

**BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION V**

**IN RE: EPCRA VIOLATIONS BY :**  
**STATE OF OHIO. : PETITION**  
**Unconstitutional under**  
**Federal Supremacy**  
**Clause. : TO U.S EPA**  
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:  
:  
:  
**Susan Hedman**  
**Region V Administrator**

**I. OVERVIEW**

This is a Petition filed by the undersigned, Teresa Mills of Grove City, Ohio, on behalf of herself and all residents across the State of Ohio, to request that the United States Environmental Protection Agency take action to avoid imminent public harm and to protect the public right-to-know arising from actions taken by the State of Ohio that are clearly unconstitutional under the Federal Supremacy Clause for violating the Emergency Planning and Community Right-to-Know Act of 1986 (“EPCRA”), Pub. L. No. 99-499, Title III, 100 Stat. 1728 (1986).

Ohio has been in violation of EPCRA since 2001 without any response to date from the United States. That violation was first created by the passage of House Bill 94, followed by the adoption of Ohio Revised Code (“ORC”) Section §3750.081 in September, 2001, that essentially exempts the oil and gas industry operating in this state from requirements under EPCRA requirement that facilities within those industries annually file emergency planning inventory forms with state and local emergency planning authorities. The violation was further compounded by passage of SB 315 in 2012, followed by the adoption of ORC Section §1509.10 (H) and (I), which divert trade secret determination authority from U.S. EPA and unduly restrict citizens’ ability to challenge trade secret claims.

Petitioner is requesting that U.S. EPA review this situation on an expedited basis and remedy it through taking the actions: 1) publishing a formal determination that ORC §3750.081 and ORC §1509.10 (H) (I) violate EPCRA; 2) inform relevant state agencies and legislators of aforesaid determination and 3) after a reasonable period of time following such publication, undertake enforcement actions against oil and gas facilities operating in Ohio that remain in non-compliance with EPCRA’s requirements.

**II. FACTUAL BACKGROUND**

The urgency of this situation arises from an incident that occurred on January 16, 2013, near the city of St. Marys in Auglaize County, Ohio, where an oil well facility initiated an emergency response due to concentrated chemical odors. Local emergency responders sought EPCRA inventory information regarding the facility to assist them in responding, but found that no such information was available either with the local emergency planning committee or the local fire department, thus complicating their response and potentially

subjecting the responders to unknown risks. As summarized in a local press account of the incident, available at [http://www.dailystandard.com/archive/story\\_single.php?rec\\_id=20053](http://www.dailystandard.com/archive/story_single.php?rec_id=20053), the lack of the local emergency response information required by EPCRA was ultimately attributed to the fact that all oil and gas facility information in Ohio instead being under the control of the Ohio Department of Natural Resources, the state agency that issues permits for oil and gas drilling operations.

Prior to this incident, the undersigned Petitioner had contacted both the Ohio Environmental Protection Agency (“OEPA”), which chairs the State Emergency Response Commission (“SERC”). SERC, established in ORC Chapter 3750 to implement EPCRA in Ohio, and the Ohio Department of Natural Resources (“ODNR”), to request EPCRA inventory data on oil and gas facilities which EPCRA mandates be made available to the public. The response from OEPA was simply that she should contact ODNR for the requested information. She has received no response, other than acknowledgement of receipt of her request, from ODNR; the initial request was made to ODNR on December 26, 2012.

Accordingly, the public’s right created by EPCRA for inventory data on oil and gas facilities is being violated in Ohio. Furthermore, Ohio emergency responders and Ohioans in general are being placed at unnecessary risk due to the lack of the emergency response data that EPCRA was specifically designed to provide.

### **III. ORC §3750.081 CLEARLY IS UNCONSTITUTIONAL UNDER THE FEDERAL SUPREMACY CLAUSE FOR VIOLATING EPCRA.**

ORC § 3750.081 provides as follows:

#### **§ 3750.081. *Compliance with filing requirements; access to database***

- (A) *Notwithstanding any provision in this chapter to the contrary, an owner or operator of a facility that is regulated under Chapter 1509. of the Revised Code who has filed a log in accordance with section 1509.10 of the Revised Code and a production statement in accordance with section 1509.11 of the Revised Code shall be deemed to have satisfied all of the inventory, notification, listing, and other submission and filing requirements established under this chapter, except for the release reporting requirements established under section 3750.06 of the Revised Code.*
- (B) *The emergency response commission and every local emergency planning committee and fire department in this state shall establish a means by which to access, view, and retrieve information, through the use of the internet or a computer disk, from the electronic database maintained by the division of oil and gas resources management in the department of natural resources in accordance with section 1509.23 of the Revised Code. With respect to facilities regulated under Chapter 1509. of the Revised Code, the database shall be the means of providing and receiving the information described in division (A) of this section.*

The clear effect of Paragraph A above is that the act of filing a “log” following the drilling of an oil or gas well and the annual filing of a “production report” about the amount of gas or oil produced at that well, both of which are filed solely with ODNR, fully substitutes for the federal and state EPCRA inventory filing requirements with state and local emergency response agencies. Accordingly, this statute exempts oil and gas facilities in Ohio from EPCRA’s basic emergency planning requirement in 42 U.S.C. §11022(a) that facility owner/operators are required to annually file an emergency and hazardous chemical inventory form, on a form approved by U.S. EPA, with the state emergency response commission, the local emergency planning committee, and the fire department with jurisdiction over the facility.

Even the briefest review of EPCRA’s provisions quickly establishes that Congress did not grant authority to states to alter any EPCRA requirement, including the annual inventory filing requirement in 42

U.S.C. §11022(a). Accordingly, the State of Ohio is in violation of EPCRA through its enactment of, and subsequent compliance with, ORC §3750.081.

This illegal state statute is daily causing the specific risk of harm to Ohioans and Ohio's emergency responders that the Congress designed EPCRA to prevent, as the incident in St. Marys makes manifest. This illegal state statute has also prevented Ohio citizens from obtaining inventory information that EPCRA establishes as their clear right and is preventing the exercise of that right to the present day.

#### **IV. ORC §3750.081 DOES NOT PROVIDE COMPARABLE PROTECTIONS TO EPCRA**

While unnecessary to establish the violation of EPCRA described above, Petitioner also submits that the apparent statutory design contained in Paragraph (B) of ORC §3750.081 requiring state and local emergency response authorities to utilize a substitute "database" to be housed at ODNR does not redress the avoidable risk and violation of the public right-to-know described above as a practical matter. The incident at St. Marys where the local responders simply could not access relevant emergency response information in a timely manner supports this conclusion as does a review of the relevant ODNR filings and its "database" contemplated in ORC §3750.081(B).

The ODNR "log" and "annual production report" forms identified in ORC §3750.081(A) are available at <http://oilandgas.ohiodnr.gov/Industry/Electronic-Forms.aspx>. It is immediately obvious that these forms are not identical to the Tier I and Tier II inventory forms required by U.S. EPA to implement EPCRA. The two sets of forms are in no way even comparable and, more to the point, the state forms appear to include absolutely no consideration of the needs of emergency responders or the chemical hazard information to which the public is entitled.

The state log form includes substantial geological and engineering data that is totally irrelevant to emergency response while failing to include information on the nature and location of chemical hazards and the identity of an emergency contact person that are the core concerns of the EPCRA forms. The state statutory provision on the well log at ORC §1509.10 contains no requirement that it be consistent with EPCRA. The regulation adopted by ODNR governing the log at Ohio Adm. Code 1501:9-1-08(D) makes no reference to chemical hazard information at all.

Further, the "log" is subject to an extreme trade secrecy provision on the chemicals used in the hydraulic fracturing process at ORC §1509.10(I) that shields chemical hazard information from public disclosure to a radically greater, if not total, extent than that allowed by EPCRA pursuant to 42 U.S.C. §11042, thus denying Ohioans' right to chemical hazard information on these materials in the manner and extent established by the Congress.

The irrelevance of the "annual production report" form to emergency response needs is similar. The form contains no information on chemicals at all, merely the amount of oil, gas, and "brine" produced by a well annually. Although there is a provision in ORC §1509.11 that broadly requires the production report to include information required by EPCRA, the state ODNR has clearly not implemented this requirement in its form, despite the passage of over a decade since the enactment of ORC §3750.081. There is simply no information on the production form of any kind related to emergency response.

The "database" contemplated by ORC §3750.081(B) to substitute for EPCRA inventory form filings is also functionally worthless for emergency response purposes, especially when compared to EPCRA-required Tier I and Tier II data. This database is located at <http://oilandgas.ohiodnr.gov/Well-Information/Oil-Gas-Well-Database.aspx>. The database contains no chemical hazard information at all, including nothing regarding the location of chemical storage or of an emergency contact. Although there is a separate statutory requirement

in ORC §1509.23(B) that this database include information required under EPCRA, ODNR has clearly ignored this requirement as well in designing its database.

ODNR's web-site has a specific link entitled "Emergency Response" at <http://oilandgas.ohiodnr.gov/Well-Information/Emergency-Response.aspx> that at least by subject appears related to the substitute EPCRA responsibilities that the Department has been given under the statute. However, this link is also functionally worthless in comparison to EPCRA-required Tier I and Tier II data. It contains only a listing of MSDS sheets filed by oil and gas companies without any reference to the specific sites where these chemicals may be encountered by emergency responders, an option for reporting spills at oil and gas sites to ODNR (but not to emergency responders), and a search program for locating oil and gas well sites.

Although the purported authority in ORC §3750.081 to file with ODNR on ODNR forms rather than with the emergency response agencies designated by EPCRA on U.S. EPA forms violates EPCRA without any need to consider the quality of ODNR's substitute system, it is nevertheless clear that the data maintained at ODNR utterly fails to serve as a practical substitute for the quality and accessibility of chemical hazard information required by the EPCRA program.

#### **V. ORC §1509.10(H)(I) IS UNCONSTITUTIONAL UNDER THE FEDERAL SUPREMACY CLAUSE FOR VIOLATING EPCRA**

While ORC §3750.09 provides comparable requirement to EPCRA, Ohio is not in compliance these requirements.

42 USC §11043(b) provides clear provision for the release of information to health professionals, doctors, and nurses. As a result of the passage of SB 315 passed in 2012 and the adoption of ORC §1509.10(H) places an undue burden on health professionals in obtaining information.

42 USC §11042 provides that the US EPA administrator determines chemical trade secret while 1509.10(I)(1),(2) appears to allow the industry to determine trade secret and requires that a civil action be filed to challenge a trade secret claim. 42 USC §11042(d) provides clear provisions for "petition for review" of trade secret to the US EPA administrator.

#### **VI. REQUEST FOR U.S. EPA TO REQUIRE EPCRA COMPLIANCE AT OIL AND GAS FACILITIES IN OHIO**

As the proceeding information establishes, Ohioans, and Ohio's emergency responders are being placed at an imminent risk of harm during chemical emergencies at oil and gas facilities in Ohio due to the illegal program established in ORC §3750.081. This situation has existed for over a decade and, with the radical expansion in the number of these facilities in Ohio due to the technologies of hydraulic fracturing, and horizontal drilling, and the greatly increased number, quantity and complexity of the chemicals used in the hydraulic fracturing process, that risk of harm is increasingly dramatically in this state. Furthermore, ORC §1509.10 (H) & (I) unduly strip the U.S. EPA Administrator of trade secret determination authority, prevent doctors and nurses from reliably and quickly accessing chemical information and deny citizens the right to challenge the trade secret claims of the oil and gas industry. The Petitioner urges the U.S. EPA to recognize that this situation is unacceptable and that appropriate action is necessary.

The action that this Petition requests to remedy this situation is:

- 1) That the U.S. EPA make and publish widely throughout Ohio a formal determination that ORC §3750.081 and ORC §1509.10 (H) & (I) violate EPCRA and do not excuse non-compliance by covered oil and gas facilities operating in Ohio;

and

- 2) That the U.S. EPA make a formal statement of the aforementioned determination to Ohio Governor John Kasich, Ohio Senate President, Keith Faber, Speaker of the House, William Batchelder, the Ohio Department of Natural Resources, the State Emergency Response Commission, the Ohio EPA that chairs the SERC, the Ohio Attorney General, and the state associations representing the oil and gas industry in Ohio:

And

- 3) after a reasonable period of time following such publication, which it is submitted given the seriousness and escalating nature of the risk involved should not exceed thirty (30) days, that on a priority basis, U.S. EPA undertake enforcement actions under EPCRA's enforcement provisions against oil and gas facilities operating in Ohio that remain in non-compliance with EPCRA's inventory filing requirements after the time period has expired.

Please advise me (the Petitioner) of the steps that U.S. EPA will be taking in response to the information contained in this Petition and the requests for a remedy made herein. I am willing to assist you in addressing this situation by phone at 614-539-1471 or by electronic mail directed to [tmills@chej.org](mailto:tmills@chej.org).

Respectfully Submitted,

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Teresa Mills

[REDACTED]

CC: SERC  
Senator Sherrod Brown