

Clearinghouse Rule 25-001

The statement of scope for this rule, SS 058-24 was approved by the Governor on May 23, 2024, published in Register No. 821B on May 28, 2024, and approved by the Natural Resources Board on August 14, 2024. This rule was approved by the Governor on insert date.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **amend** NR 520.08 (1) (b), (2) (b), and (3) (b); and to **create** NR 520.06 (6m) and 520.10 (3m) relating to an alternative method for a municipality to establish proof of financial responsibility required for a solid waste disposal facility.

WA-08-24

Analysis Prepared by the Department of Natural Resources

1. Statute Interpreted: Sections 289.05 (1) and (3), and 289.41 (3m), Stats.

2. Statutory Authority: Sections 227.11 (2) (a), 289.05 (1) and (3), and 289.06 (1), Stats.

3. Explanation of Agency Authority:

Section 289.05 (1) and (3), 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), Stats., also confer rule making authority to the department to promulgate rules implementing ch. 289, Stats.

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

2023 Wisconsin Act 107 (Act 107), effective March 14, 2024, established requirements relating to an alternative method of establishing owner financial responsibility (OFR) at municipally owned solid waste disposal facilities and directed the Department of Natural Resources (department) to promulgate emergency and permanent rules to adopt these requirements. An emergency rule, Board Order WA-07-24(E), was adopted by the Natural Resources Board on October 23, 2024. This permanent rule, Board Order WA-08-24, and its economic impact analysis contain the same content as the emergency rule, except for dates included in Section 3 of the Board Order.

4. Related Statutes or Rules:

Requirements and obligations for OFR at solid waste disposal facilities are also outlined in ss. NR 500.06 (3), 514.06 (14) and (15), and chs. NR 503 and 520, Wis. Adm. Code. The companion emergency rule, Board Order WA-07-24(E), was adopted by the Natural Resources Board on October 23, 2024, and has not yet taken effect.

5. Plain Language Analysis:

Owner financial responsibility, or financial assurance, ensures the owners and operators of a solid waste facility have sufficient funds to close the facility and to conduct any required post-closure long-term care (LTC), such as maintenance or groundwater monitoring. OFR requirements also ensure funding from owners and operators of solid waste facilities is available for the department's Waste and Materials

Management Program to perform necessary site closure activities and LTC at solid waste facilities in the rare instances where the owners do not fulfill the requirements themselves. Requiring OFR enables the department to minimize the potential risk to the environment and ensure the costs of necessary site closure activities remain the responsibility of the owner and are not a burden on the taxpayer.

The facility's owner/operator must establish an OFR "proof mechanism" before an operating license is issued. The OFR proof mechanism shall equal or exceed the cost estimate of closure, which is approved in the facility's plan of operation. After the original establishment of an OFR proof mechanism, the mechanism needs adjustments to ensure it continues to equal or exceed the cost estimate. Annual adjustments are required to account for inflation. Approved cost estimates also need to be revised at least every ten years to reflect current market values or when changes in the plan of operation impact the cost estimate.

Wisconsin administrative code and statute have long established the methods for entities to obtain proof of OFR for closure, long-term care, and remediation 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" [s. 289.41 (3), Stats. (Standard Methods)]. An additional option has been available for private companies only, known as the "Net worth method of establishing proof of financial responsibility" [s. 239.41 (4), Stats. (Net Worth Method)]. This rule will make the Net Worth Method available to municipal solid waste disposal facilities as well.

Under Act 107 and this rule, 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. Act 107 and this rule outline both of 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 and this rule also include 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.

Existing Requirements

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., 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), Stats.]. Additional provisions in statute, including s. 289.41 (6), (7), and (9), 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].

Proposed Requirements

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), 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. Therefore, this rule uses statutes, administrative code, and federal code to define the parameters for an acceptable Alternative Method for financial responsibility, including:

- A municipality must reapply annually and adjust the OFR cost estimates, taking into account the effects of inflation on the total necessary OFR amount.
- A municipality must use the total cost of compliance for all solid waste facilities it owns and operates when determining the necessary amount of OFR.
- Establishing OFR using the Alternative Method will be done as a part of the initial license application or annual reapplication and include a copy of the most recent annual audited financial statements and the opinion of an independent certified public accountant.
- The maximum amount of closure, long-term care, and remedial action costs for which a municipality may establish proof of financial responsibility using the Alternative Method cannot be more than 43 percent of the municipality's total annual revenue. A Standard Method proof of financial responsibility must cover all costs that exceed 43 percent of the municipality's total annual revenue.

- If the department has reason to believe that a municipality no longer meets the Alternative Method requirements, it may require the municipality to submit information and materials to show compliance at any time.
- A municipality is not eligible to establish OFR using the Alternative Method if any of the following apply:
 - The municipality is currently in default on any outstanding general obligation bonds.
 - The municipality has any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's.
 - The municipality operated at a deficit equal to five percent or more of total annual revenue in each of the past two fiscal years.
 - The municipality receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the certified public accountant auditing its financial statement.
- The municipality must place a reference to the closure and long-term care costs assured through the Alternative Method into its comprehensive annual financial report.
- The municipality must include year-end financial statements, a copy of the comprehensive annual financial report, and documentation from its chief financial officer and independent certified public accountant in the facility operating record.

6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations:

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. This 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.

7. If Held, Summary of Comments Received During Preliminary Comment Period and at Public Hearing on the Statement of Scope:

The department held a virtual preliminary public hearing on the statement of scope (SS 058-24) on July 8, 2024, at 2 p.m. and 13 members of the public attended the hearing.

Upon entering the hearing, four people registered in support of the scope statement and one person registered in opposition. Five people provided public testimony, which is summarized below:

- No comments requested changes to the scope statement.
- One individual requested information on how closely federal code matches what exists for private entities in the state.
- There were some requests for clarification on the timeline of the implementation of rules and how long the facilities would need to maintain current financial responsibility mechanisms.
- The remainder of the comments made addressed questions about what specifically would be in the rule or items for the department to consider during the rule writing process, which was outside the scope of this hearing. These included comments about what specific tests would be used to determine a municipality's eligibility for the new mechanism, including tests that could be scalable depending on the size of the facility or municipality, and what other types of owner financial responsibility (other than closure and long-term care) could be required in this rule.

The public comment period ended on July 8, 2024. The department received two written comments on the proposed statement of scope. Neither comment specifically identified support or opposition nor did either comment specifically request changes to the scope statement.

8. Comparison with Similar Rules in Adjacent States:

Owner Financial Responsibility or Financial Assurance is required in all neighboring states. Illinois, Iowa, Minnesota, and Michigan allow very similar standard methods to Wisconsin, and also have rules allowing a local government financial test like the one proposed in this rule package.

- Illinois and Iowa have specific state rules that are based on the language in 40 CFR 258.74, analogous to Wisconsin's proposed approach.
- Michigan directs municipalities to follow 40 CFR 258.74 without additional state rule language.
- Minnesota does allow a local government financial test, but refers to it as a self-insurance policy, which also requires collateral using one of three approved securities: unsubordinated debentures, municipal bonds, or warrants drawn on the owner's or operator's municipal treasury.

9. Summary of Factual Data and Analytical Methodologies Used and How Any Related Findings Support the Regulatory Approach Chosen:

As directed by Act 107 non-statutory provisions, this rule "shall, at a minimum, reflect the minimum financial requirements established in s. 289.41 (3m) and in 40 CFR 258.74 (f), as amended." The department utilized language from those sections of statute and federal code to develop the Alternative Method criteria in this proposed rule.

In May 2024, the department presented this approach to the Waste and Materials Management Study Group, a group of external stakeholders that serves to advise and collaborate with the department. The Study Group did not provide any additional methodologies or approaches to consider for this rule.

10. Analysis and Supporting Documents Used to Determine the Effect on Small Business or in Preparation of an Economic Impact Report:

This rule provides an optional method of providing OFR and, therefore, is expected to have no economic impact. This option will likely have a minimal positive effect on the municipalities that could be eligible for and choose to provide OFR via the Alternative Method.

There are 74 OFR mechanisms held by 33 municipalities that could potentially be impacted by the implementation of this rule. It is important to note that regardless of 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 OFR mechanisms for municipalities that meet the criteria, pass the financial test, and choose to use the Alternative Method. The release of the Standard Method mechanisms will have two impacts.

- Release of funding from escrows, trust accounts 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 adopt this mechanism 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 choose to adopt 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 financial test under the Alternative Method option, annual fees to secure an independent certified accountant's opinion would be required. While the department is not engaged in this portion of the analysis, it is estimated that the cost will be about \$5,000 per year per municipality. This will be a direct expense to each of the municipalities, but compared to the cost savings from paying fees, it is viewed as a minimal impact. It is further estimated that many municipalities already receive independent audits by certified accountants and that these are often bid out by the municipality in multi-year contracts.

11. Effect on Small Business (initial regulatory flexibility analysis):

This rule applies only to municipally owned solid waste disposal facilities. This rule has no direct effect on small businesses.

12. Agency Contact Person: Michael Schmit, Michael.schmit@wisconsin.gov, 608-235-3890

13. Place where comments are to be submitted and deadline for submission:

Written comments may be submitted at the public hearings, by regular mail, or email to:

Michael Schmit

Department of Natural Resources

101 S. Webster St.

Madison, WI 53707

608-235-3890

Michael.schmit@wisconsin.gov

Comments may be submitted to the department contact person listed above or to DNRAAdministrativeRulesComments@wisconsin.gov until the deadline given in the upcoming notice of public hearing. The notice of public hearing and deadline for submitting comments will be published in the Wisconsin Administrative Register and on the department's website, at <https://dnr.wisconsin.gov/calendar>. Comments may also be submitted through the Wisconsin Administrative Rules Website at <https://docs.legis.wisconsin.gov/code/chr/active>.

RULE TEXT

SECTION 1. NR 520.06 (6m) is created to read:

NR 520.06 (6m) ALTERNATIVEMETHOD. (a) A municipality may establish proof of financial responsibility for a solid waste disposal facility using the Alternative Method.

(b) When complying with the processes identified in s. 289.41 (3m) and this subsection, the following definitions apply:

1. “Alternative Method” means the option of establishing proof of financial responsibility for municipalities through a financial test described under s. 289.41 (3m), Stats., and this subsection.

2. “Cash plus marketable securities” means all the cash plus marketable securities held by the municipality on the last day of the fiscal year, excluding cash and marketable securities designated to satisfy past obligations such as pensions.

3. “Debt service” means the amount of principal and interest due on a loan in a given time period, typically the current year.

4. “Deficit” means total annual revenues minus total annual expenditures.

5. “Total annual revenues” means revenues from all taxes and fees except the proceeds from borrowing or asset sales. “Total annual revenues” excludes revenue from funds managed by a municipality on behalf of a specific third party.

6. “Total expenditures” means all expenditures except capital outlays and debt repayment.

Note: Definitions under this paragraph are derived from terms defined in 40 CFR 258.74 (f) as required by 2023 Act 107.

(c) A municipality using the Alternative Method shall comply with the requirements of s. 289.41 (3m), Stats., and this subsection.

(d) A municipality using the Alternative Method to provide proof of financial responsibility for more than one facility shall use the total cost of compliance for all facilities owned or operated by the municipality when determining the necessary amount of owner financial responsibility.

(e) A municipality using the Alternative Method shall apply to the department to establish proof of financial responsibility as a part of the initial license application or when submitting its annual cost adjustment under s. NR 520.10 (1). The application shall include a copy of the most recent annual audited financial statements and the opinion of an independent certified public accountant. The opinion of the independent certified public accountant shall include all of the following based upon generally accepted accounting principles:

1. All data and information necessary to determine if the municipality complies with minimum financial standards under par. (c).

2. Statements of any substantive qualifications or reservations the certified public accountant has concerning the financial statements and concerning the ability of the municipality to meet its obligations.

3. Statements of all material contingent liabilities.

(f) The maximum amount of closure, long-term care, and remedial action costs for which a municipality may establish proof of financial responsibility for a solid waste disposal facility using the Alternative Method cannot be more than 43 percent of the municipality's total annual revenue. The municipality shall obtain a standard method of owner financial responsibility under ss. 289.41 (3), Stats., for costs that exceed 43 percent of the municipality's total annual revenue.

(g) A department determination under the Alternative Method shall be done in accordance with all of the following:

1. During an initial determination, if the department determines that a municipality complies with minimum financial standards under par. (c) and that none of the contingent liabilities or other data or information provided in the financial statements under par. (h) or the opinion of the certified public accountant disqualify the municipality, then the department shall find that the municipality meets the Alternative Method requirements that constitute proof of financial responsibility for that year.

2. During an adverse determination, if the department determines that contingent liabilities or information provided in the opinion of the certified public accountant disqualify a municipality from using the Alternative Method, the department shall issue findings in writing to support this determination and provide the municipality with an opportunity for a hearing.

3. To meet annual review requirements under the Alternative Method, a municipality shall reapply annually under par. (e). Subsequent determinations by the department shall take into consideration any changes in the plan of operation and adjustments to the estimated total cost of

compliance with closure and any long-term care or remedial action requirements because of inflation or other changes.

4. During a special review, if the department has reason to believe that a municipality no longer meets the Alternative Method requirements, it may require the municipality to submit information and materials to show compliance at any time.

(h) A municipality is not eligible to establish proof of financial responsibility for a solid waste disposal facility using the Alternative Method if any of the following apply:

1. The municipality is currently in default on any outstanding general obligation bonds.
2. The municipality has any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's.
3. The municipality operated at a deficit equal to five percent or more of total annual revenue in each of the past two fiscal years.
4. The municipality receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the certified public accountant auditing its financial statement as required under par. (e). The department may evaluate qualified opinions on a case-by-case basis and allow the use of the Alternative Method in cases where the department deems the qualification insufficient to warrant disallowance of the use of the Alternative Method.

(i) The municipality shall place a reference to the closure and long-term care costs assured through the Alternative Method into its next comprehensive annual financial report after the effective date of this section or prior to the initial receipt of waste at the facility, whichever is later. The reference must include the nature and source of closure and long-term care requirements, the reported liability at the balance sheet date, the estimated total closure and long-term care cost remaining to be recognized, the percentage of landfill capacity used to date, and the estimated landfill life in years. A reference to remedial action costs must be placed in the comprehensive annual financial report not later than 120 days after the remedial action remedy has been selected. For the first year the Alternative Method is used to

assure remedial action costs at a particular facility, the reference may instead be placed in the facility operating record until issuance of the next available comprehensive annual financial report.

(j) The municipality shall include all of the following in the facility operating record after the effective date of this section or prior to the initial receipt of waste at the facility, whichever is later, and make the operating record available to the department upon request:

1. A document signed by the municipality's chief financial officer that includes a list of all facilities for which the municipality is using this Alternative Method to demonstrate financial responsibility and the cost estimates for those facilities, provides evidence and certifies that the municipality meets the conditions of s. 289.41 (3m), Stats., and certifies that the municipality meets the conditions of pars. (f), (h), and (i).

2. The municipality's independently audited year-end financial statements for the latest fiscal year, including the unqualified opinion of the auditor, who must be an independent certified public accountant.

3. A report to the municipality from the municipality's independent certified public accountant documenting the conditions under pars. (c) and (e). The certified public accountant report should state the procedures performed and findings.

4. A copy of the comprehensive annual financial report used to comply with par. (i).

SECTION 2. NR 520.08 (1) (b), (2) (b), and (3) (b) are amended to read:

NR 520.08 (1) (b) For bonds, letters of credit, or insurance under s. 289.41 (3), Stats., the Alternative Method under s. NR 520.06 (6m), or the net worth test under s. 289.41 (4), Stats., proof of financial responsibility for closure shall be equal to the estimated cost of closure in current dollars multiplied by the quantity of one plus the projected annual rate of inflation expressed as a decimal.

(2) (b) For bonds, letters of credit, or insurance under s. 289.41 (3), Stats., the Alternative Method under s. NR 520.06 (6m), or the net worth test under s. 289.41 (4), Stats., proof of financial responsibility

for long-term care shall be equal to the sum of the costs in current dollars of performing each of the years of long-term care for the required long-term care proof of financial responsibility period.

(3) (b) For bonds, letters of credit, or insurance under s. 289.41 (3), Stats., the Alternative Method under s. NR 520.06 (6m), or the net worth test under s. 289.41 (4), Stats., remedial action proof of financial responsibility shall be provided in an amount equal to the sum of the remedial action costs estimated to occur in the second half of the remedial action period expressed in current dollars.

SECTION 3. NR 520.10 (3m) is created to read:

NR 520.10 (3m) For municipalities using the Alternative Method under s. NR 520.06 (6m), the updated Alternative Method information as required under s. NR 520.06 (6m) (e) shall be submitted annually to the department within 210 days after the close of the municipality's fiscal year or 30 days after completion of the independent audit of the municipality's financial statement, whichever is earlier.

SECTION 4. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 5. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on [DATE].

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

BY _____

Steven Little, Deputy Secretary