



## Industrial Disasters Are Derailing the EPA— and Defendants with It

By Nick Polavin, PhD, Senior Jury Consultant & Jorge Monroy, Jury Consultant

The February 2023 train derailment in East Palestine, Ohio, captured the attention of the nation. The public beheld evacuation orders, reports of air, water, and soil contamination, and a billowing black cloud of burning toxic chemicals. Unlike with most spills of the past, locals—through cell phones and social media accounts—supplied their own footage and commentary, often in opposition to what they deemed traditional media talking points.

The very next month, a train derailed in Wyndmere, North Dakota, puncturing several rail cars and spilling their hazardous chemicals. Four days later, a derailment in Raymond, Minnesota, ignited the train's ethanol cargo. Then, in early April 2023, a massive warehouse fire in Richmond, Indiana, led to significant concerns about nearby residents' exposure to lead, asbestos, and benzene. The list goes on.

Widespread coverage of these disasters cast a spotlight on governments and government agencies as they worked to minimize the effects and abate the toxic wreckage. Guerrilla footage of the infamous black cloud in East Palestine went viral on Facebook and YouTube, with several clips eliciting millions of views and hundreds of thousands of shares. Many of these videos put forth a distinctly different position than did the government officials and companies involved.

### The EPA's Credibility Problem

Most notable among the East Palestine derailment videos is a TikTok with 7.6 million views and counting. In it, creator Nick Drom (a resident of nearby Pittsburgh, Pennsylvania) states, "There's maybe a million pounds of this toxic chemical [vinyl chloride] spilling into the ground and also boiling off into the air." He goes on to claim that the burning of the substance has

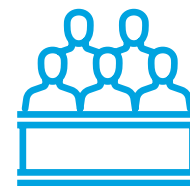
led to “hundreds of thousands of pounds of acid in the air, potentially.” And while Drom briefly acknowledges the more optimistic public statements made by government officials, freight company Norfolk Southern, and the Ohio and Pennsylvania governors—such as that on-site crews successfully burned off a vast amount of the chemicals—he does so with no shortage of skepticism. Indeed, he asserts that “since engineering school, I’ve studied a lot of industrial accidents,” and the connection he has observed is that the responsible party always “downplays the reality of the situation,” all while politicians and news outlets regurgitate the same old scripts.<sup>1</sup>

Drom’s video soon made an appearance on Episode 1941 of *The Joe Rogan Experience*—the most popular podcast in the nation—amplifying its message to millions more listeners. His viewpoint is not unique; many locals posted similar videos criticizing Norfolk Southern’s and/or the US Environmental Protection Agency’s handling of the derailment. One such video with more than 1.5 million views is bluntly titled, “THE EPA IS LYING TO THE PEOPLE OF EAST PALESTINE.”<sup>2</sup>

The clash between official government statements and individuals’ accounts and speculations has called into question the accuracy, honesty, and motivations of agencies like the EPA. In Ohio, the EPA attested to its thoroughness and transparency, yet social media broadcast stories of half-baked cleanup efforts and first-hand footage of standing chemicals, skin rashes, and discolored tap water—not to mention footage of a national reporter being arrested at an initial press conference. The EPA stated that the drinking water was safe, yet the public bore witness to stark images of thousands of dead fish and headlines that Cincinnati and Northern Kentucky shut off water intake from the Ohio River. These apparent inconsistencies may significantly undermine public trust in the EPA.

## Why Corporate Defendants Are along for the Ride

When a corporate defendant enters court hoping to rely on the standards of government agencies to support its defense, jurors’ trust in those agencies becomes paramount. Such defendants have a keen interest in the public’s perception of how effectively the agency responds to disasters like these—their views of how it managed the site, helped the victims, handled the cleanup, communicated critical safety information to the public, and ultimately, the steps it took toward securing a safer future.



Jurors’ trust becomes paramount when corporate defendants rely on the standards of government agencies to support its defense.

During voir dire for multiple recent toxic tort cases, we have heard prospective jurors mention toxic exposure events like East Palestine as they discussed their opinions of the EPA. Such perceptions are critical when jurors assess corporate defendants’ adherence to safety

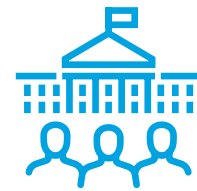
regulations, especially when diminished trust in those government agencies has the potential to support jurors’ impressions of corporate negligence.

Due to this link, we wanted to explore what effect, if any, these incidents have had on jurors’ opinions. Are the jurors who pay attention to toxic disasters the same jurors who have always had negative opinions of the EPA? Or have these events created a new font of distrustful jurors? Between our anecdotal courtroom experiences and the aforementioned videos and social media posts, recent disasters certainly seem to have undermined public trust in the EPA—but have they done so measurably?

## Our Study Results

We administered an online survey to a nationally representative sample of 200 respondents. It comprised questions about respondents’ demographics, attitudes toward litigation, opinions of the EPA and corporations, and media exposure to the 2023 train derailments in East Palestine, Ohio, and Wyndmere, North Dakota.

Preliminary results suggest that these accidents have indeed affected public attitudes toward the EPA. For instance, 21.5% of respondents reported that they have a more negative opinion of the EPA since the Ohio train derailment. To double-check this finding, we also compared our new survey results on several key questions to our results on the same questions we asked in a 2022 survey. The trend held: in 2022, 34.8% of respondents had agreed that “the EPA is too business-friendly”; that number jumped to 53.9% in 2023. Similarly, in 2022, around a quarter of respondents (26.7%) *somewhat or strongly* agreed that “large corporations have connections within the EPA and FDA so they can manipulate these agencies to do what they want”; in 2023, more than a third of respondents (36.9%) felt that way.



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Our new survey uncovered equally troubling beliefs on other questions regarding the EPA and its actions. Nearly half of respondents (48%) agreed that the EPA lies to Americans to protect corporations. And even if it is not bowing to corporate interests? A majority (55%) agreed that the EPA lacks the power and resources it needs to enforce environmental laws anyway. These attitudes reveal a lack of faith in the EPA and its ability to oversee environmental protection across industries.

## Chemical Disasters’ Effect on Juror Attitudes

Awareness of train derailments has cultivated a pessimistic outlook regarding the severity of toxic spills. Individuals who are familiar with news coverage of the Ohio and North Dakota

derailments believe that those impacted have been severely harmed by toxic exposure. Most concerning, they believe that these derailments have caused major environmental issues such as water contamination, and they believe the government is keeping this information from the general public. The more media they consumed, the greater negative impact we observed: respondents with the most pessimistic attitudes regarding the severity of the events tended to be those who most closely followed the news about them. Such attitudes were less pronounced in those who followed the reports only slightly, and least in those who did not follow them at all.



Individuals believe that the derailments have caused major environmental issues such as water contamination.

In turn, media awareness and increasing media exposure around the recent derailments have severely undermined faith in government agencies. Those familiar with the train derailments tended to have little trust in the government, with more than half of the participants (51%) agreeing that “the government can’t be trusted with anything”; only 30% of respondents who had not read or heard about them felt the same. These opinions may be driven by perceptions of the influence that corporations have on government agencies. Among those familiar with the derailments, 83% agreed that “corporations have too much influence on government agencies,” compared with 65% of those who were unfamiliar.

Ultimately, what we can see is that familiarity with the train derailments has created more negative views of the EPA. Although similar percentages of respondents had positive views of the EPA (48% of those who were familiar, 51% of those who were not), the difference lay in those who indicated negative attitudes. Nearly a third (29%) of respondents familiar with the derailments indicated negative views of the EPA, compared to only 7% of those with no familiarity.

## A Silver Lining

Despite these concerning attitudes, around 49% of our respondents reported that they maintain a positive opinion of the EPA. Meanwhile, comparing our 2022 and 2023 data, the increased number of respondents holding negative opinions toward the EPA coincided with an increase in positive opinions. How can that be? It appears that public views of the EPA—as with many subjects—have become more polarized. Fewer respondents reported being neutral or having “slight” agreement or disagreement with the issues posed. In fact, 15.1% of our sample reported feeling *more* positively about the EPA since the East Palestine train derailment.

In addition, the detrimental effects we observed seem to be limited only to attitudes concerning the government and the EPA. That is, respondents yielded similar attitudes toward corporations regardless of their derailment familiarity—suggesting that these disasters have not necessarily engendered additional anti-corporate sentiment.

## Moving Forward

Corporate defendants face critical next steps as they maneuver the complexities of litigation amid the recent catastrophes. These events have triggered a decline in trust in the EPA and other government agencies, undermining corporate defendants' reliance on established safety standards. This shift may stem from perceptions of collusion between corporations and government entities and uncertainties regarding the agencies' ability to catalyze meaningful change.

Rather than hinging solely on government standards as the main line of defense, corporate defendants will likely need a diversified approach. This may entail bolstering the credibility of expert testimony, crafting narratives to counter plaintiffs' anticipated "bare minimum" arguments (reinforced by high-profile toxic mishaps), and identifying jurors in voir dire who harbor skepticism toward government agencies and their ability to meaningfully regulate corporate conduct. By embracing these alternative strategies, corporate defendants can not only navigate the evolving landscape of litigation but also position themselves proactively in response to the derailments of the past.

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### References

<sup>1</sup> Drom, N. (2023, February 6). I've been away from TikTok dealing with some family things, but I had to come back to talk about this massive environmental disaster. <https://www.tiktok.com/@nickdrom/video/7197262870793473322>

<sup>2</sup> Sortor, N. (2023, February 16). <https://www.tiktok.com/@nicksortor/video/7200870246293523755>

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