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.	)	

RECOMMENDED ORDER

On May 24, 2001, an administrative hearing was held in this case in Stuart, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Dan White, pro se
Rustic Hills Phase III
Property Owners Association
3337 Southwest Bessey Creek Trail
Palm City, Florida 34990

For Respondent DEP:

Francine Ffolkes, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
The Douglas Building, Mail Station 35
Tallahassee, Florida 32399-3000

For Olsons: Tim Morell, Esquire
1933 Tom-a-Toe Road
Lantana, Florida 33426

STATEMENT OF THE ISSUES

The issues in this case are: (1) whether proposals by Richard and Mildred Olson to widen an existing bridge (designated Bridge 1) and construct two new pedestrian bridges (designated Bridges 2 and 4) across Bessey Creek in Martin County, Florida, qualify for the Noticed General Permit established by Rule 62-341.475; and (2) whether Petitioner participated in this proceeding for an improper purpose under Section 120.595(1). (Citations to sections are to the 2000 codification of Florida Statutes. Rule citations are to the current Florida Administrative Code.)

PRELIMINARY STATEMENT

On May 24, 2000, the Olsons applied to use the Noticed General Permit (NGP) established by Rule 62-341.475 for their proposals and for authorization to use state-owned submerged lands (for bridge pilings). Their application was given DEP File No. 43-0137548-002. Subsequently, DEP determined that two applications were required because the proposals were associated with different lots owned by the Olsons; and on September 7, 2000, DEP created a second application for the two bridges

associated with lot 191 (Bridges 1 and 2). The second application was given DEP File No. 43-0158123-002.

On November 1, 2000, DEP sent the Olsons a letter informing them that their projects qualified for use of the NGP and for a State Programmatic General Permit (signifying compliance with any applicable federal requirements) but that the private easements were not being granted pending submission of additional information.

On November 20, 2000, Petitioner, Rustic Hills Phase III Property Owners Association (POA), through its officers, requested an administrative hearing on DEP's intended actions. Petitioner complained that the proposed bridges "create a potential for upstream flooding." They complained that Bridge 1 and another existing pedestrian bridge (Bridge 3) connecting Olson property on either side of Bessey Creek were in disrepair and created flooding risk which the proposals would exacerbate if the proposed new bridges were allowed to fall into similar disrepair. They also complained that the existing bridges were lower than depicted in application drawings. They requested that the existing bridges be repaired or demolished. Finally, citing Rule 18-21.010, Petitioner contended that the Olsons did not establish that their proposals were not contrary to the public interest.

DEP referred the request for hearing to DOAH, where it was given DOAH Case No. 00-4792, and an Initial Order was issued on December 4, 2000. Neither party responded to the Initial Order. Upon inquiry, counsel for DEP informed DOAH that the parties had not received the Initial Order, and an Amended Initial Order was issued on March 23, 2001. On April 26, 2001, the Olsons' environmental consultant filed a letter complaining that Petitioner had not coordinated a response to the Amended Initial Order, but no party complied with the Amended Initial Order until May 1, 2001, when DEP and the Olsons filed a joint response indicating their inability to get input from Petitioner.

Based on the joint response by DEP and the Olsons, final hearing was scheduled for May 24, 2001, in Stuart, Florida. An Order of Pre-Hearing Instructions also was entered requiring the parties to: exchange witness lists and copies of exhibits, and file their witness lists, by May 14, 2001; and discuss settlement by May 18, 2001.

Petitioner and the Olsons timely filed their witness lists. DEP did not file a witness list, and there was no indication or evidence that DEP exchanged exhibits or witness lists.

On May 18, 2001, the Olsons' consultant filed a copy of a letter to Petitioner documenting his request to discuss

settlement with Petitioner. There was no indication or evidence that DEP attempted to discuss settlement.

Counsel made an appearance for the Olsons in place of their consultant on May 23, 2001, the day before final hearing.

At final hearing, it was established that DEP had no jurisdiction to require demolition or repair of existing bridges in this proceeding, and Petitioner agreed to withdraw any such request for relief. (Petitioner conceded that those issues, as well as perhaps others, were being raised in County permit proceedings and may not have been relevant to this administrative proceeding.) It also was established that issues relating to the "public interest" test under Rules Chapter 21-18 were premature since DEP had not yet proposed to grant private easements for the proposed projects. Petitioner then attempted to raise water quality issues relating to excrement from Olson livestock crossing the bridges (apparently one of the issues being raised in County permit proceedings), but no such issue was raised in Petitioner's request for hearing, and Petitioner was not permitted to add it at final hearing.

After opening statements, the Olsons called: Dan White, President of the POA, as an adverse party witness; Bruce Jerner, their environmental consultant; and Richard Olson. They also had Olsons' Exhibits 1 (A-F), 2 (A-D), 3, 4, and 5 admitted in evidence. DEP called Darrell Deleeuw, Environmental Specialist

II, and had DEP Exhibits 1 and 2 (the application files) admitted in evidence. White testified for Petitioner, which offered no exhibits in evidence. The Olsons recalled Jerner in rebuttal, and White testified again in surrebuttal.

After presentation of evidence, the Olsons moved ore tenus for attorney fees and costs but 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.

The Olsons requested a transcript of the final hearing, and the parties were given ten days from the filing of the transcript in which to file proposed recommended orders (PROs).

The Transcript was filed on June 1, 2001. The Olsons and DEP timely filed PROs; Petitioner did not file a PRO.

On June 15, 2001, the Olsons filed a Motion for Attorney's Fees under both Section 120.595(1) and Section 120.569(2)(e). Citing statements in DEP's 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 has not filed a response to Petitioner's request for permission to file a late response to the Olsons' motion. Permission to file the late response is granted, and the response has been considered.

FINDINGS OF FACT

1. Richard and Mildred Olson own property in Rustic Hills Phase III in Martin County, Florida. The Olsons own lots 191, 192, 195, 212, 213, and 214. Each lot is approximately two acres in size. The Olson home is on lot 213, and a rental home is on lot 195. On their property, the Olsons raise miniature goats, guinea hens, and peacocks; they also have ducks, geese, chickens, and dogs.

2. Bessey Creek winds through Rustic Hills and the Olsons' lots. The Olsons propose to use DEP's NGP for Minor Activities established by adoption of Rule 62-341.475 to widen one existing bridge and construct two others for access to their property across Bessey Creek.

3. Bessey Creek is a tributary of the St. Lucie River, through man-made Canal 23. Navigating upstream on Bessey Creek,

a boat would have to pass under the Murphy Road Bridge, which is 9 feet, one inch above mean high water (MHW), just before reaching the first of the four bridges involved in this case, Bridge 1. Bridge 1 is a steel span bridge (with no pilings in the water) that connects two portions of lot 191, which is split by the creek. The Olsons propose to widen existing Bridge 1. It is not clear from the evidence whether pilings will be required to widen Bridge 1. But it seems clear that a centerline stream clearance (horizontal width) of 16 feet and a bridge height above mean high water (MHW) (vertical clearance) of 9 feet will be maintained.

4. Proposed pedestrian Bridge 2 is the next bridge upstream, at a point where the creek is only approximately 24 feet wide from MHW to MHW. It is designed to be a 192 square foot piling-supported bridge, with an 8-foot wide by 24-foot long walkway. To support Bridge 2, sets of pilings will placed in the creek bed so as to maintain a centerline stream clearance of 16 feet. The proposed vertical clearance for Bridge 2 is 8 feet above MHW.

5. Existing Bridge 3, the next upstream, is at a point where the creek is approximately 35 feet wide from MHW to MHW. Bridge 3 is a wooden bridge approximately 25 years old. It connects lots 192 and 193 to lot 191. The Olsons use existing Bridge 3 on a daily basis. Bridge 3 was built to span the

creek; later, two sets of wooden piles were added. There is a centerline stream clearance of 13 feet between the piles. Vertical clearance is 8 feet above MHW.

6. Proposed pedestrian Bridge 4, the farthest upstream, is designed in the same manner as proposed pedestrian Bridge 2. It is located at a point where the creek is approximately 35 feet wide from MHW to MHW. Bridge 4 will connect lots 195 and 212.

Navigability

7. Proposed pedestrian Bridges 2 and 4 are designed to have the same 8-foot vertical clearance as existing Bridge 3; they are designed to have three feet more horizontal clearance than existing Bridge 3. Neither they nor widened Bridge 1 will restrict navigation as much as existing structures, natural conditions (including numerous fallen trees, underwater snags and low, overhanging vegetation), and docked boats. The United States Coast Guard and the Florida Fish and Wildlife Conservation Commission (FFWC) concur that the bridges would not have any deleterious effect on the navigation in this area of Bessey Creek.

8. While not specifically alleging impedance of navigation, Petitioner alleged that existing Bridges 1 and 3 are lower than measured by the Olsons' environmental consultant. But there was no evidence to support such a finding. Meanwhile, the Olsons' consultant explained how he determined the vertical

clearance of those bridges above MHW by measurements adjusted for MHW using NOAA tide charts.

9. Even if existing Bridges 1 and 3 had less vertical clearance than determined by the Olsons' consultant, Bridges 2 and 4 are designed to have the same vertical clearance as the consultant determined Bridge 3 to have. For that reason, even if the consultant's determinations were incorrect, the vertical clearances of Bridges 2 and 4 are designed to be the same as the vertical clearance of Bridge 3, and the vertical clearance of Bridges 2 and 4 will not impede navigation any more than Bridge 3.

Flooding

10. Bessey Creek is a typical tidal creek. It has low volume and low velocity. Being influenced by tidal ebb and flow, its flow is not continuously downstream except during and just after times of high precipitation, such as hurricanes. Under these conditions, build-up of debris around pilings of these bridges would not be expected, and none was observed around at the existing bridges. The chances of vegetation or organic matter building up over time in the area of these bridges to create a beaver dam effect and cause flooding are small.

11. The proposed new pedestrian bridges have four pilings, which is typically less than a single-family dock. The pilings

of a single-family dock are closer to the shoreline and, particularly with a boat alongside, would have more potential to trap debris and cause flooding than the proposed bridges. The same can be said of the fallen trees and low, overhanging vegetation existing under natural conditions in Bessey Creek.

12. The proposed bridges are not expected to have an adverse impact of a significant nature with respect to off-site flooding.

13. Petitioner did not present any expert testimony regarding allegations of off-site flooding potential. Dan White testified as a lay person that flooding occurs in the area during times of high precipitation and that Petitioner was concerned that the proposed bridges would exacerbate those conditions. But, while the evidence was clear that flooding is a condition to be expected under certain conditions in low-lying areas like Rustic Hills Phase III, White failed to make any causal connection between existing periodic flooding and the bridges, existing or proposed.

Improper Purpose

14. Petitioner's request for hearing, by letter dated November 16, 2000, thanked DEP for "this opportunity to contest the granting of a Noticed General Permit to the Olson's [sic]" and also requested "an Administrative Review to ensure your department has all the information needed to make a fair

decision regarding this matter." It also requested: "Since we are a small community, I hope the Department will review this petition in light of the author's lack of familiarity with the specific form and format used by the environmental consultants and those who work with you on a regular basis." Petitioner "respectfully submit[ted] the following information which is required to dispute the Department's actions and to request an Administrative hearing if necessary." In response to Petitioner's letter, DEP referred the matter to DOAH.

15. Apparently, Petitioner (and the other parties) did not receive a copy of the Initial Order. Petitioner, which was not represented by counsel at the time, failed to comply with the Amended Initial Order entered on March 23, 2001. But apparently neither did the Olsons, who also were not represented by counsel at the time, or DEP, which was. The Olsons complained by letter filed April 26, 2001, that Petitioner had not contacted them. But there was no indication or evidence that, up to that point in time, the Olsons attempted to contact Petitioner or DEP, or that DEP attempted to contact Petitioner or the Olsons, in response to the Amended Initial Order.

16. The Joint Response to Initial Order filed by the Olsons and DEP on May 1, 2001, recited that Petitioner's contact person-of-record, Treasurer Jim Fyfe, "no longer was associated with Rustic Hills" and that Petitioner's President, Dan White,

was "out of town and could not be reached." Based on the Joint Response to Initial Order filed by DEP and the Olson's, final hearing was scheduled for May 24, 2001.

17. The Order of Pre-Hearing Instructions entered along with the Notice of Hearing on May 3, 2001, required that the parties exchange witness lists and copies of exhibits and file their witness lists by May 14, 2001. Petitioner complied with the requirement to file a witness list and also included a list of exhibits. There was no indication or evidence that Petitioner did not exchange exhibits as well.

18. The Order of Pre-Hearing Instructions also required: "No later than May 18, 2001, the parties shall confer with each other to determine whether this cause can be amicably resolved." When the Olsons' environmental consultant, Bruce Jerner, went to Dan White's home on May 14, 2001, to provide him a copy of the Olsons' exhibits, he invited White to discuss settlement in accordance with the Order of Pre-Hearing Instructions. White responded to the effect that, even if Petitioner did not have a strong case, Petitioner preferred to go to hearing, and White did not want to mediate or discuss settlement with Jerner. At that point, Jerner indicated that he would be sending White a letter confirming the Olsons' attempt to comply with the Order of Pre-Hearing Instructions. The letter dated the next day requested "an informal conference to determine whether the above

referenced case can be amicably resolved and avoid hearing proceedings."

19. Significantly, there was no indication or evidence that DEP complied with the Order of Pre-Hearing Instructions in any respect. It appears that DEP distanced itself from the dispute between Petitioner and the Olsons, preferring to allow them to settle or litigate as they saw fit. In view of DEP's noncompliance, DEP at least certainly may not rely on Petitioner's noncompliance as a ground for an award of attorney fees and costs. In addition, while DEP's noncompliance does not excuse Petitioner from complying, it helps put Petitioner's actions in context and is relevant on the question whether Petitioner's noncompliance was evidence of improper purpose. In this regard, White testified to his belief that he had complied with all ALJ orders but did not "know why I would be obligated to respond to the consultant for Mr. Olson with regard to hearing or any other matters."

20. While DEP and the Olsons in part cite Petitioner's failure to follow prehearing procedures, they primarily rely on the weakness of Petitioner's presentation at final hearing and posthearing efforts as evidence of improper purpose. But this evidence must be evaluated along with other factors resulting in the weakness of Petitioner's case.

21. Not only did White misinterpret the Order of Pre-Hearing Instructions, the evidence indicated that he was unfamiliar with the administrative process in general and also was confused about the difference between the administrative hearing scheduled for May 24, 2001, and the County permitting proceedings on the bridges which also were on-going. White indicated repeatedly during final hearing that he and Petitioner had just recently learned more about distinctions between the administrative and County permit proceedings. As a result, White was beginning to recognize that several issues Petitioner had attempted to raise in this administrative proceeding may be relevant to on-going County permit proceedings but not this administrative proceeding.

22. When it was established and explained at final hearing that DEP had no jurisdiction to require demolition or repair of existing bridges in this proceeding, White agreed to withdraw that part of Petitioner's request for relief. When it was established and explained that issues Petitioner raised relating to the "public interest" test under Rules Chapter 21-18 were premature, White did not object to those issues being dropped. Later, when Petitioner attempted to raise water quality issues relating to excrement from Olson livestock crossing these bridges, and it was ruled that no such issue was raised in Petitioner's request for hearing, White accepted the ruling.

23. Final hearing proceeded on the only remaining issue specifically raised by Petitioner (alleged off-site flooding) (together with navigability--an issue addressed in the Olsons' presentation but not raised in Petitioner's request for hearing). To use White's words, Petitioner did not "have a very sophisticated presentation." Petitioner had no expert testimony, and White's lay testimony did not make a causal connection between flooding and the bridges.

24. After the presentation of evidence, Petitioner did not withdraw its request for hearing in view of the evidence presented; but, in fairness, neither was Petitioner asked to do so. Petitioner did not order a Transcript, or a copy after the Olsons ordered a Transcript, and did not file a PRO.

25. It is fairly clear from the evidence that Petitioner did not participate in this proceeding primarily to cause unnecessary delay. Even if Petitioner had never requested a hearing, the Olsons did not have all of the authorizations required of DEP for their proposals. In addition, County permits apparently also are required.

26. It seems reasonably clear that, had Petitioner retained a competent expert to evaluate its case, the expert probably would have advised Petitioner that it would not be able to make a causal connection between flooding and the bridges. Had Petitioner retained counsel prior to final hearing, counsel

probably would have advised Petitioner not to proceed with its request for hearing because, without a causal connection between flooding and the bridges, Petitioner would not be able to prevail. But there was no indication or evidence that Petitioner had and disregarded the benefit of professional advice.

27. Under the totality of these circumstances, it was not proven that Petitioner's participation in this proceeding was for an improper purpose--i.e., primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of the Olsons' applications.

CONCLUSIONS OF LAW

28. Rule 62-341.201 sets out the policy and purpose of noticed general permits (NGPs). Rule 62-341.215 sets out the general conditions for all NGPs. Rule 62-341.475 establishes a NGP for minor activities. As provided in Subsection (1)(a)-(c) of the rule, the Olsons' proposals are eligible for this NGP.

29. Rule 62-341.475(2) states in pertinent part that, in order to qualify for this NGP, an applicant must provide reasonable assurance that the proposed system:

> (a) does not significantly impede navigation and does not entail the construction of a structure for the launching or mooring of a boat when navigational access to the structure does

> not currently exist; describes the minor systems to which it applies.
> (b) does not cause a violation of state water quality standards;
> (c) does not impede the conveyance of a stream, river or other watercourse in a manner that would increase off-site flooding . . ..

30. The NGP, with all permit conditions, are set out in the above-cited rules. The only issue presented in this case is whether the Olsons have qualified for the NGP by providing the requisite assurance. See D'Antoni v. Dept. of Environmental Protection and Boston, 2000 WL 1176609 (Fla. Dept. Env. Prot.), 22 FALR 2879 (2000); Castoro, et al. v. Palmer and Dept. of Environmental Protection, 1998 WL 901857 (Fla. Dept. Env. Prot.).

31. Petitioner never raised Subsection (2)(b) of the rule before final hearing, and it was waived. Petitioner did not specifically raise Subsection (2)(a) before final hearing, but the Olsons addressed it and provided reasonable assurance. The Olsons also provided reasonable assurance as to Subsection (2)(c), the only part of the rule raised in the request for hearing.

32. Petitioner also requested a hearing on the "public interest" test in Rules Chapter 18-21, but DEP did not grant the Olsons a private easement yet, and Petitioner's challenge is premature.

33. DEP and the Olsons have moved for attorney's fees and costs under Sections 120.569(2)(e) and 120.595(1). Jurisdiction will be reserved to determine the request under Section 120.569(2)(e) because DOAH has jurisdiction to enter the final order under that statute. 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). Under Section 120.595(1), the procedures (and, to some extent, substantive law) are different.

34. Section 120.595(1) provides in pertinent part:

> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection and s. 120.569(2)(e). In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or

> more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.
> (d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.
> (e) For the purpose of this subsection:
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

(Emphasis added.)

35. The "definition" of improper purpose in Section 120.569(2)(e) is not identical to the definition in Section 120.595(1)(e)1. 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."

36. Construing the definition in Section 120.595(1)(e)1 in pari materia with the "definition" in Section 120.569(2)(e), it

is concluded that Section 120.595(1) only references the examples of improper purposes cited in Section 120.569(2)(e) but that participation in a proceeding is for an improper purpose under Section 120.595(1) only if it is "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity." (If such a limitation on the definition is not part of Section 120.569(2)(e), Section 120.595(1)(a) provides that its provisions are "supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.")

37. There is no evidence or indication that the rebuttable presumption of improper purpose created by Section 120.595(1)(c) applies in this case.

38. 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.

Although there is no appellate decision explicitly extending the objective standard to Section 120.595(1), there does not appear to be any reason why, absent the rebuttable presumption, the objective standard should not be used to determine whether Petitioner's participation in this proceeding was for an improper purpose. See Friends Of Nassau County, Inc., v. Fisher Development Co., et al., 1998 WL 929876 (Fla. Div. Admin.

Hrgs.); Amscot Insurance, Inc., et al. v. Dept. of Ins., 1998 WL 866225 (Fla. Div. Admin. Hrgs.).

39. In another appellate decision, decided before the objective standard was enunciated for cases under Section 120.569(2)(e) and its predecessor statutes, the court in Burke v. Harbor Estates Ass'n, 591 So. 2d 1034, 1036-1037 (Fla. 1st DCA 1991), held:

> The statute is intended to shift the cost of participation in a Section 120.57(1) proceeding to the nonprevailing party if the nonprevailing party participated in the proceeding for an improper purpose. A party participates in the proceeding for an improper purpose if the party's primary intent in participating is any of four reasons, viz: to harass, to cause unnecessary delay, for any frivolous purpose, [FN1] or to needlessly increase the prevailing party's cost of securing a license or securing agency approval of an activity.
>
> Whether a party intended to participate in a Section 120.57(1) proceeding for an improper purpose is an issue of fact. See Howard Johnson Company v. Kilpatrick, 501 So.2d 59, 61 (Fla. 1st DCA 1987) (existence of discriminatory intent is a factual issue); School Board of Leon County v. Hargis, 400 So.2d 103, 107 (Fla. 1st DCA 1981) (questions of credibility, motivation, and purpose are ordinarily questions of fact). The absence of direct evidence of a party's intent does not convert the issue to a question of law. Indeed, direct evidence of intent may seldom be available. In determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and

> circumstances of the case and the proceedings before him.
>
> FN1. A frivolous purpose is one which is of little significance or importance in the context of the goal of administrative proceedings. Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services, 560 So.2d 272, 278 (Fla. 1st DCA 1990).

40. Burke also is of particular interest because it involves facts similar to, but not identical with, the facts of this case. According to Burke, the hearing officer found:

> 6. Petitioner . . . submitted no evidence to show facts necessary to sustain the pleadings in the Petition. . . . Petitioner offered no expert testimony in support of the pleadings in the Petition. . . . The testimony of fact witnesses called by Petitioner was not material to Petitioner's claims. . . .
> 7. Petitioner consistently demonstrated a lack of knowledge of the applicable law, the proper scope of the formal hearing, and the distinction between argument and evidence. Petitioner repeatedly attempted to establish violations of laws not relevant to the proceeding. . . . Petitioner attempted to establish issues by arguing with witnesses during direct and cross-examination, and by repeatedly making unsworn ore tenus representations of fact.
> 8. There was a complete absence of justiciable issue of either law or fact in this proceeding because petitioner failed to show facts necessary to sustain the pleadings. Petitioner presented no evidence refuting Respondent, Burke's, showing that the modifications required by DER were adequate to assure water quality and the public health, safety, or welfare, or the property of others. Evidence presented by Petitioner was not material to the issue of

> whether the modifications required by DER were adequate for the purposes of the law applicable to this proceeding. Therefore, Petitioner participated in this proceeding for a frivolous purpose, primarily to cause unnecessary delay, or to needlessly increase the cost of licensing or approval of the proposed activity.

Id. at 1035-1036. (For reasons unknown, there are minor discrepancies between the court's version of the findings and those appearing at Harbor Estates Associates, Inc. v. E. Burke, et al., 1990 WL 749394 (Fla. Div. Admin. Hrgs.), and at DOAH's Internet website, Recommended Order, DOAH Case No. 89-2741, entered April 4, 1990.) In Burke, the Department of Environmental Regulation (predecessor to DEP) accepted the hearing officer's findings as to Petitioner's conduct but reversed the hearing officer's award, holding "that the conduct described in the recommended order cannot, as a matter of law, evince an improper purpose as defined in Section 120.59(6), Florida Statutes." Burke at 1037. The court reversed, holding:

> Despite acceptance of factual findings below, the final order characterizes the conduct of Harbor Estates' representative as mere "incompetent representation." We reject that characterization as not consistent with the hearing officer's findings and, therefore, do not here decide whether incompetent representation alone permits a finding of improper purpose.
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> * * *
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> We reject appellees' argument that a qualified lay representative in a Section 120.57 proceeding should be held to a lesser standard of conduct, as distinguished from

> legal competence, than a licensed attorney. Section 120.62(2), Florida Statutes, permitting qualified lay representatives to represent parties in administrative proceedings, provides no basis for holding such representatives to a lesser standard of conduct. A contrary rule would permit a party to insulate itself from the consequences of Section 120.59(6), Florida Statutes, by choosing lay representation.

Id. at 1037-1038.

41. As indicated, the facts in Burke were similar to, but not identical with, the facts of this case. First, Petitioner was not represented by a qualified lay person; it was pro se, being represented by one of its officers. Second, there was no evidence that Petitioner's representative repeatedly attempted to establish violations of laws not relevant to the proceeding, argued with witnesses, or repeatedly made unsworn ore tenus representations of fact during direct and cross-examination of witnesses. To the contrary, Petitioner willingly (even apologetically) conceded issues established as irrelevant or outside the request for hearing. Third, Petitioner did present evidence on flooding (albeit clearly inadequate and without making a causal connection between flooding and the bridges).

42. In addition, as found, there also were other factors apparently not present in Burke which are relevant to the determination whether Petitioner participated in this proceeding for improper purpose. As found, under the totality of these

circumstances, it was not proven that Petitioner's participation in this proceeding was for an improper purpose--i.e., primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of the Olsons' applications.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that DEP enter a final order: denying Petitioner's challenge to the propriety of the Olsons' use of the NGP for minor activities for their proposals; authorizing the Olsons to use the NGP for their proposals (DEP File Nos. 43-0137548-002 and 43-0158123-002) subject to the design criteria limitations and other conditions in the applicable general permit rules; and denying the Motion for Attorney's Fees from Petitioner under Section 120.595(1).

Jurisdiction is reserved to enter a final order on the part of the Motion for Attorney's Fees seeking sanctions under Section 120.569(2)(e).

DONE AND ENTERED this 30th day of July, 2001, in Tallahassee, Leon County, Florida.

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 30th day of July, 2001.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.