

LEGISLATIVE ISSUES IN THE

HAZARDOUS SUBSTANCES:

A Report to the 51st Montana Legislature

Environmental Quality Council

December 9, 1988

DRAFT

INTRODUCTION

Over the past decade, the American public has grown increasingly concerned about the effects of hazardous substances on human health and the environment. Dozens of state and federal programs have been initiated to regulate the use, storage, transport, disposal and cleanup of hazardous substances, and these programs are grounded in a relatively new, rapidly evolving and extremely complex body of natural resource law.

Development of Montana programs has largely kept pace with national initiatives. However, the 1989 Legislature will be asked to consider legislation on a range of hazardous substance issues. Some proposals involve the fine-tuning of state programs to conform to new federal requirements, others relate to the allocation of resources to specific programs, while still others call for substantive policy decisions.

This report highlights the status and legislative outlook for five major programs dealing with the management of hazardous substances in Montana: small-quantity hazardous waste generators; regulation of underground storage tanks; mini-Superfund; landfill regulation; and natural resource damage claims/hazardous waste site enforcement actions. These topics reflect subjects of intense past legislative interest and/or anticipated future lawmaking activity.

For additional background information, the reader is referred a report prepared by the Environmental Quality Council for the 50th Montana Legislature (EQC 1987).

SMALL-QUANTITY HAZARDOUS WASTE GENERATORS

The Montana Hazardous Waste Act, administered by the

classified as "conditionally exempt" and are thus not subject to most regulations.

-- 17 companies provide commercial hazardous waste disposal services to Montana businesses, although only one (Special Resource Management west of Butte) has in-state offices. Companies indicated they would provide hazardous waste services anywhere in the state if transportation costs could be covered.

-- hazardous wastes generated by small businesses are disposed of by the following methods: disposal in local landfills or through on-site burning and burial; discharge to community sewer or to on-site septic tank drainfields; transport off-site by regulated transporters; or recycling by on-site redistillation (used for many solvents). The legal disposal of small quantities of hazardous waste in local landfills is a potential problem, but its magnitude is not yet well defined.

-- the most common method of solvent disposal is mixture with waste oils, with subsequent usage for heating fuel, oil recycling or, in some cases, road oiling. For spent solvents that are classified as hazardous wastes (as many are), these disposal methods may constitute violations of hazardous waste laws.

Based on these findings, SAIC cited a two-fold problem in Montana. First, the many conditionally exempt generators may not be aware of the need for or desirability of waste management services. Second, high transportation costs may make service to certain areas of the state unprofitable. In consideration of these factors and other report findings, SAIC recommended that:

-- the Department of Health and Environmental Sciences (DHES) should not attempt to provide hazardous waste management services to Montana small businesses. Generator needs are too diverse and transportation considerations would make a single collection and transfer station ineffective.

-- DHES should continue to educate small businesses on waste minimization techniques specific to their industries.

-- DHES should provide all small-quantity generators with information on hazardous waste service companies active in Montana.

-- additional efforts are required to prevent the improper disposal of waste oil/solvent mixtures. Testing of waste oils should be required prior to pick-up by oil recyclers and solvent users should be informed

about recycling options, including the opportunities for shared use of distillation equipment.

-- the ongoing use of septic tank haulers for the disposal of "hot tank" wastes (metal-laden sludges from radiator repair shops) should be investigated, both in terms of volume handled and the environmental consequences of this virtually unregulated means of disposal.

The Department of Health and Environmental Sciences intends to emphasize education and technical assistance to encourage Montana's small-quantity generators to further minimize their production of hazardous wastes and to dispose of wastes properly. These efforts will continue to be backed up by the regulatory structure in place under the Montana Hazardous Waste Act, and additional attention will be given to addressing the problems cited in the SAIC report.

The department has drafted legislation to amend the Montana Hazardous Waste Act to conform to 1984 amendments to the federal hazardous waste management law. The legislation would authorize DHES to order violators to cleanup off-site pollution and would allow the department to take legal action against persons who contributed to hazardous waste contamination through past illegal disposal practices.

REGULATION OF UNDERGROUND STORAGE TANKS

Regulation of underground tanks that store petroleum products and hazardous chemicals began in 1984 on the federal level and in 1985 on the state level (with the passage of House Bill 676). These laws were enacted in response to a national environmental crisis, characterized by thousands of damaged and corroded tanks leaking petroleum products and other hazardous substances into groundwater aquifers.

In recent years, the Montana Department of Health and Environmental Sciences has received scores of reports of leaking underground storage tanks, including 44 reports in the past year alone. Incidents have occurred in every major city and many smaller communities. The leaks range in magnitude from a few hundred gallons to several hundred thousand gallons, with the largest volumes generally related to railroad refueling operations. The effects have been contaminated water wells (including some drinking water supplies), hazardous vapors in homes and businesses, contaminated soil, and polluted groundwater aquifers. In most cases the leaks have been discovered and reported by persons suffering adverse effects, not by tank owners.

The initial focus of the underground storage tank (UST) program was mandatory tank registration, which began in 1986. Montanans have registered more than 18,000 tanks (out

of an estimated 30,000 in the state), providing DHES with a detailed picture of the "tank population" in Montana. Most of the tanks are constructed of bare steel; tank capacity averages about 5,000 gallons; and more than 90% of the tanks are used to hold petroleum products. The average tank has been in the ground for 15 years -- an age at which corrosion and leakage are considered likely to occur.

In September 1988, the U.S. Environmental Protection Agency adopted minimum nationwide UST regulations. To detect possible leaks, tank owners must (a) monitor fuel supplies monthly and periodically test their tanks for leaks, or (b) conduct monthly environmental monitoring. These leak detection requirements are phased in over the next five years. Tank over 25 years old must have leak detection in place by December 1989. Any leaks or spills must be reported immediately. New tanks must be constructed of fiberglass, fiberglass-clad steel, or steel that is coated and "cathodically protected" against corrosion; existing bare steel tanks must be lined or provided with cathodic protection within 10 years. In addition, all tank owners must be insured for a minimum of \$500,000 for spill cleanup and liability.

Montana program officials are now considering the appropriate direction for state UST rules which, under federal law, must be at least as stringent as EPA's. (If a state does not enact and enforce adequate UST regulations, EPA will administer and enforce a federal program within that state.) The Montana program will thus include requirements for leak detection, corrosion protection for new and existing tanks, and financial assurance.

Montana has the option to follow the lead of several other states and enact more stringent regulations than EPA on some specific points. Massachusetts and California, for example, require all new tank installations to include "secondary containment", which in most cases means double-walled tanks. Montana also has options for developing regulations for farm fuel and heating oil tanks with capacities under 1,100 gallons. These tanks are regulated under Montana law, but are currently exempt from the federal UST program; thus there are no applicable minimum federal requirements for this class of tanks.

Recent incidents in Dillon and Cutbank illustrate the level of effort that can be required to address tank leaks and the difficulty of achieving cleanup. In Dillon, a leak was discovered in 1979 by residents whose wells were contaminated with gasoline; nine years later following extensive but inconclusive investigations, alternative water supplies have been provided but the groundwater remains unusable, the extent of the contamination is still unknown, and no cleanup efforts are contemplated (EQC 1987). In Cutbank, the basements of several homes have been contaminated by crude oil and petroleum vapors, resulting in temporary evacuations, the installation of special air ventilation systems, and one explosion. DHES has spent more

than \$100,000 over the past six months, drilled 23 test wells, and still has not yet pinpointed the source of the leak or leaks.

These incidents testify to both the complexity of groundwater pollution and the inadequacy of state and local resources for investigation, remedial action and followup work. The Department of Health and Environmental Sciences has only nine total positions (including support staff) in the UST program, divided between prevention (UST rules, including tank registration, testing, and installation) and response (leak detection and investigation). DHES officials expect that a large number of tank leaks will be discovered in the next few years, as tank owners comply with testing, monitoring and leak detection requirements of the new rules. In addition, the advanced age of Montana's underground tanks (including more than 2,800 registered tanks over 25 years old) is viewed as a source of hundreds or thousands of new tank leaks in the near future.

In recognition of the magnitude of current and projected UST problems and the shortage of personnel to effectively regulate tanks or to respond to tank leaks, DHES officials considered increasing the size of the state UST program. The increase would have been funded by annual registration fees on underground tanks, with half of the fees to be distributed to city and county governments to support local oversight of tank installations and removals, testing and compliance with UST rules. UST programs in 17 other states are funded by tank registration fees.

Budget officials in the Schwinden administration, however, rejected the proposed tank registration fee. As a result, DHES will not be requesting legislation to generate funds to increase the workforce in the UST program during the 1989 legislative session.

DHES is expected to propose a bill to require the certification of persons installing underground storage tanks. This legislation is intended to ensure that new tank installations are properly conducted and that only tanks of authorized construction are used. Permits would be required for each tank installation and closure; again, however, the Administration rejected the concept of a fee so state program costs would have to be covered by existing revenue sources.

The department has also drafted legislation to clarify state enforcement authority for "regulated substances" -- i.e., the fuels and other chemicals stored in underground tanks. The Montana Hazardous Waste Act gives the department explicit authority to regulate underground storage tanks, but does not specifically include the term "regulated substances" in various sections of the law where it would be appropriate.

Montana's UST program is now funded through a 75% federal/25% state split, totalling about \$200,000 annually. Additional funds available for leak response through the federal LUST (leaking underground storage tank) Trust are

expected to total about half a million dollars for each year of the upcoming biennium. The federal government provides 90% of these funds, with the remainder coming from an earmarked portion of the state Resource Indemnity Trust Fund. To remain eligible for LUST Trust funds, the state must administer an effective UST program, including aggressive efforts to recover LUST Trust expenditures from the parties responsible for tank leaks and enforcement based on rules no less stringent than federal.

The issue of leak response -- and who is going to pay for it -- is expected to surface during the 1989 Legislature. Petroleum marketers are supporting an increase in the state gasoline tax to develop a fund for leak response. Legislation drafted by their trade association proposes an amnesty on liability for any leaks reported in the next two years and a state-financed cleanup program after that (with the first \$25,000 in response costs to be paid by the tank owner). The program would be run by DHES. Although DHES officials have not adopted a formal position on the legislation, they have indicated that any new program responsibilities must be adequately funded, in light of the department's already strained UST program resources.

A related issue is the fate of small town service stations in Montana. Some representatives of these independent service stations favor the development of a state fund to subsidize the replacement of underground tanks. Otherwise, they contend, small service stations will be forced to close because of the high costs of tank replacement, tank retrofits, and insurance under the new UST regulations.

Ultimately Montana legislators will be asked to face a number of difficult policy decisions related to underground storage tanks during the 1989 session. These decisions center on the adequacy of the current state program to prevent or respond to leaks; the desirability of developing and funding local government UST programs; the appropriate dividing line between state and private responsibility for leak cleanup; the allocation of any new tax burden for an expanded UST program; and the effects of the new federal UST regulations and state program responses on the structure of the fuel marketing industry in Montana.

MINI-SUPERFUND

The 1985 Montana Legislature enacted House Bill 766 (now 75-10-701 et seq., MCA), authorizing the Department of Health and Environmental Sciences to take action to prevent or cleanup any releases of hazardous substances. The bill established an Environmental Quality Protection Fund (EQPF), termed the "mini-Superfund" because of its similarities to the federal Superfund. Like the federal Superfund, the EQPF:

-- can be used for emergency response or to initiate

long-term cleanup of a hazardous waste site;
-- is intended to be used on a "cost-recovery" basis, meaning the State will seek to recover its fund expenditures from the parties responsible for the contamination; and
-- invokes the possibility of damages to encourage responsible parties to undertake a cleanup. (The mini-Superfund law provides for double damages when a responsible party refuses to undertake a cleanup, while the federal Superfund has triple-damage cost recovery).

The law also states clearly that liability for cleaning up abandoned hazardous wastes sites rests with the parties responsible for releasing the hazardous wastes. There are approximately 140 uncontrolled hazardous waste sites in Montana that are not included on the federal Superfund list and that are thus subject to action under the mini-Superfund program. These sites include abandoned oil refineries, pesticide disposal sites, mine tailings, wood treatment plants, landfills, and a variety of other industrial operations.

The 1987 Legislature provided a funding source for the mini-Superfund through the passage of HB 718, which allocates 4% of the interest income from the Resource Indemnity Trust Fund to the EQPF (beginning in FY 1990). During the 1987-88 legislative interim, limited funding was provided to the department to conduct preliminary assessments of waste sites and to rank them based on the hazard posed to human health and the environment. The department is now developing a prioritized list of these sites for cleanup action under the mini-Superfund program. DHES is also conducting remedial planning to remove mine tailings at the Apex mill near Bannack; completing a site investigation and risk assessment at an oil refinery in Lewistown; and working to secure site cleanups by responsible parties at two other abandoned oil refineries in the Kevin-Sunburst area.

Four issues related to the mini-Superfund program will probably come before the 1989 Legislature. First, DHES has developed legislation to amend the mini-Superfund law to more closely conform to the authorities provided in the federal Superfund program. The amendments would authorize DHES to issue administrative orders or to seek court orders for remedial action; would clarify that hazardous waste liability extends to past owners contributing to site contamination; and would ensure that the state has access to relevant information on hazardous waste sites.

A second mini-Superfund issue relates to program funding. Although HB 718 allocated 4% of the RIT interest to this program, the Schwinden administration's proposed budget reduces the projected biennial allocation from about \$560,000 to \$450,000, diverting the difference to other programs. Since the progress of the mini-Superfund program

in cleaning up hazardous waste sites will depend largely on the funds available, a cutback as proposed would reduce the number of sites that the state can address.

The third legislative issue is a proposal to grant DHES a statutory appropriation to use the mini-Superfund. Although current language in the mini-Superfund law specifies that the fund is to be administered as a revolving fund by the department, there is no specific statutory appropriation. Therefore, the department must go through the budget amendment process for most fund uses. Officials contend that this approach is cumbersome and may delay needed remedial action. Given the number and often unexpected nature of remedial action, the lack of a statutory appropriation is likely to interfere with the state's ability to effectively pursue site cleanups or negotiate with responsible parties. Direct access to the mini-Superfund through statutory appropriation, they contend, would ensure that the state can carry out remedial action (and pursue cost-recovery plus damages) when responsible parties refuse to conduct site cleanups. This option for government action -- considered key to driving private parties to undertake site cleanups under the federal Superfund program -- is also seen as crucial to the success of Montana's program.

Finally, DHES has applied for two separate \$300,000 grants under the Reclamation and Development Grants Program. One application seeks funds to research the history of hazardous waste sites, to contact the potentially responsible parties, and to negotiate site cleanups. This grant -- actually seed money for legal and research costs -- would allow the state to convince responsible parties to initiate cleanups on their own. Otherwise, cleanup efforts will be limited to those few sites that can be addressed by DHES with the allocated mini-Superfund program funds. As noted in the grant application, all state funds expended in this effort are recoverable from the responsible party.

The second grant application seeks funds to investigate and cleanup pesticide wastes at two county weed districts and three airports. These projects received strong endorsements from local government officials who do not have the resources to effectively address the pesticide contamination.

The Department of Natural Resources and Conservation ranked the pesticide cleanup project 4th and the responsible party search project 11th on its recommended funding list under the Reclamation and Development Grants program. However, in early December the Governor's budget director determined that the projects should be dropped from funding consideration and the Governor concurred. In accordance with this direction, DNRC removed the projects from the recommended funding list that will be printed and forwarded to the Legislature.

The administration's rationale for dropping the mini-Superfund projects was that DHES would have surplus funds

available for its hazardous waste program through other earmarked RIT interest. These other funds (in the hazardous waste/CERCLA special revenue account), however, are intended to provide a state financial capability to participate in Superfund cleanups (see EQC 1987) and are not available for the proposed projects. Moreover, the Reclamation and Development Grants Program enacted by the 1987 Legislature specifically includes hazardous waste management projects within its eligibility requirements.

The 1989 Legislature will ultimately decide the fate of these projects through its appropriation process. The decision by the administration to remove them from its recommendations, however, appears to dim DHES' prospects for obtaining funds for these key mini-Superfund projects.

LANDFILL REGULATION

In August 1988, the U.S. Environmental Protection Agency released proposed minimum federal regulations for solid waste landfills. These regulations were prompted by studies demonstrating significant nationwide groundwater pollution caused by substances leaching from landfills. The EPA rules would set strict requirements for groundwater monitoring (both ongoing and for 30 years after landfill closure), financial assurance, recordkeeping and inspection of landfill loads for hazardous waste, and leak prevention for new landfills. The proposed regulations are open for comment, with final regulations anticipated in late 1989, becoming effective in early 1991.

If adopted as drafted, the EPA proposals would have major effects on the management of solid waste in Montana. The state now has 140 landfills, the large majority of which were licensed prior to the concern over groundwater contamination. Most of the landfills are operated by rural communities which have neither the financial or technical resources to conduct monitoring, inspections or recordkeeping. Only about a dozen Montana landfills have any groundwater monitoring wells in place, and in some locations groundwater pollution has been detected.

Unfortunately, the proposed regulations come at a time when the state solid waste management program is minimally staffed. DHES has only 1½ persons working on landfills -- down from a staff of 6 when federal funds supported solid waste management planning efforts in the early 1980s. State officials are already unable to meet their program responsibilities of licensing, inspecting and assisting existing landfill operations to ensure that public health concerns are met.

As EPA moves toward adoption of the new landfill regulations, DHES officials anticipate that local governments will be in need of state assistance. Many landfills are likely to close rather than meet the costs associated with the new federal regulations; those that

remain open -- even for one day after federal regulations become effective -- will be responsible for 30 years of water quality monitoring and for meeting various other program requirements. Communities will be looking for solid waste management alternatives, and ultimately Montana may need to develop a network of regional, environmentally sound landfills that are adequately funded and managed to meet EPA regulations.

Planning for this or any alternative system would logically be coordinated through the Department of Health and Environmental Sciences. DHES has already been contacted by dozens of communities aware of the pending EPA regulations and seeking direction for future action. Staff resources, however, are inadequate to meet the current needs for assistance, not to mention the drastically increased demands anticipated in the next year or two.

In recent months, DHES officials have also received a number of inquiries from out-of-state businesses interested in disposing of solid wastes in Montana. The situation is driven by economics, as waste disposal costs in other states commonly range from \$50 to \$150 per ton, compared to about \$10 per ton in Montana. Even with the added shipping costs (about \$35 per ton from the East Coast), Montana is a financially attractive place for solid waste disposal. Some Montana landfills are currently receiving small amounts of special wastes from out-of-state industries, including drilling muds and waste asbestos. There are no state regulations or state oversight of the importation of solid waste into Montana.

Some recent inquiries to DHES have been related to infectious medical waste disposal. Montana is currently one of six states that has not adopted regulations governing the disposal of infectious wastes, and thus disposal here could be seen as an inexpensive alternative for out-of-state medical facilities or labs. Most medical wastes generated in Montana are burned in hospitals, but some are landfilled.

On the federal level, EPA has not adopted infectious waste regulations despite its authority to do so under hazardous waste laws. Congress recently established a demonstration project to track disposal of medical wastes in three eastern states. Any comprehensive federal regulations, however, appear to be several years in the future.

Montana officials believe they have the authority to adopt rules to regulate the disposal of infectious medical wastes, but the solid waste program has no resources to conduct such rulemaking or to administer a regulatory program. The primary concern of state officials is that infectious wastes disposed at landfills be strictly isolated so people and equipment will not come in direct contact. There have been incidents in Montana where such contact has occurred, raising serious public health concerns.

With the recent emphasis on hazardous waste programs and

the resulting shift of federal dollars, the outlook for state programs to manage non-hazardous solid wastes is not promising. New federal landfill regulations will provide increased protection for groundwater, but will also challenge state and local governments to meet sharply increased program responsibilities with no apparent source of additional funds. Public concern over the importation of solid and infectious wastes also may generate new regulatory responsibilities.

Despite this outlook (and in consideration of state budget constraints), the Schwinden administration is not proposing any expansion in the DHES solid waste management program. Potential problems -- specifically, Montana's inadequate program commitment to landfill regulation and the lack of import controls on solid and infectious wastes -- thus remain for the 1989 Legislature to consider.

NATURAL RESOURCE DAMAGE CLAIMS/HAZARDOUS WASTE SITE ENFORCEMENT ACTIONS

The 1989 Legislature will be asked to appropriate \$200,000 annually to pursue Montana's claims for compensation for natural resources damaged by Superfund sites. The requested appropriation would come from earmarked hazardous waste accounts, and all legal and technical costs incurred by the state would be subject to reimbursement by the responsible party.

The focus of the claims is a \$50 million lawsuit filed by the state in 1983 against ARCO (purchaser of the Anaconda Company) for damage to land and water resources in the upper Clark Fork Basin (see EQC 1987 for more details). Currently, the health department and ARCO have begun discussing how to determine the extent of natural resource damage in the basin and how this damage should be valued. The state is preparing to retain the assistance of a natural resource economist to develop methodologies and timetables for assessing damages, including close review of the cleanup decisions reached at the various Superfund sites in the Clark Fork Basin. Natural resource damage claims are intended to reimburse the state for those resources that are not be cleaned up or restored through the Superfund process.

As trustee of state resources, DHES also has the obligation under federal law to pursue natural resource damage claims at other hazardous waste sites. In both Libby and Somers, where final cleanup decisions are pending, departmental action to establish natural resource claims would be timely. It is not clear, however, whether the appropriation requested by DHES will be adequate to pursue damage claims at these sites.

A separate hazardous waste enforcement issue that may face the Legislature is the effort to oversee the cleanup up of diesel fuel and hazardous wastes released by Burlington Northern at its railroad operations in Livingston.

Preliminary tests have indicated extensive groundwater contamination under the site and city, including an estimated one-half million gallons of diesel fuel and various industrial solvents. The municipal water supply is considered to be in jeopardy of contamination and one or more private wells have been polluted.

The health department has entered into discussions with Burlington Northern to resolve liability considerations and to establish investigation and cleanup procedures for the site. To date, the state has not filed suit against BN but, rather, is working with the company to negotiate a comprehensive settlement. State officials are seeking commitments from BN under which BN would accept responsibility for the Livingston contamination and cleanup pursuant to state and federal law; reimburse the state for its technical and legal costs in investigating the site and overseeing cleanup; commit to payment of appropriate penalties for violations of hazardous waste and water quality laws which may have occurred; and acknowledge potential liability for damage to state natural resources. Given the apparent magnitude of the groundwater contamination at Livingston, the health department's decision to defer the exercise of its considerable enforcement authorities (under both hazardous waste laws and clean water laws) to order a cleanup may be subject to legislative scrutiny during the 1989 session.

Burlington Northern is also believed to be responsible for diesel fuel contamination of groundwater at about 12 other railroad refueling operations across Montana. Preliminary site investigations are underway at these locations, but some state officials have expressed frustration at the slow pace at which information is being provided and the virtual absence of remedial actions.

If negotiations proceed smoothly for the Burlington Northern sites, additional legislation or requests for appropriations to pursue enforcement actions may not come before the Legislature. There is, however, the possibility that some aspect of these issues may be brought into the legislative arena if the parties fail reach substantive agreements that will bring about site cleanups.

LITERATURE CITED

EQC. 1987. Montana's regulation of hazardous substances. Annual Report, Tenth Edition: Research Topics, Environmental Quality Council, June 30, 1987. pp. 33-47 in the second printing.