

The Freedom Industries' Chemical Spill

***It Didn't Stay in
West Virginia***



by Michael D. Klein

Unlike the commercial “What happens in Vegas stays in Vegas” the same is not true about West Virginia. The ramifications of the Freedom Industries’ chemical spill into the Elk River approximately one mile upstream of a West Virginia American Water Company (WVAW) intake will be felt across the United States for many years.

As you should already know, the spill of 4-methylcyclohexane methanol from a tank owned by Freedom Industries affected over 300,000 persons in the area of Charlestown, West Virginia, and led to the temporary shutdown of schools, businesses and government offices. Also, as a result of the spill, restrictions were imposed for several days on the use of the water being supplied to the public by WVAW.

Following the spill, lawsuits were filed against Freedom Industries and WVAW. Freedom Industries has filed for bankruptcy protection. WVAW has made its own filing claiming that it has incurred significant damages and would likely be Freedom Industries’ largest creditor. It has been reported that Freedom Industries is claiming that a water main underneath the leaking tank may have been responsible for the leak. This is an effort to shift legal liability to WVAW.

The point of all this is that when contamination events of this nature occur expect plenty of lawsuits. And, if you are in any manner involved in such an event, even indirectly, expect to be sued in civil court. Also expect to be investigated and subject to fines by administrative agencies, and yes, there may even be criminal ramifications.

In a spill event, a public water supplier is seldom the cause of the spill. But when there is a spill into a waterway or aquifer used as source by a public water supplier, the public water supplier is required by law to respond in an appro-

priate manner to ensure the safety and reliability of the water it supplies to its customers. To this end, 25 Pa. Code § 109.707 requires a community water supplier to develop a plan for the provision of safe and adequate drinking water under emergency circumstances.

The emergency response plan must generally conform to the guidelines contained in DEP’s Public Water Supply Manual, and at a minimum contain the information outlined in the regulation. Included among the requirements is the very important one of identifying probable emergency situations and devising corrective actions for each possible emergency situation.

At a minimum corrective actions must be devised for probable emergency situations including, but not limited to those specified in 25 Pa. Code § 109.701(a)(3)(iii). Included among that list of circumstances is a chemical spill.

Another very important requirement is the community water supplier must review and update the plan at least annually and as necessary to reflect changes to communication procedures and certain required contact information. The plan should be readily accessible to the water system’s personnel, and those personnel should receive continuing training with respect to the plan.

The reason that I have discussed the emergency response plan requirement here, is that it will play a key role in any legal action in which you may become involved as a result of an emergency. If you have an updated, comprehensive, and legally compliant plan; and if you have continually trained your personnel with respect to the plan; and if you followed the plan during an emergency you will help to build a solid legal defense. On the other hand, if you have not done all of these, pre-

pare to transition from the emergency event to a legal emergency.

Because of the Freedom Industries’ spill, there will be a higher degree of scrutiny by federal and state regulators, and possibly more laws and regulations. Plus, the spotlight has now been placed on public water suppliers as deep-pocket targets for class action lawsuits.

If you are involved in such a lawsuit you should not want to have to answer the following questions in the negative:

- **After the Freedom Industries’ spill did you review, revise and update your emergency response plan to implement lessons learned?**
- **After the Freedom Industries’ spill did you provide any special training to your personnel?**
- **During your emergency event did you follow your emergency response plan?**

Now is the time to take measures to be able to answer these questions in the affirmative. Now is the time to review and update your vulnerability assessments, emergency response plans, and employee training.

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