STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE ENVIRONMENTAL TRUST, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	CASE NO. 96-4663RP
SIRROM RESOURCE FUNDING, L.P., Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	CASE NO. 96-4664RP
SOUTHEAST SOLUTIONS, INC., Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	CASE NO. 96-4665RP

ENVIRONMENTAL CORPORATION OF AMERICA, INC., Petitioner,	)	
vs.	)	CASE NO. 96-4666RP
DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	
SIRROM ENVIRONMENTAL FUNDING, LLC, Petitioner,	)	
vs.	)	CASE NO. 96-4836RP
DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	
RESERVOIR CAPITAL CORPORATION, Petitioner,	)	
vs.	)	CASE NO. 96-4929RP
DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	

FINAL ORDER

This matter comes before the undersigned on Petitioners' Motion for Final Order. The Administrative Law Judge has entered two orders in this case, on November 7, 1996 and December 16, 1996, finding, in essence, that as a matter of law, the retroactive application of the review criteria contained in the

proposed rules is improper and that there is no practical circumstance for the proposed rules to have prospective effect, since the program to which they relate and the statutory authority under which they are proposed expired on December 31, 1996. Accordingly, based upon the reasoning asserted in those two orders, upon the allegations in the subject motion and in consideration of the points advanced in the response to the motion and in the Motion for Redetermination and responses to that motion, already ruled upon in this proceeding, it is obvious that the proposed rules at issue in this proceeding have, for all practical purposes, been declared invalid. Moreover, they are now moot.

The Petitioners also seek a determination that the Respondent may no longer rely upon the unpromulgated agency statements or policies which were previously determined to be unpromulgated rules in the Final Order entered in Case No. 95-4606, et seq., because the proposed rules at issue in this proceeding, which represent the agency's attempt at a codification of those unpromulgated policy statements, have now been declared invalid. While the undersigned is certainly aware of the ramifications of the Petitioners' arguments that the agency may no longer rely upon the unpromulgated statements, especially in view of the fact that the existing rule apparently treats the same subject matter, the undersigned has no authority to actually render such an advisory opinion or declaratory

statement, for the reasons asserted in the Department's response to the motion. Rather, such a determination is for another proceeding at another time. However, the parties' attention is invited to Sections 120.56(4)(d) and 120.56(4)(e), Florida Statutes, which became effective October 1, 1996, which address the manner in which an agency shall be permitted to continue to rely upon an unpromulgated statement as a basis for agency action. It would seem that the scope of this statutory authority concerning the agency's reliance upon unpromulgated statements might be bounded by the extent of the authority of the existing rule on the subject matter, referenced in the undersigned's earlier order.

Be that as it may, the issues pertaining to the validity of the proposed rules themselves are all that are pending before the undersigned in this proceeding. Those issues have now been decided, save for the related question of the Petitioners' entitlement to attorney's fees for this proceeding. Accordingly, having considered the motion and responses thereto, the previous orders and related arguments of the parties, it is, therefore

ORDERED that the proposed amendments to Rule 62-773, Florida Administrative Code, are hereby declared to be invalid. Jurisdiction is reserved for a determination of the Petitioners' entitlement to, and amount of, attorney's fees and costs. The parties shall, within seven days of the date hereof, provide the

undersigned with suggested hearing dates concerning the matter of attorney's fees and costs.

DONE AND ORDERED this 12th day of February, 1997, in Tallahassee, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

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FINAL ORDER

Pursuant to notice this cause came on for formal hearing before P. Michael Ruff, duly designated Administrative Law Judge, on March 11, 1997, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner Southeast Solutions, Inc.:

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For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUE

The issues to be resolved in this proceeding concern whether the Petitioners are entitled to an award of attorneys' fees and costs for the underlying rule challenge proceeding and for seeking recovery of such attorneys' fees and costs. The amount of attorney's fees and costs to be awarded if entitlement is proved must also be determined.

PRELIMINARY STATEMENT

This is an attorneys' fee proceeding in which the Petitioners are requesting attorneys' fees and costs related to their successful challenge of a proposed rule of the Florida Department of Environmental Protection (DEP). A Final Order was

entered in that proceeding on February 12, 1997, declaring the proposed rule invalid. A hearing was conducted in this proceeding on March 11, 1997, on the issue of entitlement to attorneys' fees and costs which embodied the issue of whether the actions of the agency in proposing the rule amendments were substantially justified and whether special circumstances existed which would make an award of attorneys' fees and costs unjust.

The hearing thereafter scheduled for March 17, 1997, to determine the amount of attorneys' fees and costs if such an award were made, was cancelled because the parties stipulated to hourly rates, fees and costs and no factual issues then remained for adjudication. (See stipulation filed March 13 and 14, 1997, Motion filed March 17, 1997, and Order issued March 17, 1997.) Upon presentation of testimony and argument in the March 11, 1997 hearing, that proceeding was concluded a transcript thereof was requested and filed and in due course the parties timely filed proposed final orders, which have been considered in the rendition of this final order.

FINDINGS OF FACT

1. The Department published in the Florida Administrative Weekly a Notice of Rule Development for Rule 62-773, Florida Administrative Code, on March 22, 1996. The Department thereafter published a Notice of Workshop concerning the Rule in the June 7, 1996 issue of the Florida Administrative Weekly (FAW). It thereafter published a Notice of Proposed Rule-Making

pursuant to Section 120.54(1), Florida Statutes (1995), in the FAW September 27, 1996, issue. The publication of that Notice began the point of entry time or "window" in which persons or parties aggrieved by the proposed rules could challenge them by filing petitions in opposition.

2. The Petitioners herein filed Petitions for Hearing challenging the proposed rule pursuant to Section 120.56(2), Florida Statutes, between October 1 and October 18, 1997. On November 7, 1996, pursuant to a Motion for Partial Summary Final Order, the undersigned entered an order declaring a portion of the proposed rule to be an invalid exercise of delegated legislative authority. On February 12, 1997, the final order was entered declaring the proposed amendments to 62-773, Florida Administrative Code, invalid and moot.

3. Pursuant to the Petitioner's request for attorney's fees and costs, a hearing was held March 11, 1997, concerning whether the Petitioners are entitled to attorneys' fees and costs pursuant to Section 120.595(2) Florida Statutes, which took effect October 1, 1996. The Department has requested dismissal of that fee request, arguing that Section 120.595(2) is a substantive provision and cannot be retroactively applied in a case in which all the rule-making notices were filed prior to the effective date of that new attorneys' fee provision. The Department's position is that the operative facts were established, rights were vested, and the cause of action

concerning the rules accrued upon the date that the proposed rules were noticed September 27, 1996. The Department also presented factual evidence to show that its actions in proposing the rule amendments were substantially justified and/or that special circumstances existed which would make the award of attorneys' fees and costs unjust.

4. The filing of the Department's Notice of Proposed Rule (NPR) differs significantly from most cases such as auto accident cases or contract cases in which accrual of a cause of action is based upon a clearly defined, unchangeable event (the time and date an auto accident occurred, for example, or the date of execution of a contract). In the case of a challenge to a proposed rule, the agency's unilateral and discretionary authority to modify withdraw or otherwise dispense with the necessity of the filing of an action is not restricted until rule adoption. Section 120.54(3)(d)2, Florida Statutes (Supp. 1996), states: "after the notice required by paragraph (a) and prior to adoption, the agency may withdraw the rule in whole or in part." Until adoption, the rule-making process remains transitory and proceeds solely at the discretion of the agency to keep, modify or withdraw the proposed rule. The rights of the parties did not become fixed until a petition was filed with the Division of Administrative Hearings. Only at that time did the Department lose its unfettered, discretionary authority to cure the illegality of its proposed rule or withdraw it. Section

120.569(2)(a), Florida Statutes (Supp. 1996). (Upon filing of a Petition with the Division of Administrative Hearings, "the agency shall take no further action with respect to the formal proceeding, except as a party litigant, ...")

5. As applied to this case, the Department had complete discretion to withdraw the proposed rule. Given the Department's unilateral authority to cure the illegality of its proposed rules without the necessity of any party having to file a challenge, the Petitioners' cause of action accrued no earlier than the date the Petitioners filed their Petitions. All Petitioners filed their petitions on or after October 1, 1996. Therefore, this cause of action must have accrued after October 1, 1996, and must be a "proceeding" for which attorneys' fees will lie pursuant to Section 120.595(2), Florida Statutes (1996). The twenty-one (21) day point of entry window in which the Petitioners could challenge a proposed rule began on September 28 and extended forward beyond October 1. Therefore, there could be no proceeding to which the attorneys' fees statute referenced could apply until the petitions were filed and the time for filing those petitions extended into the time period after which the new statute concerning attorneys' fees took effect. If the Petitioners had never filed petitions challenging the proposed rules, the proposed rules would have automatically taken effect by operation of law and no dispute, controversy, or "cause of action" would ever have arisen.

Substantial Justification

6. By Final Order dated February 12, 1997, the proposed amendments to Rule 62-773, Florida Administrative Code, which were published in the September 27, 1996, Florida Administrative Weekly (NPR), were declared invalid. The Final Order found as a matter of law that the retroactive application of the review criteria contained in the proposed rule is illegal and beyond the Department's delegated legislative authority.

7. Under Section 120.595(2), Florida Statutes (Supp. 1996), the Petitioners are entitled to an award of reasonable attorneys' fees and costs unless the Department can demonstrate that its actions on the proposed rule-making were substantially justified, or that special circumstances exist. No credible evidence was presented to show the existence of special circumstances.

8. The Department has admitted that all the activities of the parties regulated by the proposed rule (ie. clean up-work and preparation and filing of reimbursement applications) occurred prior to the time the proposed rule could have been adopted, and therefore the proposed rule cannot have any prospective effect on the actions of regulated parties. Mr. Williams, for the Department, testified that, if prospective, the proposed rule "would have no effect."

9. However, the process for the Department's review of reimbursement applications would have been controlled by the

proposed rule if it had been adopted. The Department's witnesses testified that it processes applications using the standards contained in the invalidated proposed rule, regardless of whether it adopted the proposed rule. This raises the question as to whether there is any rational reason for seeking to adopt it.

10. The Department's "action" which must be substantially justified is its attempt to adopt the proposed rule. Given that the proposed rule cannot have any effect at all unless it is applied retroactively, the Department must provide substantial justification for proceeding with a retroactive rule. The Department did not identify any statutory provision that authorized adoption of retroactive rules.

11. John Ruddell, Director of the Division of Waste Management, testified that there were two justifications for adopting the proposed rule. First, the Department intended to clarify the intent of the statute, and second, it recognized that, as non-rule policy, the proposed rule needed to be adopted as a rule. Charles Williams, Administrator of the Reimbursement Section testified that the Department had committed to the Administrative Law Judge in a prior administrative proceeding that it would expeditiously proceed with this rule-making in order to establish a defense to the application of unadopted rules pursuant to Section 120.535, Florida Statutes (1995). The basis for rule-making identified by Mr. Williams is consistent with that expressed by the Department at the rule development

workshop held on July 8, 1996. The transcript for the rule development hearing was filed at the March 11, 1997 attorneys' fee hearing in this case. No other purpose was expressed at the workshop. The Final Order in that case, in which the non-rule policies were found to be rules, was admitted into evidence in this case without objection. Going forward with the rule-making to defend a law suit after the relevant program implemented by the proposed rule was terminated by statute (effective December 31, 1996) does not establish a legal basis for the retroactive application of a substantive rule.

12. The Department's witness testimony explaining these justifications contains no justification for a "clarifying" rule that will not inform anyone about future actions. There is no one to benefit from a clarification. The reimbursement applicants who have already performed work and submitted applications cannot go back in time and conform their activities to those "clarified" interpretations of the statute.

13. The Department's witnesses contradicted each other on whether the proposed rule was needed. Mr. Ruddell testified that the proposed rule formalized non-rule policy that needed to be adopted as a rule. Mr. Williams testified, on the other hand, that there was no need to adopt the proposed rule. He felt that the proposed rule merely "clarified" the existing statute and that the standards were apparent from that existing statute. His testimony was in conflict with the Administrative Law Judge's

finding in the prior proceeding that the standards constituted unadopted rules in and of themselves. His testimony is further called into question by his testimony that he considers all of the rules in Chapter 62-773, Florida Administrative Code, to be nothing more than a "clarification" of Chapter 376, Florida Statutes. Even more confusing is that both witnesses testified that the Department's reimbursement application review process would not be any different before or after adoption of the proposed rule.

14. Given that the only possible effect the proposed rule could have had, if it were adopted, is during the reimbursement application review process (even though the evidence presented was that the review process would be unaffected), the only practical effect would be to substantially alter the burden on a reimbursement applicant who challenges a department reimbursement decision. Adoption of the proposed rule would elevate the basis for the Department's decision on a reimbursement application from incipient policy analyzed on a case-by-case basis to that of a duly adopted rule.

15. Not only would such an after-the-fact change in standards impermissibly violate vested rights but it would be inconsistent with the existing rule on the same subject which expressly requires reimbursement applications to be reviewed in accordance with the laws, rules and guidelines in effect at the

time the work was done. Rule 62-773.100(5), Florida Administrative Code.

16. Based upon the evidence produced at hearing, the Department failed to do an analysis of the practical and legal consequences of its actions. There was evidence that guidance was sought from the Office of General Counsel. However, neither witness could comment on the scope of the inquiry. Given the complete lack of credible legal authority that would allow the expressly retroactive application of substantive standards, the levels of inquiry could not have been complete. In addition, despite the fact that the Department's proposed rule defines financial and economic terms, the Department's staff economist was not consulted. Finally, the Department appears to have ignored the extensive public comments filed during the rule development process prior to publication of the NPR. It was not reasonable for the Department to fail to realize the futility of a prospective proposed rule, when the statutory program was imminently expiring and the obvious illegality of a retroactive proposed rule.

17. Inconsistent and illogical testimony by Department witnesses regarding the Department's other reasons for going forward with this rule-making demonstrate a lack of consideration of whether there was any practical reason whatever to adopt the rule and whether there was any identifiable statutory authority to adopt a retroactively effective rule. Consequently, the

evidence presented by the Department does not demonstrate a sound basis in a law or fact for adopting the proposed rule. In fact, the most credible interpretation of the Department's conduct and the evidence presented is that it affirmatively sought to retroactively impose elevated legal standards on regulated parties. Even if this is not the intended result, it is the indisputable effect of adopting the proposed rule. The Department should have known that it would be impermissible to retroactively convert policy into rule, thereby changing the legal standards applicable to any challenge to the Department's actions on the reimbursement applications.

Scope of the Proceeding

18. The Petitioners, in addition to the invalidation of the proposed rule, sought an order prohibiting the Department from relying on a non-rule policy if the proposed rule was invalidated, the policy being what was putatively codified in the proposed rule. That request by the Petitioners, they maintain was a logical outgrowth of the invalidation of the proposed rules. Therefore, they maintain that the briefing and argument on that issue is beneficial to the proper resolution of this proceeding and that the time spent developing arguments concerning why the Department could not rely on the non-rule policy, if the proposed rule was invalidated, should be included

in this proceeding for purposes of calculating attorneys' fees and costs.

19. After invalidation of the proposed rule, the Petitioners sought attorneys' fees by motion or petition. Substantial work was performed to demonstrate entitlement to their fees and costs, to document the fees and costs, to negotiate stipulations with the Department, to prepare for and attend hearing on the substantial justification issue, and to prepare proposed final orders. The reasonable costs and attorneys' fees expended by the Petitioners directly related to this proposed rule, from the filing of the Petitions through the issuance of the Final Order, are part of this proceeding for purposes of awarding attorneys' fees and costs. It is found that the Petitioners have submitted sufficient records of costs and fees which I have reviewed for the part of this proceeding not covered by the stipulations.

20. The Petitioners also seek attorneys' fees associated with their participation in the rule-making process prior to the Department's submission of the Notice of Proposed Rule Making to the Department of State on September 18, 1997, which was published in the September 27, 1996, issue of the FAW.

21. The time spent on the rule-making issues before the filing of the Notice of Proposed Rule Making and the amounts of money relating thereto, attributable to such proposed attorneys' fees, are depicted on pages 12, 13, and 14 of the Department's

Proposed Final Order. The attorneys' fees the Petitioners seek for time spent in arguing the question of the Department's legal authority to rely upon the agency's statements upon which the proposed rule is based after the rule was invalidated, and the amounts related thereto, are depicted on pages 14, 15, and 16 of the Department's Proposed Final Order. These figures are adopted herein as the correct times and amounts for purposes of those proposed categories of attorneys' fees.

Single $15,000 Fee Cap

22. The Department argues that the $15,000 limitation contained in Section 120.595(2), Florida Statutes (1996), is an amount to be divided among all Petitioners to the proposed rules challenge. Five law firms representing six Petitioners challenged the proposed rules. All Petitioners, except for Reservoir Capital Corporation (hereinafter Reservoir), applied for attorneys' fees and costs; however, Reservoir's attorneys have participated in all of the telephone hearings and conferred with other attorneys in the case. Well over 400 hours have been billed by the attorneys in the aggregate; some of which time was billed for conferring and sending draft copies of documents to each other.

23. The petitions filed herein were filed separately. Each party made independent factual allegations and alleged separate reasons to demonstrate how the substantial interests have been affected. Each proceeding was assigned a separate case

number by the Division of Administrative Hearings. The cases were thereafter consolidated for hearing.

CONCLUSIONS OF LAW

Applicability of Section 120.595(2), Florida Statutes (Supp. 1996).

24. Section 120.595(2), Florida Statutes (Supp. 1996), states that:

> [I]f the court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to Section 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust.

25. Although the NPR was published prior to October 1, 1996, the effective date of Section 120.595, Florida Statutes (Supp. 1996), the Department at that point of publication still had complete unilateral authority to withdraw or modify the proposed rule in whole or in part. If no challenges had been filed, the rule would have proceeded to adoption by operation of law. See Section 120.54(3)(d)2, Florida Statutes (Supp. 1996). The freedom by the agency to unilaterally terminate the rule proposal by withdrawal of the rule (or to modify it) and the Petitioners' inchoate right (at that point)to obtain a declaration that the proposed rule was invalid shows that the vesting or accrual of the parties' rights had not yet become fixed at the point of publication of the NPR. See Williams

College v. Bourne, 677 So. 2d 1118 (Fla. 5th DCA 1996); Young v. Altenhouse, 472 So. 2d 1152 (Fla. 1985).

Because the parties' rights relating to the proposed rule challenge were not legally fixed upon publication of the NPR since the agency was free to unilaterally withdraw, change, or modify the proposed rule at that point, neither were the parties' rights fixed regarding the issue of entitlement to and recovery of attorneys' fees and costs. The agency acted at its peril by publishing the rules so close to the effective date of the subject attorneys' fee statute that the twenty-one (21) day period for challenge to the proposed rules extended beyond that statute's effective date. The agency by its publication of the proposed rule so close to the effective date of the statutory change regarding attorneys' fees, by its own hand set the time period to extend beyond October 1, 1996 for the fixing or vesting of the parties' rights by twenty-one (21) days from September 27, 1996. The subject attorney's fee statute clearly contemplates that attorney's fees be awarded if substantially justified as a result of a "proceeding" in which proposed rules are challenged. Clearly parties are afforded a twenty-one (21) day time period in which to initiate such a proceeding.

Such statutes which impair vested rights, create new obligations or impose new penalties have been held to be substantive and not remedial and as such cannot be retrospectively applied. See State Farm Mutual Auto Insurance

Company v. LaForet, 658 So. 2nd 55 (Fla. 1995); L. Ross, Inc. v. R. W. Roberts Construction Company, 466 So. 2d 1096 (Fla. 5th DCA 1985). Thus, since the substantive statute enacting the attorney's fee provision at issue cannot have retroactive application, in order for it to apply, the crucial facts giving rise to vested substantive rights in the Petitioners must have occurred or become fixed or vested after the effective date of that statute for it to operate. The court in the Ross case, supra, held that the crucial date for the fixing of the key facts or vested rights by which it may be determined whether a statutory obligation is being unconstitutionally retroactively applied is the date the particular cause of action accrued. Speaking through Judge Cowart, the court stated:

> The crucial date is the date of the accrual of the particular cause of action. . . .because that is the date on which the essential facts occurred and were sealed beyond change by the surety and after that event the legislature cannot, ex post facto constitutionally enhance the obligation or penalty that results from those facts. The increased obligation for attorney's fees resulting from the statutory amendment. . . . cannot be constitutionally applied as to causes of action in favor of subcontractors against sureties that were in existence on. . . . the effective date of the statutory amendment.

26. Applying the court's reasoning to the case at hand, it is apparent that the essential facts giving rise to the accrual of the "cause of action" in this matter occurred after the effective date of the subject attorney's fee statute. That is, until the subject twenty-one (21) day window for filing petitions in opposition to the proposed rules elapsed or petitions were

timely filed, whichever occurred first, the essential facts giving rise to the cause of action were not "sealed beyond change." The Department had complete unilateral authority to withdraw the proposed rule in whole or in part anytime prior to adoption or prior to the filing of the rule challenge petitions. Thus, the earliest possible accrual of the parties' vested rights was at the time the rule challenge petitions were filed within the twenty-one (21) day point of entry period which, due to the time the agency chose to notice the proposed rules occurred on both sides of the statutory effective date of October 1, 1996. Thus, the parties' vested rights can be concluded to have accrued only after October 1, 1996, because all the petitions were timely filed after that date. Because the parties' rights did not become legally fixed until after the effective date of the attorney's fee provision, that provision is applicable in this proceeding and does not implicate any retroactive application of substantive law.

27. Mere publication of the purely ambulatory NPR cannot fix the parties rights' in this rule challenge. Given the agencys' freedom to withdraw or amend the rule, publication of the NPR does not provide the challengers with vested rights and cannot be used to create vested rights for the Department to proceed under the pre-October 1, 1996 law.

28. Accordingly, neither the parties' rights relating to the payment and recovery of attorney's fees, nor the underlying cause

of action accrued prior to October 1, 1996. Therefore the operative attorney's fee provision, Section 120.595(2), Florida Statutes (Supp. 1996), is applicable to determine the award and amount of attorney's fees in this proceeding.

Substantial Justification

29. Because the proposed rule which is the subject of this proceeding has been declared invalid, reasonable attorneys' fees and costs must be awarded to the Petitioners "unless the Department demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust." Section 120.595(2), Florida Statutes (Supp. 1996). This section also describes the substantially justified standard as requiring a showing that the Department had a reasonable basis in law and fact at the time of its action.

30. The Equal Access to Justice Act, Section 57.111, Florida Statutes (Supp. 1996), (EAJA), contains language nearly identical to Section 120.595(2) Florida Statutes (Supp. 1996), regarding the "substantially justified" standard. Accordingly, EAJA cases can be consulted for guidance. In order to demonstrate substantial justification for its actions, the Department in this proceeding had to present evidence that it had a "solid though not necessarily correct basis in law and fact for the position it took." The Department of Health and Rehabilitative Services v. S.G., 613 So. 2d 1380 (Fla. 1st DCA 1993).

31. Applicable law states that all reimbursable clean-up work had to be completed prior to August 1, 1996, and all reimbursement applications had to be submitted to the Department on or before December 31, 1996. Section 376.3071(12), Florida Statutes (Supp. 1996). Consequently, any activities by the parties regulated under the proposed rule could not be affected by its adoption. Furthermore, without specific authorization in the statutes, the Department is not authorized to adopt a rule with retroactive effect. Jordan v. Department of Professional Regulation, 522 So. 2d 450-453 (Fla. 1st DCA 1988). ("An administrative rule is operative from its effective date, and, like a statute, is presumed to operate prospectively in the absence of express language to the contrary.") (Citations omitted) The Department itself has specifically recognized the illegality of retroactively applying its rules. Port Everglades Authority v. DER, et al, DOAH Case No. 86-0039, DER Case No. 86-0002 (October 8, 1987). ("To apply the mitigation memo to this application would be contrary to the general rule that administrative regulations will not be applied retroactively. . . . In reviewing the mitigation proposal, the hearing officer should use the policy which was in effect at the time the application was complete.") The Department failed to demonstrate any express or implied authority for adopting a rule with retroactive affect.

32. The facts revealed by the Department's witness indicate its position that the proposed rule is not actually required. However, the Department continued to vigorously proceed with the rule-making process, apparently solely to justify its prior application of unwritten, unadopted rules to reimbursement applications. Its attempted explanation that this non-rule policy must be adopted as a rule might be believable if there was any possibility for it to be prospectively applied. In this case, the only possible application of the proposed rule would be to retroactively create higher standards for applicants challenging the Department's determinations on reimbursement applications.

33. Even if the Department was unable to recognize the practical effect of its actions, it should have considered the comments received during the rule development process, which clearly and without deviation spelled out the impermissible nature of adopting the proposed rule. Based on the testimony and documentary evidence, the Department has not demonstrated substantial justification for proceeding with the adoption of the proposed rule because the proposed rule would have absolutely no prospective effect and the only retroactive effect would be to impermissibly apply new review criteria and elevate the Petitioner's burden of proof in a proceeding challenging the Department's reimbursement application review decisions. None of the grounds which the Department raised at the hearing would be

relied upon by reasonable persons, particularly where the invalidity of the rule had been clearly explained by public comments during the rule development process. The Department has failed to demonstrate that its actions in this case, in issuing a proposed rule explicitly calling for a retroactive application of substantive application review standards, were substantially justified or that special circumstances existed that would make the award unjust.

Time Spent in Rule Making and
in Discussing Reliance on Unpromulgated Agency Policy

34. The Petitioners have asserted that attorneys' fees and costs should be awarded for the time they spent in the "free-form," pre-proceeding, rule-making process. First, the Petitioners did not challenge the manner in which the agency conducted its rule-making process. No allegation was made that proper notices or other requirements of Section 120.54 were not met. It would be an "impermissible extension of the statutory language" to award attorney's fees for time spent in rule-making. Certain Lands v. City of Alachua, 518 So. 2d 386 (Fla. 1st DCA 1987) (Court would not award fees or costs for years worth of pre-foreclosure work even though fees could be awarded for the foreclosure proceeding itself).

35. Second, neither the statutory provision for the award of fees and costs nor the rule challenge provision requires proposed rule challengers to participate in a rule-making process in order to receive attorney's fees and costs, nor does the

statute indicate that the award of fees and costs should include time spent participating in rule-making. Section 120.54, Florida Statutes, governing rule-making also does not require challengers to participate in the rule-making process. As noted above, statutory awards of attorney's fees must be strictly construed Pena, at 960. There is simply no language in Chapter 120, Florida Statutes, indicating that prevailing Petitioners in a proposed rule challenge may receive cost or attorneys' fees expended while participating in the separate rule-making process.

36. Third, the rule-making process in Section 120.54, Florida Statutes, was established to encourage public participation. If successful rule challenger Petitioners, pursuant to Section 120.595(2), are allowed to re-coup attorney's fees and costs expended in attending multiple workshops held at multiple locations across the state, agencies would be reluctant to voluntarily hold more than one workshop for fear of having to pay those travel and attorney expenses. Additionally, by awarding fees and costs incurred while participating in rule-making as a result of a successful rule challenge, the rule-making process will be transformed from open discussion to pre-litigation negotiation. Such award would have a chilling effect on the entire rule-making process.

37. The Petitioners have also requested a determination that the Respondent may no longer rely upon the unpromulgated agency statements or policies as referenced in the Final Order

herein at page three. Thus, for litigating and arguing that issue, they maintain that attorneys' fees and costs are due them for that argument in the underlying proceeding. The Final Order issued in this case, however, indicates that "the undersigned has no authority to actually render such an advisory opinion or declaratory statement . . ." and "the issues pertaining to the validity of the proposed rules themselves are all that are pending before the undersigned in this proceeding." Id. Not only was an order not issued providing the relief requested by the Petitioners concerning the agency's continued reliance on the unpromulgated policy, but the final order stated that the instant case was the wrong proceeding in which to seek that relief. The Petitioners did not prevail on that issue and could not have prevailed on it in this proceeding since there was no jurisdiction to grant that which they sought. Therefore, no award of fees and costs expended pursuing that aspect of the claims can be made.

$15,000 per Rule Challenge "Cap" Issue

38. The Department maintains that any award of attorney's fees should be capped at $15,000 for the entire proceeding. Section 120.595(2), Florida Statutes, governs the award of attorney's fees for a proposed rule challenge. "If the Court or Administrative Law Judge declares a proposed rule or a portion of a proposed rule invalid pursuant to Section 120.56(2), a judgment or order shall be rendered against the agency for reasonable

costs and reasonable attorney's fees. . . ." Section 120.595(2). This section also limits the amount by stating that "no award of attorney's fees as provided by this subsection shall exceed $15,000." This is identical to the language limiting attorney's fees in challenges to existing rules.

39. The case law regarding statutory fee caps is limited. The only reported case in which a statutory fee has been construed appears to be Schommer v Bentley, 500 So. 2d 118 (Fla. 1986). In the Schommer case, the Florida Supreme Court construed the statutory fee limitation for court appointed attorneys contained in Section 925.036, Florida Statutes. That section provides that:

> (1). The compensation for representation shall not exceed the following:
>
> (a). For misdemeanors and juveniles represented at the trial level: $1,000.
>
> (b). For non-capitol, non-life felonies represented at the trial level: $2,500.00.
>
> (c). For life felonies represented at the trial level: $3,000.
>
> (d). For capitol cases represented at the trial level: $3,500.00.
>
> (e). For representation on appeal: $2,000.00.

In Schommer, two attorneys from the same firm participated in the representation of a criminal defendant. The court found that if multiple counsel was necessary for the effective representation of the criminal defendant, compensation was allowable under the statute up to the statutory limit for each attorney. The situation presented in this case is analogous to that in Schommer. Each of the parties was, due to the Department's attempt to promulgate a rule that was clearly and facially illegal, required to retain counsel in order to effectively represent and protect its interests against the Department's illegal action. As the attorney's fees provisions of Chapter 120, Florida Statutes, are intended to provide some measure of financial relief in situations in which agencies have acted outside of their authority, the $15,000.00 attorney's fee cap must apply to each party requiring representation.

40. The language of the statute and the legislative history support the fact that the $15,000 cap is to apply to each party forced to bring a proceeding before the Division of Administrative Hearings. Section 120.595(2), Florida Statutes, provides that when an agency prevails in a rules challenge proceeding, the agency is entitled to recover its costs and fees from any party that participated for an improper purpose. Therefore, the agency would be entitled to recovery from multiple parties so long as no recovery exceeded $15,000 and the total amount recovered did not exceed the actual amount expended by the

agency. Similarly, the attorney's fee provision with regard to an agency acting without substantial justification must be read in the same light so as to avoid dilution of the financial ability of a party to bring an action challenging an agency's illegal rule-making.

41. The wording of the statute itself indicates the requirement that each party is entitled to an award of attorney's fees up to $15,000. The provision begins by stating the general requirement that "a judgment or order" must be rendered against the agency for both "reasonable costs" and "reasonable attorneys' fees." Thus, the judgment or order issued by the court or administrative law judge must be for all reasonable costs and attorney's fees. The later provision in the same statute only limits each "award" of attorney's fees to $15,000. Accordingly, each party to the proceeding where a proposed rule is declared invalid is entitled to an award of attorney's fees that does not exceed $15,000. The judgment or order of the court or the administrative law judge, which must be rendered for all reasonable costs and attorney's fees is not similarly limited.

42. A review of the Final Bill Analysis and Economic Impact Statement for Chapter 96-159, Laws of Florida, is also supportive of the fact that the $15,000 cap is to apply to each party forced to bring an action to protect its substantial interest. The bill analysis prepared by the House of Representatives Committee on

Streamlining Governmental Regulations, dated June 14, 1996, provides that:

> For challenges to proposed and existing agency rules, the Governor's Commission recommended that if a proposed rule, existing rule, or portion of a rule is declared valid, the administrative law judge shall award reasonable costs and reasonable attorneys' fees to the petitioner, unless the agency demonstrates that its actions were substantially justified or that special circumstances exist that would make the award unjust (emphasis supplied).
>
> An award of attorney's fees under these provisions shall not exceed $15,000. These provisions are included in subsections (2) and (3) of Section 120.595, Florida Statutes.

It is clear from the legislative history that, although an award is to be made against an agency, it is correspondingly to be made to a petitioner.

43. At least one commentator has noted that the purpose of the attorneys' fees amendments in Chapter 120 "reflect the desired link between formal adoption of rules and agency accountability to the Legislature and to the public." M. J. Edenfield, "Attorneys Fees and Costs," Florida Bar Journal, Volume LXXI, No. 3, March 1997. Ms. Edenfield concluded by stating that:

> Although attorneys fees and costs are by no means automatically awarded to prevailing parties in APA proceedings, the changes brought about by the 1996 Legislature for award of fees and costs make for a more level playing field between the private sector and state agencies.

If the award of fees in multi-party litigation is diluted and

restricted in cases where an agency is found to have acted without substantial justification, the Legislature's intent to level the playing field and allow for effective participation by the private sector will have been thwarted.

For the foregoing reasons, it is concluded that the fee limitation contained in Section 120.595(2), Florida Statutes (1996 Supp), applies to each proceeding filed by each petitioner with the Division of Administrative Hearings challenging the Department's proposed rule amendment. Therefore, the parties to these consolidated proceedings are each entitled to an award of their attorneys' fees and costs up to the statutory $15,000 limit.

In consideration of the foregoing, it is concluded that the Department shall reimburse each Petitioner for their reasonable attorneys' fees and costs incurred in the underlying rule challenge proceeding, and in demonstrating entitlement to attorneys' fees and costs incurred in seeking recovery of attorneys' fees and costs for the time period beginning with the preparation and filing of the Petitioners' petitions, through the issuance of this Final Order. It is, therefore,

ORDERED that the Department shall pay attorneys' fees and costs to the Petitioners in this proceeding as follows (excludes time spent in rule-making and on policy issue):

1. Reservoir Capital Corporation: no attorneys' fees and no costs.

2. Environmental Corporation of America, Inc.: $15,000 for attorneys' fees and $464.93 in costs;

3. The Environmental Trust: $8,844 for attorneys' fees and $81.40 in costs;

4. Sirrom Resource Funding, L. P., and Sirrom Environmental Funding LLC jointly: $12,789 in attorneys' fees and $250.00 in costs; and

5. Southeast Solutions, Inc.,: $14,220.00 for attorneys' fees and $212.00 in costs.

DONE AND ORDERED this 8th day of September, 1997, at Tallahassee, Leon County, Florida.

_____

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

This Final Order is subject to judicial review pursuant to Section 120.68, Florida Statutes.