STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALAN R. BEHRENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-1129
	)	
HAS-BEN GROVES and SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,	)	
	)	
Respondents.	)	
	)	

FINAL ORDER

Notice was given, and on November 13, 2003, a final hearing was held in this case. Pursuant to the authority set forth in Sections 120.569(2)(e) and 120.57(1), Florida Statutes, the final hearing was conducted by Charles A. Stampelos, Administrative Law Judge, by video teleconference with sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Alan R. Behrens, pro se
4070 Southwest Armadillo Trail
Arcadia, Florida 34266

For Southwest Florida Water Management District

Martha A. Moore, Esquire
Southwest Florida Water
Management District
2379 Broad Street
Brooksville, Florida 34604-6899

STATEMENT OF THE ISSUE

Whether the Southwest Florida Water Management District proved that Alan R. Behrens signed a pleading, motion, or other paper in this proceeding for an "improper purpose," and, if so, whether sanctions should be imposed pursuant to Section 120.569(2)(e), Florida Statutes?

PRELIMINARY STATEMENT

On January 27, 2003, the Southwest Florida Water Management District (District) issued a notice of final agency action for approval of Water Use General Permit (WUP) No. 20012410.000 issued to Has-Ben Groves. Has-Ben Groves' well and property are located in Hardee County.

On February 19, 2003, Alan R. Behrens (Mr. Behrens) filed a Petition for Formal Hearing, which the District found to be timely, but not in substantial compliance with the requirements of Section 120.569(2)(c), Florida Statutes, and Florida Administrative Code Rule 28-106.201(2) governing the initiation of administrative proceedings. The District issued an Order of Dismissal Without Prejudice on February 27, 2003. On March 12, 2003, Mr. Behrens filed an Amended Petition for Formal Hearing.

On March 26, 2003, the District referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge.

After receiving a response to the Initial Order, the case was set for final hearing for June 2-3, 2003, in Bartow, Florida. After granting a joint motion to continue the final hearing, the final hearing was re-set for August 14-15, 2003, in Bartow, Florida.

On May 23, 2003, the District deposed Mr. Behrens.

On June 25, 2003, the District filed a "Motion for Summary Recommended Order of Dismissal and for Reasonable Costs and Attorney's Fees," with affidavits and a copy of the Transcript of Mr. Behrens' deposition.

On June 30, 2003, Mr. Behrens filed a "Notice of Voluntary Dismissal" and responded, in part, to the District's Motion for Summary Recommended Order, but not to the District's request for attorney's fees and costs.

On June 30, 2003, an "Order Closing File" was issued, canceling the final hearing. This Order also denied the District's motion for reasonable costs and attorney's fees requested pursuant to Section 120.595(1), Florida Statutes. However, jurisdiction was retained "for consideration of the District's motion for reasonable attorney's fees and costs (as a sanction) pursuant to Section 120.569(2)(e), Florida Statutes." The District was requested to advise the undersigned within ten days from the date of the Order if the District wished to pursue the request for sanctions.

On July 2, 2003, the District advised that it wished to pursue sanctions.

On July 18, 2003, an Order was issued which clarified the "Order Closing File" and gave Mr. Behrens until August 1, 2003, to file a response to the District's request for reasonable attorney's fees and costs as a sanction.

On July 30, 2003, Mr. Behrens filed a response and objected to the District's request.

On November 13, 2003, a final hearing was held by video teleconference with sites in Tallahassee and Tampa, Florida. The District presented the testimony of Michael L. Phillippi, professional geologist; Michael K. Balser, Water Use Manager for the Bartow Regulation Department; Mary Beth McNeil, Esquire; Diane Lee, Administrative Supervisor; and Douglas P. Manson, Esquire. The District's Exhibits 1-13 were admitted into evidence. Mr. Behrens testified in his own behalf and his Exhibits 1-4 were admitted into evidence.

Official recognition was taken of the recommended and final orders in the following administrative cases: DeSoto Citizens Against Pollution, Inc. v. Farmland Hydro Limited Partnership, Frank T. Basso, Jr., Redland Growers Exchange, Inc., and Southwest Florida Water Management District, Case No. 02-0232, 2002 WL 1592349 (DOAH June 3, 2002; SWFWMD June 25, 2002)(Basso); Alan Behrens and DeSoto Citizens Against

Pollution, Inc. v. Michael J. Boran and Southwest Florida Water Management District, Case No. 02-0282, 2002 WL 31125125 (DOAH July 29, 2002; SWFWMD Aug. 27, 2002)(Boran); Alan R. Behrens, et al. v. Consolidated Minerals, Inc. and Southwest Florida Water Management District, et al., Case Nos. 92-0953-92-0957, 1993 WL 944120 (DOAH April 20, 1993; SWFWMD Nov. 30,(1994) (Consolidated). (Transcript (T.), p. 88.)

The one-volume Transcript of the final hearing was filed with DOAH on December 3, 2003. After Mr. Behrens was granted an extension of time to file his proposed final order, the District filed its Proposed Final Order on February 2, 2004, and Mr. Behrens filed his Proposed Final Order on February 3 and 9, 2004, and have been considered in the preparation of this Final Order.

FINDINGS OF FACT

The Parties

1. Alan R. Behrens has resided and owned property at 4740 Southwest Armadillo Trail, Arcadia, DeSoto County, Florida, since 1985. There is a two-inch free-flowing artesian well used for domestic purposes on this property. Mr. Behrens' well is approximately 150 feet deep and draws water from the Intermediate aquifer. The well currently has no pumping mechanism, and Mr. Behrens relies on an unaided artesian flow to produce water, which at times is inadequate.

2. In prior administrative cases and the case involving Has-Ben Groves, Mr. Behrens is concerned that the withdrawal of water in the amounts requested by others from areas near his property will impair his ability to draw adequate amounts of water from his well.

3. Mr. Behrens stated that his purpose in challenging the Has-Ben Groves WUP "is to receive assurances that any proposed use is not going to adversely impact [his] well. That's [his] general biggest, main goal." He feels that he did not receive assurances from the District; therefore, his only option was to request a hearing.

4. The Southwest Florida Water Management District is the administrative agency charged with the responsibility to conserve, protect, manage, and control water resources within its boundaries pursuant to Chapter 373, Florida Statutes, and the rules promulgated thereunder as Chapter 40D, Florida Administrative Code. The District has the statutory duty to review and approve or deny applications requesting consumptive water use permits.

The Has-Ben Groves WUP Application

5. On January 27, 2003, the District issued a notice of final agency action for approval of Water Use General Permit No. 20012410.000 issued to Has-Ben Groves.

6. The WUP authorized annual average groundwater withdrawals of 31,100 gallons per day (gpd) to be used for irrigation of Has-Ben Groves' 40-acre citrus grove. (Peak monthly withdrawals of 254,300 gpd and withdrawals for crop protection at 1,015,200 gpd were authorized.)

7. Tomlinson previously owned the Has-Ben Groves' 40 acres. The District previously permitted the well on the Has-Ben Groves 40 acres when Tomlinson owned the property.

8. The Tomlinson well was previously permitted for 77,000 gpd on an annual basis, but the permit expired. Thus, Has-Ben Groves applied for a new WUP.

9. The Has-Ben Groves permitted well site is located in Hardee County and is approximately 16 miles from Mr. Behrens' artesian well in DeSoto County, and is expected to draw approximately 94 percent of its water from the Upper Floridan aquifer.

Did Mr. Behrens sign a pleading, motion,or other paper for an improper purpose?

10. On January 20, 2003, Mr. Behrens, by letter, asked the District to be advised of any agency action regarding five WUP applications, including the Has-Ben Groves application. In this letter, Mr. Behrens also requested, what he characterized as "public information," "what the predicted drawdown to the intermediate and Floridan aquifers are." He inquired further:

"Please make sure the hydrologist includes this information. I have previously asked for this basic information; please do not force me to take legal action against SWFMD per the Sunshine law & other public information laws." (Emphasis in original.) Mr. Behrens was copied with the District's "Final Agency Action Transmittal Letter" sent to Has-Ben Groves on January 27, 2003.

11. According to Mr. Behrens, "legal action" meant the filing of a petition requesting an administrative hearing. He felt that it was his only option to receive information and assurances. In particular, Mr. Behrens wanted the District to create and provide him with drawdown contours and modeling even if the District believed it was unnecessary. See Endnote 1.

12. By letter dated January 29, 2003, the District, by Pamela A. Gifford, CLA, Office of General Counsel, responded to Mr. Behrens' request for 'predicted drawdown' information and stated in part: "First, please be advised, the District does not prepare 'predicted drawdown' for all water use permits. Second, to ask for 'predicted drawdown' for permits, you are making a pubic records request. The District does not accept anticipatory public record requests. In other words, when the District receives a public records request, it will search for existing records responsive to the request as of the date of the public records request. . . . Third, the District will not create a record to respond to a public records request. If a

'predicted drawdown' exists, it will be provided to you, if it does not, it will not be created to answer your request."[1]

13. By letter dated January 31, 2003, Mr. Behrens responded to the District's January 29, 2003, letter referred to above and expressed his understanding that he could "expect the results of drawdown modeling to be included in Notices of Agency Action that [he] receive from the District." Mr. Behrens requested the name of the District office and the hydrologist who reviewed the Has-Ben Groves WUP application; the location of the file; a statement that it was "apparently a new withdrawal"; a request to identify the amount of water coming from the Intermediate and Floridan aquifers; a query as to why the withdrawal would "be cased to only a depth of 120 feet; won't this mean that much of the water will be drawn from the intermediate?" Mr. Behrens also requested "a copy of the drawdown modeling results (map)." Mr. Behrens advised that it was "very important that new groundwater withdrawals do not lower [his] well level further, because [he is] relying completely on artesian free-flowing pressure; every inch of level reduction creates further hardship for [him]." (During his deposition, Mr. Behrens felt that the District could produce the information on a "voluntary" basis in order to give him "assurances up front.")

14. By letter dated February 10, 2003, the District, by Ms. Gifford, responded to Mr. Behrens' January 31, 2003, letter and advised him "that drawdown modeling will not be included in Notices of Agency Action that you receive from the District. The only way that you will receive the drawdown modeling is if the District has records related to the modeling at the time you make a specific public records request for same. For example, if you make a public records request today for drawdown modeling, the District will only provide records to you that are in our files as of today. You would have to make a subsequent public records request to get any records that were received or created by the District after today's date." (Emphasis in original.) Ms. Gifford also advised Mr. Behrens that he was being provided with "copies of documents that are responsive to [his] public records request dated January 31, 2003."

15. Mr. Behrens was provided with a copy of the Has-Ben Groves General Water Use Permit Application which indicated, in part, that the application was "new" as opposed to a "renewal" or "modification"; the location of the well site; that Has-Ben Groves intended to irrigate 40 acres for citrus; and that the construction date of the well was in "1960." The word "existing" is written on the line describing, in part, the casing diameter, depth, and pump capacity. See Finding of Fact 18. The name "Phillippi" is handwritten on page one of the

application. (Michael Phillippi is a professional geologist and employed with the District for over nine years. He had a pre-application telephone conversation with the applicant for the Has-Ben Groves WUP.) A "Water Use Permit Evaluation Worksheet" was also enclosed which included, among other information, the names "Lucille" and "Deborah" and the initials of two persons.

16. The record does not indicate that Mr. Behrens followed up with the District regarding the Has-Ben Groves application after receiving the District's February 10, 2003, letter and enclosures.

17. On February 19, 2003, Mr. Behrens filed a Petition for Formal Hearing challenging the District's preliminary decision to approve the WUP. The District determined that the Petition was timely filed, but not in substantial compliance with the requirements of Section 120.569(2)(c), Florida Statutes, and Florida Administrative Code Rule 28-106.201(2), governing the initiation of administrative proceedings. The District issued an Order of Dismissal Without Prejudice on February 27, 2003.

18. On March 12, 2003, Mr. Behrens filed an Amended Petition for Formal Hearing. Mr. Behrens alleged that the withdrawal to be authorized by the WUP "would use huge quantities of water from the intermediate aquifer, even though water from the Floridan aquifer is completely suitable for citrus irrigation"; is "very close" to Mr. Behrens' "property

and well"; and the "cone of depression in the Intermediate aquifer that would be caused by the new use will cause a reduction in Petitioner's water level and pressure and impair the ability of his well to produce water." (Mr. Behrens also alleged that "[t]he proposed well would be eight inches in diameter, 920 feet deep, and cased to only 120 feet." See Finding of Fact 15.)

19. Mr. Behrens also alleged that the District refused to provide certain information, such as predicted drawdown to area wells. He also raised numerous disputed issues of material fact.

20. On May 23, 2003, the District deposed Mr. Behrens. During his deposition, Mr. Behrens was asked to identify all facts and documents or sources of information he relied on in making the allegations in the Amended Petition. Mr. Behrens testified that the challenged water use withdrawal "seems like a very excessive amount"; "is [c]lose enough to have an impact on [his] well"; "is going to have a drawdown, is going to have an impact on the aquifer" and he has "a well on the aquifer"; that "these wells are going to have a drawdown and they're going to draw down [his] well"; and that his position, that the Has-Ben Groves well will have a drawdown impact on his well, is based upon "[s]cience and facts and common sense" and "the evidence is self-evident."

21. Mr. Behrens has "done no studies." Rather, he relies on information, such as the documents he introduced into evidence and his knowledge about the area and the District, to support the allegations in the Petition and Amended Petition. See, e.g., Findings of Fact 22-23. He does not have enough money to hire experts. He relies on the District's hydrologists for the information he requests and for assurances. Yet, Mr. Behrens did not contact any District hydrologist to discuss his concerns before he filed the Petition and Amended Petition. See also Findings of Fact 26-28.

22. On June 17, 2003, Mr. Behrens responded to the District's Interrogatories, which requested Mr. Behrens to identify all facts he relied upon in making his assertions, including all documents prepared or reviewed in connection with such assertions. Mr. Behrens stated that no specific documents were prepared or reviewed in connection with his assertions made in paragraph 6 of the Amended Petition, and that the assertions in paragraph 6 were "pure truth – there's no need to go searching to prove the obvious!" (Paragraph 6 of the Amended Petition alleged: "The proposed new groundwater withdrawal would use huge quantities of water from the Intermediate aquifer, even though water from the Floridan aquifer is completely suitable for citrus irrigation.")

23. During the final hearing, Mr. Behrens claimed that prior to filing his Petition, he relied on his experience and the information he maintains regarding the District's identification of water use problems, and the District's March 2000 Horse Creek Draft Resource Evaluation Report, the "Water Resources in Jeopardy" report published during the early 1990's, and the 1992 Recommended Order in Alan R. Behrens, et al. v. Consolidated Minerals, Inc. and Southwest Florida Water Management District, et al., Case Nos. 92-0953-92-0957, 1993 WL 944120 (DOAH April 20, 1993; SWFWMD Nov. 30, 1994), in which Hearing Officer Daniel M. Kilbride found that Mr. Behrens was substantially affected by the District's then proposed renewal and modification of an existing WUP held by Consolidated Minerals. 1993 WL 944120, at *4. (In interrogatory responses, Mr. Behrens also identified a 1986 potentiometric surface map of the Intermediate aquifer, among other maps he might identify.)

24. These documents do not provide information relevant to whether the challenged Has-Ben Groves water withdrawal meets the conditions for issuance of a WUP or would lead a reasonable person to allege that the challenged Has-Ben Groves water use and well would have an adverse impact on Mr. Behrens' use of his well.

25. Before filing his initial Petition and during the interval before he filed his Amended Petition, Mr. Behrens did

not contact or speak to District staff who reviewed the Has-Ben Groves WUP application or District staff in the Bartow Service Office (the District service office responsible for permitting matters in Hardee County) to obtain information concerning the Has-Ben Groves permit application or to discuss his concerns regarding whether the proposed water use to be authorized by the WUP would adversely affect his well. But see Finding of Fact 13, which indicates that on January 31, 2003, Mr. Behrens posed several questions to the District, prior to filing his Petition, which apparently were left unanswered. It appears Mr. Behrens did not pursue this inquiry until he served the District with Interrogatories on May 29, 2003. Mr. Behrens did not review the District's "work file" after filing his Petition.

26. In his Proposed Final Order (PFO), Mr. Behrens provided a detailed chronology and analysis of the factors he considered that caused him to file prior challenges to District action and his challenge to the District's intent to approve the Has-Ben Groves WUP. He has mistrusted the District over time and has had little faith that the District understands his "unique circumstance" and will protect his well from adverse impacts resulting from the issuance of WUPs. See, e.g., (T. 95-96, 98, 100.)

27. He notes in his PFO that it was not until the Has-Ben Groves case that he "started to have trust in the District

staff's reliance on regional well monitoring data (as its sole source of cumulative impact analysis)." According to Mr. Behrens, the District provided him with information during discovery from which he derived reasonable assurances. He also felt that based on his experience, he "did not contact the permit reviewers in this matter because, from experience, he knew he could not trust them to provide the necessary assurances with a few comments over the telephone." Yet, because of his financial inability to hire experts, Mr. Behrens relies on the expertise of the District's hydrologists for assurance that his well will not be adversely impacted. See, e.g., (T. 112) (District Exhibit 13, pp. 41-42, 55, 58-61.) Stated otherwise, Mr. Behrens wanted the District staff to provide him with proof of reasonable assurance and he filed the Petition and Amended Petition because he felt he did not receive appropriate proof.

28. If this final hearing went forward, his intent was to ask questions of the District's hydrologists regarding many of the documents in his possession and to ask "District staff, under oath, about specific matters related to the protection of his well and the intermediate aquifer, in general," presumably as he had done in the Basso and Boran cases, for example. See, e.g. (District Exhibit 13, p. 59-60.) Then, the ALJ, after hearing all of evidence, would decide whether reasonable assurance was provided.

29. Prior to and after Mr. Behrens filed his Amended Petition, the District maintained Regional Observation and Monitoring Program (ROMP) wells that provide cumulative monitoring information concerning the Intermediate and Floridan aquifer water levels throughout the District. ROMP well data are available to the public upon request. (In response to a question posed by Mr. Behrens during the final hearing, Mr. Balser stated that ROMP well data do not give absolute assurance or reflect "[e]xactly what is happening in the geology under [Mr. Behrens] property." Mr. Balser stated that he "would have to do testing of [his] property. But this is the best guess we can make looking at it from a regional view.")

30. It is more than a fair inference that Mr. Behrens was familiar with ROMP well data and their application in specific cases as a result of his participation in prior administrative cases. See pp. 4-5, supra. He did not request ROMP well data available from the District prior to filing his Petition and Amended Petition, although he asked for the quantity of groundwater which was expected to be withdrawn from the Intermediate and Floridan aquifers. See Conclusions of Law 48-50.

31. District WUP information and other records are available for public inspection, including the use and

permitting history of the water withdrawal challenged by Mr. Behrens in this proceeding.

32. If Mr. Behrens had inquired of the District prior to filing his Petition and Amended Petition, Mr. Behrens could have learned that the well on the Has-Ben Groves property had been in existence as early as the 1960's for citrus irrigation, was first permitted around 1974, had previously been authorized by the District for withdrawals of as much as 77,000 gpd, was expected to draw approximately 94 percent of its water from the Upper Floridan aquifer, and there was no reasonable basis to conclude that withdrawals of 31,100 gpd from the Has-Ben Groves well would cause any adverse impact to his well, which draws water from the Intermediate aquifer.

33. Stated otherwise, at the time he filed his Petition and Amended Petition, Mr. Behrens had no reasonable factual basis to allege that withdrawals of 31,100 gpd from the Has-Ben Groves' well, located approximately 16 miles from his well, would have an adverse impact on his use of water from his well. (An applicant for a WUP is required to provide, in part, reasonable assurance that the water use "[w]ill not adversely impact an existing legal withdrawal." Fla. Admin. Code R. 40D-2.301(1)(i).)

34. On June 30, 2003, Mr. Behrens filed a "Notice of Voluntary Dismissal" and responded, in part, to the District's

Motion for Summary Recommended Order, but not the District's request for attorney's fees and costs. Mr. Behrens stated that he withdrew his Amended Petition because he obtained information that he did not have when he filed his Amended Petition and that addressed his concerns about impacts to his well. He claimed, in part, that being informed of the District's plan to set minimum levels for the Intermediate aquifer had allayed his fears that he would be without an artesian free-flowing water supply. However, the challenged WUP did not address or involve the setting of minimum flow levels.

35. Based on the foregoing, Mr. Behrens did not make a reasonable inquiry regarding the facts and applicable law. Using an objective standard, an ordinary person standing in Mr. Behrens' shoes would not have prosecuted this claim if a reasonable inquiry had been conducted. Stated otherwise, Mr. Behrens did not have a "reasonably clear legal justification" to proceed based on his limited inquiry. Mr. Behrens signed the Petition and Amended Petition for an "improper purpose."

The District's Request for Sanctions

36. The District proved that its lawyers expended approximately 98.8 hours in responding to the challenge brought by Mr. Behrens and that the District incurred $426.25 in costs. An hourly rate of $125.00 per hour is a reasonable rate. The

hours expended by District lawyers were reasonable. The costs incurred were reasonable. The District requests that sanctions be imposed in the amount of $12,350.00 for attorney's fees and $426.25 in costs.

37. For the reasons more fully stated in the Conclusions of Law, based on the totality of the facts presented, the imposition of a sanction against Mr. Behrens in the amount of $500.00 (for costs and a small portion of fees) is appropriate.

CONCLUSIONS OF LAW

Jurisdiction

38. The Division of Administrative Hearings has jurisdiction to consider a motion filed pursuant to Section 120.569(2)(e), Florida Statutes, notwithstanding that a party, here Mr. Behrens, files a notice of voluntary dismissal and the files at DOAH are closed. See The Corporation of the President of the Church of the Jesus Christ of Latter Day Saints v. St. Johns River Water Management District and the City of Cocoa, 13 F.A.L.R. 1014, 1016-1018 (DOAH Feb. 8, 1991); Cecile Joyner and Debbie Manning v. Leon County and Department of Environmental Protection, Case No. 00-4220 (DOAH Order April 4, 2001). See also Procacci Commercial Realty, Inc. v. Dept. of Health and Rehab. Services, 690 So. 2d 603, 606 (Fla. 1st DCA 1997)(ALJ has the authority to issue a final order on a request for sanctions pursuant to Section 120.569(2)(e), Florida Statutes.)

Improper Purpose

39. Section 120.569(2)(e), Florida Statutes, 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."[2] Section 120.569(2)(e) authorizes the presiding officer to impose an appropriate sanction, including a reasonable attorney's fee, for signatures which are in violation of this subsection.

40. Section 120.569(2)(e), like its predecessor Section 120.57(1)(b)5, Florida Statutes (1995), "is designed to prevent misuse of the administrative process. The statute creates potential liability for costs and attorneys' fees, which may deter a party who would otherwise initiate a claim or defense for the purpose of delay, to gain an economic advantage, or simply to harass the opposing party." Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 56 (Fla. 1st DCA 2000)(Padovano, J., dissenting).

41. An objective standard is used to determine whether a party or attorney signed a pleading, motion or other paper for an "improper purpose" and, if so, whether sanctions should be imposed under Section 120.569(2)(e). The "determination must be

based on an objective evaluation of the circumstances existing at the time the petition was filed." Id. at 57. (The issue is not whether the party would ultimately prevail on the merits.) As stated in Friends of Nassau County, Inc., 752 So. 2d at 49-51:

> 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 should would have prosecuted the claim."
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> 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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> * * *
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> Whether [predecessor to Section 120.569(2)(e)] 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.

42. Further, in Mercedes Lighting and Electric Supply, Inc. v. Department of General Services, 560 So. 2d 272, 276 (Fla. 1st DCA 1990), the court stated that 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) and, in this regard, the court stated:

> 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).
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> 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.
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> One of the basic tenets of rule 11 enforcement appears to be, not surprisingly, that a party is required to take actions 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.

43. The District has the burden to show, by a preponderance of the evidence, that Mr. Behrens violated Section

120.569(2)(e) and that sanctions should be imposed. Friends of Nassau County, Inc., 752 So. 2d at 52. See also § 120.57(1)(j), Fla. Stat.

Resolution of the Controversy

44. This case turns on whether Mr. Behrens made a reasonable inquiry of the facts and law prior to signing and filing the Petition and Amended Petition.

45. Prior to filing the Petition, Mr. Behrens inquired of the District regarding the Has-Ben Groves WUP application. On or about February 10, 2003, the District sent Mr. Behrens a copy of the application. The application provided, in part, the name of the applicant; the name of the applicant's contact or consultant; the location of the 40-acre property and the location of the well; the type of crops to be irrigated and method; the depth of the casing and diameter; the pump capacity; the mainline diameter; the withdrawal rate according to "AGMOD"; and the notation "existing." See Findings of Fact 15 and 18. Mr. Behrens also has access to the first names and initials of persons who may have reviewed the application. Id. After receiving a copy of the actual WUP issued by the District and the Final Agency Action Transmittal Letter of January 27, 2003, Mr. Behrens knew the quantities of water authorized for withdrawal and knew that the WUP was issued most likely out of the District's Brooksville office, although other office

locations are mentioned. Telephone numbers and street addresses are listed for several offices including the Brooksville office and the Bartow Service office.

46. Mr. Behrens alleged in his Petition that he received notice of the District's action on or about February 1, 2003, which meant that any petition had to be filed on or before February 22, 2003. The Petition was filed on February 19, 2003, but dismissed without prejudice.

47. On March 12, 2003, Mr. Behrens filed an Amended Petition. However, there is no evidence that Mr. Behrens made any inquiry of the District after he filed the Petition and before he filed the Amended Petition notwithstanding that he received notice of the proposed District action on or about February 1, 2003, and was aware of the Has-Ben Groves application as of January 20, 2003. See Finding of Fact 10. Thus, Mr. Behrens had approximately 38 days to inquire of the District regarding his concerns before he signed and filed the Amended Petition after he received notice of the agency action. (He had 21 days from receipt of the District's notice of final agency action to file a petition.)

48. Mr. Behrens is no stranger to administrative proceedings involving challenges to the District's proposed issuance of WUPs. See DeSoto Citizens Against Pollution, Inc. v. Farmland Hydro Limited Partnership, Frank T. Basso, Jr.,

Redland Growers Exchange, Inc., and Southwest Florida Water Management District, Case No. 02-0232, 2002 WL 1592349 (DOAH June 3, 2002; SWFWMD June 25, 2002); Alan Behrens and DeSoto Citizens Against Pollution, Inc. v. Michael J. Boran and Southwest Florida Water Management District, Case No. 02-0282, 2002 WL 31125125 (DOAH July 29, 2002; SWFWMD Aug. 27, 2002); Alan R. Behrens, et al. v. Consolidated Minerals, Inc. and Southwest Florida Water Management District, et al., Case Nos. 92-0953-92-0957, 1993 WL 944120 (DOAH April 20, 1993; SWFWMD Nov. 30, 1994). Mr. Behrens prevailed in the Consolidated case, but not in the Basso and Boran cases.

49. In Basso, Mr. Behrens represented DeSoto Citizens Against Pollution (DCAP), a not-for-profit corporation, in which he served as president. Basso proposed to irrigate 140 acres at 454,000 gpd on an annual basis and 1,241,000 gpd, as a peak month quantity. The Basso well was located approximately 18-20 miles from Mr. Behrens' well. The concept of ROMP wells is discussed in detail in the Recommended Order. DCAP did not prove its standing. Also, the evidence demonstrated "that the propose water use will not adversely impact Behrens' well," notwithstanding Mr. Behrens claim to the contrary. DeSoto Citizens Against Pollution, Inc. v. Farmland Hydro Limited Partnership, Frank T. Basso, Jr., Redland Growers Exchange,

Inc., and Southwest Florida Water Management District, 2002 WL 1592349, at *2, 4, 6-7, 10-11 and 14.

50. In Boran, Mr. Behrens was a named Petitioner and appeared pro se. DCAP was also a Petitioner, but voluntarily dismissed its Petition. The Boran property is a little over 1,000 acres in size. Boran proposed a modification to his existing WUP and requested to increase his annual average daily quantity by 175,000 gpd, and increase the peak month daily quantity by 423,900 gpd. With the proposed increase, the new annual average daily quantity was expected to be 1,488,000 gpd, and the new peak month daily quantity was expected to be 3,600,900 gpd. The Boran well was located approximately four miles from Mr. Behrens' well. ROMP wells are discussed in the Recommended Order. The greater weight of the evidence did not support Mr. Behrens' view that his well would be adversely impacted by the Boran's withdrawal of the water as modified. Also, Mr. Behrens did not prove his standing. Alan Behrens and DeSoto Citizens Against Pollution, Inc. v. Michael J. Boran and Southwest Florida Water Management District, 2002 WL 31125125, at *3, 10, and 17. (Boran's request, joined in by the District, for attorney's fees and costs pursuant to Sections 120.569(2)(e) and 120.595(1), Florida Statutes, was denied.)

51. In this proceeding, the weight of the evidence indicates that Mr. Behrens made a minimal attempt to gather

information from the District, notwithstanding his request to be informed of the disposition of the Has-Ben Groves WUP application and other applications. His January 31, 2003, inquiry raised some of his concerns, but he did nothing to follow up on this inquiry especially after the District sent him a copy of the Has-Ben Groves application and Evaluation Worksheet.

52. Although Mr. Behrens appeared pro se in this proceeding, he has experience in dealing with and understanding the issues presented. His participation in the cases referenced herein attests to this fact.

53. Nevertheless, after receiving the Has-Ben Groves WUP application, he did not speak with anyone from the District regarding his concerns or review the "work file" or request any other public records from the District including ROMP well or other data. The documents and information that Mr. Behrens relied on to prepare and sign his Petition and Amended Petition support his concerns about maintaining the free-flowing nature of his well, but they do not support his assertion that his well would be adversely affected by the Has-Ben Groves water withdrawal or that reasonable assurance had not been provided by Has-Ben Groves. The documents and information possessed by Mr. Behrens alone would not have led an ordinary person to

reasonably conclude that a justiciable controversy existed in this matter.

54. Mr. Behrens asserted, in part, that he did not trust District staff to provide him with reasonable assurance and, therefore, he did not feel that discussing his concerns with District staff would comfort him. On the other hand, he asserted that he relied on District staff to create and then provide him with modeling and drawdown contours, and then expected to rely on his examination of District staff during an administrative hearing to prove his case, or, at the very least, to receive reasonable assurance. This was not a reasonable rationale for not conducting a reasonable inquiry prior to signing and filing the Petition and Amended Petition.

55. To fulfill the obligation to make a reasonable inquiry, a person must investigate the facts, examine the law, and then decide if a pleading is justified. Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir. 1987).

56. The District, in issuing its notice of agency action, determined that Has-Ben Groves provided reasonable assurance. (An applicant for a WUP must provide reasonable assurance that several statutory and rule requirements are satisfied. See, e.g., § 373.223, Fla. Stat.; Fla. Admin. Code R. 40D-2.301. But, absolute assurances are not required. See Basso, 2002 WL

1592349, at *12.) This preliminary action was subject to challenge and a de novo hearing (if there were disputed issues of material fact) because there is no presumption of correctness that attached to the District's preliminary agency action. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 785, 789 (Fla. 1st DCA 1981).

57. Mr. Behrens had information at his disposal when he signed the Petition and Amended Petition regarding the effects of water uses in his geographic area and associated problems. See, e.g., Findings of Fact 23 and 26. It was incumbent on Mr. Behrens to conduct a reasonable inquiry into the facts and law and to decide whether the signing of the Petition, and ultimately the Amended Petition, was justified regarding the Has-Ben Groves WUP. Again, the focus of his attention and inquiry should have been on the Has-Ben Groves WUP, not his general concern with water withdrawal.

58. Mr. Behrens subjective belief in the merits of his Petition and Amended Petition is insufficient to overcome his lack of a reasonable investigation to ensure that his objections to the Has-Ben Groves WUP application were supported by the facts and the law. Regrettably, it is concluded that Mr. Behrens signed the Petition and Amended Petition for an improper purpose. Notwithstanding this conclusion, the sanction requested by the District is not appropriate.

59. The District is correct that relevant information was available to Mr. Behrens when he filed his Petition and Amended Petition. This same information was available to the District. Also, the District participated fully in the Basso and Boran cases and was intimately familiar with the arguments made by Mr. Behrens and the limitation of his proof in these cases. (Mr. Behrens testified in both cases but called no expert witnesses of his own. Rather, he relied on examination of District experts.)

60. Armed with superior knowledge, the District should have raised the "improper purpose" issue sooner in this proceeding, thereby alerting Mr. Behrens to the potential consequences of proceeding further. Mercedes, 560 So. 2d at 276-277, 279 (duty to mitigate).

61. Nevertheless, the District proved that Mr. Behrens signed the Petition and Amended Petition for an "improper purpose." A sanction in the amount of $500.00 is appropriate. See Findings of Fact 35 and 37. (Section 120.569(2)(e), Florida Statutes, like Rule 11, Florida Rules of Civil Procedure, "is aimed at deterrence, not fee shifting or compensating the prevailing party." Department of Health & Rehabilitative Services v. S.G., 613 So. 2d 1380, 1384 (Fla. 1st DCA 1993)(quoting Mercedes, 560 So. 2d at 276).)

DISPOSITION

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

ORDERED that Alan R. Behrens filed his Petition and Amended Petition for Formal Hearing for an "improper purpose" and should be sanctioned in the amount of $500.00. This amount shall be paid to the Southwest Florida Water Management District within 45 days after this Final Order is filed with the Clerk of the Division of Administrative Hearings.

DONE AND ORDERED this 25th day of February, 2004, in Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of February, 2004.

ENDNOTES

[1]/ Chapter 119, Florida Statutes, "provides a right of access to inspect and copy an agency's existing public records; it does not mandate that an agency create new records in order to

accommodate a request for information from the agency," or "give out information from the records of his or her office." 22 Government-In-The-Sunshine Manual 105 (2000)(Emphasis in original)(Citation omitted.) See also In re Report of the Supreme Court Workgroup on Public Records, 825 So. 2d 889, 898 (Fla. 2002)(the custodian of judicial records "is required to provide access to or copies of records but is not required either to provide information from records or to create new records in response to a request." (Citations omitted.)) Chapter 119, Florida Statutes, did not require the District to create the "drawdown contours" requested by Mr. Behrens. Conversely, District staff undertakes groundwater impact analysis modeling and preparation of drawdown contours when annual average quantities of 100,000 gpd or greater are requested, or when evaluation of the proposed water use otherwise demonstrates a need to undertake such analysis for reasonable assurance purposes. The District explained that their experience has demonstrated that quantities below this threshold have minimal-to-no-impact upon the water resource and are indistinguishable from naturally occurring or background fluctuation. Here, District staff felt that because the requested withdrawal was 31,100 gpd and no adverse impacts expected, groundwater modeling or the preparation of drawdown contours were not needed as part of the initial evaluation of the Has-Ben Groves WUP application. Further, groundwater modeling is time-consuming, as a District geologist or hydrologist must expend approximately four to eight hours to complete the modeling process. An additional two hours of professional staff time is generally required to convert groundwater-modeling results into a graphical representation of drawdown contours. Nevertheless, after Mr. Behrens' filed his challenge, Mr. Phillippi undertook groundwater modeling and prepared drawdown contours for the Has-Ben Groves withdrawals of water after the Amended Petition was filed.

[2]/ "A frivolous purpose is one which is of little significance or importance in the context of the goal of administrative proceedings." Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034, 1037 n.1 (Fla. 1st DCA 1991)(Citation omitted.)

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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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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 this Final Order.