

Waste & Materials Management Program Guidance – “Exemption Low-Hazard Wastes from Solid Waste Regulations”, WA-1645

Summary of changes based on public comments

Thank you to the individuals that provided feedback on the Department of Natural Resources (Department) proposed guidance titled “Exempting Low-Hazard Wastes from Solid Waste Regulations”, publication number WA-1645. Two sets of comments were submitted to the Department during the public comment period. Included in this document are copies of the public comments received.

Based on the comments received, the Department added language to the guidance that applicants requesting a Low-Hazard Waste Grant of Exemption (LHGE) state the action will not cause “environmental pollution” and identify the history of waste disposal activities on the property. We also indicate how long LHGE’s are typically valid before a new exemption must be requested.

All comments were considered; unfortunately we were not able to incorporate all comments into the guidance. Comments that were not able to be included at this time will be shared with two external advisory groups which are discussing issues related to contaminated soil and contaminated sediment management. Attached is a letter to those who provided comments. The final guidance was issued on June 11, 2015.

If you have any questions, please contact John Morris at (715) 635-4046 or john.morris@wisconsin.gov.

Joint Comments Submitted on Behalf of:

Clean Wisconsin

**Marathon County
Solid Waste Department**

Waste Management

January 19, 2015

**TRANSPARENCY IN GUIDANCES FOR NR 718 AND
LOW-HAZARD WASTE EXEMPTIONS**

We understand that these draft guidances are a first step in the Department of Natural Resources' plans to clarify and strengthen policies regulating unlicensed disposal of contaminated soil and solid wastes. The guidances provide an important opportunity to make the practice of unlicensed disposal more transparent to local governments, disposal site neighbors and the public.

DNR cannot fulfill its obligation to evaluate the potential hazard to public health and the environment without taking into account current and future land uses. Today, however, well drillers, communities and prospective homebuyers have no means of determining whether land has been used for unlicensed waste disposal under state approval. Neighbors of quarries and other sites accepting high volumes of contaminated material have no ready way of knowing what types and volumes of contaminated material an unlicensed disposal site accepts. And DNR has no assurance that a subsequent owner of an approved disposal site will not unwittingly relocate waste to a far less appropriate location. The following recommendations for public notice and information would provide crucial assurance that long-term land uses remain consistent with DNR's initial approval of an unlicensed disposal site.

1. Institutional controls restricting development of drinking water wells in or through waste placed on the unlicensed disposal site, including notice to the register of deeds.
 2. Written notice to the property owner before using land for unlicensed disposal, including
 - a) a requirement that the property owner provide the information to the next purchaser of the property; and
 - b) a requirement that the owner of an unlicensed disposal site notify DNR prior to relocating waste.
 3. Minimum public participation requirements prior to accumulating 10,000 cubic yards or more of waste at an unlicensed disposal site, including published notice in a newspaper of record and an opportunity for the public to request a public informational meeting.
 4. Creation of a centralized database through which citizens could easily determine the locations, types, sources and volumes of wastes DNR has approved for unlicensed disposal within their communities.
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Joint Comments
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We urge the Department to incorporate greater transparency into its revisions to Wisconsin's policies and practices for authorizing unlicensed disposal. This letter reflects our shared concerns regarding transparency, and our individual organizations may provide further comments independently.

Thank you for your consideration.

Sincerely,

Clean Wisconsin



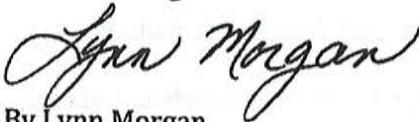
By Amber Meyer Smith,
Director of Program & Government Relations

Marathon County Solid Waste Department



By Meleesa D. Johnson,
Director

Waste Management



By Lynn Morgan,
Manager of Public Affairs

Morris, John M - DNR

From: Morgan, Lynn <lmorgan@wm.com>
Sent: Wednesday, January 21, 2015 10:14 AM
To: Fassbender, Judy L - DNR; Morris, John M - DNR
Subject: Update -- Joint Comments re Guidances for NR 718 and Low-Hazard Exemptions

Judy and John, the League of Wisconsin Municipalities would like to be added as a supporter of these joint comments:

Curt Wityinski
Assistant Director
League of Wisconsin Municipalities
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Thank you,

Lynn

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Tel 262 250 8711
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From: lmorgan@wm.com
Sent: Monday, January 19, 2015 4:12 PM
To: Judy.Fassbender@Wisconsin.gov; John.Morris@wisconsin.gov
Cc: Amber Meyer Smith (asmith@cleanwisconsin.org); Meleesa Johnson (Meleesa.Johnson@co.marathon.wi.us)
Subject: Joint Comments re Guidances for NR 718 and Low-Hazard Exemptions

Judy and John, please accept the enclosed joint comments from Clean Wisconsin, Marathon County and Waste Management regarding the guidances for NR 718 and low-hazard exemptions. Kindly include these contacts in any correspondence about the comments or guidances:

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608/251-7020

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Thank you!

Lynn

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WASTE MANAGEMENT

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January 19, 2015

COMMENTS REGARDING DRAFT GUIDANCE EXEMPTING LOW-HAZARD WASTES FROM SOLID WASTE REGULATIONS

Waste Management of Wisconsin, Inc. strongly supports the Department of Natural Resources' efforts to ensure that its procedures and criteria for allowing waste disposal at unlicensed sites are consistent, fair and protective of the environment. The revisions to this guidance for low-hazard exemptions and the related NR 718 soil management guidance are an important first step in urgently needed reform of the State's unlicensed disposal policies.

Wisconsin's solid waste management laws are among the most stringent in the nation. Low-hazard exemptions are intended to provide an "off-ramp" from those laws for solid wastes that can be safely managed under eased or alternative requirements that provide equivalent environmental protection. In recent years, however, low-hazard exemptions have allowed relocation of waste or contaminated materials and other waste to virgin land without:

- Consistent standards for determining what levels of contamination are safe for unlicensed disposal;
- Notice to the community that an unlicensed site is accepting waste or contaminated materials;
- Land use restrictions, deed notice or other safeguards restricting public exposure;
- Assurance that the wastes will not be moved again to yet another location, entirely without DNR's knowledge or approval; or
- Provisions protecting taxpayers from the future cost of remediating unlicensed disposal sites.

The volume of material diverted to unlicensed disposal sites is unknown, because Wisconsin has no central registry of the locations of unlicensed disposal sites and how much waste they've accepted. It's clear, however, that some owners of unlicensed disposal sites have exploited weaknesses in the low-hazard exemption criteria and process. For example:

- Wisconsin quarries are accepting wastes under low-hazard exemptions that do not require monitoring of groundwater or surface water. The reclamation plan for at least one quarry calls for single-family homes with private drinking water wells drilled directly into the waste mass.
- Low-hazard exemptions allowed a single quarry in southeastern Wisconsin to accept soils containing levels of arsenic, lead, selenium and PAHs exceeding residual contamination levels (“RCLs”) applicable to remediation sites. The quarry has placed some contaminated soil directly into surface water and the bottom 3.79’ of fill sits directly in groundwater. The quarry is known to have accepted at least 311,735 tons of contaminated soil during 2005-2011 from 49 remediation projects and is estimated to have accepted more than 500,000 tons to date. The quarry continues to receive contaminated soil.
- In several instances, the quarry’s own consultant applies for the low-hazard exemptions. DNR issues the exemptions without any representations from the parties who are actually responsible for ongoing sampling and characterization of the waste.
- A low-hazard exemption allowed contaminated soil to be dumped on a property where a remediation effort funded by a state brownfields grant was underway.

We applaud efforts DNR has already made to address these abuses by fostering uniform and thorough evaluation of low-hazard exemption applications. The proposed guidance, and particularly the proposal example, provide a valuable guide for applicants and DNR staff. The recommendations that follow outline opportunities to more fully align the guidance with the Department’s statutory and regulatory obligations.

1. Standard for Exemption

In general, “[n]o person may store or cause the storage of solid waste in a manner which causes environmental pollution.” s. 289.45, Wis. Stats. To obtain an exemption from the requirements of NR 500 to 538, DNR requires an applicant to apply in writing to the Department “with the appropriate documentation which demonstrates that the proposal will not cause environmental pollution as defined in s. 299.01(4), Stats.” NR 500.08(4). “Environmental pollution” means:

[T]he contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life. s. 299.01(4).

In empowering DNR to selectively exempt wastes from regulation, state law assigns DNR both the authority and the obligation to ensure exemptions will not cause environmental pollution. The guidance should explicitly acknowledge that authority and obligation as the basis for any grant of exemption so that all parties are aware that the information submitted by the applicant, DNR's evaluation, and conditions of an exemption must support and justify a finding that the exemption will not cause pollution. References within the guidance understating DNR's powers and duties should be revised accordingly. For example, the statement that DNR's discretion allows approval of "relatively low risk" exemptions conflicts with its power to approve only those exemptions that the applicant demonstrates will not pollute, not any with a "relatively low" risk. In the Proposal Example, the "Comparative Justification" section suggests that the applicant's burden is to show that the pollution that will result is within the range of contamination accepted for other activities under. Similarly, the statement that "DNR's discretion....may be used to limit projects based on their size and similarity to other regulated facilities such as landfills..." could give the misimpression that DNR's powers are limited to that comparison, when in fact its powers are much broader.

2. **Relevant Factors**

The guidance cites a list of relevant factors drawn from statute, but omits two key criteria: the design of the facility and the operational history of the facility. These criteria should be included, since they are among the factors the statute requires DNR to review.

3. **Conditions of Exemption**

Providing additional examples of potential conditions would alert applicants and DNR staff to the range of conditions DNR may impose, including prohibition of development of drinking water wells within or through the waste mass, land use restrictions and public notification. The proposal example should include a "Proposed Conditions" subsection along these lines:

Proposed Conditions

Provide a detailed description of measures to limit potential human exposure at the proposed disposal or reuse site.

- Describe features limiting access such as fencing and signage and identify the parties who will maintain those controls.
- Describe measures that will be taken to limit potential use of the disposal or reuse site to uses consistent with the associated risks, including at a minimum:

What steps will be taken to ensure that the DNR is notified of any subsequent

relocation of the waste;

What measures, if any, will be taken to prevent development of drinking water wells in, through, or adjacent to the waste mass;

Proposed land use, including whether the property will ever be used for single- or multi-family residences;

What steps will be taken to ensure that the current property owner and all subsequent owners are bound by the conditions of the approval if granted; and

What steps will be taken to notify the current property owner and the residents, tenants and occupants of the use of the property for waste disposal.

4. **Cumulative Impact**

The DNR has historically considered the relative size of a waste disposal project in evaluating the project's relative risk. On that basis, numerous provisions in state code distinguish facilities on the basis of size and impose less stringent requirements on smaller demolition disposal sites, compost facilities, and other operations. The guidance contains two references to the size of projects, and in one explicitly states that "large-scale" disposal will require engineered liners and other safeguards. Today, however, DNR has no means of tracking, let alone considering, the total amount of waste in place at each unlicensed disposal site. One unlicensed disposal site in southeastern Wisconsin, for instance, has apparently accepted more than 500,000 tons of waste under low-hazard exemptions. In evaluating an exemption request, however, DNR considers solely the amount of waste a location would receive through that individual exemption. The cumulative amount of waste already accepted is not considered, and in fact is not even tracked internally by the Department.

The guidance should require an applicant to disclose the total amount of waste accepted under all approvals, whether granted by the Waste and Materials Management Bureau or the Remediation & Redevelopment Bureau. In addition, the DNR should maintain a central registry of unlicensed disposal sites through which citizens could obtain information about the location, size, sources and types of waste placed in their communities.

5. **Accountability**

The guidance should identify the parties who must be party to an exemption request. In several instances, a consultant for the unlicensed disposal site has prepared and submitted the exemption request. The DNR has relied solely on the disposal site's own representations regarding the sampling and screening protocols, documentation and other requirements that will be followed, even though the consultant provided no documentation that it had the authority to impose those requirements on the property owner, generator, transporter or other parties involved in excavating and relocating

the waste.

6. **Approval Expiration**

An approval of exemption should be valid for activity conducted during an 18-month window. If activity continues beyond that window, the DNR should require a new application for exemption. Approvals should not be valid indefinitely. A reasonable shelf life for exercising an exemption will ensure that DNR is able to periodically assess whether conditions or regulations have changed.

7. **Geologic and Hydrologic Conditions**

The seal of a licensed professional engineer or geologist should be required in virtually all instances. While the Example Proposal suggests that it is recommended if a project has “significant engineering aspects,” it’s not clear what that means. Wis. Stats. 299.01(4) obligates DNR to assess geologic and hydrologic conditions in determining that the exemption will not cause pollution. That would appear to require professional involvement in almost all cases.

8. **Background Levels**

The first paragraph in the second column of page 1 describes the potential relocation of soil containing high background levels. The DNR should not allow the relocation of materials to an unengineered site where lower background levels are prevalent. The fact that high levels of arsenic or other hazardous substances may occur naturally doesn’t justify relocating material to new locations that will simply expose a different group of people. In general, if removal of material is necessary for any reason the opportunity should be taken to treat the material or place it in an engineered facility where health risks are mitigated.

9. **National Heritage Inventory**

If an NHI preliminary assessment is not provided, the applicant should provide documentation indicating the steps that have been taken in determining that no assessment is needed.

We appreciate the Department’s consideration of these suggestions. Please contact Lynn Morgan (lmorgan@wm.com, 262/250-8711) if we can assist your efforts in any capacity.



Date: June 11, 2015

Clean Wisconsin,
Marathon County Solid Waste Department,
Waste Management, Inc.,
The League of Wisconsin Municipalities

Subject: **Response to comments received on the WDNR's proposed guidance "Exempting Low-Hazard Wastes from Solid Waste Regulations"**

Dear Stakeholders,

We greatly appreciate all the comments we received on the "Exempting Low-Hazard Wastes from Solid Waste Regulations" guidance. We have considered all the comments received, but unfortunately cannot incorporate all of them into the document at this time. The suggestions offered would be very useful for some but not all exemption requests. Some LHWGEs propose to recycle waste into an ingredient for manufacturing or other uses similar to a new material, while other proposals request non-landfill disposal. For example, projects to use dredged material under paved roadways, waste salt brine as highway deicer, or select waste as a farm soil additive or nutrient are beneficial uses and may not necessitate the need to have deed notices. The guidance cannot create or change rules circumventing the rule making process; instead the Department must consider the suggestions written in guidance on a case-by-case-basis for each project based on the merits of the project.

Low-hazard waste grant of exemptions have been used for very different waste types and for vastly different purposes. This guidance is not intended to cover details for any one specific waste type; however, existing guidance already exists for concrete coated with lead-bearing paint, processed container glass, bottom ash cinder at dams, and street sweepings. We also anticipate drafting more detailed guidance in conjunction with an external advisory group for management of dredged sediment.

The Department through the Remediation and Redevelopment Program has formed two external advisory groups under the umbrella of the Brownfields Study Group, one to address contaminated soil issues and concerns and the second to address contaminated sediment issues and concerns. The purpose of these external advisory groups is to provide feedback on procedural and policy issues associated with the management of soils and waste materials. We will share your comments with the external advisory groups for their consideration; the external advisory groups may ultimately recommend the state create and/or revise rules and guidance to include your suggestions.

If the proposed alternate disposal or use of the waste poses great enough risk to necessitate the need for institutional controls, the project might not be eligible for a low-hazard waste grant of exemption. Our guidance does indicate in the second column of page 3 that the Department may impose conditions on an approval (which would be done on a case-by-case basis) such as completing a solid waste disposal site affidavit, deed notification, or adding the site to the R&R Program's GIS registry.

The Waste and Materials Management Program maintains files for low-hazard waste grant of exemption projects but does not have central database as you describe. The information is available but would require a review of Department files. Creation of a database as you envision would likely need the approval of and funding from the legislature.

Based on your suggestions, we have added the language listed at the bottom of this letter to the guidance document, including language to better inform applicants that their proposal cannot cause environmental pollution.

We are working internally to create a more consistent process and train staff to recognize who should be issued an exemption approval, and who is responsible for the project and associated conditions of approval. We recognize that at times both the waste generator and the disposal site owner should be issued and be responsible for the project and approval, while at other times it may be the person offering the waste to be used or the person accepting the waste..

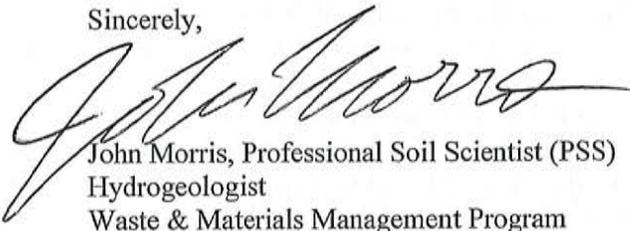
Because of the variety of LHWGE proposals, a PE or PG signature is not needed for every proposal. For example, when a cheese plant and highway department worked closely with the DNR on a first of its kind exemption to use cheese brine as a highway deicer, the Department did not think the final proposal needed to be submitted under the seal of a PE or PG. In that example the Department had multiple professional staff collaborating with the applicant on what would be needed in the proposal to make it successful.

The following is the language added to the guidance document based on stakeholder suggestions:

- Low-hazard waste grant of exemption proposals should identify if the proposed alternate disposal site has previously been used for licensed or unlicensed solid waste disposal or use, and state the types, volumes, and locations of the wastes disposed.
- Low-hazard waste grant of exemption should include a statement that the proposed alternate waste disposal or use will not cause environmental pollution as defined in s. 289.01(8), stats., and documentation to support the statement. ("Environmental pollution" means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life).
- Low-hazard waste grant of exemptions typically has an expiration date based on factors such as the applicant's anticipated window of need, the window of waste generation (one-time vs ongoing generation from manufacturing), and knowledge of the waste including past use under previously issued low-hazard waste grant of exemptions; common expiration dates used are two, five, and ten years from the date of approval.
- If you feel a NHI screening is not applicable for your LHGE proposal, your proposal should include the reasons why.

Please call me at (715) 635-4046 or email me at john.morris@wisconsin.gov if you have any questions about this letter.

Sincerely,



John Morris, Professional Soil Scientist (PSS)
Hydrogeologist
Waste & Materials Management Program

c: Ann Coakley, Waste & Materials Management Bureau Director