

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

THE NEWARK GROUP, INC.:(P)

**DOCKET NOS. 99-R-70,(P)
99-R-72 THROUGH 99-R-83**

**THE NEWARK GROUP, INC.,(P)
f/k/a PAPERBOARD CORP.;**

**DOCKET NOS. 00-M-44(P)
THROUGH 00-M-46**

and

**THE NEWARK GROUP, INC.,(P)
f/k/a RECYCLED FIBERS OF WI., INC.,
1516 E. Thomas Avenue
Milwaukee, WI 53211,**

**DOCKET NOS. 00-M-47(P)
AND 00-M-48**

Petitioner,

vs.

DECISION AND ORDER

**WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708**

Respondent.

THOMAS M. BOYKOFF, COMMISSIONER:

These matters came before the Commission for trial on March 4 and 5, 2003, in Madison, Wisconsin. The parties have submitted post-hearing briefs.

Attorney Maureen A. McGinnity, of Foley & Lardner, Milwaukee, represents The Newark Group, Inc. ("petitioner"). Attorney Veronica Folstad represents respondent, Wisconsin Department of Revenue ("Department").

Having considered the entire record, the Commission hereby finds, rules, and orders as follows:

FINDINGS OF FACT

Jurisdictional Facts

1. Petitioner timely requested extensions to February 16, 1999 of the January 15, 1999 deadline for filing Applications for Exemption of Waste Treatment Facility ("waste treatment exemption application") for calendar year 1999. The Department granted the requests.

2. On February 16, 1999, petitioner timely filed 19 waste treatment exemption applications with the Department for the land, buildings, structures, and vertical balers used by two of petitioner's divisions: Paperboard Corp. ("Paperboard"), with a plant located in Milwaukee, and Recycled Fibers of Wi., Inc. ("Recycled Fibers"), with a plant located in Green Bay and office space at Paperboard's facility in Milwaukee.

3. The Department denied all 19 applications, and, on April 22, 1999, petitioner filed 14 timely appeals with the Commission. These were assigned Docket Nos. 99-R-70 through 99-R-83. Petitioner subsequently withdrew Docket No. 99-R-71 and re-filed it as Docket No. 00-M-48.

4. Under date of June 14, 1999, the Department issued five valuation notices to petitioner covering properties at issue in Milwaukee and Green Bay which the Department classified as manufacturing property.

5. Under date of August 9, 1999, petitioner timely filed five objections to the assessments, asserting that the assessments should read "0" because the properties should be properly categorized as exempt waste treatment facilities.

6. Under date of January 12, 2000, the State Board of Assessors sustained the Department's assessments.

7. On March 10, 2000, petitioner timely filed five appeals of these decisions with the Commission. These were assigned Docket Nos. 00-M-44 through 00-M-48.

Petitioner's Business¹

8. Petitioner is a privately held corporation. Prior to 1997, Paperboard and Recycled Fibers were wholly owned subsidiary corporations of petitioner. In 1997, the two subsidiaries merged with petitioner and became divisions of petitioner. The merger did not affect the day-to-day operations of either division.

9. Petitioner has been in the business of producing recycled paperboard for over 100 years, and is one of the largest producers of 100% recycled paperboard in the United States. Petitioner has more than 60 operations throughout the nation, providing a network of paper recovery facilities, paperboard mills, and paperboard converting plants.

10. All of the subject properties were purchased after July 31, 1975.

11. These appeals relate to petitioner's operations involving real estate, real estate improvements, structures, machinery, and equipment. The appeals also cover personal property (especially vertical balers) located in municipalities in Green Bay, Two Rivers, and the southeastern portion of the state, including Brookfield, Burlington, Cudahy, Elkhorn, Elm Grove, Kenosha, Milwaukee, Muskego, Oak Creek,

¹ Unless otherwise specified, the facts apply to 1999 and 2000, the "years under review".

Oconomowoc, Racine, and West Allis.

12. The Department assessed the land, buildings, structures, and land improvements of petitioner's Recycled Fibers plant in Green Bay and Paperboard plant in Milwaukee as manufacturing property under Wis. Stat. § 70.995. The Department also classified the machinery and equipment at the Milwaukee Paperboard plant as exempt manufacturing property.

An Overview of Petitioner's Operations

13. Recycled Fibers collects waste paper and old corrugated containers ("OCC") (i.e., shipping boxes) and brings them to its Green Bay plant and to Milwaukee, though it does not have a plant in Milwaukee. Recycled Fibers' Milwaukee office is located at Paperboard.

14. Recycled Fibers locates its vertical balers at the sites of retail, industrial, and commercial businesses that have waste paper and OCC ("waste generators"). A vertical baler is a portable machine into which OCC or loose waste paper (free of glass, plastic, and wood) is placed by waste generators' site personnel. When the hopper is fully loaded, the operator presses a control button; a hydraulic downstroke press (or "ram") compacts its contents' volume; with the operator's assistance, ties the OCC or waste paper into bales weighing 700 to 900 pounds each; and ejects the bales onto a wooden palate for removal and storage or transportation. The vertical balers compact waste paper and OCC separately into bales.

15. Recycled Fibers sells these bales to Paperboard and other customers.

16. Quality control of the raw material is critical in the recycled paper industry. The industry has developed specifications for various grades of recyclable waste paper which are set forth in "Scrap Specifications Circular 1997 — Guidelines for Paper Stock: PS97" (1997) ("Circular"). The Circular defines 51 standard grades of baled recyclable waste paper and indicates for each grade the percentage of allowable prohibitive materials (contaminants) and outthrows (types of waste paper not meeting grade requirements). All baled waste paper Recycled Fibers sells to Paperboard and other purchasers must meet the Circular's specifications.

Recycled Fibers' Milwaukee Operations

17. Recycled Fibers begins petitioner's recycling process by entering into agreements with retail stores (ex., grocery stores) and other industrial and commercial generators of OCC or waste paper to purchase their OCC or waste paper or both.

Acquiring OCC

18. Recycled Fibers locates its vertical balers, free of charge, at the waste generators' sites. Recycled Fibers owns the vertical balers and maintains them in good working order. To promote waste generators' compliance with the Circular's specifications, Recycled Fibers educates waste generators' employees on the materials not to be put into the vertical balers (ex., wax, metal, plastic, food stuff, cellophane) by affixing labels on the balers and by giving each waste generator a videotape for instructing personnel how to distinguish between conforming and nonconforming materials.

19. Depending on the volume of OCC baled, Recycled Fibers may pick up bales from a number of waste generators using a crane mounted on its flatbed truck and load them onto the truck. If a waste generator produces a high volume of bales, Recycled Fibers may locate a trailer at the generator's site to accumulate bales until the trailer has a full load; the full trailer is then taken away and an empty trailer is substituted. In both cases, Recycled Fibers' trucks deliver the baled OCC to either Paperboard or another unrelated paper mill.

20. When baled OCC is delivered to Paperboard, the bales are weighed, and possession of the bales is transferred to Paperboard. Recycled Fibers sells 60,000 bales each month, of which 30% is sold to "internal paper mills,"² i.e., Paperboard and similar operations of petitioner in Ohio. The remaining bales are sold to other mills across the U.S.

21. Recycled Fibers pays the OCC bale generators for bales at their market rates, based on their weight and quality standards. If Recycled Fibers' truck drivers observe excessive contaminants in any bale, they reject the bale and do not take possession of it. Similarly, Recycled Fibers may reject bales after their delivery if the bales do not meet quality standards. Recycled Fibers does not pay for rejected bales.

22. Recycled Fibers' vertical balers, tractors, trailers, and cranes are used exclusively to convert OCC and waste paper into bales and to transport the bales

² March 4, 2003 Transcript, p. 133. Testimony of Norm Bennett, The Newark Group's Director of Finance and Administration, also states that of the 60,000 tons of bales sold per month, 30,000 tons are sold to "internal paper mills" and the remaining 30,000 tons are sold to unrelated paper mills. March 4, 2003 Transcript, pp. 114, 115, and 133. For this decision, it is not material or necessary for this conflict to be reconciled.

to Paperboard or to another bale purchaser.

Acquiring Waste Paper

23. Recycled Fibers acquires, collects, transports, and sells waste paper bales in the same way as it acquires, collects, transports, and sells OCC bales.

24. For waste paper to be marketable, it almost always must be baled. Industry pricing is based on baled waste paper's weight and the quality standards of the industry.

Paperboard's Operations

25. Paperboard occupies about 20 acres of real property in Milwaukee, comprised of three parcels. The large, improved parcel consists of a paper mill with two large paper machines, a powerhouse building, an electrical substation, and surrounding paved yards to receive and store OCC and waste paper it uses to make paperboard. The two smaller parcels are parking lots, improved with asphalt paving and cyclone fencing.

26. Paperboard operates 7 days a week, 24 hours each day. It uses waste paper as its raw material, purchasing an average of 14,000 tons of waste paper per month consisting of several grades, including mixed paper (i.e., office waste and packaging material); OCC; boxboard cuttings (i.e., trimmings of Paperboard's products repurchased from its customers); newsprint; and double-lined cuttings (i.e., scraps from corrugated box manufacturers). Paperboard purchases both baled and loose waste

paper.³

27. Paperboard purchases more than 99%⁴ of its raw material from Recycled Fibers and the remainder from other suppliers. Of the raw materials purchased from Recycled Fibers, 86% is baled and the remainder is loose paper, which costs half as much as baled paper.

28. Paperboard operates as follows:

(a) Baled and loose waste paper is delivered to the receiving area of the Paperboard mill, where Paperboard has two conveyors. Loose OCC is piled near the north conveyor, and loose waste paper is piled near the south conveyor. Forklifts stack bales in inventory, sorted by paper grade.

(b) Loose waste paper must be used as soon as it is received. The conveyors move the loose paper from the receiving yard and dump it into continuous pulpers located inside the plant. When the fiber in the continuous pulpers reaches a certain consistency of water and fiber content, the conveyors automatically discharge more waste paper into the pulpers.

(c) Baled waste paper is stored in inventory in the receiving yard until it is needed. Forklifts are then used to move the bales into batch pulpers located inside

³ Jorge Sanchez, Recycled Fibers' Green Bay plant manager, testified that about one-third of waste paper purchased by Paperboard is baled and two-thirds is loose. March 4, 2003 Transcript, pp. 162-163. This is not consistent with other testimony that most of the waste paper purchased by Paperboard is already baled. It is not necessary for this decision to reconcile conflicting statements about the proportion of loose or baled waste paper purchased. The fact is that Paperboard purchases both baled and loose waste paper.

⁴ March 4, 2003 Transcript, p. 32, l. 26.

the plant.

(d) Both the continuous pulpers and the batch pulpers are essentially huge blenders. Water is pumped into the pulpers and mixed with the paper to break the paper down into fibers and turn it back into a pulp state.

(e) The *continuous pulpers* process loose waste paper and have cleaning systems attached to them. Loose paper contains many contaminants. The first cleaning step is to remove large contaminants such as wires, rags, plastic wraps, broken glass, and garbage. Then the cleansed waste paper passes through a series of centrifuges and screens to remove everything heavier and lighter than paper fiber.

(f) The *batch pulpers* process baled waste paper and do not include a cleaning system, since baled waste paper has fewer contaminants than loose waste paper.

(g) After the waste paper leaves the pulpers, it passes through a fine mesh screen and is then stored in a series of chests until the paper machines need that type of fiber. The paper machines operate continuously and draw stock out of the storage chests as needed.

(h) Paperboard's two paper machines each have 8 large rotating cylinders that rotate through a large vat filled with a mixture of 5-6% waste paper and 94-95% water. The cylinders remove the fine fibers and deposit them on a continuous felt to form a sheet. The felt then passes through a series of presses to extract the water by vacuuming, squeezing, and drying, to form a continuous sheet of paperboard.

(i) A paperboard sheet next passes through large steel rolls under

pressure ("calendars"), where various finishes, dyes, waxes, and chemical additives are applied according to customer specifications.

(j) The finished paperboard is then rolled into large rolls, cut to a customer's specified width, and prepared for shipping. If a customer prefers sheets of paperboard rather than rolls, the rolls are conveyed to the converting area and cut. Other special processes, such as lamination, also are performed in the converting area.

29. Paperboard uses many processes to customize its treatment and production processes to meet a customer's requirements for strength, flexibility, adhesive absorption properties, color, thickness, type of finish, and edge appearance.

30. Paperboard produces and sells 50 to 60 different grades of finished paperboard to companies which manufacture a wide range of products, such as game boards, book covers, tubes and cores, jewelry boxes, partitions for shipping cartons, backings for ready-to-assemble furniture, loose-leaf binders, automotive parts, and display boards.

Recycled Fibers' Green Bay Plant Operations

31. Recycled Fibers' Green Bay plant occupies a parcel of land improved by two adjacent buildings, with an overhead conveyor between them, and shipping and receiving docks on opposite ends of the buildings. A second conveyor and a large Harris two-stroke baler are located inside one building.

32. The Green Bay plant operates 5 days a week, 10 hours a day. The plant removes contaminants, sorts waste paper into grades, and compacts the paper into marketable bales. It collects, removes contaminants from, sorts, processes, and

bales 25-30 different grades of waste paper generated exclusively by industrial and commercial users. The plant treats and bales an average of 3,200-3,400 tons of waste paper per month.

33. The Green Bay plant sells about 1,000 tons of baled waste paper per month to Paperboard and sells the rest to other paper manufacturers not affiliated with petitioner. Customers use the baled waste paper as their raw material in producing a wide variety of finished products. These bales of waste paper are subject to the Circular's specifications. If the bales do not satisfy quality specifications, they are rejected, and Recycled Fibers does not get paid for them.

34. The Green Bay plant operates as follows:

(a) Waste paper is delivered by truckloads to the receiving dock. Loose paper is delivered in containers or Gaylord boxes, which are 4-foot cubed boxes that hold from 50-300 lbs. of waste paper.

(b) Forklifts unload the Gaylord boxes from trailers at the receiving dock and move them either to the concrete slab outside the plant or to the plant floor. The Gaylord boxes of waste are dumped onto the slab or plant floor.

(c) Two to three employees then hand sort the waste paper to remove contaminants.

(d) After contaminants are removed, forklifts and end loaders sort the waste paper into piles of like grades. The graded piles remain until there is enough to make several bales of a specific grade.

(e) Front end loaders push the piles of graded waste paper onto one of

the two conveyors.

(f) A bale operator operates the conveyors to control the feed of paper into the baler. The conveyors move the graded waste paper and dump it into the hopper of the baler, where it is funneled into the baler's chambers.

(g) The baler's downstroke ram compacts the waste paper and forms it into a bale. A second ram then ejects the bale out the side of the baler. The strapper at the end of the baler automatically straps the bale.

(h) Finished bales weigh between 1,100-1,500 lbs. Forklifts move them to the south side of the plant, where they are stacked in inventory in like grades, or to the shipping area.

35. In addition to baling waste paper, Recycled Fibers also contracts with stores in the Green Bay area to use its vertical balers to bale OCC, the same as does its Milwaukee operation. These bales are transported to the Green Bay plant for inventory storage and shipping. These vertical balers are reported by Recycled Fibers on its manufacturing property tax return for the Green Bay plant and are treated as exempt manufacturing machinery and equipment. They are not at issue in this case.

36. The Green Bay plant's land, structures, and improvements (in Docket No. 00-M-47) are used exclusively to receive industrial waste paper and convert it into marketable bales.

37. The Green Bay plant's machinery and equipment (in Docket No. 00-M-48) are used exclusively to treat industrial waste paper and convert it into marketable bales. Specifically, the two-stroke baler compacts waste paper and forms it

into bales; forklifts unload trailers at the receiving dock, transfer the containers of loose paper to the sorting area, sort the waste paper into grades, and transfer finished bales from the plant to the inventory storage or shipping area; the end loaders push piles of grade waste paper onto the conveyors; the toters collect and store waste paper at certain business office locations; the conveyors feed the graded waste paper into the baler; an octagon compactor is used by one printing facility to collect, compact, and store waste paper, instead of using a Gaylord box; and the strapper is part of the baler and ties the bales.

Abating or Eliminating Pollution

38. The OCC and waste paper acquired and recycled by petitioner diverts them from being deposited in landfills or incinerators by their waste generators. Depositing OCC and waste paper in a landfill involves energy and air pollution to transport them; once in the landfill, combined with other materials deposited there, a chemical reaction produces methane gas, a potent global greenhouse gas which is an air pollutant. Incinerating the OCC and waste paper gives off air pollutants.

39. Recycling OCC and waste paper is an alternative to making paper from virgin fiber (i.e., newly cut trees). Converting virgin fiber to pulp uses more fresh water and produces more waste water effluent than using recycled OCC and paper. The conversion has a large impact on water resources in this state and on the pollutants in them, especially considering the chlorine bleaching and the chemicals that are used in and come out of that process. In addition, recycling OCC and waste paper saves the energy that would be involved in working with virgin pulp. Using virgin pulp requires

energy to cut down logs, transport them, and chemically treat them to turn them into paper while producing pollution, most of it in the forms of carbon dioxide and nitrous oxide which contribute to air pollution and global warming.

APPLICABLE WISCONSIN STATUTES

70.11 Property exempted from taxation. The property described in this section is exempted from general property taxes:

* * *

(21) TREATMENT PLANT AND POLLUTION ABATEMENT EQUIPMENT.

(a) All property purchased or constructed as a waste treatment facility used for the treatment of industrial wastes, as defined in s. 281.01(5), or air contaminants, as defined in s. 285.01(1), but not for other wastes, as defined in s. 281.01(7), for the purpose of abating or eliminating pollution of surface waters, the air, or waters of the state if that property is not used to grow agricultural products for sale and, if the property's owner is taxed under ch. 76, if the property is approved by the department of revenue. For the purposes of this subsection, "industrial waste" also includes wood chips, sawdust, and other wood residue from the paper and wood products manufacturing process that can be used as fuel and would otherwise be considered superfluous, discarded, or fugitive material. The department of natural resources and department of health and family services shall make recommendations upon request to the department of revenue regarding such property. All property purchased or upon which construction began prior to July 31, 1975, shall be subject to s. 70.11(21), 1973 stats.

281.01 Definitions. In this chapter, unless the context requires otherwise:

* * *

(5) "Industrial wastes" includes liquid or other wastes resulting from any process of industry, manufacture, trade or business or the development of any natural resource.

* * *

(7) "Other wastes" includes all other substances, except industrial wastes and sewage, which pollute any of the surface waters of the state. The term also includes unnecessary siltation resulting from operations such as the washing of vegetables or raw food products, gravel washing, stripping of lands for development of

subdivisions, highways, quarries and gravel pits, mine drainage, cleaning of vehicles or barges or gross neglect of land erosion.

285.01 Definitions. In this chapter, unless the context requires otherwise:

(1) "Air contaminant" means dust, fumes, mist, liquid, smoke, other particulate matter, vapor, gas, odorous substances or any combination thereof but shall not include uncombined water vapor.

APPLICABLE ADMINISTRATIVE RULE

§ TAX 12.40 Waste treatment facilities - industrial.

(1) STATUTE. The general property tax exemption for a waste treatment facility is contained in s. 70.11(21), Stats.

(3) INDUSTRIAL WASTE TREATMENT FACILITY EXEMPTION.

(a) The words "waste", "treatment" and "facility" are deemed to have the following meanings:

1. "Facility" means tangible property that is built, constructed or installed as a unit so as to be readily identifiable as directly performing a waste treatment function.

2. "Treatment" means removing, altering or storing waste.

3. "Waste" means that which is left over as superfluous, discarded or fugitive material. In addition, "*industrial wastes*" is defined by reference to s. 281.01(5), Stats., as including liquid or other wastes resulting from any process of industry, manufacture, trade, business or the development of any natural resource. "*Air contaminant*" is defined by reference to s. 285.01(1), Stats., as dust, fumes, mist, liquid, smoke, other particulate matter, vapor, gas, odorous substances or any combination thereof but shall not include uncombined water vapor.

4. "Waste treatment facility" means tangible property that is built, constructed or installed as a unit so as to be readily identifiable as directly removing, altering or storing leftover, superfluous, discarded or fugitive material.

(b) The exemption for industrial waste treatment facilities does not extend to "unnecessary siltation resulting from operations such as the washing of vegetables or raw food products, gravel washing, stripping of lands for development of subdivisions, highways, quarries and gravel pits, mine drainage, cleaning of vehicles or barges or gross neglect of land erosion" as provided in s. 281.01(7), Stats.

(c) The exemption for industrial waste treatment facilities does not apply to conversion of an industrial furnace from one type of fuel

to another type of fuel, or to the increased height of a smoke stack to diffuse emissions over a wide area or increments to property held for the production of income but which may be indirectly related to pollution abatement. However, the installation of a scrubber or electrostatic precipitator in a smoke stack could qualify for exemption.

(d) The exemption for industrial waste treatment facilities does not apply to monitoring equipment that is not a component or integral part of a waste treatment facility.

ISSUES AND CONCLUSIONS OF LAW

ISSUE NO. 1: Do petitioner's real and personal property used in Recycled Fiber's operations constitute a "waste treatment facility" under § 70.11(21)?

CONCLUSION OF LAW: Recycled Fibers' collecting, compacting, baling, and removing contaminants from OCC and waste paper is not part of a "waste treatment facility," and, therefore, its real and personal property used in these operations are not exempt from property tax under § 70.11(21).

ISSUE NO. 2: Do petitioner's real and personal property used in Paperboard's operations constitute a "waste treatment facility" under § 70.11(21)?

CONCLUSION OF LAW: Paperboard's recycling operations and its real and personal property used in those operations, from the receipt of OCC and waste paper to its manufacture of paperboard, is a "waste treatment facility" under § 70.11(21).

ISSUE NO. 3: Did the Department know, or should it have known, that its assertions concerning the definition of waste and the scope of pollution abatement and elimination lacked any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law (i.e., that they are frivolous), justifying an award to petitioner of reasonable attorney fees and

costs under § 814.025?

CONCLUSION OF LAW: Yes.

OPINION

Petitioner's two divisions in Wisconsin use real and personal property which petitioner contends constitutes pollution abatement facilities. Recycled Fibers acquires OCC and waste paper from businesses which generate them ("waste generators"), sorts and removes contaminants from the OCC and waste paper, and then sells the OCC and waste paper to Paperboard, which converts it to useable cardboard for sale.

Petitioner asserts that all of its real property, real property improvements, and machinery and equipment involved in the above processes constitute a waste treatment facility under § 70.11(21) and, therefore, are exempt from property taxation. The Department contends that none of the above constitutes a waste treatment facility.

The language of § 70.11(21), as well as the statutes cross-referenced within it, and Wis. Admin. Code § TAX 12.40 describe the elements of a "waste treatment facility." No reported appellate cases apply these statutes and the administrative rule to a fact situation.

Tax exemption statutes must be given a strict but reasonable construction in favor of taxation. *Sisters of St. Mary v. City of Madison*, 89 Wis. 2d 372, 379 (1979), (citing *Columbia Hospital Assoc. v. Milwaukee*, 35 Wis. 2d 660, 668-69 (1967)). Petitioner has the burden of proving that its operations clearly fall within the language of an exemption statute. *Revenue Department v. Greiling*, 112 Wis. 2d 602, 605 (1983). To

prevail here, petitioner must prove that its operations and property constitute a "waste treatment facility" which abates or eliminates pollution of air, surface waters or waters of this state under § 70.11(21).

Petitioner asserts that its Recycled Fibers division's real property, buildings, improvements, and machinery and equipment in Green Bay, and its vertical balers located in many Wisconsin municipalities, constitute a part of its waste treatment facility which abates or eliminates pollution of air, surface waters or waters of this state under § 70.11(21) and are, therefore, exempt from property taxation. Petitioner also asserts that the OCC and waste paper Recycled Fibers obtains is "industrial waste" under §§ 70.11(21) and 281.01(5) and "waste" under Wis. Admin. Code § TAX 12.40(3)(a)1; that Recycled Fibers "treats" the waste by "altering" it pursuant to Wis. Admin. Code § TAX 12.40(3)(a)2 and by "converting loose, contaminated, non-marketable waste into sorted, graded, compacted and tied bales"⁵ through its Milwaukee operation and Green Bay plant; that Recycled Fibers' vertical balers, the Paperboard mill, and the Green Bay plant are "facilities" under § TAX 12.40(3)(a)1; and that petitioner's waste treatment operations abate or eliminate the pollution of air, surface waters or waters of this state under § 70.11(21).

The Department contends that compacting and baling OCC and waste paper is not "treatment" of waste. Instead, it is merely the reduction in size of waste, to prepare it for transportation to Recycled Fibers' or Paperboard's property, to increase

⁵ Petitioner's Initial Brief, p. 28 (filed May 16, 2003).

the economical marketability of the OCC and waste paper.⁶ The Department further asserts that petitioner's operations are recycling activities for profit, rather than a pollution abatement facility which is preventing or abating pollution of air and water; that removing contaminants "is not an operation within the contemplation of the statutes and rules defining waste treatment facilities";⁷ that the sorting and compacting by vertical balers do not "treat" wastes; and that there was no testimony from a grocery store operator that if its OCC were not compacted and sold to Recycled Fibers, it would be sent to landfills or incinerators.

Defining
"Industrial Wastes" and "Wastes"

The phrase "industrial wastes" is used in § 70.11(21) and is defined, by cross-reference to Wis. Stat. § 281.01(5), to "include liquid or other wastes resulting from any process of industry, manufacture, trade or business" This is a broad, inclusive definition. OCC and waste paper are clearly covered by its language as "wastes resulting from any process of . . . trade or business".

Under Wis. Admin. Code § TAX 12.40(3)(a)3, "waste" means what is "left over as superfluous, *discarded* or fugitive material." [Emphasis added.] The OCC and waste paper involved in the instant case are discarded and clearly are covered by this definition.

The Department contends, however, that the waste paper used as Paperboard's raw material is not "waste" under § 70.11(21). Among the reasons stated is

⁶ Department's Post-hearing Brief ("post-hearing brief"), p. 15 (filed August 26, 2003).

⁷ *Id.*, p. 14.

that the definition of "Industrial waste" in § 281.01(5) (and included in § TAX 12.40(3)(a)3) and the definition of "Air contaminant" in § 285.01(1) (also included in § TAX 12.40(3)(a)3) relate only to chs. 281 and 285, titled "Water and Sewage" and "Air pollution", respectively. Further, the Department states, "The waste paper that serves as the raw material for paperboard production is not related to either water or air pollution."⁸ We do not agree. The definitions of "wastes" and "industrial wastes" are adopted in § 70.11(21) by cross-reference, and the recycling of waste paper is related to abating or eliminating water and air pollution (as discussed later in this opinion).

The Department further contends that, to qualify under § 70.11(21), waste paper used by Paperboard must have no value whatsoever, citing the Department's ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS ("ASSESSMENT MANUAL") (p. 10-23): "The terms superfluous, discarded, or fugitive material mean without use or value to anyone. If the material has a value or can be used it is not superfluous, discarded or fugitive material, nor is it likely to be placed in a landfill." The concept of "value" is not a factor in either § 70.11(21) or § TAX 12.40. The ASSESSMENT MANUAL, therefore, narrows the definition improperly; it may not override the meaning of the statute or administrative rule.⁹ See, *Metropolitan Holding Co. v. Board of Review of the City of Milwaukee*, 173 Wis. 2d 626, 633 (1993).

Collecting and Compacting

⁸ *Id.* p. 31.

⁹ Because the Department is directed by § 73.03(2a) to prepare the Manual "with a view to more nearly uniform and more consistent assessments of property *at the local level*" (emphasis added), it might be argued that its narrative and illustrations do not apply to *state assessments* of property. However, we do not address that here.

Through its Recycled Fibers division, petitioner locates its vertical balers on the premises of OCC and waste paper generators, whose employees deposit and compact the OCC and waste paper. Petitioner asserts that this constitutes "treatment" of industrial wastes under § 70.11(21) and Wis. Admin. Code § TAX 12.40(3)(a)2, which

provides "'Treatment' means removing, *altering* or *storing* waste." [Emphasis added.] The Department contends that this is not an integral part of waste treatment facility operations. Instead, it is a process of compacting in preparation for the transportation of baled OCC and waste paper from paper generators to either Recycled Fibers' or Paperboard's facility.

Petitioner asserts that its acquiring, collecting, and baling of OCC and waste paper constitutes "treatment" of industrial wastes under § 70.11(21)(a) and § TAX 12.40(3)(a)2. We do not agree. Acquiring is not part of "treatment." Sorting, compacting, and baling do not "alter" the nature or composition of the OCC and waste paper. Petitioner merely reduces the volume. Therefore, we conclude that Recycled Fibers' real property, improvements, balers, and related items are not part of a waste treatment facility under § 70.11(21).

"Alter" means "to make different."¹⁰ Sorting, compacting, and baling OCC and waste paper do not change their physical qualities, nature or composition. The only alteration is that their volume has been reduced.

Similarly, at Recycled Fibers' Green Bay plant and its Milwaukee facility, Recycled Fibers' machinery and equipment convert loose, contaminated, and less valuable OCC and waste paper into sorted, graded, compacted, and tied bales that have greater economic worth. This also does not change their physical qualities, nature or composition.

¹⁰ Webster's II, New College Dictionary, p. 33 (2001).

Recycling OCC and Waste Paper

Petitioner's Paperboard division in Milwaukee is a waste treatment facility. This division treats industrial wastes and air contaminants to abate or eliminate pollution of surface water, the air, or waters of this state pursuant to § 70.11(21).

Paperboard receives OCC and waste paper, both baled and loose ("raw material"). This raw material comprises "industrial wastes" under § 70.11(21) and § TAX 12.40(3)(a)3.

Paperboard's building and improvements and some of its tangible personal property in Milwaukee comprise a "facility," both as the word is used in § 70.11(21) and in § TAX 12.40(3)(a)1. The statute refers to "All property" (including real property), and the administrative rule defines facility as "tangible personal property that is built, constructed or installed as a unit so as to be readily identifiable as directly performing a waste treatment function."

Paperboard operates on three parcels of real estate, equaling about 20 acres. Improvements on these 20 acres include Paperboard's main plant building, an attached power house building, an electrical substation, and a considerable amount of outside paving surrounded by cyclone fencing.

Paperboard's recycling process is succinctly described as follows:

It begins with its receipt of raw material (waste paper and OCC), which is put through pulpers, to transform it into pulp state. This pulp passes through cleaning equipment, which removes contaminants (ex., metal, plastic or glass); is altered into lengths as required by its next purchasers; run through a paper machine; formed into

sheets and passed through presses with large water removal; and passed through steam dryers to dry the sheets. The sheets may have chemicals or color added, are then wound into large rolls and slit into sizes a customer may have specified, and then transported to a customer or moved into storage.

The Department's administrative rule, § TAX 12.40(3)(a)1, defines "facility" more narrowly than the statute. Besides "tangible personal property . . . that is constructed . . .", the Commission holds that the real property upon which the facility stands and the supporting buildings and real estate improvements (ex., cement and asphalt storage areas and cyclone fencing) are part of the "facility."

Paperboard also "treats" waste paper under § 70.11(21) and § TAX 12.40. The rule defines "treatment" to mean "removing, altering or storing waste." (§ TAX 12.40(3)(a)2.) Paperboard's converting OCC and waste paper into pulp, then into saleable cardboard products, clearly alters the waste paper by changing its nature, use, and composition.

The following properties used by Paperboard are components of petitioner's waste treatment facility: 3 parcels of real property equaling about 20 acres; real property improvements (including asphalt paving and cyclone fences around the real estate); forklifts that unload raw material from vehicles on arrival and place the raw material in inventory or on conveyors; the conveyors; the continuous and batch pulpers; the cleaning systems of the continuous pulpers; the fine mesh screen; storage chests; and the machinery and equipment that convert raw materials into paperboard; machinery and equipment that cuts, colors or applies finishes, dyes, waxes, and

chemical additives to paperboard; machinery and equipment that makes paper into rolls or sheets; and forklifts that move paperboard into inventory and onto vehicles.

The Department states that while recycling paper is a laudable activity, the waste treatment facility exemption "is limited in scope to activities aimed at eliminating air or water pollution."¹¹ The assertion is that a waste treatment facility may not have two uses: eliminate pollution and manufacture a product for sale.

This primary—or sole—purpose contention has been rejected by both the judiciary and the Commission. In *Owens-Illinois. v. Town of Bradley*, 132 Wis. 2d 310 (Ct. App. 1986), the plaintiff sought the waste treatment exemption for its industrial power boiler, boiler house, equipment, and computerized power house system. The boiler burned wood waste and coal to produce steam and heat for industrial production. The Department denied the exemption. The Court of Appeals held that the boiler and power house are exempt from taxes under § 70.11(21), stating:

The statute contains no requirement that the primary purpose of a waste treatment facility be pollution abatement in order to qualify for [the] exemption The fact that the boiler and power house produce usable energy as well as dispose of wood waste does not negate its exempt status when the statute unambiguously provides that such property is exempt.

132 Wis. 2d at 315-316.

In *Consolidated Papers, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-250 (1996) (notice of nonacquiescence filed by the Department (October 31, 1996)), the Department denied petitioner the waste treatment facility exemption under § 70.11(21) for its paper manufacturing facility's building which housed its washer/filter facility

which removed lignin (a water pollutant) and other pollutants to prevent their discharge into the environment. The Commission held that the subject building was a waste treatment facility although it housed a manufacturing process. The Commission rejected the primary purpose test which had been rejected by the Court of Appeals 10 years earlier.

The same principles apply in the case now before the Commission. There is no "primary purpose" language in § 70.11(21). The fact that petitioner's recycling operation generates a saleable product while abating or eliminating air and water pollution does not negate the facility's exempt status under the still-unambiguous § 70.11(21). Because the Department nonacquiesced to the Commission's decision in *Consolidated Papers*, the case is not binding on the Department. The Commission, however, may cite and rely upon the case and its rationale as precedent.

The parties disagree on the relevance to the case before us of a 1993 Sales Tax Committee ("STC")¹² decision.¹³ The STC considered whether components of a county's material recovery facility ("MRF")¹⁴ were exempt from the sales tax under § 77.54(26). The STC described the operations of the MRF as collecting recoverable residential waste materials, delivering them to the MRF, removing contaminants, combining like materials and processing or treating them to upgrade them to market-

¹¹ Department's Brief, p. 33.

¹² The STC is a group of Department employees with special knowledge of sales and use tax who consider, analyze, and respond to sales tax questions which arise and are referred to it. *SSM Health Care v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-593 (WTAC 1997), footnote 6.

¹³ STC Decision, 1993, Issue # 22, p. 1 (Department's Exhibit 51).

¹⁴ What was then called an "MRF" by the STC was, by both § 70.11(21) and § 77.54(26) being amended, renamed a waste treatment facility.

able quality, storing the processed materials, and selling them to industries for manufacture of new products. Further, the STC stated that baling and compacting these materials is treatment of waste.

Petitioner asserts that the STC decision acknowledged that baling operations like Recycled Fibers' constitutes waste treatment. Not so, counters the Department, because the question before the STC dealt with sales tax, not property tax; the use of residential (not industrial) waste distinguishes the decision from the case now before the Commission; and petitioner "is not truthful"¹⁵ because it did not include a sentence reading "If the facility were constructed by an industrial concern, for property tax purposes, exemption from tax would be denied because the waste is 'post-consumer.'"¹⁶

Petitioner's assertion misses the mark. The Commission holds that acquiring, removing contaminants from, and baling waste paper and OCC away from the Milwaukee Paperboard waste treatment facility is not part of the facility's operation. The Department's contention that the sentence petitioner omitted proves its case is likewise faulty; the STC's members have special knowledge of sales and use tax matters, but not property tax matters. The sentence is, therefore, extraneous and not persuasive.

Abating or Eliminating Pollution of
Surface Waters, the Air or Waters of this State

To qualify as a "waste treatment facility" under § 70.11(21), the treatment

¹⁵ Department's Brief, p. 20. Department's counsel's characterization of petitioner's counsel for not citing some language in this STC decision is overly harsh. This is neither appropriate nor necessary.

of waste must be "for the purpose of abating or eliminating pollution of surface waters, the air or waters of the state. . . ."

Petitioner's expert witness was Sherrie Gruder, Sustainable Design Specialist with the Solid and Hazardous Waste Education Center and Distinguished Lecturer in the University of Wisconsin Extension. Her credentials indicate a broad scope of knowledge of waste treatment and its relationship to pollution and protecting the environment. She has been involved in the field of her expertise since 1986, participating in professional societies and task forces in the field also since 1986, writing at least 20 publications and at least 30 UW-Extension publications (fact sheets and resources), and making 85 invited presentations on pollution prevention. The Commission finds Ms. Gruder eminently qualified to testify on waste treatment facilities and their relationship to abating or eliminating water and air pollution. The record supports this conclusion.

The Department seems to try to minimize Ms. Gruder's testimony when it states:

In a nutshell, 'preventing waste pollution' and 'recycling' summarizes the substance of Ms. Gruder's testimony regarding the relationship between Petitioner's property and the exemption requirements of sec. 70.11(21), Wis. Stats.¹⁶

The Commission, however, recognized Ms. Gruder as an expert witness after reviewing her credentials. (March 3, 2004 Transcript, p. 81.) Her testimony was credible and

¹⁶ Calling waste "post-consumer" is unnecessary, ambiguous, and irrelevant to these proceedings. All waste in the case before us is, in a sense, post-consumer; the consumers are industrial, commercial, and retail establishments. The phrase is not in § 70.11(21) or § TAX 12.40.

¹⁷ Department's Post-hearing Brief, p. 15.

demonstrated an intimate, scholarly knowledge of her field of expertise.

Ms. Gruder's testimony and opinions regarding petitioner's Milwaukee waste treatment facility are further supported by several learned treatises in the record.

These include:

- Proclamation 7250 of November 15, 1999 (64 FR 62563, November 17, 1999): "Buying **recycled** products . . . reduces water and air pollution Producing 1 ton of paper from **recycled** pulp saves 17 trees, 3 cubic yards of **landfill** space. . . . It also reduces air pollutants by 60 pounds [Emphasis in original.] (Inadvertently unnumbered treatise preceding Exhibit MM, p. 1.)
- Studies by the Wisconsin Department of Natural Resources report that manufacturing paper from recycled waste paper produces 73% less air pollution and 35% less water pollution than manufacturing paper from virgin materials. (Exhibit MM at p. 1 and Exhibit NN at p. 2.)
- A Natural Resources Defense Council Study report "Too good to throw away" (February 1997), states "It is virtually beyond dispute that manufacturing products from recyclables instead of from virgin raw materials . . . making, for instance, paper out of old newspapers instead of virgin timber — causes less [water and air] pollution and imposes fewer burdens on the earth's natural habitat and biodiversity." (Exhibit PP, p. 1.)

The Department states that petitioner's expert witness testified that when petitioner recycles OCC and waste paper into paperboard, petitioner's impact is to "prevent" pollution. The Department further notes that its administrative rule § 12.40(3)(a)3 defines "treatment" to mean "removing, altering or storing waste." "Preventing" waste is not included as a treatment under the rule, so, the Department asserts, it is not a waste treatment function.¹⁸

This unique argument has no merit. Preventing pollution is a consequence of pollution abatement operations. The purpose of § 70.11(21) is to abate

or eliminate pollution; preventing pollution eliminates pollution before it becomes pollution. It is odd for the Department to argue that, for the property tax exemption, pollution must exist, and that preventing pollution is not covered by the statute.

The Department also challenges Ms. Gruder's statements that pollution may be prevented "by avoiding landfills or incinerators," arguing that even if the Commission were to accept "this indirect relationship, landfills are used to dispose of solid waste. Treating solid waste is not included in the language of § 70.11(21)" ¹⁹ The Commission is not persuaded. In § 70.11(21), a waste treatment facility must treat "industrial wastes" or "air contaminants." "[I]ndustrial wastes" is defined by cross-reference to § 281.01(5) which, the Department asserts, does not include solid wastes in that definition. To the contrary, § 281.01(5) defines "industrial wastes" to include "liquid or other wastes." "Other wastes" includes solid wastes.

Costs and Reasonable Attorney Fees

Under Wis. Stat. § 814.025(1), petitioner moves that the Commission award it costs (under Wis. Stat. § 814.04) and reasonable attorney fees. The motion is based on petitioner's assertion that the Department lacked good faith in denying petitioner's applications and in continuing this litigation. (Petitioner's Initial brief, p. 34.)

Under Wis. Stat. § 814.025, the Commission may award a party costs under Wis. Stat. § 814.04 and reasonable attorney fees if the other party's assertions or positions are found to be frivolous. A position is frivolous if the party or the party's

¹⁸ Department's Post-hearing Brief, p. 18: "Preventing pollution is not a waste treatment function."

attorney knew, or should have known, that it was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. § 814.025(3)(b). A position is also frivolous if an attorney "knows or should reasonably know that the facts necessary to meet the required elements of an allegation are not present and cannot be produced" *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 244 (1994).

The Department contends that the Commission lacks authority to make an award under § 814.025 for three reasons: (1) The Department is protected by sovereign immunity; (2) the Commission's administrative rule, § TA 1.39, does not authorize it to apply § 814.025; and (3) two other statutes, §§ 227.485 and 814.245, allow remedies for costs. (Post-hearing brief, pp. 35-36.) The Department offers no further arguments to challenge petitioner's assertions of frivolous positions and its invoking § 814.025.

We reject the Department's contentions. First, Article IV, § 27 of the Wisconsin Constitution provides: "The legislature shall direct by law in what manner and *in what courts suits* may be brought against the state." [Emphasis added.] The Wisconsin Supreme Court has long recognized that sovereign immunity may be invoked only when a "suit" is commenced against the state. *See Polk County v. State Public Defender*, 188 Wis. 2d 665 (1994). Petitioner's request for the Commission to apply § 814.025 is not a "suit" against the state. It is an adjunct remedy provided by the legislature to prevent or punish frivolous actions in litigation. Moreover, § 814.025 is a remedy that was prescribed by the legislature.

¹⁹ Department's Post-hearing Brief, p. 17.

Second, under Wis. Stat. § 73.01(4)(b), the Commission may adopt administrative rules prescribing its procedures.²⁰ In addition, § 73.01(4)(d) prescribes many procedures which must be similar to procedures in civil actions in circuit courts

²⁰ Rule TA 1.39 was adopted under the authority of § 73.01(4)(b) which reads, in part, ". . . all proceedings shall be conducted in accordance with rules of practice and procedure prescribed by the Commission."

of this state. Reading that language *in pari materia* with the Commission's statutory authority to adopt administrative rules further supports the Commission's jurisdiction to apply § 814.025.

In *Tatum v. LIRC*, 132 Wis. 2d 411 (Ct. App. 1986), Ms. Tatum commenced a case of discrimination against her employer under the Wisconsin Fair Employment Act ("WFEA") before the Labor and Industry Review Commission ("LIRC"). LIRC held that there was no discrimination and that it had no authority to award attorney fees, and the circuit court affirmed.

Regarding attorney fees, the Court of Appeals held that LIRC possesses the authority to award attorney fees. It cited a Wisconsin Supreme Court case which held that LIRC had this authority under a liberal construction of what is now Wis. Stat. § 111.39(4)(c) to effectuate the purpose of the WFEA. 132 Wis. 2d at 421-422. The Commission cites *Tatum* to demonstrate that, if statutory language authorizes it, an administrative agency is authorized to award attorney fees.

The Commission has considered awarding costs and attorney fees under § 814.245. Asserting its authority to make such awards, the Commission declined making any award. The circuit court and Court of Appeals affirmed the Commission's authority to make awards under the statute, while overturning the Commission's refusal to make such awards under the circumstances of the case.²¹

Unlike LIRC, the Tax Appeals Commission is explicitly authorized to

²¹ See *Sunburst IV Ltd. Partnership v. Dept' of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-550 (WTAC 2001); Docket No. 97-T-373 (WTAC 2001) (ruling and order on costs; reversed on issue of costs in Wis. Tax Rptr.

adopt "rules of practice and procedure" by § 73.01(4)(b). The Commission has done so by adopting TA § 1.39, which provides that the Commission "shall substantially follow the practice and procedures before the circuit courts of this state."

Third, the Department asserts that § 814.025 is not applicable because costs and attorney fees may be awarded under two other statutes (§§ 227.485 and 814.245). The existence of these two statutes does not negate the Commission's authority to apply § 814.025 here. The Commission rejects the Department's assertion.

The Department's objections to the Commission's jurisdiction were its sole defense to petitioner's request that the Commission apply § 814.025. The Department did not respond substantively to any part of petitioner's request for costs and reasonable attorney fees. The Commission, therefore, reviews petitioner's request without the benefit of the Department's legal arguments.

Petitioner's request under § 814.025 is predicated on its assertion that the Department has taken allegedly frivolous positions and made allegedly frivolous legal arguments at several stages of this case: (1) The Department's initial denial of petitioner's 19 applications; (2) the Board of Assessors' denial of petitioner's appeals; (3) the cross-motion for summary judgment, which the Commission denied; and (4) during the trial before the Commission and the post-trial briefs.

The language of § 814.025 applies to "an action or special proceeding commenced or continued" Prior to petitioner's appeal to the Commission, there was no "action or special proceeding" within the Commission's jurisdiction.

(CCH) ¶ 400-643 (Circ. Ct. Waukesha County, 2002) and by Wis. Tax Rptr. (CCH) ¶ 400-691 (Ct. App.

As a jurisdictional matter, under Wis. Stat. § 73.01(4)(a), "the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and . . . s. 70.995(8)" Under Wis. Stat. § 73.01(5), a "person who is aggrieved by a determination of the state board of assessors under s. 70.995(8) . . . may . . . file with . . . the commission . . . a petition for review of the action of the department of revenue"

Under these statutes, the Commission has jurisdiction over "determination[s] of all questions of law and fact" and " a determination of the state board of assessors. . . ." The Commission has no jurisdiction over the internal procedures or operations of the Department or of the State Board of Assessors. Petitioner's request for an award under § 814.025 for its perceived shortcomings of the Department's procedures or operations must be denied.

The standards the Commission must use in determining whether to award petitioner costs and reasonable attorney fees in this case's summary judgment, hearing, and post-hearing phases are set forth in § 814.025(3):

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) *The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.* (Emphasis added.)

In examining the Department's briefs both at the summary judgment level

and the post-trial level,²² the Commission believes that the Department's assertions and arguments were not "in bad faith, solely for purposes of harassing or maliciously injuring" petitioner under § 814.025(3)(a). The Commission, therefore, declines making an award on this basis.

The Commission next reviews the Department's assertions and arguments under § 814.025(3)(b). "The inquiry under [this subpar.] is an objective one, focusing on what a reasonable attorney or party should have known." *Wisconsin Chiropractic Association v. State of Wisconsin Chiropractic Examining Board*, Slip Op., Appeal No. 03-0933 (Ct. App. January 24, 2004). The Commission has examined the Department's briefs in both the summary judgment phase of this proceeding and the post-trial phase.

Petitioner asserts that the Department's contentions on several issues in this case were frivolous. Each issue is discussed separately below.

Petitioner asserts that the Department lacked a good faith basis to argue that the waste paper which petitioner acquires is not "waste" because it has "value," and if it has value, it is not "waste." (Petitioner's initial post-trial brief, p. 36; SJ Brief #1, pp. 5-6; and Post-hearing Reply Brief, p. 17.) The Department also argues that § 70.11(21) adopts the definition of "industrial wastes" in § 281.01(5), but that the definition does not include petitioner's solid waste paper. (SJ Brief #1, p. 5, and Post-hearing Brief, pp. 28-29.)

²² These briefs are: "Respondent's Brief in Support of Counter Motion for Summary Judgment" (filed February 19, 2002) ("SJ Brief #1"); "Respondent's Response to Petitioner's Motion for Summary Judgment" (filed February 22, 2002) ("SJ Brief #2"); "Respondent's Reply Brief in Response to Petitioner's Combined Reply Brief and Brief in Opposition to Respondent's Counter Motion" (filed May 30, 2002) ("SJ Brief #3"); "Respondent's [Post-hearing] Reply Brief" (filed August 26, 2003) ("Post-hearing Reply Brief").

The Department cites a provision in the ASSESSMENT MANUAL (p. 10-23) which reads, "The terms superfluous, discarded or fugitive material mean without use or value to anyone. If the material has a value or can be used it is not superfluous, discarded or fugitive material, nor is it likely to be placed in a landfill." (Post-hearing Brief, p. 32.) The terms "superfluous, discarded or fugitive material" are used in § TAX 12.40(3)(a)3 in defining "waste." However, neither § 70.11(21) nor § TAX 12.40(3)(a)3 include the concept of "value." The ASSESSMENT MANUAL, by inserting "value," improperly narrows the definition of "waste". (SJ Brief #1, p. 5, and Post-hearing Brief, p. 32.) By relying on impermissively restrictive definitions in its own administrative rule, the Department knew or should have known that its argument is without any reasonable basis.

The Department then asserts that petitioner cannot meet its burden of proving that the waste paper used as raw material is 'waste' as that term is used in the statute, i.e., § 70.11(21). (Post-hearing Brief, pp. 17 and 32; SJ Brief #1, p. 5.) However, this overlooks that the definition of "industrial wastes" in § 70.11(21), adopted by cross-reference to § 281.01(5) and (7), does not exclude solid waste. The statute provides that "[i]ndustrial wastes includes liquid or other wastes resulting from any process of industry . . . trade or business" The Department's brief overlooks or ignores that in the definitions of "industrial wastes" and "other wastes," the word "includes" precedes the enumeration and does not exclude solid wastes from its coverage.

The Department's assertions that petitioner's waste paper is excluded from the definition of "industrial waste" in § 281.01(5) and "waste" in § TAX 12.40(3)(a)3

are matters that the Department's counsel "knew or should have known . . . [were] without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." § 814.025(3)(b).

Petitioner argues that the Department lacked a good faith basis to deny its initial applications on the basis that it is a manufacturer (Petitioner's Initial Post-hearing Brief, pp. 39-40) or on the basis that some of petitioner's operations amount to a transportation activity (*Id.*, p. 41). The statements objected to were made by the Board of Assessors at the initial stage of this dispute. Because the Commission has no jurisdiction over the Department's operations or procedures prior to petitioner's appeals to the Commission, its request for an award under § 814.025 is denied.

Petitioner asserts that the Department lacked a good faith basis to deny that petitioner's operations contribute to abating or eliminating air and water pollution. (*Id.*, p. 42.) This argument at the summary judgment level was not frivolous. The Commission denied petitioner's motion for summary judgment, in part, stating: "The extent to which petitioner's property is used for 'the purpose of abating or eliminating pollution of surface waters, the air or waters of the state' under § 70.11(21)(a), 99-00 Stats., is not persuasive. This might be addressed by evidence at trial." *The Newark Group, Inc., et al. v. Dep't of Revenue*, Docket Nos. 99-R-70, 99-R-72 through 99-R-83; 00-M-44 through 00-M-46; 00-M-47; and 00-M-48, Ruling and Order, Slip Op. (WTAC August 26, 2002).

However, petitioner addressed the issue of abating or eliminating

pollution of waters and air by having an expert testify at the trial. (March 4, 2003 Transcript, pp. 80-137.) Petitioner's expert witness, Sherrie Gruder, testified that based on her knowledge, research, and experience in the field of recycling and pollution prevention, her opinion "to a reasonable degree of scientific certainty" . . . "is that there's a very profound connection between using recycled materials and the mitigation of air and water pollution" (March 4, 2003 Transcript, pp. 86-87.)

Ms. Gruder explained how recycling waste paper uses far less energy and reduces air and water pollution than making paper from trees. She also stated that if OCC or waste paper were not recycled, it would either be put in a landfill or incinerated. Recycling would abate or eliminate water and air pollution. *See Findings of Fact Nos. 38 and 39.* The Department contends that this undisputed testimony does not demonstrate that petitioner's recycling operations contribute to abating or eliminating water or air pollution. (Post-hearing Brief, pp. 13, 17-18.) We disagree. The Department knew or should have known that its contention is without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The Department asserts that there is no testimony in the record from any grocery store operator to support this inference that OCC would be sent to landfills or incinerators if petitioner did not purchase it. (Post-hearing Brief, pp. 16-17.) This is true. However, no grocery store operator's testimony is necessary because petitioner's expert, Ms. Gruder, provided this information. The Department knew or should have known that its argument was without any reasonable basis in law and could not be supported

by a good faith argument for an extension, modification or reversal of existing law.

The Department also contends that preventing pollution by avoiding landfills or incinerators does not support petitioner's case. The Department states that even if the Commission were to "accept this indirect relationship, landfills are used to dispose of solid waste . . . [and] [t]reating solid waste is not included in the language of" § 70.11(21). (Post-hearing Brief, p. 17.) To the contrary, "treatment of industrial wastes" to reduce air or water pollution is specified as one requirement to be a "waste treatment facility." § 70.11(21). The Department knew or should have known that its argument was without any reasonable basis in law and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The Department cites language in § 70.11(21) requiring that a waste treatment facility be used "for the purpose of abating or eliminating pollution" of air or water. True. But the Department then states, "Preventing waste is not a waste treatment function." (Post-hearing Brief, p. 18.) The assertion that preventing pollution is not covered by the statute's language "abating or eliminating pollution" is absurd. "Preventing" can be equated to "eliminating." Even if this were not so, "preventing" could be seen as a higher, more desirable standard, as it would avoid the need for eliminating pollution. The Department knew or should have known that its argument was without any reasonable basis in law and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

IT IS ORDERED

1. That the Department's actions on the petitions for redetermination

are modified by the conclusion that petitioner's Paperboard division constitutes a waste treatment facility described above in this Decision and Order and, as modified, are affirmed;

2. That petitioner's motion for attorney fees and costs is granted under Wis. Stat. § 814.025, for contesting (1) in its summary judgment and post-hearing briefs the Department's arguments that Paperboard's raw material was not waste within the definitions referenced in Wis. Stat. § 70.11(21)(a) and (2) in its post-hearing briefs the Department's arguments that Paperboard's activities do not abate or eliminate water or air pollution;

3. That within 30 days from the date of this Decision and Order, petitioner or its counsel shall file with the Commission an affidavit detailing its eligible costs under Wis. Stat. § 814.04, plus reasonable attorney fees, incurred with respect to items in the previous paragraph. Within 30 days from the date petitioner's statement is filed with the Commission, the Department may file a response to the statement. Within 30 days from the date the Department's response is filed with the Commission, petitioner may file a reply.

Dated at Madison, Wisconsin, this 22nd day of March, 2004.

WISCONSIN TAX APPEALS COMMISSION

Don M. Millis, Commission Chairperson

Thomas M. Boykoff, Commissioner

