Ohio EPA held a 30-day comment period ending on May 30, 2018 regarding a new proposed rule that outlines how public information requests shall be handled under ORC Chapter 3750, Emergency Planning. This document summarizes the comments and questions received at during the associated comment period. Additional comments were received after the 30-day comment period due to new Federal America’s Water Infrastructure Act of 2018.

Ohio EPA held a public hearing on December 20, 2018 regarding how public information requests shall be handled under ORC Chapter 3750, Emergency Planning. This document summarizes the comments and questions received at during the associated comment period, which ended on December 20, 2018.

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.

General/Overall Concerns

3750-90-01 – Apply for Access to Information

Comment 1: The statutory language at Ohio Revised Code (ORC) 3750.02(B)(2)(c)(v) requires only “employees” of the commission or committee shall copy information in the files of the commission or committee, but draft Section 3750-90-01(B) would change “employees” to “authorized representatives” with no accompanying definition of “authorized representatives” nor any explanation as to why the statutory requirement of limiting that to activity to “employees” should be changed to “authorized representatives.” The Ohio EPA should either provide a valid explanation and justification for this change, or Section 3750-90-01(B) should be revised for consistency with ORC.

(Christian B. Zeigler, Executive Director, American Petroleum Institute)

Response 1: The SERC is comprised of representatives from state agencies and appointed members. The SERC has no employees, so an alternative to the term “employees” was needed. Ohio EPA would like to continue to use the
term “authorized representative” and add clarifying language as suggested by the commenter such as “Until such time as the commission has its own staff and office, only publicly employed authorized representatives of the commission or committee shall copy information in the files of the commission or committee.”

Comment 2: 3750-90-01(D); Both the statutory language at ORC 3750.02(B)(2)(c)(i) and the draft language at Section 3750-90-01(D) state that the information that is protected as trade secret information or confidential business information must be kept in files that are separate from those containing information that is not so protected. However, to further clarify that any such trade secret or confidential information is not only to be kept in separate files, but also must not be made available in response to any information requests under this new rule. Recommend adding language to draft rule “….and shall not be made available to any person requesting information under this chapter.”
(Christian B. Zeigler, Executive Director, American Petroleum Institute)

Response 2: EPA concurs with comment and shall include into proposed rule.

Comment 3: 3750-90-01(G); In the third sentence of Section 3750-90-01(G), a few clarifying edits are recommended as “Requester can seek information in writing on company letterhead but shall include all information contained on the commission or committee approved application request form.”
(Christian B. Zeigler, Executive Director, American Petroleum Institute)

Response 3: EPA shall add clarifying edits as provided by commenter.

Comment 4: 3750-90-01(J); The first paragraph of Section 3750-90-01(J) seems to make it clear that fees may be charged for “copying, mailing, or conducting a computer search,” but the second paragraph appears to address on the fees for making copies, though that isn’t stated as clearly as it could be. To make it clearer that the second paragraph is only addressing the fees for copies, and does not affect the separate fees that can be charged for mailing and conducting computer searches, the first sentence of the second paragraph should be modified to “Those seeking copies of public records may be charged on the actual cost of making copies and not labor” and it may also be appropriate to add something to the paragraph about fees that are established for conduction computer searches.
(Christian B. Zeigler, Executive Director, American Petroleum Institute)
Response 4: EPA shall add the clarifying language as presented by the commenter to the second paragraph in the rule “those seeking copies of public records may be charged on the actual cost of making copies and not labor.” EPA does not charge for a computer search, so no language is being added to establish a computer search fee.

Comment 5: OAC 3750-90-01(G) speaks to requiring any person seeking access to information to submit a written application providing “the person’s name and current mailing address on the application…” at the same time, 3750-90-01(H) allows “the applicant with a means of indicating that the applicant’s name and address are to be kept confidential” pursuant to ORC 149.43. If the commission accepts that claim, section (H) allows for the commission to delete that information from the application copy and withhold it from any log of information requests. We have concerns that if some “bad actor” could illegitimately claim confidentiality and that the name and address of that “bad actor” is completely expunged from the public record. We trust that while the copy may have deleted relevant information, the original is still retained with all pertinent information should an investigation be necessary. (Robert E. Ashton, Assistant Director, Regulatory Compliance, Columbus Department of Public Utilities)

Response 5: Ohio EPA maintains the original request form for all requests for information on behalf of the SERC. Requests that include the request to keep the applicant’s name and mailing address as confidential are still maintained on-site with Ohio EPA.

Comment 6: OAC 3750-90-01(K) allows the commission to “not routinely notify the operator of the facility involved” of information requests. We are concerned that (1) the Department’s Emergency Response Plans and Vulnerability Assessments that are provided to Franklin County’s Emergency Management Agency are not released pursuant to ORC 3750.22; and (2) that if indeed someone is inquiring about extremely hazardous chemicals (i.e., chlorine) locations, that our potentially at-risk facilities be notified of the information request. (Robert E. Ashton, Assistant Director, Regulatory Compliance, Columbus Department of Public Utilities)

Response 6: A vulnerability assessment of a facility or business or any other security-sensitive information developed regarding a facility or business and provided to a local emergency planning committee is not a public record as noted in ORC 3750.22. To provide clarification to the rule, the following language has been added: (M) The commission or committee shall not share, except as otherwise authorized by division (A) of section 3750.22 of
the Revised Code, any vulnerability assessment or other security-sensitive information it receives pursuant to division (A) of section 3750.22 of the Revised Code and that assessment or information is neither a public record under section 149.43 of the Revised Code nor subject to the mandatory disclosure requirements of section 149.43 of the Revised Code.

ORC 3750 does not require the SERC to adopt rule language establishing procedures for the notification of facilities for which public information requests are received. While the SERC does not currently notify facilities when information requests are received, it has the flexibility to do so. Requests from the public must identify the facility for which the information is requested. General requests regarding the storage of extremely hazardous substances or hazardous chemicals without the identification of the reporting facility are not processed. In addition, reporting facilities may request that the storage locations of the reported chemicals be withheld from the public.

Comment 7: As currently written, the proposed rule will severely limit the ability of drinking water utilities to identify potential risks to drinking water supplies by adding unnecessary obstacles to information gathering as part of source water protection planning. Furthermore, this lack of easy access to broader data sets and the requirement to gather information on a site-by-site basis will result in greater risk to water supplies and limit the implementation of appropriate risk mitigation strategies. Flexibility must be added to the rules to allow local emergency planning committees to work directly with drinking water utilities to identify water quality risks.

GCWW would also like to point out the new America’s Water Infrastructure Act (S. 302, Pub. L. 115-270) which was signed into law on October 23, 2018. This Act specifically requires water utilities to be able to access EPCRA Tier II data from any facility in the utility’s delineated source water area. It is clear that congressional intent of this provision was to support drinking water utilities’ source water protection programs by allowing them quick, easy access to data set for the purpose of establishing and maintaining source water protection program or provide emergency response in the event of a release. The current proposal by Ohio EPA seems to be in contrast to the intent of the new law by making it more difficult for utilities to access information and become aware of new sources in its source water area. Undoubtedly, this is an unintended consequence of the current proposal and GCWW asks the Ohio EPA to make exceptions for drinking water systems which would still allow drinking water systems to easily access data. Some specific suggestions are included below.
Finally, the rigidity included in the proposed rule must be relaxed in the event of a spill or other emergency that may affect drinking water. Especially during spill events into surface water bodies, immediate and detailed knowledge of the contaminants are necessary for drinking water suppliers to determine whether the contaminant is treatable. Depending on the situation, utilities have only a matter of hours to reach to a contaminant release. (Jeff Swertfeger, Superintendent, Greater Cincinnati Water Works)

Response 7:

The new America’s Water Infrastructure Act had not been passed into law when the rules were drafted, and Ohio EPA appreciates the commenter pointing out this change to the federal law to us. To incorporate congressional intent for community water systems to have easy access to the Tier II information, the SERC is proposing to add language to the rule, outlining the requirements for requests for information from a person, an employee of the state, and community water systems as follows:

(A) Requests for information
   (1) A person who requests to receive information submitted under chapter 3750 of the Revised Code by a facility owner or operator shall submit a separate application for each facility for which information is being requested and shall specify both the facility and address for which information is being requested and the particular types of documents requested.
   (2) An officer or employee of the state or a political subdivision acting in his official capacity may have access to tier II information by submitting a written request to the commission or committee.
   (3) An affected community water system may have access to tier II information by submitting a request to the commission or committee. Upon receipt of a request for tier II information, the commission or committee shall make available such information to the affected community water system
      (i) The term “affected community water system” in this section means a community water system (as defined in section 1401(15) of the Safe Drinking Water Act) that receives supplies of drinking water from a source water area, delineated under section 1453 of the Safe Drinking Water Act, in which a facility that is required to prepare and submit an inventory form under 3750-30 of the Administrative Code is located.

The request for information from a community water system does not require facility specific information.

Comment 8:

The draft rule would limit information requests to single facilities and the information request must include the facility name and address. This will significantly limit drinking water utilities’ ability to identify risks to their source water. The proposed requirement presupposes that the utility will be aware of every facility by name and address when in reality, source water areas are often large and the only means of
identifying upstream risks is a broader information request of the SERC or LEPC.

In addition to limiting the normal source water protection activities, this requirement restricts timely response in the event of a spill or contamination event that could threaten downstream drinking water utilities. Contaminant information needs to be made available to downstream drinking water utilities in the event of an emergency.

We request that a waiver be included in the final rule that allows the SERC and LEPCs to provide complete facility information to drinking water utilities on a local, county or regional basis. Utilities should be able to request information for sites within their source water protection area based on generalized geographic descriptions, for example by source water protection boundary. Please include a statement in paragraph A that reads: “the commission or local emergency planning committee shall waive the separate application requirement for drinking water utilities engaged in source water protection activities and will fulfill information requests based on generalized geographic descriptions. During a spill or emergency any pertinent information shall be immediately made available to drinking water utilities in person or by telephone or email.” (Jeff Swertfeger, Superintendent, Greater Cincinnati Water Works)

**Response 8:**

As noted in response 3, the SERC is proposing to modify the language in (A) as follows:

(A) Requests for information

1. A person who requests to receive information submitted under chapter 3750 of the Revised Code by a facility owner or operator shall submit a separate application for each facility for which information is being requested and shall specify both the facility and address for which information is being requested and the particular types of documents requested.

2. An officer or employee of the state or a political subdivision acting in his official capacity may have access to tier II information by submitting a written request to the commission or committee.

3. An affected community water system may have access to tier II information by submitting a request to the commission or committee. Upon receipt of a request for tier II information, the commission or committee shall make available such information to the affected community water system.

   (i) The term “affected community water system” in this section means a community water system (as defined in section 1401(15) of the Safe Drinking Water Act) that receives supplies of drinking water from a source water area, delineated under section 1453 of the Safe Drinking Water Act, in which a facility that is required to prepare and submit an inventory form under 3750-30-01 of the Administrative Code is located.
The request for information from a community water system does not require facility specific information, and requests based on geographic area or generalized descriptions can be fulfilled by the commission or committees.

During spills or emergencies, verbal notification is made by facilities, to Ohio EPA or ODNR on behalf of the Ohio SERC, which includes but is not limited to: (1) the chemical name or identity of any substance involved in the release and whether the substance is an extremely hazardous substance; (2) an estimate of the quantity of any substance released into the environment; (3) any known or anticipated acute or chronic health risks associated with the release and, if known to the informant, advice regarding medical attention necessary for individuals exposed to the substance released; (4) proper precautions to take as a result of the release, including evacuation and other proposed response actions, unless that information is readily available to the community emergency coordinator pursuant to the plan of the district prepared under section 3750.04 of the Revised Code; and (5) the name and telephone number of the person or persons to be contacted for further information.

The new America’s Water Infrastructure Act requires the applicable state agency, which is Ohio EPA, to promptly forward such notice to any community water system the source waters of which are affected by the release. The proposed rules in OAC 3750-90 are limited to the rules required to be adopted under ORC 3750.02 (B)(2)(c), and do not include procedures for Ohio EPA to relay information from verbal notifications to community water systems during a spill or release. The relay of information involving a spill/release is established within internal procedures of the Ohio EPA Emergency Response Program and coordinated with appropriate entities involved such as, but not limited to, the public drinking water system(s).

Comment 9: The draft rule limits requests for material safety data sheets to in-person or by mail and further limits the request to a single facility per application. Material Safety Data Sheets (MSDS) must be made available to drinking water utility during an emergency response on an immediate basis. The utilities must be allowed to request the MSDS in person, via email or over the telephone and that information must be provided promptly to allow the utilities to make informed decisions regarding drinking water protection. We request that the SERC and/or LEPC be required to accept MSDS requests made by drinking water utilities in-person, via telephone, or email during an emergency, and that the appropriate information be provided electronically or in-person immediately.
Please include the following sentence in Paragraph C: “The Commission or Local Emergency Planning Committee shall accept requests for material safety data sheets from drinking water utilities in person or by telephone or email during an emergency and shall provide those material safety data sheets to the authorized representative of the utility immediately upon request.” (Jeff Swertfeger, Superintendent, Greater Cincinnati Water Works)

Response 9:

The reporting requirements of ORC 3750 and the federal requirements of the Emergency Planning and Community Right to Know Act (EPCRA) do not require facilities to submit MSDSs to the SERC, LEPCs or jurisdictional fire departments. However, the requirements provide a mechanism to obtain MSDSs from facilities which store hazardous chemicals or extremely hazardous substances. If a facility brings a hazardous chemical or an extremely hazardous substance on-site in a quantity that exceeds its Threshold Planning Quantity (TPQ), it must notify the SERC, LEPC and jurisdictional fire department within 90 days or 60 days respectively. Under this one-time notification requirement, the facility may submit an MSDS for each chemical or submit a list of chemicals. This requirement can also be fulfilled by submitting the facility identification form and the chemical identification and hazard category sections of the annual inventory report form. Most reporting facilities submit a list or chemical inventory form.

Under ORC 3750, the SERC and the LEPCS can request that a facility submit an MSDS, and the facility must submit the MSDS within thirty days of the receipt of the request. Because the SERC must request the MSDS from each individual facility, any requests for MSDSs must identify each facility for which the MSDS is needed.

Comment 10: The proposed rule specifically limits the ability of the commission or committees to provide information classified as “trade secret information” or “confidential business information.” While the need to keep that information from a routine information request is obvious, drinking water utilities and other responders must have access to chemical-specific information during an emergency regardless of trade secret designations. GCWW requests that a waiver be included in the rule that allows the commission and the committee enough flexibility to provide drinking water utilities access to trade secret information, so they can make informed decisions to safeguard public health during a spill or other emergency.

Please include the following statement in the final rule: “the commission and committees shall provide drinking water utilities all
chemical-specific information from an affected facility during a spill or other emergency regardless of whether that information is otherwise protected as trade secret information immediately upon request.” (Jeff Swertfeger, Superintendent, Greater Cincinnati Water Works)

Response 10: The SERC does not maintain trade secret information for reporting facilities. Reporting facilities may submit their trade secret claim to U.S. EPA and simply notify the SERC that it has a pending claim. The SERC does not currently have any trade secret information in its files. If the SERC were to receive trade secret information, both ORC 3750, Emergency Planning and the federal EPCRA statute does not include a mechanism to provide trade secret information to community water systems.

Comment 11: Paragraph G describes a lengthy application process to obtain information in the commission or committee files. Once again there must be enough flexibility in this rule to allow drinking water utilities access to information on an immediate basis in the event of an emergency that may affect their source water quality.

We request that the rule include a waiver to the lengthy application process for drinking water utilities during an emergency. Please include the following sentence in Paragraph G: “The Commission or Local Emergency Planning Committee shall accept requests for facility information from drinking water utilities in person or by telephone or email during an emergency and provide information to the authorized representative of the utility immediately upon request.” (Jeff Swertfeger, Superintendent, Greater Cincinnati Water Works)

Response 11: The language included in 3750-90-01 (G) mirrors the language required to be adopted by the SERC in OAC 3750.02 (B)(2)(c)(vii) and applies to information in the files of the commission.

During spills or emergencies, verbal notification is made by the facility to Ohio EPA as required by ORC 3750.06, or to ODNR on behalf of the Ohio SERC for facilities regulated by ODNR under ORC 1509. These rules do not include procedures for Ohio EPA to follow when relaying information from verbal notifications to community water systems during a spill or release. Ohio EPA has internal operating procedures in place for such information sharing and exchange once a notification has been made and facts of the spill or release have been determined.
End of Response to Comments