

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 10

DANE COUNTY

CITY OF MILWAUKEE, a Municipal Corporation,
200 E. Wells St., Rm. 800
Milwaukee, WI 53202,

CITY OF MADISON, a Municipal Corporation,
210 Martin Luther King Jr. Blvd.
Madison, WI 53701,

WILLIE L. HINES, Jr.,
2361 N. 46th Street
Milwaukee, WI 53210,

ROBERT J. BAUMAN,
856 N. 29th Street
Milwaukee, WI 53208

and

ASHANTI HAMILTON,
5545 N. 36th Street,
Milwaukee, WI 53209,
Plaintiffs,

v.

CATHY STEPP, in her official capacity as
SECRETARY of the WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,
101 S. Webster Street
Madison, WI 53707

MICHAEL HUEBSCH, in his official capacity as
SECRETARY of the WISCONSIN
DEPARTMENT OF ADMINISTRATION,
101 E. Wilson Street
Madison, WI 53703

Defendants.

12CV1902

Case No. _____

Code No. 30701

Declaratory Judgment

Code No. 30704

Other Injunction or Order

CIRCUIT COURT
DANE COUNTY, WI
12 MAY 11 AM 11:52

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CARLO ESQUEDA
CLERK OF CIRCUIT COURT

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Plaintiffs City of Milwaukee ("Milwaukee"), Willie L. Hines, Jr., Robert J. Bauman, and Ashanti Hamilton, by their attorney, Grant F. Langley, City Attorney, by Assistant City Attorneys Thomas D. Miller and Margaret C. Daun, and the Plaintiff City of Madison ("Madison"), by its attorney, Michael P. May, City Attorney, by Assistant City Attorney John W. Strange, as and for their Complaint against the above-named defendants, allege as follows:

NATURE OF ACTION

1. The Secretaries of the Wisconsin Department of Natural Resources ("DNR") and Department of Administration ("DOA"), without approval or oversight from the state Legislature or a legislative committee, began to eliminate the statewide Recycling Grant program in fiscal year 2010-11 (FY 2011), by reducing the legislated Recycling Grant appropriation by \$13.1 million.

2. After learning of this cut after their local budgets were fixed, many of the participating local governments, including Milwaukee and Madison, submitted objections to the defendants.

3. Despite the DNR's clear statutory obligation to disburse the funded appropriations to the participating local governments, the defendants took 40% of the Recycling Grant appropriation for other purposes, primarily via a transfer to the General Fund.

4. The defendants justified their decision to severely reduce the Recycling Grant appropriation based upon a non-statutory provision of the 2009-11 state budget, 2009 Wis. Act 28, §3416d.

5. According to the defendants, in section 3416d, the Legislature delegated to the DOA Secretary the power to transfer nearly a half billion dollars of appropriated moneys to the

General Fund for general spending purposes without imposing any standards or conditions, and without requiring Legislative approval, oversight, public notice, or comment.

6. This delegation violates the Wisconsin Constitution's reservation of appropriation and spending powers in the Legislature, subject to the Governor's partial veto.

7. Therefore, because section 3416d places unlimited and unreviewable discretion to reduce the moneys available for Legislatively-approved appropriations by a half billion dollars in the hands of unelected executive branch appointees, Section 3416d is an unconstitutional delegation of the Legislature's appropriation power, both on its face and as applied.

8. Plaintiffs seek declaratory and supplemental relief under Wis. Stat. § 806.04, as well as injunctive relief pursuant to the Court's equitable powers. The Plaintiffs assert that § 3416d is unconstitutional on its face and as applied by the defendants; that the defendants acted *ultra vires* of their authority under both § 3416d and § 287.23(5b) by failing to distribute the appropriated amounts according to the statutory requirements; and that the defendants created an unlawful tax by diverting regulatory recycling fee revenue for non-recycling purposes, an unlawful action that continues under the 2011-13 state budget. Plaintiffs also request that the Court order the defendants to provide an accounting of the regulatory recycling fees collected, expended, and transferred by the defendants in fiscal year 2012.

PARTIES

9. Milwaukee is a municipal corporation existing under the laws of Wisconsin with its principal place of business located at 200 East Wells Street in Milwaukee, Wisconsin.

10. Madison is a municipal corporation existing under the laws of Wisconsin with its principal place of business located at 210 Martin Luther King Jr. Boulevard in Madison, Wisconsin.

11. Willie L. Hines, Jr. is an adult resident of the City of Milwaukee, Milwaukee County, Wisconsin. Hines resides and owns property at 2361 N. 46th Street, Milwaukee, WI 53210. As a property owner Hines pays municipal solid waste fees to the City of Milwaukee, to in part, offset the cost of recycling tipping fees paid by Milwaukee to the DNR.

12. Robert J. Bauman is an adult resident of the City of Milwaukee, Milwaukee County, Wisconsin. Bauman resides and owns property at 856 N. 29th St., Milwaukee, WI 53208. As a property owner Bauman pays municipal solid waste fees to the City of Milwaukee, to in part, offset the cost of recycling tipping fees paid by Milwaukee to the DNR.

13. Ashanti Hamilton is an adult resident of the City of Milwaukee, Milwaukee County, Wisconsin. Hamilton resides and owns property at 5545 N. 36th Street, Milwaukee, WI 53209. As a property owner Hamilton pays municipal solid waste fees to the City of Milwaukee, to in part, offset the cost of recycling tipping fees paid by Milwaukee to the DNR.

14. Defendant Cathy Stepp is the Secretary of the DNR, an agency of the State of Wisconsin, which is responsible for administering the statewide solid waste recycling regulatory and financial assistance program. Defendant Stepp is sued in her official capacity. Defendant Stepp has her office at the DNR at 101 South Webster Street, Madison, Wisconsin 53703.

15. Defendant Michael Huebsch is the Secretary of the DOA, an agency of the State of Wisconsin. Defendant Huebsch is sued in his official capacity. Defendant Heubsch has his office at the DOA at 101 East Wilson Street, Madison, Wisconsin 53703.

16. By letter sent by certified mail on September 26, 2011, the City of Milwaukee served a "Notice of Injury and Claim" upon Wisconsin Attorney General J.B. Van Hollen pursuant to Wis. Stat. § 893.82. Pursuant to § 806.04(11), Milwaukee served a copy of this

complaint on the Wisconsin Attorney General and the Wisconsin Joint Committee on Legislative Organization.

17. By letter hand delivered on September 27, 2011, the City of Madison served a "Notice of Injury and Claim" upon Wisconsin Attorney General J.B. Van Hollen pursuant to Wis. Stat. § 893.82. Pursuant to § 806.04(11), Madison served a copy of this complaint on the Wisconsin Attorney General and the Wisconsin Joint Committee on Legislative Organization.

I. FACTS COMMON TO ALL CLAIMS

A. The State Legislature Established Policy Favoring Recycling and Created the Recycling Grant Program To Further That Policy.

18. In 1989, the Wisconsin State Legislature created a statewide solid waste recycling regulatory and financial assistance program to reduce the amount of municipal solid waste in landfills, declaring, "maximum solid waste reduction, reuse, recycling, composting and resource recovery is in the best interest of the state in order to protect public health, to protect the quality of the natural environment and to conserve resources in energy." Wis. Stat. § 287.05(1) (2009-10)¹.

19. To pay for this program, the Legislature created the segregated "Recycling Fund," later re-named the Recycling and Renewable Energy Fund, as a "separate nonlapsible trust fund." Wis. Stat. § 25.49.

20. Segregated fund revenues "are deposited into funds other than the general fund and are available for the purposes for which such funds are created." Wis. Stat. § 20.001(2)(c).

21. Here, the purpose of the Recycling Fund is to create and support a solid waste recycling program.

¹ All statutory references are to the 2009-10 statutes unless otherwise indicated.

22. Since 1989, by far the largest cumulative appropriation from the Recycling Fund has been in the form of grants to local governments to offset the cost of mandated local recycling efforts ("Recycling Grants"). *Solid Waste Recycling and Waste Reduction*, Legislative Fiscal Bureau ("LFB"), Informational Paper 71, January, 2011, at 32-33.

B. Recycling Tipping Fees Are the Primary Source of Recycling Fund Revenues and Over Half of Recycling Fees Are Paid By Municipalities.

23. In FY 2011, over 55% of total Recycling Fund revenues came from a recycling tipping fee imposed upon solid waste disposed at licensed facilities (the other portion came largely from a recycling surcharge tax).

24. The \$7 per ton recycling fee is imposed on the generator of solid waste, a disposal company, or a hauler who transfers waste from a collection point to a landfill. Wis. Stat. § 289.645(6).

25. According to the LFB "well over half of [all recycling fee revenue] is paid by municipalities that operate programs that collect solid waste from residences and businesses." See Legislative Fiscal Bureau, *2011-13 Budget Paper #496*, at 8 (June 2, 2011).

26. In 2011, Milwaukee paid approximately \$1.6 million in recycling fees deposited into the segregated Recycling Fund. Milwaukee contracts with Waste Management of Wisconsin, Inc. ("WMI") to transport and dispose of municipal solid waste received at designated transfer stations and hauled by WMI to its owner-operated landfills. Milwaukee pays all recycling fees to WMI, which in turn passes these fees on to the DNR for deposit in the segregated Recycling Fund.

27. Madison uses its own transfer station and the Dane County Landfill. Madison pays all recycling fees to Dane County, which in turn passes these fees on to the DNR for deposit

into the segregated Recycling Fund. In 2011, Madison paid Dane County approximately \$576,411.42 in recycling fees.

28. The vast majority of Recycling Fund revenues are spent on the Recycling Grant program.

29. The Fund revenues primarily come from recycling fees.

30. The majority of recycling fees are paid by municipalities, including Milwaukee and Madison.

C. Recycling Fees Were Enacted By the Legislature As Regulatory Fees – Not Taxes – To Fund the Grant Program

31. The recycling fee was increased to \$7 per ton in the 2009-2011 state budget from \$4 per ton – a 75% increase.

32. The LFB estimated that the \$3 per ton fee increase would generate additional Recycling Fund revenue of \$17.74 million in FY 2011.

33. Because municipalities pay well over half of all tipping fees, this 75% increase significantly increased the fiscal burden on local governments.

34. To soften the impact, at the same time it increased the recycling fees, the Legislature also increased the Recycling Grant appropriation by \$1.0 million over the previous fiscal year.

35. The Legislature also directed the DNR Secretary to request an increase in the Recycling Grant appropriation if Fund revenues exceeded the amounts estimated in budget deliberations.

36. Taken together, the Legislature enabled the return of recycling fee revenue (paid primarily by municipalities) to the municipalities, in the form of the Recycling Grants. This intent is also evidenced by the pairing of recycling fee increases with Grant increases in prior

years. Specifically, when the fee was created in the 1999-2001 budget, Governor Thompson increased the grant funding to “provide an offset to the anticipated impact of the 30 cent recycling tipping fee on local government finances.” *See* Governor’s Veto Message, 1999 Wis. Act 9, at 33.

37. Unlike the recycling surcharge tax, the recycling fees are collected by the DNR, not by the Department of Revenue.

38. The DNR’s sole means of enforcing collection of the recycling fee is to suspend the collection and hauler licenses of a licensee who fails to pay the recycling fee.

39. DOA’s State Accounting Manual classifies recycling tipping fees and electronic waste recycling fees as “Licenses and Permits” revenue, which are “charges for the privilege of engaging in a regulated activity often over a particular period of time.” *State Accounting Manual*, Vol. 1, “Revenue Source Definitions.”

40. Therefore, it is clear that recycling fees are intended to be regulatory fees, used exclusively to defray the cost of recycling and recycling programs (namely, the Grant program), and not for the state’s general fiscal needs.

D. The DNR Is Merely a Conduit for Distributing Recycling Grants to Municipalities. DNR Has No Authority to Reduce or Increase Grant Amounts.

41. Through its appropriation power, the Legislature establishes the total amount available to be distributed to municipalities under the Grant program in a single, line-item appropriation. Wis. Stat. §§ 20.005(3) and 20.370(6)(bu).

42. In the 2009-11 biennial budget, the Legislature appropriated \$32,098,100 for the calendar year 2011 grants.

43. This appropriation was an increase of \$1.0 million over the previous FY 2010 appropriation and exceeded the amount proposed by Governor Doyle by \$2.0 million.

44. Between 1992 and 1999, the DNR allocated Recycling Grants according to a complex formula. However, beginning with the year 2000 grants, state statute requires the DNR to distribute Recycling Grants based upon a simple percentage (based on each municipality's relative share of the 1999 grant award). Wis. Stat. § 287.23(5b).

45. This simple means of distributing grants was mandated to reduce administrative burdens on local governments and the DNR, permitting a reduction in the full-time positions responsible for the administration of the Recycling Grant program.

46. Also, since 2000, under the new statutory scheme, so long as a municipality operates an effective recycling program and applies for the grant by October 1, DNR is *required* to distribute its proportion of the overall grant amount.

47. A municipality that applies after October 1 but no later than October 30 receives a reduced grant amount (according to a sliding scale set forth in the statutes). A municipality that applies after October 30 is not eligible for the grant.

48. Finally, section 287.23(6) requires DNR to make the appropriate distributions no later than June 1 of the grant year.

49. Thus, after the appropriation is established by the Legislature and after the municipalities submit the grant applications, the DNR simply performs a ministerial function to distribute the grants according to a straightforward percentage.

E. Without Legislative Standards, Oversight, or Approval, the DOA and DNR Secretaries Decided to Begin to Eliminate the Recycling Grant Program in February 2011.

50. Despite the Legislature's stated policy intent and its decision to further that policy by funding the 2011 Grants at \$32,098,100, the defendants unlawfully diverted approximately \$13,100,000 from the Recycling Grant appropriation account and the Recycling Fund for non-recycling purposes.

51. Defendants claimed that 2009 Wis. Act 28, § 3416d provided authority to transfer the bulk of these funds to the General Fund.

52. Section 3416d, a non-statutory provision of the 2009-2011 budget, amended 2009 Act 2 § 9201(1) to provide in pertinent part:

(b) Notwithstanding section 20.001(3)(a) to (c) and 25.40(3) of the statutes, but subject to paragraph (c), the secretary of administration shall lapse or transfer to the general fund from the unencumbered balances of appropriations to executive branch state agencies, other than sum sufficient appropriations and appropriations of federal revenue, an amount equal to \$125,000,000 before July 1, 2011... The amounts lapsed or transferred under this paragraph shall be in addition to the amounts lapsed or transferred under 2007 Wisconsin Act 20, section 9201(1c)(a) to (c). The amount required to be lapsed or transferred under this paragraph is increased by an additional \$354,807,600 from available balances in appropriations and funds.

(c) 1. The secretary of administration may not lapse or transfer moneys under paragraph (b) if the lapse or transfer...would violate the federal or state constitution.

(underscored in original).

53. DOA determined how to allocate the total lapse/transfer requirement of \$479,807,600 under § 3416d among state agencies.

54. DOA thus directed DNR to lapse/transfer \$25,303,100 from DNR state agency appropriations, and later, DOA Secretary Huebsch increased this amount to \$26,906,700.

55. In an effort to meet DNR's nearly \$27 million lapse/transfer obligation, in early February 2011, DNR officials, including Deputy Secretary Matt Moroney, discussed with the DOA and the Governor's Office a nearly thirty-eight percent (38%) cut to the 2011 Recycling Grants (total reduction of \$12 million, from over \$32 million to approximately \$20 million).

56. For example, in a February 8, 2011 e-mail from Alan Shea, DNR Office of Business Support and Sustainability Director, to Deputy Secretary Moroney, Shea stated: "The \$12 million is \$4 million more of a reduction than the initial discussions with DOA arrived at. Your advocacy in support of taking the additional \$4 million would be helpful! . . . This could be viewed as a first phase down of the RU grants." The \$12 million reduction was approved.

57. Between February and April 2011, in consultation with the Governor's Office, DOA and DNR further increased the cut to the Recycling Grants by another \$1 million, resulting in a total reduction of \$13.1 million.

58. As DOA, DNR, and the Governor's Office planned the "first phase down" of the Recycling Grant program in February 2011, they prepared to completely eliminate the Recycling Grant program in the next biennial budget (see section "G" below).

59. In April 2011, less than two months before the grants were required to be distributed, all participating local governments learned that DNR was reducing the amount available for Recycling Grants to no more than \$19 million.

60. Although the \$13.1 million in Grant cuts were the result of consultations between the Governor's Office, DOA, and DNR, and although they planned to eliminate the Grants entirely in the next budget, in response to opposition over the announced cuts from local governments, Deputy Secretary Moroney stated in an April 10, 2011 e-mail to the Assistant Editor of the Milwaukee Journal Sentinel:

The recycling aid cut this year really has nothing to do with Walker. The Doyle administration had planned to do this as part of its lapse plan. We were shocked when we found out about this in late February. We have been trying to cut in other areas to protect as much of the fund as possible; however, we have just a few months left in the fiscal year so our hands are mostly tied to their lapse approach...I agree that it is not fair to do it this way and catch communities by surprise...

61. Secretary Stepp approved Deputy Secretary Moroney's email to the Journal Sentinel as "perfect."

F. DOA and DNR Disbursed \$19 Million in Reduced Recycling Grants in May 2011 and Lapsed/Transferred the \$13.1 Million Balance of the Recycling Grants Appropriation in June 2011.

62. DNR submitted its final \$27 million lapse plan to DOA for approval on May 26, 2011.

63. The "Proposed FY11 Lapse Plan" included a lapse of \$10,279,900 from the Recycling Grants appropriation alone, a cut so devastating that, according to the DNR and DOA, an additional cut of \$2.8 million was required to avoid a deficit in the Recycling Fund.

64. Thus, the largest single source of the DNR's total required \$27 million lapse was the \$10.2 million lapse from the Recycling Grant appropriation resulting in a total cut of \$13.1 million in the Recycling Grants appropriation.

65. Thereafter on May 31, 2011, DNR disbursed the remaining \$19 million of the Grant appropriation to local governments.

66. The next day, June 1, 2011, DOA issued instructions to Agency Budget Directors and Staff as to how to execute the FY 2011 lapses.

67. DNR and DOA executed the lapse/transfer of funds between June 1 and June 30, 2011.

68. In sum, of the \$13.1 million cut from the Recycling Grants appropriation, \$10,279,900 was lapsed/transferred from the Recycling Grants appropriation account or directly from the Recycling Fund to the general fund and the \$2.8 million balance of the cut was used allegedly to "balance" the Recycling Fund.

69. But for the lapses/transfers from the Recycling Fund, there would have been sufficient moneys to fully pay out the \$32.1 million in Recycling Grants appropriated by the Legislature for FY 2011.

70. In fact, recycling fees alone generated \$35.3 million in revenues in FY 2011.

71. Total FY 2011 Recycling Fund revenues exceeded revenue estimates and equaled approximately \$63.5 million (more than enough to fully fund the Grants and exceeding the FY 2010 total revenue by approximately \$11.7 million).

72. Because Milwaukee timely submitted its 2011 Recycling Grant application on September 21, 2010, Milwaukee was entitled to the full payment of \$3,666,135, as required by the statutory formula.

73. In reliance upon the DNR's statutory duty to distribute the Recycling Grants according to the statutory formula, Milwaukee adopted a 2011 budget in November 2010 that included approximately \$3.5 million in Recycling Grant revenue to the City.

74. Notwithstanding the DNR's statutory duty and the statutory formula, Milwaukee received a 2011 Recycling Grant totaling \$2,164,860.75

75. Because Madison timely submitted its 2011 Recycling Grant application on September 21, 2010, Madison was entitled to the full payment of \$1,145,979, as required by the statutory formula.

76. In reliance upon the DNR's statutory duty to distribute the Recycling Grants according to the statutory formula, Madison adopted a 2011 budget that included approximately \$1.1 million in Recycling Grant revenue to the City.

77. Notwithstanding the DNR's statutory duty and the statutory formula, Madison received a 2011 Recycling Grant totaling \$740,876.64.

G. The Governor's Proposed 2011-2013 Budget Eliminated the Recycling Grants, Continued to Impose Substantial Recycling Tipping Fees Upon Municipalities, and Proposed Using None of Those Fees for Recycling Purposes.

78. The Governor's proposed budget for the 2011-2013 biennium, introduced on or about March 1, 2011; completely eliminated the Recycling Grant program and the mandate that municipalities continue to operate effective recycling programs.

79. Even though municipalities would no longer receive Recycling Grants, the budget nonetheless required municipalities to continue to pay the \$7 per ton recycling tipping fee.

80. The Governor's budget proposed to siphon \$4 of the \$7 per ton recycling tipping fee to the Economic Development Fund.

81. The Economic Development Fund supports a quasi-public entity, the Wisconsin Economic Development Corporation ("WEDC"), the purpose of which has nothing to do with the recycling of solid waste.

82. The Governor's budget directed the remaining \$3 per ton to the Environmental Management Account for non-recycling purposes.

83. While municipalities would still pay the majority of the tipping fees, the Grants would be eliminated and those revenues would be siphoned off for non-recycling purposes.

H. In the 2011-13 Budget Adopted by the Legislature, Large Portions of Recycling Tipping Fees Will Be Used For Non-Recycling Purposes.

84. The Legislature rejected the Governor's proposal to terminate the recycling program and to use its recycling tipping fees for the WEDC when it adopted the 2011-13 state budget, 2011 Wis. Act 32.

85. Although the Legislature did preserve the Grant program, it appropriated only \$19 million for Recycling Grants and \$1 million for recycling consolidation grants in each year of the biennium. 2011 Wis. Act 32, § 596b.

86. Act 32 also transferred all Recycling Fund appropriations, including the Recycling Grants, to the environmental management account of the Environmental Fund.

87. Despite dramatically reducing the Recycling Grant appropriations to \$19 million per year, the Legislature maintained the \$7 per ton recycling tipping fee on municipal solid waste.

88. LFB estimated that the recycling tipping fee would generate revenue of \$35.7 million in FY 2012 and \$36.4 million in FY 2013, amounts significantly in excess of the \$19 million per annum Recycling Grant appropriations.

89. LFB's recycling fee revenue estimates of \$35.7 million and \$36.4 million in FYs 2012 and 2013 respectively also greatly exceed the combined recycling grants of \$20 million per annum.

90. During the 2011-13 biennium, recycling tipping fee revenue not used for Recycling Grants, consolidated recycling grants, or recycling-related administration costs will be used for non-recycling purposes (including DNR operations and debt service).

91. After increasing the recycling fee by 75% in the 2009-2011 budget, the Legislature elected to divert at least \$12.5 million of recycling fee revenue to non-recycling purposes in each year of the 2011-2013 budget.

92. While municipalities will continue to pay the majority of the recycling fees, which were enacted to defray the cost of municipal recycling programs, under the 2011-13 budget, much of those revenues will be used for non-recycling purposes.

93. Milwaukee timely submitted its 2012 Recycling Grant application. In addition, Milwaukee timely applied for a recycling consolidation grant created under 2011 Act 32.

94. By letter dated April 10, 2012, Milwaukee received notice that it was receiving \$2,324,896.43 composed of both the Recycling Grant and the recycling consolidation grant.

95. Madison timely submitted its 2012 Recycling Grant application. In addition, Madison timely applied for a recycling consolidation grant created under 2011 Act 32.

96. By letter dated April 10, 2012, Madison received notice that it was receiving \$803,653.61 composed of both the Recycling Grant and the recycling consolidation grant.

97. The DNR is required to issue 2012 Recycling Grant payments to all eligible recycling communities by no later than June 1, 2012. Wis. Stat. § 287.23(6).

II. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

2009 Wis. Act 28 § 3416d Is Unconstitutional on Its Face

98. Paragraphs 1-97 are incorporated herein by reference.

99. Section 3416d unconstitutionally delegates to the unelected DOA Secretary the authority to lapse or transfer to the General Fund nearly a half billion dollars from whichever appropriations and funds the DOA Secretary chooses, without any Legislative procedural

safeguards, standards, direction, oversight, or approval. This violates the non-delegation doctrine and separation of powers implicit in the Wisconsin Constitution's tripartite division of government.

100. Through § 3416d, the Legislature has delegated its fundamental legislative power to make "appropriation[s] by law."

101. Article VIII, §2 of the Wisconsin Constitution provides that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law."

102. The appropriation power is a fundamental legislative power, vested in the Senate and Assembly, and subject only to the governor's exercise of partial veto authority. *See* Art. IV, § 1, Art. V, § 10, and Art. VIII, § 2, Wisconsin Constitution.

103. Section 3416d delegates authority to the DOA Secretary to lapse or transfer to the General Fund \$125,000,000 without any standards or conditions other than that the DOA Secretary make the lapses or transfers from "unencumbered balances of appropriations to executive branch state agencies, other than sum sufficient appropriations and appropriations of federal revenues...."

104. § 3416d delegates additional authority to the DOA Secretary to lapse or transfer an additional \$354,807,600 "from available balances in appropriations and funds" without any standards or conditions on the DOA Secretary's authority over appropriation authority or the use of state funds.

105. Because the Legislature delegated its fundamental authority to make appropriations "by law" without any standards or guidelines, § 3416d is an unconstitutional violation of the non-delegation doctrine implicit in the Wisconsin Constitution.

SECOND CLAIM FOR RELIEF

2009 Wis. Act 28 § 3416d Is Unconstitutional As Applied

106. Paragraphs 1-105 are incorporated herein by reference.

107. The DOA and DNR Secretaries had a duty to apply § 3416d in a manner that harmonizes the delegated authority to shift appropriations with the legislative spending and policy decisions adopted by the Legislature in the 2009-11 state budget and existing statutes.

108. However, the DOA and DNR Secretaries' \$13.1 million reduction in the Recycling Grants appropriation from \$32,098,100 to \$19,000,000 cannot be harmonized with the Legislature's spending and policy decisions for numerous reasons, set out in paragraphs 109 through 113.

109. The DOA and DNR Secretaries' \$13.1 million reduction in the Recycling Grants appropriation from \$32,098,100 to \$19,000,000 is directly at odds with the Legislature's specific appropriation of \$32,098,100 – a \$1.0 million increase over the previous fiscal year – to the Grants. *See* 2009 Wis. Act 28, § 176; Wis. Stat. §§ 20.005(3) and 20.370(6)(bu).

110. The \$13.1 million (or 40%) cut fundamentally undermines the purpose, function, and operation of the Recycling Grant cost-share program.

111. The DOA and DNR Secretaries' \$13.1 million reduction in the Recycling Grants appropriation cannot be reconciled with the Legislature's intent to use surplus Recycling Fund moneys generated as a result of the 75% increase in tipping fees to support the Recycling Grant program, *see* 2009 Wis. Act 28 §§ 2657 and 9137(4c).

112. The DOA and DNR Secretaries' \$13.1 million reduction in the Recycling Grants appropriation conflicts with Wis. Stat. § 13.101(6)(a) which prohibits the Joint Finance

Committee, the Legislature's own budget-writing committee, from making any mid-budget reductions in "moneys distributed to any county, city, village, town, school district."

113. The DOA and DNR Secretaries' \$13.1 million cut to the Recycling Grants violates the DNR Secretary's ministerial duty to distribute the \$32,098,100 according to the statutory formula and timeframe set forth in Wis. Stat. § 287.23(5b) and (6).

114. Thus, § 3416d, as applied by DOA and DNR to cut \$13.1 million from the Recycling Grant program, is an unconstitutional delegation of the Legislature's power to appropriate funds.

115. Because § 3416d was applied by the DOA and DNR Secretaries in violation of the Wisconsin Constitution, the \$13.1 million cut in the Recycling Grant appropriation is a violation of § 3416d itself, per 2009 Act 2, § 9201(1)(c).

THIRD CLAIM FOR RELIEF

The Defendants Violated § 3416d and § 287.23(5b) and Unlawfully Acted *Ultra Vires* When They Transferred Grant Funds to Other Accounts in June 2011

116. Paragraphs 1-115 are incorporated herein by reference.

117. Sections 3416d's lapse/transfer provision applies only to "unencumbered balances of appropriations" or "available balances in appropriations and funds."

118. However, the DNR Secretary had a duty to encumber the entire \$32.1 million appropriated for Recycling Grants as of October 30, 2010, the statutory deadline for applications for calendar year 2011 grants.

119. The \$32.1 million appropriated for grants was not "unencumbered" and "available" as of the June 1 disbursement deadline, and therefore was not subject to lapse or transfer under section 3416d.

120. The DNR had a merely ministerial and statutory duty to simply distribute the \$32,098,100 appropriated by the Legislature to the eligible responsible units according to the percentage formula by no later than June 1, 2011.

121. The DNR Secretary violated §§ 287.23(5b) and (6) when it failed to award the total amount available pursuant to § 20.370(6)(bu) by June 1, 2011.

122. The DNR and DOA violated § 3416d when they lapsed/transferred *encumbered* and *unavailable* moneys from the Recycling Fund into other accounts between June 1 and June 30, 2011.

123. The actions of the defendants violated state statute, exceeded the scope of their delegated authorities, and were therefore unlawfully *ultra vires*.

FOURTH CLAIM FOR RELIEF

By Transferring Regulatory Recycling Fees to the General Fund for Non-Recycling Purposes the Defendants Created an Unconstitutional Tax

124. Paragraphs 1-123 are incorporated herein by reference.

125. Pursuant to Article VIII, § 1 of the Wisconsin Constitution, only the Legislature has the authority to impose a tax.

126. A tax is an enforcement of proportional contributions from persons and property, imposed by the State in its governmental capacity for the support of its government and public needs.

127. A tax may not be imposed absent clear and express statutory language for that purpose, with all ambiguity and doubt resolved against the one who seeks to impose a tax.

128. The language of Wis. Stat. § 289.645(6) imposing the recycling tipping fee does not clearly and expressly impose a tax on Wisconsin municipalities, businesses, and individuals.

129. The majority of revenue deposited in the Recycling Fund in FY 2011 came from the regulatory recycling tipping fee.

130. The Legislature imposed the recycling tipping fee solely to support the regulation of solid waste recycling. *See Wis. Stat. § 289.645(6)*.

131. The recycling tipping fee was therefore created as a regulatory fee, not as a tax to be used to raise general purpose revenue.

132. Regulatory fees enacted under the state's police power must bear some reasonable relationship to the costs of administering and enforcing the regulation or providing the service and cannot be used for the purpose of raising general revenue. *Wisconsin Telephone Co. v. PSC*, 206 Wis. 589, 240 N.W. 411 (1932).

133. In FY 2011, the \$7 per ton regulatory recycling fees generated \$35.3 million in regulatory revenue.

134. This \$35.3 million in recycling fee revenue vastly exceeded the \$19.0 million awarded to local governments in Recycling Grants and any recycling-related administrative expenses.

135. In FY 2011, the DNR transferred over \$30 million from the Recycling Fund to the General Fund and other funds for non-recycling purposes.

136. Part of that \$30 million included the \$10,279,900 which the defendants transferred from the Recycling Fund to the General Fund for general revenue purposes.

137. The defendants' diversion of regulatory recycling fees to the General Fund for non-recycling purposes ignored the advice of Wisconsin Legislative Reference Bureau attorneys who counseled DOA staff, in a drafter's note concerning an earlier lapse statute, "to make certain that no regulatory fees are being lapsed to the general fund."

138. By transferring \$10,279,900 to the General Fund in 2011 from the moneys appropriated for the Recycling Grants, the defendants unlawfully siphoned off regulatory recycling fee revenues to the General Fund for non-recycling purposes.

139. By doing so, the defendants converted the regulatory recycling fee into an unconstitutional tax. Wis. Const. Art. VIII, § 1.

140. The unlawful use of regulatory fees for non-recycling purposes continues under the 2011-13 budget, 2011 Wis. Act 32, as at least \$12.5 million of regulatory recycling fees generated per annum are appropriated for non-recycling purposes, continuing the defendants' conversion of the regulatory recycling tipping fee into an unlawful tax.

141. Because § 596b of 2011 Act 32 appropriates only \$19 million for Recycling Grants, the regulatory recycling fee, which generates revenue of over \$35 million, bears no reasonable relationship to recycling-related appropriations in violation of *Wisconsin Telephone Co.*, 206 Wis. 589, 240 N.W. 411 (1932).

FIFTH CLAIM FOR RELIEF

The Defendants' Actions Resulted in an Unlawful Tax upon Milwaukee and Madison, Tax-Exempt Municipalities

142. Paragraphs 1-141 are incorporated herein by reference.

143. Municipal corporations, such as Milwaukee and Madison, are generally exempt from paying state income (§ 71.26(1)(b)), property (§ 70.11(2)), and sales and use taxes (§ 77.54(9a)(b)).

144. Because the defendants did and continue to unlawfully convert the regulatory recycling fee into an unlawful tax, the defendants unlawfully imposed and continue to impose that unlawful tax upon Milwaukee and Madison, tax-exempt municipalities.

III. REQUESTS FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Enter a declaratory judgment that 2009 Wis. Act 28, § 3416d is unconstitutional on its face and as applied by the defendants;

2. Enter a declaratory judgment that the defendants acted *ultra vires* of their authority under applicable law in reducing the appropriation for Recycling Grants from \$32,098,000 to \$19,000,000 and failing to award the total amount available pursuant to Wis. Stat. § 20.370(6)(bu) by June 1, 2011;

3. Enter a declaratory judgment that the defendants established an unlawful tax by diverting regulatory recycling fee revenue from the segregated Recycling Fund to the general fund for non-recycling purposes;

4. Enter a declaratory judgment that the defendants established an unlawful tax upon Milwaukee and Madison, tax exempt municipalities;

5. Enter a declaratory judgment that the ongoing diversion of regulatory recycling fees to non-recycling related purposes pursuant to 2011 Wis. Act 32 is unlawful;

6. Award supplemental relief under Wis. Stat. § 806.04 to compel the defendants to reimburse to the Recycling Fund (now Environmental Fund) the amounts lapsed or transferred from the FY 2011 Recycling Grants appropriation and Recycling Fund and to remit the full payments that all eligible responsible units or local governments would otherwise be entitled to under Wis. Stat. § 287.23(5b) and § 20.370(6)(bu);

7. Award supplemental relief under Wis. Stat. § 806.04 compelling the defendants to award Milwaukee the balance of the \$3.66 million calendar year 2011 grant that Milwaukee is entitled to pursuant to Wis. Stat. § 287.23(5b);

8. Award supplemental relief under Wis. Stat. § 806.04 compelling the defendants to award Madison the balance of the \$1.14 million calendar year 2011 grant that Madison is entitled to pursuant to Wis. Stat. § 287.23(5b);

9. Award supplemental relief under Wis. Stat. § 806.04 to compel the defendants to restore to the Environmental Fund recycling fee revenue collected in FY 2012 that were diverted or are in the process of being diverted to non-recycling purposes;

10. Enter an injunction compelling the defendants to reimburse to the Recycling Fund (now Environmental Fund) the amounts lapsed or transferred from the FY 2011 Recycling Grants appropriation and Recycling Fund and to remit the full payments that all eligible responsible units or local governments would otherwise be entitled to under Wis. Stat. § 287.23(5b) and § 20.370(6)(bu);

11. Enter an injunction preventing defendants, their successors, and all those acting in concert with them or at their direction from lapsing, transferring, or otherwise diverting funds under 2009 Wis. Act 28, § 3416d (or its equivalent) from the segregated Recycling Fund absent guidelines and oversight from the Legislature;

12. Enter permanent orders enjoining defendants, their successors, and all those acting in concert with them or at their direction from implementing and enforcing the diversion of regulatory recycling fees to non-recycling related purposes under 2011 Wis. Act 32;

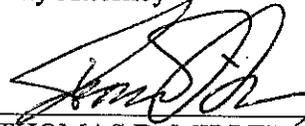
13. Enter an injunction ordering the defendants to provide an accounting of the regulatory recycling fees collected, expended, and transferred by the defendants in FY 2012; and

14. For judgment for costs and further relief as the court may deem just and proper.

Dated at Milwaukee, Wisconsin this 10th day of May, 2012.

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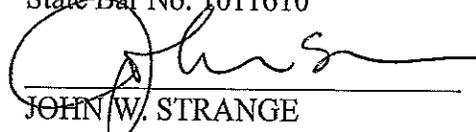
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Dated at Madison, Wisconsin, this 11th day of May, 2012.

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