STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RUSTIC HILLS PHASE III PROPERTY OWNERS ASSOCIATION,	)	
Petitioner,	)	
vs.	)	Case No. 00-4792
RICHARD OLSON; MILDRED OLSON; and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

ORDER DENYING SANCTIONS
UNDER SECTION 120.569(2)(e)

On May 24, 2001, a final administrative hearing was held in this case in Stuart, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH). The issue for final hearing was whether proposals by Richard and Mildred Olson to widen an existing bridge and construct two new pedestrian bridges across Bessey Creek in Martin County, Florida, qualified for the Noticed General Permit established by Florida Administrative Code Rule 62-341.475. (Citations to rules are to the current Florida Administrative Code.)

After presentation of evidence at final hearing, the Olsons moved ore tenus for attorney fees and costs. However, they were required to file a motion, and the other parties

were given an opportunity to respond. It was indicated that jurisdiction would be reserved to rule on the motion.

On June 15, 2001, the Olsons filed their Motion for Attorney's Fees under both Section 120.595(1) and Section 120.569(2)(e). (Citations to sections are to the 2000 codification of Florida Statutes.) Citing statements in DEP's proposed recommended order (PRO), the Motion for Attorney's Fees stated that DEP "would join in the Olsons' motion for sanctions."

DEP did not file a response to the Motion for Attorney's Fees. However, as indicated in the Olsons' motion, DEP stated in its PRO that it "joins in that motion." Petitioner did not file a response to the Olsons' motion in the time allotted by Rule 28-106.204(1). But on July 3, 2001, counsel made a limited appearance for Petitioner for the purpose of responding to the Motion for Attorney's Fees and asked for permission to file Petitioner's late response in opposition.

On July 12, 2001, the Olsons filed a reply in opposition to Petitioner's response on both procedural grounds (lateness) and substantive grounds (lack of merit). DEP did not file a response to Petitioner's request for permission to file a late response to the Olsons' motion. Permission to file the late response was granted in the Recommended Order entered July 30, 2001, and the response has been considered.

The request made under Section 120.595(1) was addressed and ruled upon in the Recommended Order. As indicated in the Recommended Order, the procedures (and, to some extent, substantive law) are different under Section 120.569(2)(e). Under Section 120.569(2)(e), DOAH has jurisdiction to enter the final order. See Procacci Commercial Realty, Inc. v. Dept. of Health and Rehab. Services, 690 So. 2d 603, 606 (Fla. 1st DCA 1997); Dept. of Health and Rehab. Services v. S.G., 613 So. 2d 1380, 1384-85 (Fla. 1st DCA 1993). The Recommended Order reserved jurisdiction to determine the request and enter the final order under Section 120.569(2)(e).

Section 120.569(2)(e) provides that signatures on pleadings, motions, or other papers certify that the signatory has read the document and that "based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation."

Case law holds that an objective standard is used to determine improper purpose for the purpose of imposing sanctions on a party or attorney under Section 120.569(2)(e) and predecessor statutes. As stated in Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 49-51 (Fla. 1st DCA 2000):

> In the same vein, we stated in Procacci Commercial Realty, Inc. v. Department of

> Health and Rehabilitative Services, 690 So.2d 603 (Fla. 1st DCA 1997): The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." Id. at 608 n. 9 (quoting Pelletier v. Zweifel, 921 F.2d 1465, 1515 (11th Cir.1991)). See In re Sargent, 136 F.3d 349, 352 (4th Cir.1998) ("Put differently a legal position violates Rule 11 if it 'has "absolutely no chance of success under the existing precedent." ') Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir.1991)(quoting Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir.1987))."
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> Whether [predecessor to Section 120.595(1)] section 120.57(1)(b)5., Florida Statutes (1995), authorizes sanctions for an initial petition in an environmental case turns . . . on the question whether the signer could reasonably have concluded that a justiciable controversy existed under pertinent statutes and regulations. If, after reasonable inquiry, a person who reads, then signs, a pleading had "reasonably clear legal justification" to proceed, sanctions are inappropriate. Procacci, 690 So.2d at 608 n. 9; Mercedes, 560 So.2d at 278.

Petitioner only filed two papers in this case: its request for hearing, filed on November 20, 2000; and its witness and exhibit list, filed on May 8, 2001. The findings of fact pertinent to the request under Section 120.569(2)(e) are set out in the Recommended Order. For essentially the

reasons set out in the Recommended Order why, under the totality of the circumstances, it was not proven that Petitioner's participation in this proceeding was for an improper purpose, grounds for sanctions under Section 120.569(2)(e) likewise were not proven.

In addition, it was held in Mercedes Lighting and Electric Supply, Inc. v. Dept. of General Services, 560 So. 2d 272, 276 (Fla. 1st DCA 1990), that the case law construing Rule 11 of the Federal Rules of Civil Procedure was useful in applying a predecessor statute to Section 120.569(2)(e). The court went on to state:

> The rule's proscription of filing papers for an improper purpose is designed to discourage dilatory or abusive tactics and to streamline the litigation process. The rule is aimed at deterrence, not fee shifting or compensating the prevailing party. In short, the key to invoking rule 11 is the nature of the conduct of counsel and the parties, not the outcome. Schwarzer, "Sanctions Under the New Federal Rule 11--A Closer Look," 104 F.R.D. 181, 185 (1985). A party seeking sanctions under rule 11 should give notice to the court and the offending party promptly upon discovering a basis to do so. Advisory Committee Note to Rule 11. If it may be fairly accomplished, the court should then promptly punish the transgression. In re Yagman, 796 F.2d 1165, 1183 (9th Cir.1986). See also, Ortho Pharmaceutical v. Sona Distributors, Inc., 117 F.R.D. 170, 173 (S.D.Fla.1986). If an obvious and recognizable offending pleading is filed, the court at the very least should provide notice to the attorney or party that rule 11 sanctions will be assessed at the end of

> the trial if appropriate. The purpose of the rule--deterring subsequent abuses--is not well served if an offending pleading is fully litigated and the offender is not punished until the trial is at an end. See In re Yagman, 796 F.2d at 1184-6; and Ortho Pharmaceutical, 117 F.R.D. at 173.
> One of the basic tenets of rule 11 enforcement appears to be, not surprisingly, that a party is required to take action to mitigate the amount of resources expended in defense of the offending pleading or motion. In his article, Schwarzer comments:
> Normally, although not necessarily always, a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition either in the process of narrowing issues under Rule 16 or by motion. Only in the rare case will the offending party succeed in delaying exposure of the baseless character of its claim or defense until trial. Permitting or encouraging the opposing party to litigate a baseless action or defense past the point at which it could have been disposed of tends to perpetuate the waste and delay which the rule is intended to eliminate. It also undermines the mitigation principle which should apply in the imposition of sanctions, limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper.
> Schwarzer, 104 F.R.D. at 198.

Id. at 276-277. In this case, both the Olsons and DEP waited until final hearing to seek sanctions. Indeed, the basis for seeking sanctions was the weakness of the evidentiary presentation by Petitioner, not the lack of a "reasonably clear legal justification" for the papers filed by Petitioner. The delay in seeking sanctions also militates, in and of

itself, against granting sanctions, especially as to Petitioner's request for hearing.

Finally, the Order of Pre-Hearing Instructions entered in this case was "reasonably clear legal justification" for filing Petitioner's witness and exhibit list. It required the parties to exchange witness lists and copies of exhibits, and file their witness lists, by May 14, 2001.

For the foregoing reasons, the Motion for Attorney's Fees from Petitioner under Section 120.569(2)(e) is denied.

DONE AND ORDERED this 31st day of July, 2001, in Tallahassee, Leon County, Florida.

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J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 31st day of July, 2001.

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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.