

Testimony of
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Before the House Committee on Transportation and Infrastructure
Subcommittee of Water Resources and Environment
“The Administration’s Priorities and Policy Initiatives Under the Clean Water Act”

September 18, 2019

Good morning. My name is Pamela Nixon. Thank you for allowing me time to testify on the EPA’s No-Action decision on the Hazardous Substance Spill Prevention Rule for aboveground storage tanks. I am representing the organization People Concerned About Chemical Safety, which is an affiliate of the Environmental Justice Health Alliance for Chemical Policy Reform.

On January 9, 2014, there was a major chemical spill at the former Freedom Industries tank farm located on the banks of the Elk River in Charleston, West Virginia. Ten thousand gallons of crude MCHM (4-methylcyclo-hexanemethanol) mixed with PPH (primarily dipropylene glycol phenyl ether and propylene glycol phenyl ether) were released into the river only 1 ½ miles upstream of our public drinking water system intake.

The governor and public health officials called a Do Not Use order for our drinking water supply. Approximately 300,000 residents in nine counties were advised **not** to use tap water for drinking, cooking, showers, washing dishes, or washing clothes. Nearly 600 people visited emergency rooms complaining of symptoms related to the spill, and 13 were hospitalized. A few days after lifting the Do Not Use order, the West Virginia Bureau for Public Health announced that pregnant women should continue to drink bottled water, which caused confusion.

Schools, businesses, and hotels were closed, non-critical surgeries were canceled, patients were transferred to other hospitals for surgeries, and the 2014 West Virginia Legislative Session had to temporarily adjourn because of the chemical spill. Businesses in the area lost at least \$61 million dollars during the first month because of this disaster. (1)

Low-income residents and the elderly were the most vulnerable and negatively impacted. Bottled water stations were located on parking lots that could accommodate the large trucks. If a household didn’t have a vehicle, they had to rely on public transportation (bus), ask neighbors or family members to take them to get water, or walk. If they walked or rode a bus, they had to carry the heavy bottles of water back home to their families. Unless you have been through a disaster like this, you tend to take for granted just how dependent we are on water. To this day I continue to buy bottled water for drinking and cooking.

At the time of the spill, West Virginia did not have spill-prevention regulations for aboveground storage tanks (ASTs) storing hazardous chemicals and neither did, nor does, the U.S. EPA.

When the 2014 West Virginia legislature reconvened, they wrote and passed Senate Bill 373, a comprehensive AST bill, which the governor signed into law. But, under industry pressure, those provisions have been amended, and weakened, twice.

When Congress passed the Federal Clean Water Act in 1972, it directed the President to issue spill-prevention regulations for facilities that store oil and hazardous substances, like ASTs. (2) President Nixon delegated that responsibility under Clean Water Act section 311(j)(1)(C) to the EPA. (3) The EPA quickly issued spill-prevention regulations for oil. (4) And in 1978, the EPA proposed spill-prevention rules for hazardous substances like ammonia, benzene, PCBs, and hydrochloric acid at certain industrial facilities. (5) But despite promising a spill rule covering all ASTs under EPA jurisdiction “in the near future,” the EPA never finalized any hazardous substance spill rule for ASTs.

In 1982, Congress created a federal program to regulate underground storage tanks (USTs) containing petroleum and hazardous chemicals to minimize tank leaks. Congress directed the EPA to establish operating requirements and technical standards for tank design and installation, leak detection, spill and overfill control, corrective action, and tank closure. Between 1984 and 2015 there have been five Congressional actions to improve and strengthen requirement for UST owners as well as create a trust fund for cleaning up leaks. (6)

In an effort to ensure similar requirements and standards are in place for ASTs, the Environmental Justice Health Alliance for Chemical Policy Reform (EJHA), People Concerned About Chemical Safety (PCACS), and Natural Resources Defense Council (NRDC) filed suit against the EPA in 2015 over its failure to issue hazardous substance spill-prevention regulations for ASTs, as Congress had required over 40 years before. (7) In February 2016, EPA agreed in a Consent Decree to develop a proposed hazardous substance spill-prevention rule, accept comments, and publish the final rule by this summer. (8)

In June 2018, EPA Administrator Scott Pruitt signed a proposal to take no action to prevent hazardous substance spills from ASTs. He did so despite the Clean Water Act’s clear command that the EPA “shall issue regulations” and EPA’s own finding that industry self-reports nearly 1000 hazardous substance spills each year. To justify his proposal, Administrator Pruitt pointed to existing regulations that provide only limited protections for some types of hazardous substances at some subset of ASTs at chemical facilities. (9)

Despite many comments identifying the flaws in EPA’s analysis and the holes in existing regulations, (10) Administrator Wheeler signed the final do-nothing rule on August 22 of this year. It was published in the Federal Register on September 3. (11)

Many states across the country lack any spill prevention laws for ASTs. Residents in those states remain as vulnerable today as we West Virginians were on January 9, 2014. It is imperative that EPA develop and implement regulations directly designed to prevent spills of hazardous substances, as Congress mandated over 45 years ago. By not finalizing a

comprehensive rule, EPA is continuing to put the health and safety of millions of U.S. residents in potentially dangerous situations.

A robust federal spill-prevention program for aboveground chemical tanks should do the following:

1. Regulate ASTs containing petroleum **and** hazardous substances to minimize tank leaks and protect drinking water sources supplied by surface and groundwater;
2. Create a trust fund to clean up AST leaks, similar to the fund for USTs;
3. Develop regulations for ASTs that will ensure the designs, construction materials, and secondary containment systems meet established engineering standards;
4. Require leak and corrosion detection systems for ASTs;
5. Require transparent third-party audits;
6. Ensure the public has the right to know and access to information about the hazardous chemicals in ASTs near where they live, work, and recreate; and
7. Provide robust notification to the public and public drinking water systems in a timely manner when a spill does occur. (12)

If EPA continues to ignore its duty to issue these necessary regulations, Congress should step in and again require them to do so.

Thank you for considering my testimony.

End Notes

- (1) Lessons from the Elk River Spill – Environmental Health Perspective.
<https://ehp.niehs.nih.gov/doi/pdf/10.1289/ehp.122-A214>.
- (2) Pub. L. No. 92-500, § 311(j)(10), 86 Stat. 816, 868 (codified at 33 U.S.C. § 1321(j)(1)).
- (3) Executive Order No. 11735, § 1(4), 38 Federal Register 21243 (Aug. 7, 1973).
- (4) *Oil Pollution Prevention, Non-transportation Related Onshore and Offshore Facilities*, 38 Fed. Reg. 34,164, 34,164 (Dec. 11, 1973); *see also* 40 C.F.R. part 112.
- (5) *Hazardous Substances Pollution Prevention for Facilities subject to Permitting Requirement*, 43 Fed. Reg. 39,276 (Sept. 1, 1978).
- (6) EPA Underground Storage Tanks (USTs). How have Congress and EPA responded to concerns about USTs? <https://www.epa.gov/ust/learn-about-underground-storage-tanks-usts#how>.
- (7) Compl., *Env'tl. Justice Health All. for Chemical Policy Reform v. EPA*, 15-cv-5705 (SAS) (filed S.D.N.Y. July 21, 2015).
- (8) Consent Decree, *Env'tl. Justice Health All. for Chemical Policy Reform v. EPA*, 15-cv-5705 (SAS) (entered S.D.N.Y. Feb. 16, 2016), available at <https://www.documentcloud.org/documents/2714720-2-16-16-Haz-Mat-Consent-Decree.html>.
- (9) *Clean Water Act Hazardous Substances Spill Prevention. Proposed Action*, 83 Fed. Reg. 29,499 (June 25, 2018), available at <https://www.federalregister.gov/documents/2018/06/25/2018-13470/clean-water-act-hazardous-substances-spill-prevention>.
- (10) *E.g.*, Comments of Environmental Justice Health Alliance et al. (Aug. 24, 2018), available at <https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0184>; Comments of the Association of Metropolitan Water Agencies (Aug. 23, 2018), available at <https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0160>; Comments of the National Association of SARA Title III Program Officials (Sept. 9, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0152>.
- (11) *Clean Water Act Hazardous Substance Spill Prevention. Final Action*, 84 Fed. Reg. 46,100 (Sept. 3, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-09-03/pdf/2019-18706.pdf>.
- (12) *See generally* Comments of Environmental Justice Health Alliance et al. on Docket ID No. EPA-HQ-OLEM-2018-0024-001 (Aug. 24, 2018), at 25-33.