UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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PROTECTION AGENCY

IN THE MATTER OF:	)	
	)	
Proceedings to Determine	)	
Whether to Withdraw Approval	)	
of North Carolina's Hazardous	)	
Waste Management Program	)	
	)	DOCKET NO.
	)	RCRA-SHWPAW-IV-01-87
RESPONDENTS	)	

FINAL DECISION ON APPLICATION FOR ATTORNEY'S FEES

The Environmental Policy Institute (EPI),[1] a respondent in the proceeding to determine whether to withdraw approval of North Carolina's hazardous waste management program, has filed an exception to the November 2, 1990 Recommended Decision by the presiding officer, Administrative Law Judge Spencer T. Nissen, which denied EPI's application for the award of attorney's fees and other expenses under the Equal Access to Justice Act.[2] EPI takes exception to the four Conclusions in the recommended decision as well as to the presiding officer's recommendation not to award attorney's fees and expenses to EPI.

After reviewing EPI's exception, I adopt and incorporate herein the recommended decision prepared by the presiding officer; my response to EPI's exception follows.

Applicable Statutes and Regulations. 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,[3] unless the position of the agency was substantially justified or special circumstances make an award unjust.

"Adversary adjudication" is defined in 5 U.S.C. § 504(b)(1)(C) as

an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .

Section 554 "of this title" is 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 . . . .

EPA has promulgated regulations at 40 C.F.R. Part 17 to implement the Equal Access to Justice Act. The EPA regulations follow generally the model regulations issued by the Chairman of the Administrative Conference of the United States. 46 Fed. Reg. 32900 (June 25, 1981).

Procedural Background. Under Section 3006 of the Solid Waste Disposal Act, 42 U.S.C. § 6926, commonly referred to as the Resource Conservation and Recovery Act ("RCRA"), states may develop programs for the regulation of hazardous wastes which, if approved by the Administrator of EPA, can be administered in lieu of the federal program.

After opportunity for a public hearing, the Administrator may "authorize" (approve) a state program if the program (1) is equivalent to the federal program under RCRA, (2) is consistent with the federal or state programs applicable in other states, and (3) provides for adequate enforcement of compliance with the requirements of RCRA. RCRA § 3006(b)(1)-(3); 42 U.S.C. § 6926(b)(1)-(3).

The Administrator may also withdraw authorization. Section 3006(e) of RCRA provides:

[w]henever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to [subchapter III of RCRA]. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

42 U.S.C. § 6926(e).

This provision is implemented by Section 271.23(b) of EPA regulations, 40 C.F.R. § 271.23(b). Under that regulation, the Administrator may order the commencement of withdrawal proceedings on his own initiative or in response to a petition from an interested person. The Administrator may conduct an informal investigation of the allegations in a petition to

determine whether cause exists to commence withdrawal proceedings. The Administrator is required to respond in writing to any petition to commence withdrawal proceedings.

In the present instance, petitions were received from GSX Chemical Services, Inc. (GSX)[4] and the Hazardous Waste Treatment Council (HWTC) requesting that North Carolina's hazardous waste program authorization be withdrawn because of the enactment by the state legislature of Senate Bill 114, which in their views rendered the state's hazardous waste program inconsistent with RCRA. Finding of Fact 2.[5] Acting under a delegation from the Administrator, the Regional Administrator of EPA Region 4 responded to the petitions by issuing an order which summarized the results of the region's investigation. The order concluded that substantial questions had been raised as to the consistency and equivalency of North Carolina's hazardous waste program with the federal program and that these questions provided cause to commence a withdrawal proceeding. Finding of Fact 1; 52 Fed. Reg. 43903-906 (November 17, 1987). North Carolina responded by denying the allegations in the order; the Environmental Policy Institute (EPI) moved to intervene in opposition to the proposed withdrawal and was admitted as a party. Finding of Fact 3.

Initially the hearing was scheduled for January 12 and 13, 1988, but was postponed several times in order to allow a taskforce commissioned by then-Administrator Lee Thomas to make a policy recommendation on hazardous waste treatment capacity issues. Finding of Fact 4. During the period of postponement GSX and the HWTC filed a petition for a writ of mandamus ordering EPA to proceed with the hearing. Hazardous Waste Treatment Council and GSX Chemical Services, Inc. v. William K. Reilly, No. 88-1889 (D.C. Cir.). EPA rescheduled the hearing before the petition was heard. On November 30, 1989, in the course of ruling on motions regarding alleged ex parte contacts, the presiding officer determined that the Administrative Procedure Act was not applicable to the withdrawal proceeding. Finding of Fact 5. The hearing was held on several dates during the period May through September, 1989. On April 11, 1990 the presiding officer issued a decision recommending that the withdrawal proceeding be dismissed. I adopted the recommended decision, except for certain portions I considered to be dicta, in a final decision dated May 31, 1990. The underlying withdrawal proceeding has therefore been dismissed, although GSX and HWTC have challenged that decision in the U. S. Court of Appeals for the District of Columbia Circuit. Hazardous Waste Treatment Council, et al. v. William K. Reilly, No. 90-1443 (D.C. Cir.).

EPI's First Exception. The first Conclusion by the presiding officer to which EPI takes exception is that

[s]tate program authorization withdrawal proceedings in accordance with RCRA section 3006(e) are not "adjudications" required by statute to be determined on the record after opportunity for an agency hearing within the meaning of Section

554 of the APA and thus are not "adversary adjudications" within the meaning of the EAJA.

In support of this Conclusion, the presiding officer notes at pages 22-23 of the Recommended Decision that in Chemical Waste Management v. U.S. EPA, 873 F. 2d 1477 (D.C. Cir. 1989) the court found that the requirement in RCRA § 3008 for a "public hearing" did not indicate whether Congress intended formal or informal hearing procedures to be used and accordingly EPA, which had adopted formal APA procedures for hearings on penalty orders under RCRA § 3008(a), was free to change its interpretation when adopting hearing procedures for orders under RCRA § 3008(h). 873 F.2d 1477 at 1480. EPA's decision to adopt formal procedures for hearings under RCRA § 3008(a) was seen by the court in Chemical Waste as one based on the nature of the issues raised by the penalty orders, not on the statutory language of RCRA § 3008. The presiding officer reviewed the requirement for a public hearing in RCRA § 3006(e) applicable to proceedings to determine whether to withdraw state program authorization and concluded that, as with RCRA § 3008, there was no indication that Congress intended formal "on the record" hearing procedures to apply. Similarly, he concluded that EPA had adopted formal procedures under 40 C.F.R. Part 22 for use in state program withdrawal proceedings based on the nature of the issues raised by state program withdrawal proceedings rather than on requirements of the statute. He concluded that, because it could not be said that Congress intended withdrawal hearings to be "on the record," the APA was not applicable to those hearings. It follows that the EAJA is also not applicable.

EPI argues that formal procedures were required to be employed under the statute in the underlying proceedings here, and therefore the Equal Access to Justice Act applies. EPI considers that formal proceedings were required under the statute even though acknowledging the presiding officer's finding that "the language of the applicable statute, RCRA § 3006(e), was indeterminate as to the applicability of APA § 554" and his finding that the legislative history of the statute was silent on the issue. EPI points to the fact that the Part 22 rules of practice [as modified by section 271.23(b)], were adopted by EPA for withdrawal proceedings under RCRA section 3006(e) and argues that by applying the rule of interpretation articulated in Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) and in Chemical Waste, supra, the presiding officer should have found that formal procedures were required to be employed for purposes of the EAJA's application. The rule cited by EPI is quoted in Chemical Waste from the Chevrondecision as follows:

At the outset, we ask whether "Congress has directly spoken to the precise question at issue".... [I]f so, then we "must give effect to the unambiguously expressed intent of Congress" and may

not defer to a contrary agency interpretation.... If the statute is "silent or ambiguous with respect to the specific issue," however, we proceed to ask "whether the agency's answer is based on a permissible construction of the statute,"....[I]f so, then we must defer to the agency's construction.
873 F. 2d 1477 at 1480 (citations omitted), quoting 467 U.S. 837 at 842-43.

In making this argument, EPI assumes that the agency has made a construction of the statute to which I or a reviewing court must defer.[(6)] However, the agency's decision to use modified Part 22 procedures for RCRA withdrawal proceedings is not necessarily a decision that such procedures were required by RCRA.[(7)] To the contrary, the Chemical Waste decision was correctly construed by the presiding officer as holding that the agency's decision to use formal procedures in penalty cases under RCRA § 3008(a) was not a decision by EPA either that the language of the statute required a formal hearing or that Congressional intent required such a hearing. Chemical Waste, supra, at 1481.[(8)] The agency's decision to use formal hearing procedures for withdrawal proceedings under RCRA Section 3006(e) is similar, and involves no determination by the agency that formal hearing procedures are required by statute. The presiding officer cites St. Louis Fuel and Supply Co., Inc. v. F.E.R.C., 890 F. 2d 446 (D.C. Cir. 1989), for the principle that waivers of sovereign immunity must be strictly construed, and therefore attorney's fees may not be awarded under the EAJA in adversary adjudications that Congress did not make subject to Section 554 of the APA. The presiding officer correctly concludes that, because the public hearing in a RCRA withdrawal proceeding is not required by RCRA § 3006(e) to be conducted under Section 554 of the APA, the EAJA does not apply to the underlying proceeding here.

EPI challenges on several grounds the presiding officer's reliance on St. Louis Fuel. EPI asserts that the presiding officer relied on St. Louis Fuel "for the proposition that formal § 554 procedures may only be deemed to be 'required' for EAJA purposes if Congress has explicitly spoken to so require them."[(9)] EPI asserts that this reliance is flawed because "case law clearly establishes that RCRA need not contain the magic words 'on the record' to trigger the formal requirements of § 554." This argument by EPI is irrelevant, since the presiding officer has not relied on the absence of the phrase "on the record" to prove that hearings in RCRA withdrawal proceedings are not subject to the APA. See, for example, pages 22-23 of the Recommended Decision.

EPI cites Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978), cert. denied 439 U.S. 824 (1978), for the proposition that an adjudicatory administrative hearing subject

to judicial review must be on the record and formal APA procedures apply when the statute states "after opportunity for public hearing." The actual holding in the case (with respect to a license under the Federal Water Pollution Control Act) is "[w]e are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record." 572 F.2d 872 at 877 (emphasis added). That holding seems of little relevance to the present case in light of the laterChemical Waste decision specifically interpreting RCRA.

EPI also argues that the presiding officer's position is erroneous in light of the quotation in St. Louis Fuel from the preamble to the model regulations for implementing the EAJA issued by the Administrative Conference of the United States, to the effect that "questions of [EAJA] coverage should turn on substance--the fact that a party has endured the burden and expense of a formal hearing--rather than technicalities." However, this quotation appears to have been cited in St. Louis Fuel in order to acknowledge a view contrary to that taken by the court in that case. 890 F.2d 446 at 451. In addition, the quoted language refers to the philosophical approach taken by the Administrative Conference in issuing draft regulations. In the final regulations, however, the Administrative Conference changed position after considering comments received on the draft regulations. In stating the new position the Administrative Conference said:

We are concerned, however, that the liberal interpretation of the draft model rules may provide for broader applicability than Congress intended . . . . Moreover, if Congress did intend to restrict awards to cases required to be conducted under the procedures of Section 554, then agencies have no legal authority to award fees under the Act in any other class of cases. We have decided, therefore, to drop the provision of the draft rules suggesting that awards will be available when agencies voluntarily use procedures described in section 554.

46 Fed. Reg. 32900 at 32901 (June 25, 1981).

EPI also attempts to distinguish St. Louis Fuel from the present case by pointing out that in St. Louis Fuel the court found that Congress intended to require less formal procedures than would be provided under the APA. (In the present case, in contrast, there is no statement of Congressional intent as to the degree of formality of the required hearing.) However, the rule stated inSt. Louis Fuel would nevertheless apply to the present case: where an adversary proceeding has not been made subject to the APA by Congress, attorney's fees may not be awarded under the EAJA. While EPI has attempted to argue against the applicability ofSt. Louis Fuel, EPI makes no similar objection to

Advanced Medical Systems, Inc., Nuclear Regulatory Commission, Atomic Safety and Licensing Appeal Board, ALAB-929; 31 N.R.C. 271; 1990 NRC Lexis 10 (March 30, 1990), cited by ALJ Nissen for the holding that where the Atomic Energy Act did not require formal "on-the-record" hearings in license suspension or revocation actions, Commission rules and long-standing practice to afford on the record hearings in such proceedings did not invoke the APA and could not serve as a basis for an award of attorneys' fees under the EAJA.

Recommended Decision at 26.

EPI's Second Exception. The second Conclusion by the presiding officer to which EPI takes exception is that

> [t]he mere fact that the Agency rules of practice governing state program authorization withdrawal proceedings (40 C.F.R. Part 22, as modified by section 271.23(b)) contemplate formal "on the record" proceedings and that the North Carolina withdrawal proceeding was conducted in accordance with the mentioned rules, does not have the effect of converting the proceeding into an "adversary adjudication" within the meaning of the EAJA.

EPI argues that the underlying policy of the EAJA would be flouted if the government could burden parties with formal procedures and then deny a fee award by characterizing the decision to employ formal procedures as discretionary. This argument has been addressed above at page 11. As explained there, the Administrative Conference of the United States took the position when issuing model rules for the implementation of the EAJA in 1981 that fee awards would not be available when agencies voluntarily hold formal APA hearings.[(10)] 46 Fed. Reg. 32900 at 32901 (June 25, 1981). While Congress broadened the applicability of the EAJA in certain respects when reenacting the statute in 1985,[(11)] there are no statements in the legislative history and no changes in the statutory language that would indicate a change of position on this issue. H. R. Report No. 120(I), 99th Cong. 1st Sess. (1985), reprinted in 1985 U.S. Code and Admin. News 132. Accordingly, it appears that the intended scope of the EAJA continues to exclude voluntary formal hearings.

EPI cites Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988) and Abela v. Gustafson, 888 F.2d 1258 (9th Cir. 1988) for the proposition that EAJA coverage is determined by whether formal procedures were in fact employed. The presiding officer correctly rejected that argument based on St. Louis Fuel, discussed above. Not only is the rule used in the U.S. Court of Appeals for the District of Columbia Circuit, as stated in St. Louis Fuel, more relevant here when the underlying decision is under appeal to that Circuit,[(12)] but the rule stated in St. Louis Fuel appears to be the better one in light of its reliance on the principle that waivers of sovereign immunity must be strictly construed. See also the other criticisms of Escobar Ruiz in

Owens v. Brock, 860 F.2d 1363 (6th Cir. 1988).

EPI's Third Exception. The third Conclusion by the presiding officer to which EPI takes exception is that

[e]ven if the withdrawal proceeding against the State of North Carolina were an "adversary adjudication" within the meaning of the EAJA, the Agency's position was "substantially justified" and thus EPI has not established entitlement to attorney's fees and expenses.

The presiding officer found that EPA's position was substantially justified under the standard in Pierce v. Underwood, 487 U.S. 552 (1988). In Pierce the Court held that "substantial" for the purposes of EAJA court proceedings means justified in substance or in the main, that is, justified to a degree that could satisfy a reasonable person. 487 U.S. 552 at 565.

EPI does not challenge use of the standard articulated inPierce, although it puts forward a standard from Derickson Co., Inc. v. NLRB, 774 F.2d 229, (8th Cir. 1985):

The test of substantial justification is a practical one,viz., whether the agency's position was reasonable both in law and fact.

774 F.2d 229, 232 (citation omitted). The standard quoted fromDerickson appears to be identical to that in Pierce, since the Court in Pierce observed that "justified in substance or in the main" is no different from the "reasonable basis both in law and fact" formulation adopted by certain courts of appeals. 487 U.S. 552 at 565.

EPI also quotes Derickson for the proposition that

The agency bears the burden of demonstrating the justification for its position and must make a "strong showing" to meet that burden.

774 F.2d 229, 232 (citation omitted). The agency has in fact made the necessary showing of justification for its position through the filing of Complainant's Response in Opposition to Respondent's Application for Award of Fees and Expenses, pp. 13-19.

EPI asserts that "the magnitude of EPI's victory" as measured by the "number of allegations made by the Agency which were held to be incorrect or invalid shows the Agency's position to have been clearly unjustified." While EPI has a victory, the close interrelation of the issues in the withdrawal proceeding[13] and the fact that the consistency requirements for state RCRA programs in 40 C.F.R. §§ 271.4(a) and 271.4(b) are so similar in concept[14] make it inappropriate to measure the magnitude of the victory by counting up the number of issues "won" or "lost."

EPI asserts that a lack of substantial justification is evinced

by the Agency's indecision in adhering to its litigation position, citing as an example EPA's "one-time decision to withdraw its allegations and terminate the proceedings." EPI's apparent reference is to the Agency's decision at one point to postpone the hearing until further notice, for the purpose of allowing a task force commissioned by former Administrator Lee Thomas to issue a report and policy recommendation as to the best way of assuring adequate capacity for storage and treatment of hazardous wastes. Finding of Fact 4.[(15)] The fact that the hearing was postponed during the policy debate over whether it was better to use the agency's authority under RCRA or under CERCLA to assure that states provide adequate hazardous waste treatment capacity does not show a lack of justification for EPA's litigation position in the withdrawal proceeding.

EPI also argues that lack of substantial justification is shown because the agency trial staff abandoned its prosecutorial approach at the end of the proceedings to assert a neutral investigative stance, and did not file a final memorandum supporting withdrawal of North Carolina's RCRA program. The presiding officer adequately addressed this in the Recommended Decision at pages 30-31 when he noted that the Regional Administrator of Region 4 had advocated resumption of the hearing to the Administrator and later recused himself as a decision-maker, and that a likely reason for EPA's stance is that Region 4 staff did not wish to be seen as attempting to unduly influence the ultimate decision. Additionally, where, as in the present case, withdrawal proceedings are commenced in response to a petition, the provision of 40 C.F.R. § 271.23(b)(1) that "[t]he party seeking with drawal [sic] of the State's program shall have the burden of coming forward with the evidence in a hearing under this paragraph" suggests that EPA staff could take a neutral stance, rather than prosecuting the case against North Carolina for GSX and HWTC. Thus the adoption of a neutral stance by EPA staff does not indicate that the decision to initiate and pursue withdrawal proceedings was unjustified.

EPI argues that the existence of controversy cannot be made equivalent to a finding of substantial justification, and that the evidence of controversy cited by ALJ Nissen at page 28 of the Recommended Decision "indicates nothing more than that the Agency's position was considered to be questionable both internally and externally." Contrary to EPI's assertion, the internal debate in the agency appears to have turned on difficult questions of policy rather than on whether the agency's position regarding withdrawal of North Carolina's RCRA program was questionable. See Finding of Fact No. 8 and discussion at page 28 of the Recommended Decision. EPI argues that the presiding officer's references to the motivations of the sponsors of Senate Bill 114 are irrelevant to the question of substantial justification and that this was "tacitly agreed to" in the final

decision in the underlying proceeding. While the April 11, 1990 Recommended Decision by the presiding officer and my decision adopting it focus on formal actions taken by legislative committees rather than on statements by the sponsors of Senate Bill 114, that does not mean that the motivations of the bill's sponsors are irrelevant in regard to the decision to institute withdrawal proceedings. The history of the state's legislative activity summarized in the notice commencing withdrawal proceedings, 52 Fed. Reg. 43903, 905 (November 17, 1987), indicates that Senate Bill 114 was the third in a series of bills addressing the proposed GSX facility. Region 4 had advised North Carolina of its opinion that each of the bills was inconsistent with RCRA. In light of this history, the motivations of the sponsors of Senate Bill 114 were not irrelevant to the agency's decision to institute withdrawal proceedings and are therefore also not irrelevant to the question whether the agency's decision was substantially justified.

Finally, EPI is disturbed by the presiding officer's consideration of the effect of the withdrawal proceeding on other states, arguing that "[a] frivolous lawsuit could certainly deter nonparties, but that deterrent effect could never transform a frivolous lawsuit into one that is substantially justified." EPI's suggestion that the withdrawal proceeding was frivolous is completely misplaced. As noted by the presiding officer at p. 29 of the Recommended Decision, at the time the proceeding was instituted there had been no litigation of the requirement in Section 271.4(a) and (b) that state RCRA programs be consistent with the federal program and programs in other states. Nor, of course, had there been final agency action interpreting Section 271.4(a) and (b) as they apply to the facts of the North Carolina case, leaving room for widely varying interpretations of the effect of Senate Bill 114 on the RCRA consistency requirement. In that vacuum, some states may well have enacted statutes that were inadvertently inconsistent with RCRA while other states may have been reluctant to legislate at all on a subject matter which could put the consistency of their RCRA programs in question. Under these circumstances the effect of a withdrawal proceeding on other states was a legitimate subject of concern for the agency.

EPI's Fourth Exception. The final Conclusion by the presiding officer to which EPI takes exception is the recommendation that EPI's application for attorney's fees and expenses be denied. EPI apparently reads that conclusion as incorporating Finding of Fact 16, in which Judge Nissen finds that

> . . . the application claims attorney's fees in excess of $75 an hour and expert witness fees in excess of $24.09 per hour, which rates are in excess of those authorized by 40 C.F.R. § 17.7. The

EAJA, 5 U.S.C. § 504(b)(1), provides that attorney's fees in excess of $75 an hour may not be paid unless the agency determines byregulation that special factors, e.g., cost of living or limited availability of qualified attorneys, justify a higher fee.

EPI argues that the full total of attorney's fees and expenses requested by EPI is justified and should be awarded. The presiding officer has not made a detailed examination of EPI's fee application, Finding of Fact 16, and in light of my decision to adopt his recommended decision there is no need to do so. The presiding officer notes correctly that Section 504(b)(1) of the EAJA, 5 U.S.C. § 504(b)(1), limits attorney's fees to $75 per hour, unless the agency determines by regulation that a higher fee is justified. EPA's regulations implementing the EAJA limit attorney's fees to $75 per hour, with no provision for higher fees. 40 C.F.R. § 17.7. Consequently no award can be made in excess of $75 per hour. Although EPI notes that the $75 limit adopted by Congress in 1981 may be outdated, and suggests that a "cost of living adjustment" be applied to the $75 rate, EPI has cited no regulatory or statutory authority for doing so.

Judicial Review of the Underlying Proceeding. The presiding officer notes in Finding of Fact 16 that petitioners GSX (now Laidlaw) and HWTC have filed a petition for judicial review of the final agency decision dismissing the withdrawal proceeding.Hazardous Waste Treatment Council, et al. v. William K. Reilly, No. 90-1443 (D.C. Cir.). He also notes that final agency action on EPI's application for attorney's fees may be precluded until the petition for review is decided, because 40 C.F.R. § 17.14(c) provides that if judicial review is sought of the final agency disposition of the underlying controversy, proceedings for the award of fees will be stayed pending completion of judicial review. Although Section 17.14(c) might have been invoked to stay this proceeding before the presiding officer arrived at his recommended decision, it does not preclude the issuance of a final decision denying a fee award. Section 17.14(c) appears intended to implement 5 U.S.C. § 504(C)(1), which prohibits agencies frommaking awards when a court reviews the underlying decision. Obviously, it could be inappropriate to make an award of attorney's fees under circumstances where an apparently-prevailing party's position might be overturned as the result of judicial review, so that the party no longer qualified for a fee award. The present decision, however, denies an award to an apparently-prevailing party. If the court on review overturns the final agency decision dismissing the withdrawal proceeding, EPI will no longer be a prevailing party, and so would be disqualified from any award on that ground. While it is possible the court could affirm the underlying decision on different grounds than those relied on by the agency, and in

doing so could provide some support for EPI's claim that the agency was not substantially justified, EPI would still have no basis for showing that the withdrawal proceeding is covered by the EAJA. Thus judicial review of the underlying action does not have the potential to render this fee decision invalid.

ACCORDINGLY, IT IS ORDERED THAT EPI's application for attorney's fees and other expenses is DENIED. This decision constitutes final agency action on this matter.

Dated: 12/21/90 /S/_____
Daniel W. McGovern Regional Administrator
Region 9 U.S.Environmental Protection Agency

1. EPI has recently merged with Friends of the Earth and the Oceanic Society and now operates under the name of Friends of the Earth. For the purposes of its fee application, however, it has continued to refer to itself as EPI.

2. EPI filed its 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 filed an exception 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.

3. The definition of "party" in 5 U.S.C. § 504(b)(1)(B) incorporates certain restrictions based on net worth, number of employees, and other factors. States do not qualify as parties under the definition, so no fee application has been received from the State of North Carolina.

4. GSX has been acquired by Laidlaw Environmental Services, Inc.

5. References to findings of fact are to the Recommended Decision dated November 2, 1990, unless otherwise indicated.

6. The clearest example of the assumption is found in EPI's summary of the decisionmaking methodology in Chevron:

. . . if Congress is silent or speaks ambiguously, the decisionmaker should look to the agency which interprets and enforces the statute to see what the agency has determined the statute requires. If the agency's regulations require formal procedures to be utilized, then the EAJA applies.

Exception at p. 11. EPI's prescription for decisionmakers fails to acknowledge the possibility that an agency could adopt formal procedures as a matter of policy or of administrative convenience, rather than because the agency considered formal procedures to be required by statute.

7. While it is true that the underlying proceeding here was conducted under a modified form of the Part 22 procedural rules and that Part 22 is used by EPA for formal hearings under the APA, it should be noted that EPA has also elected to use Part 22 in certain types of proceedings where Congress clearly allowed the agency to adopt less formal non-APA procedures. See, e.g., 54 Fed. Reg. 21174, 21175 (May 16, 1989)

involving CERCLA class I penalty cases. Consequently, the fact that a certain type of administrative case is actually being handled under Part 22 does not necessarily indicate that the agency has decided formal APA adjudicative procedures are required by statute for that type of case.

8. At page 9 of the Exception EPI argues that the presiding officer has misconstrued the Chemical Waste case as standing for the proposition that, because the agency was free to change its regulations requiring formal APA procedures under RCRA § 3006(e) at any time, formal procedures were not required. EPI points out (correctly) that such a change would require formal notice and comment, and EPI asserts that such a change could not be made "in the middle of these proceedings." However, I do not read ALJ Nissen to be stating that the agency could change procedures without formal notice and comment.

9. The presiding officer actually cited St. Louis Fuel for the proposition that waivers of sovereign immunity must be strictly construed and that accordingly "[a]ttorneys' fees may be awarded in adversary adjudications governed by APA section 554; they may not be awarded in adversary adjudications that Congress did not subject to that section." Recommended Decision at p. 26, quoting 890 F.2d 446 at 451.

10. The Administrative Conference was apparently referring to agencies that held hearings voluntarily. The hearing under RCRA § 3006(e) is required, but EPA is following a policy of holding a formal rather than informal hearing. The same principle should apply to both situations.

11. E.g., certain social security hearings and hearings before boards of contract appeals.

12. Hazardous Waste Treatment Council, et al. v. William K. Reilly, Docket No. 90-1443.

13. See the lists of issues in the presiding officer's Order Establishing Issues, dated May 3, 1989, and in the Proposed Order Establishing Issues, served on the parties April 28, 1988.

14. Section 271.4(a) provides "Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes . . . shall be deemed inconsistent." Section 271.4(b) provides "Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent."

15. Two different approaches to addressing hazardous waste treatment capacity issues were available--through the RCRA consistency requirements in 40 C.F.R. §§ 271.4 and 271.23 or through state capacity assurances required under Section 104(c)(9) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9604(c)(9).