Testimony of Richard O. Faulk

Before the
Committee on Environment and Public Works
United States Senate

February 4, 2014

Thank you for inviting me to speak to you today. At the outset, let me note that I am not appearing here on behalf of any client or organization. I have responded to the committee's invitation as a concerned citizen, and I will provide information based upon my experience and observation.

I am a partner in the Washington DC law firm of Hollingsworth LLP, where I maintain a trial and appellate practice that includes environmental litigation matters. I also serve as the Senior Director of the Initiative for Energy and the Environment for the Law & Economics Center at George Mason University School of Law, where I develop and participate in forums designed to promote constructive dialogue regarding our nation's energy and environmental concerns. Prior to coming to Washington, I maintained a trial and appellate litigation practice in toxic tort and environmental litigation in Texas for approximately 35 years, most notably as the Chair of the Litigation and Environmental practices of Gardere Wynne Sewell LLP, a large Texas law firm with offices in Houston, Dallas, Austin and Mexico City.

Over the years of my practice, I have become familiar with some of the interaction and inter-relationships between America's oil and chemical manufacturing facilities and the regulatory authorities that address safety and environmental concerns regarding their operations. I do not claim to have expertise in all such areas, but I do generally understand and appreciate the attitudes, concerns, policies and programs that America's responsible chemical and

petrochemical companies apply to reduce the risk of accidents and injuries. Many of those practices are mandated by federal and state laws and regulations, but many are also the result of voluntary programs developed internally by particular companies or industry organizations.

From my experience with the mainstream of that industry, I believe that the safety of its employees and the people who live and work around its operations is the industry's highest priority. I have observed the industry work consistently over the years to enhance and improve their safety standards and practices. Even when accidents happen in facilities owned by other companies in other industries, the American chemical and petrochemical industries use those incidents as learning opportunities to improve the safety of their own operations. Unfortunately, the West Virginia chemical spill is a disappointing, and tragic exception to the practices I have observed in the mainstream of America's chemical and petrochemical industry. Based upon my experience, however, I have reason to expect that American chemical companies are already intensively engaged in inquiries, examinations, studies and discussions regarding the West Virginia tragedy -- with a view to understanding how and whether a similar incident could occur or be prevented in their own unique operations.

I also have reason to believe that federal, state and local regulatory authorities across the United States are actively engaged in investigations and are reviewing existing standards and procedures to determine their ability to detect and prevent problems from causing similar incidents. Their intensity, concern and enthusiasm likely match this committee's zeal because they are on the "front lines" for preventing similar tragedies. Certainly, the West Virginia incident, in itself, strongly motivates companies and state and local regulators to pursue such reviews – and this committee's investigation also provides a powerful motivation for those studies.

With all of this focus, motivation and energy, is there a need for immediate federal legislation? I think not. The aftermath of any complex accident generates a certain "fog" where the sheer volume of information, mixed with the shock, alarm, fear and confusion of the moment can obscure clear deliberations. In dealing with incidents like the West Virginia spill, it is important for state and local authorities responsible for the operations and knowledgeable about the parties' practices to undertake the following actions:

- Investigate and ascertain the facts that contributed to the incident;
- Examine any broader questions they raise about oversight, implementation,
- Determine appropriate remedial actions and coordinate enforcement and information sharing among federal, state, and local officials;
- Critically examine whether better enforcement of existing regulations could have helped prevent this incident; and
- Determine if new regulations are needed and if so, consult and involve all stakeholders to ensure that new policies are carefully tailored to avoid overreaching, duplication of existing industry practices, and to minimize unintended consequences.

All of these procedures are essential parts of an effective and useful investigation. In the process of these investigations, state and local authorities will necessarily address other problems such the existence and scope of existing local laws, the record of spills or releases reported in their jurisdictions, the efficacy of their laws in preventing accidents and redressing offenses, and the relative frequency of enforcement proceedings. After completing this process, the state and local authorities should have sufficient information to redress the situation and determine what, if any, new policies, procedures, laws and regulations should be considered to prevent future incidents. If state authorities prove themselves adequate to this task, federal intervention may be unnecessary.

For example, the West Virginia Senate has already passed legislation addressing the issues raised by the Spill. The bill is now before the West Virginia House of Representatives. Given the intense interest in West Virginia, it is likely that this law, when passed, will broadly address the circumstances that led to this tragedy. Other states may then review the law, consider it and adapt it to their own concerns and needs. As our nation's "laboratories of democracy," each state may develop its own solutions to its own unique operations and problems – and such solutions may be complimented by voluntary and cooperative programs developed by industry.

A "top down" system of solutions mandated hastily by federal authorities may displace a protective system of state and local laws, regulations or voluntary industry practices in some jurisdictions. Without an appreciation of those practices, the scope and severity of the risk throughout the nation may be vastly overstated. Stated another way, the presence of a regulatory "gap" does not mean that a hazard necessarily exists – such hazards may be already prevented by state or local laws or regulations, voluntary and customary industry practices, or other restraints. Without an appreciation of those variations, a "one size fits all" federal approach might even *reduce* safety by preempting broader, more effective, or uniquely tailored programs that are already working.

The safety precautions needed to prevent accidents such as the West Virginia incident are probably known to engineers, regulators, and safety professionals. The challenge of spill prevention, detection and containment is a ubiquitous and recurring concern. West Virginia and many other states, as well as the federal EPA, have issued guidance documents which provide information and directions regarding the necessity for containing dangerous materials, the methods for doing so in above-ground storage tanks, and the means for preventing damage by

containing spills and leaks. These resources describe and illustrate such important matters as sound engineering in tank construction, proper tank maintenance, the need for regular inspections, spill prevention techniques, and containment measures. These publications are available to the public and provide common-sense information and advice that could have prevented the tragedy in West Virginia.

Although no EPA program specifically regulates non-petroleum above-ground storage tanks, EPA's Chemical Emergency Preparedness and Prevention Office (CEPPO) issued a *Rupture Hazard from Liquid Storage Tanks* Chemical Safety Alert in May, 2009, available at http://www.epa.gov/oem/docs/chem/tanks7.pdf (visited February 2, 2014). The alert summarized tank failures due to defective welding, cautioned owners of ASTs in all liquid services to be aware of rupture risks, and provided guidance for proper AST inspection and maintenance. To minimize risk, it recommended the use of API Standards 650, 653, and 579 for tank construction, inspection, and modification. This alert also provided information regarding hazard awareness, identification, reduction and prevention. Among many other recommended precautions, the EOA advised tank owners and operators to "perform regular inspections of tanks" to "be sure to look for all possible risks." *Id.* at 4. In the preface to this important document, EPA also counseled that "[m]ajor chemical accidents cannot be prevented solely through regulatory requirements. Rather, understanding the fundamental root causes, widely disseminating the lessons learned, and integrating these lessons learned into safe operations are also required." *Id.* at 1.

Well before that alert was issued, the federal EPA had provided strong warnings about the importance of regular inspections since at least 2001:

> ***Routinely monitor*** ASTs to ensure they are not leaking. An audit of a newly installed tank system by a professional engineer can identify and correct problems such as loose fittings, poor welding, and poorly fit gaskets. After installation, inspect the tank system periodically to ensure it is in good condition.

> Depending on the permeability of the secondary containment area, more frequent containment area checks may be necessary. Areas to inspect include tank foundations, connections, coatings, tank walls, and the piping system. Integrity testing should be done periodically by a qualified professional and in accordance to applicable standards.

Managing Above Ground Storage Tanks to Prevent Contamination of Drinking Water (USEPA, July 2001), available at http://www.epa.gov/safewater/sourcewater/pubs/ast.pdf (accessed February 1, 2014)(emphasis in original).. Irrespective of whether this is a "law" or a recommendation, the EPA has enforcement jurisdiction under the Clean Air Act over water pollution incidents arising from tank failures. Accordingly, anyone dealing with products which. If not properly contained, could compromise drinking water, should obviously monitor the efficacy of containers and containment barriers to ensure that nearby drinking water supplies are not compromised.

West Virginia itself has "guidance" documents that refer to explicit requirements to protect "groundwater" from leaking above ground storage tanks – but the *existing regulatory requirements* described in those documents would, if obeyed, also prevent leakage into surface waters:

> Secondary containment refers to a structure usually constructed of dikes or impervious walls to contain the tank contents in the event it is drained out. **Section 4.8.a. of 47C858 requires that all ASTs have secondary containment that is appropriate to protect against groundwater contamination . . . The secondary containment must be designed and constructed to contain the full contents of the largest tank within the containment unit until the spilled material can be removed without contamination of groundwater.**

Above Ground Storage Tank Guidance Document (Dept. Env. Prot. 2010), at 3 available at http://www.dep.wv.gov/WWE/Programs/gw/Documents/AST%20Guidance%20Document.pdf (accessed February 1, 2014).

The incident in West Virginia was apparently caused by at least two failures – one which permitted the initial leaks, and another which involved the failure of secondary containment. Viewed in that perspective, *existing West Virginia law expressly provided a requirement which, if honored, would have prevented the incident*. Like many tragedies, the failure cannot necessarily be blamed on the absence of a law, but rather on human error. If a legal requirement under existing West Virginia law did not prevent the tragedy, one wonders whether federal laws will produce a different result. Fortunately, the rarity of events similar to those in West Virginia suggests that, by following common sense precautions and existing laws, American industry appears to be acting responsibly to prevent similar tragedies without the need for federal laws or regulations.

Much more study, including empirical evidence, is needed before this committee concludes that displacing these precautions and voluntary industry programs with federal legislation will achieve more salutary results. More laws – especially more regulation – and especially more *federal* regulations in a nation that is even now struggling to comply with a plethora of existing standards – cannot and should not be the answer to every problem – even every tragedy – that befalls our citizens.

Instead, we must empower the governments closest to the people with information, training, responsibility and tools to address the needs of their citizens. If that requires additional resources, so be it – for those resources are best entrusted and administered by those who are closest to the citizens who need them. Not every problem requires federal legislation – but every problem, especially serious ones, deserves the careful consideration, empowered intervention, and educated assistance of responsive and politically accountable community members. When, as here, the laws – if obeyed – are sufficient, we should avoid federal intervention and allow the

states, which have physical possession of their natural resources, to conserve, defend, and administer them in the best interests of their citizens.