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June 10, 2004

By Electronic Mail

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Hopkinton Board of Appeals
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By Facsimile and Regular Mail

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Re: E.L. Harvey Special Permit Decision, Discussion Draft #2

Dear Chairman Davies and Attorney Faiman:

On behalf of the Cedar Swamp Conservation Trust ("CSCT"), I write to comment on the conditions in the above-referenced discussion draft special permit decision (the "Discussion Draft"), as suggested by Chairman Davies in his letter dated June 3, 2004. As I understand it, the Discussion Draft was directed to be prepared "in the 'affirmative'" (i.e., granting all special permits requested) but in no way represents the Board's final position on this matter. For reasons stated and reiterated by CSCT and others throughout this proceeding, CSCT does not believe that the Board has been given sufficient and accurate information to make the findings necessary to grant the special permits sought by E.L. Harvey & Sons, Inc. ("ELH"). Nor does CSCT believe that the special permits can be conditioned in such a way as to adequately protect the interests served by the Town of Hopkinton Zoning By-law (the "By-law"), in general, and the Water Resources Protection Overlay District (the "WRPOD"), in particular. As a result, the "affirmative" Discussion Draft gives the Material Resource Recovery Facility ("MRRF") proposal more credit than it deserves, even if it does so inadvertently. Rather than further this perception with detailed comments on permit conditions, I wish to make a few brief points.

First, the restriction on assignment or transfer of the special permit (Condition No. 5, p. 28) does not adequately address concerns that the proposed MRRF is being permitted by ELH only to be transferred to one of the solid waste industry titans (e.g., Casella, BFI, and Waste

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Management) without prior approval by the Board. It needs to be redrafted to cover corporate restructuring, acquisition of some or all of the interest in ELH, and other myriad ways in which the large solid waste industry corporations have acquired so many smaller operations and facilities deemed valuable to their enterprises.

Second, the “insurance” required of ELH to protect the Town’s municipal water supply (Condition No. 38, p. 36) – which calls for ELH to put up an unspecified sum in the form of cash, a bond, or a bank account – does not adequately protect the interests of the Town or its residents. The Draft Decision requires that this insurance be maintained for a period of three years, beginning once construction is complete and “the MRRF is placed in service.” This provides no protection in the event that construction causes contamination of the water supply but the MRRF is never “placed in service.” Moreover, the trigger for this coverage – adverse effects to groundwater caused by “the construction and operation of the MRRF” – is too easily evaded where, as here, the adverse impacts being caused by the existing landfill have not been adequately identified, assessed or remediated. There is nothing to stop ELH from simply arguing that impacted groundwater is attributable to the landfill, not construction and operation of the MRRF, and therefore no coverage is triggered. Further, the insurance obligation purports to address only public water supply, not the private water supply that is a major concern due to the heavy reliance on private bedrock wells to serve water needs in the area. Finally, providing coverage for no more than three years is clearly insufficient. Nothing about the first three years of operation makes contamination more likely than in year ten, for instance. What is needed is an insurance obligation in an amount adequate to cover the worst case scenario (i.e., the complete loss of public and private water supply wells due to groundwater contamination) – regardless of whether the source of contamination is the MRRF, the landfill, or the interaction of the two – to be maintained so long as the MRRF is operating. Additional provisions should be made to cover any contamination discovered after operations cease.

Third, the Draft Decision purports to authorize ELH to use the access road between the proposed MRRF and ELH’s Westborough Facility (Condition No. 41, p. 37). The Draft Decision should expressly require as a condition that ELH first obtain town meeting approval to rezone this access road from the Agricultural District to the Industrial District. Otherwise, it is susceptible to argument by ELH that this town-wide approval is not needed by virtue of the Board’s special permit decision.

Finally, the finding in the Draft Decision that the MRRF is protected by the safe harbor provision of G.L. c. 40A, § 9 – Finding No. 12, p. 42 – is likewise susceptible to future misuse by ELH. Elsewhere, the Draft Decision expressly provides that no finding is made with respect to the applicability of the safe harbor provision. Consistent with the rest of the Draft Decision, Finding No. 12 should be stricken. Otherwise, ELH may, among other things, seek to expand its

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operation sometime in the future by arguing that this expansion cannot be denied due to the safe harbor protection acknowledged by the Board.

More than anything, these four points underscore the serious problems associated with approving the proposed MRRF project. These projects have a tendency to grow and change in ways not anticipated or considered – and thereby not dealt with – during the permitting process. Given the complex environmental conditions and circumstances surrounding the MRRF proposal, much of which remains undefined, even the most scrupulously drafted special permit may end up giving away far more than it protects while failing to safeguard the wetland resources and drinking water supply at risk.

I appreciate your consideration of these comments.

Very truly yours,



Gareth I. Orsmond

cc: John E. Craycroft, President, Cedar Swamp Conservation Trust
Michael J. Pierdinock, LSP, Lightship Engineering, Inc.
Sanford M. Matathia, Esq.