TESTIMONY OF NORMAN J. MULLEN, STAFF ATTORNEY,
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

AT HEARING ON SOLID WASTE RULEMAKING ON NOVEMBER 4, 2009
(MAR NOTICE NO. 17-284 15-8/13/09)

My name is Norman J. Mullen. I am a staff attorney for the Montana Department of Environmental Quality. I have been employed in that capacity for the past 10 years. My area of responsibility is solid waste, septic cleaning and disposal, and junk vehicles. I have also represented the Department on water quality and drinking water matters. My duties are to draft legislation, review and edit proposed rules and amendments, draft and edit administrative and judicial enforcment actions, and otherwise advise the Department on legal matters. I have a bachelor's degree from the University of Colorado in economics and environmental conservation, and a juris doctor degree from the University of Colorado School of Law. I have been an attorney for 22 years.

The Department received comments on this rulemaking that many of the proposed new rules and amendments were more stringent than comparable federal regulations or guidelines.

To aid the Department in responding to this stringency issue, I reviewed the existing rules, proposed rules and amendments, and the federal Environmental Protection Agency's rulemaking notices and regulations. On behalf of the Department, I offer the following testimony concerning stringency.

Commenters stated that the Department's use of the term "any other matter determined by the Department to be necessary to protect human health or the environment," or a similar term, constituted a vague and inappropriate extension of Department discretion that was also more stringent than comparable language used by the federal Environmental Protection Agency (EPA) in its solid waste regulations. The following analysis shows that, in many instances where this or similar language was used, the federal regulatory scheme anticipated that a regulating state would need flexibility and should exercise its discretion to protect health and the environment. I note that the Montana Supreme Court just last year reviewed language concerning a rule implementing the Water Quality Act, and cited with approval language in a Montana Board of Environmental Review rule notice stating that the use the phrase "any other information deemed relevant to the department and that relates to the criteria in (1) [concerning water quality degradation]" was permissible and indeed "important" for "[DEQ] [to] have discretion to make a determination of significance independent of the criteria in [ARM 17.30.715(1)]." Indeed, "when an agency, because of a misinterpretation of its rule, does not exercise its discretion it abuses its discretion." *Clark Fork Coalition v. Mont. Dep't of Envtl. Quality*, 2008 MT 407, P43 (Mont. 2008).

In the statements accompanying its notice of proposed rulemaking on which the proposed Montana rules being analyzed here are based, EPA stated numerous times that it intended states to have flexibility in addressing solid waste regulatory issues.

For instance, in 53 Fed. Reg. 33314 8/30/88, EPA stated, under General Approach to Today's Proposal at 33322- "EPA's primary goals in developing today's proposal were to develop standards that are protective of human health and the environment, that are within the practicable capability of the regulated community, and that provide state flexibility in implementation."

Specific examples of EPA's intent to authorize states to be flexible are for exclusion of hazardous waste: "measures that MSWLF owners and operators must incorporate in their programs to exclude receipt of hazardous waste include, at a minimum, random inspections of incoming loads, recordkeeping of inspection results, training of personnel to recognize hazardous waste, and procedures for notifying the proper state authorities if a regulated hazardous waste is found at the facility. The state may require additional program elements. … In developing this proposal, EPA considered specifying the program in detail, delineating all activities and procedures needed to exclude hazardous waste. The agency decided against a strictly defined program because each landfill will receive different amounts of waste that could contain questionable material. Today's proposal gives states and MSWLF owners and operators flexibility in implementing this requirement." 53 Fed. Reg. 33314, 33335 (8/30/88).

Regarding recordkeeping, EPA stated: "EPA has not defined the time period for retaining these records, required that reports should be submitted, nor specified in what form records should be maintained because the Agency believes it is more appropriate for these requirements to be specified by States, which are directly responsible for implementing these provisions. EPA believes this requirement is flexible enough to allow the States to establish specific requirements for recordkeeping and to determine if additional records should be maintained." 53 Fed. Reg. 33314, 33341 (8/30/88).

Regarding closure, EPA stated: "Owners or operators must prepare a closure plan, to be approved the by State, that describes the activities to be undertaken at the landfill to close it in accordance with the closure performance standard." 53 Fed. Reg. 33314, 33342 (8/30/88). EPA modified its approach in the adoption notice for the municipal solid waste landfill rules, at 56 Fed Reg. 50992 (10/9/1991), to make many of the regulations self-implementing, because it was not confident that states would be prepared to oversee compliance with the regulations within the two years provided. However, EPA was clear that it expected states to have oversight over implementation: "Despite the promulgation of self-implementing standards in today's rulemaking, EPA continues to believe that requirements such as those pertaining to landfill design, ground water monitoring, corrective action, and closure should optimally be implemented under the oversight of a State implementing agency. Today's rule does not represent a shift away from the longstanding Agency policy of requiring regulatory oversight of

such important procedures. Rather, the inclusion of self-implementing standards in today's rule is a recognition that, due to resource limitations, States may not have adequate programs in place by the effective date of the revised Criteria. This scheme will insure that in States that do not act to establish adequate programs, human health and the environment will be protected and the Federal requirements will be enforceable. … EPA's approach to State program approval [EPA required states to have permitting programs to enforce the 40 CFR part 258 requirements in a rulemaking that promulgated 40 CFR part 239, in 1998] recognizes the traditional State role in implementing landfill standards and protecting groundwater. EPA fully intends that States will maintain the lead role in implementing this program. EPA's goal is for all States to apply for and receive approval of their programs. Under this rule States will have the flexibility to tailor standards to meet their state-specific conditions." 56 Fed. Reg. 50978, 50992 (10/9/1991).

Regarding post-closure care, EPA stated: "In addition to the minimum post-closure activities specified in today's proposal, the Agency encourages States to specify more detailed post-closure care requirements, such as maintaining the vegetative cover through periodic mowing, replanting, and regarding to preclude erosion that occurs naturally over time and as a result of sever storms, and repairing the cap when necessary to prevent the cap from becoming permeable." 53 Fed. Reg. 33314, 33345 (8/30/88).

In addition, in its rulemaking notices addressing regulation of non-municipal solid waste landfills, EPA stated that: "One aim in developing these criteria was to be as specific as possible to facilitate the distinction or classification of disposal facilities, without reducing the flexibility of State solid waste management and enforcement agencies to take into account the site-by-site variation and makes assessments based on local conditions. These criteria are not intended to prevent or restrict the authority or discretion of States to develop or utilize more stringent State or site-specific (situational standards or criteria. States may choose to require mores stringent location, design, construction, operation, maintenance, and performance standards where local conditions indicate." 43 Fed. Reg. 4942 (2/6/1978).

So, it is clear that the EPA's approach to its rulemaking was to include basic requirements, and then to give the states flexibility in regulating. This raises the question of whether the stringency findings required in 75-10-107, MCA, are relevant to these rules, because the EPA regulations were designed to allow a state to tailor rules to meet state-specific concerns.

EPA's use of phrases such as "including, but not limited to," "at least," and "at a minimum," which are found throughout EPA's solid waste regulations at 40 CFR parts 257 and 258, make it clear that the requirements are not all-inclusive or limiting, but rather intended to give states flexibility in implementing them, with the purpose of protecting human health and the environment.

The Department requested the EPA to review the proposed rules and amendments, and EPA wrote a letter dated October 22, 2009, that states that the rules are consistent with federal requirements. That letter is attached to my testimony.

Therefore, it is appropriate, and not a violation of the "no-more-stringency" requirement of section 75-10-107, MCA, for the Department to adopt the phrase "any other matter determined by the Department to be necessary to protect human health or the environment" or similar language when discretion is provided in a comparable regulation of the federal EPA.

My analysis of specific rules follows:

ARM 17.50.508

(1)(aa) would authorize the Department to request additional information in a license application if necessary to protect human health or the environment. The federal regulations do not address the licensing of solid waste management systems, so there is no comparable federal license application regulation or guideline.

Montana statute, § 75-10-221(3), MCA, authorizes the Department to require, in a license application, "the name and business address of the applicant, the location of the proposed solid waste management system, a plan of operation and maintenance, and other information that the department may by rule require."

There is language in the existing license application rule, ARM 17.50.508, authorizing the application form "to require at least the following information." The requirement proposed in ARM 17.50.508(1)(aa) gives the Department less discretion than that in the existing rule, and provides standards for review of a department request for more information.

ARM 17.50.509

(2)(k) would require plans for handling of special waste streams. Special waste would be defined in ARM 17.50.502(37) as that term is defined in § 75-10-802, MCA, which is "solid waste that has unique handling, transportation, or disposal requirements to ensure protection of the public health, safety, and welfare and the environment." This carries forward language from the existing rule, and provides examples of common types of special wastes. It gives the Department the flexibility to require special handling plans for other types of special waste. There is no comparable federal regulation.

(2)(m) would require, in operation and maintenance plans, "any other plans or information determined by the department to be necessary to protect human health or the environment." Rules governing operation and maintenance plans are required by § 75-10-204(1), MCA. There is no comparable federal regulation requiring operation and maintenance plans.

(4) would require that an operation and maintenance plan be updated within 45 days, or a longer period if requested and approved, after the Department mailed notice that an update was necessary to protect human health or the environment. There is no comparable federal regulation concerning operation and maintenance plans.

New Rule II

(4) would require the Department to mail notice when an additional requirement is needed to protect human health or the environment. This was proposed to make it clear that the burden is on the Department to notify a person of any additional requirement or information. This is a requirement on the Department, not regulated entities, and does not implicate stringency.

New Rule IX

(1) concerns the factors to be used in determining whether an area is an unstable area. The Department proposed language requiring consideration of "any other factor determined by the department to be necessary to protect human health or the environment." Existing ARM 17.50.505(2)(g) uses the term "at a minimum." The comparable federal regulation, 40 CFR 258.15, states "at a minimum". Therefore, the Department's ability to exercise discretion in the proposed rule is narrower, with standards, than allowed in the comparable federal regulation.

New Rule XI

(1)(j) would require a landfill to comply with "any other locational requirement determined by the department to be necessary to protect human health or the environment." There is no comparable federal regulation.

New Rule XVI Disease Vector Control

(1) requires a landfill to use techniques to prevent or control disease vectors "appropriate for the protection of human health and the environment. There is identical language in 40 CFR 258.22(a).

New Rule XVII Explosive Gases Control

(4) requires, if methane levels exceed limits, the landfill to take and report all steps necessary to protect human health. This is identical to 40 CFR 258.23(c).

(7) would allow the Department to establish, for small landfills, alternative methane monitoring frequencies that are protective of human health and the environment.

This is identical to 40 CFR 258.23(e)(3).

New Rule XIX Access

(1) would require access control at a Class II landfill as "appropriate to protect human health and the environment." This is identical to 40 CFR 258.25

XXVI Special Waste

(1)(c) would require management of special wastes such as asbestos-contaminated material and infectious wastes according to the plan provided under ARM 17.50.509 and under the laws and rules applicable to them, and for "any other special waste, in the manner determined by the department to be necessary to protect human health or the environment." As discussed above in the analysis of ARM 17.50.509, there is no comparable federal regulation concerning special waste.

XXVII Operating Criteria

(2)(f) requires that "a solid waste management facility must be designed, constructed, and operated in a manner to prevent harm to human health and the environment". This provision is carried forward from existing ARM 17.50.506(17). It reflects the purpose of the solid waste regulatory approach adopted by EPA: "EPA's primary goals in developing today's proposal were to develop standards that are protective of human health and the environment, that are within the practicable capability of the regulated community, and that provide state flexibility in implementation." 53 Fed. Reg. 33322 (8/30/1988).

New Rule XXXIII – Design for Class II and IV

(2) would require the Department, in considering approval of a design for an alternative liner, to consider "any other matter determined by the department to be necessary to protect human health or the environment." The comparable federal regulation, 40 CFR 258.40(c), requires "at least the following". Existing ARM 17.50.506(2) contains the same "at least" language as the federal regulation. Therefore, the Department's ability to exercise discretion in the proposed rule is narrower, with standards, than is allowed in the comparable federal regulation and existing department rule.

(3) authorizes the Department, when determining the location of the Relevant Point of Compliance for measuring potential ground water contamination, to consider "any other matter determined by the department to be necessary to protect human health or the environment" In 40 CFR 258.40(d), addressing the same matter, the language "at least the following" is used. Therefore, the Department's ability to exercise discretion in the proposed rule is narrower, with standards, than allowed in the comparable federal regulation.

New Rule XXXIV

(1)(d) would require a Class II or IV landfill unit to comply with "any other design standard determined by the department to be necessary to meet the requirements of [NEW RULE XXXIII(1)]", which is the basic landfill liner design standard. This matter was addressed immediately above in the discussion of New Rule XXXIII(2).

(3)(e) would require a Class II or IV landfill leachate collection system to "meet any other requirements determined by the department to be necessary to protect human health or the environment". Because the design of a leachate collection system is part of the overall design, the same analysis as for the design rule, New Rule XXXIII, applies. The Department's ability to exercise discretion in the proposed rule is narrower, with standards, than allowed in the comparable federal regulation.

New Rule XXXVIII

(4)(a)(iv) would require a Class II or IV landfill to provide a ground water monitoring plan including "any other information determined by the department to be necessary to protect human health or the environment". Federal regulations do not require a ground water monitoring plan, so they are not comparable. A ground water monitoring plan, and rules concerning a ground water monitoring plan, are required in § 75-10-204(5)(b), MCA. In addition, 40 CFR 258.53(c) concerns ground water sampling procedures and frequency, which are two elements of a ground water monitoring plan, and it states they must be protective of human health and the environment. Aspects of a ground water monitoring plan must be designed, so the above discussion of New Rule XXXIII is relevant. Therefore, (4)(a)(iv) is not more stringent than a comparable federal regulation.

New Rule XXXIX Ground Water Sampling and Analysis

(1)(f) requires a landfill required to monitor ground water to submit a sampling and analysis plan that documents procedure and techniques for … "any other matter determined by the department to be necessary to protect human health or the environment." As noted above, 40 CFR 258.53(c) states that groundwater sampling procedures and frequency must be protective of human health and the environment. Therefore, the proposed rule is not more stringent than the comparable federal regulation.

(9)(c)-(e) concerns statistical methods for analysis of ground water monitoring. Those subsections require the methods to "be protective of human health and the environment." These provisions are the same as in existing ARM 17.50.708(13), and are identical to comparable regulations at 40 CFR 258.53(3)-(5).

New Rule XLII Assessment of Corrective Measures

(1)(b) would require a landfill with a statistically significant exceedance of a ground water protection standard to assess corrective measures, addressing "any other criteria determined by the department to be necessary to protect human health or the environment." Existing ARM 17.50.710(6)(b) states that the assessment shall include an analysis of the effectiveness of potential corrective measures in meeting all of the requirements and objectives of the remedy as described under (7) of this rule, addressing **at least** the following. ONE OF THE objectives of the remedy described under (7) is that it "must [b]e protective of human health and the environment." The comparable federal regulation is 40 CFR 258.56, which states at (c) that the assessment must satisfy all requirements and objectives of the remedy in 40 CFR 258.57, "addressing at least the following…" 40 CFR 258.57(d)(1) remedy requires remedies to be protective of health & environment. The Department's ability to exercise discretion in the proposed rule is narrower, with standards, than allowed in the existing rule and the comparable federal regulation.

New Rule XLIII Selection of Remedy

(4)(g), concerning "any other factor determined by the department to be necessary to protect human health or the environment," see discussion of 40 CFR 258.57(d)(1) in analysis of New Rule XLII (1)(b) immediately above;

XLIV Implementation of Corrective Action

(1)(c)(vii)- The Department and a landfill owner would be required to consider, when determining if interim measures are necessary, "other situations that may pose threats to human health and the environment." This is identical to the comparable regulation in 40 CFR 258.58(a)(3)(vii), except for Department approval.

New Rule XLV Hydrogeological and Soils Report

(2)(g) requires a landfill to submit a hydrogeological and soils report that includes, for each ground water monitoring well, "any other information determined by the department to be necessary to protect human health or the environment." Existing ARM 17.50.705(1) concerns the hydrogeological and soils report, and states that "[a]t a minimum, the scope of each report will include the following components." The hydrogeologic and soils work plan is a fundamental element of a site-specific ground water monitoring plan. Submittal and approval of the hydrogeologic and soils work plan, as part of a ground water monitoring plan is required under 75-10-207(4), MCA. Because this submittal and approval is required by state law, 75-10-107, MCA, does not apply.

In addition, the federal regulations at 40 CFR 258.51(b) require that a multiunit ground water monitoring network be as protective of human health and the environment as individual

monitoring systems, based on, among other things, the hydrogeological setting. This is quite broad and encompasses other information that could be requested under (2)(g). Therefore, the proposed rule is not more stringent than a comparable federal regulation.

New Rule XLIX Closure

(4) requires that a closure plan must contain "any other information determined by the department to be necessary to protect human health or the environment". Similar requirements in 40 CFR 258.60(c) state that a closure plan must contain, "at a minimum …" Therefore, the Department's ability to exercise discretion in the proposed rule is narrower, with standards, than allowed in the comparable federal regulation.

(8) authorizes the Department to grant an extension of the one-year deadline for beginning closure if the landfill demonstrates that the unit has capacity to receive additional waste and that it has taken all steps necessary to protect human health and the environment; 40 CFR 258.60(f) uses identical language.

(9) has similar language to (8) for an extension to the 180-day deadline for completing closure. The federal regulation is identical.

New Rule L Post-Closure

(1)(e) provides that post-closure care must consist of any other measure necessary to protect human health or the environment. The comparable federal regulation, 40 CFR 258.61(a), states that post-closure care must consist of "at least" the following. Therefore, the Department's ability to exercise discretion in the proposed rule is narrower, with standards, than allowed in the comparable federal regulation.

(2) would provide that the post-closure care period may be decreased or increased based on a demonstration or determination of protection of health and environment. This is based on the existing rule at ARM 17.50.531. The comparable regulation, 40 CFR 258.61(b), uses identical language. Therefore, the proposed rule is not more stringent than the comparable federal regulation.

(3) would provide that the post-closure plan must include "any other information determined by the department to be necessary to protect human health or the environment" 40 CFR 258.61(c) p-c plan "includes, as a minimum, the following information". Therefore, the Department's ability to exercise discretion in the proposed rule is narrower, with standards, than allowed in the comparable federal regulation.

(3)(c) would allow the Department to approve certain disturbances to a landfill during the post-closure care period if it approved a demonstration that the disturbance "will not increase the potential threat to human health or the environment." This is identical to 40 CFR 258.61(c)(3).