



**CALVERT COUNTY
BOARD OF COUNTY COMMISSIONERS**

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Board of Commissioners

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Steven R. Weems

August 12, 2022

VIA FIRST CLASS MAIL

The Honorable Brian E. Frosh,
Attorney General
Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202

RE: Request for an Opinion of the Attorney General
Requestor: Board of County Commissioners of Calvert County

Attorney General Frosh:

We write to request an Opinion with respect to an exemption from noise regulations of the Maryland Department of the Environment; specifically, that for agricultural field machinery. We have enclosed the analysis of our county attorney for your consideration.

In brief, we have received complaints from a number of residents regarding the use of a “deer cannon” in the Dunkirk area. Upon information and belief, the auditory deterrent is not modified and is maintained and operating as the manufacturer intended to aid the farmer by reducing crop damage from deer. However, the surrounding residents have expressed objections to the disruptive effect of the loud noises being generated without respite, day or night, multiple times per hour, for the past couple of weeks. The question presented is whether a deer cannon is “agricultural field machinery” as that phrase is used in the Code of Maryland Administrative Regulations (COMAR) 26.02.03.02.C(2)(c). There, “agricultural field machinery” is exempt “...when used and maintained in accordance with manufacturer’s specifications.” *Id.*

Thank you in advance for your kind consideration of, and opining in, this important matter. Should you have any questions or require any additional information, please do not hesitate to contact County Attorney John Norris at 410-535-6323.

Sincerely,
BOARD OF COUNTY COMMISSIONERS
CALVERT COUNTY, MARYLAND

Handwritten signature of Earl F. Hance in blue ink.

Earl F. Hance, President

Handwritten signature of Steven R. Weems in blue ink.

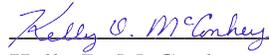
Steven R. Weems, Vice President



Christopher J. Gadway



Mike Hart



Kelly D. McConkey

Enclosure: as noted above.



**OFFICE OF THE COUNTY ATTORNEY
INTEROFFICE MEMORANDUM**

TO: Board of County Commissioners of Calvert County
cc: Julian M. Willis, County Administrator
Linda S. Vassallo, Deputy County Administrator
FROM: John Norris, County Attorney
DATE: August 10, 2022
SUBJECT: Complaints regarding use of Auditory Deterrents in Agricultural Fields

Background:

There are a number of residents of the Owings and Dunkirk areas¹ that have contacted various County departments and agencies, the Sheriff, and the State's Attorney regarding the private use of an auditory deterrent (referred to by citizens as a deer cannon)² in that area. It is understood that a nearby farmer is using an auditory deterrent in a soybean field to protect against, or at least reduce, crop damage by deer. The Department of Natural Resources publication "Deer Management Techniques"³ acknowledges the use of such devices can be effective,⁴ though its non-binding recommendation for placement favors rural, versus suburban or residential, locations⁵.

Discussion:

The current situation arises from the use of auditory deterrents sufficiently close to residences that complaints are being made. The Health Department's Director of Environmental Health investigated to determine if this auditory deterrent is having a negative effect on public health. He returned a negative finding.⁶ With this determination, we turned to the County's Noise Control Ordinance, codified as Chapter 80 of the Calvert County Code.⁷ That Chapter adopts the Environmental Noise standards adopted by the Maryland Department of the Environment and found in the Code of Maryland Administrative Regulations (COMAR) 26.02.03.02.⁸ There, subpart C(2)(c) exempts "Agricultural field machinery when used and maintained in accordance with manufacturer's specifications." Upon

¹ This does include military retirees who admit to having PTSD that is further aggravated by the noises.

² The potential implications of restricting, or enabling, the use of auditory deterrents is broader than this instance. Auditory deterrents, like gas or propane exploders, are deployed not only for truck crops like soybean, but also fruit tree orchards, berries and grape vines, as evidenced not only by the DNR publication following, but also studies by American Society of Agricultural and Biological Engineers (ASABE).

³ https://dnr.maryland.gov/wildlife/pages/hunt_trap/ddmtdeter.aspx

⁴ "Gas or propane exploders produce loud, banging noises, which frighten deer away, and have been used to help protect orchards, row crops and truck crops." *Id.*

⁵ "Most auditory deterrents should not be used in suburban or residential areas out of consideration for neighbors - their use should be restricted to rural areas where noise is not a problem." *Id.*

⁶ "While the noise generated by the deer cannon was unexpected and annoying, I do not believe that there is any danger to public health or safety because of its use." Report of observations made during investigation of complaints, Matt Cummers, July 26, 2022 (Copy enclosed).

⁷ <https://ecode360.com/15520602>

⁸ Following publication in the Md. Register on November 2, 2012, and effective February 4, 2013, the requirements for the Maryland Department of the Environment (MDE) to enforce noise control standards was repealed and made optional for local governments. Notwithstanding, the exemption being discussed here is that propounded by the Secretary of MDE in accordance with the Administrative Procedures Act, and is a mandatory exemption that must be provided by every jurisdiction that has utilized the enabling provisions. Failure to provide the exemption required by the State regulation is a violation of the enabling provisions.

information and belief, the deer cannon deployed in this instance is unmodified, and is being used in accordance with manufacturer's specifications.

The phrase "agricultural field machinery" is not defined in any Title of COMAR, nor within the Maryland Annotated Code. It was found that the Supervisors of a Soil Conservation District are empowered to "[m]ake available to land occupiers within the district ... **agricultural** and engineering **machinery** and equipment, fertilizer, seeds, seedlings, and other material or equipment, to assist land occupiers in conserving soil resources and preventing and controlling soil erosion." Md. Ann. Code, Agriculture Art., § 8-306(a)(9) (emphasis added). A review of equipment made available by various Districts found an array of meat freezers, fence post pounders, grain drills and manure and litter spreaders, but, no deer cannon or other auditory deterrents. This, however, is not dispositive since such devices may be said to not aid in "conserving soil resources and preventing and controlling soil erosion".

As best can be gleaned from COMAR 26.02.03.02(c)(2)(c), it seems the intent of this provision was to not hamper the proper use of machinery to sow, treat, maintain, and harvest agricultural crops. First, and as mentioned above, we have no reason to find that the auditory deterrent has been modified nor that its use is not in accordance with manufacturer's specifications. Next, the acknowledged purpose of an auditory deterrent is to protect the crop from loss due to wildlife. In that respect, the auditory deterrent increases yield per acre of the crop it is deployed to protect. Finally, the word "machinery" is not defined in COMAR, and has been used, without having a relevant definition, in the Maryland Ann. Code, before being deleted as redundant of the reference to "equipment" in the *Economic Development Art.*⁹ Merriam-Webster defines "machinery" as "machines in general or as a functioning unit". It further defines a "machine" as "a mechanically, electrically, or electronically operated device for performing a task". Propane exploders, like that auditory deterrent in this instance, are propane-powered gas guns which produce a periodic explosion with electronic controls that would seem to meet this definition of "machine".

Conclusion/Recommendation:

We have advised complainants of available self-help options, including the Maryland Department of Agriculture's mediation service that seeks to resolve conflicts¹⁰, and their option to seek private counsel to explore if a private nuisance claim may be available to them. The residents should continue to be encouraged to seek private counsel on their individual rights with respect to the auditory deterrent in current use, with knowledge that this may become a recurring concern with their neighboring farmer.

In order to not find the County afoul of the enabling provisions that allow for local regulation of noise, it is recommended that the Board seek an Opinion of the Attorney General to confirm or reject my recommended finding that auditory deterrents are "agricultural field machinery" as that phrase is used at COMAR 26.02.03.02(C)(2)(c). That is, it's fair to conclude that auditory deterrents are collateral to the agricultural operations for the growth and harvest of crops. Akin to fertilizers, which enhance crop yields, auditory deterrents prevent crop loss to wildlife, resulting in more agricultural product taken to market. This, however, is not settled by definition or statute, and any conclusion has State-wide implications regarding the use of auditory deterrents in the orchards and vineyards that dot the entire state, as well as the feed, grain, and truck crops more prevalent in Southern Maryland and the Eastern Shore.

Enclosure as noted above.

⁹ Including Md. Ann. Code, Econ. Dev. Art., §5-322, §5-325, §5-348, §5-451, §5-453, §5-540, §10-101, §10-201, §10-301, §10-501, §10-601, and §12-101.

¹⁰ <https://mda.maryland.gov/Pages/acrs.aspx>