

The attached guidance “Granting Fee Waivers for Voluntary Waste Removals under 2013 Wisconsin Act 333” was developed to clarify under what circumstances such fee waivers can be granted by the DNR, and what fees can be waived under the law. It is intended to be used internally by various DNR staff as well as external stakeholders and others who wish to know whether this law is likely to apply to a given situation. This document was developed by the DNR’s Waste and Materials Management Program with assistance and review from the DNR Remediation and Redevelopment program and the DNR attorneys assigned to those programs. . We are now soliciting comments from the public on the guidance. Once the 21 day notice period is complete, all comments will be considered, revisions will be made to the guidance documents as needed, and final guidance will be made available to internal and external stakeholders. Comments related to this draft guidance document should be sent to Brad Wolbert at [Brad.Wolbert@wisconsin.gov](mailto:Brad.Wolbert@wisconsin.gov).

# **DRAFT**

## **Granting Fee Waivers for Voluntary Waste Removals under 2013 Wisconsin Act 333**

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New provisions in chapter 289, Wis. Stats., signed into law in 2014, provide the DNR the authority to grant a waiver from the following statutory landfill tipping fees: the groundwater and well compensation fees, the solid waste facility siting board fee, the recycling fee, and the environmental repair fund fee. Under the newly adopted section 289.675, Wis. Stats., the granting of a fee waiver is at the DNR's discretion, and is limited to certain specific circumstances, when the department:

- “requests a person to participate in waste removal activities to mitigate potential environmental impacts and related liability” and
- “determines that granting a waiver from the fees [...] will provide an incentive for the person to participate in those activities.”

The department may not grant the above fee waiver to a person who:

- “knowingly committed a violation of law that caused or contributed to the need for the waste removal activities” or
- “committed an act that the person knew or should have known would cause or contribute to the need for the waste removal activities.”

There are two policy issues that must be addressed in order for the DNR to implement this new fee waiver law: defining who qualifies for the fee waiver, and determining whether the landfill license fee surcharge under s. NR 520, Wis. Adm. Code, would be affected by the granting of a fee waiver.

### **Who Qualifies for a Fee Waiver?**

The law came about as a result of a case in south-central Wisconsin in which a licensed solid waste processing facility accumulated a large amount of unprocessed and partially processed waste, then went out of business, leaving the waste on the ground where it could cause soil and groundwater contamination and constitute a fire hazard. In order to encourage timely removal of this material, the DNR approached the haulers who had delivered waste to this licensed facility and asked them to voluntarily remove and take to a licensed landfill approximately as much waste as they had delivered to the facility. Landfill tipping fees posed an impediment to reaching agreement with the haulers.

In response, the state assembly member for this district sponsored AB 494 to allow the DNR to waive the state portion of the landfill tipping fee. The purpose of the law was to apply to the very unusual situation in which the DNR requests a voluntary waste<sup>1</sup> removal by a party not otherwise legally required to remove the waste.

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<sup>1</sup>The law is designed to facilitate waste removal, not remediation of contaminated environmental media. In implementing the law, the DNR recognizes that it may be necessary or expedient to remove a limited amount of surficial soil in order to accomplish a complete waste removal, and that it may be most practical to dispose of this soil in the same manner in which the waste is disposed of. This soil would also qualify for the fee waiver when disposed of at a licensed landfill.

There are good policy reasons for limiting the application of the discretionary fee waiver to situations where the Department requests that the waste be removed and the party responding is truly a voluntary third party. Therefore, there are a number of situations that require removal of waste but that would not qualify for fee waiver under Act 333. For example, many property owners experience situations where someone else's waste needs to be removed from their property, due to, for example, the activities of tenants, or illegal dumping. Property owners may also encounter or take possession of waste on newly acquired parcels. These property owners may not have violated a law or committed an act that created or exacerbated the waste problem on the parcel, but they still have a responsibility for waste removal and completing the removal is to their benefit because they own the property. They would not qualify for a fee waiver. Their situation is distinct from that of a hauler or other party who is asked and agrees to incur costs for waste removal absent a legal obligation to do so. It would be a much greater administrative and financial burden for the DNR to attempt to provide fee waivers to all property owners needing to remove solid waste that they didn't cause from their property, and it is not clear where the line would be drawn between a qualifying waste removal and removal of waste that the owner should carry out as an inherent obligation of property ownership.

To be consistent with the language and the purpose of the fee exemption provision, the department should limit fee waivers to the very narrow set of circumstances where the department requests a third party to remove waste and the third party does not have an existing legal obligation to do so. For these individuals or companies, the department may (at its discretion) offer a fee waiver to a party who voluntarily agrees to remove waste for proper disposal.

The department should *not* grant a fee waiver to owners, operators or other persons or companies who have a clear legal obligation to remove and properly dispose of waste. Persons or companies with clear legal obligations include, for example, persons identified as responsible parties under the Spills Law (s. 292.11(3), Wis. Stats.) or the Environmental Repair Law (s. 292.31, Wis. Stats.) and persons who would be liable for waste disposal under ss. 289.31 (solid waste facility operating license) and 289.45 (solid waste storage), Wis. Stats. Under the Spill and Environmental Repair Laws, issuance of a responsible party letter would be indicative of a "clear obligation" and render the recipient not eligible for the fee waiver; whereas issuance of a "potentially responsible party letter" would not be a "clear obligation."

Under ss. 292.11 (9)(e) and 292.23, Wis. Stats., local governments may be exempt from obligations under the Spills Law and the Environmental Repair Law. In these cases, the DNR would need to determine whether the municipality bears any culpability for contributing to the need for a waste removal. If there is no significant culpability, the DNR could grant the local unit of government a fee waiver.

### **Is the Landfill License Fee Surcharge Affected by a Fee Waiver Granted Under This Law?**

Section 289.675, Wis. Stats., states that the DNR may waive the fees under ss. 289.63 (groundwater and well compensation fees), 289.64 (solid waste facility siting board fee), 289.645 (recycling fee) and 289.67 (environmental repair fee and surcharge), Wis. Stats. There is one other tonnage-based fee imposed on solid waste disposed of at a landfill: the landfill license fee surcharge, which is specified in s. NR 520.04(1)(d)3., Wis. Adm. Code, and is currently set at \$0.15 per ton of waste and is collected quarterly. Section 289.675 does not make any reference to waiver of this landfill license surcharge fee.

The landfill license fee surcharge was adopted pursuant to the authority in s. 289.61(1) ("The department shall adopt by rule a graduated schedule of reasonable license and review fees to be charged for solid waste license and review activities."). Under s. 289.61(3), Wis. Stats., the department must set fees at a level anticipated to recover the solid waste program staff review costs of conducting solid waste review activities. Under s. 520.04(d)5., Wis. Adm. Code, the department must review the status of and projections for the waste management program revenue account each year. If the account balance is greater than the expenditure levels for 3 consecutive fiscal years, the department must submit proposed

rule revisions to the Natural Resources Board to modify the surcharge to more closely align revenues with expenditures in accordance with s. 289.61(3), Wis. Stats.

The WMM program has exempted a limited number of waste types from the license surcharge fees. Wastes used for landfill construction, as well as natural disaster cleanup wastes, are exempt from all statutory fees and the WMM program practice has been not to apply the surcharge to those wastes. The WMM program has also not imposed the surcharge on mining wastes, which may be produced in huge quantities and which are exempt from the well compensation fee. The surcharge is paid on all other waste types, including seven categories of wastes that are exempt from the recycling fee.

The purpose of Act 333 is to provide an incentive for participation in waste removal activities, and the law is written to provide the DNR complete discretion in offering this incentive. The department would incur significant costs in arranging for a voluntary waste removal. A 15 cent per ton fee on the removed waste, to cover these costs, is reasonable. In addition, the cost of the surcharge fee does not appear large enough to significantly affect a voluntary party's decision to participate in a waste removal activity. Based on these factors, the department should not waive the landfill license fee surcharge in conjunction with any fee waivers granted under s. 289.675, Wis. Stats.

**Contact 608/266-2111 or [DNRWasteMaterials@wisconsin.gov](mailto:DNRWasteMaterials@wisconsin.gov) for further information.**

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