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COMMONWEALTH OF PENNSYLVANIA

Sent via email to pubcomment-ees.enrd@usdoj.gov.

August 2, 2024

Assistant Attorney General
US DOJ – ENRD
PO Box 7611
Washington, DC 20044-7611

RE: Commonwealth of Pennsylvania’s comments on the United States and Norfolk Southern Railroad Settlement Agreement for the East Palestine Train Derailment; 89 Federal Register 50635 (June 14, 2024); *The United States of America v. Norfolk Southern Railway Company, et al.*, D.J. Ref. No. 90-11-3-12792.

To Assistant Attorney General, Environmental and Natural Resources Division:

The Commonwealth of Pennsylvania appreciates this opportunity to submit the following comments on the U.S. Department of Justice’s (“US DOJ”) proposed consent decree with Norfolk Southern Railroad (“NSR”) for the East Palestine train derailment as per the notice of comment period provided at 89 Federal Register 50635 (June 14, 2024).¹

The Commonwealth commends the US DOJ for taking a meaningful step towards providing relief for individuals affected by the February 3, 2023 derailment and by NSR’s troubling response to that derailment. We particularly applaud the rail safety provisions included in the decree aimed at addressing safety issues, including the failure to identify failing wheel bearings; delayed transmission of train consist information to first responders; use of tank cars with documented poor derailment performance; the failed communication and decision-making process leading up to the deliberate breach of five tank cars containing vinyl chloride monomer; and the assessing of a large penalty for the violations of the law. Strong rail safety measures are an important step to avoiding similarly devastating derailments from recurring.

Despite those significant aspects of the agreements, the Commonwealth remains concerned that the agreement does too little to protect the health of our residents and our public natural resources generally and specifically by: 1. failing to address health care treatment costs for present or future adverse health impacts related to the toxic plumes of contaminants that filled our air following the derailment and the vent and burn; 2. establishing an inappropriately limited

¹ The proposed consent decree is available at <https://www.justice.gov/enrd/consent-decrees>.

range of applicability of the decree’s health and environmental monitoring provisions, thus precluding many impacted Pennsylvania residents from coverage; and 3. failing to incorporate recommendations made by the National Transportation Safety Board (“NTSB”) in the NTSB Final Report on the derailment, dated June 25, 2024.²

As a result, the Commonwealth submits the following comments regarding issues important to Pennsylvania which NSR needs to address.

Background of the Agreement

The proposed consent decree settles claims brought by the United States under section 309 and 311 of the Clean Water Act, 42 U.S.C. §§ 1311, 1321, and sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9607, 9613, against Norfolk Southern Railway Company and Norfolk Southern Corporation related to the February 3, 2023 train derailment in East Palestine, Ohio. The proposed consent decree would require Norfolk Southern: (i) to reimburse all CERCLA and CWA response costs incurred by the United States; (ii) pay a civil penalty of \$15 million for violating CWA §§ 301 and 311; (iii) establish a \$25 million community health monitoring program for qualifying members of the public impacted by the derailment; (iv) implement an array of specified rail safety procedures; (v) develop and adopt programs for coordination of rail track restoration and vent and burn procedures; (vi) implement a \$6 million local waterways remediation plan; (vii) pay \$175,000 for natural resource damages; and (viii) implement compliance and future monitoring requirements in the various work plans approved under EPA's Unilateral Administrative Orders and CWA Order.

Specific Concerns

1. Payment of health care treatment costs should be required.

The US DOJ proposed consent decree does not include a requirement that NSR pay for health care treatment costs of those individuals for whom derailment related exposures are substantially likely to be a significant factor in aggravating, contributing to or causing an individual’s health condition. Any such costs should be borne by NSR – not by the innocent victims.

Many of the wide array of contaminants released into the environment immediately after the derailment and resulting from the vent and burn of five tank cars were extremely hazardous. These hazardous materials included at least 6 types of Class 3 flammable liquids, combustible liquids and Division 2 flammable gases. The fire resulting from the derailment ignited lading from tank cars containing benzene, butyl acrylates, ethylene glycol monobutyl ether and other hazardous contaminants.³ One class of those contaminants includes vinyl chloride monomers (“VCM”).

² National Transportation Safety Board’s Railroad Investigation Report; NTSB/RIR-24-05, June 25, 2024.

³ A detailed account of the hazardous materials involved in the derailment is provided in Section 1.8 of the National Transportation Safety Board’s (“NTSB”) Railroad Investigation Report; NTSB/RIR-24-05, June 25, 2024.

Five tank cars contained VCM, known human carcinogens. In the days after the derailment, these tank cars were exposed to fires and released VCM from pressure relief devices. Some of the releases were “energetic.”⁴ When five tank cars were intentionally breached, huge black smoke plumes resulted. The air pathway of those huge plumes covered significant portions of western Pennsylvania, up to a 20 mile distance from the site. (Please see the attached soot deposition map.) VCM were released into the atmosphere and VCM and its combustion products traveled through Pennsylvania’s air where they were deposited as soot.

The health risks associated with inhalation exposure to VCM are well documented and include increased risk of a rare form of liver cancer as well as primary liver cancer, brain and lung cancers, lymphoma and several forms of leukemia.⁵ In addition to cancers, there are other adverse health effects from VCM exposure including liver damage and adverse reproductive and development effects. The cumulative risks from multiple contaminant exposures add to these risks.

Cancers such as those caused by exposure to VCM do not occur immediately after exposure; they usually take many years up to several decades to manifest clinically. Because of the long latency periods for cancers, the individuals exposed to the hazardous contaminants released during and after the derailment may not have health conditions related to that exposure for a long period. Such cancers are obviously devastating to the impacted individuals and families. Additionally, health care costs of cancer treatment can be financially devastating. Any such costs should be borne by NSR – not by the innocent victims.

NSR should be required to establish a health care treatment fund to cover health care costs for Pennsylvania residents and workers for whom derailment related exposures are substantially likely to be a significant factor in aggravating, contributing to or causing an individual’s adverse health condition. There are various mechanisms for establishing such a fund and for ensuring the equitable distribution of the fund. Such funds have been successful in reimbursing health care treatment costs in the past for environmental disasters and provide a road map for mechanisms to pay for such costs here.

Further and specifically, Pennsylvania residents and workers living/working within a 20 mile radius of the derailment should be eligible to participate in NSR coverage of relevant health care treatment costs.

2. Stronger monitoring provisions are needed by Pennsylvania residents.

The medical monitoring provisions of the Community Health Program of the proposed consent decree apply to “qualified individuals” as defined in paragraph 50.b. That definition is limited in part to individuals who resided within 2 miles of the derailment area during a specific time period.

⁴ *Id.*, at page 17.

⁵ See U.S. EPA Snapshot, Vinyl Chloride, at <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/vinyl-chloride.pdf>. See also Agency for Toxic Substance and Disease Registry, *Medical Management Guidelines for Vinyl Chloride*, available at <https://www.cdc.gov/TSP/MMG/MMGDetails.aspx?mmgid=278&toxid=51>.

Pennsylvania objects to the limitations of this definition. The definition of qualified individuals excludes many Pennsylvania residents who were adversely impacted by the derailment and its aftermath. As demonstrated by the attached plume soot deposition map, and stated above, the black toxic clouds traveled through large swaths of Pennsylvania where it likely deposited its dangerous soot. Pennsylvania residents in the path of those plumes and those who were otherwise adversely impacted should be covered by any NSR health monitoring requirements.

Similarly as stated above for health care treatment costs, NSR health monitoring requirements should include Pennsylvania residents and workers living/working within a 20 mile radius of the derailment.

Likewise, the environmental monitoring required under paragraph 43 to 47 must not be limited to only a 2-mile, or other limited, radius. That monitoring must be expansive enough to ensure that Pennsylvanians are receiving adequate information about the consequences of this unprecedented event. Finally, while the long-term monitoring plans under paragraphs 43 to 47 are subject to the U.S. EPA's approval, Pennsylvania Department of Environmental Protection should also have the opportunity to review and approve those plans prior to implementation.

3. NSR should be required to implement all relevant recommendations of NTSB Final Report.

The notice of the proposed US DOJ consent decree was filed prior to the June 2024 public hearing conducted by the NTSB. The notice was also filed prior to the issuance of the NTSB Final Report in July 2024.

Pennsylvania is reviewing the findings from that report and asserts that any settlement with NSR should address every relevant finding in that report. The following are a few examples of such items that may not be included in the US DOJ proposed consent decree.

The NTSB Final Report addressed the failed placards that became unreadable after the fires and explosions and thus were useless for first responders.⁶ A settlement with NSR should address the hazards created by illegible placards. NSR should immediately commence use of placards for hazardous materials identification that can survive a fire or accident.

Further, NSR should immediately be required to conduct routine inspections of wheel bearings and wheel bearing detectors on a regularly scheduled basis, followed by required interventions to fix any defects found during the inspection. As pointed out in the NTSB Final Report, one of the wheel bearings that failed during the derailment was last reconditioned in June 2011 – *thirteen years prior to the derailment*.⁷ Clearly, NSR's current inspection interval is not adequate. In addition, according to the NTSB Final Report, NSR has no way to track whether a railcar has been submerged in water deep enough that the water entered the bearings. Again, regular appropriately timed inspections could possibly catch these bearings prior to failures.

⁶ *Id.*, at page 78.

⁷ *Id.*, at page 48. Reconditioning includes disassembling, cleaning, inspecting, repairing as needed and reassembling.

Conclusion⁸

Thank you for this opportunity to express our concerns with the consent decree. We are happy to discuss any of the above with you in detail as appropriate. Please feel free to reach out to Ann Johnston, Assistant Chief Deputy Attorney General, Civil Environmental Enforcement Unit at 717-497-3678.

Sincerely,



JOSH SHAPIRO
Governor

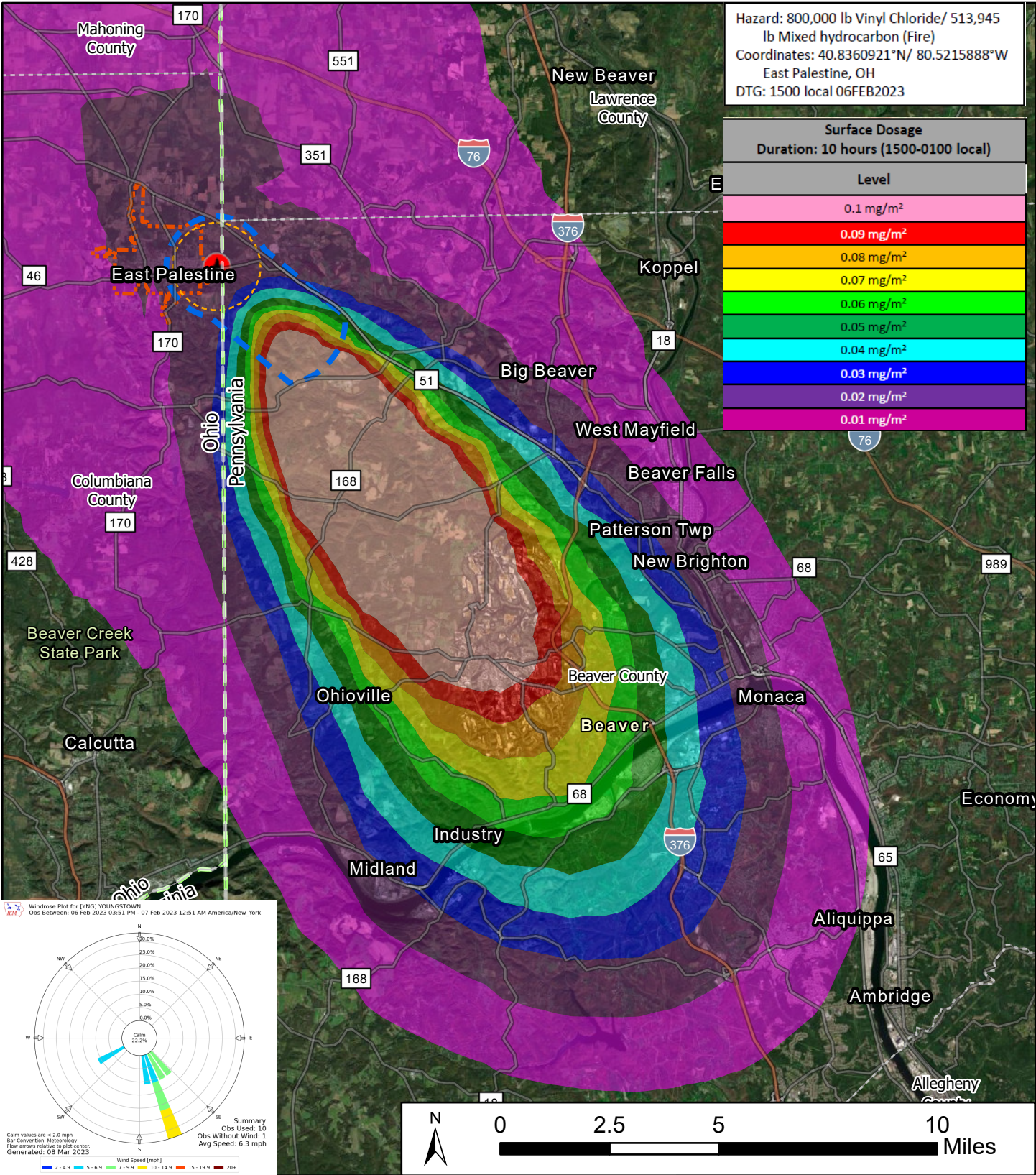


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⁸ There are additional provisions of the proposed consent decree that the Commonwealth asserts should be applicable to Pennsylvania resources. For example, any plan such as the Local Waterways Remediation Plan should explicitly include Little Beaver Creek in the southwest corner of Pennsylvania where sampling proved positive for derailment related contaminants. As currently worded, paragraph 91 of the proposed decree includes Little Beaver Creek as it fits within the term “downstream waters “ but it should be included explicitly. Furthermore, provisions such as those in the Natural Resource Damages provisions should be expanded to include reparations for Pennsylvania’s state forest lands, which lie directly in the path of the black smoke plumes resulting from the derailment and vent and burn.

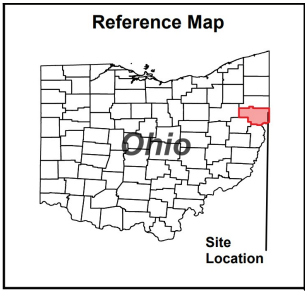
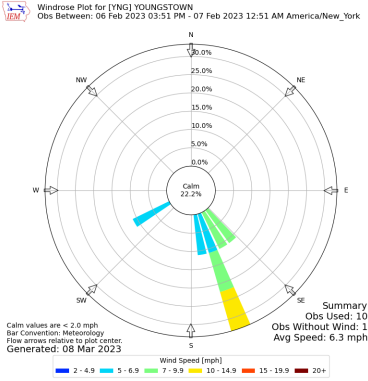
ATTACHMENT

SOOT DEPOSITION MAP



Hazard: 800,000 lb Vinyl Chloride/ 513,945 lb Mixed hydrocarbon (Fire)
 Coordinates: 40.8360921°N/ 80.5215888°W
 East Palestine, OH
 DTG: 1500 local 06FEB2023

Surface Dosage	
Duration: 10 hours (1500-0100 local)	
Level	
0.1 mg/m ²	(Pink)
0.09 mg/m ²	(Red)
0.08 mg/m ²	(Yellow)
0.07 mg/m ²	(Light Green)
0.06 mg/m ²	(Green)
0.05 mg/m ²	(Light Blue)
0.04 mg/m ²	(Blue)
0.03 mg/m ²	(Purple)
0.02 mg/m ²	(Dark Purple)
0.01 mg/m ²	(Magenta)



Legend

- East Palestine Derailment Location
- One Mile Evacuation Area
- 1x2-mi Area of Operation
- East Palestine Boundary

East Palestine, Ohio Train Derailment Response

IMAAC Model - Soot Surface Deposition over 10 hours (1500 - 0100) 2/6/23

Prepared By: U.S. EPA Region 5 GIS Unit
 Prepared For: Environmental Unit
 Date: 3/8/2023