January 30, 1998

Re: Welsh Road Superfund Site

Dear Cynthia:

This letter responds to the Agency's September 30, 1997 Special Notice Letter directed to Waste Management Disposal Services of Pennsylvania, Inc., as well as Waste Management, Inc. (collectively "Waste Management") with regard to the above-referenced site. Please note that Waste Management is willing to negotiate terms for a consent decree to construct the cap remedy in conjunction with other noticed parties at this site. Although Waste Management firmly believes it has absolutely no liability whatsoever with regard to Ernest Barkman's alleged activities at the Welsh Road facility, it is also mindful that a protracted legal battle over issues of successor liability would result in substantial transaction costs. For that reason - and that reason alone - Waste Management is willing to meet and negotiate with EPA with regard to the cap construction, if other parties among the generator group agree to do so. However, I feel compelled to state up front that Waste Management is not likely willing to shoulder the entire burden of the remedy nor the entire reimbursement of past costs.

In short Waste Management believes the EPA should carefully re-evaluate its determination that Waste Management succeeds to the liabilities of Ernest Barkman's alleged activities at the Welsh Road facility, it is also mindful that a protracted legal battle over issues of successor liability would result in substantial transaction costs. For that reason - and that reason alone - Waste Management is willing to meet and negotiate with EPA with regard to the cap construction, if other parties among the generator group agree to do so. However, I feel compelled to state up front that Waste Management is not likely willing to shoulder the entire burden of the remedy nor the entire reimbursement of past costs.

I. WASTE MANAGEMENT HAS NO LIABILITY AT THIS SITE EXCEPT FOR EPA's ALLEGATIONS THAT IT SUCCEDS TO THE LIABILITIES OF ERNEST BARKMAN. THE AGENCY'S INVOCATION OF SUCCESSOR LIABILITY WITH RESPECT TO BARKMAN IS INAPPROPRIATE AND INCORRECT.

A. WASTE MANAGEMENT'S SOLE SOURCE OF LIABILITY AT THIS SITE ALLEGEDLY ARISES OUT OF ITS PURCHASE OF ASSETS OF BARKMAN DISPOSAL.

Waste Management extensively investigated any potential source of liability it might have at this facility, and has found no record or testimony indicating that any of its subsidiaries used this site for disposal. A review of EPA's files confirmed this finding, and thus the only connection that you have communicated is through the
equitable doctrine of successor liability. I reviewed all of the transaction files in connection with the 1983 acquisition of Barkman's Disposal, as well as the 1993 acquisition of Twin Counties Sanitation, a corporation of which Ernest Barkman was a principal shareholder.

As you may be aware, with respect to Twin Counties Sanitation, the record is clear that this corporation was not formed by Ernest Barkman until 1984, some seven or eight years after the Welsh Road Landfill closed. Waste Management also acquired Twin Counties Disposal in a cash for assets agreement dated June 1993 ("Second Agreement"). This Agreement contains a more explicit clause concerning CERCLA liabilities at Section 1.4 (Excluded Liabilities):

... Purchaser shall not assume, and Owner and Seller shall retain and be responsible for, any CERCLA or other environmental liability of any nature with respect to the remediation of any real estate or groundwater which relates to the generation, collection, transportation or disposal of any materials, whether prior to or after the Closing, by Owner, Seller or any business predecessor or successor of either of them to any site or facility whatsoever, whether or not such site or facility was owned, leased, or operated by any of them at any time.

Thus, when Waste Management purchased those assets for cash, the landfill had been inactive for 17 years, and the assets of that Corporation did not include that facility.

Moreover, when Waste Management purchased for cash the assets of the sole proprietorship Ernest Barkman Trash Disposal Service in 1983, the landfill had been closed for seven years, and Waste Management only purchased the hauling operations then existing. Upon information and belief Ernest Barkman operated the landfill in his personal capacity, and did not form a company to do so.

B. THE USE OF JUDGE RAMBO'S DECISION IN KEYSTONE SANITATION TO ESTABLISH WASTE MANAGEMENT'S SUCCESSOR LIABILITY IS INAPPROPRIATE AND INAPPLICABLE


You indicated to me that the basis for EPA's belief that Waste Management succeeds to Barkman's liabilities arises out of the August 1996 Order in the matter entitled United States v. Keystone Sanitation et al., C.A. No. 3: CV-93-1482. Based on a very detailed examination of a well-developed factual record, Judge Rambo ruled that Waste Management succeeded to the liabilities of Keystone Sanitation under the doctrines of de facto merger and substantial continuity of enterprise. Waste Management's position in that matter, as in the instant case, is that in all but exceptional circumstances the purchaser of another company's assets is not vested with the seller's liabilities.1

Although Waste Management in no way concedes that any aspect of Judge Rambo's decision is appropriate under either outdated notions of federal common law, or under state law, it is clear that the de facto merger portions of her decision are completely inapposite in this matter because the nature of the transactions was cash for assets, with no stock changing hands. Although Waste Management believes Judge Rambo erroneously concluded that stock ownership of a very small percentage of company stock was a material basis for de facto successor

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1 These exceptions are: (1) an express or implied agreement by the purchaser to assume such liabilities; (2) de facto merger; (3) the purchaser is a mere continuation of the predecessor; or (4) a fraudulent transaction. See, Atchison, Topeka and Santa Fe Railway Company et al. v. Brown & Bryant, Inc. et al., 1997 U.S. App. Lexis 36359, 36360 (9th Cir. 1997); Smith Land & Improvement Corp. v. Celotex Corp. 851 F. 2d 86 (3d Cir. 1988).
merger, at the very least the absence of any stock ownership would defeat any analysis under that doctrine. Moreover, there is no indication whatsoever that the transaction itself was tainted by fraud, or that there was any express or implied assumption of liability by Waste Management, especially given the language of section 1.4 of the Acquisition Agreement quoted above.

The “mere continuity” doctrine is similarly inapplicable because it requires at the very least identity of management and employees, neither of which apply in this matter. As pointed out in a recent scholarly article, “[t]he mere continuation exception ... attempts to distinguish a bona fide sale of assets between two distinct corporations from a fraudulent reorganization by a single corporation.” Gregory C. Sisk and Jerry L. Anderson, The Sun Sets on Federal Common Law: Corporate Successor Liabilities Under CERCLA After O’Melveny & Meyers, 16 Va. Env. L.J. 505, 514 (1997), a copy of which is attached.

Most importantly, Judge Rambo relied upon an amorphous (and increasingly discredited) body of federal common law in support of her ruling finding substantial continuity. It should come as no surprise that Waste Management earnestly believes this decision would not withstand appellate scrutiny and further flies in the face of the Supreme Court’s clear rulings in O’Melveny & Meyers v. FDIC, 512 U.S. 79, 114 S. Ct. 2048 (1994), as well as Atherton v. FDIC, 117 S. Ct. 666 (1997). Taken together, these cases make it clear that it is improper for a federal court to rely upon federal common law to resolve successor liability issues, given the Supreme Court’s clear direction that the creation of federal common law should be limited to only a “few and restricted” instances. Atherton, 117 S. Ct. at 673; O’Melveny, 114 S. Ct. at 2055.

Most recently the Ninth Circuit Court of Appeals had occasion to examine in detail the impact of these two rulings upon successor liability determinations under CERCLA in Atchison, Topeka and Santa Fe Railway Company, et al. v. Brown & Bryant, Inc., et al., 1997 U.S. App. Lexis 36359 (9th Cir. 1997), a copy of which is attached for your review. Most critically, the Ninth Circuit reversed its past practice of using federal common law as a basis for making such liability determinations (though interestingly it had always rejected the applicability of the doctrine of “substantial continuity”). The federal appellate court took pains to review the substantial body of case law concerning the use of federal common law, including several decisions rendered in the Eastern District of Pennsylvania, the forum in which any litigation arising out of our matter pertains. Interestingly, the court did not even cite to the Keystone decision as part of its analysis, though it clearly examined such decisions as U.S. v. Atlas Minerals & Chemicals, Inc., 824 F. Supp. 46 (E.D. Pa. 1993) and Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261 (E.D. Pa. 1994). Ultimately, the Ninth Circuit concludes that the above-referenced Supreme Court decisions are directly on point, and obliterate the purported federal common law surrounding successor liability in CERCLA cases.

However, assuming arguendo that the doctrine of substantial continuity of enterprise could apply to this matter, there is no indication that EPA undertook the painstaking review of facts necessary to render this determination. Ultimately, however, in Keystone the Judge was clearly influenced by the fact that when Waste Management attempted to distance itself from the Keystone Landfill, which was individually owned by the shareholders of Keystone Sanitation (the company of which it purchased the assets) that company was still actively

2 The continuity of enterprise theory considers not only whether there is an identity of stock, stockholders, and directors, but also whether the successor: (i) retains the same employees; (ii) retains the same supervisory personnel; (iii) retains the same production facilities in the same location; (iv) continues producing the same products; (v) retains the same name; (vi) maintains continuity of assets and general business operations; and (vii) holds itself out to the public as the continuation of the previous corporation.

engaged in landfill activities. As you may be aware, Keystone Sanitation had a pending expansion application, as well as a closure plan, and thus the landfill operations themselves were arguably integral to the operations of Keystone Sanitation, although again, Waste Management takes issue with that determination.

In the instant matter, no such contemporaneous landfilling operations were taking place at the time of the 1983 acquisition, and the landfill had been closed for at least seven years. Thus the entity of which Waste Management purchased assets for cash was a hauling enterprise that disposed of waste at other facilities, but clearly not at the Welsh Road site. Waste Management believes this is a pivotal distinction. It is also further justification for EPA to take a very conservative view of successor liability: if an acquiring entity can never escape the liabilities of a purported predecessor, however distant in the past they may be, how could any prospective purchaser during that time frame have insulated itself from liabilities both known and unknown? 3

2. Judge Rambo’s Ruling Creates a Negative Social Policy Which Results in a Strong Disincentive for a Buyer to Pay Fair Market Value for a Company Which May Have CERCLA Liability

There is absolutely no reason that EPA or any other entity should grope at questionable doctrines of liability to bring otherwise innocent parties into the morass of Superfund simply because it is expeditious to pursue a deep pocket. Although it was clear that Judge Rambo was deaf to important social policy issues surrounding her decision, EPA should not remove itself from the very real consequences of adopting overly liberal notions of successor liability. In particular, Waste Management (like many other companies) entered into numerous acquisitions such as Barkman with a clear understanding that it was permissible to purchase assets of a corporation without incurring the liabilities of the predecessor unless at least one of the traditional exceptions to successor liability applied. Were this not the case, Waste Management would have assigned negative values to such enterprises as Barkman’s Disposal and Keystone Sanitation, given their extensive liabilities. EPA’s actions in this regard would serve to render such entities commercial pariahs with no meaningful business value, and would nullify any attempts by such companies to sell off assets in the hopes of raising the necessary revenues to address their respective liabilities.

Moreover, the net result of such an expansive use of successor doctrines may well cause an increased incidence of bankruptcies among sellers. That is to say, if EPA continues its expansive use of successor doctrines, one of the only ways a purchaser could be assured it does not acquire unanticipated liabilities is by purchasing a company’s assets under the protection of bankruptcy laws. Thus, the bankrupt entity would have significantly less revenue with which to pay for remediation, and the EPA would be unable to recover from the purchasing entity which received assets from the bankruptcy court free and clear of any liabilities or encumbrances. See, In The Matter of Reading Company, 115 F.3d 1111, 30 Bankr. Ct. Rec. 1224 (3d Cir. 1997). In essence, EPA should encourage the sale of assets from a liable party to an otherwise innocent purchaser. It is through this mechanism that the seller who contributed to the pollution at a site can garner the resources necessary to perform its legal obligations under CERCLA.

Thus Waste Management sees no basis on which the EPA can assert any transporter, owner or operator liability upon it from the Barkman transaction, without grossly expanding the already unquestionably expansive doctrine of continuity of enterprise (or substantial continuity). However, for purposes of entering into settlement discussions with EPA, Waste Management, without admitting any issue of fact or law, would be willing to negotiate a consent decree with EPA consistent with Waste Management’s very limited alleged role as successor to Barkman.

3 Although EPA now has policy concerning prospective purchasers, entitled “EPA Guidance on Landowner Liability Under Section 107(a)(1) and Settlements with Prospective Purchasers of Contaminated Property,” 54 Fed. Reg. 34235 (June 6, 1989), no such policy existed at the time of the 1983 acquisition.
Disposal’s transporter liabilities at the site. Waste Management strictly denies such liability, but is cognizant of the likely expensive transaction costs associated with defending its position. Again, at the time Waste Management purchased the assets of Barkman Disposal, that entity had not disposed of any waste in the Welsh Road landfill in over seven years, and thus it is highly questionable as to whether a court would hold Waste Management liable for activities which occurred nearly a decade prior to the acquisition.

II. CONCLUSION:

In short, Waste Management is willing to meet with the Agency to resolve its liabilities with respect to this site, consistent with a fair share allocation attributable solely its purported (and denied) status as a transporter to this site, if other members of the generator PRP group will participate in such negotiations. Waste Management does not believe it has liability at this site, but is willing to settle on the basis of transaction costs associated with defending its claims. In exchange, Waste Management would require a full release of liability at this site. Moreover, as we have previously discussed, EPA would have to guarantee our access to the facility, with no remuneration to Mr. Barkman from Waste Management, as well as a complete cessation of any activities at the site by Mr. Barkman which could conceivably compromise the integrity of any such cap (whether pursuant to the ROD-designated cap, or an agreed upon alternative) or otherwise exacerbate any environmental condition thereupon.

Thank you for your continued courtesies in this matter, and I look forward to fruitful and meaningful negotiations toward a consent decree.

Very truly yours,

Andrew S. Levine
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Waste Management, Inc.

cc: Stephen Joyce
    Trevan Houser
    Noel Birle, Esquire