

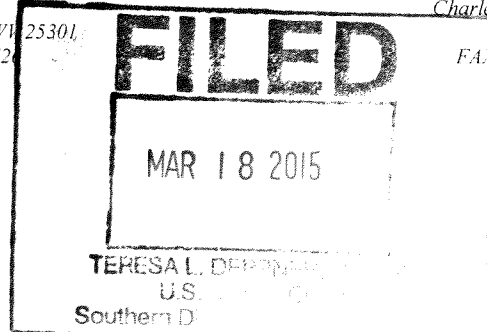


United States Department of Justice

United States Attorney
Southern District of West Virginia

Robert C. Byrd United States Courthouse
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Charleston, WV 25326
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October 27, 2014

Susan M. Robinson, Esquire
Thomas Combs & Spann PLLC
P.O. Box 3824
Charleston, WV 25338

Re: United States v. Michael E. Burdette

Dear Ms. Robinson:

This will confirm our conversations with regard to your client, Michael E. Burdette (hereinafter "Mr. Burdette"). As a result of these conversations, it is agreed by and between the United States and Mr. Burdette as follows:

1. **CHARGING AGREEMENT.** Mr. Burdette consents to the filing of a single-count information to be filed in the United States District Court for the Southern District of West Virginia, a copy of which is attached hereto as "Plea Agreement Exhibit A."

2. **RESOLUTION OF CHARGES.** Mr. Burdette will plead guilty to a violation of 33 U.S.C. § 1319(c)(1)(A) and 1311 (negligent discharge of a pollutant) as charged in said information.

3. **MAXIMUM POTENTIAL PENALTY.** The maximum penalty to which Mr. Burdette will be exposed by virtue of this guilty plea is as follows:

- (a) Imprisonment for a period of one year;
- (b) A fine of not less than \$2,500 nor more than \$25,000 per day of violation. Alternatively, and pursuant to 18 U.S.C. § 3571, a fine of \$100,000, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from defendant's conduct, whichever is greater, may be imposed;

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- (c) A term of supervised release of one year;
- (d) A mandatory special assessment of \$25 pursuant to 18 U.S.C. § 3013; and
- (e) An order of restitution pursuant to USSG §5E1.1(a)(2).

4. **SPECIAL ASSESSMENT.** Prior to the entry of a plea pursuant to this plea agreement, Mr. Burdette will tender a check or money order to the Clerk of the United States District Court for \$25, which check or money order shall indicate on its face the name of defendant and the case number. The sum received by the Clerk will be applied toward the special assessment imposed by the Court at sentencing. Mr. Burdette will obtain a receipt of payment from the Clerk and will tender a copy of such receipt to the United States, to be filed with the Court as an attachment to this plea agreement. If Mr. Burdette fails to provide proof of payment of the special assessment prior to or at the plea proceeding, the United States will have the right to void this plea agreement. In the event this plea agreement becomes void after payment of the special assessment, such sum shall be promptly returned to Mr. Burdette.

5. **PAYMENT OF MONETARY PENALTIES.** Mr. Burdette agrees not to object to the District Court ordering all monetary penalties (including the special assessment, fine, court costs, and any restitution that does not exceed the amount set forth in this plea agreement) to be due and payable in full immediately and subject to immediate enforcement by the United States. So long as the monetary penalties are ordered to be due and payable in full immediately, Mr. Burdette further agrees not to object to the District Court imposing any schedule of payments as merely a minimum schedule of payments and not the only method, nor a limitation on the methods, available to the United States to enforce the judgment.

6. **COOPERATION.** Mr. Burdette will be forthright and truthful with this office and other law enforcement agencies with regard to all inquiries made pursuant to this agreement, and will give signed, sworn statements and grand jury and trial testimony upon request of the United States. In complying with this provision, Mr.



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Burdette may have counsel present except when appearing before a grand jury.

7. **USE IMMUNITY.** Unless this agreement becomes void due to a violation of any of its terms by Mr. Burdette and except as expressly provided for in paragraph nine below, nothing contained in any statement or testimony provided by Mr. Burdette pursuant to this agreement, or any evidence developed therefrom, will be used against him, directly or indirectly, in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines.

8. **LIMITATIONS ON IMMUNITY.** Nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from any information and testimony provided pursuant to this agreement, in determining the applicable guideline range or in prosecuting Mr. Burdette for any violations of federal or state laws. The United States reserves the right to prosecute Mr. Burdette for perjury or false statement if such a situation should occur pursuant to this agreement.

9. **STIPULATION OF FACTS AND WAIVER OF FED. R. EVID. 410.** The United States and Mr. Burdette stipulate and agree that the facts comprising the offense of conviction include the facts outlined in the "Stipulation of Facts," a copy of which is attached hereto as "Plea Agreement Exhibit B."

Mr. Burdette agrees that if he withdraws from this agreement, or this agreement is voided as a result of a breach of its terms by him, and he is subsequently tried on any of the charges in the information, the United States may use and introduce the Stipulation of Facts in the United States case-in-chief, in cross-examination of Mr. Burdette or of any of his witnesses, or in rebuttal of any testimony introduced by him or on his behalf. Mr. Burdette knowingly and voluntarily waives, see United States v. Mezzanatto, 513 U.S. 196 (1995), any right he has pursuant to Fed. R. Evid. 410 that would prohibit such use of the Stipulation of Facts. If the Court does not accept the plea agreement through no fault of the defendant, or the Court declares the agreement void due to a breach of its terms



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by the United States, the Stipulation of Facts cannot be used by the United States.

The United States and Mr. Burdette understand and acknowledge that the Court is not bound by the Stipulation of Facts and that if some or all of the Stipulation of Facts is not accepted by the Court, the parties will not have the right to withdraw from the plea agreement.

10. **AGREEMENT ON SENTENCING GUIDELINES.** The United States and Mr. Burdette agree that the following provisions of the United States Sentencing Guidelines apply to this case.

USSG §2Q1.3

Base offense level	6
Ongoing, continuous discharge	+ 4 or 6
Disruption of public utility or substantial expenditure in cleanup	+ 4
Discharge without a permit	+ 4
Adjusted offense level	18 or 20

The United States and Mr. Burdette acknowledge and understand that the Court and the Probation Office are not bound by the parties' calculation of the United States Sentencing Guidelines set forth above and that the parties shall not have the right to withdraw from the plea agreement due to a disagreement with the Court's calculation of the appropriate guideline range.

11. **WAIVER OF APPEAL AND COLLATERAL ATTACK.** Mr. Burdette knowingly and voluntarily waives his right to seek appellate review of his conviction and of any sentence of imprisonment, fine, or term of supervised release imposed by the District Court, or the manner in which the sentence was determined, on any ground whatsoever including any ground set forth in 18 U.S.C. § 3742(a), except that the defendant may appeal any sentence of restitution ordered as a



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condition of supervised release and any sentence that exceeds the maximum penalty prescribed by statute. The United States also agrees to waive its right to appeal any sentence of imprisonment, fine, or term of supervised release imposed by the District Court, or the manner in which the sentence was determined, on any ground whatsoever, including any ground set forth in 18 U.S.C. § 3742(b), except that the United States may appeal any sentence that is below the minimum penalty, if any, prescribed by statute.

Mr. Burdette also knowingly and voluntarily waives the right to challenge his guilty plea and conviction resulting from this plea agreement, and any sentence imposed for the conviction, in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

The waivers noted above shall not apply to a post-conviction collateral attack or direct appeal based on a claim of ineffective assistance of counsel.

12. **WAIVER OF FOIA AND PRIVACY RIGHT.** Mr. Burdette knowingly and voluntarily waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without any limitation any records that may be sought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a, following final disposition.

13. **FINAL DISPOSITION.** The matter of sentencing is within the sole discretion of the Court. The United States has made no representations or promises as to a specific sentence. The United States reserves the right to:

- (a) Inform the Probation Office and the Court of all relevant facts and conduct;
- (b) Present evidence and argument relevant to the factors enumerated in 18 U.S.C. § 3553(a);
- (c) Respond to questions raised by the Court;



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- (d) Correct inaccuracies or inadequacies in the presentence report;
- (e) Respond to statements made to the Court by or on behalf of Mr. Burdette;
- (f) Advise the Court concerning the nature and extent of Mr. Burdette's cooperation; and
- (g) Address the Court regarding the issue of Mr. Burdette's acceptance of responsibility.


14. **VOIDING OF AGREEMENT.** If either the United States or Mr. Burdette violates the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept this agreement, it shall be void.

15. **ENTIRETY OF AGREEMENT.** This written agreement constitutes the entire agreement between the United States and Mr. Burdette in this matter. There are no agreements, understandings or recommendations as to any other pending or future charges against Mr. Burdette in any Court other than the United States District Court for the Southern District of West Virginia.

Acknowledged and agreed to on behalf of the United States:


R. BOOTH GOODWIN II
United States Attorney

By:


PHILIP H. WRIGHT
Assistant United States Attorney

PHW/vld

I hereby acknowledge by my initials at the bottom of each of the foregoing pages and by my signature on the last page of this seven-page agreement that I have read and carefully discussed every


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part of it with my attorney, that I understand the terms of this agreement, and that I voluntarily agree to those terms and conditions set forth in the agreement. I further acknowledge that my attorney has advised me of my rights, possible defenses, the Sentencing Guideline provisions, and the consequences of entering into this agreement, that no promises or inducements have been made to me other than those in this agreement, and that no one has threatened me or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.



Michael E. Burdette
Defendant

10-28-2014

Date Signed



Susan M. Robinson
Counsel for Defendant

10.28.2014

Date Signed

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

UNITED STATES OF AMERICA

v.

CRIMINAL NO.

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 pollutions 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: _____

PHILIP H. WRIGHT
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v.

CRIMINAL NO. _____

MICHAEL E. BURDETTE

STIPULATION OF FACTS

The United States and Michael E. Burdette ("Burdette") stipulate and agree that the facts comprising the offense of conviction in the Information include the following:

1. The Chemical Spill of January 9, 2014

On January 9, 2014, a major chemical leak was discovered at an above-ground storage tank farm located on the east bank of the Elk River, on Barlow Drive in Charleston, West Virginia, within the Southern District of West Virginia. The tank farm, known as the Etowah River Terminal ("Etowah Facility"), was owned by Freedom Industries, Inc. ("Freedom"), a West Virginia corporation.

Freedom 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 major chemical leak that occurred on January 9, 2014, consisted of MCHM, which leaked from Tank 396 at the Etowah



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Facility. A significant amount of the leaked MCHM pooled around the northwest side of Tank 396. MCHM breached containment, ran down the riverbank and discharged into the Elk River at one or more discernible, confined and discrete channels or fissures. After it leaked, the MCHM was a pollutant as defined in the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. The Elk River was, and is, a navigable water of the United States. Freedom did not have a permit issued pursuant to the CWA to discharge MCHM into the Elk River.

2. Freedom and Burdette

For many years, and all times pertinent to the Information, Freedom and its affiliated companies, including Etowah River Terminal, LLC ("ERT"), and Poca Blending, LLC, were engaged in the business of storing and selling chemicals and other substances used in various industries such as the coal mining industry. ERT was formed in 2001 to purchase and then operate the Etowah Facility. (Poca Blending operated a chemical processing site in Nitro, West Virginia.) At all times pertinent to the Information, ERT acted on behalf of and with the intent to benefit Freedom.

Burdette began working for Freedom in approximately March 2008. He initially reported to the Plant Manager of Etowah Facility. When that Plant Manager retired in the summer of 2010, Burdette became the "Terminal Manager" and Plant Manager for the Etowah Facility, positions he held up through and after January 9, 2014. As such, he supervised the employees who operated the tank farm at the Etowah Facility.

As Plant Manager, Burdette was responsible for, among other things, operating and maintaining the Etowah Facility in a safe manner and in compliance with applicable laws, including all environmental laws. He was also responsible for ensuring that his operators were properly trained in all aspects of their jobs, including environmental compliance, although Burdette was not required to perform the training himself.



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3. The NPDES Permit

Freedom, directly and through its agent ERT, operated the Etowah Facility pursuant to a "Multi-Sector General Water Pollution Control Permit," No. WV0111457, Registration No. WVG610920 ("The Permit"), that was issued by the State of West Virginia, Department of Environmental Protection, pursuant to the National Pollutant Discharge Elimination System ("NPDES"). The Permit, which was in effect at all relevant times, authorized Freedom (and ERT) to discharge storm water into navigable waters, subject to monitoring and reporting requirements for certain pollutants, but it did not allow for the discharge of MCHM into any navigable waters.

Burdette was aware that the Etowah Facility's operations were subject to the Permit. He was responsible for reading the Permit and ensuring that the Etowah Facility operated in accordance with the Permit's requirements.

4. Negligence - Failure to Have and Implement an SWPPP/GPP

The Permit required Freedom/ERT to develop and maintain a Storm Water Pollution Prevention Plan ("SWPPP") and Groundwater Protection Plan ("GPP"). The plans were to be signed and held on-site. Freedom, however, never developed and maintained an SWPPP or a GPP for the Etowah Facility as required by the Permit. Freedom also failed to implement certain pollution controls that such plans would have required.

For example, pursuant to the Permit, a SWPPP should have (i) identified potential sources of pollution that might reasonably be expected to pollute storm water discharges from the Etowah Facility; and (ii) described and implemented "Stormwater Management Controls" that would be used to reduce pollutants and to assure compliance with the Permit terms and conditions.

The Stormwater Management Controls that should have been implemented at the Etowah Facility, as listed in the Permit, required the following:



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- Freedom should have formed a "Pollution Prevention Committee" that would have been responsible for developing a pollution prevention plan, and assisting in its implementation, maintenance, and revision.
- Freedom should have performed preventive maintenance on "stormwater pollution prevention devices," and inspected and tested "plant equipment and systems" to "uncover conditions that could cause breakdowns or failures resulting in discharges of pollutants to surface waters."
- Freedom should have trained "personnel at all levels of responsibility" on the components and goals of the stormwater pollution prevention plan.
- Freedom should have had spill prevention and response procedures in place.
- Freedom should have performed a site inspection annually to ensure that controls were being implemented and that a required drainage map had been updated to reflect current conditions.

In addition, Freedom should have reviewed its stormwater pollution prevention practices annually, and made revisions to the SWPPP as necessary.

The dike wall and containment area were "pollution prevention devices" and "plant equipment" or "systems," the breakdown of which could result in the discharge of a pollutant to surface waters.

Freedom also should have implemented a Groundwater Protection Plan ("GPP"), which could have been combined with a SWPPP. A GPP would have required Freedom to:

- Comply with the law and rules of West Virginia regarding groundwater protection. Section 58-4.8 of Title 47, West Virginia Code of State Rules, required an above-ground storage tank facility such as the Etowah Facility to have "secondary containment" for the tanks that would be sufficient to hold the contents of the largest tank for 72 hours in the event of a spill.



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- Conduct training of employees on pollution prevention.
- Perform quarterly site inspections to ensure "all elements and equipment of the groundwater protection programs are in place, functioning properly, and are appropriately managed."

The dike wall and containment area of the Etowah Facility were "elements and equipment of the groundwater protection program."

Burdette should have known that the Permit required the SWPPP and GPP, as a mere reading of the Permit would have informed him of these requirements. Moreover, there was a file labeled "Stormwater" in Burdette's office at the Etowah Facility. Burdette was aware of the file, which contained various papers related to the Permit and a "Draft" SWPPP that had been prepared in February 2002, was never signed, and the terms of which were never implemented.

Burdette was negligent in failing to know of, and familiarize himself with, all of the requirements of the Permit. Consequently, and even though he was well aware that, among other things, the dike wall was not impervious, would not function to contain liquids, and was in obvious need of repair, Burdette failed to exercise due care to ensure that Freedom developed, implemented, and maintained an SWPPP and a GPP. As a result of Burdette's negligence (and the negligence of other responsible corporate officers and agents), Freedom did not implement effectively or at all any of the required Stormwater Management Controls listed above on pp. 3-4; and Freedom failed to comply with the requirements of a GPP for the Etowah Facility, including the requirement to have sufficient secondary containment to hold the contents of the largest tank within the facility for 72 hours in the event of a spill.

The negligence of Burdette (and others) as outlined above was a proximate cause, albeit not the only proximate cause, of the discharge of MCHM into the Elk River from the Etowah Facility on January 9, 2014.

This Stipulation of Facts does not contain each and every fact known to Burdette and to the United States concerning his



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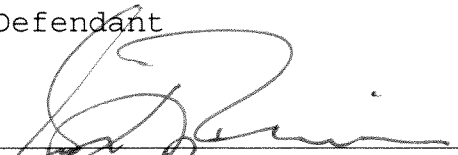
involvement and the involvement of others in the charge set forth in the Information, and is set forth for the limited purpose of establishing a factual basis for Burdette's guilty plea.

Stipulated and agreed to:



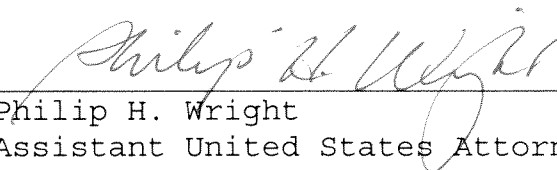
Michael Burdette
Defendant

10-28-2014
Date



Susan M. Robinson
Counsel for Defendant

10.28.2014
Date



Philip H. Wright
Assistant United States Attorney

10.28.2014
Date



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