

# Memorandum

Date: January 25, 2010  
To: William C. Marshall, Chairman of the Devens Enterprise Commission  
From: Peter Lowitt, AICP, Neil Angus, AICP and Edith Netter, Esq.,  
RE: Reconsideration of DEC 12/3/09 Decision on Evergreen Solar Permanent Daytime and Nighttime Sound Monitoring System Protocol

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This Memorandum highlights the overarching issue raised by the Request for Reconsideration, outlines the procedures to be followed, summarizes the legal framework for the DEC's decision on the Request, and lists the specific issues to be decided by the DEC and makes recommendations as to their resolution.

The Harvard Board of Selectmen ("Harvard"), acting through its agent, seeks Reconsideration of the DEC's decision to approve the Evergreen Solar Permanent Daytime and Nighttime Sound Monitoring System Protocol (the "Protocol"). Harvard alleges that the DEC acted "outside the scope of its authority" in approving the Protocol.

Acting "outside the scope of its authority" is one of the four grounds for granting a Request for Reconsideration. [974 CMR 1.12(1)(a)].<sup>1</sup> A claimant alleging that an action is "outside the scope" of the authority of a decision-maker must prove that there is no legal authority for the action or the action conflicts with the governing law. A brief summary of recent Massachusetts State Supreme Judicial Court rulings on "scope of authority" issues is attached as Exhibit A.

The principal issue to be addressed by the DEC is whether it acted "outside the scope of its authority". As discussed below, the DEC also should decide whether the Request was timely, Harvard had the right to request reconsideration (standing) and whether the DEC's

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<sup>1</sup> The others are "mistake or misrepresentation on the plans or submission", "fraud", and "significant changes in site conditions." 974 CMR 1.12(1)(b), (c) and (d)

fees should be waived (see page 3 for a discussion of these procedural issues). The DEC should vote separately on each issue.

### Substantive Issue Raised by the Request for Reconsideration

Harvard claims that the DEC acted “outside the scope of its authority” when it approved the Protocol in that the DEC:

- (a) Did not allow “input, discussion, or open debate regarding each issue raised regarding the development and approval of the long-term Sound Monitoring System Protocol”
- (b) Adopted the Protocol “based on information submitted that lacked the requisite supporting data to definitively determine that the Sound Monitoring Protocol will ensure that Evergreen Solar will be in compliance with 974 CMR 4.05(3): Noise Limits and Standards at all times of night and day and at all times of year”
- (c) “Extending the waiver granted to Evergreen Solar...beyond the DREZ, approximately 194’ onto private property located in the Town of Harvard over which the DEC has no jurisdiction.”
- (d) Failed “to exercise adequately its role as the Board of Health for the DREZ by not allowing discussion during the hearing regarding adverse impacts to the health and welfare of neighboring residents and their animals caused by the noise impacts.”

In other words, Harvard maintains the DEC had no authority to enact the Protocol because it did not allow adequate public participation [see above (a) and (d)], did not have sufficient supporting data [see above (b)] and “extended the waiver” outside of the DREZ boundary [see above (c)].

We suggest that the DEC had ample authority to approve the Protocol and in approving the Protocol went far beyond the requirements of the Regulations to protect the interests of the neighbors. We also suggest that the claims that the DEC did not allow for adequate public participation, that the Protocol was based on insufficient data, and that the DEC inappropriately extended a waiver of its regulations, have no basis and even if they were true they do not mean that the DEC acted “outside the scope of authority.” [See pages 4-7

of this Memorandum for a discussion of the “outside the scope of authority” claim”]. Nevertheless, we recommend that the DEC address these specific claims.

### Procedures and Recommended Votes

The procedures, requirements and recommendations thereon for the Request for Reconsideration include:<sup>2</sup>

- (a) Request for Reconsideration must be received by the DEC within 30 days of DEC vote on Protocol. [974 CMR 1.12(1)(b)]

**The DEC approved the Protocol on 12/3/09 and received the Request on 12/28/09. Request was received within 30 days.**

- (b) Harvard must have “standing” (the right) to make the Request.

**The Regulations expressly state that a Town (in this instance, the Town of Harvard) has standing (the right) to bring a Request for Reconsideration. [974 CMR 1.12(1)]**

- (c) The Regulations require the payment of a fee [974 CMR 1.12(1)(b)(4)]:

**Harvard submitted the required fee of \$1000 plus the cost of the required administrative notice requirements but has submitted a 12/22/09 request for a fee waiver.**

**Fees for Reconsideration (and all other matters involving public hearings) include administrative fees (paying for legal notice), peer review fees (hiring consultants and obtaining legal assistance) and staff time. The costs incurred by the Commission to process this Request for Reconsideration are well over the \$1000 fee. For the prior Request for Reconsideration, which was brought by a private citizen, the DEC denied a request to waive fees. However, the DEC has routinely waived fees for municipalities, except the costs of providing legal notice.**

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<sup>2</sup> DEC Regulations also state that the Request must include certain information [974 CMR 1.12(1)(b) 1-3]. The Director has determined that this information has been provided.

- (d) The DEC must hold a public hearing on a Request for Reconsideration. 974 CMR 1.12(1)(c ). A quorum is seven commissioners; at least seven votes are required to grant such a Request.
- (e) The decision on a Request for Reconsideration must be made at a public hearing and rendered within 45 days of receipt of the Request (unless extension granted pursuant to 974 CMR 1.08, requiring agreement of the Requester). [974 CMR 1.12(1)(c )]

### Legal Framework for the DEC's Decision on the Request

To determine whether the DEC's decision to enact the Protocol is "outside the scope of its authority" the DEC must decide whether the proponent of the Request has demonstrated to the DEC's satisfaction that the Protocol is not authorized by Chapter 498 of the Acts of 1993, as amended, the Devens By-Laws, the DEC's Rules and Regulations and/or the Resolution or that the Protocol is in conflict with these laws, bylaws, regulations and/or the Resolution and any other applicable laws. [A summary of the DEC's noise performance standards is attached as Exhibit B].

The DEC Industrial Performance Standards for Noise and Vibration (974 CMR 4.05) provide the regulatory framework for determining whether the DEC acted outside the scope of its authority . The DEC Noise Resolution was enacted in accordance with the Regulations but was not required by them. The DEC Protocol was approved in furtherance of the Resolution .<sup>3</sup> [See Exhibit C for a summary of the Goals of the Protocol]

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<sup>3</sup> Conditions 2 and 7 in the Resolution form the basis for the Protocol:

Condition 2: After having achieved compliance with the DEC's Industrial Performance Standards for noise Evergreen shall establish a permanent noise monitoring station at its lease line and at 62 Old Mill Road and shall continuously monitor (24 hours, seven days a week) noise levels from the Facility to ensure compliance with 974 CMR 4.05. All monitoring shall be in accordance with ANSI (American National Standards Institute) standards for noise monitoring. Evergreen shall submit monthly monitoring reports to the DEC no later than the first day of the following month.

Condition 7: Evergreen shall report to the DEC, at least once monthly, after achieving compliance, in a manner consistent with ANSI standards for noise monitoring. Additionally, Evergreen shall provide a written report to the DEC detailing, with supporting documentation if and to the extent relevant and appropriate, the then-current status of all sound attenuation and mitigation controls as set forth in, and the results of all monitoring (including, monthly, monitoring logs) and any other material matters....

The DEC cannot unilaterally amend the Noise Regulations because the Bylaws require unanimous approval by the Joint Boards of Selectmen before they go into effect. [By-Laws, Article II.B] Consequently, changes to this section of the Regulations also require JBOS approval. The DEC can however, amend or revoke the Evergreen Solar Noise Resolution and/or the Protocol. In enacting the Resolution and the Protocol the DEC is going above and beyond the requirements of the Regulations in order to protect the neighbors.

See Memorandum from Tech Environmental to the DEC dated January 25, 2010

Did the DEC act outside the scope of its authority in that it:

- (a) Did not allow “input, discussion, or open debate regarding each issue raised regarding the development and approval of the long-term Sound Monitoring System Protocol”

**There is no legal requirement for public meetings or public hearings during the DEC enforcement process. The requirements for how the DEC is to enforce the performance standards in general and the noise and vibration standards in particular are set forth at 974 CMR 4.01 and 4.05 respectively. Nevertheless, since March 2009 (when the DEC received the initial written complaint concerning noise from Evergreen Solar), the DEC has convened no less than 16 public meetings to discuss noise emanating from Evergreen Solar. These meetings were held on May 7, May 26, June 4, June 30, July 9, July 14, July 28, August 6, August 25, September 3, September 29, October 8, October 27, November 12, November 24 and December 3, 2009. They were held in full compliance with the Open Meetings law [G.L. c. 30A sections 11A and 11A ½ ] as required by the Devens By-Laws. [Article II.B4] The DEC provided the public with the opportunity to provide written and oral comments at all but the December 3, 2009 meeting.**

**Of the 16 meetings, five focused on discussion and approval of the Protocol. These meetings were held on October 8, October 27, November 12, November 24 and December 3, 2009. At the first four meetings the DEC allowed the public to speak. At the November 24, 2009 meeting, the DEC announced it would limit public participation to written comments at the**

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**December 3, 2009 meeting so that the commissioners could have time to deliberate on the Protocol. At the December 3<sup>rd</sup> meeting the Commissioners voted to approve the Protocol.**

- (b) Adopted the Protocol “based on information submitted that lacked the requisite supporting data to definitively determine that the Sound Monitoring Protocol will ensure that Evergreen Solar will be in compliance with 974 CMR 4.05(3): Noise Limits and Standards at all times of night and day and at all times of year”

**The DEC adopted the Protocol after considering supporting data provided by Evergreen Solar and its noise consultant. The DEC’s noise consultant reviewed, corrected, as necessary, and verified this data. A description of the supporting data is set forth in a Memorandum to the DEC from Douglas Sheadel, CCM, Modeling Specialties dated January 25, 2010. This data was used to confirm the calibration methodology of the Protocol.**

- (c) Extended “the waiver granted to Evergreen Solar...beyond the DREZ, approximately 194’ onto private property located in the Town of Harvard over which the DEC has no jurisdiction.”

**The Request to Reconsider this waiver is not timely. It should have been made within 30 days of the issuance of the ROD. Furthermore, the use of R1 was not an extension of the waiver.**

**The DEC granted a waiver as part of the ROD on Phase II of Evergreen Solar dated April 3, 2008. The waiver requested by Evergreen Solar was for:**

**“a slight excess of noise at a limited area of the DREZ, an unpopulated area. This excess will only occur in the event that the plant is in full operation with the emergency generators running, an unlikely event. The estimated excess noise level during the daytime is 7dBA (with an emergency generator in operation). The estimated excess noise level at night is 6 dBA (with no emergency generator in operation). The applicant has complied with noise requirements at the closest sensitive receptors. Conditions of approval note that should there be a valid noise complaint from one of the sensitive receptors, the facility will be required to undertake the necessary measures to comply with 974 CMR 4.05(3).”**

**This waiver allowed EGS to operate 6 or 7dBA above the DEC's noise limits under certain circumstances. As the language of the waiver states, it does not apply when complaints are made.**

**The argument that R1 is not within the DEC's jurisdiction is without merit. Condition 2 of the Resolution requires monitoring at 62 Old Mill Road (Dunroven Farm). Condition 2 is based on the "EGS plan" which is attached to the Resolution. The Harvard Board of Selectman in a letter to the DEC dated July 13, 2009 "endorsed" this plan. Because of the Protocol, the DEC has been able to collect data and monitor EGS's compliance at R1. [See Exhibit C and the Tech Environmental Memorandum for an explanation as to why R1 is representative of the DREZ boundary].**

**By using R1, the DEC is not, either figuratively or literally, moving the DREZ boundary line onto residential property.**

- (d) Failed "to exercise adequately its role as the Board of Health for the DREZ by not allowing discussion during the hearing regarding adverse impacts to the health and welfare of neighboring residents and their animals caused by the noise impacts.**

**See recommendation made under (a) above for a recommendation on a response to the claim that "discussion" was not allowed. As to the claim that "the adverse impacts to the health and welfare..." , it is correct that these issues were not discussed during the meetings on the Protocol. This is because the Protocol is a technical measurement system. However, these issues were discussed in public as part of the DEC's response to the EGS noise complaints.**

## EXHIBIT A

Below are highlights of recent Massachusetts Supreme Judicial Court decisions on when a government regulation or action is “outside the scope of authority”:

Authority to zone did not include the right to regulate conversion of apartments to condominiums. Zoning can be used to regulate land use, it cannot be used to regulate building “tenure” (ownership v. rental). *CHR General, Inc. v. City of Newton*, 387 Mass. 351 (1982).

Zoning cannot be used to protect business from competition. Business owners do not have a right to sue simply because they are in competition with another business. *Circle Lounge & Grille v. Board of Appeal of Boston*, 324 Mass. 427 (1949):

Placement by Middlesex County Sheriff’s office of prisoners in a monitored community setting does not violate the Massachusetts constitution (Article 30 of the Massachusetts Declaration of Rights). *Commonwealth v. Edward Donahue*, 452 Mass. 256 (2008)

DTE regulations treating commercial and residential (apartment) building owners as “utilities” and authorizing access to commercial and residential buildings for purpose of physically attaching wires or cables was ultra vires of DTE’s statutory authority. *Greater Boston Real Estate Board v. Department of Telecommunications and Energy*, 38 Mass. 197 (2002)

## EXHIBIT B

Section 4.05 of the Regulations provides, in pertinent part, as follows:

Purpose: to “preclude or significantly mitigate conditions that could cause nuisance to any receptor within or without Devens.” States that noise issues are to be addressed through complaints and enforcement and “supplemented and enhanced” (to minimize or preclude potential noise...issues) when there is an application for site plan approval or building permit. 974 CMR 4.05(1)

Complaints/enforcement: Once there is a “reasonable certainty of the nuisance source, the violator shall be subject to providing reasonable mitigation measures that essentially resolve the difficulty. 974 CMR 4.05(2)(a)

Upon a finding of “probable cause” a violator has a second 30 day period during which to demonstrate that it has initiated “good faith” efforts to correct the objectionable circumstances. If such efforts are not initiated, the violator may be subject to remedies...974 CMR 4.05(2)(b)

Applicable noise standards [974 CMR 4.05(3)]:

Broadband sound (white sound) cannot exceed existing background noise by 5 dBA as measured at any DREZ boundary abutting a residential External Receptor. [974 CMR 4.05(3)(a)(3)]

Broadband sound cannot exceed 45 dBA nighttime/ 55dBA daytime as measured at any DREZ boundary abutting a residential External Receptor. [974 CMR 4.05(3)(b)(3)]

Facilities cannot produce a “pure-tone” condition (perceived as humming or buzzing) as defined in 974 CMR (3)(d)7.

Facilities cannot produce “impulsive” (intermittent) sounds in excess of decibel limits (10dBA as measured at any residential property line or receptor) or 15dBA as measured at any commercial/industrial property line or receptor) for a cumulative duration of not more than one minute within any given one-hour period. Impulsive noise, as measured at any residential receptor shall only be allowed to occur during normal daytime hours.[974 CMR 4.05(3)(d)8]Exceptions to the noise and vibrations standards are listed at 974 CMR 4.05(4)(b) and include “national defense activities” and “maintenance equipment between the hours of 7:00am and 8:00pm.”

## EXHIBIT C

### **Goals of the Protocol**

Conditions 2 and 7 of the July 14, 2009 Evergreen Solar Noise Violation Resolution required Evergreen Solar (EGS) to develop a long-term monitoring protocol that would act as a self-monitoring system. That the system would monitor noise levels from the facility on a regular basis to be used as a reference to explore compliance issues once all the noise attenuation measures were in place.

### **Goals**

The Protocol was developed to provide on-site monitoring to determine whether EGS is contributing 5dBA above background (ambient) sound. The regulations require that upon a complaint, the DEC is to determine whether EGS (or any other facility at Devens) contributes on a regular basis more than 5dBA at the DREZ boundary [(974 0.05(3)(a) 3] In order to make this determination, the DEC-approved Protocol is designed to measure EGS's contribution to total sound levels at the DREZ boundary. It does this by establishing three monitoring stations (R1, R5 and R7). R5 and R7 are located close to EGS in order to capture the sounds coming from EGS. The R1 station is designed to capture those sounds heard at Dunroven Farm (the closest residential External Receptor). The Protocol uses a mathematical formula to calculate how much of the sounds from R5 and R7 reach the DREZ boundary.

The Protocol was also developed to provide EGS instant feedback of sound sources that its facility generates. A secondary goal of the protocol was to enable EGS to measure compliance (or non-compliance) with 974 CMR 4.05 at any point in time, not just when ambient noise conditions are at their quietest and EGS is the only dominant noise source. This would facilitate the ability of EGS to conduct "sustained measurements" to demonstrate whether or not they were in compliance with 974 CMR 4.05.