

Memorandum

Date: November 25, 2009

To: Peter Lowitt, AICP

From: Edith Netter, Esq.

RE: Do the DEC Measurements Used to Determine Whether Evergreen Solar Complies With DEC Noise Resolution Comply With the DEC Regulations and Resolution?

DID THE DEC CAUSE COMPLIANCE MEASUREMENTS TO BE TAKEN AS REQUIRED BY THE DEC REGULATIONS AND RESOLUTION?

This Memorandum considers whether the Devens Enterprise Commission (“DEC”) is required, as alleged by Noise Control Engineering, Inc. (“NCE”), consultant to an unidentified “group of abutters,” to redo its Devens Regional Enterprise Zone property line (“DREZ Line”) measurements used to determine Evergreen Solar (“EGS”) compliance with the DEC noise performance standards. NCE and various EGS neighbors maintain that the DEC should have taken the property line measurements at the DREZ Line not at R1. These claims are reviewed in light of the pertinent sections of 974 CMR 4.00, the Devens Enterprise Commission Rules and Regulations (“Regulations”), the Devens Enterprise Commission Evergreen Solar Noise Violation Resolution Amendment #1 October, 2009 (“Resolution”) [which Resolution references and incorporates the Evergreen Solar Noise Abatement Plan – July 13, 2009 (“EGS Plan”)], and the DEC staff (as advised by the DEC noise consultant) explanation as to why R1 was used for the DREZ Line measurement, and determines that the decision to use the R1 measurements complied with the Regulations and the Resolution (which Resolution incorporates the EGS Plan).

This Memorandum also considers the neighbors’ allegation that measurements should have been taken at and throughout various properties, not just at R1 (the DEC also caused to be taken measurements at R2 through R4, locations less exposed to EGS noise than R1), the DEC staff (as advised by the DEC noise consultant) explanation of why the measurements have been limited to R1 (along with R2-R4), and determines that the use of R1 as the measuring point suffices for purposes of compliance with the Regulations and the Resolution.

WHAT ARE THE RELEVANT PROVISIONS OF THE DEC NOISE REGULATIONS, THE DEC AMENDED RESOLUTION, AND THE EGS PLAN?

To obtain a Certificate of Occupancy EGS must comply with the DEC Regulations, the DEC Resolution and the EGS Plan. The salient issue addressed in this Memorandum is where the measurements are to be taken to determine compliance.

The **Regulations** require daytime and nighttime compliance measurements to be taken at “any Devens perimeter boundary abutting a residential External Receptor.” [Sections 4.05(3)(a) (3) and 4.05(3)(b)(3) of the Regulations] The Regulations define External Receptors as “community residents from the towns of Ayer, Harvard and Shirley”. [Section 4.01(3) of the Regulations].

The **Resolution** requires compliance with the **Regulations** and the **EGS Plan**. More specifically, the Resolution provides, in pertinent part, as follows:

Item #12 of the “Background” section of the Resolution references the interim June 1, 2009 Facility Noise Analysis of Modeling Specialties, the DEC noise consultant, which Analysis substituted the “R1” (Dunroven Farm) location for the actual DREZ property line when determining ambient noise and compliance levels.

Condition #1: “Evergreen shall achieve compliance with the Industrial Performance Standards for noise determined by sustained measurements taken as provided under the plan”

The EGS Plan provides for compliance measurements to be taken at Dunroven Farm and for a “worst case scenario” compliance measurements at Dunroven Farm or any other location in the neighborhood. . . .Measurements are conducted at this location as it is the closest to the facilities. Other residential locations are further away and have lower sound levels.”

Condition #4: compliance with Section 4.05 of the Regulations is a prerequisite to EGS obtaining a certificate of occupancy.

Condition #9: Evergreen shall demonstrate that on November 30, 2009 under a worst case scenario it is producing no more than 38dBA as measured at Dunroven Farm or any location in the neighborhood.

WHY DID DEC STAFF USE THE R1 MEASUREMENT?

DEC staff relied on the information provided by the DEC's noise consultant, Modeling Specialties, Inc ("MS") (along with its own judgment and that of the Commission) in order to interpret and implement the Regulations, the Resolution and the Plan.

The Regulations require measurements at "any Devens perimeter boundary abutting a residential External Receptor." The DREZ boundary line abutting Dunroven Farm (the External Receptor) is the middle of Cold Spring Brook. MS recommended that the R1 location be used because it is the closest land area to Dunroven Farm and the most exposed area to noise from the EGS facility. The R1 location is on the Dunroven Farm bridal path and is 160' from the DREZ line. MS has stated that in comparison to R1, the brook is lower and less exposed to facility noise. Therefore the conservative approach (one that is protective of the community) is to use R1. Another reason for using R1 is that it is impractical to take measurements in a brook. Another reason R1 was used is the EGS Plan references the Dunroven Farm/R1 location for purposes of compliance standards and the noise controls to be implemented to achieve these standards. In sum, because R1 is the land location most susceptible to noise from the EGS facility and is more exposed to EGS noise than the brook and because the EGS Plan referenced in the Resolution used R1 for the compliance measurements, the DEC staff decided, in consultation with MS, to use R1 instead of the DREZ.

R1 has also been used as the proxy for the worst case scenario testing to be measured at "Dunroven Farm or any location in the neighborhood" as required by Condition #9 of the Resolution and the EGS Plan. This is because MS advised DEC staff and the DEC (as also stated above) that if EGS is in compliance at R1, it is also in compliance at all of the neighboring properties because the R1 location is nearest to the EGS facility and noise dissipates over distance.

THE DEC CAUSED COMPLIANCE MEASUREMENTS TO BE TAKEN AS REQUIRED BY THE DEC REGULATIONS, DEC RESOLUTION, AND EGS PLAN

It is the responsibility of the DEC to interpret its own regulations. Clearly, this responsibility must be discharged in a reasonable and consistent fashion. The DEC noise performance standards require measurement at the DREZ property line near an External Receptor to determine compliance. Throughout the DEC's response to noise complaints concerning Evergreen Solar, on the advice of its consultant, Modeling Specialties, it has been consistently using R1 for its DREZ Line compliance measurements. The intention behind the MS advice and the DEC staff direction to MS (resulting from the MS advice) has been to protect the interests of the neighbors as much as reasonably possible within the confines of the DEC Regulations. The use of R1 has also been referenced in the DEC Resolution and the EGS Plan incorporated therein and used in all of the MS reports prepared on behalf of the DEC. In sum, the use of the R1 location for purposes of the DREZ Line and worst case scenario testing is in accordance with the DEC Regulations and Resolution.