STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLOTTE COUNTY, Petitioner, vs. IMC-PHOSPHATES COMPANY and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 03-3561F

FINAL ORDER

On September 26, 2003, Charlotte County (County) filed a Petition for Attorneys' Fees and Costs (Petition) to be assessed against IMC-Phosphates Company (IMC). On October 8, 2003, IMC filed a Motion to Dismiss and Response. On October 22, 2003, the County filed a Response in Opposition to IMC's Motion to Dismiss.

The County's Petition was filed under Sections 120.569(2)(e), 120.595(1), and 57.105(5), Florida Statutes.[1] It was directed at IMC's Exception X, which was filed in Division of Administrative Hearings (DOAH) Case No. 02-4134. Exception X was directed to Conclusion of Law 268 in the Recommended Order (RO) entered in Case No. 02-4134, which concluded that the County had standing, despite the preceding Conclusion of Law 267 that the 2002 amendments to Section 403.412(5) eliminated the County's standing under that statute (a conclusion which DEP reversed in

its Final Order (FO)). The County's Petition asserted that the filing of Exception X warranted sanctions under Sections 120.569(2)(e), 120.595(1), and 57.105 because, as DEP stated in its FO:

> Conclusion of Law 268 is thus entirely consistent with . . . IMC's Proposed Recommended Order submitted to the ALJ. How could DEP grant this Exception by ruling that the ALJ erred in reaching a conclusion on standing that was stipulated to and requested by IMC [by proposing in its Proposed Recommended Order (PRO) a recommendation that the County had standing]?

Jurisdiction

At the outset, it is noted that DOAH jurisdiction to grant the relief requested under the cited statutes is questionable. It was held in Sellars v. Broward County School Bd., DOAH Case No. 97-3540F, 1997 WL 1053430 (DOAH Sept. 25, 1997), that DOAH had no jurisdiction over a motion for sanctions under Sections 120.595(1) and 120.569(2)(c), now 120.569(2)(e), filed after entry of the RO, and that the appropriate remedy for the refusal of the agency with final order authority to remand would be an appeal to the district court of appeal. In most other reported cases where sanctions were considered under these statutes and their predecessors, the request for sanctions was made prior to entry of the RO, and either ruling was made contemporaneously with the DOAH recommended or final order, or jurisdiction to consider sanctions was reserved in the DOAH order. In the few

exceptions, consideration of sanctions was based on conduct that took place before entry of the DOAH order. See Beverly Health and Rehab. Services-Palm Bay v. Agency for Health Care Admin., DOAH Case No. 02-1297F, 2003 WL 1986599 (DOAH Apr. 25, 2003)(jurisdiction over motion for sanctions under Section 120.569(2)(e) filed after final order but based on conduct prior to entry of the RO); Singer v. DeLong and Dept. of Environmental Protection, DOAH Case No. 01-3327, 2003 WL 1789054 (DOAH Mar. 31, 2003)(motion for sanctions under Section 120.595(1) filed one week after DOAH order closing filed based on withdrawal of request for hearing, but based on conduct prior to loss of DOAH jurisdiction by entry of recommended order and resulting in re-opening of DOAH case); Hall v. Dept. of Juvenile Justice, DOAH Case No. Case No. 97-0175F, 1997 WL 1052923 (DOAH July 3, 1997)(motion for sanctions filed after final order not considered under Section 120.59(6), now 120.595(1), but considered under Section 120.57(1)(b)5., now 120.569(2)(e), where based on conduct before entry of recommended order). See also Santa Rosa Medical Center v. Agency for Health Care Admin., DOAH Case No. 98-4771FC, 1999 WL 1486348 (DOAH July 14, 1999)(sanctions considered under Mandate from district court of appeal). Assuming jurisdiction, sanctions would not be warranted on the merits of this case.

Merits

Section 120.569(2)(e) provides in pertinent part:

> If a pleading, motion, or other paper is signed in violation of these requirements [that the filer "has read the pleading, motion, or other paper 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"], the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The County has not demonstrated that the Exception X was filed for any improper purpose, and sanctions are not appropriate under this statute.

Section 120.595(1)(b) provides:

> 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.

Again, the County has not demonstrated that IMC participated in this proceeding for an improper purpose; and an award of prevailing-party costs and fees under this statute is not appropriate.

Section 57.105(5) provides:

> In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4).

Those subsections provide:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense <u>when initially presented to the court or at any time before trial</u>:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.
>
> * * *
>
> (2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.
>
> * * *
>
> (3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to

> any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.
> (4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(Emphasis added.)

It is concluded that, on the facts of this case, an award of prevailing-party attorney's fees is not appropriate under Section 57.105(5), with particular reference to the emphasized language in Subsections (1)-(4) of the statute. First, regardless of the excuses offered by the County, it is clear that the mandatory requirements of Subsection (4) were not met. In addition, when IMC "initially presented" Exception X, DEP had not yet characterized IMC's PRO as a stipulation to the County's standing; and it was not unreasonable at the time for IMC not to know that the "material facts" included such a stipulation and for IMC to make an argument that the County did not have standing "by the application of then-existing law [including RO Conclusion of Law 267] to those material facts." Finally, the County did not demonstrate that IMC's Exception X was filed "primarily for

the purpose of unreasonable delay." For these reasons, it is concluded that an award of prevailing-party attorney's fees or damages to the County would not be appropriate under Section 57.105(5).

Based on the foregoing, Charlotte County's Petition for Attorneys' Fees and Costs is denied.

DONE AND ORDERED this 7th day of November, 2003, in Tallahassee, Leon County, Florida.

S

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of November, 2003.

ENDNOTE

1/ Except for Section 57.105, which refers to the statute as amended by Section 9, Chapter 2003-94, Laws of Florida (2003), all cited statute sections refer to the 2002 codification of the Florida Statutes.

COPIES FURNISHED:

Edward P. de la Parte, Jr., Esquire
de la Parte & Gilbert, P.A.
101 East Kennedy Boulevard, Suite 3400
Post Office Box 2350
Tampa, Florida 33601-2350

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

Roger W. Sims, Esquire
Holland & Knight, LLP
200 South Orange Avenue, Suite 2600
Orlando, Florida 32801-3453

Teri L. Donaldson, General Counsel
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Kathy C. Carter, Agency Clerk
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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 agency 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 the order to be reviewed.