

Granting Fee Waivers for Voluntary Waste Removals Under 2013 Wisconsin Act 333



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New provisions in chapter 289, Wisconsin Statutes (Wis. Stats.), signed into law in 2014, provide the Department of Natural Resources (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 s. 289.675, Wis. Stats., the granting of a fee waiver is at the DNR's discretion, and is limited to certain specific circumstances, including, 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 DNR 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 ch. NR 520, Wisconsin Administrative Code (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.

The law is to address very unique situations, such as illustrated in the example above, in which the DNR requests a voluntary waste¹ removal by a party not otherwise legally required to remove the waste.

¹ 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

The law limits the application of the discretionary fee waiver to situations where the DNR 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, as these parties would still have a legal responsibility to remove the waste.

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

The DNR 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."

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 DNR 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 DNR 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.

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.

The DNR's Waste and Materials Management (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 DNR would incur significant costs in arranging for a voluntary waste removal. The DNR believes 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 DNR should not waive the landfill license fee surcharge in conjunction with any fee waivers granted under s. 289.675, Wis. Stats.

Contact DNRWasteMaterials@wisconsin.gov for further information.

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Pursuant to ch. 227, Wis. Stats., the Wisconsin Department of Natural Resources has finalized and hereby certifies the following guidance document.

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DOCUMENT TITLE

Granting Fee Waivers for Voluntary Waste Removal Under 2013 Wisconsin Act 333

PROGRAM/BUREAU

Waste and Materials Management

STATUTORY AUTHORITY OR LEGAL CITATION

Ch. 289, Wis. Stats.; ch. 520. Wis. Adm. Code.

DATE SENT TO LEGISLATIVE REFERENCE BUREAU (FOR PUBLIC COMMENTS)

September 9, 2019

DATE FINALIZED

October 4, 2019

DNR CERTIFICATION

I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.

October 4, 2019

Signature

Date