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**Pro/Con:
Intervention in Environmental
Permitting
Should there be a price?**

YES

by Frank E. Matthews
and Kathleen L. Blizzard

Environmental litigation has seen an increasing use of F.S. §403.412(5), often referred to as the "citizen suit" provision of Florida's Environmental Protection Act of 1971.¹ Under F.S. §403.412(5), traditional standing requirements have been deemed inapplicable for the initiation of formal evidentiary administrative proceedings pursuant to F.S. §120.57(1). By merely invoking F.S. §403.412(5) and alleging to be a citizen via a verified petition, not-for-profit corporations, public interest groups, associations, and individuals have commenced numerous administrative proceedings covering a host of environmental issues.²

The most troubling aspect of these suits is that citizens invoking F.S. §403.412(5) for purposes of initiating a formal administrative hearing have been determined to be completely insulated from the assessment of costs and attorney fees provided for in F.S. §403.412(2)(f). Recent administrative decisions have misinterpreted the legislature's intended relationship between subsections (2)(f) and (5) of F.S. §403.412,³ and thereby have established a distinction between circuit court citizen suits and administrative citizen suits which was not intended in the original law as enacted.

In the first Department of Environmental Regulation administrative decision on this issue, *Agrico Chemical Company*, former DER Secretary Victoria Tschinkel reasoned that the words "this section" as used in F.S. §403.412(2)(f), referred only to Section 403.421(2), which in its other paragraphs, (a) through (d), deals exclusively with injunctive actions instituted in circuit courts.⁴

This overly-narrow interpretation of the

Florida has established an opportunity for broad citizen participation in environmental decisions through intervention in administrative permitting. Was it the intent that this participation carry with it a price? This article presents both positions

intent of F.S. §403.412(2)(f) is clearly shown to be erroneous when one consults the *original* form of F.S. §403.412, as it was enacted in Ch. 71-343, Laws of Florida. Before editing and renumbering by the Division of Statutory Revision, Ch. 71-343, §2, paragraph 6 (the current Section 403.412(2)(f)) used the word "act" rather than the word "section" relied on in *Agrico*. Thus, the original language of F.S. §403.412(2)(f) provided that costs and attorney's fees were available to prevailing parties "[i]n any action instituted

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NO

by Thomas W. Reese

In 1971 the Florida Legislature enacted the Environmental Protection Act of 1971 (Little EPA),¹ which grants any citizen of the State of Florida with standing to *institute* suit in a court of law for injunctive relief against any person or legal entity which is violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state;² and standing to *intervene* "in any administrative, licensing, or other proceeding authorized by law for the protection of the air, waters, or other natural resources of the state from pollution, impairment or destruction."³ This legislation made several important distinctions between the right to institute suit in a court of law seeking injunctive relief and the right to intervene into ongoing administrative and licensing proceedings. These distinctions include different standing requirements and different treatment with regard to attorney's fees.

The Little EPA standing requirements for initiating suits for injunctive relief in courts of law are significantly more stringent than the requirements for intervention into ongoing administrative and licensing proceeding. The Little EPA requires citizens seeking to *institute* suits in courts of law for injunctive relief to allege and prove facts demonstrating they will be *affected* by the activity they are seeking to enjoin.⁴ The Florida Supreme Court has interpreted this to mean that not only must a citizen allege facts sustaining an allegation of irreparable injury to the environment, necessary for any injunctive relief, the citizen must also establish "that the question raised is real and not merely

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pursuant to this act.” (Emphasis added.) Consequently, the only reasonable and unambiguous interpretation of the original statutory language renders costs and attorney’s fees appropriate to the entire act, i.e., all of F.S. §403.412 including subsection (5). Clearly, subsection (5) is part of the “act,” and we must assume the legislature did not use the word “act” without due consideration for the consequences of its choice of terminology.⁵

Even when interpreting the revised language of Section 403.412(2)(f) the *Agrico* argument is flawed, because though subparts of a statute, such as “Section 403.412(2),” are commonly referred to as “sections” (as has been done in this article), in the proper statutory terminology, 403.412(2) is referred to as subsection while the entire 403.412 is referred to as a section. Therefore, applying proper statutory terminology any reference in subsection (2) to “this section” would mean all of F.S. Section 403.412, inclusive of subsection (5). Because the original act contained only Section 403.412, the Division of

Statutory Revision properly implemented the legislative intent when it exchanged the word “act” for “section” in transcribing the act.⁶

As one can readily see, this extremely important issue has been decided by reliance on a rewording by the Division of Statutory Revision of the word “act” to “section” followed by a clear misinterpretation of the proper statutory terminology contained in that rewording.

Certainly there is no reason that the legislature would not have intended that administrative suits be subject to the same potential for assessment of costs and attorney’s fees that exists in circuit court.⁷

Administrative litigation in environmental matters can be as time-consuming and costly as circuit court suits. For example, the *Florida Audubon Society* administrative citizen suit resulted in one year’s delay in the construction of a badly needed expressway in central Florida, and it cost the public expressway authority more than \$100,000 in litigation expense.⁸ In light of these considerations, it would be proper for the statute which supplies any citizen with the standing to sue for environmental protection to likewise constrain the imprudent filing of these actions by providing the prevailing party with the potential for recovering its costs and attorney’s fees.

It has been argued that this would chill citizen participation, and probably it would. However, those citizens having meritorious and legitimate environmental concerns about a development proposal should find themselves to be prevailing parties. The citizen suit provision in the federal Clean Water Act⁹ provides for costs and fees to the prevailing party, and it has not unduly limited citizen activism at that level.

Furthermore, other recent legislative actions have been taken to bring accountability to the administrative arena. Amendments to F.S. §120.57(1)(b)5. and §120.56(6)¹⁰ were adopted to provide for awards of attorney’s fees when a pleading is filed for an improper purpose, and when a nonprevailing party is determined to have participated in an administrative matter for an improper purpose.

While these enactments would seem to require an insurmountable standard of proof, we are aware of one pending award of attorney’s fees under F.S. §120.59(6). While this case was not an environmental “citizen suit,” it indicates that the most egregious behavior by an economic competitor will not be tolerated by the Florida Public Service Commission in an adminis-

trative hearing context. In *St. Johns North Utility Corp. v. Florida Public Service Commission*, Final Order No. 20668 (Jan. 27, 1989), appeal docketed No. 89-00514 (Fla. 1st DCA, Jan. 27, 1989), a privately owned water and sewer utility initiated a Section 120.57(1) formal administrative hearing pursuant to F.S. §367.041, seeking review of the application for extension of a service by a neighboring private utility.

The Florida Public Service Commission found improper purpose based on the conduct of the nonprevailing petitioner throughout the proceedings. The nonprevailing utility failed to meet filing deadlines (even those it had agreed to or even volunteered); it repeatedly failed to comply with discovery requests, including an order compelling discovery; it filed no prehearing statement, offered no direct or rebuttal argument, presented no witnesses, and filed no post-hearing brief.

While this case indicates that at least F.S. §120.59(6) may be applied to curb the most outrageous conduct against an economic competitor, it remains to be seen whether this provision will be a source of relief to permit applicants beleaguered by unsubstantiated claims and delaying tactics put forth in the form of “citizen suits.”

Conclusion — Administrative citizen suit petitioners should pay a price.

The legislature intended that Florida citizens have unfettered participation in environmental permitting; however, accountability was an integral part of this statutory scheme of expansive judicial and administrative access. Under current administrative case law suspect and consequently questionable citizen petitioners take comfort in a lack of exposure. Until this improper impunity is corrected, unwarranted environmental litigation will continue to flourish. □

¹ FLA. STAT. §403.412.

² See, e.g., *Environmental Confederation of Southwest Florida, Inc. v. Cape Cave Corp. and DER*, 8 FALR 317 (October 16, 1985), 498 So.2d 1309 (Fla. 1st D.C.A. 1986), rev. den., 509 So.2d 1117 (Fla. 1987); *League of Women Voters of Clearwater—Upper Pinellas County v. DER and Fairfield Communities, Inc.*, 8 FALR 2367 (March 26, 1986); *Florida Audubon Society, et al. v. DER and Orlando Orange County Expressway Authority*, 9 FALR 565 (October 31, 1986).

³ See *Friends of the Everglades, Inc. v. Board of County Commissioners of Monroe County, DOAH Case Nos. 82-3427 and 82-3428* (consolidated March 2, 1983); *Agrico Chemical Company v. DER, Freeport Land Company, et al.*, 6 FALR 4352 (June 27, 1984), and *Florida Audubon Society v. DER*, 9 FALR

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This column is submitted on behalf of the Environmental and Land Use Law Section, Terry E. Lewis, chairman, and Irene K. Quincey, editor.



(amended final order regarding attorney's fees February 11, 1987).

⁴ This insulation of citizens was extended to include third party bonding in *West Volusia Conservancy and Friends of St. John, Inc. v. Bayou Arbors, Inc. and DER*, 9 FALR at 5828 (October 30, 1987).

⁴ *Agrico Chemical Company v. DER*, 6 FALR at 4355.

⁵ In three different parts of the act, the legislature did make reference to distinct subparts of the act explicitly by number reference and using the word "subsection." See Ch. 71-343, §2, subsections (2), (3) and (4). The Division of Statutory Revision later replaced "subsection" with "paragraph."

⁶ The terminology used by the State of Florida, Joint Legislative Management Committee, Division of Statutory Revision is set forth in the Preface to the Florida Statutes (1987), p. vii: The hierarchical arrangement of textual subdivisions is indicated by various designations. Thus, chapters are indicated by whole Arabic numbers; sections, by numbers containing a decimal point; subsection, by whole Arabic numbers enclosed by parentheses; paragraphs, by lowercase letters enclosed by parentheses; subparagraphs, by whole Arabic numbers followed by a period; and subparagraphs, by lowercase letters followed by a period. Subdivisions beyond the subparagraph level are not ordinarily used."

⁷ See Ch. 88-393, Laws of Florida. The legislature amended F.S. §403.412(5)(f) to except actions involving a state NPDES permit from the certainty of the prevailing party receiving attorney's fees. Pursuant to this amendment, awards of attorney's fees for any action involving such a permit shall be *discretionary*. This underscores the legislative intent that attorney's fees are mandatory in other cases.

⁸ See *Florida Audubon Society v. DER*, 9 FALR 565 (October 31, 1986); 9 FALR 1422 (February 8, 1987). See motions filed in support of attorney's fees and cost denied at 9 FALR 1423.

⁹ 33 U.S.C. §1365 (1987).

¹⁰ Laws of Florida, Ch. 86-108, Ch. 87-385.

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theoretical, and that the plaintiff has a bona fide and direct interest in the result."⁵ Thus, standing to initiate court action for injunctive relief requires citizens to have suffered some form of injury and to have an interest in redressing the injury suffered. The only difference between this requirement and the standing needed to bring a common law nuisance action is that the Little EPA eliminates the need for an injury different in kind and degree from that suffered by the public at large.

The Little EPA standing requirements for *intervening* in administrative and licensing proceedings are less demanding. All that is required is that the intervenor be a citizen of the state and file a verified pleading asserting that "the activity, con-

duct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state."⁶ There is no requirement that the citizen suffer any injury or have any interest which will or may be affected by the proposed activity.⁷ This difference in standing recognizes the distinction between a citizen instituting an action for injunctive relief with the judicial branch of government and intervening in an ex-

ecutive branch administrative or licensing proceeding. Case law has established that citizens can use the Little EPA's broad grant of standing to intervene into administrative licensing proceedings once the agency issues its notice of proposed agency action.⁸ Intervention can also occur when another party has requested a F.S. §120.57 hearing.

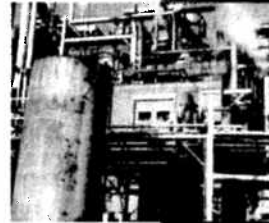
A second major distinction made by the Little EPA between instituting court suits and intervening in ongoing executive branch

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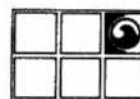
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administrative and licensing proceedings concerns the availability of attorney's fees. F.S. §403.412(2)(f) of the act provides that

[I]n any *action instituted* pursuant to this section, the prevailing party or parties shall be entitled to costs and attorney's fees. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this section, the court may order the plaintiff to post a good and sufficient surety bond or cash. (emphasis supplied.)

Numerous attempts have been made to apply this attorney's fee and costs provision to parties who intervene in administrative and licensing proceedings pursuant to the Little EPA. All of these attempts have been unsuccessful, and properly so. The governor and cabinet sitting as the Florida Land and Water Adjudicatory Commission⁹ and the Department of Environmental Regulation¹⁰ have denied attempts to impose attorney's fees. The Second District Court of Appeal affirmed the decision of DER without writing an opinion. Attempts to have DOAH hearing officers require citizens intervening pursuant to the Little EPA to post bonds to ensure payment of attorney's fees have similarly been unsuccessful on the grounds that the Little EPA's attorney's fee provision does not apply to intervention in administrative proceedings.¹¹

Attorney's fees and costs are not available in F.S. §403.412(5) administrative and licensing intervention proceedings for several reasons.

The award of attorney's fees is in derogation of the common law and statutes allowing for the award of such fees must be strictly construed.¹²

The Little EPA attorney's fee provision specifically refers to "*actions instituted* pursuant to this Section." (emphasis supplied.) Section 120.60(2) administrative licensing proceedings are instituted when the permit applicant files the application. The word *action* is also a term of art which specifically refers to a proceeding in a court of law; it does not include executive branch administrative proceedings.¹³

The Little EPA attorney's fee provision is located in F.S. §403.412(2). Section 2 of the act only concerns court suits for injunctive relief. The placement of the attorney's fee provision in the section dealing with suits for injunctive relief logically infers attorney's fees are not available for intervention in administrative licensing proceedings which is dealt with in Section 5 of the statute.

The Little EPA's attorney's fee provision in Section 2 twice refers to "courts," a reference which indicates an intent to preclude administrative agencies from accessing and awarding attorney's fees.

One of the sponsors of the Little EPA was then state Senator Bob Graham. Bob Graham was the governor at the time the Florida Land and Water Adjudicatory Commission interpreted the Little EPA attorney's fee provision to be inapplicable to interventions in administrative licensing proceedings.¹⁴ Senator Graham's interpretation of this statute should be given great weight and deference since he was a sponsor of the legislation.¹⁵

The Florida Legislature has been aware for the past four years of the construction given the attorney's fee provision of the Little EPA, and no attempts have been made to amend the statute to overrule these interpretations. This amounts to legislative acceptance of the interpretations given the statute by DER, the Florida Land and Water Adjudicatory Commission, and the Second District Court of Appeal, particularly in light of the fact the legislature has attempted during this time period to amend other portions of the Little EPA.¹⁶

The imposition of any attorney's fee or costs upon citizens intervening into the administrative process is contrary to the Federal Administrative Procedure Act (5 U.S.C. §500, *et seq.*) and the federal Constitution's first amendment right for citizens to be able to petition their government. The distinctions made by the Florida Legislature concerning the different tests for standing and the imposition of fees and costs in court proceedings and administrative proceedings was a recognition by the legislative of the fundamental differences between these two procedures.

There is no logical reason why citizens who use F.S. §403.412(5) should be liable for costs and attorney's fees if they lose in a F.S. §120.57 hearing when citizens who do not use F.S. §403.412(5) have no liability for attorney's fees when they lose such a hearing. If permit applicants are not liable for attorney's fees when they lose a F.S. §120.57(1) hearing, a situation which frequently occurs, then why should citizens be liable for fees and costs merely because they used F.S. §403.412(5) to obtain standing?

Florida Statutes §120.57(1)(b)(5) and F.S. §159.59(5) provide for attorney's fees and costs if a petition is filed for an improver or frivolous purpose. The fact that attorney's fees and costs have not

been awarded under these statutes against any party relying upon F.S. §403.412(5) clearly indicates that the provisions of F.S. §403.412(5) have not been abused. In fact, parties who have used F.S. §403.412(5) have successfully modified agency action in numerous cases to the benefit of all citizens in the state.¹⁷

Conclusion — *Attorney's fees are not and should not be available under F.S. §403.412(5).*

The distinctions drawn by the Little EPA concerning the requirements for standing and attorney's fees for court suits seeking injunctive relief and intervention in administrative licensing proceedings are valid and promote sound public policy. Public participation in administrative licensing proceedings should be, and is, encouraged by the Little EPA establishing less stringent standing requirements for intervening into administrative licensing proceedings and by not requiring the imposition of attorney's fees or costs.□

¹ FLA. STAT. §403.412, Fla.Stat., Fla. Laws Ch. 71-343, §§1-6.

² FLA. STAT. §403.412(2).

³ FLA. STAT. §403.412(5).

⁴ FLA. STAT. §403.412(2)(c).

⁵ Florida Wildlife Federation v. State Department of Environmental Regulation, 390 So.2d 64, 67 (Fla. 1980).

⁶ FLA. STAT. §403.412(5).

⁷ Booker Creek Preservation, Inc. v. Mobil Chemical Company, 481 So.2d 10, 12 and 14 (Fla. 1st D.C.A. 1986).

⁸ ManaSota-88, Inc. v. Department of Environmental Regulation, 441 So.2d 1109, 1111 (Fla. 1st D.C.A. 1983); Cape Cave Corp. v. Department of Environmental Regulation, 498 So.2d 1309, 1311 (Fla. 1st D.C.A. 1986), *cert. den.*, 509 So.2d 1117 (Fla. 1987); ManaSota-88, Inc. v. Gardinier, Inc. 481 So.2d 948, 949 (Fla. 1st D.C.A. 1986).

⁹ Friends of the Everglades, DOAH Case Nos. 82-3427 and 82-3428 (March 2, 1983).

¹⁰ Agrico Chemical Company v. Department of Environmental Regulation, 6 FALR 4352 (DER 1984).

¹¹ ManaSota-88, Inc. v. Wilbur Boyd Corp., DOAH Case No. 85-2904 (1985); Concerned Citizens of Citrus County, Inc. v. Eyster, DOAH Case No. 84-0841(1984).

¹² Sunbeam Enterprises, Inc. v. Upthegrove, 316 So.2d 34 (Fla. 1975) (mechanics lien statute which authorized reasonable attorney's fees to enforce lien held not to authorize attorney fees on appellate work).

¹³ FLA. JUR 2d, *Actions* §2.

¹⁴ Friends of the Everglades, DOAH Case Nos. 82-3427 and 82-3428 (March 2, 1983).

¹⁵ NLRB v. Fruit and Vegetable Packers and Warehousemen Local 760, 377 U.S. 58 (1964). 49 FLA. JUR 2d, *Statutes*, §166.

¹⁶ PCB 84-15, Select Committee on Growth Management (1989).

¹⁷ Concerned Citizens League of America, Inc. v. IMC Fertilizer, ER FALR 89:0041 (DER 1989).