

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WA-07-24 (E) and WA-08-24

Relating to: Revisions to chs. NR 500 and 520 to provide an alternative method for a municipality to establish proof of financial responsibility required for a solid waste disposal facility.

Rule Type: Permanent and Emergency

1. Finding/nature of emergency (Emergency Rule only):

2023 Wisconsin Act 107 (Act 107), effective March 14, 2024, establishes requirements relating to an alternative method of establishing owner financial responsibility (OFR) at municipally owned solid waste disposal facilities and directs the Department of Natural Resources (department) to promulgate rules no later than November 1, 2024. Act 107 states that the department “shall use the procedure under s. 227.24 to promulgate rules under s. 289.41 (3m) no later than the first day of the 7th month beginning after the effective date of this subsection. Notwithstanding s. 227.24 (1) (c) and (2), emergency rules promulgated under this subsection remain in effect until the first day of the 36th month beginning after the effective date of the emergency rules or the date on which permanent rules take effect, whichever is earlier. ... Notwithstanding s. 227.24 (1) (a) and (3), the department of natural resources is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.”

2. Detailed description of the objective of the proposed rule:

Act 107 provided an alternative method for municipalities to establish owner financial responsibility for their solid waste disposal facilities. Emergency and permanent rulemaking are required under Act 107. The emergency rule must pertain to the alternative financial responsibility method as outlined in Act 107.

The department anticipates that this rule will impact chs. NR 500 and 520, Wis. Adm. Code, but additional chapters that reference these chapters may also be affected by the revisions.

Under Act 107, municipalities may meet their financial responsibility requirements for a solid waste disposal facility by applying to the department and satisfying the minimum financial requirements established by statute and rule. If a solid waste facility is maintained by two or more municipal governments, any owning or operating municipality may establish proof of financial responsibility on behalf of itself and the other municipalities that are owners or

operators. In addition to any requirements established by this rule, Act 107 outlines the following as necessary for establishing alternative municipal financial responsibility:

— If the municipality has any outstanding, rated, general obligation bonds, none have been rated lower than “Baa” as issued by Moody’s Investors Service or “BBB” as issued by Standard & Poor’s Corporation.

— The municipality’s most recent audited annual financial statement shows a ratio of cash plus marketable securities to total expenditures of not less than 0.05, and a ratio of annual debt service to total expenditures of not greater than 0.20.

Act 107 identifies that if the department determines that a municipality does not meet the financial responsibility requirements established by statute and this rule, the municipality shall apply to establish proof of financial responsibility through one of the standard methods outlined in ch. NR 520, Wis. Adm. Code. The municipality shall establish proof of financial responsibility within 45 days of the department’s determination.

Related to the alternative OFR method, the emergency and permanent rules may use existing state statutes, administrative code and federal code to define the parameters for an acceptable alternative method for financial responsibility. These parameters may include methods for calculating financial ratios, auditing requirements for both the state and municipalities, criteria that would constitute a municipality’s ineligibility to assure its obligations via this method, and processes for the department to evaluate submittals and their validity on a case by case basis and may specify other parameters necessary for appropriately evaluating elements under the net worth test.

Additional rule changes may be pursued which are reasonably related to those discussed here.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Wisconsin Administrative Code and Statute have long established the methods for entities to obtain proof of OFR for Closure, Long-Term Care and Corrective Action activities. The owners or operators of both privately and municipally owned solid waste facilities have been able to obtain proof of OFR through one or more “Standard methods of establishing proof of financial responsibility” (Standard Methods). An additional option has been available for private companies only, known as the “Net worth method of establishing proof of financial responsibility” (Net Worth Method). This rule will make the Net Worth Method available to municipal facilities as well. All of the methods available to facilities are explained more in depth below.

Existing Policies

Statute specifies that Standard Methods may be met by obtaining any of the following made payable to or established for the benefit of the department: a bond, a deposit, established escrow account, irrevocable letter of credit, irrevocable trust, or satisfactory financial commitment (these are referred to as OFR mechanisms). All are viable in proving to the department a facility's ability to comply with closure or long-term care requirements [s. 289.41 (3) (a) 1. to 5., Wis. Stats.]. This proof must be reviewed and approved by the department.

Administrative Code further defines how a facility may use the Standard Methods, with specific requirements outlined for each assurance type [s. NR 520.06 (1) to (5), Wis. Adm. Code]. Beyond establishing Standard Methods, Administrative Code also defines additional processes the department and regulated facilities must utilize to:

- Change OFR mechanisms,
- Adjust the amounts of OFR Mechanisms, or
- Calculate the amount of proof for OFR [ss. NR 520.07 to 520.15, Wis. Adm. Code].

Ultimately, it is through the Administrative Code that facilities can find the most practical instruction on how to prepare for establishing OFR.

As previously mentioned, prior to Act 107, only privately owned facilities had the option to choose the Net Worth Method to establish OFR. Under the opinion of an independent certified accountant, facilities may apply for the Net Worth Method as a component of an initial site inspection. Upon the review of all relevant material, including a copy of the most recent annual audited financial statements which were distributed to any persons with a financial interest in the facility, the department may issue a determination on the facility's OFR status [s. 289.41 (4) and (5), Wis. Stats.]. Additional provisions in Statute, including s. 289.41 (6), (7), and (9), Wis. Stats., outline the criteria for the facility to maintain compliance with the minimum financial standards for using the Net Worth Method for OFR. As with the Standard Methods, code further defines how to use the Net Worth Method [s. NR 520.06 (6), Wis. Adm. Code].

New Policies Proposed

To complement the Standard Methods and the Net Worth Method currently available in Wisconsin Administrative Code and Statute, Act 107 establishes in Statute a new “Alternative method of establishing financial responsibility for solid waste disposal facilities; minimum financial standards for municipalities” (Alternative Method) [s. 289.41 (3m), Wis. Stats.]. This Alternative Method is the municipal equivalent to the Net Worth Method used by private facilities. As previously outlined, a municipality may use obligation bonds with ratings above certain defined standards paired with the proof of maintaining established financial ratios to demonstrate they can meet closure and long-term care requirements. Municipalities may also use this method to establish OFR for a facility co-owned or co-operated by municipalities other than the applicant.

In Statute, the Alternative Method requires many of the specific application processes to be further defined in a rule promulgated by the department.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Section 289.05 (1) and (3), Wis. Stats., requires the department to promulgate rules establishing minimum standards for construction, operation, and closure of solid waste facilities. Sections 227.11 (2) (a) and 289.06 (1), Wis. Stats., also confer rule making authority to the department to promulgate rules implementing ch. 289, Wis. Stats.

Section 289.41 (3m), Wis. Stats., requires the department adopt by a rule the minimum financial requirements for a municipality to establish proof of financial responsibility under the related section. The statute requires the department to establish the processes necessary to review and determine municipal owner financial responsibility through this alternative method.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

The estimated staff time needed to develop the emergency and permanent rules is approximately 900 hours. This includes staff time needed to address the full public input process, develop the economic impact analysis, conduct outreach to stakeholders, and coordinate agency reviews for the permanent rules.

6. List with description of all entities that may be affected by the proposed rule:

Municipalities that own solid waste disposal facilities that may be eligible to qualify under Act 107 for establishing OFR through the Alternative Method are listed below:

City of Abbotsford	Marinette and Oconto Counties
Adams County	City of Menomonie
City of Antigo	City of Middleton
City of Ashland	Monroe County
City of Beaver Dam	Oneida County
Dane County	Outagamie County
Door County	Portage County
Town of Eden	City of Richland Center
Green County	Sauk County
Jackson County	City of Shawano
City of Janesville	City of Superior
City of Janesville/Rock County	Vernon County
Juneau County	Town of Washington Island
Kewaunee County	City of Westby
La Crosse County	Village of Whiting
Lincoln County	Winnebago County
Marathon County	

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

As a part of the proposed rulemaking processes, Act 107 directly refers to the inclusion of the federal “local government financial test” as presented in title 40 of the Code of Federal Regulations [40 CFR 258.74(f)]. This federal regulation shall act as the framework for this proposed rule. As such, the proposed rule, at a minimum, will meet the federal requirements of a local government financial test, including the processes of financial requirement, public notice, and recordkeeping, among others.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses):

This rule is expected to have a minimal economic impact, which will likely have a positive effect on the municipalities that could be eligible for providing OFR via the Alternative Method.

There are 74 OFR mechanisms held by 33 municipalities that will potentially be impacted by the implementation of this rule. It is important to note that whether a municipality chooses to use the new Alternative Method or must maintain their current Standard Method, the cost of OFR will remain the same for the facility. The major difference will be that the new method does not require money to be set aside in a separate mechanism. The municipality will have the choice of which OFR mechanism to use for a facility it owns. Either way it is the municipality's responsibility to fund the appropriate amount of OFR for the duration required in Statute and Administrative Code.

The immediate impacts will come from the release of current mechanisms when municipalities pass the net worth test through the Alternative Method. The release of the Standard Method mechanisms will have two impacts.

— Release of funding from escrows, trusts or deposits with the department will result in a one-time distribution of those funds directly to the municipality for which the funds are held. The total estimated release of these funds if all municipalities were to pass is approximately \$139 million. While these funds will no longer be held in third party accounts, the municipalities will still be responsible for bearing the costs of their OFR requirements; therefore, it is estimated that this will be a net zero gain or loss over the duration of the OFR period.

— Release of funding from escrows, trusts, Letters of Credit, Bonds and Insurance will no longer require municipalities to pay fees to a third party. No fees are charged on deposits with the department. While the department is not directly involved in establishing these mechanisms or determining what fees are charged, it is estimated that fees range from 1% to 3% of the total amount of the mechanism per year. Using these figures, it is estimated that somewhere between \$1,550,000 and \$4,640,000 total might be saved annually if all the potentially affected municipalities were to pass the net worth test under the new Alternative Method. This can be viewed as a direct cost saving to the municipalities.

If a municipality were to choose to utilize and pass the net worth test under the Alternative Method option, annual fees to secure a third-party certified accountant's opinion would be required. While the department is rarely engaged in this portion of the net worth test, it is estimated that the cost will amount to no more than \$5,000 per year per municipality. This will be a direct expense to each of the municipalities, but compared to the cost saving from paying fees, it is viewed as a minimal impact.

9. Anticipated number, month and locations of public hearings:

The department anticipates holding one public hearing in winter of 2024-25. The department will hold the hearing virtually to allow as many people to attend as possible. Comments may be provided by mail, phone and email as well as in-person.

Contact Person: Michael Schmit, Business Support and IT Section Manager, 608-235-3890,
Michael.schmit@wisconsin.gov