STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL STILL, Petitioner, vs. NEW RIVER SOLID WASTE ASSOCIATION and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 01-1033

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

On June 4-5, 2001, a final administrative hearing was held in this case in Gainesville, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH). The issue for final hearing was whether the Department of Environmental Protection (DEP) should grant an application filed by New River Solid Waste Association (NRSWA) to renew its permit for continued operation of its landfill in Union County, including a permit to construct and operate a bioreactor landfill system in part of the landfill.

On March 19, 2001, NRSWA filed a Motion to Dismiss Petition for Administrative Hearing and a Motion for Attorney Fees and Costs based on both Section 120.595(1) and Section 120.569(2)(e). (Citations to sections are to the 2000

codification of Florida Statutes.) There was no hearing or ruling on the motion before final hearing.

On June 1, 2001, the parties filed a Joint Prehearing Stipulation, which identified as one of the issues of law to be determined whether the prevailing party would be entitled to attorney's fees under Chapter 403 and/or 120, Florida Statutes. In addition, NRSWA's Motion for Attorney Fees and Costs was listed as a pending motion.

NRSWA's PRO included a request for attorney's fees and costs under Section 120.595(1) and Section 403.412(2)(f). NRSWA did not specifically renew its Motion for Attorney Fees and Costs under Section 120.569(2)(e).

The requests made under Section 120.595(1) and Section 403.412(2)(f) were addressed and ruled upon in the Recommended Order. It is not clear whether NRSWA intended to preserve its Motion for Attorney Fees and Costs under Section 120.569(2)(e). But if so, as indicated in the Recommended Order, while Section 120.569(2)(e) and Section 120.595(1) are similar and related, the procedures (and, to some extent, substantive law) are different. 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.

In this case, Petitioner's verified Petition for Administrative Hearing was tested by NRSWA's Motion to Dismiss Petition for Administrative Hearing filed on March 19, 2001, and by DEP's Motion to Dismiss Verified Petition for Administrative Hearing filed on April 9, 2001. NRSWA's motion to dismiss was based on standing and res judicata. DEP's motion was based only on res judicata. The motions were heard on April 25, 2001, and an Order Denying Motions to Dismiss was entered on May 1, 2001.

On May 21, 2001, NRSWA filed a Motion in Limine. Petitioner filed a response in opposition, and DEP filed a response in support of the Motion in Limine. Essentially, NRSWA and DEP sought to limit the issues for final hearing to

those identified in the Order Denying Motions to Dismiss as reasons why the doctrine of res judicata did not bar the Petition for Administrative Hearing. An Order Denying Motion in Limine was entered on May 31, 2001.

The Order Denying Motions to Dismiss and Order Denying Motion in Limine indicate that there was a "reasonably clear legal justification" for the verified Petition for Administrative Hearing. In addition, on June 1, 2001, the parties filed a Joint Prehearing Stipulation, which identified three issues of fact and five issues of law as remaining for determination at final hearing.

The Order Denying Motions to Dismiss noted a discrepancy between allegations in the Petition for Administrative Hearing and Petitioner's argument on the motions to dismiss, and Petitioner was instructed to amend his pleading if he intended the Petition for Administrative Hearing in this case to challenge renewal of the modified underlying landfill permit under the standards of Rule 62-701.330(3)(a). (Citations to rules are to the current Florida Administrative Code.) On May 8, 2001, an Amendment to Petition for Administrative Hearing was filed clarifying Petitioner's challenge to renewal of the modified underlying landfill permit under the standards of Rule 62-701.330(3)(a).

NRSWA never moved to dismiss or strike the amendment. In addition, NRSWA's Motion in Limine did not address the issue raised in the amendment. Finally, the Joint Stipulation included as one of the issues for determination at final hearing whether NRSWA provided reasonable assurance that its renewal application complied with Rule 62-701.330(3). These circumstances would suggest NRSWA's concession that the Amendment to Petition for Administrative Hearing had a "reasonably clear legal justification."

In addition, NRSWA never filed a motion for sanctions under Section 120.569(2)(e) specifically directed to the Amendment to Petition for Administrative Hearing. It also is not clear that NRSWA intended the listing of its Motion for Attorney Fees and Costs in the Joint Prehearing Stipulation as a renewal of the motion with respect to the Amendment to Petition for Administrative Hearing. (Indeed, as previously indicated, it is not clear that NRSWA intended to renew or preserve its Motion for Attorney Fees and Costs at all.) But even if that were NRSWA's intention, NRSWA waited until final hearing to seek sanctions. For the reasons set out in Mercedes Lighting and Electric Supply, Inc. v. Dept. of General Services, 560 So. 2d 272 (Fla. 1st DCA 1990), the delay in seeking sanctions also militates, in and of itself,

against granting sanctions as to the Amendment to Petition for Administrative Hearing.

It was held in Mercedes, at 276, 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:
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> > 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.
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> Schwarzer, 104 F.R.D. at 198.

Id. at 276-277.

For these reasons, in addition to those 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 under Section 120.595(1), grounds for sanctions under Section 120.569(2)(e) likewise were not proven. To the extent that it

was preserved, NRSWA's Motion for Attorney Fees and Costs from Petitioner under Section 120.569(2)(e) is denied.

DONE AND ORDERED this 7th day of August, 2001, in Tallahassee, Leon County, Florida.

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J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of August, 2001.

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