

News

SHARE

PRINT | COMMENTS (5) | EMAIL | LETTER TO EDITOR | SIZE

January 25, 2014

g+1 3

Recommend 265

Tweet 45

### Freedom tanks not 'unregulated,' as Tomblin said

DEP chief calls site 'under-regulated'



This photo shows the boom deployed to control the Crude MCHM chemical leak from the Freedom Industries tank farm into the Elk River. (U.S. Environmental Protection Agency photo)

By [Ken Ward Jr.](#)

CHARLESTON, W.Va. -- Last Monday, Gov. Earl Ray Tomblin stood behind a podium in the West Virginia Capitol and announced his plan for a new program to prevent chemical spills from what

### Get Daily Headlines by E-Mail



Sign Up

Sign up for the latest news delivered to your inbox each morning.

Advertisement - Your ad here



Links to great West Virginia getaways!

### News Videos

he called "unregulated" above-ground storage tanks.

Tomblin said his proposal would give the state Department of Environmental Protection "the tools necessary" to prevent another chemical leak like the one from the Freedom Industries tank farm, which contaminated the Elk River and the drinking water supply for 300,000 West Virginians.

"It was not regulated, and this bill will address that," the governor said later to a small group of reporters.

When asked how he could call the Freedom



AP Photo

Freedom Industries' Etowah River Terminal tank farm -- along the Elk River -- where the Jan. 9 leak occurred.

[More media](#)

Industries tank farm -- which held a water-pollution permit approved by the DEP -- "unregulated," the governor had agency Secretary Randy Huffman explain. Huffman carefully clarified what the governor had said.

"Unregulated is probably not the right word," Huffman said. "It was under-regulated."

Policymakers are beginning to respond to the leak of the chemical Crude MCHM into the Elk River, just upstream from the West Virginia American Water regional intake.

Some confusion continues, though, about exactly what authority the DEP had over the facility. A front-page New York Times story, for example, paraphrased Huffman as saying that, "because the facility stored chemicals, but did not produce them, his department had no responsibility for

## Most Recent

- [Ex-Salem city manager appeals convictions](#) 55 min. ago
- [Two state hotels receive AAA Four Diamond Award](#) 58 min. ago
- [State museum to exhibit cameo glass artist's work](#) 9:03 am
- [Boone County drug courts to hold graduation](#) 9:01 am
- [Two Bluefields to celebrate 90th wedding anniversary](#) 8:59 am
- [SAVE! with Home Delivery](#)

Advertiser

Advertisement - [Your ad here](#)

regulating it."

However, in several interviews with the Sunday Gazette-Mail, Huffman and other DEP officials have made it clear -- as Huffman did in his appearance with the governor -- that Freedom Industries was absolutely not unregulated.

"I don't think of them as being unregulated, but as being under-regulated," Huffman said in one discussion.

As debates over future actions move through the Statehouse, the distinction is important. Environmental groups and regulatory experts say that no matter what rules govern Freedom Industries or any other company, those rules mean little unless the DEP becomes more aggressive with inspections and enforcement actions.

"[The] DEP has long been influenced by anti-regulation and pro-industry political pressure," said Pat McGinley, an environmental law professor at West Virginia University's College of Law. "West Virginians can't expect any new law, alone, to change this deep-rooted culture."

Even some political leaders are starting to agree that West Virginia needs to take a closer look at how its political culture influences the DEP's enforcement actions.

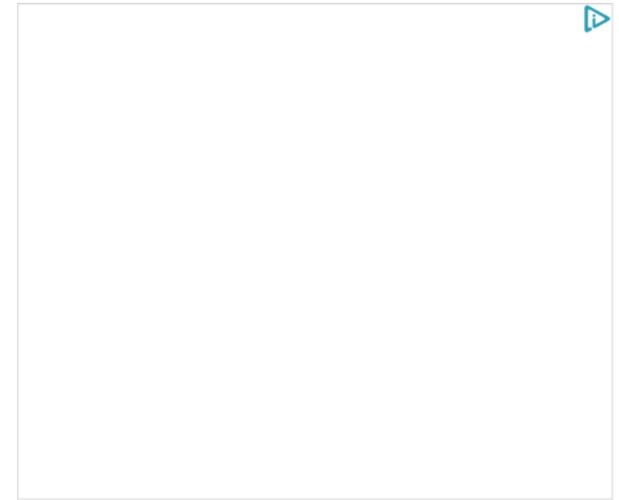
"All the rules on the books won't work if there isn't adequate enforcement," said state Senate President Jeff Kessler, D-Marshall.

### **'They just store things'**

In the days immediately after the Elk River leak, DEP officials said an initial review showed that they had not inspected the Elk River tank farm since at least 1991, when it was owned by a different company and was used for a different purpose.

After a more comprehensive review of their records, DEP officials have revealed a series of site visits by inspectors from the agency's Division of Air Quality. Air inspectors were responding to odor complaints from residents -- some of whom reported the now-familiar black-licorice smell of Crude MCHM -- and examined if the site needed a state air-pollution permit. So far, DEP records indicate the agency concluded that the odor complaints were unfounded, and that no new permits were necessary.

"They don't manufacture anything and they don't process anything," the DEP's Huffman said on



## Top Stories

---

- Icy roads close Interstate 77 near Sissonville
- Life sentence sought for repeat offender
- Workers who lost income can apply for relief
- Statehouse Beat: Spill fills legislative void
- Upshur commission seeks dismissal of election suit

Advertisement - [Your ad here](#)



Jan. 10. "They just store things."

Last week, though, Freedom revealed that it was mixing two chemicals to make a material it called "PPH, stripped," and, in turn, mixing that material with Crude MCHM. Twelve days after the initial leak, Freedom revealed those facts when it disclosed that PPH also leaked into the Elk.

The DEP has not responded to a question about whether mixing those chemicals together should have required an agency permit or not.

What agency officials have disclosed is that Freedom Industries asked for and received DEP approval for registration under a "general permit" program covering storm-water-runoff pollution from industrial facilities.

During a legislative committee meeting Thursday, several lawmakers quizzed Huffman about this permit and what it did -- and didn't -- require of the DEP.

Huffman explained that the permit clearly gave the DEP authority to inspect the site. Then again, Huffman told lawmakers, "I have authority to enter onto any piece of ground in the state of West Virginia, whether it has a permit or not."

The site's storm-water permit also contained three key provisions that are important to remember in the context of the Elk River leak: It mandates that the company submit a storm-water-pollution prevention plan and a groundwater-pollution prevention plan, and it requires that the company immediately report any spills.

### **'[The] DEP issues these permits'**

Early last week, the West Virginia Rivers Coalition and the consulting firm Downstream Strategies issued a report on the leak that pointed a finger at the DEP for not doing enough to use those tools to prevent such an incident.

"[The] DEP issues these permits, and it is [the] DEP's responsibility to enforce these permits," said Evan Hansen, president of Downstream Strategies and co-author of the report.

Hansen said that proper pollution-prevention plans would have required the company to explain the measures it had in place to contain the materials it handled, prevent spills and respond to any spills that did occur. However, Hansen's report indicated that those plans don't appear to have ever been filed with the DEP, and agency officials have not disputed that assessment.

Huffman doesn't dispute that some provisions of the storm-water permit could have helped. He pointed to the requirement to immediately report the leak, which Freedom Industries didn't follow, and the mandate to immediately take steps to adequately contain any spills, something else DEP inspectors say the company ignored.

If those things had been done, Huffman told the Senate Judiciary Committee, they "very possibly could have prevented this from entering the river."

DEP officials, though, also have tried to downplay any connection between the storm-water permit and the leak. Huffman said, for example, that the permit alone doesn't give his agency authority to set specific standards for the integrity of above-ground storage tanks -- something that legislation moving through the Senate would do.

Environmental groups don't necessarily disagree that more specific standards for such tanks are needed. They just think that a much broader approach, including a rethinking of the state's common jobs-versus-the-environment rhetoric is what's needed.

The Rivers Coalition-Downstream Strategies report, for example, urges the Legislature to require the DEP to inspect all facilities across the state that have any kind of water-pollution permit -- something the public might be surprised to learn isn't already mandated. And, the report recommends that the DEP no longer be allowed to grant storm-water permits to industrial facilities near drinking-water intakes through the much-less rigorous "general" permitting program.

General permits "are intended to be reserved for categories of activities with minimal environmental impact and are used to make permitting more efficient," the Rivers Coalition-Downstream Strategies report said.

Under this program, the DEP issues what it calls a "general permit" that contains basic requirements for controlling storm-water pollution. Companies then register with the DEP under the program, promising on paper that they'll comply with its basic requirements. Frequently, there is little follow-up by the DEP.

"Our presence at this or any of these sites is reactive in nature," Huffman said in a Jan. 20 interview.

"This incident could have been prevented or minimized just with the regulations we have in place," Huffman said, "but it just didn't click in anybody's mind that this was a concern."

### **'This is a different kind of animal'**

Pat Parenteau, an environmental law professor at the Vermont Law School, said that's part of the problem with the DEP allowing such a site to be covered by a general permit program.

"It's no surprise that there was weak follow-up and enforcement on a general permit," Parenteau said. "That program isn't really designed for facilities like this. This is a different kind of animal."

Parenteau said the Elk River leak also is symptomatic of what happens when agencies have media-specific inspection procedures, rather than combined efforts that include things like air and water together.

"You have this sort of tunnel-vision approach," Parenteau said. "Media-specific inspections often miss violations of other sorts of media. It doesn't surprise me that the air-quality guys would go out there and pay no attention to spill prevention of any kind. That really isn't their job."

Johnnie Banks, a supervising investigator with the U.S. Chemical Safety Board, told lawmakers Friday that it's easy for companies and for regulators to, over time, ignore things like the odors residents complained were coming from Freedom Industries.

Often in industrial settings, Banks said, odors can become "normalized," so that workers don't really notice them. The same thing can happen with warning alarms about leaks. If little leaks set off alarms too often, workers can grow to ignore them as "nuisance alarms."

"If it becomes part of the lay of the land," Banks said in a later interview, "people get used to it."

In its report on the Upper Big Branch Mine disaster, a team led by longtime mine-safety advocate Davitt McAteer made the same point.

"'Normalization of deviance' refers to a gradual process through which unacceptable practices or standards become acceptable," the McAteer team wrote. "As the deviant behavior is repeated without catastrophic results, it becomes the social norm for the organization. Individuals who challenge the norm -- from within the organization or outside it -- are considered nuisances or even threats."

### **'High' susceptibility to contamination**

The DEP isn't the only state agency whose inactions could have played a role in the Jan. 9 leak at Freedom Industries. In their report on the incident, the Rivers Coalition and Downstream Strategies discussed the Department of Health and Human Resources' role.

In April 2002, the DHHR's Bureau for Public Health assessed potential threats to the Elk River water supply that West Virginia American Water uses to provide drinking water to 300,000 people

in nine counties.

Agency officials ranked the Elk's water as having a "high" susceptibility to potential contamination from a variety of industrial, commercial, municipal and agricultural sources. The report lists only two sources by name: The Allegheny Power Co. and Pennzoil Manufacturing, which previously operated the tank farm now owned by Freedom Industries.

The Rivers Coalition/Downstream Strategies report notes that the DHHR assessment is 12 years old "and out of date."

"Since 2002, the Pennzoil site has changed ownership . . . the types of materials stored at the site have changed as well," the report said. "Effective management of the risk of source water contamination required accurate, up-to-date information about potential hazards."

The DHHR assessment notes that the "next step" in protecting the Elk's drinking-water supply is to prepare a plan for doing so. However, the Rivers Coalition/Downstream Strategies report says, no such protection plan appears to have ever been written -- by the water company, by state officials or by local government planners.

Laura Jordan, a spokeswoman West Virginia American, said the water company has the 2002 assessment on file and, "I am not aware of any more-recent report."

Likewise, DHHR spokeswoman Allison Adler said the 2002 assessment is "the most current information" her agency has.

Jennifer Sayre, Kanawha County manager, said her staff searched county computer files and could not locate a copy of the 2002 Elk River assessment, or any memos regarding it.

*Reach Ken Ward Jr. at [kw...@wvgazette.com](mailto:kw...@wvgazette.com) or 304-348-1702.*

**[More Articles in News](#)**