

MAYOR JIM GRAY



LEXINGTON

CHARLES H. MARTIN, P.E.
DIRECTOR
WATER QUALITY

June 28, 2017

Ken Cooke
639 Cardinal Lane
Lexington, KY 40503

Re: Open Records Request
Derby Drive – Norfolk Southern

Dear Mr. Cooke:

This is in response to your open records request received in our office on June 26, 2017 for information related to the location above. Records were found and are enclosed in this letter. Due to action pending on the Notice of Violation issued on 4/12/17, no further enforcement action was taken on the 5/25/17 incident. If you have any questions, please contact me at 859-425-2409 or bgray@lexingtonky.gov.

Sincerely,

A handwritten signature in blue ink that reads "Brooke Gray". The signature is fluid and cursive, with a large loop at the end.

Brooke Gray
Program Specialist
Division of Water Quality



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May 22, 2017

VIA CERTIFIED MAIL

Lexington Fayette Urban County Government
Division of Water Quality
ATTN: Richard Lamey
Compliance and Monitoring Manager
125 Lisle Industrial Avenue, Ste. 180
Lexington, Kentucky 40511

RE: April 12, 2017 Notice of Violation

Dear Mr. Lamey:

This letter is in response to the April 12, 2017 Notice of Violation (“NOV”) regarding the Norfolk Southern Railway Company (“NSRC”) main line rail in the vicinity of 272 Derby Dr., Lexington, Kentucky. The NOV alleges that NSRC is “[c]reating, causing, continuing, or authorizing an illicit discharge prohibited by the ordinance” and/or “[t]ransporting dirt, earth or debris, including yard waste, within the urban county in a manner that caused it to wash, drain or otherwise be caused to enter and be deposited in or upon the streets, sanitary sewers, storm sewers and/or other drainage facilities, except as authorized by a land disturbance permit.”

NSRC has investigated the assertions in the NOV and has found no illicit discharge or land disturbance. As there is no discharge and no land disturbance or other activity which would trigger the ordinance provisions cited in the NOV, the assertions in the NOV are misplaced and incorrect. Importantly, federal law provides that regulatory jurisdiction over railroad operations is exclusive in the Surface Transportation Board. Pursuant to the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10501 and Federal Railway Safety Act of 1970 (“FRSA”), 49 U.S.C. § 20101, state and local regulation is preempted. See *City of Auburn v. U.S. Gov’t*, 154 F.3d 1025 (9th Cir. 1998); *CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002). Although NSRC is not subject to the permitting, preclearance and regulatory provisions of the Lexington Fayette Urban County Government, NSRC is subject to the provisions of the Federal Clean Water Act, 33 U.S.C. § 1251, *et seq.* (“CWA”) which regulates stormwater discharges “associated with industrial activity.” For rail transportation facilities, the EPA determined that only those areas which have



vehicle maintenance shops, equipment cleaning operations, or airport deicing operations are prohibited from the discharge of stormwater without an NPDES permit. 40 C.F.R. § 122.26. The Kentucky Department of Environmental Protection (“KDEP”) adopts the same regulatory exceptions and requirements. See NPDES Permit KYR00 - Stormwater Associated with Industrial Activities. Similarly, Lexington Fayette Urban County Government ordinances incorporate the same provisions of the KDEP program and regulations at 40 C.F.R. § 122.26, but again local ordinances are preempted pursuant to ICCTA and FRSA regarding rail operations, construction, et al.

The NOV was issued prior to any contact by the Lexington Fayette Urban County Government regarding the matter. NSRC does not conduct any activity which would produce any industrial wastewater or other wastewater sources which could discharge from the railroad. NSRC’s preliminary investigation also indicates that there has been no land disturbance performed by NSRC relating to the NOV.¹ The main line rail has operated in this location for over a century in largely the same manner.

Although railroad operations are excluded from city or county ordinances under ICCTA and FRSA, NSRC is not conducting any activities which would be regulated under the Lexington Fayette Urban County Government ordinances referenced in the NOV. Lexington Fayette County Code of Ordinances, Section 16-101 *et seq.* regulate land disturbance, defined as clearing, grading, excavating, and filling activities that will result in disturbing the existing land surface. There is no land disturbance, and similarly no illicit discharge.

NSRC is investigating the information from the NOV. We have asked track inspection staff to note any adjacent land disturbances which might contribute pollutants to NSRC’s rail ditches, as part of their regular track and drainage inspections. It appears as though the rail drainage system, which was designed to serve the rail line purposes and not as a general stormwater conveyance for the area may be receiving drainage from adjacent areas, including roadways, parking lots, and other impervious areas, which could have caused or contribute to the issues identified in the NOV. NSRC regularly works with local entities to identify and address illicit stormwater discharges to the rail stormwater management system and would plan to contact the Lexington Fayette Urban County Government in case of a need for follow-up in that regard. It is important that these discharges to the rail storm management system be controlled as excess water near or adjacent to the track can cause serious track damage and pose significant safety risk.

We appreciate the Lexington Fayette Urban County Government bringing the matter to NSRC’s attention. As part of the company’s environmental stewardship and sustainability

¹ CWA regulations exempt land disturbance and construction relating to routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. 40 C.F.R. 122.26(b)(14).

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principles we are investigating the issue and would appreciate any assistance in addressing illicit discharge to the rail stormwater management system. The NOV, however, is misplaced and incorrect and we would appreciate the Lexington Fayette Urban County Government withdrawing the NOV to correct the record with respect to this matter.

We hope to update you in the next few weeks with additional information regarding this matter. Thank you for your assistance and please contact me at (404)245-5421 if you have questions.

Sincerely,

SMITH, GAMBRELL & Russell, LLP



David Montgomery Moore

DMM/db

cc: Matthew Gernand, Esq.

Brooke Gray

From: Jeremy Knight
Sent: Friday, May 26, 2017 11:32 AM
To: Gabriel Hensley; Richard Lamey
Cc: Kevin Lyne; Brooke Gray
Subject: RE: 272 Derby Drive

I went out to the 272 Derby outfall coming from railroad today at 10:00 (IDDE 882833). This is an open investigation initiated per Ken Cook's complaint to KYDWQ. So Brooke this would be on file already. It was flowing out of both directions (overland and underground pipe) clean water (pics uploaded). The measurements monitored were as follows:

Water temp. 63 F

Conductivity 375 mg/l

pH 8.5

Flow not estimated (can get an estimate if you need it).

Jeremy

From: Gabriel Hensley
Sent: Friday, May 26, 2017 9:32 AM
To: Jeremy Knight
Subject: FW: 272 Derby Drive

FYI

From: Lori Henry
Sent: Friday, May 26, 2017 8:55 AM
To: Richard Lamey; Gabriel Hensley; Kevin Lyne; Brooke Gray
Subject: 272 Derby Drive

Incident Report for Incident: 882833

Address: 272 DERBY DR 40503

Reported by: Anonymous Anonymous

Phone:

SRID	ProblemID	Problem Description and Notes	UserID	Date & Time Entered	Status
1559575	341SS18	Spill/Non-Emergency <i>Ken Cooke reported that sediment discharge from Norfolk Southern Railroad is washing into the storm sewer system.</i> <i>Deerfield Neighborhood, Ken Cooke 859-940-8234</i>	jcobb	05/25/17 03:18PM	Completed
	lhenry	05/26/2017	Assigned	emailed Richard Lamey, Kevin Lyne, Gabe Hensley and Brooke Gray for assignment.	
	bgray	05/30/2017	Completed	Ongoing investigation. See LexCall #875263 and 17-IDDE-0081. Jeremy Knight investigated the 272 Derby outfall coming from railroad on 5/26 at 10:00. This is an open investigation initiated per Ken Cook's complaint to KYDWQ. It was flowing out of both directions (overland and underground pipe) clean water (pics uploaded). The measurements monitored were as follows: Water temp. 63 F Conductivity 375 mg/l pH 8.5 Flow not estimated	

Incident Report for Incident: 875263

Address: 272 DERBY DR 40503

Reported by: Ken Cooke

Phone: (859) 940-8234

SRID	ProblemID	Problem Description and Notes	UserID	Date & Time Entered	Status
1549278	341SS18	Spill/Non-Emergency <i>Ken Cooke with Friends of Wolf Run filed a complaint that sediment discharge from Norfolk Southern Railroad is washing into the storm sewer system. Handled by Richard Lamey and Gabe Hensley.</i>	bgray	04/13/17 02:53PM	Assigned
	bgray	05/30/2017	Assigned	5/25/17 - Ken Cooke reported that sediment discharge from Norfolk Southern Railroad is washing into the storm sewer system. Deerfield Neighborhood, Ken Cooke 859-940-8234	