

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Proceedings to Determine	)	Docket No.
Whether to Withdraw Approval	)	RCRA-SHWPAA-IV-01-87
of North Carolina's	)	
Hazardous Waste Management	)	
Program	)	
_____	)	

DECISION ON MOTION FOR RECONSIDERATION

The Environmental Policy Institute (EPI), a respondent in the proceeding to determine whether to withdraw approval of North Carolina's hazardous waste management program, has filed a motion for reconsideration of the decision issued May 31, 1990.

The motion concerns the portion of Appendix C to the May 31, 1990 decision that discusses Administrative Law Judge Spencer T. Nissen's statement that this proceeding is not subject to the Administrative Procedure Act. That statement was made in a November 30, 1989 ruling concerning ex parte contacts, in which Judge Nissen denied North Carolina's motion for dismissal on the grounds, among others, that the Administrative Procedure Act, which authorizes dismissal as a sanction for ex parte contacts, is inapplicable to state program withdrawal proceedings.

EPI requests that I either (1) "state unequivocally that the procedures used in these proceedings were 'under section 554' and thus an 'adversary adjudication' within the meaning of the Equal Access to Justice Act, 5 U.S.C. § 504" or (2) find that "formal APA procedures under 5 U.S.C. § 554 are required in state program withdrawal proceedings under 42 U.S.C. § 6926(e)."<sup>1</sup>

EPI states that it has filed this motion "to preserve its rights to collect attorney's fees and expenses for its participation in these proceedings." EPI is therefore apparently not seeking review of Judge Nissen's earlier refusal to dismiss this proceeding, but instead has filed this motion for reconsideration only as a first step toward applying for attorney's fees.

Approximately three weeks after filing this motion, EPI filed an

---

<sup>1</sup>The Equal Access to Justice Act provides at 5 U.S.C. §504(a)(1) that an agency that conducts an "adversary adjudication" shall award attorney's fees and other expenses incurred in connection with that proceeding to a prevailing party, unless the position of the agency was substantially justified or special circumstances make an award unjust.

"Adversary adjudication" is defined by reference to 5 U.S.C. §554, which provides at Section 554(a):

This section applies ... in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing....

application for attorney's fees with the Chief Judicial Officer. Because EPI's application raised certain procedural questions, the Administrator issued an order on August 27, 1990 clarifying the procedures to be used in considering EPI's application for attorney's fees and designating Judge Nissen to issue a recommended decision on the application. The Administrator also designated me to review the recommended decision in the event any party files exceptions to the decision. The Administrator directed that the procedures in 40 C.F.R. Part 17 and in 40 C.F.R. §271.23(b)(7) and (8) (with specified modifications) be followed in deciding and reviewing EPI's application.

Since Judge Nissen's recommended decision must necessarily determine whether this proceeding is an "adversary adjudication" within the meaning of the Equal Access to Justice Act, and Judge Nissen can also address, to the extent necessary, the applicability of the Administrative Procedure Act to state program withdrawal proceedings,<sup>2</sup> EPI's motion for reconsideration should be denied.

It would be administratively inefficient for me to decide those issues now, when EPI must in any event obtain from Judge Nissen the actual determination as to whether it qualifies for the award of attorney's fees. It is preferable that Judge Nissen decide all issues related to the application for award of attorney's fees, with review by me later if necessary, rather than for me to issue a partial decision for Judge Nissen to implement.

Accordingly, it is ordered that respondent's motion for reconsideration is DENIED.

/s/ \_\_\_\_\_  
Daniel W. McGovern  
Regional Administrator  
Region 9  
U.S.Environmental Protection Agency

Dated: August 28, 1990

---

<sup>2</sup>EPI has included its arguments on both issues at pages 3-15 of its application for attorney's fees.