

March 23, 2018

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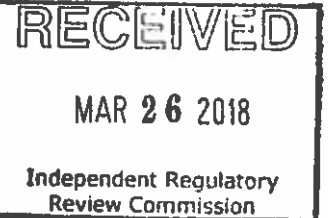


**MERCK**

Environmental Quality Board  
Rachel Carson State Office Building, 16<sup>th</sup> floor  
400 Market Street  
Harrisburg, PA 17101-2301

WP20-205  
770 Sumneytown Pike  
West Point, PA 19486-0004 U.S.A.  
T: 215-652-7548  
E: Cassie.Gaudiosi@merck.com

merck.com



Subject: Submission of Public Comments  
Ref: Proposed Rulemaking: 25 PA Code 245,  
Administration of the Storage Tank and  
Spill Prevention Program

Dear Sir/Madam:

Merck Sharp & Dohme Corp. ("Merck") hereby submits these comments to the Environmental Quality Board ("Board") regarding the proposed amendments to 25 Pa. Code Chapter 245 (relating to the administration of the Storage Tank and Spill Prevention Program) published in the Pennsylvania Bulletin on Saturday, February 24, 2018, 48 Pa.B. 1101 ("Proposed Rulemaking"). Merck supports the provisions of the Proposed Rulemaking that will minimize the frequency of releases from storage tank systems that may adversely impact the environment, including those amendments designed to ensure that equipment functions properly and that tank systems are timely inspected.

But Merck believes that the Proposed Rulemaking is flawed in an important respect: its classification of every spill into emergency and secondary containment structures as a "release." At Merck facilities, these structures are designed and constructed in accordance with regulatory standards and Merck's own Engineering Design Standard to prevent contamination of the environment. See 25 Pa. Code § 245.542. Yet the proposed regulations seek to reverse existing law and classify, with one minor exception, all spills fully captured by containment structures as "releases." In this respect the proposal contravenes the Storage Tank and Spill Prevention Act ("Storage Tank Act"), 35 P.S. 6021.101-2104, imposes reporting, corrective action and other obligations on regulated entities that are unnecessary to protect human health or the environment, and needlessly deviates from the practical approach utilized by the federal government, our sister states, and at present Pennsylvania. As more fully explained below, Merck respectfully requests that the proposed amendment to the definition of "release" in Section 245.1 not be adopted.

In addition, certain other amendments contained in the Proposed Rulemaking raise concerns and may harm or unnecessarily burden Merck and other tank owners or operators. Merck's specific recommendations regarding these proposed amendments are included in the comments below.

**I. Merck Owns and Operates Complex Manufacturing Facilities in Pennsylvania.**

For more than a century, Merck has been a global health care leader. Merck manufactures prescription medicines, vaccines, biologic therapies, and animal health products to deliver innovative health solutions to customers in more than 140 countries. We also demonstrate our commitment to increasing access to health care through far-reaching policies, programs and partnerships. Corporate responsibility is at the heart of our company's mission to discover, develop and provide innovative products and services that save and improve lives. It underscores our commitment to developing and rewarding our employees, protecting the environment, and operating with the highest standards of ethics and transparency.

Merck's West Point Facility ("Facility") in Montgomery County, Pennsylvania serves as a principal location for pharmaceutical and vaccine research and development, and for the manufacture of vaccines and other biologics. Among the vaccines manufactured are measles, mumps and rubella (M-M-R® II) and varicella (VARIVAX®) vaccines, human papillomavirus (HPV) 9-valent vaccine (Gardasil® 9), rotavirus vaccine (RotaTeq®), hepatitis B vaccine (RECOMBIVAX HB®) and pneumococcal vaccine (PNEUMOVAX 23®). The Facility consists of about 100 buildings situated on a 400-acre campus, and employs approximately 7,000 people in Pennsylvania. Merck also owns and operates a pharmaceutical manufacturing facility in Riverside, Northumberland County, Pennsylvania.



Merck owns numerous storage tanks located at its Pennsylvania facilities and operates them in accordance with the requirements of Chapter 245. By investing several million dollars to design and construct emergency and secondary containment structures, deploy release detection equipment, perform inspections and implement its spill prevention response plan ("SPRP"), Merck ensures any spills from its storage tank systems are captured by and promptly removed from these containment structures so as not to cause or threaten environmental harm. Merck's containment structures are designed in accordance with Merck's Engineering Design Standard and Chapter 245 to contain significantly more than the total capacity of the largest associated storage tank. See 25 Pa. Code § 245.542(d). They work exceptionally well.

II. The Proposed Definition of "Release" Contravenes the Storage Tank Act.

A. **Spills that Pose No Threat of Contamination are not Releases.**

The General Assembly enacted the Storage Tank Act to prevent storage tank releases from contaminating the Commonwealth's lands and waters. 35 P.S. § 6021.102. Declaring these releases to threaten public health and safety, the General Assembly sought to prevent their occurrence, provide liability for damages resulting from any releases and require prompt cleanup. 35 P.S. § 6021.102(b). Consistent with its goal of protecting the environment, the General Assembly focused on preventing and cleaning up those spills that cause contamination, not spills that pose no risk of degrading the environment.

To effectuate these goals, the Storage Tank Act distinguishes between spills to the environment and spills captured by a containment structure. This distinction recognizes that a spill to the environment<sup>1</sup> has a direct impact, while a spill to a containment structure may never reach the environment and cause pollution.

Spills to the environment are "releases" if they reach a reportable quantity threshold. 35 P.S. § 6021.103. But spills into a containment structure are releases only if they pose an immediate threat of contamination of the environment. The Storage Tank Act provides that the term "release" "shall also include spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into a containment structure or facility that poses an immediate threat of contamination of the soils, subsurface soils, surface water or groundwater." 35 P.S. § 6021.103 (emphasis added). In the ordinary situation at Merck's facilities and those of other companies deploying containment structures that satisfy Chapter 245 requirements, a spill to a containment structure poses no such threat.

B. **Existing Regulations Properly Classify Spills to a Containment Structure as Releases only When they Pose an Immediate Threat of Contamination.**

The current definition of the term "release" in Chapter 245 is consistent with the Act—it distinguishes releases from a storage tank into the environment from releases "from a storage tank into a containment structure or facility that pos[e] an immediate threat of contamination of the soils, subsurface soils, surface water or groundwater." 25 Pa. Code § 245.1 (release). A spill to the environment constitutes a "release" only if it is in an amount equal to or greater than either the reportable released quantity under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") or sufficient to constitute a discharge as defined in the Federal Water Pollution Control Act ("Clean Water Act"). In contrast, a spill to a containment structure constitutes a release only if it poses an immediate threat of contamination of the environment. With respect to spills to containment structures, an evaluation of whether and when the spill may reach the environment as well as its potential environmental impact determines whether a release has occurred.

The Environmental Hearing Board ("EHB") held this regulatory language to be clear. In *Merck Sharp & Dohme Corp. v. DEP*, 2016 EHB 411, the EHB considered whether Merck's SPRP submitted in connection with a tank permit application conforms to the release reporting regulations. The SPRP provided that Merck personnel will determine whether a spill to an intact containment structure poses an immediate threat of contamination to environmental media, and report the spill to the Department only if the spill poses such a risk. The Department denied Merck's permit application based on its position that only the Department, and not Merck, can determine whether spills that are completely contained in a containment structure and not

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<sup>1</sup> For purposes of these comments, we use the term "environment" to include only the environmental media identified in the definition of release, which does not include air.

released to the environment pose "an immediate threat of contamination." The Department contended that spills to a containment structure must be reported to the same extent as releases directly to the environment. In rejecting the Department's position and granting Merck's motion for summary judgment, the EHB stated:

The definition of "release" is clear and unambiguous. There is no "release" (and therefore, no reportable release) unless the spill is from a storage tank into environmental media or "into a containment structure or facility that poses an immediate threat of contamination of" environmental media. Under the definitions of both "release" and "reportable release," it is clear that fully contained spills that pose no immediate threat need not be reported.

*Id.* at 421. Because the existing regulations and the Storage Tank Act define "release" in the virtually identical language, the EHB's holding that the regulatory language is clear also signifies that the statutory language is clear. Any amendment to the regulations must not contravene this clear statutory language.

**C. The Definition of "Release" in the Proposed Regulations Improperly Stands the Statutory Definition on its Head.**

The Proposed Rulemaking seeks to modify the definition of "release" to "clarify" that the verbiage "that poses an immediate threat of contamination" in the Storage Tank Act and existing regulations refers to all spills of a regulated substance into a containment structure or facility. According to the Proposed Rulemaking, the draft regulations would revise the regulatory definition of "release" to "clarify" that in all but one limited set of circumstances,<sup>2</sup> "all releases into a containment structure or facility pose an immediate threat of contamination of soils, subsurface soils, surface water or groundwater." Proposed Rulemaking Section E, paragraph 5.

This is no mere "clarification." It seeks to reverse the EHB's holding that a spill to a containment structure is not a release, and need not be reported, when the tank owner or operator determines that the spill does not pose an immediate threat of contamination of environmental media. Notably absent from the proposed amendment is any consideration of facts specific to the spill and containment structure at issue, such as whether the containment structure will prevent the spill from reaching the environment and, if not, whether the spill will cause environmental harm.

Plainly some spills do not cause or threaten harm. The statutory and regulatory definitions of release encompass spills directly to the environment only in amounts equal to or exceeding the specified reportable quantities. 35 P.S. § 6021.103 (release) and 25 Pa. Code § 245.1 (release). Yet the proposed revision to Section 245.1 would classify even spills less than reportable quantities as releases if made to a containment structure. This is plainly flawed. If a spill directly to the environment below a reportable quantity causes no harm and is not a release, then clearly the same spill to a containment structure, whether or not captured by that structure, likewise does not immediately threaten or cause contamination. And if a spill is fully captured, it would not pose a threat of contamination, let alone an "immediate" threat, even if it exceeded the reportable quantity. The Storage Tank Act establishes a fact-specific standard—poses an immediate threat of contamination—but the proposed rule disregards the facts.

The Storage Tank Act's mandate to consider whether a spill to a containment structure poses an immediate threat of contamination of the environment is soundly based on the function of containment structures. These structures are designed to accomplish a goal of the Storage Tank Act, preventing releases to the environment. Chapter 245 recognizes their effectiveness. Indeed, the Proposed Rulemaking states: "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 Rulemaking at D.

More particularly, Section 245.542 imposes stringent requirements applicable to secondary and emergency containment structures. They must be of very low permeability, Section 245.542(c) and (d), and of sufficient capacity to contain a spill. Section 245.542(e). A spill to a low permeability structure does not pose an "immediate" threat to the environment. In addition, stringent standards for new containment structures must be met or a professional engineer must verify "that the

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<sup>2</sup> Spills to a liquid-tight containment sump or emergency containment structure as a result of tank handling activity, if the certified installer provides direct onsite supervision and additional conditions specified in the definition are satisfied.

emergency containment structure, coupled with the tank monitoring program and response plan, is capable of detecting and recovering a release and is designed to prevent contamination of the waters of this Commonwealth." Section 245.542(d)(2)(ii). Based upon these and Chapter 245's inspection and repair requirements (let alone more stringent requirements in Merck's Engineering Design Standard), the proposal to declare that every spill to a containment structure poses an immediate threat of contamination is contrary to fact.

When the General Assembly defined "release" to include all spills to the environment in reportable quantities, but only those spills to containment structures that pose an immediate threat of release, it clearly considered containment structures to reduce environmental risk. As the quote from the Proposed Rulemaking set forth above illustrates, Chapter 245 acknowledges the protective value of these structures. The proposed amendment classifying all spills to containment structures as releases encompasses a broader range of spills when made to a containment structure than when made directly to the environment, and thereby turns the statutory definition on its head.

**D. The Proposed Misclassification of Releases Harms the Regulated Community by Triggering Unnecessary Reporting, Corrective Action and Other Obligations.**

Classifying all spills to containment structures as "releases" adversely affects Merck and other tank owners and operators. Under the Proposed Rulemaking, any release must be reported to the Department as soon as practicable, but no later than 24 hours after the confirmation of a release. 25 Pa. Code § 245.305. Because the proposed regulations classify any spill of any quantity to a containment structure as a release, absent an exemption even a single drop of a substance spilled from a tank system into a containment structure must be reported. The reporting exemptions in proposed Section 245.305(i) in effect apply the same quantity thresholds to spills directly to the environment and spills to containment structures, provided that the release is "completely contained" and remediated within 24 hours. But a completely contained spill that is promptly remediated does not pose an immediate threat of contamination and, under the Storage Tank Act, is not a release in the first instance. The Proposed Regulations improperly classify these spills as releases and then exempt them from reporting.<sup>3</sup> But because this exemption applies only to spills below their reportable quantities, the exemption does not apply to spills to containment structures in greater amounts that nonetheless pose no immediate threat of contamination.

Requiring tank owners and operators to report spills that are captured in a containment structure and promptly remediated, including those exceeding the reportable quantities, imposes unnecessary (and unauthorized) burden. Reporting requires more than the mere submission of a form. At Merck, it involves internal processes to ensure that submissions are accurate and complete. Heightened reporting likewise places a burden on the Department to review the submission. The Proposed Rulemaking asserts that the amendments will reduce the administrative burden on the Department, see Proposed Rulemaking at F, yet requiring review of reports of spills to intact containment structures produces the opposite result.

Unnecessary spill reporting creates a record susceptible to misinterpretation by other government agencies or the public. The Proposed Rulemaking declares that every spill to containment poses an immediate threat of contamination of the environment. Other agencies or the public may review spill report records and conclude that the tank owner endangered the public, when in fact the tank owner can demonstrate that any risk to the public or environment was negligible. This misunderstanding may result in citizen suits or enforcement actions for spills that did not actually pose any threat.

In addition to causing needless reporting, misclassifying spills fully captured by containment structures as releases posing an immediate threat of contamination triggers unnecessary corrective action obligations (unless exempt under § 245.305(i)). These involve a time-consuming site characterization and preparation of a site characterization report, even when no cleanup is needed. See proposed Sections 245.309 and 245.310. For example, if a reportable quantity of material, 25 gallons of petroleum, were to spill to a large secondary containment structure during transfer to a storage tank and be immediately recovered, the proposed regulations would require performance of a site characterization and interim remedial action although no benefit to the environment would ensue. *Id.*; see also § 245.306. These obligations would apply regardless of the absence of any actual threat of contamination posed by the spill. A storage tank owner would be relegated to seeking a waiver of corrective

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<sup>3</sup> The same illogic applies with respect to spills to the environment. Proposed § 245.305(i)(2) exempts from reporting "a release of a hazardous substance . . . that is less than its reportable quantity under [CERCLA]." However, pursuant to the definition of "release," a "release" to the environment in an amount less than its reportable quantity would not be a "release" in the first place; to fit within the definition of a "release" such occurrence must be in an amount greater than or equal to its reportable quantity.

action from the Department, a time-consuming endeavor for both the regulator and the owner. See Proposed Rulemaking § 245.303(e)(1) (authorizing the Department to waive corrective action requirements when the release is to a "liquid-tight" containment structure). All of these burdens and other adverse consequences to tank owners occur because the Proposed Rulemaking would amend the definition of "release" in a manner which contravenes the Act.

III. **The Exemptions Under Proposed Section 245.305(l) are Unreasonably Narrow As Applied to Releases to Containment Structures.**

Assuming *arguendo* that the Board decides to deem all spills to a containment structure to be "releases," an amendment that would contravene the Storage Tank Act and fact-specific evaluations of whether an immediate threat of contamination exists, the maximum volume of a release that the Proposed Rulemaking would exempt from reporting is the same for a release directly to the environment as for a release occurring and remaining completely within an emergency containment structure. This improperly disregards the lower risk to the environment when a spill is contained.

Merck's situation is a case in point. For example, if a spill of 25 gallons of petroleum from Merck's 400,000 gallon storage tank entered the containment structure, it would occupy less than .006% of secondary containment capacity. Except under extraordinary circumstances, this spill would not present an immediate threat of contamination of the environment; the containment structure, carefully designed, constructed and maintained by Merck at considerable cost, would eliminate any such threat.

The Proposed Rulemaking recognizes elsewhere that certain spills to containment structures or facilities, such as those shown to be liquid tight, are unlikely to result in environmental harm. See, e.g., proposed § 245.303(e)(1) (regarding waiver of corrective action requirements). Actual threat of contamination of the environment may depend on, among other factors, the integrity of the containment structure, its design and construction (see § 542), the quantity, toxicity and other characteristics of the substance spilled, and the location and nature of the environmental media or resources that may be impacted.

By relying solely on reportable quantity thresholds with regard to spills to containment structures, the Proposed Rulemaking does not properly consider the actual immediate threat posed by a spill, as the definition of "release" in Section 6021.103 of the Storage Tank Act requires it to do.

IV. **The Proposed Release Reporting Obligations of Certified Companies, Installers, and Inspectors are Overinclusive.**

The requirements in proposed Sections 245.132(a)(4)(iii) and 245.132(a)(6) that certified companies, certified installers, and certified inspectors report all releases and the observation of a regulated substance in a containment structure are overly broad. Requiring a report of the presence of a regulated substance in a containment structure or facility, regardless of quantity and potential for harm to human health or the environment, disregards the preventive function of the containment structure. Spills that the certified installer or inspector concludes do not pose an immediate threat of contamination of environmental media are not "releases" as defined by the Storage Tank Act and no reporting should be required.

In addition, the Proposed Rulemaking would require certified installers and inspectors to report to the Department releases below the reportable quantity threshold, even though pursuant to § 245.305(l) the owner or operator would have no reporting obligation. If the injury or threat posed by a spill is insufficient to require reporting by the storage tank owner, the spill likewise should not trigger reporting obligations by any other person.

V. **The Board Should Follow Existing Federal and Neighboring States' Release Reporting Regulations that Focus on Actual Risk.**

The regulations of other environmental agencies and neighboring states recognize that spills to a containment structure pose less risk than spills directly to the environment. Minimizing risk is the reason for constructing an emergency or secondary containment system, and supports a less stringent reporting requirement for these spills.

The spill reporting requirements under several federal programs recognize that no environmental benefit exists to warrant burdening tank owners with reporting each and every spill to secondary containment, but rather regulations should consider the actual threat of environmental harm. For example, under the Clean Water Act, discharges of oil into or upon navigable waters of the United States must be reported only when the quantity of the spill may be harmful to public health or the environment. 33 U.S.C. § 1321(b)(4). The regulations implementing this requirement, 40 CFR § 110.3, establish that the quantities of oil discharges that "may be harmful" are those that cause a violation of applicable water quality standards or a film or sheen on the surface of the water, among other similar observable conditions.

Apart from oil, notice of a discharge of a hazardous substance must be reported under the Clean Water Act if the discharge is in an amount equal to or exceeding such substance's reportable quantity. 40 C.F.R. § 117.21. But unless and until a hazardous substance reaches the waters of the United States, no notification requirement is triggered. 40 C.F.R. § 117.11. If a spill to a containment structure does not reach or threaten to reach the environment, notification to the Department of the spill will not further the objective of protecting the environment.

The spill reporting requirements of the federal underground storage tank ("UST") regulations are consistent with Merck's position. Implementation of the federal underground storage tank program may be delegated to the states. 40 C.F.R. Part 281 (Approval of State Underground Storage Tank Programs). To obtain delegation, a state must require reporting of "underground releases and any spills and overfills *that are not contained and cleaned up.*" 40 C.F.R. § 281.34(b) (emphasis added). Neither a "release" nor an "underground release" occurs unless environmental media are impacted. 40 C.F.R. § 280.12. Under this standard, Pennsylvania is not obligated to require reporting of a spill contained by secondary containment and cleaned up. Similarly, absent delegation, EPA does not require reporting of spills to secondary containment so long as there is no release to the environment, any defective equipment is repaired or replaced, and the liquid in the interstitial space of secondarily contained systems is removed. 40 C.F.R. § 280.50(b).

The leak and spill response regulatory requirements for tank systems at hazardous waste treatment, storage and disposal facilities regulated under the Resource Conservation and Recovery Act ("RCRA") require the owner or operator to remove materials released to a secondary containment system within 24 hours, or as soon as possible, to "prevent harm to human health and the environment." 40 C.F.R. § 264.196(b)(2). A spill to secondary containment that does not reach the environment does not trigger the RCRA notification requirement. 40 C.F.R. § 264.196(d).

At the state level, New York's release reporting regulations exempt from reporting all spills to secondary containment, regardless of quantity, as long as the following conditions are met: (i) the secondary containment system meets certain design requirements; (ii) the spill or overflow is controlled and completely contained within 24 hours; (iii) the total volume of the spill or overflow is recovered or accounted for; and (iv) the spill will not result in certain conditions including fire, explosion, contravention of air quality standards, harmful vapors, or runoff from fire control or dilution waters contributing to a contravention of water quality standards. 6 CRR-NY 598.14(a)(4).

In Delaware, the aboveground storage tank regulations require reporting of a leak (defined as a failure of an aboveground storage tank to contain a regulated substance) of a regulated substance inside secondary containment in any quantity only if the regulated substance cannot be cleaned up within 7 days. 7 DE Regs 1352 Part E 1.1.2.

Finally, New Jersey's aboveground storage tank regulations require notification to the New Jersey Department of Environmental Protection "immediately after a discharge commences." N.J.A.C 7:1E-5.3(a). Notably, the definition of "discharge" involves a release into waters or onto land. The definition expressly states that the term does not include "leak," which is defined as "any escape of a hazardous substance from the ordinary containers employed in the normal course of storage, transfer, processing or use *into a secondary containment or diversion system* or onto a surface which is cleaned up and removed prior to its escape into the waters or onto the lands of the State." N.J.A.C 7:1E-1.6 (emphasis added). New Jersey also exempts from reporting any discharge that is not otherwise required to be reported under any other state or federal rule so long as the discharge occurs at a facility that has a discharge prevention and discharge removal plan, or another related approved plan, if the discharge "[h]as not entered any waters of the State or migrated off-site" and within 24 hours the discharge is stopped and contained in accordance with such plan and is cleaned up and removed. N.J.A.C 7:1E-5.3(e)(1).

The federal government and each of these neighboring states exhibit a common-sense approach to release reporting. Pennsylvania's current Storage Tank regulations do the same, and no change to the release reporting requirements is needed to protect human health or the environment.

**VI. Proposed Section 245.304(a)(6) Should be Clarified.**

Proposed Section 245.304(a)(6) would classify the discovery of any damage to a storage tank system as an "indication of release." Merck has two concerns with this amendment. First, it is unclear whether every "indication of release" is a "suspected release" and therefore triggers the obligation to investigate. This ambiguity is created by the proposal to change "investigation of an indication of a release" to "investigation of a suspected release" where it first appears in Section 245.304(a), while continuing to list conditions that constitute an "indication of release." Merck recommends clarifying this ambiguity.

Second, classifying any "damage to a storage tank system" as an indication of release is overly broad. Certain types of damage such as peeling paint, dents or surficial rust are not signs of a release. They should not trigger investigation and recordkeeping requirements that would impose burdens on Merck and other members of the regulated community. If the Board concludes that the existing language in Section 245.304(6), "the discovery of holes in a storage tank," is inadequate to cover conditions presenting a risk of release, then "damage" should be qualified by additional language, such as "damage creating a pathway for a regulated substance from a storage tank system to be released."

**VII. Proposed Section 245.513(c) Should be Modified.**

Proposed Section 245.513(c) would require Merck to "immediately initiate" the actions necessary to correct deficiencies noted during the 72-hour visual and monthly maintenance inspections. The words "immediately initiate" are not defined. This proposed Section should be clarified or revised so as to place clear and reasonable obligations on the storage tank facility owner and operator.

In the context of the immediate reporting obligation contained in 25 Pa. Code § 91.33(a), the Department at times has interpreted "immediate" to mean within 15 minutes of discovery. In many instances, it would be impractical for Merck to undertake corrective actions of storage tank deficiencies within this or any similar time period. For example, many storage tank repairs require contracting with third parties for professional design or other services and cannot be performed "immediately."

In addition, it is unclear what activities "initiate" the corrective action. For example, would a report sent to management notifying management of the need for a repair "initiate" the necessary actions, or would the Department require more to be done "immediately" to "initiate" the repair? As drafted, the proposed amendment does not inform tank owners and operators of what actions comply with this requirement or how much time is afforded. Merck suggests that the proposed requirement be phrased in more practical terms, such as requiring diligent, commercially reasonable actions to correct any deficiencies noted during inspections.

**VIII. Proposed Section 245.514(b) Should be Clarified.**

Section 245.514(b) requires the maintenance of a "written log book." Merck currently maintains a similar record and has no objection to the substance of this amendment. Merck suggests that the final language expressly allow log books to be maintained in electronic format. As electronic recording devices such as iPads come into greater use during inspections, and records are maintained on servers or other electronic storage equipment, a hard copy of a log book may become obsolete. Merck suggests that the language be clarified to allow an electronic option. For example, the language "a written log book in hard copy or electronic format" would improve the proposal.

**IX. Proposed Section 245.516(c)(15) and Similar Sections Should be Withdrawn.**

Proposed Section 245.516(c)(15) would require documentation of investigations of suspected releases to be maintained for the operational life of the tank system and retained for a minimum of 1 year after the tank system has been permanently closed. Proposed Sections 245.435(d)(22) and 245.615(b)(7) would impose similar requirements. But if the investigation of a suspected release reveals that no release occurred, the records are of limited value. They are not relevant to any corrective action mandated by the regulation or to any damages to third persons.

Requiring maintenance of these records for more than a few months is unnecessary and burdensome. It would also serve to discourage investigations that a company may voluntarily undertake as a precaution when the likelihood of a release is very low. The number of records may give a misimpression of multiple problems at a facility when the operator was merely being diligent. To best encourage investigations, a recordkeeping requirement limited to confirmed releases would be most protective of the environment without imposing undue burden on regulated entities.

If proposed Section 245.516(c)(15) were withdrawn, records necessary for Department oversight would still be preserved. When investigation of a suspected release shows that a non-exempt release occurred, the release must be reported to the Department, see § 245.305(a), and the records must be maintained. See § 245.516(c)(5). Merck recommends that the proposed amendment adding Section 245.516(c)(15) and the similar Sections identified above be withdrawn, or the retention period be limited to no more than 6 months.

**X. Proposed Section 245.531 Should Not Apply to Existing Above-Ground Storage Tanks.**

The proposed amendment to Section 245.531 may pose a significant, expensive obligation on Merck. In accordance with existing regulations and a SSIP permit from the Department, Merck recently installed and registered a 400,000 gallon above-ground storage tank to store fuel oil. While the outside of the tank is painted for corrosion prevention, the tank bottom is not. Corrosion protection of the bottom is not legally required, and is unnecessary because the tank sits on a concrete pad, not on soil.

More specifically, under current regulations, the corrosion evaluation provisions of Section 245.531(b) do not apply to this tank because the tank bottom is not in direct contact with the soil or other electrolyte. Existing Section 245.531(c) requiring upgrade is likewise inapplicable because that Section applies only when the standards in Section 245.531(b) are not met, and even then only when the tank bottom is replaced. Neither of these conditions exists. In addition, because the tank stores petroleum, potential interior corrosion is not at issue.

The proposed amendment to Section 245.531 may be interpreted to require Merck to upgrade its existing tanks to add corrosion protection for the tank bottom. Under the proposed amendment, Merck may also need to meet the requirements of §§ 245.532 and 245.534 (relating to cathodic protection systems; and interior linings and coatings) for existing tank bottoms not equipped with corrosion protection, such as the bottom of Merck's 400,000 fuel oil tank. But when a tank bottom sits on a concrete pad, no valid reason for corrosion protection exists.

If the regulations are amended to require corrosion protection for tank bottoms on concrete pads, then the contents of existing tanks must be emptied and significant alterations made. Even Merck's new 400,000 gallon tank, recently approved by the Department and shown during inspection to be fully compliant with existing regulations, would need to be taken out of service and modified at very major cost and expense. No environmental risk exists to warrant this onerous result.

Merck suggests that the proposed regulation be modified to allow for tank bottoms without corrosion protection when the bottoms are not in direct contact with soil or other electrolyte, such as when they are located on concrete pads. This result would be consistent with Section 245.531(b) which requires evaluation by a corrosion expert only if the tank bottom is in direct contact with soil or other electrolyte. Alternatively, Merck requests that any new requirement applying to tank bottoms not in direct contact with soils or other electrolyte apply only to storage tanks constructed after the effective date of the regulation or when tank bottoms are replaced.

**XI. Proposed Section 245.612(d)(1) Should Not Apply to Existing Above-Ground Storage Tanks.**

Currently, Section 245.612(d)(1) permits use of a spill containment bucket when filling a double walled above-ground storage tank. The proposed amendment to this Section would require permanently installed spill prevention equipment.

Merck owns and operates numerous double walled tanks, many of which store diesel fuel for emergency generators. Except for some newer tanks, these double walled tanks do not have permanently installed spill prevention equipment. When the tanks are being filled, a bucket is placed under the fill point and an operator continuously monitors the filling activity. In Merck's experience, this method is effective in preventing releases to the environment.



Altering numerous existing tanks to install permanent spill prevention equipment would be expensive, time-consuming and unnecessary to prevent releases. Merck suggests that use of a spill containment bucket remain a permissible option for existing tanks. A requirement that an operator continuously monitor the filling activity would be consistent with Merck's practice. Merck has no objection to requiring permanently installed spill prevention equipment on new above-ground double walled storage tanks.

In the event the Board rejects Merck's suggestion and requires Merck to install spill prevention equipment on existing tanks, Merck requests a period of three years to fully implement this requirement. It would be unrealistic to expect storage tank owners to modify numerous tanks in a short period of time. Altering the numerous tanks at Merck's facilities is a significant undertaking that will require considerable planning, construction and expense.

XII. Conclusion

Merck fully supports the Department's stated objective of "fewer releases and a reduction in the severity of releases from ASTs." Merck has an excellent track record of preventing releases from storage tank systems at its facilities, and is generally supportive of the existing regulations and the proposed rulemaking. But imposing an obligation on operators of storage tanks to report any spill to secondary containment structures, even when based on specific facts and circumstances the spill poses no immediate threat of harm or contamination, ignores the preventive function of containment structures and contravenes the Storage Tank Act. The current regulations which require reporting of only those spills to a containment structure that actually pose an immediate threat of contamination to the environment properly implements the Storage Tank Act, protects the environment, and should not be altered. In addition, Merck requests the Department to make the modifications to the other Sections of the Proposed Rulemaking addressed in these comments.

Merck appreciates the opportunity to comment and your consideration of the issues raised.

Sincerely,



Cassie Gaudiosi  
Director, West Point Safety & Environment