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West Virginia's Water Catastrophe Reveals Gaping Holes In Government Oversight

BY [KILEY KROH](#)  ON JANUARY 13, 2014 AT 4:23 PM

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After a major chemical spill contaminated the water supply and as 300,000 West Virginians endure their fifth day without clean tap water for drinking, bathing, or cooking, many residents are left asking the same question: How could this happen?

On Thursday, up to 7,500 gallons of crude MCHM, a chemical used in the coal production process, leaked from a storage facility operated by Freedom Industries into the Elk River and the drinking water supply for 16 percent of the state's population. The fact that a potentially toxic chemical could be stored on the banks of a river — just over a mile upstream from a major water treatment facility that distributes drinking water to a 1,500 mile area — without adequate testing, inspection, or reporting points to several levels of

failure.

"The fundamental issue here is the governor and the DEP [Department of Environmental Protection] have created an atmosphere of permissiveness related to coal and gas operations," said Evan Hansen, president of Downstream Strategies located in Morgantown, West Virginia. "It seems like their intention is to make permitting as cheap and easy and painless as possible and this is what was going to happen eventually."

State officials have said Freedom Industries potentially fell into one or more 'loopholes' because the chemical was not classified as a hazardous material, the Charleston Daily Mail [reported](#). Thus, they may not have been required to "follow a state law requiring industrial facilities to report an emergency within 15 minutes."

However, Freedom Industries "gave the West Virginia Division of Homeland Security and Emergency Management a list of chemicals with 'immediate (acute) hazards,' which is required annually under federal law. MCHM was among them," [according](#) to the Wall Street Journal.

Considering the language in the company's industrial stormwater permit, awarded by the Department of Environmental Protection, Hansen said he's curious how DEP officials could think there's a loophole. "The industrial stormwater permit appears to clearly require Freedom Industries to immediately report noncompliance that may endanger health or the environment. It seems pretty black and white to me."

Indeed, the [permit](#) specifically states that "The permittee shall report any noncompliance which may endanger health or the environment immediately after becoming aware of the circumstances by using the Agency's designated spill alert telephone number."

The [timeline](#) of Thursday's events, however, shows that the company flouted that procedure. Residents reportedly began complaining of a strong smell around 7 or 8 a.m. Freedom Industries' president Gary Southern says employees discovered the leak around 10:30 a.m. and apparently did not alert authorities. DEP officials arrived at the site at 11:05 a.m. and Freedom Industries finally reported the spill to the hotline at 12:05 p.m.

Both the stormwater protection permit and Clean Water Act permit held by Freedom Industries have multiple requirements related to safety and potential spills, namely requiring Freedom to identify potential risks, considering the toxicity of chemicals and their use of the Elk River, and potentially significant pollution sources, including outdoor storage. Further, they were required to ensure employees were trained in spill response and that

necessary clean up equipment was available to all personnel.

Enforcing these requirements, says Hansen, was the responsibility of the DEP. But in a state whose economy depends heavily on the coal and chemical industries, politicians, business leaders, and residents often characterize attempts to regulate the activity of these industries as overly burdensome and an unnecessary restraint on job-creating industries.

"In his State of the State address, the governor promised he would, 'never back down from the EPA because of its misguided policies on coal,' Ken Ward Jr. writes in the Charleston Gazette.

"I hear some of the mantra in the Legislature from time to time that government needs to get out of the way, and too much regulation and that kind of stuff," state Senate President Jeff Kessler told the Charleston Daily Mail. "But boy, I bet you there are 300,000 people in the state who wish we had more regulation of the industry."

Because the facility was only storing chemicals, not producing anything, inspections are not required under West Virginia law. This particular facility hadn't been inspected by state or federal authorities since 1991.

Three years ago, a team of experts with the U.S. Chemical Safety Board "urged the state of West Virginia to help the Kanawha Valley create a new program to prevent hazardous chemical accidents," reported Ward. "Since then, the proposal has gone nowhere."

While the Charleston spill stands out due to its magnitude, Hansen said the DEP's apparent reluctance to enforce regulations against the fossil fuel industry is nothing new. As evidence, he points to a recent controversy in Morgantown regarding a Marcellus gas well that was proposed for just upstream of the water intake facility serving the city of Morgantown and the surrounding county. The state DEP "just wanted to issue that permit and it was only by getting our local water utility involved that they were able to negotiate some additional protections," Hansen said. The DEP reluctantly agreed to additional protections in the permit, but had no intention of rejecting the permit. "I think the DEP is afraid to set a precedent for stricter enforcement, stricter control of Marcellus drilling operations."

"What I know the governor has the power to do is set an entirely different tone about how he regulates coal and gas industry operations," said Hansen. "He can make it clear that environmental protection is an actual priority for the administration."

While Gov. Tomblin has called the leak "unacceptable" and opened the door for potential

changes in state oversight law, Ward [notes](#) that the governor continues to emphasize that the spill was not a coal industry incident. "This was not a coal company, this was a chemical supplier, where the leak occurred," Tomblin said at a press conference on Sunday. "As far as I know there was no coal company within miles."

UPDATE This post has been updated to correct a quote from Evan Hansen.

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