

ATTORNEY AT LAW



David A. Marcelino
625 County Street
Taunton, MA 02780
P: (508) 821-3500
F: (508) 821-9099

November 24, 2009

Board of Directors
Devens Enterprise Commission
33 Andrews Parkway
Devens, MA 01434

RE: Janice & Charles Perry
42 Old Mill Road, Harvard, MA

Dear Members of the Board:

I am legal counsel for Janice and Charles Perry. As you know, the Perrys filed a noise complaint on March 19, 2009 against Evergreen Solar Company in the spring of this year. During your last meeting one of your members proposed placing the three sound experts meet to finalize a sound protocol to present to the Board. The experts met on November 18, 2009. They discussed eight issues. The meeting produced a document entitled "Topics for DEC-Evergreen Solar-November 18, 2009." A copy of the document is attached. The document purports to summarize the positions of each expert on the eight issues. This letter is a response to that document.

1) "Compliance vs. Non-Compliance: Measured levels do not consistently reach 38 dBA."

The first issue presented is labeled "Compliance vs. Non-Compliance: Measured levels do not consistently reach 38 dBA." My clients' noise expert, NCE, stated that at no time during the nearly 40 days of monitoring did he see any evidence in Cavanaugh Tocci ("CTA") or Modeling Specialties ("MS") data that the noise levels ever reached the compliance level of 38dBA. I examined the charts provided by CTA from the various PowerPoint presentations CTA authored. Unless my eyes were playing tricks on me, I did not see any evidence in the documents produced by CTA where the noise levels met the 38 dBA requirement.

The CTA response as shown in the document provides the following response to the issue: "variability in measurements comes from outside influences." CTA offers no data to support 38 dBA compliance. CTA takes the position that "outside influences" are to blame for "variability" whatever that word means. CTA does not offer demonstrable evidence that its client has met the

38 dBA requirement because it does not have it. Since it cannot produce supporting evidence, CTA attempts to place blame for lack of compliance on outside influences. Since monitoring began, we have heard CTA blame the wind, truck traffic, Route 2 construction, air conditioners, delivery trucks, trains and insects. Just as CTA cannot show 38 dBA compliance with data from its monitoring effort, it does not offer proof of what specific noises are the alleged "outside influences." **We respectfully request that the DEC order CTA to produce a written analysis of the monitoring data showing compliance dates, times, decibel levels and corresponding power levels on Evergreen equipment with said analysis signed by a certified CTA noise engineer.**

MS stated that "the long term data record shows various times" when the 38 dBA level has been met "during quiet environmental conditions." The DEC By-law governing noise and vibration, 974 CMR 4.00, states "No party owning, leasing, or otherwise controlling a facility within Devens shall be allowed to: (a) produce a broadband sound pressure level which exceeds an existing background sound pressure level . . ." The By-law goes on to provide specific decibel levels that must be met. It provides the time the levels must be met. The By-law offers no quantifying language such as the "various times" language provided by MS. **The By-law provides an all or nothing standard, either you are in compliance or you are not during the prescribed times.** MS used the "various times" language because it cannot produce evidence that proves Evergreen has ever been in compliance with the By-law. **We respectfully request that the DEC order MS to produce a written analysis of the monitoring data showing compliance dates, times, decibel levels and corresponding power levels on Evergreen equipment with said analysis signed by a certified MS noise engineer.**

2) Ambient Background

CTA states that 33 dBA ambient noise was "very rarely as low as the original farmhouse." The original farmhouse was the location used to establish the ambient sound level by Evergreen's plant designer. Evergreen's designer established the level at 33 dBA. CTA admits that the 33 dBA sound level has been met albeit "rarely" during its monitoring. We must presume the 33 dBA was recorded at R1 during CTA monitoring, not at the old farmhouse. Apparently, CTA suggests that you should ignore these facts. Evergreen established the 33 dBA ambient sound level. The level has been met during monitoring. Therefore, the 33 dBA level is the only ambient sound level that you may use to make your decision on compliance.

CTA also states that "EGS sound level at R1 does not exceed 37 dBA for most days of the year." CTA has not offered any evidence to prove compliance. CTA cannot specifically quantify alleged ambient sounds, the wind, truck traffic, Route 2 construction, air conditioners, delivery trucks, trains and insects, however it knows with absolute certainty that EGS sound levels do "not exceed 37 dBA for most days of the year." CTA can either prove the exact source and decibel level of the ambient noise and Evergreen noise or it cannot. You certainly cannot permit CTA to have it both ways. **We respectfully request that the DEC order CTA to produce a written analysis of the monitoring data showing "37 dBA for most days of the year" with said analysis signed by a certified CTA noise engineer.**

MS stated that the "33 dBA background is not, nor has it ever been, a frequent occurrence based on the CH2MHill study and former Devens baseline measurements." The words "a frequent occurrence" can only be interpreted as meaning that 33 dBA was measured by MS during the monitoring process. MS went on to further state "38 dBA will only be achieved when 33 dBA level conditions are present." This statement by MS effectively summarizes my clients' position. The 38 dBA requirement, premised on the DEC By-law and the 33 dBA level established by Evergreen will only be met when in the required but infrequent 33 dBA level is met. These MS statements are an admission that Evergreen will not be in compliance until it mitigates its noise pollution. MS appears to suggest that you should ignore the 33 dBA level that it admits still exists on the land at issue. Clearly, you cannot ignore a condition you negotiated and certified. You cannot waive the application of this fact to your By-laws.

MS blamed crickets as the difference maker between measurements taken on October 7-8 and November 9-10. **We respectfully request that the DEC order MS to produce a written analysis of the monitoring data showing crickets as the reason why there was a variance in the measurements with said analysis signed by a certified MS noise engineer.**

3) Application and Approach of 5 dBA increase.

We have no comment on this section of the document.

4) Receptor locations.

We have no comment on this section of the document.

5) Worst Case Scenario testing.

Evergreen has stated on more than one occasion that its equipment operation levels will never exceed 80%. CTA, MS and Noise Control Engineering ("NCE") all noted that Evergreen failed the worst case scenario test at 60% in November when there were no insects. Evergreen has made us very aware of the fact that in the spring and summer the 60% operations level will be the norm not the exception. The fact is Evergreen failed its compliance test. The clear inference one may draw from the 60% failure is Evergreen will not be capable of compliance in the future as the plant is currently constructed. Evergreen clearly has more work to do in mitigating the noise levels emanating from its plant.

6) Duration of Compliance Measurements 5 minutes or 20 minute samples.

My clients' expert, NCE, made suggestions concerning the duration of measurements. It is my understanding he made his suggestions in an effort to provide you with an advanced method for measurement. His suggestions were not received in the collegial spirit under which they were given. My clients have no problem with the 20 minute measurement period as they know Evergreen has never been in compliance with the all or nothing nature of the DEC By-law and they believe that unless Evergreen installs more mitigation measures it will never comply with the By-law.

7) Statistical analysis of data to determine reference limits.

CTA stated Evergreen “sound cannot be separated from sound produced by non-EGS sources.” It also stated that “there are no statistical processes that can reliably separate non-EGS sound from EGS sound.” CTA goes on to state “statistical analysis of data corrupted non-EGS sound inaccurately attributes measured sound to EGS.” Our analysis of those statements produces the following interpretation: 1) sounds cannot be separated; 2) no statistical analysis exists to separate sound; and, 3) despite the facts that sounds cannot be separated and no statistical analysis exists to measure, CTA measures anyway and offers a conclusion. There is no way these CTA claims may be logically reconciled. Put more simply, if no analysis exists how can CTA produce one and ask you to believe it. **We respectfully request that the DEC order CTA to produce a written analysis of a non-existent statistical process that separates non-EGS sound from EGS sound with said analysis signed by a certified CTA noise engineer.**

CTA also offers the statement that “even with the cooling towers at 100%, EGS is not loud enough to be the only audible noise source at R1.” Judge Keith C. Long, in MS&G Lakeville v. Town of Lakeville et al., 15 LCR 259; 2007 Mass LCR Lexis 87, 19 (2007), provided the following description of one property of decibels: “if one source of noise is 10 dB (or more) louder than another source, then the total sound level is simply the sound level of the higher source.” CTA’s Gregory Tocci seemed to concur with that description during testimony he offered in an unrelated court case. Northern Middlesex Housing Associates v. Commonwealth of Massachusetts Housing Appeals Committee, 1992 MA Housing App. Lexis 36. Mr. Tocci testified that if a foundry’s noise was louder, the positive noise effect of a spillway on the Concord River would have no counter effect on the louder foundry noise.

It is our understanding that when the cooling tower is at 100% it is 10 dB louder than all other sources. As CTA noted, it failed the compliance test at 60%, never mind 100%.

MS offers the comment that “even during demonstrated periods of compliance, ambient sources contribute energy to the Evergreen sound.” In light of the discussion presented above, this comment begs the question: If you cannot separate and identify ambient sources, how can you possibly claim ambient noise contributes to Evergreen noise?

8) Multiple Noise Sources Adjustment

We agree with CTA that “current compliance requirements assume a preexisting, uniform background sound pressure level of 33 dBA at all of Dunroven farm.”

We agree with MS that “none of the factors relating to land use, property line, exposure or ambient have changed substantially” since the ambient level of 33 dBA established by Evergreen.

The 33 dBA is the pure and undeniable noise factor in all of the evidence on record concerning an ambient sound that may be used to determine compliance. Anything else is pure and undeniable speculation.

The Perrys' Position

My client filed her complaint on March 19, 2009. Since that time Evergreen has worked to mitigate. Since that time my clients have been patient. At this time, my clients' patience has been consumed. They are sick. They have moved their horses off their farm as a result of the animals showing ill health. They can no longer enjoy their animals in their property. They are not comfortable in their home. They cannot sleep in their second floor bedroom because of the noise. They cannot sleep on the first floor of their home. They have found sleeping in their damp basement relieves the noise issue but creates other issues. When they sleep away from their home, they sleep well. Their business careers have been affected. Evergreen noise pollution has evicted them from their home and their lives. They meet all the legal conditions for the granting of relief.

Before Evergreen's arrival my clients lived peacefully on their 24 acre rural farm. There were trains. There were trucks. There was Army cannon fire. There was lots of noise. My clients raised two children and owned many horses. They never complained about noise pollution.

The only differences in their lives pre-Evergreen and now is Evergreen noise and its effects.

My clients want action. Your By-laws provide the means for enforcement to protect their rights versus noise pollution. You have all the facts you need to make a decision: a certified 33 dBA ambient noise level to apply your 5 dBA adjustment. Curiously, your staff and Evergreen employees have made the compliance argument, not CTA and MS. Mr. Tocci and Mr. Sheadel answer questions occasionally. Evergreen executive officers and DEC Staff, people who are not noise experts have made oral arguments concerning compliance without offering evidence in support of their layman's opinions. If the experts, CTA and MS, believe that Evergreen is in compliance, we request that you receive written evidence from CTA and MS that Evergreen is in 100% compliance with the letter of your By-law. If Evergreen cannot meet that standard it should be shut down until it does. To date, Evergreen cannot prove compliance under your By-laws. An alleged occasional attaining of compliance is not compliance. You must do what other municipalities across the State and State courts have done: shut Evergreen down until they mitigate the noise.

Yours truly,



David A. Marcelino