The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

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AUDITOR

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May 23, 2011

Members of the Leverett Selectboard
Town Hall
9 Montague Road
Leverett, Massachusetts 01054

RE: Sections 63-66 of Chapter 131 of the Acts of 2010, Amending M.G.L. c. 111, § 150A Relative to Solid Waste Facilities

Dear Mr. Brazeau, Mr. d'Errico, and Ms. Shivley:

This letter is in response to your request relative to the Local Mandate Law, M.G.L. c. 29, § 27C, and the above-captioned amendments to the law governing solid waste facilities. The amendments change the process for siting and permitting these facilities in two distinct ways. First, relative to site assignments for all types of solid waste facilities, the amendments provide that the state Department of Environmental Protection (DEP) is no longer required to issue a "site suitability report" evaluating whether an applicant satisfies the seventeen criteria to protect the public health, safety, and the environment delineated by M.G.L. c. 111, § 150A½. As a result, you anticipate that your Board of Health will need to hire consultants to perform these assessments, in the event a party files an application to site a solid waste facility in the Town of Leverett. Second, the amendments require local boards of health to evaluate regulatory standards and grant or deny any applications for permits to establish and operate small transfer stations (those handling no more than 50 tons of waste per day) in their communities. Previously, this responsibility was vested in DEP, along with the duty to permit other solid waste facilities. Again, you anticipate the need to contract experts to review any proposed design and operation plans, as well as public health and environmental reports required in this process. After a review of pertinent statutes, legislative history, case law, and input from effected parties, my Division of Local Mandates (DLM) has reached the conclusion that these amendments are state mandates subject to the provisions of M.G.L. c. 29, § 27C. The following is a brief explanation of these conclusions for each of the two new requirements.

M.G.L. c. 29, § 27C:

In general terms, the Local Mandate Law provides that any post-1980 law or regulation that imposes additional costs upon any city or town must either be fully funded by the Commonwealth, or subject to local acceptance. Any community aggrieved by an unfunded state mandate may petition the superior court for an exemption from compliance, until the Commonwealth provides funding to assume the cost. In one such proceeding, the Supreme Judicial Court emphasized two points of particular relevance to our analysis. First, the Local Mandate Law will apply only where there has been a genuine change in law, and will not apply to a mere clarification of pre-1981 obligations. Second, the Local Mandate Law will apply only where state law or regulation imposes more than "incidental local

administration expenses," as these are explicitly exempted under M.G.L. c. 29, § 27C. See *Worcester v. The Governor,* 416 Mass. 751 (1994).

Site Suitability Analysis:

The general requirement that local boards of health review and approve or deny applications for site assignments for solid waste facilities dates back to 1955, and therefore is beyond the scope of the Local Mandate Law. However, it was post-1980 law that first set detailed state standards for determining site suitability. See St. 1987, c. 584, § 16 (the Solid Waste Act). Pre-1981, the only statutory requirement was that a facility must be located at least 300 feet away from a dwelling. Beyond this, each local Board of Health was free to set its own criteria consistent with local law. Per DEP staff, the problem with this system was that few boards of health would grant site assignments, leading to capacity problems in waste management.

Accordingly, the 1987 Solid Waste Act provided the M.G.L. c. 111, § 150A½ state criteria for site suitability, and required local boards to issue site assignment decisions in writing, stating their reasons "including determinations of each issue of fact or law necessary to the decision." With this, the standards for siting solid waste facilities changed in significant ways, introducing a level of technical analysis that was not required by pre-1981 law. In apparent recognition of the difficulty of these new standards, the Legislature required the state environmental agency to perform a site suitability analysis, and issue a report of findings to assist local boards in each case. For this reason, boards of health did not experience the true burden of making §150A½ determinations until the Chapter 131 amendments removed DEP from this process in 2010. Because the level of expertise required to make § 150A½ determinations is beyond the customary staff resources of local government, DLM concludes that provisions of the 1987 Solid Waste Act requiring § 150A½ determinations – now without the benefit of a DEP site suitability report – are a substantive change in law, not a mere clarification of pre-1981 obligations.

Leverett officials anticipate the need to hire consultants (current rate of $150/hour) for 40 to 120 hours, depending upon the complexity of a potential site assignment application. Resulting costs would range from $6,000 to $18,000 to review and determine satisfaction of the § 150A½ criteria. DEP charged applicants $8,615 for a site suitability review and report. Current regulations set maximum fees that a board of health may charge to offset its costs for technical assistance and conducting hearings in the site assignment process. Yet, these maximums do not reflect the additional costs to contract experts to determine satisfaction of the § 150A½ criteria. DLM concludes that the cost of hiring consultants is not an administrative cost that would fall within the Local Mandate Law exception for incidental administration expenses.

Permitting Small Transfer Stations:

There is no history of state law or regulation requiring municipalities to permit small transfer stations. Initially effective July 31, 2010, the Chapter 131 amendments to M.G.L. c. 111, § 150A provide that local boards of health must review and grant or deny any permit to establish a small transfer station within its boundaries. This will include applications for permit renewals and modifications. The process includes the review of design and operational plans defined by state regulation, as well as public health and environmental reports submitted by the applicant. The local board must issue a decision in writing with "findings in regard to criteria established by [DEP]." The determination is considered to be "a final decision in an adjudicatory proceeding," and is subject to M.G.L. c. 30A appeal. The Permit Extension Act (St. 2010, c. 240, § 173) extends these (and other) permits for two years. The effect is that DEP retains jurisdiction over small transfer stations permitted between August 15, 2008 and August 15, 2010 until the extended expiration date of July 1, 2012. By that date, each of these facilities

(approximately 172 per DEP data) must obtain a renewal from the local board of health. In the meantime, any application for a new small transfer station must be submitted to a local board.

DEP reports that the average amount of time devoted to review and determination of new permit applications was 58 hours; to renewals was 17 hours; and to a permit modification was 18 hours. As with site suitability determinations, the level of technical expertise required for permitting a transfer station is beyond the customary staff resources of local government. Leverett officials have estimated the need to utilize technical and legal experts in the field for at least one half of the hours required to review and issue a new permit. At the current consultant rate of $150 per hour, the local board would have to expend at least $4,400 for professional guidance in this process. Yet, the law transferred this duty to boards of health with no grant of authority to charge fees to cover their expenses in this regard. In light of these facts, DLM concludes that the provisions of St. 2010, c. 131, § 66 requiring local boards of health to review and determine permit applications for small transfer stations are a substantive change in law that will impose more than administrative costs on the Town of Leverett.

Conclusion:

It is the opinion of the Division of Local Mandates that M.G.L. c. 29, § 27C applies to the obligations regarding site suitability determinations and permitting small transfer stations imposed by St. 2010, c. 131, §§ 63-66. As explained above, the Local Mandate Law allows a community aggrieved by an unfunded state mandate to petition the superior court for an exemption from compliance. More expedient, however, would be a legislative remedy, such as provisions to repeal the 2010 amendments at issue included by the House of Representatives as part of its version of the fiscal year 2012 state budget.

I will forward copies of this opinion to your legislative delegation, the Speaker of the House of Representatives, the Senate President, the Chairs of the Committees on Ways & Means, the Department of Environmental Protection, and the Executive Office of Administration and Finance, and I encourage you to inform them of your concerns. I thank you for bringing this matter to our attention. Please call Attorney Emily Cousens, DLM Director, with comments or questions you may have.

Sincerely,

Suzanne M. Bump
Auditor of the Commonwealth

cc: The Honorable Therese Murray
The Honorable Robert A. DeLeo
The Honorable Stephen M. Brewer
The Honorable Brian S. Dempsey
The Honorable Stanley C. Rosenberg
The Honorable Stephen Kulik
Jay Gonzalez, Secretary, Executive Office of Administration and Finance
Kenneth L. Kimmell, Commissioner, Department of Environmental Protection