

The Aftermath of the Chemical Spill in East Palestine

Shortly before 9 p.m. on Feb. 3, Norfolk Southern freight train 32N carrying both ordinary and hazardous cargo approached East Palestine, Ohio. East Palestine is located less than one mile west of the Pennsylvania border and is home to approximately 4,700 people. Although the train crew had yet to declare an emergency, an electronic sensor alerted them to an overheated wheel bearing. The crew was slowing the train when 38 rail cars derailed, spilling some of their contents to the surrounding land and waterways.

Norfolk Southern promptly notified government agencies of the derailment. Eleven of the derailed cars contained hazardous materials posing a threat of serious injuries to human health and the environment. Worse still, a fire spread, damaging 12 other rail cars and contributing additional releases.

The response to the spill proved difficult to implement. Over the next days, firefighters applied large quantities of firefighting materials to extinguish the fire. Pollutants from the train cargo and firefighting foams flowed into the surrounding creeks, tributaries to the Ohio River. Responders discovered dead fish and wildlife.

Five of the derailed cars contained tanks of vinyl chloride, a known carcinogen. The temperature in the tanks rose posing a risk of explosion. The governors of Ohio and Pennsylvania ordered residents located within one mile of the derailment site to evacuate, and on Feb. 6, enlarged the evacuation area to extend up to two miles due to the threat of explosion. On Feb. 6, Norfolk Southern emptied the tanks and burned the contents in a trench. The deliberate burning of vinyl chloride created airborne contaminants including dioxins that disbursed to downwind locations. The evacuation order terminated on Feb. 8.

As a precaution, several public water systems with intakes on the Ohio River downstream from the accident site temporarily ceased withdrawals. Yet despite the public concern, samples of water, soils and air analyzed by government agencies and Norfolk Southern showed contaminant concentrations below applicable government standards.

The Ohio EPA led the initial government response and worked closely with the U.S. EPA, other government agencies and Norfolk Southern. Many residents distrusted the sampling results and remained fearful of health effects. Some residents complained of acute health symptoms, and homeowners and businesses

asserted economic losses. In the midst of the turmoil, certain members of Congress and the public criticized the absence of federal leadership. Soon thereafter, the EPA took command and government enforcement proceeded in earnest.

On Feb. 21, the EPA issued a unilateral order under Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) requiring Norfolk Southern to, among other things, monitor and sample indoor air in nearby structures, delineate the extent of contamination, remediate contaminated soils, surface waters, sediments and groundwater, and dispose of contaminated materials at EPA-approved facilities. The EPA's Section 106 authority extends to the release of any pollutant or contaminant that may present an imminent and substantial danger to the public health or welfare, regardless of whether the site is placed on the EPA's national priority list of the most hazardous sites. Here, the EPA's action compelled Norfolk Southern to undertake and obtain EPA approval for its response actions.

On March 14, acting through its Attorney General, Ohio commenced an action against Norfolk Southern in the U.S. District Court for the Northern District of Ohio. Ohio asserted federal and state claims to compel Norfolk Southern to perform the remediation in a manner consistent with the EPA's order, reimburse Ohio for its past and future response costs, redress injuries to Ohio's natural resources and pay damages.

Thereafter, on March 30, the United States commenced a lawsuit against Norfolk Southern in the same court. The complaint requests civil penalties under Section 309 of the Clean Water Act (CWA) for the discharge of pollutants into waters of the United States in violation of Section 301 of the CWA, and for the discharge of oil or hazardous substances into the waters of the United States in violation of Section 311 of the CWA. The complaint also seeks the recovery of the United States' response costs pursuant to Section 107 of CERCLA. These costs likely include the costs of sampling and monitoring and the EPA's costs in overseeing Norfolk Southern's work. Pennsylvania has not remained on the sidelines. Rather, it negotiated an agreement with Norfolk Southern to compensate Pennsylvania's firefighters and first responders, and is pursuing relief for residents and businesses affected by the spill. Norfolk Southern quickly reimbursed \$1 million to Pennsylvania responders.

Meanwhile, businesses and residents in Ohio and Pennsylvania claiming injuries from the spill commenced over 30 class action lawsuits for personal injury, property damage, medical monitoring and other relief. Allegations that Norfolk Southern historically placed profit over safety by reducing staff and equipment inspections heighten the company's challenges in restoring its tarnished reputation. Consolidation of these suits before U.S. District Judge Benita Pearson of the Northern District of Ohio is anticipated.

A prudent crisis management approach for Norfolk Southern would involve emphasizing its apology for the spill and expressing empathy for the affected community. It would also include an explanation of the cause of the spill, a candid evaluation of risk to nearby residents, and a commitment to clean up the site and compensate injured residents and businesses for their actual injuries. Timely communication to the public of the remediation plan details and Norfolk Southern's progress in implementing the remedy would help instill trust and mend the company's relationship with the public.

Yet faced with lawsuits by government and private parties, company officials have proceeded cautiously. Norfolk Southern accepted responsibility for the spill and cleanup, and paid costs incurred by evacuated residents. But the extent to which it will voluntarily satisfy other claims of residents and businesses remains unclear. Prompt resolution of the private party lawsuits would benefit Norfolk Southern.

A principal issue in the class action lawsuits is the extent of injury to plaintiffs from the spill. Experts evaluating the existence and cause of alleged personal injury and property damage are likely to disagree over whether the timing and scope of sampling produced results representative of environmental conditions and whether the risk posed by the concentrations detected is severe. For example, experts are likely to debate the risk posed by exposure to concentrations of dioxins found to date that are below cleanup levels employed by the EPA and Ohio, but are higher than standards adopted in other states. Similarly, experts may disagree whether plaintiffs located far from the spill site have suffered any injury. One potential resolution is for Norfolk Southern to establish a compensation fund to be distributed to plaintiff class members proffering sufficient proof.

Resolving the pending government claims requires a multifaceted approach. The CERCLA unilateral order requires Norfolk Southern to perform the cleanup, and it is doing so. The amount of civil penalties will depend on factors such as the gravity of the harm, the economic benefit to Norfolk Southern from failing to institute controls that may have prevented the spill and its cooperation. Federal policies allow a defendant to partially offset a civil penalty by performing supplemental environmental projects (SEPs) that benefit the community and have a nexus with the legal violation. Performing SEPs may benefit the environment and help restore a company's relationship with the community.

Particularly when a spill is highly publicized, the possibility of criminal prosecution looms large. Here, the discharge was accidental and the sampling results have not shown significant harm. Accepting responsibility for the spill, performing the cleanup, showing the absence of significant harm, resolving claims by private parties, undertaking SEPs, and implementing operational changes to minimize the likelihood of future spills are among the actions that may reduce the likelihood of criminal prosecution. A cooperative, community-based approach may serve Norfolk Southern well.

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