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United States Environmental Protection Agency  
Washington, D.C. 20460  
Office of Solid Waste and Emergency Response

June 4, 1993

Ms. Joan Z. Bernstein  
Vice President of Environmental Policy and Ethical Standards Waste  
Management, Inc.  
3003 Butterfield Road  
Oak Brook, Illinois 60521

Dear Ms. Bernstein:

This letter responds to your request of March 26, 1992, for clarification of requirements in 40 CFR 264.115 and 265.115 related to certification of closure by an independent registered professional engineer. Specifically, you asked whether a registered professional engineer employed by a subsidiary can provide an "independent" certification of closure for its parent firm within the meaning of those sections.

As your letter indicated, the Agency has interpreted the requirement that engineers be independent in two preamble discussions. The preamble to a 1986 final rule promulgating standards for closure established the principle that the engineer certifying the closure of a hazardous waste unit must be someone who is "least subject to conscious or subconscious pressure" to certify inaccurately (see 51 FR 16433, May 2, 1986). The preamble to a 1986 rule promulgating standards applicable to tanks established that an engineer employed by the owner or operator of the hazardous waste unit cannot be considered independent (see 51 FR 25445-46, July 14, 1986).

Applying these principles to situations involving parent/subsidiary relationships between the company receiving and the company providing certification, EPA believes the independence of the certifying engineer may be affected in some cases but not in others. We do not believe that a parent company typically has the means to compromise the independence of the engineer in situations where the company that employs the engineer is a less than

majority-owned subsidiary (see footnote 1).

However, we do believe that the certifying engineer's independence may be affected in cases where the employer of the certifying engineer is a majority owned subsidiary of the company receiving certification -- but not in all such cases. Specifically, we believe that the engineer may be considered independent in majority ownership situations if the following criteria are met.

First, the certifying company must offer its certification services to non-affiliated companies (i.e., its closure certification services cannot be limited to companies within the corporate family). The fact that a company is actively solicited by and provides the same certification services to non-affiliated companies helps to establish the expertise, integrity, and objectivity of the certifying engineer.

Second, the management of the facility being certified and that of the certifying engineer must exist and operate separately of each other such that the engineer is completely free of any reporting obligation to the management of the facility for which he or she is providing certification and that management is not responsible for the engineer's compensation. The absence of any managerial link between the two entities is essential to the certifying engineer's ability to act independently. The Agency believes that these two conditions are both necessary and sufficient to ensure the engineer's independence in majority ownership situations.

In summary, EPA interprets the language in section 264.115 and 265.115 to mean that an engineer employed by a less than majority owned subsidiary may certify closure of a unit owned or operated by its parent company. In majority ownership situations, the engineer may be considered independent if the aforementioned criteria are met.

I hope that this information is adequate to guide you in deciding on a case-by-case basis whether it is appropriate to use the services of registered professional engineers. If you would like to discuss this issue further or have questions on how this policy applies to your specific situation, please contact Tina Kaneen of the Office of General Counsel (202 260-7713) or Becky Daiss of the Permits and State Programs Division (703 308-7057).

Sincerely,  
Sylvia K. Lowrance, Director  
Office of Solid Waste

- 1 According to SEC regulations, the term "majority owned subsidiary" means, "a subsidiary more than 50% of whose outstanding voting shares is owned by the subsidiary's parent and/or one or more of the parent's other majority-owned subsidiaries" (See 17 CFR 210.1-02).