Charges brought against executives in West Virginia chemical spill

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Federal prosecutors have charged Freedom Industries—the company responsible for the January 9 chemical leak of the coal-cleaning agent MCHM—with criminal violations of the Clean Water Act (CWA). In addition to the charges brought against the company, six executives, owners and employees of the Freedom have also been charged with violations of the CWA.

The charges against Freedom Industries are in the form of a document called an Information—rather than an indictment—because the parties reached a plea agreement whose stated aim is to avoid defense costs for the bankrupt company as it continues cleanup operations. In exchange for a guilty plea, the US Attorney's Office offered not to indict the company or seek restitution for victims of the company's crimes.

The Information charges that Freedom operated its Etowah River Terminal storage-tank facility near Charleston, West Virginia in a "negligent manner." On January 9, approximately 10,000 gallons of coal-cleaning chemicals leaked from its storage tank, breached a containment area, including a dike wall, ran down the riverbank and discharged into the Elk River. The chemical made its way about a mile downstream to West Virginia American Water's regional treatment and distribution plant intake, poisoning the water supply.

The contamination led to a ban on tap water usage for 300,000 residents—some 16 percent of state residents—and a declaration of a state of emergency for nine counties. Thousands of businesses, government buildings and schools were ordered closed. Hospitals treated residents for nausea, skin burns, and eye irritations from contact with the contaminated water.

"Freedom failed to exercise reasonable care and thus failed to satisfy its duties to operate the Etowah Facility in a safe and environmentally sound manner, failed to comply with the requirement of the NPDES (National Pollutant Discharge Elimination System) Permit, and failed to prevent unauthorized discharges of pollutants such as MCHM into the Elk River," the Information explained.

In charging Freedom on three counts of violations of the CWA, prosecutors stipulated that the unlawful discharges from the facility occurred between January 1, 2002 and January 9, 2014, leaving open the possibility that water contamination had been ongoing for more than 12 years.

Two Freedom employees, plant manager Michael E. Burdette and environmental compliance officer Robert J. Reynolds, were both charged with only one-count of violating the CWA in exchange for their cooperation with government investigators.

A separate federal grand jury indictment also accuses Dennis P. Farrell, William E. Tis, Charles E. Herzing, and Gary L. Southern with three counts of violating the CWA. "In their respective capacities as officers, directors, managers, and supervisors of Freedom, defendants Farrell, Tis, Herzing, and Southern were 'responsible corporate officers' of Freedom, exercising authority over the operation and management of Freedom and the Etowah Facility," the indictment explains.

"Freedom and its officers and agents, including responsible corporate officers, failed to exercise reasonable care in its duty to operate the Etowah Facility in a safe and environmentally-sound manner, in that it failed to comply with applicable law, regulations, and guidelines; failed to follow its own internal operating procedures; and failed to conform to common industry standards for safety and environmental compliance," the indictment read.

The indictment further notes that "Farrell, Tis, Herzing, and Southern approved funding only for those projects that would result in increased business revenue for Freedom or that were necessary to make immediate repairs to equipment that was broken or about to break."

Farrell, Tis and Herzing were former owners of

Freedom until December 6, 2013, when the company was sold to Chemstream Holdings Inc. in a $20 million deal. Prior to Chemstream's acquisition of Freedom, Farrell served as president of the company, Tis as secretary, and Herzing as vice president. If convicted, they face a maximum three years in prison.

Gary Southern is charged in his capacity as Freedom's chief operating officer since May 2009 and company president after the acquisition. In addition to the three counts of violating the CWA, Southern was charged with ten additional counts related to "a scheme to defraud" Freedom's creditors and those who had sued him personally.

Southern was initially charged in a criminal complaint two weeks ago and arrested at his Florida residence. Last week's indictment supersedes the criminal complaint. Southern is currently free on bond.

The indictment argues that Southern's scheme was aimed at "retaining, preserving and protecting his assets and net worth." To this end, Southern is accused of wire fraud, making false statements, and concealing his assets. If convicted, he faces a maximum of 68 years in prison.

After Freedom declared bankruptcy on January 17, Southern told the court that prior to becoming Freedom's president at the start of the year, his involvement with the company was as a "part-time, financial type consultant" in an attempt to limit his personal liability for the company's criminal conduct.

The charges against Southern also cite a transfer of $6.5 million that Southern made on February 7 from his bank account to an annuity account. In a court filing last Thursday, Assistant US Attorney Phil Wright noted, "Southern's own assessment of his net worth thus indicates that in a mere 8-9 months, approximately $7 million has dissipated or disappeared, during the very time period of the fraud scheme alleged in the indictment of this case."

Warrants for the seizure of more than $7 million worth of Southern's assets have been approved and federal officials claimed the confiscations were underway. It is unclear whether similar seizures will be carried out against Farrell, Tis, and Herzing.

The *Charleston Gazette* noted in the aftermath of the charges against Southern that "officials managing the bankruptcy proceeding have yet to even begin an investigation of the actions—or the finances—of any of the former Freedom officers to see if money could be recouped for site remediation, victim compensation or creditor payments."

What is clear, however, is that as the bankruptcy proceedings drag on and the company's assets are consumed by a raft of legal professionals and consultants, little to nothing will be left for the thousands of workers whose lives were endangered and disrupted by Freedom's reckless criminality. In addition to the substantial environmental cleanup obligations of the company, over 3,000 creditors have claims against Freedom totaling more than $176 million.

On December 11, Freedom reached a $3.2 million agreement with its insurance company AIG. The deal paves the way for an agreement to be reached in a proposed $2.9 million class-action lawsuit over damages from the leak. Under the proposal, the money would be spent for health studies, water testing or other projects to benefit residents and businesses affected by the leak.

Meanwhile the West Virginia Department of Environmental Protection (DEP) is working out a deal with Freedom, which will leave the site contaminated. In the aftermath of the spill, the DEP had issued enforcement orders that mandated the clean up of "all" contaminated soil and ground water. Under a new deal, Freedom would be allowed to enter into DEP's Voluntary Remediation Program and use a "risk-based" approach and clean up only soil and groundwater above a certain level of contamination.

While Freedom has instruments that can detect contamination down to parts per billion, the company's chief restructuring officer Mark Welch has complained that site remediation to a non-detect level would be impossible. Freedom officials told the bankruptcy court that if accepted into the DEP's voluntary program, "very little, if any" additional cleanup work would be left to perform.

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