



REGION 5

CHICAGO, IL 60604

VIA ELECTRONIC MAIL

Ms. Lesley Pacey
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Re: June 13, 2024 Emergency Administrative Procedure Act Petition

Dear Lesley Pacey:

This letter relates to the emergency Administrative Procedure Act (APA) Petition submitted on June 13, 2024, by the Government Accountability Project, Scott Smith, Claudia Miller, George Thompson, Nancy Alderman, Rick Tsai, and Jami Rae Wallace (together, the "Petitioners"). This letter also addresses the supplemental information provided by the Petitioners on September 23, 2024.

As discussed in more detail below, the U.S. Environmental Protection Agency needs additional information from Petitioners before the Agency can fully respond to your Petition. Please provide the requested information as soon as possible. We would also like to note that the Petition contains several factual misstatements relating to the monitoring and sampling conducted by EPA and its state and local partners. This letter corrects some key misstatements in the Petition, with the goal of ensuring that both Petitioners and the public have accurate information about the soil and other testing that has been performed in and around East Palestine to protect public health. The government's environmental testing in and around East Palestine since February 2023 has been extensive, and the government has followed strict protocols to ensure that the information provided to the public is accurate and reliable. While EPA welcomes additional research and data from independent scientists, misinformation and unreliable data are harmful and not in the public's interest.

The petition alleges that EPA prematurely advised residents that it was safe to use their gardens as normal because no government entity or contractor has tested for dioxin or other derailment-related contaminants in garden crops in East Palestine. However, as your petition acknowledges, the Ohio Department of Agriculture and the Ohio State University College of Food, Agriculture, and Environmental Sciences did test crops in East Palestine and surrounding areas to determine whether there was any contamination caused by the derailment. This project included collecting 31 plant tissue samples within a 5-mile radius of the derailment site, and analyzing them for 26 different semi-volatile

organic compounds (SVOCs) associated with the derailment.¹ Like dioxin, certain SVOCs would have been formed as combustion byproducts. None of the samples taken within 3 miles of the derailment site had SVOCs above the reportable limits.² As a result, the State of Ohio concluded that “plant materials from agricultural sites in the East Palestine area are not contaminated with semi-volatile organic compounds (SVOCs) associated with the train derailment.”³ Similar testing done by the Pennsylvania Department of Agriculture – which tested SVOCs in various crops in Pennsylvania – found no SVOCs above reportable limits.⁴ Based on these results, Pennsylvania, like Ohio, concluded that “contamination from the derailment has not spread into crops grown in the region.”⁵ The conclusions of the State of Ohio and Commonwealth of Pennsylvania were also informed by, and consistent with, the soil sampling programs overseen by EPA and the Pennsylvania Department of Environmental Protection, discussed below.

Petitioners take issue with Ohio’s agricultural testing, claiming that the results are “not applicable” to home garden crops in East Palestine because the researchers only sampled crops such as wheat, barley, alfalfa, and grasses. Petitioners fail to note that Pennsylvania tested other plants, including garlic and blueberry bushes. Regardless, if a variety of certain plants do not show any contamination from the derailment, and area soil has shown to be at typical background levels, it is reasonable to conclude that other types of plants in the same area would similarly not be contaminated. Petitioners also claim that the testing done by Ohio was not close enough to the derailment site. However, Ohio collected 14 plant samples within 3 miles of the derailment site.⁶ When choosing the sampling locations, Ohio gave special consideration to sites particularly affected by the smoke plume, as well as observations made during the vent and burn.⁷ Again, none of these samples showed higher than normal amounts of

¹ See Ohio Dept. of Agriculture & Ohio State University, *Agricultural Plant Tissue Sampling Results, East Palestine, Ohio, Columbiana County*, at 5-6 (May 16, 2023) (hereinafter, “Ohio Plant Sampling Results”), available at https://content.govdelivery.com/attachments/OHIOGOVERNOR/2023/05/16/file_attachments/2499518/East%20Palestine%20Plant%20Tissue%20Sampling%20Results%20for%20ODA%20-%202023-05-15%20%282%29.pdf.

² *Id.* A reportable limit is the lowest concentration of a chemical that can be quantitated by a laboratory. A laboratory may detect and estimate traces of the chemical below this level, or it may not be present.

³ Ohio Emergency Management Authority, *East Palestine Train Derailment: Testing & Results*, <https://ema.ohio.gov/media-publications/east-palestine-derailment-info/testing-results>.

⁴ See *Shapiro Administration Releases Results of Crop Samples Showing No Contamination on PA Farms Near Norfolk Southern Train Derailment* (June 27, 2023), <https://www.pa.gov/agencies/pda/newsroom/shapiro-administration-releases-results-of-crop-samples-showing-no-contamination-on-pa-farms-near-norfolk-southern-train-derailment-.html#:~:text=%E2%80%8BHarrisburg%2C%20PA%20%E2%80%93%20Agriculture%20Secretary,derailment%20on%20February%203%2C%202023>.

⁵ *Id.*

⁶ Ohio Plant Sampling Results, Exhibit B.

⁷ *Id.* at 4.

SVOCs. Although Ohio tested additional plants between 3 miles and 5 miles from the derailment site, the purpose of testing these plants was to determine the amount of contamination that is considered “normal” for the area, so that they could be compared against the tests done closer to the site.⁸ In other words, plants in and around East Palestine already had some amount of SVOCs in them before the derailment due to human activities. Because the amounts before the derailment were unknown, Ohio needed to collect samples to determine the range of those pre-derailment concentrations.

EPA’s statement that residents can continue normal use of their properties was based on the work conducted by its state partners, discussed above, as well as testing done by EPA itself and Norfolk Southern Railway Company (Norfolk Southern) in March and April 2023. EPA and Norfolk Southern collected soil samples at 146 different residential, agricultural, and commercial locations in Ohio and Pennsylvania to determine whether the “vent and burn” operation on February 6, 2023, had contaminated soil with dioxins or SVOCs.⁹ This was known as the “Phase 1 Soil Sampling Program.” Petitioners falsely state that EPA “refused to test residents’ property or gardens for dioxins.” In fact, 37 of the locations where EPA and Norfolk Southern tested for dioxins were agricultural properties and 39 were residential properties (i.e., the types of properties where home gardens would be located).¹⁰ Two soil samples were collected at each location: one from the top inch of soil and the other from 1 to 6 inches below the surface.

As part of the Phase 1 Soil Sampling Program, EPA tested soil from a home garden just across from the derailment site. The farm closest to the derailment site was also tested for dioxins and SVOCs. The results showed that dioxins and SVOCs in the soil at both of these properties were within normal levels for the area. For the vast majority of other properties, the results of the Phase 1 Soil Sampling Program similarly showed levels of dioxins and SVOCs in the soil that were within normal ranges for the area. The only exceptions were a few commercial/industrial properties and roadside samples collected farther away from the derailment site. Based on the results of the Phase 1 Soil Sampling Program, EPA concluded that there was no discernable soil contamination caused by the derailment at the dozens of locations tested, and that residents could continue to use their properties for normal use, including gardening.

Petitioners do not appear to dispute the fact that EPA’s soil sampling program showed normal levels of dioxins and SVOCs at properties in East Palestine and neighboring communities. Instead, Petitioners assert that EPA should not have informed residents that they could continue normal use of their

⁸ *Id.* at 5-6, Exhibit B.

⁹ 25 of the locations were sampled to get information on “background” levels of contamination. The other 121 locations were sampled to determine whether there was SVOC or dioxin contamination caused by the derailment. See EPA, Phase One Residential, Commercial, and Agricultural Soil Sampling Results, <https://www.epa.gov/east-palestine-oh-train-derailment/phase-one-residential-commercial-and-agricultural-soil-sampling>; see also EPA, Summary of Phase 1 Dioxin Results for the East Palestine Derailment Incident, available at: <https://www.epa.gov/system/files/documents/2023-10/phase-1-soil-sampling-technical-memo-20230914pdf.pdf>.

¹⁰ Summary of Phase 1 Dioxin Results for the East Palestine Derailment Incident, *supra* n.9, at 5 (Table 2).

properties given elevated levels of Toxic Equivalency Quotients (TEQs) found in **waste** at the derailment site. However, this waste was isolated at the derailment location and hauled off-site precisely to protect people and nearby properties. None of this waste spilled on or migrated to residential properties near the site. To evaluate potential impacts of ash, soot, and smoke on nearby properties, EPA required Norfolk Southern to implement the Phase I Soil Sampling Program. And as explained above, the results of that sampling program, as well as the other testing done by the State of Ohio and Commonwealth of Pennsylvania, confirmed that chemicals from the derailment fire and the vent and burn did not noticeably impact nearby properties.

Petitioners' criticism of EPA's testing methods is unfounded. Petitioners suggest that a "nonstandard" approach for testing soil in and around East Palestine was used. To the contrary, EPA followed normal standards and processes for this testing to ensure the results were accurate and reliable. If Petitioners review the work plan and technical summary report for EPA's Phase 1 Soil Sampling Program, they will see that the program used accepted scientific principles, including both random and targeted sampling techniques, appropriate statistical principles, a comprehensive background evaluation, and comparison of legacy contamination (subsurface) to potentially impacted soils (surface).¹¹ As part of the Phase 1 Soil Sampling Program, EPA also directed Norfolk Southern to sample more locations than had been originally included in the plan to ensure coverage of areas impacted by the vent and burn. EPA made the decision to expand the sampling area based on the results of a plume deposition model that EPA had requested from the Interagency Modeling and Atmospheric Assessment Center. Lastly, EPA ensured that the implementation and evaluation of the program was conducted using rigorous quality assurance and quality control (QA/QC) requirements. You can learn more about EPA's QA/QC requirements [here](#).

In consultation with state and federal agriculture departments, EPA determined that long-term testing of soil and plants was not necessary because, if the derailment (or vent and burn) had contaminated soil or plants, that contamination would have shown up in all of the testing that was done in the spring of 2023. As discussed above, the soil sampling done by EPA in spring 2023 did not find derailment-related contamination of soil at residential, commercial, or agricultural properties. Scientific research has found that plants become contaminated with SVOCs when the surrounding soil is contaminated and comes into contact with the outside of the plant. In other words, like the soil, the tests done on plants in spring 2023 would have shown contamination from the derailment if any had occurred. Meanwhile, there is no ongoing source of contamination for either soil or plants, so there is no risk that plants or soil will become contaminated in the future.

With respect to Petitioners' claim that EPA failed to collect "critical" chemical data, Petitioners do not identify which data are missing. Since February 2023, EPA and its state and local partners have been conducting extensive monitoring and sampling of air, soil, surface water, and drinking water in the community. EPA has used several types of air monitoring and sampling equipment to test the outdoor

¹¹ See Norfolk Southern Railway Company, *Phase I – Preliminary Residential/Commercial/Agricultural Site Sampling Plan: East Palestine Train Derailment Site, East Palestine, Ohio* (Rev. Apr. 5, 2023), <https://www.epa.gov/system/files/documents/2023-06/04%2005%2023%20Residential-Commercial-Agricultural%20Soil%20Sampling%20Work%20Plan%20508.pdf>; Summary of Phase 1 Dioxin Results for the East Palestine Derailment Incident, *supra* n. 9.

air, including stationary and mobile air monitors, canisters, and sorbent tubes. In the first several months after the derailment, EPA's outdoor air monitors were collecting information 24/7. EPA's outdoor air equipment has not detected any sustained exceedances of the derailment contaminants of concern, vinyl chloride and butyl acrylate, in East Palestine or surrounding communities since the evacuation order was lifted.

The most recent phase of cleaning of Sulphur Run and Leslie Run was completed this past summer, and Norfolk Southern, at EPA's direction, is planning another sediment chemistry assessment to determine whether any additional cleanup is needed. This reassessment is expected to be completed in early 2025. Air monitoring conducted during the stream cleanup did not show any elevated levels of vinyl chloride or butyl acrylate in the air. Ohio EPA tests the East Palestine municipal drinking water supply on a weekly basis, and tests of treated drinking water have not detected any contamination attributable to the derailment. In addition, the Columbiana County Health District and the Pennsylvania Department of Health have collected more than 1,600 private drinking water well samples in Ohio and Pennsylvania. Samples continue to be collected, and the results – quality-assured, quality-controlled, and verified – continue to show that private wells have not been impacted by the derailment.

Petitioners also assert that there are still questions about the derailment's impact on wildlife, including wild game. As Petitioners have noted, early in the response, other than the acute aquatic life impacts, state officials did not link local animal deaths to the derailment. To date, other than oil-related impacts to the creeks, there has been no indication of ongoing off-site chemical impacts from the derailment, as described above. As such, EPA's recommendations as described in your petition – which were made in consultation with state and federal agricultural and natural resources agencies – have not changed. As assessment and cleanup of the creeks continue, signs remain posted to “keep out” of these waterways until further notice.

Finally, the Petition claims that independent tests on garden crops, soil, and surface waters in East Palestine show elevated levels of contamination. However, the Petition does not actually provide any test results to support this assertion. For example, the Petition alleges that one of the Petitioners (Mr. Smith) tested a “few” residential gardens and found high levels of contamination in garlic. The Petition also claims that tests performed by Mr. Smith in the creeks have found elevated levels of dioxins and polycyclic aromatic hydrocarbons (PAHs). Yet the Petition does not actually provide any of those test results, or the work plans and corresponding quality control documents that would be needed to properly evaluate them. (The footnote that purports to cite Mr. Smith's test results regarding garlic is a link to the State of Ohio's test report). It is also important to note that EPA visited with Mr. Smith during a sampling project that he conducted in East Palestine in July 2023, and there were significant concerns about the methods he used, which were not accepted standard practices and rendered the data unusable. For example, EPA staff intervened after Mr. Smith attempted to use the same sampling equipment between samples without cleaning his tools, which could have resulted in cross-contamination and erroneous data. Mr. Smith's July 2023 data and other data, shared with EPA by third parties, have evident quality control issues as determined by our scientific experts. Accordingly, EPA does not have confidence in the information that Mr. Smith has shared publicly. Regardless, as Petitioners' claims are based largely on sample data, it is necessary for EPA to be able to evaluate the

data underlying Petitioners' claims. EPA cannot do so because Petitioners have not provided EPA with the underlying data.

Petitioners' September 23 letter claims to provide additional evidence, based on affidavits from outside parties, that EPA "underreported or misrepresented the extent of contamination in East Palestine." These claims are untrue. They are not based on evidence, but rather, false and misleading statements.

For example, Petitioners' September 23 letter includes an affidavit from Mr. Smith that accuses EPA of "providing fraudulent environmental sampling data and misleading the public." However, this claim is entirely false. Contrary to Mr. Smith's assertions that he "uncovered non-public . . . data," the data referenced by Mr. Smith were in fact *publicly available* data that EPA provided to the Associated Press. More importantly, the data do not demonstrate that EPA "under-reported" or "omitted" information about chemical contamination data in local creeks. It appears that Mr. Smith is basing his claim on a summary worksheet, and not the full laboratory data set. The full laboratory data set shows that the conditions of the creek are as EPA has been reporting to the public. You may review EPA's videotaped [update](#) from March 2024 to better understand all of the work that has been done by EPA to clean up the local creeks since February 2023. The false statements in Mr. Smith's affidavit are another example of why EPA has no confidence in the information that Mr. Smith has provided regarding this incident.

Regarding the other affidavits submitted by the Petitioners, please refer to the United States' response to comments on the proposed Consent Decree in *United States et al. v. Norfolk Southern et al.*, as well as EPA and expert declarations that were all filed with the court on October 10, 2024. You can find this information on EPA's East Palestine Train Derailment website (<https://www.epa.gov/east-palestine-oh-train-derailment>) under "Settlement Information." Concerns raised by GAP regarding EPA's commitment to transparency and community engagement are addressed in the Declaration of Mark Durno. Concerns raised by Dr. George Thompson in his affidavit are addressed in detail in the Declaration of Constance Senior. Specifically, Dr. Senior explains why Dr. Thompson's conclusions are based on unreasonable assumptions. Concerns raised by Mr. Stephen Petty and the anonymous commenter are also addressed throughout the Declaration of Ralph Dollhopf and the "Response to Public Comments" document.

We would also like to highlight that Mr. Petty's affidavit relies almost entirely on information provided by Mr. Smith, which renders the affidavit unreliable. Further, Mr. Petty's purported concerns about drinking water and subsurface contamination are baseless. Norfolk Southern, EPA, and state and local officials have collected tens of thousands of soil, sediment, surface water, drinking water, and groundwater samples since February 2023. The results of this extensive testing show that peoples' homes and drinking water are not threatened by hazardous substances from the derailment. However, to provide confidence today and in the future, the proposed Consent Decree requires Norfolk Southern to conduct 10 years of environmental monitoring after the cleanup is finished. Finally, we would like to emphasize that the final site confirmation sampling is complete. This "double check" to ensure the cleanup is thorough and complete has identified areas of low-level contamination at the derailment site that EPA has directed Norfolk Southern to clean up. These additional efforts are nearly complete and

will continue until EPA determines that the threats from derailment related contamination have been mitigated.

In sum, the Petition submitted on June 13 is based on unreliable information and contains numerous misstatements of fact. Moreover, EPA needs additional information from Petitioners before it can either grant or deny the Petition. It is essential that Petitioners provide all test results that form the factual basis of the Petition. This includes Mr. Smith's test results, as well as all other "[i]ndependent tests on garden crops, soil, and surface waters" that Petitioners suggest show elevated levels of dioxins, SVOCs, and PAHs. See Petition at page 2. In addition to the test results, EPA requests that Petitioners submit the associated supporting documentation such as the work plans, quality assurance plans, final reports, and validated analytical results associated with these efforts, as well as a data validation summary from a qualified chemist. Without this data, the Agency is unable to properly evaluate Petitioners' claims, and therefore, cannot yet grant or deny the Petition.

In the meantime, EPA has committed to full transparency of its efforts and will continue to communicate the results of all monitoring and sampling efforts via EPA's East Palestine website and its regular newsletters.

Sincerely,

Debra Shore
Regional Administrator
& Great Lakes National Program Manager
US EPA Region 5