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June 29, 2004

## By Electronic Mail

Office of the Board of Appeals  
Town of Hopkinton  
Town Hall  
18 Main Street, Room 207  
Hopkinton, Massachusetts 01748-3209

Re: E.L. Harvey & Sons, Inc. ("Harvey"),  
Proposed Materials Recovery and Recycling Facility ("MRRF"),  
Application for Special Permits, File No. 04-005, Hopkinton, Massachusetts

Dear Members of the Board:

Thank you for the opportunity to speak on behalf of the Cedar Swamp Conservation Trust ("CSCT") at the June 23<sup>rd</sup> hearing session. This letter serves to highlight some key points.

First, the Board has full jurisdiction over Harvey's special permit applications. Harvey's claim that the MRRF is protected by the "safe harbor" provision of Chapter 40A is wrong. This provision looks to whether the MRRF would have been permitted under the zoning bylaw in effect on July 1, 1987. Harvey acknowledges that, on July 1, 1987, the MRRF was not generally permitted in the agricultural zone in which the site was then located, but suggests that the MRRF would have come within an exception for uses "otherwise permitted by law" by virtue the "safe harbor" provision itself. Two points show the fallacy here. First, the "safe harbor" provision did not exist on July 1, 1987. It was only passed and took effect on December 17, 1987. Second, even had it existed, it would only have "otherwise permitted" solid waste facilities in an industrial zone, not in the agricultural zone that then encompassed the site.

Second, with full jurisdiction comes discretion. The Board alone must make the policy determination as to whether the MRRF should be permitted in view of the significant public purpose served by the Water Resources Protection Overlay District ("WRPOD"). Given the standards imposed by the zoning bylaw and the protection of existing and future water supply at issue, we urge the Board to exercise this discretion cautiously. The criteria under which the Board must review the MRRF are some of the most stringent applicable. Not only must it be found that the MRRF will completely "avoid material disturbance of ... water-related characteristics," but it

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must also be found that the MRRF will “in no way” affect existing or potential water quality or quantity (emphases added). This language contemplates a zero risk standard. Further, it must be found that the MRRF is the “most appropriate land use,” not just one of many appropriate land uses, and that it will result in a net public benefit (e.g., promote the public health, safety and welfare by, among other things, preserving and protecting existing and potential drinking water sources).

Third, in CSCT’s view, the stringent criteria posed by the zoning bylaw cannot be met. Illustrative are the following points:

- In place of the 15+ years of groundwater monitoring legally required but not performed by Harvey, we have only a few rounds of monitoring that have been compromised by high pH levels and improper well installation.
- There is no assessment of the depth of solid waste and the extent to which it is commingling with groundwater. As a result, it cannot be said that collecting groundwater in a recharge chamber and sending it downgradient directly into the landfill will “in no way” impact existing or potential water quality. This is true regardless of whether groundwater mounding will exacerbate impacts.
- There has been little assessment of the potential movement and extent of existing contamination and pollution, which include volatile organic compounds, lead and cadmium all above maximum contaminant levels, and manganese and iron up to 240 times and 400 times secondary maximum contaminant levels, respectively. Bedrock fractures (through which contaminants may move in any direction, upgradient or down) have not been analyzed, nor has the extent to which contamination has impacted or is continuing to impact surface waters that will function as critical components of the proposed stormwater controls, such as the pond just west of the landfill.
- The MRRF cannot be considered “the most appropriate use” when it does not comply with existing solid waste regulations, which require a 500-foot setback from residential areas in place of the proposed 250-foot setback, would be within 1000 feet of existing private water supply wells (a concern illustrated by the Board of Health regulation prohibiting the siting of wells within 1000 feet of a landfill), and may in reality be hydraulically connected to Hopkinton’s existing – let alone potential – public water supply, despite the current assumption that there is no such connection with the Fruit Street well field.
- The sole net public benefit offered by Harvey is to improve the inadequate existing landfill cap. This is not an appropriate consideration. Landfill cap improvements would have to be done regardless of the MRRF, much as Harvey has been compelled to upgrade the cap for its landfill that spans the Westborough/Hopkinton border. Take away the existing landfill,

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and it cannot be said that the MRRF will in any way benefit the public with respect to the water supply concerns properly before the Board.

- The MRRF is not a “recycling center,” as defined in the zoning bylaw. Nothing in that definition contemplates the receipt and processing of materials for disposal rather than recycling. Yet, the low recovery rates forecasted by Harvey – not to mention the 11% recovery rate of Harvey’s construction and demolition debris operation in Westborough – reveal that much if not most of the materials brought to the site will be discarded, not recycled. Had the drafters of the bylaw intended to broaden the definition of recycling center to incorporate the secondary DEP and EPA materials cited by Harvey, they would have done so, much like they defined a “landfill” solely by reference to DEP’s definition at 310 CMR 19.006. That they chose not to reference these materials illustrates that they had a much narrower concept in mind: a modest operation with a full – or at least near full – recovery rate that an ordinary person would consider to be recycling.
- The Project obliterates the distinction between activities within and outside of the WRPOD. Even setting aside technical legal issues such as access, it is clear that the inclusion of a maintenance and repair garage and a fueling station as an integral part of operations on a site that is largely within the WRPOD is not in harmony with the purpose and intent of the bylaw. Nor is it in harmony with the bylaw to use the site for activities typical of, and posing the same impacts as, a “truck terminal,” such as the storage, repair, maintenance, fueling, and loading of trucks. Maintenance and repair facilities, fueling facilities, and truck terminals are all prohibited in the WRPOD; yet, for all practical purposes, the MRRF seeks to skirt this prohibition.

This list is far from complete. Nonetheless, it amply shows that the Board has not been provided with the information necessary to make findings in favor of the MRRF. Further, it shows the extent to which the provisions and definitions of the zoning bylaw are being stretched to fit the MRRF, rather than the MRRF designed to meet the purpose, intent, and letter of the bylaw. The MRRF – given its ambitious size, scope, nature and design, all within an area so obviously sensitive to environmental and public health concerns – is a square peg that Harvey seeks to hammer into a round hole.

As a final matter, it should be noted that the burden was and still is on Harvey to prove that the MRRF meets the zoning bylaw criteria. Its failure to provide the Board with key information – as well as the unreliability of much of what was provided – has been largely responsible for the length of this proceeding. During this time, the Board, its consultants, CSCT, and members of the public have been repeatedly called upon to demonstrate to Harvey how its applications fall short. While we commend the Board for its diligence and patience, at some point it becomes unfair to the Board and the public alike that they be forced “to go repeatedly to the barricades on the same issue[s],” to quote one Massachusetts court. This policy – which serves as grounds for the two-year

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prohibition on special permit reapplications – is equally applicable to extended hearings in which a reluctant applicant does not timely address all the pertinent issues.

In view of the shortcomings still apparent in Harvey's applications, we ask the Board bring down the gavel and deny the special permits requested.

Very truly yours,



Gareth I. Orsmond

GIO/sk

cc: Hopkinton Board of Health, c/o Nancy Peters, Chair  
Hopkinton Conservation Commission, c/o Brian Morrison, Chair  
Hopkinton Planning Board, c/o John Coolidge, Chair  
E.L. Harvey & Sons, Inc., c/o Stephen M. Richmond, Esq.  
John E. Craycroft, President, Cedar Swamp Conservation Trust  
Paul Graham, Vice President, Cedar Swamp Conservation Trust  
Michael J. Pierdinock, L.S.P., Joseph O'Brien, P.E., Lightship Engineering  
Sanford M. Matathia, Esq.