

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON

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TERESA L. DEPPNER, CLERK  
U.S. District Court  
Southern District of West Virginia

UNITED STATES OF AMERICA

v.

CRIMINAL NO.

2:14-CR-00276  
33 U.S.C. § 1319(c)(1)(A)  
33 U.S.C. § 1311

MICHAEL E. BURDETTE

I N F O R M A T I O N

The United States Attorney charges:

(Negligent Discharge of a Pollutant)

At all times relevant to this Information:

Background

1. Freedom Industries, Inc. ("Freedom") was a West Virginia corporation located in Charleston, West Virginia, and engaged in the business of storing, selling, and transporting chemicals that were to be used in various industries, including the coal mining industry.

2. The Etowah River Terminal, LLC ("ERT"), was a West Virginia limited liability company, and, at times, a general partnership. ERT was formed by the principal shareholders of Freedom in approximately September 2001, to purchase and then operate an above-ground storage tank facility located at 1015



Barlow Drive, Charleston, West Virginia (the "Etowah Facility"), on the east bank of the Elk River.

3. On December 31, 2013, ERT formally merged into Freedom. Prior to that date, and at all times pertinent to this Information, ERT acted on behalf of and with the intent to benefit Freedom.

4. Freedom and ERT used the Etowah Facility to store and process chemicals and other substances, including a substance that was used in the coal mining industry as a cleansing agent and which consisted primarily of the chemical 4-methylcyclohexane methanol. That substance, both in the form as Freedom originally purchased it and in the form after Freedom processed it, was commonly referred to (and will be referred to hereinafter) as "MCHM."

#### The MCHM Spill Into the Elk River

5. In the morning of January 9, 2014, it was discovered that MCHM owned by Freedom had leaked from Tank 396 at the Etowah Facility into a containment area.

6. MCHM that leaked from Tank 396 breached containment and discharged into the Elk River via at least one discernible, confined, and discrete channel or fissure. The MCHM then flowed downstream.

7. The water treatment and distribution plant of the West Virginia American Water Company ("WVAWC"), and an intake for

that plant, were located approximately 1-1½ miles downstream from the Etowah Facility on the Elk River. Through the intake, WVAWC took in water from the Elk River and treated it to supply potable water for thousands of residents in Charleston and surrounding areas.

8. The MCHM from the Etowah Facility flowed into WVAWC's intake and treatment plant on the Elk River on January 9, 2014. As a result, at approximately 6:00 p.m. on January 9, 2014, the State of West Virginia issued a "do not use" advisory, which effectively denied water from WVAWC, for drinking, cooking and washing, to an estimated 300,000 residents within a nine-county area for several days.

The Clean Water Act and the NPDES Program

9. The Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), codified at Title 33, United States Code, Sections 1251-1387, was enacted by Congress to restore and maintain the integrity of the Nation's waters and to prevent, reduce, and eliminate water pollution.

10. The CWA prohibited the discharge of any pollutant into waters of the United States by any person, except in compliance with a permit issued under the National Pollutant Discharge Elimination System ("NPDES") by the United States Environmental Protection Agency ("EPA") or an authorized state.

11. The CWA defined a "person" as, among other things, an individual, corporation, and responsible corporate officer, 33 U.S.C. §§ 1362(5) and 1319(c)(6); the "discharge of a pollutant" as the addition of any pollutant to navigable waters, from any point source, 33 U.S.C. § 1362(12); a "point source" as any discernible, confined and discrete conveyance from which pollutants are discharged, for example a pipe, ditch, channel, conduit or discrete fissure, 33 U.S.C. § 1362(14); and a "pollutant" as, among other things, solid waste, chemical waste, and industrial waste discharged into water, 33 U.S.C. § 1362(6).

12. At all places relevant to this Information, the Elk River was a navigable water of the United States within the meaning of the CWA. 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2.

13. The EPA delegated the NPDES program to the State of West Virginia in May 1982, see 47 Fed. Reg. 22,363 (May 24, 1982). Thereafter, and at all relevant times, the NPDES program in West Virginia was administered by the West Virginia Department of Environmental Protection ("WVDEP").

14. Pursuant to the NPDES delegation of authority, the WVDEP issued a "Multi-Sector General Water Pollution Control Permit," No. WV0111457 ("the NPDES Permit"), under which industrial activities could apply for individual registration

and authority to operate. The NPDES Permit authorized permit holders to discharge storm water into navigable waters, subject to monitoring and reporting requirements for certain pollutants, but did not allow for the discharge of MCHM.

15. Freedom, directly and through its agent ERT, operated the Etowah Facility pursuant to the NPDES Permit, under General Permit Registration Number WVG610920. Freedom did not have any permit allowing for the discharge of MCHM into the Elk River.

#### Negligent Operation of the Etowah Facility

16. At all times pertinent to this Information and up through and including January 9, 2014, Freedom and its responsible corporate officers and agents, including BURDETTE, failed to exercise reasonable care and thus failed to satisfy their duties to operate the Etowah Facility in a safe and environmentally sound manner.

17. One manner in which Freedom, BURDETTE and others failed to exercise reasonable care was by violating the conditions of the NPDES Permit. The violations included:

- The failure to develop and maintain a Storm Water Pollution Prevention Plan ("SWPPP") and a Groundwater Protection Plan ("GPP") for the Etowah Facility, and
- The failure to implement certain pollution controls and other reasonable practices at the Etowah Facility that an SWPPP and a GPP would have required.

18. The pollution controls and reasonable practices that should have been but which were never implemented at the Etowah Facility included:

- Properly assessing the spill potential of all substances, including MCHM, stored at the Etowah Facility;
- Ensuring that the area within the diked containment area would actually hold the contents of the largest tank, without spillage or leaking, for at least 72 hours;
- Ensuring that periodic inspections, maintenance, and necessary repairs were conducted of pollution prevention devices and plant equipment and systems, including the dike wall and containment area, the breakdown of which might result in the discharge of pollutants to surface waters; and
- Conducting training of all personnel, including responsible corporate officers, to insure that all hands were well aware of the requirements of the SWPPP and the GPP and the importance of pollution prevention.

19. The failures by Freedom, BURDETTE and other agents of Freedom to exercise reasonable care in the operation of the Etowah Facility, and in particular, to develop and maintain an SWPPP and a GPP for the Etowah Facility and to implement certain pollution controls and other reasonable practices at the Etowah Facility to assure compliance with the NPDES Permit, were proximate causes of the significant leak of MCHM from Tank 396 and the resulting discharge of MCHM into the Elk River on January 9, 2014.

Criminal Violation of the CWA

20. From at least in or about the summer of 2010, through on or about January 9, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendant BURDETTE and other persons and entities known to the United States Attorney, negligently discharged a pollutant, that is, MCHM, which discharge occurred on or about January 9, 2014, from point sources into the Elk River, a navigable water of the United States, without a permit issued under Title 33 of the United States Code authorizing such discharge.

In violation of Title 33, United States Code, Sections 1319(c)(1)(A) and 1311.

UNITED STATES OF AMERICA

R. BOOTH GOODWIN II  
UNITED STATES ATTORNEY

By:

  
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