preparedness plan.

C. List or MSDS Reporting Requirements

ORC Section 3750.07 provides that any person who owns or operates a facility who is required to prepare or have available a Material Safety Data Sheet (MSDS) on site, must submit to the SERC, the LEPC, and the local fire department either a list of any hazardous chemical(s), or individual MSDSs (for facilities with ten or fewer hazardous chemicals) for each chemical used, stored or produced in quantities exceeding the threshold quantity (TQ).

Within three (3) months after discovery of new information, or first obtaining a

hazardous chemical, the owner or operator must submit a revised list or additional MSDSs to the SERC, the LEPC, and the local fire department.

D. Emergency and Hazardous Chemical Inventory Reporting Requirements

Owners or operators must prepare and submit a Facility Identification Form (EPA 0316), and Emergency and Hazardous Chemical Inventory Form (EPA 0317), and facility map to the SERC, the LEPC and the local fire department by March 1 of each year. Facilities may file electronically in lieu of filing EPA Form 0316 and 0317, using the electronic software approved by the SERC.

E. Filing Fee Requirements

ORC Section 3750.13 requires facilities to submit annually by March 31 a filing fee and a "Facility Annual Chemical Inventory Filing Fee Worksheet" (EPA 0320). Before 2001, late fee interest was compounded on the principal and interest at the rate of fifteen per cent (15%) compounded quarterly, commencing on April 1, July 1, October 1, and January 1, of each year.

Beginning with inventory year 2001, late fees are assessed at the rate of ten (10%) per year of the total fees, as 3750.13 (A)(2) was amended by House Bill 94, which became effective Sept. 4, 2001.

V. STATUTORY PENALTIES

ORC 3750.20 provides for the following penalties:

A. Release Reporting Requirements

Failure of an owner or operator to give verbal and written notice of the release of a hazardous substance, extremely hazardous substance, and/or oil, pursuant to ORC Section 3750.06, shall pay a civil penalty of not more than twenty-five thousand dollars for each day of violation.

B. Falsifying, Tampering With, or Rendering Inaccurate Information

Any person who falsifies, tampers with or renders inaccurate any information or records required to be submitted any section of Chapter 3750 shall pay a civil penalty of not more than twenty-five thousand dollars for each day of violation.

C. Notification and Identification Reporting Requirements

Failure of an owner or operator to notify the SERC and the LEPC within sixty (60) days after first acquiring an extremely hazardous substance or ninety (90)

days after first acquiring a hazardous substance, and designate a facility emergency coordinator as required by ORC 3750.05 , shall pay a civil penalty of not more than ten thousand dollars for each day of violation.

D. List or MSDS Reporting Requirements

Failure of an owner or operator of a facility who is required to prepare or have available a Material Safety Data Sheet (MSDS) on site, to submit to the SERC, the LEPC, and the local fire department either a list of any hazardous chemical(s), or individual MSDSs (for facilities with ten or fewer hazardous chemicals) for each chemical used, stored or produced in quantities exceeding the threshold quantity (TQ), as required by ORC 3750.07, shall pay a civil penalty of not more than ten thousand dollars for each day of violation.

E. Emergency and Hazardous Chemical Inventory Reporting Requirements

Failure of an owner or operator to submit a Chemical Inventory Report, as required by ORC 3750.08, shall pay a civil penalty of not more than ten thousand dollars for each day of violation.

As required by ORC 3750.20(B)(4), all civil penalties received pursuant to actions brought upon the written request of the Executive Committee of the SERC shall be credited to the emergency planning and community right-to-know fund created in ORC 3750.14.

All civil penalties received pursuant to actions brought upon the written request of a local emergency planning committee or fire department shall be credited to the special emergency planning fund created in section 3750.03 of the Revised Code of the district in which the violation occurred.

VI. LEVELS OF ACTION

The Executive Committee may enforce ORC Chapter 3750 chemical release inventory reporting requirements, and may exercise administrative discretion in considering enforcement alternatives. Levels of action include: (A) SERC warning letter; (B) SERC administrative orders; and (C) consent decree with civil administrative penalties.

A. SERC Warning Letter

A consent decree with civil penalty is the appropriate response for violations of ORC Chapter 3750, except where the facts and circumstances support the issuance of a SERC warning letter. The SERC warning letter may be sent to the owner or operator of a facility advising that legal action is being considered and offering an opportunity for voluntary compliance. If a SERC warning letter

is issued, the violator should generally be given thirty (30) days from the date of issuance to come into compliance, if necessary. Failure to correct any violation for which a SERC warning letter is issued may be the basis for referral to the Attorney General.

Examples of facts and circumstances which may support the issuance of a SERC warning letter:

1. First time violations of ORC 3750.06, Release Reporting Requirements, provided that: (1) no other violations of ORC 3750 were simultaneously discovered; (2) an EHS was not released; and (3) the release was less than two (2) times the reportable quantity (RQ).
2. First time violations of ORC 3750.05, 3750.07 and 3750.08, (Notification and Identification Reporting Requirements, List or MSDS Reporting Requirements, and Emergency and Hazardous Chemical Inventory Reporting Requirements) provided that: (a) no other violations of 3750 were simultaneously discovered; (b) fewer than five (5) chemicals were stored in quantities greater than the minimum threshold level; (c) the stored chemicals were in quantities less than five (5) times the minimum threshold level; and (d) none of the chemicals stored was an extremely hazardous substance.
3. First time violations of ORC 3750.05, 3750.07, and 3750.08, where the facility has timely reported to two of the three reporting entities (SERC, LEPC, and fire department), and compliance with the third entity is needed.

Although prior receipt of a SERC warning letter does not constitute a prior history of violations for purposes of increasing the penalty, it would generally preclude a facility from receiving another SERC warning letter.

B. SERC Administrative Orders

Pursuant to ORC Section 3750.02(B)(9), the Executive Committee by majority vote of a quorum (at least three members) may issue enforcement orders requiring facility owners and/or operators to abate violation(s) of ORC Chapter 3750 or rules adopted or orders issued under it. These Orders are issued to the owner or operator of a facility requiring the facility to come into compliance within specified time frames set in the body of the Orders. Administrative orders are nonnegotiable, but may be appealed to the Environmental Review and Appeals Committee.

Administrative orders shall be in writing and shall adequately identify the owner or operator and facility. The Orders shall specify the section(s), rule(s), or orders(s) violated; shall give a description of the violation(s); and shall specify the action(s) required by the facility in order to abate the violation(s). Administrative orders do not include a civil penalty component. Orders shall be sent to the responsible party by certified mail, return receipt requested. Notice of the order shall be deemed effective when delivery is tendered at the last known address or the address currently on file with the SERC, LEPC, or local fire department for any facility owner or operator subject to the order. An order shall be public noticed through procedures adopted by the SERC, and entered into the SERC's journal.

C. Referrals to the Attorney General

A consent decree with civil penalties is the appropriate response for violations of ORC 3750, except as noted above. At the discretion of the Executive Committee, LEPC, or fire department, an enforcement case may be referred to the Attorney General's office. The Attorney General may bring an action against any person(s) or facility(ies) to require the violation(s) to be terminated or the Attorney General may seek an injunction against the violator to cease the violation.

The Attorney General may draft and enter into Consent Decrees, which specify the action(s) required by the facility to abate the violation and specify the penalty amount. Penalties provide a means of compensating the state for damages to the environment caused by the facility, and for punishing the facility for violating the laws and regulations. Penalties deter future violations and encourage swift resolution to the environmental problems and the return to compliance.

In order to maintain an efficient enforcement process, warning letters, when warranted, and referrals to the Attorney General will be the primary mechanisms used to resolve violations. SERC Administrative Orders will not routinely be used.

VII. PROCEDURES

A. Investigation Procedures

Ohio EPA (on behalf of the SERC), LEPCs, and fire departments may investigate and/or inspect the nature of a release to determine if an amount equal to or greater than the reportable quantity (RQ) of an EHS, hazardous substance or oil was released and the appropriate release reporting requirements satisfied. SERC, LEPC, and fire department personnel may also inspect facilities for compliance with inventory reporting requirements.

Ohio EPA investigators prepare various types of release investigation reports. The On Site Coordinators (OSCs) prepare Notice of Violations (NOVs) and/or District Office Investigation Reports (DOIRs). The Special Investigators prepare Field Investigation Reports (FIRs). The Duty Officers prepare Initial Pollution Incident Reports (IPIRs). Based upon information contained in any of the investigator's reports, DAPC personnel issue Release Reporting Reminder Letters and may issue a SERC Notice of Violation. Reminder Letters are issued to RPs informing them that a written 30-day follow-up report is due to the SERC and the LEPC. If necessary to substantiate that a violation(s) has occurred or is occurring, DAPC may issue Requests for Information letters.

DAPC staff may conduct inspection or complete investigation reports for violations of release or inventory reporting. Pursuant to Section 3750.16 of the ORC, the Ohio EPA has authority to enter a facility at reasonable times to inspect or investigate, obtain samples and examine and copy any records to determine compliance with Chapter 3750 of the ORC. The Ohio EPA may apply for an administrative inspection warrant or another appropriate search warrant to achieve the purpose of Chapter 3750. Inspection reports, where applicable, may be included in the Executive Committee Referral Package and/or in the Attorney General Referral Package.

B. Enforcement Procedures

Upon the receipt of an Enforcement Referral Package, and by majority vote, the Executive Committee will initiate an enforcement action. The Executive Committee, through DAPC staff, may issue a NOV or Warning Letter, or a referral to the Attorney General's office. The Executive Committee may seek a consent decree with a civil penalty; and/or injunctive relief; or a criminal fine or imprisonment. SERC Administrative Orders will not typically be used to resolve a violation because the Orders do not include a penalty component.

The DAPC staff shall compile referral packages for those cases where violations of the law could adversely impact human health, safety and/or the environment. Minimally, a case file could include the following items:

1. Enforcement Referral;
2. SERC Request for Information responses supplied by the facility regarding the specified violation(s);
3. Field Reports or Citations (DOIR, NOVs, IPIRs, or CEPO investigation or inspection reports);
4. SERC NOV and/or Warning Letters;

5. Analytical Information;
6. Copies of all correspondence (correspondence with the violator, letters to and from complainants, any information generated by public officials, interoffice communications, field notes, meeting notes and telephone memorandum);
7. Interview notes;
8. Photographs or slides; and,
9. Additional information that substantiates the reporting requirements and/or the release or discharge event.

The Enforcement Referral Package should also include an index of all the information contained within the enforcement case files. The Enforcement Referral Package shall be submitted and presented to the Executive Committee with the DAPC recommendation(s) and proposed penalty calculations (penalty Matrix, Release Reporting Form and Penalty Matrix, Inventory Reporting Form). A formal resolution and AGO referral cover letter should be prepared in anticipation of the Executive Committee meeting for immediate signing by the Co-Chairpersons.

Upon the Executive Committee determining to refer a case to the Attorney General, DAPC staff shall prepare the Enforcement Referral Package and the following:

1. SERC Executive Committee Request for Enforcement Action By Attorney General;
2. AGO Cover Letter addressed to the Attorney General requesting representation;
3. Recommended actions to achieve compliance;
4. Proposed penalty amount, where appropriate;
5. LEPC and fire department Notification of Referral Letter, where appropriate; and,
6. Case file copy.

The Enforcement Referral Package shall be marked "Prepared in Anticipation of Litigation" and "Confidential Attorney-Client Privileged Communication:

Enforcement Sensitive”. Such information shall not be disclosed under a public records request pursuant to ORC Section 149.43.

II. ENFORCEMENT TRACKING

The DAPC Right-to-Know Unit Supervisor is the primary person responsible for tracking the progress, development, and resolution of the Executive Committee cases. The DAPC Right-to-Know Unit Supervisor coordinates all enforcement activities, as necessary, between investigators, Ohio EPA legal staff, the Executive Committee, the Attorney General's Office, U.S. EPA, LEPCs, and the public.

III. PENALTY ELEMENTS

The penalty elements in this Protocol and Guidance Document are designed to be equitable and provide an appropriate level of deterrence to would-be violators. Generally, this Protocol and Guidance Document assumes that the greater the quantity of chemicals one uses in conducting business, the more likely that a violation of reporting requirements will undermine the intentions of ORC Chapter 3750. It also assumes that the greater the quantity of chemicals maintained, the more responsible a facility should be in safe handling those chemicals in both emergency and non-emergency situations. Penalty calculation matrices were established so that a worse-case scenario violation could result in the statutory maximum penalty being assessed.

Penalties are calculated in two steps: (1) an offense appropriate base penalty is determined using gravity of offense factors such as the circumstances, nature and extent of the violation; and (2) a facility specific penalty is determined based on violator factors such as ability to pay, continued business viability, history of prior violations, the degree of culpability, and the extent of economic benefit the facility derived by not complying with the law. Together, the two calculations are synthesized to yield a proposed civil penalty appropriate for the violation(s).

A. Determination of Base Penalty for Release Reporting

The base penalty reflects the overall seriousness of the violation(s).

1. **Nature:** Describes the type of violation or requirement violated. Violations under Section 3750.06 of the ORC include those in which the Respondent failed to perform some function or duty during or after the release of a hazardous substance, extremely hazardous substance, or oil in excess of its applicable reportable quantity (RQ). Such violation for failure to notify the Ohio EPA, LEPC, or local fire department having jurisdiction over the facility; or failure to provide all verbal information required by statute or

implementing regulation; or failure to provide a written follow-up report to Ohio EPA and the LEPC; or failure to provide all the written information required by statute or implementing regulations.

2. **Gravity:** Determination made by the amount and type of substance involved in the violation. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) lists hazardous substances (HSs) and applicable RQs under 40 CFR Part 302.4, which are incorporated by reference in OAC Rule 3750-20-50. EPCRA provides a list of EHSs and applicable RQs under 40 CFR Part 355 Appendices A and B, which are incorporated by reference into OAC Rule 3750-20-30. Additionally, OAC Rule 3750-25-20 establishes an RQ for oil.

RQs indicate an amount, which if exceeded in a release that migrates off the facility premise, would require immediate notification to the proper governmental authorities. The RQ scale itself is a relative measure of the potential threat to human health and the environment. The greater the amount released over the RQ, the greater the need for immediate notification. The release reporting penalty matrix, provided in this Strategy and Guidance Document, sets an inversely proportional point value for the specific substances released with the higher point value given to those substances with lower assigned Rqs.

The release reporting penalty matrix considers impacts to human health and environmental impacts. Penalty points vary depending upon the degree and extent of impact. A higher point value is assigned for death and serious injury to humans and a lower point value for impact to wildlife and vegetation. Parameters for wildlife kills will incorporate the Ohio Department of Natural Resources, (ODNR), Division of Wildlife Procedures 26 and 87 (ODNR forms 210 and 233). The environmental impact indicator has a point value system for each environmental medium or media affected. The water point value system is based upon factors identified in the Ohio EPA, Division of Surface Water, Water Pollution Control Civil Penalty Worksheet.

3. **Extent:** Used to reflect the deviation from EPCRA statutory and regulatory requirements. A violation may range from being substantially in compliance with the EPCRA provisions to being in total disregard of the requirement. Owners or operators are required to notify the proper authorities within thirty minutes after discovery of a release. Any delays in notifying could seriously hamper a response team and pose serious threats to human health

and the environment. A written follow-up report is required to be submitted to the Ohio EPA and LEPC within thirty days from the date the release was discovered.

Failure to report the release to each of the Ohio EPA, LEPC, and the local fire department is a separate violation subject to the full penalty amount allowed under ORC Section 3750.20(B)(1). An owner or operator who fails to submit release reporting information (either verbal or written) to any reporting agency is liable for separate maximum penalty amounts and per day penalties. In determining the appropriate civil penalty amount, multiply by the number of violations using the Penalty Matrix, Release Reporting worksheet.

4. **Circumstances:** Refers to the potential for harm resulting from the violation. The objective of the emergency notification provision is to alert state and local officials of a chemical release so that action can be taken and to prevent injury or death to the community and emergency responders.

The harm may be measured by:

- a. The potential for emergency response personnel, the community and/or the environment to be exposed to hazards posed by noncompliance; or
- b. The adverse effect noncompliance has on statutory or regulatory purposes or procedures for implementing the EPCRA program.

Factors to be considered in assessing circumstance:

- a. Relative proximity of the surrounding population;
- b. The negative effect of noncompliance on the LEPC's ability to plan for chemical emergencies; and,
- c. Any actual problems that the first responders and emergency managers encountered due to the failure to notify in a timely manner.

The circumstance factor is assigned a specific dollar amount on a scale of low, medium to high depending upon the adverse impact of the violation. The selection of the exact penalty amount within each range is left to the discretion of the Executive Committee or

its agents on the DAPC staff in any given case. However, the rationale for the selection of the penalty amount should be incorporated into a memorandum in the case file.

B. Assessment

ORC Section 3750.20 (B)(1) authorizes penalties for violations on a per day basis. The two primary goals for using per day assessments are: (1) added deterrence, and (2) the need to receive the sought information. Per day assessments expeditiously return a facility to compliance by creating disincentives for continued noncompliance and deter future violations.

C. Determination

The base penalty reflects the overall seriousness of the violation.

1. **Nature:** Describes the type of violation or requirement violated. Violations under ORC Sections 3750.05, 3750.07, 3750.08, and 3750.13 include those in which the Respondent was required to submit to the SERC, LEPC or fire department notification of chemicals, facility identification, inventory reports, or filing fees under statutory or regulatory time frames.
2. **Gravity:** Determination made by the number and/or amount of the substance stored in excess of the reporting threshold quantities at the facility. The greater the number and amount of hazardous materials stored on site, the greater the need for fire departments and local emergency planners to know of their existence.
 - a. **ORC 3750.07 - Penalty Calculation Factors:** A MSDS or Tier II list is required for each chemical held in quantities exceeding the threshold. For violations of this section, gravity levels are based on the quantity of hazardous chemical(s) or EHSs used, stored, or produced at the facility. The first gravity level is an amount greater than five times (5x) the reporting threshold, and secondly an amount greater than ten times (10x) the reporting threshold.
 - b. **ORC 3750.08 - Penalty Calculation Factors:** A facility with hazardous chemicals in quantities exceeding thresholds must prepare and submit an emergency and hazardous chemical inventory form listing chemicals. The gravity levels for violations under this section are based on amounts of hazardous chemicals or EHSs used, stored, or produced at the facility in amounts greater than five times (5x) the reporting threshold, and amounts greater than ten times

(10x) the reporting threshold.

A dollar value of \$3,500 is assigned to those quantities stored five times above the threshold quantities and a dollar value of \$5,000 is assigned to those quantities stored ten times above the threshold quantities. Those specific dollar values are identified in the Penalty Matrix, Inventory Reporting form.

- c. **ORC 3750.13 - Penalty Calculation Factors:** Facility owners or operators are required to prepare and submit a filing fee and filing fee worksheet. Late fees are assessed at the rate of 15% compounded quarterly if the fees are not paid by March 31 of the filing year. Beginning inventory year 2001, late fees are assessed at the rate of 10% per year of the total fee due.

- 3. **Extent:** Reflects the deviation from EPCRA statutory and regulatory requirements. The extent factor equates the potential deleterious effect of facility noncompliance with the public's and government's decreased ability to plan for emergencies. The extent factor provides incentive for facilities to properly complete the forms and timely submit required reports. Penalty extent factors are provided on the Penalty Matrix Sheet.

Failure to submit the reporting information by the reporting deadline to any one of the agencies designated to receive submissions and notice according to the law (i.e., SERC, LEPC and local fire department) is a separate violation subject to the full penalty amount allowed under ORC Section 3750.20 (B)(3). An owner or operator who fails to submit reporting information to all three (3) "points of contact" is liable for three (3) separate maximum penalty amounts and a per day penalty for each violation. Each point of contact category is a penalty multiplier.

- 4. **Circumstances:** Refers to the potential for harm from the violation. The main objective of the emergency notification provisions is to alert state and local officials of a chemical release so that action can be taken to prevent injuries or deaths. The objectives of inventory reporting are to assist in emergency planning and to provide information to citizens detailing chemical hazards present in their community. The potential for harm may be measured by:

- a. The potential for emergency response personnel, the community and/or the environment to be exposed to hazards posed by noncompliance; or,

- b. The adverse effect noncompliance has on statutory or regulatory purposes or procedures for implementing the EPCRA program.

Factors to weigh in assessing circumstances:

1. Proximity of the surrounding population;
2. The negative effect of noncompliance on chemical emergency planning; and,
3. Any actual problems emergency responders encountered due to the facility's failure to notify or submit inventory reports.

The circumstance factor is assigned a specific dollar amount based upon the adverse impact of the violation on a scale of high, medium and low. The circumstances of the violation indicate that the potential for emergency personnel and the surrounding community to be at risk of exposure. The selection of the applicable level of adverse impact is left to the discretion of the Executive Committee. However, the rationale for such selection of the penalty amount should be incorporated into a memorandum in the enforcement case file.

D. Assessment of Multi-Day Penalties for Inventory Reporting

ORC Section 3750.20 (B)(3) authorizes the SERC to seek to assess penalties for violations on a per day basis. The two primary goals of assessing per day penalties are (1) deterrence, and (2) quick information collection. Per day assessments may promote an expeditious return to compliance and deter those with a history of violations. Multi-day penalties are not for use as a recalcitrance factor. Per day penalties are predetermined dollar amounts for each day of violation as listed on the Inventory Reporting, Penalty Matrix form.

E. Calculation of Penalty Factors for Release and/or Inventory Reporting

Penalty factors under this section consider the reasons the violation was committed, the intent of the Respondent, and other factors related to the Respondent. This section provides enough flexibility to make adjustments for legitimate differences between similar violations. The Executive Committee is not required by law, but may adjust a civil penalty based on the following factors.

1. **Ability to Pay (downward adjustment only):** An estimate of the

current financial condition of the company. The dollar amounts reflected in the penalty matrices assume that the Respondent has the ability to pay. Generally, the Executive Committee will not request penalties that are clearly beyond the financial means of the Respondent.

The burden to demonstrate the inability to pay, as with the burden to demonstrate other mitigating factors, rests with the Respondent. The financial ability adjustment will normally require that the Executive Committee receive a significant amount of information specific to the violator, including but not limited to, tax returns, balance sheets, income statements, statement of changes in financial position, statement of operations, retained earnings statements, and annual and quarterly reports to shareholders and the Securities Exchange Commission for approximately the past five (5) years, if available. Such records are to be provided to the Executive Committee at the Respondent's expense and must conform to generally accepted accounting procedures. The Executive Committee reserves the right to request, obtain, and review all underlying and supporting documents that form the basis of these records to verify their accuracy.

2. **Compliance history** (upward adjustment only): The fact that a respondent has a history of similar violations under Chapter 3750 of the ORC at the same or different locations is evidence that the previous penalty(ies) did not provide sufficient deterrence. "Prior violations" means violations of Sections 3750.05, 3750.06, 3750.07, 3750.08, and/or 3750.13 of the ORC. The following items apply to evaluating compliance history of a particular respondent:
 - a. A prior violation is considered to be any act or omission for which a formal enforcement response has occurred regardless of whether or not Respondent admits to the violation (NOVs, Warning Letters, Administrative or Consensual Orders);
 - b. To be considered a prior violation, the final order must have been entered within five (5) years of the present violation; or,
 - c. In the case of large corporations with many divisions or wholly-owned subsidiaries, the Executive Committee should begin with the assumption that if the same corporation was involved, adjustments for history of noncompliance should apply. The history of noncompliance should apply, unless the Respondent can demonstrate that the violating facilities

are independent. In the case of wholly-or partially-owned subsidiaries, the violation history of the parent corporation shall apply to its subsidiaries and the subsidiaries to the parent.

3. **Degree of Culpability** (upward or downward adjustment): The base penalty may be increased or decreased based on the Respondent's degree of culpability.

Two concepts that underlie culpability are: (1) the Respondent's knowledge of the law; and, (2) the Respondent's control over the violation act.

- a. The lack of knowledge involving a particular requirement would not necessarily reduce culpability. The test is whether the Respondent knew or should have known the legal requirements or that the general nature of his operation deals with hazardous chemicals. A reduction in the penalty based upon lack of knowledge may only occur where a reasonably prudent and responsible person in the Respondent's position would not have known that the conduct was a violation of ORC Chapter 3750.

Evidence the Respondent had prior knowledge of EPCRA and its reporting requirements includes previous compliance with the law, documented attendance at seminars, workshops, or previous contact with the Ohio EPA, SERC, LEPC or local fire department regarding EPCRA rules.

- b. The amount of control that the Respondent had over remedying the violation is relevant in certain circumstances. Specifically, if the correction of the violation was delayed by circumstances not reasonably foreseeable and out of the Respondent's control, the penalty may be reduced.

If the Respondent manifested good faith by identifying and promptly reporting violations before detected by an agency, mitigation of the penalty may be justified. Lack of good faith, on the other hand, can result in an increased penalty. No downward adjustment should be made for the Respondent's efforts to comply after the Ohio EPA, LEPC or local fire department has detected the violation. Indeed, failure to take such action may justify upward adjustment of the penalty.

If the Respondent relies on written guidance by the SERC, Ohio EPA, LEPC, or local fire department that an activity

would satisfy reporting requirements, and later it is determined that the activity does not comply with the law, downward adjustment in the penalty may be warranted. The Respondent must demonstrate it relied on those assurances in good faith. However, mistaken reliance on a representation by a governmental official does not alleviate a Respondent's responsibility to comply.

4. **Economic Benefit or savings for release reporting** (minimal penalty): Any economic benefit accrued by the Respondent from noncompliance. An economic benefit component should be calculated and added to the base penalty (but not to exceed the statutory maximum) when a violation results in economic benefit to the Respondent. It is general policy not to settle cases for an amount that is less than the economic benefit of noncompliance. The BEN computer model is appropriate in calculating the benefit derived. The Ben User's Manual contains all the formulas that make up the BEN computer model.

Matters which shall be addressed in calculating economic benefit for release reporting shall include the preventive measures which should have been installed to either have prevented the release from occurring or minimizing the impact of the release into the environment.

5. **Economic benefit or savings for inventory reporting** (minimal penalty): Any economic benefit accrued by the Respondent from noncompliance should be recovered. An economic benefit component should be calculated and added to the base penalty (but not to exceed the statutory maximum) when a violation results in economic benefit to the Respondent. The usual agency policy is not to settle cases for an amount that is less than the economic benefit of noncompliance.
6. **Mitigation or adjustment of proposed penalties - release and inventory reporting** - Any mitigation of a proposed penalty must be documented in the enforcement case file. A narrative justification and revised penalty calculation matrix should document the amount of the penalty mitigated and the justification for the mitigation based on the statutory factors.

F. **Allocation of Penalty Monies Collected**

ORC 3750.14 requires money collected by the SERC from fees and penalties to be deposited into the emergency planning and community right-to-know fund

(Fund), until an aggregate amount of five million dollars has been credited to it during a fiscal year. Any additional money is to be deposited into the emergency response and community right-to-know reserve fund (Reserve Fund) created by ORC 3750.15. In the event penalties are collected pursuant to an enforcement action brought upon the written request of the LEPC or fire department, those penalties shall be deposited into the special emergency planning fund created in ORC 3750.03 and OAC Rule 3750-50-05.

II. Penalty Matrix

A. Release Reporting Matrix

I. Base Penalty Calculation			
Nature: ORC 3750.06(C) or 3750.06(D)			
Gravity			
a. Type of Substance/Amount involved in the release			
<u>Reportable Quantity in pounds</u>	<u>Point Value</u>	<u>Volume Release Above Reportable Quantity</u>	<u>Point Value</u>
1	10	5.1 x the RQ	10
10	8	4.1 - 5x's	8
100	6	3.1 - 4x's	6
1000	4	2.1 - 3x's	4
5000	2	RQ - 2x's	2
Volume, in gallons, of oil product discharged or spilled		Volume recovered due to mitigation factors	
<u>Water</u>	<u>Land</u>	<u>Point Value</u>	<u>Amount Recovered</u>
500+	1000+ gallons	10	0%
250-499	500-999	8	50%
25-249	250-499	5	99%
sheen - 25	25-249	1	
			<u>Point Value</u>
			10
			5
			1
b. Impact to human health, wildlife, and/or environment			
<u>Damage</u>	<u>Point Value</u>	<u>Waterway</u>	<u>Point Value</u>
Death	10	Cold Water Habitat	9
Severe Injury	8	Exceptional Warm Water Habitat	8
Wildlife Kill (over \$50)	6	Warm Water Habitat	7
Wildlife Kill (under \$50)	4	Lake Erie Habitat	7
Vegetation/Other Damage	2	Ohio River Habitat	7
		Small Drainageway Maintenance	7
		Ground Water/Aquifer	7
<u>Air Releases</u>	<u>Point Value</u>	Private/Public Drinking Water Source	+2
Evacuation of work area	4	State Resource Water	+1
Evacuation of facility employees	5	Seasonal Salmonoid Habitat	+1
Evacuation of facility employees <u>and</u> nearby public citizens or business	6		
<u>Land Releases</u>		<u>Point Value</u>	
Contained		1	
Uncontained with 10x10 area or less affected		2	
Uncontained with further migration from the immediate area		3	
Extent			

Verbal	<u>Hours Late</u> 8+ 7-8 6-7 5-6 4-5 3-4 2-1 1-2 0.5-1	<u>Point Value</u> 10 8-9 7 6 5 4 3 2 1	<u>Multiplier</u> Points of Contact Made (EPA, LEPC, Fire Dept) no contact: x3 1 contact: x2 2 contacts: x1	Written	<u># Days Late</u> 60+ 45+ 31+	<u>Point Value</u> 10 5 1	<u>Multiplier Factor:</u> Points of Contact Made (EPA, LEPC) no contact: x2 1 contact: x1
Circumstances	Refers to the potential consequences of the violations. To be utilized in final determination of penalty High () Medium () Low ()						
II. Multi-Day Penalty Assessment				\$1,000 per day for Priority I \$ 750 per day for Priority II \$500 per day for Priority III			
III. Determination of Penalty Factors Related to the Violation							
Ability to Pay (adjust downward only)							
Compliance History		Number of violations x 1 pt					
Degree of Culpability and/or Recalcitrance				Sliding Scale: Very Recalcitrant +5 pts; Very Cooperative -5 pts			
Economic Benefit (minimum penalty) - Any economic benefit derived from noncompliance that accrues to the violator							
Civil Penalty Grid							
<u>Points</u>		<u>Civil Penalty Amount</u>					
< 0		no penalty					
1 - 20		\$250 - 499					
21 - 40		500 - 999					
41 - 60		1,000 - 2,499					
61 - 80		2,500 - 3,499					
81 - 100		3,500 - 4,999					
101 - 120		5,000 - 9,999					
121 - 140		10,000 - 14,999					
141 - 160		15,000 - 19,999					
161 - 180		20,000 - 24,999					
181 - up		25,000					

A. Inventory Reporting Matrix

Nature	ORC 3750.05/302 Failure to notify presence of EHS	ORC 3750.05/303 Failure to identify a facility emergency coordinator	ORC 3750.07/311 Failure to provide requested information for emergency planning	ORC 3750.07/311 Failure to submit MSDS or list of chemicals	ORC 3750.07/311 Failure to respond to request for MSDS or list
I. Base Penalty					
Extent					
Within 30 days	\$1,500 per POC	\$1,000	\$1,000	\$1,000 per POC	\$1,000 per POC
Within 31-60 days	\$2,000 per POC	\$1,500	\$1,500	\$1,500 per POC	\$1,500 per POC
Within 61+ days	\$2,500 per POC	\$2,000	\$2,000	\$2,000 per POC	\$2,000 per POC
Submits an inventory form or MSDS claiming trade secret but fails to justify claim.			+\$2,000	+\$2,000	
Failure to include a hazardous chemical on the list or fails to submit MSDS for each hazardous chemical				\$1,000 per chemical	
a) Likelihood of exposure					
High Medium Low					
b) Adverse impact of violation					
High Medium Low	\$1,000 \$500 \$250				
Gravity					
ORC 3750.07/3750.08 only Any one or more chemicals stored in an amount above the TPQ or TQ that has not been reported	Over 5x TPQ: +\$3,500 Over 10x TPQ: +\$5,000				
II. Penalty Factors Related to Violator					
Compliance History - Number of prior violations	\$100 per prior violation				

Nature	ORC 3750.05/302 Failure to notify presence of EHS	ORC 3750.05/303 Failure to identify a facility emergency coordinator	ORC 3750.07/311 Failure to provide requested information for emergency planning	ORC 3750.07/311 Failure to submit MSDS or list of chemicals	ORC 3750.07/311 Failure to respond to request for MSDS or list
Culpability - Degree of disregard for violation	\$ (+/-)				
Economic Gains - Monetary gain for noncompliance	\$ (+/-)				
Ability of Violator to Pay - Solvency of the company	\$ (+/-)				
III. Per Day Penalty Amount	\$500/day of violation				

* POC - Point of Contact (SERC, LEPC and fire department)

Nature	ORC 3750.08/312 Failure to submit inventory form	ORC 3750.08/312 Failure to respond to request for inventory information
I. Base Penalty		
Extent		
Within 30 days Within 31-60 days Within 61+ days	\$1,000 per POC \$1,500 per POC \$2,000 per POC	\$1,000 per POC \$1,500 per POC \$2,000 per POC
ORC 3750.08/312 only - Failure to include a hazardous chemical on inventory form	\$1,000 per chemical	
ORC 3750.08/312 only - Failure to submit a complete form	+\$1,000	
Submits an inventory form claiming trade secret but fails to justify claim.	+\$2,000	
Circumstances		
a) Likelihood of exposure		
High Medium Low		\$1,000 \$500 \$250
b) Adverse impact of violation		
High Medium Low		\$1,000 \$500 \$250
Gravity		
ORC 3750.07/3750.08 only Any one or more chemicals stored in an amount above the TPQ or TQ that has not been reported		Over 5x TPQ: +\$3,500 Over 10x TPQ: +\$5,000
II. Penalty Factors Related to Violator		
Compliance History - Number of prior violations	\$100 per prior violation	
Culpability - Degree of disregard for violation	\$ (+/-)	
Economic Gains - Monetary gain for noncompliance	\$ (+/-)	
Ability of Violator to Pay - Solvency of the company	\$ (+/-)	
III. Per Day Penalty Amount	\$500/day of violation	
IV. Economic Gain	Review economic gain to ensure that a minimum penalty amount is equal to or greater than the amount of the economic benefit derived from non-compliance	

* POC - Point of Contact (SERC, LEPC and fire department)

**Approved by State Emergency Response Commission majority vote dated
December 9, 2015**