



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

March 17, 2023

OFFICE OF
LAND AND EMERGENCY
MANAGEMENT

Re: Alert Regarding Disposal of Hazardous Waste Material from East Palestine, Ohio,
Train Derailment Site

Dear Commissioners, Directors, and Secretaries:

The U.S. Environmental Protection Agency (“EPA”) appreciates the commitment from all state environmental agencies to ensure the safe and proper treatment, storage, and disposal of solid and hazardous wastes. While recognizing that waste management in the United States remains primarily a function of state and local regulation, Congress has long provided that “the problems of waste disposal” represent “a matter national in scope and in concern,” necessitating federal action. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 1002(a)(4).

Under RCRA, EPA has authorized and provides some funding to states to carry out RCRA programs, including programs for issuing permits for the treatment, storage, and disposal of hazardous wastes. EPA also exercises federal authority under RCRA and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., to ensure the protection of human health and the environment through response to contaminated sites. EPA provides this letter to state environmental agencies to emphasize the need for continued cooperation in addressing local and national concerns for cleanup and waste management.

EPA has received information that some states may be seeking to block acceptance of out-of-state hazardous waste material from the East Palestine, Ohio, Train Derailment Site (the “Site”). If accurate, this likely would be impermissible, as states cannot ban interstate transport of waste in these circumstances. Norfolk Southern Railway Company is disposing of the waste in accordance with its obligations under a Unilateral Administrative Order (“EPA Order”) issued by EPA directing the company to conduct all necessary actions associated with the cleanup of the Site.¹ Norfolk Southern must have usual access to all available and appropriate disposal facilities to promptly complete this cleanup.

As you know, responsible parties conducting cleanups at sites send hazardous wastes to facilities permitted to receive them by EPA or a state under an authorized RCRA hazardous waste program. These facilities must also be on EPA’s list of facilities that are qualified to receive the waste materials under the EPA’s Off-Site Rule. 40 C.F.R. § 300.440. Many facilities across the country are permitted to receive and dispose of the waste Norfolk Southern is removing from the Site.

¹ See EPA Unilateral Administrative Order, *In the Matter of: East Palestine Train Derailment Site, East Palestine, Columbiana Cty, Ohio*, CERCLA Dkt No. V-W-23-C-004 (EPA Regions 3 & 5 Feb. 23, 2023).

States cannot unilaterally stop shipments of out-of-state hazardous waste material from the Site. Under the Supremacy Clause of the U.S. Constitution, state actions are preempted when they are an obstacle to executing Congress's purpose and objectives. *See Arizona v. United States*, 567 U.S. 387, 399 (2012). A state that blocks these waste shipments may be impeding Norfolk Southern's ability to comply with its obligations under CERCLA and the EPA Order. Such actions may also contravene the objectives of RCRA. State actions that purport to bar the interstate movement of hazardous waste taken at the direction of EPA frustrate Congress's purpose in enacting CERCLA and RCRA by preventing the expeditious cleanup of hazardous waste and the disposal of such waste at EPA-approved facilities. *See* 40 C.F.R. § 271.4(a); 45 Fed. Reg. 33390.

Any interference with the movement of hazardous waste material into or through another state raises concerns under the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause limits the power of states to discriminate against interstate commerce, including by curtailing the movement of articles in commerce such as the interstate movement of hazardous waste. *See, e.g., Fort Gratiot Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353, 360 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978).

Under the EPA Order, Norfolk Southern is required to provide written notice to EPA and the appropriate state environmental official in the receiving facility's state for out-of-state shipments exceeding ten cubic yards, and it must notify the state official and EPA of any major changes in shipment plans. The waste from the Site has been subject to more testing and analysis, with more characterization, than many other, similar wastes regularly accepted at facilities nationwide. States have no basis to prevent receipt of out-of-state waste from East Palestine, particularly while allowing similar wastes to be disposed in their states. This is especially so where many states routinely ship their wastes to other states for disposal. In fact, in an average month, pursuant to RCRA, there may be approximately 97,000 shipments of hazardous waste in the United States, two-thirds of which may cross state lines.

The integrity of the nation's hazardous waste management system and, therefore, public safety depends on the availability of safe disposal capacity. Similarly, the manufacturing sector cannot operate without a reliable waste management framework. All states that have appropriate and available facilities must continue to allow access to those facilities for waste treatment and disposal from the Site. The residents of East Palestine and other communities across the country should expect that states, private companies, and the federal government will work together to effectuate the swift cleanup they deserve.

We respectfully request that you notify the appropriate officials in your state of this alert, and we are available to discuss any questions you may have. Thank you for your prompt attention to these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry N. Breen", with a horizontal line extending to the right.

Barry N. Breen
Acting Assistant Administrator