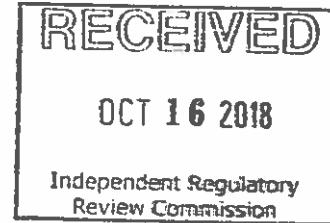




Kenneth J. Warren
Direct Dial: 484-383-4830
Email: kwarren@warrenenvcounsel.com

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Via E-Mail

David Sumner, Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17120

Re: Comments on Final Rulemaking: Administration of the Storage Tank and Spill Prevention Program, Environmental Quality Board (#7-530), Independent Regulatory Review Commission (#3199)

Dear Mr. Sumner:

I am writing on behalf of Merck, Sharp & Dohme Corp. ("Merck") regarding the Environmental Quality Board's ("EQB's") final-form Regulation #7-530: Administration of the Storage Tank and Spill Prevention Program to express concerns about provisions relating to spill reporting. The provisions in question are not central to fulfilling the "primary goal of this final-form rulemaking" which the EQB identified as "reduc[ing] the potential for releases of hazardous substances from [Underground Storage Tanks ("USTs")],¹ and "are not needed to align Chapter 245 with EPA amendments to its UST regulations."² Rather, the objectionable amendments to the spill reporting requirements modify existing regulations in a manner that conflicts with Pennsylvania law and creates unnecessary burdens on regulated entities.

Many of the comments that Merck and other members of the regulated community submitted to the EQB during the public comment period supported the provisions in the proposed amendments to the Storage Tank regulations intended to minimize the frequency of releases from storage tanks systems that may adversely impact the environment. So, for example, Merck supported the regulatory changes designed to ensure that equipment functions properly and that the tank systems are timely inspected. But Merck and other commenters strongly opposed the proposed changes to the spill reporting requirements that impose unnecessary obligations to report spills into intact containment structures that pose no appreciable risk of even reaching the environment, let alone adversely impacting it.

¹ Regulatory Analysis Form at p.3, ¶ 1.

² Pennsylvania Department of Environmental Protection ("PADEP") response to Comment 20 at p. 31.

In response to comments, the EQB modified its proposed spill reporting requirements in a way that perpetuates the flaw in its original proposal. The EQB offered no opportunity for the public to comment on this change. As a result, the standards for reporting spills to intact containment structures set forth in the final-form regulation, like those in the original proposal, violate the Storage Tank and Spill Prevention Act (“Act”),³ and contravene an opinion of the Environmental Hearing Board,⁴ good science, common sense and the practical approaches utilized by the federal government, our sister states, and at present Pennsylvania. Merck respectfully requests the IRRC not to approve the final-form regulation until the EQB corrects this flaw.

The Storage Tank regulations require the owner or operator of a storage tank system to report a “release.”⁵ Hence the reporting obligation depends on the definition of “release.” We turn first to the language of the Act.

In the definition of “release” contained in section 103 of the Act,⁶ the General Assembly expressly distinguished spills directly to the environment from spills to containment structures. Section 103 defines spills to the environment as releases if they exceed the reportable quantities set forth in section 102 of the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),⁷ or section 311 of the Federal Water Pollution Control Act (“Clean Water Act”),⁸ or their implementing regulations. In contrast, Section 103 defines a spill from a storage tank into a containment structure or facility as a “release” only if it “poses an immediate threat of contamination of the soils, subsurface soils, surface water or groundwater.” This is sensible because if an intact containment structure captures a release, and the material is promptly removed from the structure, no appreciable threat of harm, immediate or otherwise, occurs.

The Storage Tank regulations currently in effect (Chapter 245) are consistent with this approach – spills to the environment are “releases” if they exceed the reportable quantities, while spills to containment structures are “releases” only if they pose an immediate threat of contamination of the environment.⁹ And at present the owner or operator of a storage tank need only report spills to the Pennsylvania Department of Environmental Protection (“PADEP”) if they are “reportable releases,” i.e. they are “releases” that are not otherwise exempt. While requiring reporting of only those spills to containment structures that pose an immediate threat, the current regulations are more stringent than regulations of EPA and many state agencies which require reporting of spills only if they reach the environment.¹⁰

³ 35 P.S. 6021.101-2104.

⁴ *Merck, Sharpe & Dohme Corp. v. DEP*, 2016 EHB 411.

⁵ 25 Pa. Code § 245.305.

⁶ 35 P.S. § 6021.103.

⁷ 42 U.S.C. § 9602.

⁸ 33 U.S.C. § 1321.

⁹ 25 Pa. Code § 245.1 (definition of “release” and “reportable release”).

¹⁰ Merck’s comments submitted to the EQB cite and discuss these regulations in greater detail.

In its February 24, 2018 proposal published in the Pennsylvania Bulletin for public comment,¹¹ the EQB defined all spills or leaks into a containment structure as “releases,” regardless of the risk posed. In response to comments that this approach directly contradicted the definition in the Act, the EQB has now approved a final-form regulation that accomplishes the same result in a slightly different and equally invalid way. Under the final-form regulation, the EQB has added a definition of “immediate threat of contamination” that classifies a spill to a containment structure as posing an immediate threat of contamination, i.e., it constitutes a “release,” if it exceeds the same CERCLA or Clean Water Act standards applicable to a spill directly into the environment.¹² By utilizing the exact same reportable quantity thresholds and considering no other factors, the EQB has eliminated the statutory distinction between spills to the environment and spills to containment structures and disregarded the protective function of containment structures.¹³

The EQB’s explanation for rejecting the General Assembly’s decision to apply more stringent criteria to spills to the environment than to spills to containment structures is inconsistent and unpersuasive. On the one hand, the EQB acknowledges that containment structures minimize the risk to the environment from any spill.¹⁴ It would have been untenable for the EQB to deny the utility of the extensive secondary containment requirements which the Storage Tank regulations impose on storage tank owners and operators.¹⁵ Yet the EQB then ignores these structures when establishing spill reporting requirements because the structures might malfunction or be damaged,¹⁶ and facilities should not “spend valuable time determining if a spill poses a threat.”¹⁷

To be sure, a regulation stating that a release to a containment structure that is not intact or otherwise compliant with the regulations should be addressed similarly to a release to the environment might pass muster. But as the Environmental Hearing Board stated after reviewing the definition of “release,” “it is clear that fully contained spills that pose no immediate threat

¹¹ 48 Pa.B. 1101.

¹² The final-form regulation contains a minor exception for spills of less than 25 gallons of petroleum resulting from tank handling activity that is controlled and responded to by a certified installer.

¹³ Similarly, the de minimis reporting exemption in the final-form regulation applies equally to discharges to the environment and discharges to containment structures. 25 Pa. Code § 245.305(i).

¹⁴ “Secondary containment reduces releases to the environment by containing releases from the primary containment area in a second containment area to ensure detection before the contaminants reach the environment.” Proposed Regulation at D. *See also*, PADEP response to Comment 11.

¹⁵ *See* 25 Pa. Code § 245.542 (containment structures must be of low permeability to prevent the released substance from penetrating the containment structure until the release can be detected and recovered and of sufficient capacity to contain 110% of the capacity of the largest tank).

¹⁶ *See* PADEP response to Comments 11 and 14.

¹⁷ Response to Comment 21 at p. 34.

need not be reported.”¹⁸ And the Board emphasized that regulated entities may make the determination of whether an immediate risk exists – doing so is not a waste of “valuable time.”¹⁹ By defining all spills to a containment structure over a specified quantity as posing an immediate threat merely because the same spills would pose such a threat if spilled directly into the environment, the final-form regulation improperly contravenes the statutory definition.

Elsewhere in its response to comments, PADEP shifts from explaining the imposition of excessive reporting obligations based on the potential that a containment structure may malfunction to the assertion that the reporting obligation may be justified based on administrative convenience -- a “simple quantitative approach” “streamlines the analysis of spills.”²⁰ PADEP ignores the obvious fact that if the General Assembly had intended the quantities applicable to spills directly to the environment to apply equally to spills into containment structures, it would not have distinguished between these two types of spills in the Act. Instead, where the design and construction of the containment structure, its integrity, the toxicity and characteristics of the spill, and the nature of the environmental media or resources that may be impacted all demonstrate the absence of any immediate risk of contamination, no basis exists for the regulation to require reporting.

Merck’s West Point facility is a case in point. Merck has spent millions of dollars designing and constructing containment structures around the storage tanks located at its West Point facility to meet its own Engineering Design Standard that is more stringent than required by the Storage Tank regulations, and diligently inspects the integrity of its storage tanks as required by the regulations.²¹ If a spill of 25 gallons of petroleum from Merck’s 400,000 storage tank occurred, it would occupy only .006% of the capacity of the containment structure. Nevertheless, even if fully cleaned up within 24 hours, the final-form regulation would require Merck to report the spill. It would also require Merck to take corrective action to the same extent as if no containment were present, unless Merck seeks and PADEP grants a waiver. Because this impractical requirement violates the Act, the decision of the Environmental Hearing Board and common sense, Merck requests the IRRC not to approve the final-form regulation until the changes to the spill reporting requirements are withdrawn or appropriately modified.

Thank you for your consideration of these comments.

Very truly yours,



Kenneth J. Warren

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¹⁸ *Merck*, footnote 4, *supra*, slip op. 11.

¹⁹ *Id.* Slip op. at 12.

²⁰ Response to Comment 20 at p.32 and to Comment 21 at p.33.

²¹ *See* 25 Pa. Code §§ 245.551 and 552.