



## CleanLaw 78

### *Quick Take: Legal Implications of the East Palestine Train Derailment with Sara Dewey and Hannah Perls March 7, 2023*

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Hannah Perls: Welcome to CleanLaw from the Environmental and Energy Law Program at Harvard Law School. I'm Hannah Perls, and in today's Quick Take episode, I'll be speaking to Senior Staff Attorney Sara Dewey about the status and legal implications of the train derailment in East Palestine, Ohio.

So this is a really complicated issue with significant human impacts and a multifaceted government response. Sara, what aspects of this issue are you focused on?

Sara Dewey: Hi, Hannah. It's good to be with you. Yes, this train derailment is an incredibly difficult situation for residents of East Palestine where the derailment took place and it's caused health and safety concerns across the region. And as we've seen in media coverage, there are many moving pieces to the government response as well as private lawsuits. It's rapidly evolving and a really politically charged situation.

So given EELP's focus on federal environmental law, in this Quick Take, we'll talk mostly about EPA's legal authority and the cleanup order that it issued. And we'll also look ahead to federal reforms that might arise in response to the derailment.

Hannah: Gotcha. And before we dive into that, can you just provide a quick overview of the derailment and the chemicals that were released?

Sara: Sure. On February 3rd, a Norfolk Southern Freight train that was carrying hazardous chemicals including vinyl chloride derailed in East Palestine, Ohio, which is under a mile from the Pennsylvania border. There were homes very close to the derailment site. The train was 149 cars long, which is nearly a mile and a half. 20 of the cars contained hazardous materials. 11 of the cars carrying these chemicals derailed and they ignited fires that damaged 12 of the non-derailed cars as well. At the time of the derailment and after, hazardous chemicals carried on the train were released into the air and the soil and water. Three days after the derailment, emergency responders conducted a controlled vent and burn for five cars containing vinyl chloride to prevent an explosion.

Hannah: Do we know at this stage what caused the derailment?

Sara: The National Transportation Safety Board, which is the independent government agency investigating the cause of the derailment, has issued preliminary findings that suggest



that a wheel bearing on one of the freight cars was overheating, which may have led to the failure of the car's axle. Axle failure is a pretty common cause of freight train derailments.

Hannah: So now that it's been a little over a month since that derailment, what do we know now about the human health and environmental impacts?

Sara: Well, the hazardous substances in the rail cars are known to pose a range of health and environmental threats. Several are known carcinogens and others can cause birth defects, lung damage, and inflammatory reactions. Some residents are currently reporting respiratory issues, rashes and other ailments. Though of course, we can't know the long-term effects of this accident on residents at this point. There's also considerable environmental damage including over 40,000 dead fish. And there's environmental monitoring now in place, including air, soil and water testing, which is being conducted by the Environmental Protection Agency, EPA, and the state of Ohio.

Hannah: So you just listed a host of really harmful effects of these chemicals. I think a lot of folks are confused as to how these damages were allowed to occur. And so are there special safety regulations for trains carrying these types of hazardous materials?

Sara: Yes. So there are two types of high-risk trains that are required to take special safety measures, but the derailed train in East Palestine was not considered a high-risk train under either of these categories despite carrying 20 cars of hazardous materials. So I'll briefly describe these two types of high-risk trains.

The first are high hazard flammable trains, which is a federal designation for trains that haul at least 20 consecutive cars or 35 total of a certain class of flammable liquid like crude oil. The Norfolk Southern train didn't meet this designation because only three of its cars carried this class of flammable liquids.

And the second designation, which is called Key Trains, is a voluntary safety standard developed by the railroad industry, and it applies to trains hauling 20 or more cars of any combination of hazardous materials. The East Palestine train didn't meet this designation because three of the cars carrying hazardous waste contained only residue and therefore didn't count as cars containing hazardous materials under the standard.

So as you can imagine in light of this, there have been calls for safety reforms, which we can discuss a bit later.

Hannah: And it also sounds like there's a lot of different government actors here. You've mentioned the Department of Transportation, you've mentioned EPA, and of course the state of Ohio. So can you talk a bit about who's in charge of the response here and the different roles that federal agencies in particular play in the response effort?



Sara:

Yes, absolutely. And it is complicated. The federal government has coordinated a multi-agency response in collaboration with state and local officials and there are agencies with different jurisdictions and different roles at play.

In terms of regulating transportation of these hazardous chemicals, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration issues regulations for the safe packaging and movement of hazardous materials. Then the Federal Railway Administration implements and enforces those standards on rail lines, and it's currently working to determine whether Norfolk Southern was in compliance with rail safety standards.

In terms of understanding the causes of the accident, the National Transportation Safety Board mentioned earlier is leading the investigation into the causes of the derailment.

And then for the cleanup itself, the EPA is in the lead. It issued an administrative order requiring Norfolk Southern to conduct cleanup and it's coordinating oversight of the cleanup process. EPA is also monitoring air quality and screening and cleaning homes in the area.

I'll also mention that the Federal Emergency Management Agency, FEMA, and the Centers for Disease Control and Prevention are supporting these efforts. And of course, this is all being done in coordination with Ohio and Pennsylvania state agencies and local authorities. So there are a lot of folks working to coordinate a response.

Hannah:

Wow. So yes, a lot of cooks in the kitchen. I do want to focus on that last order, you mentioned from EPA. Can you talk a bit more about EPA's cleanup order and what it specifically requires Norfolk Southern to do?

Sara:

Yes. On February 21st, about two weeks after the derailment, EPA issued an order requiring Norfolk Southern to conduct the cleanup. EPA's response is being organized under a law called the Comprehensive Environmental Response Compensation and Liability Act, CERCLA, which is also known as the Superfund Law. It's a law that creates a framework to clean up certain types of contaminated sites and to hold polluters liable for cleanup costs. What's key here is that CERCLA empowers EPA to issue the cleanup order for the derailment site and to hold it accountable for that cleanup. While Norfolk Southern had already agreed to pay for cleanup costs, EPA's order gives legal teeth to that agreement. So for example, CERCLA authorizes fines of up to \$25,000 per day for failure to comply with a cleanup order. And if the railroad doesn't clean up, EPA can do the cleanup and charge them triple the cost.

Under EPA's order, Norfolk Southern has to identify and clean up contaminated soil and water resources. It needs to attend and participate in public meetings and post information online. It needs to submit a work plan to EPA that outlines all the steps for cleaning up the environmental damage at the site. And if the company fails to complete



any actions as the EPA has ordered, then the agency can immediately step in. The railroad also has to pay for EPA's costs for work performed under the order.

So far, Norfolk Southern has begun removing water, liquid waste, and soil from the site. So the cleanup is underway, though of course, residents are continuing to worry about the lasting impacts of the derailment and there's a long road ahead.

Hannah: Speaking of the long road ahead, and this is my last question for you, are there other federal actions or litigation that we should be on the lookout for in response to the derailment?

Sara: Yes. To start, the Department of Transportation will be considering steps to improve rail safety. In the near term, their response includes targeted track inspections and improving how information about hazardous trains is shared with local communities. The agency will also consider possible rulemakings. So for example, restoring a breaking requirement put in place in 2015 that required railroads to install more responsive breaking systems on certain trains carrying hazardous materials. Those rules were criticized as too expensive by the rail industry and the Trump administration rolled them back. The Trump administration also rolled back an Obama-era proposal requiring two-person crews, and it allowed expanded transport of liquid natural gas by rail, which the Biden administration has paused. Congress has also been engaged here, and we've seen bipartisan legislation introduced in the Senate to improve rail safety. A bill introduced in the House would expand the definition of high hazard flammable trains, and I suspect we'll see more legislation coming along.

We're also seeing state and private legal actions. The Ohio and Pennsylvania Attorneys General are reviewing the matter and could bring criminal charges, and several class action lawsuits have already been filed on behalf of residents and local businesses. This is certainly just the beginning and we'll be keeping an eye on the developments to come.

Hannah: Great. Well, I think we'll leave it there. Sara, thank you so much for walking us through the latest on the train derailment in East Palestine.

Sara: It was great to talk to you, Hannah, and we'll be continuing to track the recovery and the response efforts ahead.

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