

November 1, 2007

Rodman E. Honecker, Esq.
Windels Marx Lane & Mittendorf
120 Albany Street Plaza
New Brunswick, New Jersey 08901

John E. Lanza
Lanza and Lanza
5 Main Street
Flemington, New Jersey 08822

Re: Right to Farm Conflict Resolution Matter
Irene's Evergreens/Larry Amorosi
Marlboro Township, Monmouth County

Dear Messrs. Honecker and Lanza:

Enclosed please find a copy of the hearing report and addendum in the above-captioned matter. The State Agriculture Development Committee (SADC) adopted the report and addendum, and the recommendations set forth therein, at its meeting on November 1, 2007.

By copy of this letter, and pursuant to N.J.S.A. 4:1C-10.1c, the SADC is forwarding a copy of the hearing report to the Monmouth County Agriculture Development Board (CADB). The CADB is required to hold a public hearing and issue its findings and recommendations within 60 days of receipt.

If you have any questions, please contact David Kimmel, Right to Farm Program Specialist, at (609) 984-6323.

Sincerely,

Susan E. Craft
Executive Director

Encl.

c: Harriet Honigfeld, Monmouth CADB (w/ enclosures)

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State Agriculture Development Committee
Right to Farm Conflict Resolution

Hearing Report

Complainants: Lawrence and Tatiana Thomson
Daniel & Angela Juffey
John & Mary Turi

Respondent: Larry Amorosi d/b/a Irene's Evergreens

Hearing Dates: April 13 and June 26, 2007

I. Background

This matter involves a dispute between two neighbors regarding a sawmill operation and tree harvesting activities on property owned by Larry Amorosi in Marlboro Township, Monmouth County (hereinafter "property"). Mr. Amorosi's agricultural use of the property is harvesting trees and processing them into wood products. In 2006, he purchased a small, portable sawmill and placed it 20 feet from the boundary line that separates his property from that of the complainants, Lawrence and Tatiana Thomson.

The Thomsons filed a right-to-farm complaint with the Monmouth County Agriculture Development Board (CADB) in May 2006, alleging eight specific objections to Mr. Amorosi's sawmill operation and contending that Mr. Amorosi's actions are "also clearly designed to harass, annoy and disturb his neighbors."

The CADB forwarded the complaint to the SADC pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.1c, as the activities that are the subject of the complaint are not addressed in any promulgated agricultural management practices.

In the fall of 2006, the hearing officer postponed the scheduling of a hearing pending settlement discussions. In the spring of 2007, the hearing officer was advised that the parties could not settle the matter and scheduled the hearing, which took place over two days in April and June 2007.

After the first day of hearing, the hearing officer contacted the Township of Marlboro and the County of Monmouth and requested their input as to whether they believe Mr. Amorosi's operation poses a threat to public health and safety and as to whether the Township believes the operation is in violation of any municipal ordinances. Both the Township and County responded, as set forth in detail below.

II. Threshold Eligibility Criteria

To receive the protections of the Right to Farm Act (Act), a farm must qualify as a "commercial farm." N.J.S.A. 4:1C-3. Commercial farm is defined as

(1) a farm management unit of no less than five acres producing agricultural or horticultural products worth \$2,500 or more annually, and satisfying the eligibility criteria for differential property taxation pursuant to the "Farmland Assessment Act of 1964" (citations omitted), or (2) a farm management unit less than five acres, producing agricultural or horticultural products worth \$50,000 or more annually and otherwise satisfying the eligibility criteria for differential property taxation pursuant to the Farmland Assessment Act of 1964" (citations omitted). N.J.S.A. 4:1C-3.

Mr. Amorosi submitted a certification to establish that he meets the production requirements of the Right to Farm Act. He produced receipts of processed/finished wood products showing \$875 worth of production in 2005. For 2006, he produced receipts showing sales of processed/finished wood products in the amount of \$4,400. (Certification and Exhibit D10).

Given that the right-to-farm complaint addresses on-going issues and the hearing did not commence until 2007, I find it appropriate to consider the 2006 receipts as the basis for determining whether Mr. Amorosi met the production criteria described above. I find that he does meet the production requirements of the Right to Farm Act.

To receive the protections of the Act, the farm must also be located in a zone in which agriculture is a permitted use. The farm at issue is located in the Township's Land Conservation Zone, in which agriculture is permitted.

III. Complaint

The right-to-farm complaint sets forth the following grievances:

- “1) the establishment of a commercial retail operation in their quiet, residential neighborhood, including the associated unwanted pedestrian and automobile traffic (Beacon Hill Road is a single lane road); Mr. Amorosi has established a sawmill operation and fabricates and manufactures finished product;
- 2) the relentless operation of Mr. Amorosi's sawmill during all hours of the day and early morning, e.g., 6a.m., including on weekends;
- 3) the noise generated by Mr. Amorosi's sawmill
- 4) the saw dust and related effluent generated by his milling activities;
- 5) the hazardous conditions created by his milling activities, including the very real risk of injury to neighboring children and adults to the proximity of the operation to his neighbor, despite Amorosi owning a 10-acre lot;
- 6) the running of his chain saw for commercial purposes within close proximity of residential houses;
- 7) the continued trespass and migration of effluent from Mr. Amorosi's operation onto the Complainant's lands; and
- 8) the riding of his motorcycle during early morning hours, e.g., 5:45 a.m.”

IV. Summary of Relevant Facts

A public hearing was held on April 13 and June 26, 2007.

The following witnesses testified:

On behalf of the Complainants:

Lawrence and Tatiana Thomson
John Erdreich, Ph.D., FASA

On behalf of Larry Amorosi:

Larry Amorosi

Mr. Amorosi purchased the mostly-wooded property in 1984. He has had forestry management plans for the past 20 years. Since purchasing the property 23 years ago, he has harvested firewood and produced other wood products from the trees. He described the topography of the property as “very hilly.” There is a single family residence on the property. The property has been assessed as farmland since before he purchased it.

Mr. Amorosi testified that he processes only wood that he grows and harvests on his property – except for one instance where he custom-milled a split oak tree as a favor for someone.

Mr. Amorosi purchased the sawmill at issue in this matter in late February or early March 2006. It is a portable sawmill – a Hud-Son Oscar, with an 18-inch saw and a 5.5 horsepower engine. According to Mr. Amorosi’s forester, the sawmill is “without a question the smallest sawmill I have ever seen on a property.” (Exhibit D4). This was the first sawmill Mr. Amorosi has owned, and he purchased it because his “old method” was not good for producing wood products. He testified that he wanted to increase his income from the sales of wood products because his taxes have increased, and the purchase of the sawmill enabled him to increase his production.

Although the sawmill is marketed as portable, Mr. Amorosi testified that the owner’s manual states that the sawmill must be placed on level ground. He claims that although the mill is portable, it nevertheless requires a foundation under the rails and

needs to be on “good, firm ground.” He said at the hearing, “To me, it’s not portable.”

Mr. Amorosi testified that he cuts trees with a gas-operated chain saw that has a “less than 4.5 horsepower” engine. He rides in an all-terrain vehicle (ATV) to get to the trees he wishes to cut. After he cuts down a tree, he brings it to the sawmill with his ATV and a cart. He then passes a typical tree through the sawmill three or four times.

Mr. Amorosi testified that he usually begins operating the sawmill at 7:00 a.m. He likes to mill early in the morning because that is the coolest part of the day and the “stillest” part of the day. The ideal time, he testified, is between 6:00 a.m. and 8:00 a.m.

If the wind speed on any given day is greater than 14 or 15 mph, he does not use the saw, as that is the wind speed at which dust from the saw starts to move. Mr. Amorosi sprays water to keep any dust from spreading.

When operating the mill, he makes three or four cuts in each log. Each cut takes approximately one minute and Mr. Amorosi stated that he turns off the mill between cuts. Most of his time is spent putting the log on the mill and orienting it. Mr. Amorosi testified that he never runs the mill at full throttle and usually runs it around half-throttle.

In addition to the sawmill, Mr. Amorosi also has a kiln, located about 20 feet from the mill, which is used for drying wood. He located the kiln close to the mill so that he does not have to carry the boards too far. Mr. Amorosi also began constructing a shed about 15 feet from the boundary line separating his property and the Thomsons’. The Township requested that he stop construction on this barn in April 2006 because it violated municipal setback ordinances. (Exhibit C25).

Mr. Amorosi produced photographs depicting various products he has made from the wood he harvests and processes. (Exhibit D9.)

Mr. Amorosi testified that other than one errant woodchip that flew onto the Thomsons' property, the saw does not produce wood chips. The waste output of the mill, he stated, is granular, wet, and goes right to the ground.

In a typical week, Mr. Amorosi testified that he runs the mill two mornings a week, sometimes three. He began keeping meticulous details of his mill use in April 2006.

Mr. Amorosi claimed to be "doing his best" to minimize the sound from the saw. He fabricated an insulated pad/jacket to put around the motor and he attaches a muffler to the saw when he cuts logs.

He asserted that his sawmill operation has not caused an increase in rodents, that there is no effluent coming from his property, and that his equipment does not produce smoke.

Around the same time that the Thomsons filed the right-to-farm complaint with the Monmouth CADB, they and three other sets of neighbors filed an action in the Superior Court of New Jersey, Chancery Division, seeking to enjoin Mr. Amorosi from operating the sawmill. On February 2, 2007, Judge Lehrer issued an Order with Preliminary Injunction, prohibiting Mr. Amorosi from operating his sawmill, wood chipper, chain saw and hydraulic wood splitter before the hours of 8:00 a.m. and after the hours of 6:00 p.m., with no operation of the equipment on Sundays. (Exhibit C27). Judge Lehrer then issued an order enforcing litigants' rights and continuing and extending the injunctive relief previously granted, on June 19, 2007. (Exhibit C35). The February order was amended to further enjoin Mr. Amorosi from "riding or otherwise operating motorcycles or ATVs on his property before 8:00 a.m. or after 6:00 p.m.," and

on Sundays. Mr. Amorosi was also ordered to remove a tarp canopy he constructed near his sawmill.*

Mr. Amorosi admitted to smoking cigarettes while operating the mill and chainsaw, but stated that he does not “gas anything up with a cigarette in his mouth.” He testified that there have been no incidents where brush has smoldered or caught fire because of ashes from his cigarette.

Throughout the hearing, there was much discussion about whether there is a feasible alternate location on Mr. Amorosi’s property to which he can move the sawmill. Mr. Amorosi contends that the area in which he has placed the sawmill is the only portion of his property level enough to support it. The sawmill is located 20 feet from the property line separating his property from the Thomsons’. When questioned at the hearing about whether he can move the sawmill to an alternate location, Mr. Amorosi testified that if he moved the sawmill to the front of his property, he would have to clear, fill and grade the land. He claimed that it would be too costly to prepare another portion of his property for the mill; his estimate was \$35,000. He added that he would like to be able to see the mill from his house, for liability purposes.

In the course of the Superior Court action described above, Judge Lehrer visited the property to help determine whether there was another appropriate location for the mill. Judge Lehrer suggested Mr. Amorosi move the mill to the area between the Amorosi house and swimming pool. When questioned during the hearing about this location, Mr. Amorosi stated that the ground is too uneven to operate the mill. He stated

* It is unclear whether Mr. Amorosi asserted any procedural objections to the matter being heard in New Jersey Superior Court based on the Right to Farm Act, which requires “persons aggrieved by the operation of a commercial farm” to “file a complaint with the applicable county agriculture development board. . . prior to filing an action in court.” N.J.S.A. 4:1C-10.1. According to the orders issued by Judge Lehrer, the matter is proceeding to trial.

that there is a three-foot drop on one side of that area and a two-foot drop on the other side. Further, he testified that because of a three-foot hump in the middle of that area, he would have to excavate down to water and electric lines and re-grade the property. And then, he said, there would not be enough room for his operation. He testified that he needs a 45 square foot area to have enough room to swing logs, and load and unload logs.

The Thomsons' testimony centered around how Mr. Amorosi's activities have affected their quality of life and deprived them of the use of their property. They purchased their property in August 1998. It is assessed as farmland. They have two purebred Chinese ponies and goats. They also process firewood and grow Christmas trees and raise and sell peonies flowers. Mr. Thomson testified that prior to 2006, Mr. Amorosi would cut a few trees a year and stockpile the firewood. In 2006, he began clearcutting trees at 5:45 a.m., including trees near the Thomsons' house.

Mr. Thomson testified that in an attempt to create a buffer to block the noise, effluent, odor, rodents and snakes emanating from Mr. Amorosi's property as a result of the sawmill operation, he installed a split rail fence along the 1,200-foot long property boundary and transplanted cypress trees and 40 other plants. He stated that he spent \$12,000 on the buffer, but that the buffer has not sufficiently blocked out the noise and other elements described above.

Mr. Thomson relied upon a series of photographs he took to illustrate how the actions of Mr. Amorosi have interfered with the ability of the Thomsons to enjoy their property. (Exhibits C5 to C23). Mr. Thomson testified that the sawmill is located 10 feet from the property boundary and 40 to 50 feet from their house and swimming pool. He

also testified that in March 2006, Mr. Amorosi was operating the mill from 10 minutes to two hours, from early morning until it was dark outside.

Mr. Thomson contended that the sawmill is not currently located on level ground and presented a photograph depicting rails on which the sawmill is situated. (Exhibit C13). In response to Mr. Amorosi's contention that this is the only level area of his property, Mr. Thomson testified that there is a "rolling topography, but many flat areas." The Thomsons produced a topographic map to support this conclusion. (Exhibit C26).

Much of the testimony of Mr. and Mrs. Thomson focused on the effect of the sawmill operation on their two young children. They testified that their children were terrified by the sawmill, could feel the vibrations in their bed, and would constantly seek the comfort of Mrs. Thomson. As a result of the sawmill operation, the children were cranky and irritable, had trouble sleeping, and were tired at school. Mrs. Thomson was visibly upset during her testimony. She stated that it was extremely difficult having her children so upset, scared all the time, and running to her for comfort. Mrs. Thomson said that the effects of the sawmill operation on her family were like "Chinese torture."

The Thomsons also testified that the sawmill affected their livestock – that the livestock would start running when Mr. Amorosi was operating the sawmill. On one occasion, one of their ponies trampled their son, when the pony got spooked from the noise from the sawmill. (Their son was unhurt.)

Mr. Thomson testified that the sawmill has caused physical damage to their property, particularly their swimming pool, which gets a film on the surface.

The Thomsons can also smell the gasoline-powered machinery and the exhaust from the machinery.

The Thomsons allege that Mr. Amorosi intentionally operates the sawmill to interfere with their enjoyment of the property. For example, when the Thomsons had friends visiting from London, and brought their guests to their pool, Mr. Amorosi “fired up” the machinery. The Thomsons and their guests could not tolerate the noise and were forced to go inside the house. As soon as they went inside, Mr. Thomson testified, Mr. Amorosi stopped the machinery.

When Mr. Thomson once attempted to speak to Mr. Amorosi about the problem and asked Mr. Amorosi why he placed the sawmill so close to the Thomson house, Mr. Amorosi replied with a series of invectives and expletives. Mr. Thomson called the police, but was later advised by a municipal official not to call the police again, as the Thomsons would not want to “be branded as wasting municipal resources.”

The Thomsons described the court order limiting the hours of operation of the sawmill as “a blessing” and “a miracle.”

John Erdreich, Ph.D., FASA, an acoustical engineer, testified on behalf of the Thomsons regarding the results of the noise tests he performed on Mr. Amorosi’s property. He presented his findings, which are summarized in a report dated September 26, 2006. (Exhibit C31). Dr. Erdreich measured the noise levels at different intervals between September 13 and September 20, 2006, in decibels designated as dB(A). He found that weather conditions from September 13 through 17 precluded lumbering activity.

Noise measurements were taken on the Thomson property, approximately six feet from the boundary separating the Thomson and Amorosi properties. On September 18, the noise level began rising at 6:30 a.m., increasing from 57 dB(A) to around 69dB(A). From 7:00 to 8:00 a.m., the noise level was constant at 55 dB(A). Between 8:00 a.m. and 10:00 a.m., the level increased to 60-67 dB(A). At around 11:00 a.m., the level dropped

to the background, and then increased to 65 dB(A) at 11:30 a.m. The report states that a “similar pattern is seen on September 19” and that on September 20, “there isn’t any of this type of activity.” (Exhibit C31).

Mr. Amorosi’s attorney objected to Dr. Erdreich’s testimony based on the fact that Dr. Erdreich did not use the equipment required in the noise rules promulgated by the New Jersey Department of Environmental Protection, N.J.A.C. 2:9. Dr. Erdreich responded by stating that the State’s noise rules apply to old type of equipment that uses a meter, and that DEP has informally sanctioned the type of equipment used by Dr. Erdreich.

After the first day of hearing, I as the hearing officer solicited input from the Township of Marlboro and the County of Monmouth with respect to whether Mr. Amorosi’s operation poses a threat to public health and safety and as to whether the Township believes the operation is in violation of any municipal ordinances. The Thomsons testified during the first day of hearing that the Township had concerns with Mr. Amorosi’s sawmill operation, but that the Township believed the Right to Farm Act precluded a township from enforcing its ordinances. Although the Act may preempt municipal ordinances, it did not take away a municipality’s right to enforce its ordinances – but it must do so using the procedures set forth in the Act. The State Agriculture Development Committee and the county agriculture development boards have an obligation to consider a municipality’s ordinances and public health and safety concerns and weigh those concerns against a farmer’s “legitimate agricultural interests” when determining whether to preempt the ordinances. Township of Franklin v. den Hollander, 172 N.J. 147, 151 (2002).

The Monmouth County Board of Health (Board of Health) responded with a letter dated June 11, 2007, summarizing the results of noise testing it conducted on June 8, 2007. (Exhibit D3). The Board of Health conducted the test from the Thomson property at the fence erected by the Thomsons. The sound from the sawmill measured 63.6 to

67.6 dB(A)s when the mill was in operation. The Board of Health cited the State noise control rules, N.J.A.C. 7:29-1.2, which state that “no person shall cause, suffer, allow or permit sound from any industrial, commercial, public service or community service facility that, when measured at any residential property line of any affected person” in excess of 65 dBAs between 7:00 a.m. and 10:00 p.m.* Based on this rule, the Board concluded that no violations exist. (The letter does not indicate what time the measurements were taken, but they were presumably taken between 7:00 a.m. and 10:00 p.m.)

The Thomsons objected to the findings of the Board of Health, contending that Mr. Amorosi was operating the sawmill at a lower speed than when he normally operates it. They have requested the Board of Health to conduct new testing with a third party operating the sawmill. (Exhibit C38).

The Township of Marlboro, Division of Zoning/Code Enforcement, also submitted a letter stating that it has “serious concerns regarding noise, quality of life issues for neighboring residences and possible air pollution issues emanating from the Amorosi Farm.” The Township alleges violation of the State’s Noise Control rules, the Township’s Public Nuisance Ordinance (Chapter 96-3), Noise Ordinance (Chapter 93), Right to Farm Ordinance (84-30.1E), Schedule of Area, Yard and Building Requirements (Section 84-29D) and building permit ordinance (Section 84-27).

The Township expressed concern over wood particles and sawdust emitted from the sawmill, but did not cite any specific ordinances that these emissions would violate. The Township also alleged violations of setback ordinances for the shed and pole barns on the property, and violations of the ordinance requiring building permits for such buildings. The Township concluded with suggestions that Mr. Amorosi move the sawmill operation to another portion of the property if it is feasible. In the alternative, it

* The Board of Health letter states that the State’s Noise Control rules provide for a +/- 3 dB(A) range when measuring decibels, however the rules do not appear to contain this provision.

requested that the State Agriculture Development Committee limit the hours of the mill, and require Mr. Amorosi to plant a 25-foot buffer of trees and/or erect a six-foot fence.

After receiving the response from the Township, Mr. Amorosi's attorney objected to my request for the Township's input.

At the conclusion of the hearing, I stated that I would like to arrange for a site visit by a neutral certified forester who is familiar with sawmill operations to assess whether there are alternate feasible locations to accommodate the sawmill on the property. Through the recommendation of the Division of Forestry at DEP, I found a forester who was willing to perform such an assessment. Unfortunately, however, the parties to this matter could not find a mutually agreeable day for the forester to visit the property.*

V. Whether the sawmill and other forestry activities meet the eligibility criteria of the Right to Farm Act.

To receive the protections of the Right to Farm Act, a farm operation must be in compliance with generally accepted agricultural practices and relevant State and federal laws and regulations, and not pose a direct threat to public health and safety. N.J.S.A. 4:1C-9.

A. Generally accepted agricultural practices

I find, based on evidence submitted by Mr. Amorosi, that he is operating his sawmill and other forestry equipment in accordance with generally accepted practices.

B. Compliance with relevant State and federal law and regulations

The State Noise Control rules prohibit industrial, commercial, public service, or community service facilities from producing sound, when measured at the residential

* The hearing officer is leaving her position with the State Agriculture Development Committee; hence, the site visit had to be scheduled within a short time frame to accommodate her schedule.

property line of any affected person, in excess of 65 dBA from 7:00 a.m. to 10:00 p.m. and in excess of 50 dBA from 10:00 p.m. to 7:00 a.m. N.J.A.C. 7:29-1.2.

The State Agriculture Development Committee does not have the authority to determine whether a landowner is in violation of State law. In this matter, however, the Monmouth County Board of Health found the noise generated by the sawmill operation is within the performance standards established in the State's Noise Control rules.

Although the findings of the Thomsons' acoustical engineer contradict the conclusions of the Board of Health, I nonetheless defer to the finding of the Board of Health, as it is the State's agent with respect to enforcement of the State's Noise Control rules. N.J.S.A. 26:3A2-21.

It is also worth noting, however, that the Noise Control rules exempt agricultural activities from the operational performance standards set forth in N.J.A.C. 7:29-1.2.

Agricultural activities are defined as “. . .activities associated with the growing, producing, processing, or selling of farm-related products, as long as those activities are conducted on farmlands. . .” N.J.A.C. 7:29-1.1. The Monmouth County Board of Health did not mention this exemption in its findings.

C. Direct threat to public health and safety

The Thomsons contend that the noise, exhaust, dust, and wood chips generated by the sawmill pose a direct threat to their health and safety. The Township concurs, although it does not cite any specific ordinances regarding wood particles and dust. Although the Board of Health found that the noise generated by the sawmill did not violate the State's Noise Control rules, it clearly is having a negative impact on the Thomsons' use and enjoyment of their property.

The Township asserts that the sawmill violates its noise ordinance, Chapter 93, although the ordinance exempts “agricultural equipment used in an agricultural area.” Code of the Township of Marlboro, §93-2. The Township did not explain why it does not believe the sawmill falls within this exemption. It should also be noted that the State Agriculture Development Committee may not be required to give deference to the noise ordinance, as the ordinance does not seem to be consistent with the model ordinance drafted by DEP in 1997. Township noise ordinances need approval by the New Jersey Department of Environmental Protection pursuant to N.J.A.C. 7:29-1.7(a) if they are not consistent with the model ordinance. In this instance, it does not appear that the Township’s ordinance is consistent with the model ordinance.

Notwithstanding the Board of Health’s conclusions, and the uncertainty of whether the Township is entitled to any deference of its noise ordinance, I find it appropriate and necessary to consider the impact of the operation on Mr. Amorosi’s neighbors in light of the testimony and evidence presented at the hearing. See In re Samaha Farms (Appeal by Ronald and Donna Samson from the Decision of the Monmouth County Agriculture Development Board) 2006 WL 923700 (App. Div. April 11, 2006). I find that the manner in which Mr. Amorosi operates the sawmill and its close proximity to the Thomsons’ property poses a direct threat to public health and safety.

VI. Conclusions

Mr. Amorosi’s operation conforms to generally accepted practices and does not violate the State Noise Control rules. In light of my findings that the manner in which he operates the sawmill poses a direct threat to the public health and safety of his neighbors,

however, I find that Mr. Amorosi is entitled to the protections of the Right to Farm Act only if he meets the following conditions:

1. He may not operate the sawmill or any other forestry machinery before 8:00 a.m. nor after 6:00 p.m. and on Sundays.
2. He may not operate the sawmill unless he plants a buffer of trees or erects a fence six feet in height along the border of his property and the Thomsons' property.
3. He cannot leave the sawmill running unattended.
4. The operation may preempt the municipal setback ordinances set forth in the Township's May 29, 2007 letter to the State Agriculture Development Committee, as Mr. Amorosi has demonstrated a legitimate agricultural reason for placing the sawmill operation at its current location. Such preemption, however, is only granted if Mr. Amorosi meets the conditions set forth in 1 and 2 above, as those conditions address the Township's public health and safety concerns.
5. If the Uniform Construction Code, N.J.A.C. 5:23-1 et seq. requires that Mr. Amorosi receive construction permits for any agricultural buildings he has started to build, or intends to build, he will need to apply for such a permit, as the Right to Farm Act does not preempt State law. See N.J.S.A. 4:1C-9 (requiring a commercial farm operator to be in compliance with relevant State law.)

I strongly urge the Monmouth County Agriculture Development Board to follow up on my unsuccessful attempt to have a neutral party with expertise in sawmill operations visit Mr. Amorosi's property and provide an opinion on whether there is a feasible alternative location for the sawmill. If such a location exists without prohibitive expense to Mr. Amorosi, I recommend that Mr. Amorosi not be entitled to the protections of the Right to Farm Act unless he moves his operation to the alternative location.

Date:

Marci D. Green
Public Hearing Officer
State Agriculture Development Committee

State Agriculture Development Committee
Right to Farm Conflict Resolution

**Addendum to the
Hearing Report from July 12, 2007**

Complainants: Lawrence and Tatiana Thomson
Daniel & Angela Juffey
John & Mary Turi

Respondent: Larry Amorosi d/b/a Irene's Evergreens

Township: Marlboro, Monmouth County

Hearing Dates: April 13 and June 26, 2007

I. Background

Marci D. Green, the former Chief of Legal Affairs for the State Agriculture Development Committee (SADC), served as the Public Hearing Officer in this Right to Farm conflict-resolution matter. As with past Right to Farm hearings, Ms. Green prepared a hearing report to present to the SADC. Ms. Green left the SADC in July 2007, however, before the matter could be presented to the Committee for its action.

Following Ms. Green's departure, SADC staff reviewed the hearing report and the supporting record in preparation for presenting it to the SADC. While the SADC staff recommends adoption of the factual findings of the Hearing Officer's Report without modification, the purpose of this memorandum is to recommend that the SADC adopt the report as amended by the following modifications to the Hearing Officer's recommended remedy.

II. Analysis

The issue at hand is whether Mr. Amorosi's operation conforms to generally accepted management practices in a manner that does not pose a direct threat to public health and safety (N.J.S.A. 4:1C-9). If such a threat to public health and safety exists, the operation cannot be afforded right-to-farm protection.

Specifically, Staff agrees with the Hearing Officer that the noise generated by Mr. Amorosi's operation of the sawmill negatively impacts his neighbors' quality of life, and may, at times, present a threat to their health and safety. However, Staff makes a different recommendation as to the manner in which this threat is best mitigated.

In order to determine the level of noise that does, or does not, pose a direct threat to public health and safety, Staff recommends that the SADC rely on the noise control standards already established by regulation, pursuant to the Noise Control Act of 1971. N.J.S.A. 13:1G et seq.; N.J.A.C.7:29-1.2. These standards presumably were designed to meet the Act's concerns, having been based on the Legislature's finding:

that the people of the State are entitled to and should be insured an environment free from noise which unnecessarily degrades the quality of life; that the levels of noise in the community have reached such a degree as to endanger the health, safety and welfare of the people of this State as well as the integrity of the environment; and that this threat can be abated by the adoption and enforcement of noise standards embodied in regulations. (N.J.S.A. 13:1G-2)

The State Noise Control rule adopts a limitation on noise of 50 decibels during nighttime (10:00 p.m. to 7:00 a.m.) and 65 decibels during daytime (7:00 a.m. to 10:00 p.m.). The rule also adopts a maximum sound level for impulsive sound (80 decibels during daytime; 80 decibels during nighttime unless the impulsive sound repeats more than four times a minute, in which case the maximum is 50 decibels) as well as adopts maximum octave band sound pressure levels.

According to NJDEP's Model Noise Control Ordinance, which incorporates these noise level standards, the State Noise Control rule was promulgated to regulate noise "from stationary commercial and industrial sources". Notwithstanding that the rule does not address standards for agriculture ("agricultural activities" are excepted from the rule, as described in the Hearing Report), we conclude that these standards provide the best reference, in this case, for identifying a level of noise that does not pose a direct threat to public health and safety. Clearly, not having an established standard for agriculture does not constitute "carte blanche" for a commercial farm to make as much noise as it needs, whenever it wants. Because the noise in this case is generated by a sawmill operation, it is not a case of intermittent noise such as from a propane cannon, or from a large piece of farm equipment passing by. Rather, the noise from the sawmill originates from a stationary piece of equipment that may generate longer periods of uninterrupted sound.

Given the nature of the operation and the noise it generates, we conclude greater deference should be given to complying with the operational performance standards outlined in the State Noise Control regulations in order to insure that the operation does not pose a direct threat to public health and safety. Therefore, to be eligible for the affirmative protection from municipal regulations and private nuisance suits provided by the Right to Farm Act, the SADC and/or CADB must make an affirmative determination that the farm does not pose a direct threat to public health and safety. The noise limits established pursuant to the State's Noise Control Act rules were intended to ensure protection of the public's health and safety. For purposes of this case, the SADC finds that the 65 dBA daytime/50 dBA nighttime levels thus set an appropriate noise level standard for the determination that the SADC must make under the Right to Farm Act.

SADC staff agrees with the Hearing Report that Mr. Amorosi's operation conforms to generally accepted practices and did not, *at the time tested by the Monmouth County Board of Health*, technically exceed State Noise Control levels. However, the data seems to suggest a "razor thin" finding of compliance. As outlined in the hearing report, the Monmouth County Board of Health found that Mr. Amorosi's operation met this standard, while the neighbor's acoustical engineer found that the farm did not. The County Board of Health is the official agent with respect to enforcement of the State Noise Control rule, however our reliance solely on the County Board of Health's single testing episode to make a determination of the farm's compliance or non-compliance is tenuous. The Board of Health qualifies its noise level readings by writing, and by using capitals for emphasis, "IF THE SAWMILL IS OPERATED UNDER THE EXACT CONDITIONS AS THOSE UNDER WHICH THE NOISE READING WERE TAKEN, THIS OFFICE FEELS THAT THE SAWMILL DOES NOT POSE A THREAT TO PUBLIC HEALTH AND SAFETY." Mr. Amorosi's operation may or may not operate differently on other days. The fact that the readings submitted by the neighbor's acoustical expert do show exceedences of the noise level standards suggest that the operation of the sawmill may have been different on other days. The margin of error factor associated with the Board of Health's reading also adds to the tenuousness of making a firm finding of compliance. The reading fell right within the margin of error, meaning the farm might, or might not have been, meeting the standard.

The Hearing Officer's Report outlined several operating conditions meant to mitigate this threat, including a limit on the hours and days of operation (8:00 a.m. to 6:00 p.m. and not on Sundays), and a requirement that a buffer of trees be planted or a fence erected along the property line. Staff has concluded that it is more appropriate to condition Right to Farm Act

protection for Mr. Amorosi's operation on a performance-based requirement that Mr. Amorosi operate his sawmill so that the noise it generates does not pose a direct threat to public health and safety. The specific methodology Mr. Amorosi would employ to comply with this noise level standard would be determined by him and could include creating a sound barrier, planting a buffer of trees, installing a fence, moving the sawmill, or employing some other type of sound-buffering measure that would enable him to meet the noise standard and do so in the manner that has the least negative impact on the operation of his farm business.

Overall, our recommendation is to establish a performance-based standard that would 1) protect the public's health and safety and 2) allow the farm operator the flexibility to meet this standard as he best saw fit. To include specific requirements, such as limiting the hours and days of operation, or necessitating a buffer of trees or a fence, would be at odds with our recommendation for a performance-based standard.

Regarding the final three numbered conditions in the Hearing Report, we feel these conditions are appropriate and should remain.

II. Conclusions

Mr. Amorosi's operation conforms to generally accepted practices and did not, at the time it was tested, exceed State Noise Control levels, based on the conclusions of the county agency charged with enforcement of that rule. In light of the tenuousness of this finding of compliance and our findings that the manner in which Mr. Amorosi operates his sawmill could readily pose a direct threat to the public health and safety of his neighbors, SADC staff recommends the following: 1) to reach a more definitive conclusion on the farm's compliance with regards to the noise level standards, the CADB should conduct a more rigorous

investigation or testing regimen to determine whether the operation is in compliance with the state noise control standards at various times of the week, times of day and weather conditions; and 2) find that Mr. Amorosi is entitled to the protections of the Right to Farm Act only if he meets the following conditions:

1. The sawmill is operated within the following noise level standards: 50 decibels during nighttime (10:00 p.m. to 7:00 a.m.); 65 decibels during daytime (7:00 a.m. to 10:00 p.m.); and the additional standards for impulsive sound and octave band sound pressure levels specified in N.J.A.C.7:29-1.2.
2. He cannot leave the sawmill running unattended.
3. The operation may preempt the municipal setback ordinances set forth in the Township's May 29, 2007 letter to the State Agriculture Development Committee, as Mr. Amorosi has demonstrated a legitimate agricultural reason for placing the sawmill operation at its current location. Such preemption, however, is only granted if Mr. Amorosi meets the conditions set forth in 1 above, as that condition is intended to address the Township's public health and safety concerns.
4. If the Uniform Construction Code, N.J.A.C. 5:23-1 et seq. requires that Mr. Amorosi receive construction permits for any agricultural buildings he has started to build, or intends to build, he will need to apply for such a permit, as the Right to Farm Act does not preempt State law. See N.J.S.A. 4:1C-9 (requiring a commercial farm operator to be in compliance with relevant State law.)