

Report From Agency

REPORT TO LEGISLATURE

NR 500, 502, 542, and 544, Wis. Adm. Code

Board Order No. WA-13-21
Clearinghouse Rule No. 23-065

Basis and Purpose of the Proposed Rule

The general objectives of this proposed rule are to correct, clarify, and update effective recycling program criteria throughout ch. NR 544, Wis. Adm. Code, as well as amend sections of other code chapters related to waste reduction, recovery, and recycling efforts. This rule also makes updates to definitions; changes to storage, collection and transportation, or processing requirements for recyclable materials; minor modifications or corrections to code based on previous statutory changes; and updates to recycling grants authorized under statutes.

Summary of Public Comments and Modifications Made

Public outreach and input opportunities were conducted throughout the rulemaking process:

STAKEHOLDER FEEDBACK MEETINGS - February through May 2023

The department coordinated a series of feedback opportunities prior to the formal rule comment periods to assist in conceptual development of the rule revisions. Sessions were held during meetings with the Council on Recycling, the Waste and Materials Management Study Group, the National Waste and Recycling Association, the Wisconsin Beverage Association and the Wisconsin Counties Solid Waste Management Association. Department staff also hosted a session on rule changes at the February 2023 Wisconsin Integrated Resources Management Conference and had numerous informal discussions with public and private sector recycling professionals in Wisconsin.

The department held two virtual meetings in May 2023 for local government responsible units (RUs) at which 213 of the 1080 RU representatives in the state attended. The presentation addressed topics such as RU education, multiple-family “adequate” recycling, the collection standard, hauler tonnage data changes, and the RU annual reporting time frame. Live polling was used to solicit immediate feedback on specific issues.

Comments received during these meetings and department responses include:

- **RU outreach and education.** Forty-nine percent of the respondents supported proposals requiring the addition of food waste reduction/composting opportunities to their education and outreach programs and to coordinating outreach with their material recovery facilities (MRFs). An additional 38 percent supported the proposals but wanted more information. The department explained that outreach materials would be made available to the RUs at no cost. The department proceeded with the rule revisions and added a note regarding availability of outreach materials.
- **Criteria for “adequate” multiple-family recycling.** Fifty-four percent of the respondents supported the proposal to include criteria defining “adequate” and an additional 38 percent supported the proposals but wanted more information. After discussion, the department included in the rule a suggestion to allow flexibility in how adequate services could be met.
- **Recycling collection standard for RUs.** At issue was whether to keep the RU collection standard established in 1995, replace it with another standard, or operate without a collection standard. A slight majority of meeting attendees, 53 percent, were in favor of keeping the collection standard, with others uncertain or in favor of elimination. After discussion, the department decided to eliminate the static standard in code and instead utilize RU recycling tonnage data to provide program goals and performance metrics.

- **Reporting required by recycling haulers.** Eighty-five percent of attendees expressed support for requiring recycling haulers to provide tonnage information to RUs by Feb. 1 each year and to provide RUs with the name of recycling facilities used by the hauler. The department has proposed those revisions in the rule.

The department held a virtual meeting on May 3, 2023, targeting the 42 MRFs in the state. Twenty MRFs were represented among the total 34 attendees. Ten of the MRF operators that were in attendance also provide recycling hauler services. The department again used live polling to obtain immediate feedback. Topics covered at this meeting included:

- **Owner financial responsibility (OFR) for MRFs.** Twenty four percent of respondents indicated support for requiring OFR for all MRFs certified to operate as part of an RU's effective recycling program. An additional 24 percent supported the proposal but wanted more information. One question was whether OFR would be required for municipally owned MRFs. Based on this discussion, additional stakeholder input and further analysis of the potential costs for OFR, the department reached the decision to exclude MRFs accepting less than 5,000 tons of material per year from this requirement in the rule language.
- **MRF education requirements.** A majority of respondents, 68 percent, supported additional educational and outreach requirements, with an additional 18 percent in support but wanted more information. The department proceeded with the education requirements as originally proposed and clarified that they only applied to newly created documents.
- **MRF operational requirements.** A majority of poll respondents supported proposed MRF operational requirements, such as contingency plans for unexpected closures and containment of unbaled, outdoor material to prevent littering. The department added flexibility in outdoor storage litter control procedures based on discussions.
- **MRF residual rates.** Ninety-five percent of respondents supported establishing a 20 percent maximum residual rate for processed materials, but several requested added flexibility in how a MRF might justify exceedances and remain in compliance. In response to stakeholder input, the department added the flexibility requested and proceeded with a 12 percent glass recycling rate in lieu of establishing a residual cap on each recyclable material.
- **Revisions to MRF self-certification application and annual reporting.** The contents of the initial self-certification application were revised under the proposed rule to obtain more detailed information on MRF structure and operations in order to reduce the information needed on annual recertifications. Sixty-four percent polled in support of the proposals, with an additional 27 percent in support with questions. After discussion, the department proceeded with proposed revisions.

ECONOMIC IMPACT ANALYSIS

A public comment period on the economic impact of the rule was held from October 2 to October 23, 2023. The department received comments from four individuals and organizations on the draft economic impact analysis (EIA) during this period. The comments were considered in further rulemaking and helped clarify the proposed rule language. No changes were made to the EIA in order to finalize it. The comments were as follows:

- An Attorney for Troutman Pepper Environmental Law and Policy Monitor requested clarification related to hauler reporting and collection requirements.
- The National Waste and Recycling Association – WI Chapter submitted concerns related to the proposed requirements for MRF OFR, noting the process to determine the financial responsibility amount in code was vague and provided no criteria or methodology. The Association also did not support exempting MRFs that accept less than 5,000 tons per year from OFR requirements, stating these facilities are less likely to be able to bear the costs of clean-up and are therefore the most likely to increase financial risk to the state.
- A Public Affairs Manager II for the Midwest Area at WM (formerly Waste Management) asked several questions related to OFR (are costs estimated on an annual basis, what does OFR cover,

method to determine OFR amount), the outdoor containment requirements, and consequences for not meeting the 12 percent glass recycling requirement.

- A private citizen asked specific questions about changes in recycling services in Burnett County that are unrelated to this rulemaking.

In response, the department clarified in the rule that a hauler is only required to report to an RU if it collects any of the materials listed in s. 287.07 (4), Stats., from single family and 2 to 4 unit residential dwellings. The department also added greater specificity to the proposed rule pertaining to how OFR would be calculated and delayed until 2027 the requirement that MRFs obtain OFR. The rule continues to exempt this requirement for MRFs processing less than 5,000 tons per year because the amount of OFR funds required for small facilities would be minimal and it reduces the rule's impact on smaller businesses.

PUBLIC COMMENTS ON DRAFT RULE

The department held a public comment period on the draft rule from December 4, 2023 to January 24, 2024 and a public hearing was held on January 17, 2024. There were 106 people who registered in advance of the hearing (five registering in support, two in opposition, 99 for information only), and 48 people attended the virtual hearing. Two people testified: Melissa Tashjian of Compost Crusader registered for information only; Julie Ketchum, Public Affairs Manager for WM (formerly known as Waste Management) registered in opposition/as interest may appear. Four written comments were submitted during the hearing comment period by David Pellitteri, Chair of the National Waste and Recycling Association – Wisconsin Chapter (NWRA); Jason Pelz, Vice President of Recycling Projects, Carton Council; Rick Meyers, Sanitation Services Manager, City of Milwaukee Public Works Operations; and the Associated Recyclers of Wisconsin (AROW). Amanda Haffele, Solid Waste Director of Portage County Solid Waste submitted written comments on February 2.

The following is a summary of comments received and the department's response.

WM stated that it supports 90 percent of the new rule changes, but they request that the requirement for OFR at MRFs be eliminated from the rule because it is precedent setting, the materials handled at MRFs pose little environmental threat, and it would be a financial burden for larger facilities.

NWRA stated the same as WM, also noting that they have major concerns with implementation of a financial responsibility requirement for MRFs of any size because it creates an unnecessary and burdensome increased insurance risk, resulting in increased premiums or becoming a barrier to attaining insurance coverage.

Both WM and NWRA stated that the likelihood of an abandoned MRF requiring state or municipal assistance for clean-up is overstated, and that OFR currently is not required for MRFs in any other state, which could put Wisconsin MRFs at a disadvantage.

AROW submitted support for all the proposed rule revisions. Ms. Haffele expressed support for requiring OFR for all MRFs, without the size exemption, referring to extensive clean-up costs incurred by a county for a small private recycling processor that went out of business.

Department response: Requiring OFR enables the department to minimize the potential risk to the environment and ensure the costs of necessary facility closure activities remain the responsibility of the owner/operator, not of the local government and taxpayers. The rule seeks to align MRFs with other solid waste processing facilities that already must have OFR, including electronics and tires processors.

Based on comments, greater specificity was added to the proposed rule pertaining to how OFR would be calculated. Cost of closure calculations will be limited to removing remaining equipment and materials, recycling or disposal costs (including transportation and labor), and a 10% contingency. Implementation of this requirement was also delayed until 2027 so the estimated 15 privately owned MRFs and three publicly owned MRFs that would need to acquire proof of OFR can prepare over the next few years. The rule continues to exempt the requirement for MRFs processing less than 5,000 tons

per year because the amount of OFR funds required for small facilities would be minimal (few hundred dollars per year) and it reduces the rule's impact on smaller businesses.

The rule's economic impact analysis notes that total annual/recurring costs related to OFR are estimated at \$90,000 for 18 materials recovery facilities (15 private, 3 public). Approximate cost per facility is \$5,000 per year to provide proof of OFR and ensure funds are set aside for management of materials left behind at facilities upon unexpected closure.

There have been large, damaging fires at multiple Wisconsin recycling facilities and reports of small fires almost weekly, likely because of misplaced lithium-ion batteries in the waste stream. It only takes one lithium-ion battery to cause a huge fire and put workers, fire crews, and facilities at risk. Recycling facilities that handle cans, bottles and paper are not designed to handle batteries and electronics. Paper, cardboard and other material can easily catch fire with a spark from a damaged battery or rechargeable device. This risk is part of the reason that it is important to have OFR in place so facilities can be properly cleaned and closed if a business owner abandons the site.

City of Milwaukee comments also stated general support of most of the rule revisions, noting that aligning the code to current industry conditions will assist all involved parties in maximizing solid waste reduction, reuse, recycling, composting, and resource recovery initiatives in Wisconsin. Milwaukee's concern was with allowing municipalities of any size to meet their collection system requirements using individual household recycling subscription service. This could jeopardize the effectiveness of the state-wide recycling program and policy outlined in s. 287.05, Wis. Stats. The city pointed out that it would be problematic to enforce that an RU demonstrate 100% household recycling services coverage.

Department response: Municipalities are currently able to meet the recycling collection service requirements using individual subscription services. Based on this comment and to ensure recycling program integrity and mandatory recycling, the department added language to the rule. Code now requires municipalities that use individual subscription services to meet their collection requirements to 1) modify their recycling ordinance to require households to individually subscribe, 2) modify their compliance assurance plan to identify how they will deal with non-compliance and enforce the individual subscription service requirement, and 3) collect and report recycling tonnage data to the department.

As noted, AROW submitted comments in support of the rule overall and stated it is important that code is reviewed and updated to reflect changing markets, products, and staffing that have occurred in the recycling industry over time.

The Carton Council's comments noted they fully support the proposed rule to improve recycling in the state and commended the department for recognizing the necessity of increasing education as well as providing recycling to multi-family dwellings. They requested that the department "include cartons amongst the recyclable materials that should be diverted from landfills."

Department response: Adding cartons to landfill-banned materials must be done through a statutory change and cannot be done in this rulemaking.

Modifications Made

See above

Appearances at the Public Hearing

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Changes to Rule Analysis and Fiscal Estimate

A public comment period on the economic impact of the rule was held from October 2 to October 23, 2023. The department received comments from four individuals and organizations on the draft EIA during this period. The comments were considered in further rulemaking and helped clarify the proposed rule language. No changes were made to the EIA in order to finalize it.

Minor updates to the plain language analysis of the board order document were made to reflect code changes made in response to the public hearing comments and comments from the Legislative Council Rules Clearinghouse.

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on Form, Style and Placement in Administrative Code; Adequacy of References to Related Statutes, Rules and Forms; and Clarity, Grammar, Punctuation and Use of Plain Language. Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse, except for those discussed below.

- Comment 4.c. – Cross-references proposed under s. NR 544.16 (1) (e) 2. and (f) 2., could be made more specific, in particular regarding the standards the department would apply in evaluating whether adequate justification was provided for not meeting the minimum required recycling rate.
 - The department considered this recommendation but the proposed reference to ch. 287, Stats., was intentional and matches other code sections not affected by the rule.
- Comment 5.k. – Consider defining “vectors” to provide better clarity for requirements imposed on MRFs.
 - The department considered this recommendation and did not create a definition of vector, as the term is already used elsewhere in code without a definition.
- Comment 5.n. – Consider providing examples of sampling methods or measurements acceptable to the agency, as specified under s. NR 544.16 (3) (a) 23. d.
 - The department considered this recommendation and did not make the change because doing so would imply preference in code for those methods provided over those not identified.

Final Regulatory Flexibility Analysis

The main economic impact of the rule on small businesses is the addition of requiring that MRFs obtain proof of owner financial responsibility. It is difficult to assess the precise number of MRFs that qualify as small businesses. No facilities claimed to be small businesses during rule development. MRFs typically employ office workers, material handlers, heavy equipment operators, maintenance staff, line sorters and managerial positions. In total, these positions likely exceed 25 employees at a substantial number of facilities. The department does not have data on the number of employees at each MRF. Further, the department does not have data on gross annual sales. It is noted that annual sales data will vary considerably year to year as the primary revenue generator for MRFs is the sale of recyclable commodities. Commodity market pricing changes at least monthly (more often for certain materials) and is affected by international and domestic factors, such as other countries buying and selling commodities, transportation challenges in exporting and domestic travel by

truck and rail, fuel expenses, labor disputes, paper mill downtime, seasonal fluctuations in supply and demand and other trends. A MRF may exceed gross annual sales of \$5,000,000 in one year and fall below this level in the subsequent year due to commodity market values. It is possible that a MRF may meet the definition of a small business in certain years and not in others.

However, the department is able to confidently state that the number of potential small businesses affected is small. Excluding municipally owned facilities and privately owned facilities that meet the definition of a small business (those that are independently owned and operated and not dominant in their field), the number of material recovery facilities that may qualify as small businesses is not likely to exceed ten.

To reduce the economic impact on small operations (including municipally owned and private small businesses) and in response to comments received from stakeholders, the proposed rule would exempt materials recovery facilities that process 5,000 tons per year or less from the new requirement to attain OFR. This would exempt approximately 50 percent of in-state materials recovery facilities (17 of 35) from OFR requirements, reducing the impact on small businesses yet protecting the state from the most significant financial risks associated with cleaning up large, abandoned processing operations.

The rule will also reduce annual reporting obligations of MRFs (including those that qualify as small businesses) by limiting requests for certain operational information, not likely to change on an annual basis, to a one-time operational self-certification application. This change will reduce the content of the recurring annual self-certification report and reduce the time needed to complete the report.

Response to Small Business Regulatory Review Board Report

The department provided a summary of rule changes to the Small Business Regulatory Review Board in February 2024. The Board did not prepare a report on this rule proposal.