UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

Resource Conservation and Recovery Act - State Program Authorization and Withdrawal Proceedings - Public Hearing - Applicability of Administrative Procedure Act

Even though rules of practice contemplate that the public hearing provided by RCRA § 3006(e) in proceedings for withdrawal of a State's program authorization be formal in accordance with Administrative Procedure Act, controlling factor is intent of Congress and where it could not be said that Congress intended such proceedings be "on the record," APA was not applicable.

Resource Conservation and Recovery Act - Administrative Procedure Act - Rules of Practice - Ex Parte Communications - Remedies

Remedy for violation of regulatory provision (40 CFR § 22.08) prohibiting *ex parte* communications is disclosure and opportunity for opposing party to reply or rebut and where full disclosure was ultimately accomplished, Respondents had obtained remedy provided by *ex parte* rule. Even if APA applied and even if egregious violations of the *ex parte* rules were established, proceeding would not be dismissed as apparently authorized by 5 U.S.C. § 557(d)(1)(D), because dismissal would not be in accordance with the policy of the underlying statute, i.e., RCRA § 3006(e).

Resource Conservation and Recovery Act - State Program Authorization and Withdrawal Proceedings - Decisionmakers - Recusal

Where evidence failed to establish that Administrator had prejudged facts or result of the matters at issue, his recusal as a decisionmaker was not required.

Resource Conservation and Recovery Act - Rules of Practice - Ex Parte Communications - Hearings

Where EPA disclosures demonstrated that facts concerning alleged *ex parte* communications and the substance thereof had been placed on the record, no necessity for a hearing on such communications had been shown and motion for a hearing thereon was denied.

ORDER DENYING MOTIONS FOR DISMISSAL OF PROCEEDING, FOR RECUSAL OF THE ADMINISTRATOR AND FOR A COMPLETE DISCLOSURE AND HEARING ON ALLEGED EX PARTE COMMUNICATIONS

On August 14, 1989, Respondents, the State of North Carolina and the Environmental Policy Institute (EPI), filed a motion for an order compelling EPA to make full disclosure of ex parte communications and for an evidentiary hearing on such disclosures and alleged procedural irregularities to commence on September 18, 1989, the date then scheduled for resumption of the hearing on the merits. Intervenor (Respondent) Conservation Council of North Carolina adopted the motion in a paper filed on August 17, 1989. Alternatively, Respondents moved that the proceeding be dismissed "* * due to the incurable bias, prejudgment, and procedural irregularities established in the documents which have been disclosed to date and which permeate this EPA proceeding as a whole, including final decisionmakers" (Id. at 1).

On May 4, 1989, the Conservation Council of North Carolina (Conservation Council), an intervenor in this proceeding, filed a motion to dismiss, which alternatively included, inter alia, a motion to conduct an investigation and schedule a hearing on ex parte communications and bias and for expedited discovery thereon, i.e., production of documents and access to EPA staff.[1]

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[1] The matter of possible ex parte communications during the course of the policy review ordered by former Administrator Lee Thomas was first raised by EPI in a Prehearing Reply And Motions, dated March 14, 1988. This matter was also raised in letters to (continued...)

This motion was denied by an order, dated May 12, 1989, which cited an earlier order (Order Addressing Procedural Motions, dated April 28, 1988) to the effect that action to remedy violations of the rule against ex parte communications (40 CFR § 22.08) was the province of the Administrator. This ruling was premised on the belief that any investigation or evidentiary hearing relating to ex parte communications would appropriately be a separate proceeding. Respondents appealed the mentioned ruling to the Administrator, requesting, inter alia, a stay of the hearing on the merits scheduled to commence May 31, 1989, an investigation and discovery of alleged ex parte communications and the holding of an evidentiary hearing thereon (Motion To Conduct Investigation Of Ex Parte Contacts, May 15, 1989). On May 26, 1989, the Acting General Counsel, acting on behalf of the Administrator, remanded the motion to me as presiding ALJ, opining that Region IV's decision to reinstitute the proceeding reinstated my authority to consider such motions until such time as a recommended decision and

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[1/](...continued)
the Administrator from the Conservation Council and Office of the Attorney General of North Carolina, dated April 19 and 22, 1988, respectively. EPI reiterated its concerns regarding alleged ex parte communications which assertedly undermined or tainted the proceeding (Motion For An Extension Of Time, dated May 9, 1988).

certification of the record were prepared.[2/] In an Addendum To Motion To Conduct Investigation Of Ex Parte Contacts, dated May 30, 1989, Respondents stated their intention to seek judicial review, if they were required to proceed without prior disclosure of ex parte information or adequate time to prepare rebuttal evidence. Respondents assert that they were procedurally and substantively prejudiced by EPA's contradictory characterization of the status of the proceeding during the course of the national review process (May 20, 1988, to April 18, 1989) to develop policies which, implicitly, or expressly, affected the issues herein. The General Counsel's view that the proceeding was in effect dismissed after the indefinite postponement was announced (supra at note 2) was disputed. Respondents pointed out that the Joint Motion Of Petitioners and Respondent For Continuance Of Oral Argument Pending Events That Will Moot The Case, dated May 8, 1989,[3/] joined in by the Acting Assistant Attorney General, Land and Natural Resources,

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[2/] In a reply to the Attorney General of North Carolina's letter to the Administrator (note 1, supra), the General Counsel adopted the position that the proceeding was no longer pending from the time an indefinite postponement of the hearing was announced, 53 Fed. Reg. 32899, August 29, 1988 (letter from Lawrence J. Jensen, EPA General Counsel, dated October 24, 1988).

[3/] On December 21, 1988, GSX and HWTC filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit (Hazardous Waste Treatment Council and GSX Chemical Services, Inc. v. Lee M. Thomas, presently William K. Reilly, Administrator, Environmental Protection Agency, No. 88-1889) for a writ of mandamus ordering EPA to proceed with the postponed hearing. Oral argument on the petition was scheduled for May 18, 1989. EPA's action rescheduling the hearing precipitated the joint motion.

on behalf of EPA, acknowledged that administrative proceedings had already been initiated to withdraw North Carolina's authority to administer a hazardous waste program and that a hearing in the proceeding had been postponed pending the previously mentioned national policy review. The purpose of this argument was, of course, to refute any contention that the ex parte rules were not applicable during the review period.

The addendum alleged that absent full disclosure through a fact-finding hearing, the record will never be purged of the taint which now permeates the proceeding, i.e., EPA's final decision has already been made based on a record deliberately concealed from the movants and the ALJ. Attached to the addendum was a copy of a letter from the HWTC, dated February 3, 1989, to Dr. John A. Moore, Acting Administrator, Dr. J. Winston Porter, Assistant Adminitrator, Solid Waste and Emergency Response (SW&ER) and Mr. Greer C. Tidwell, Administrator of Region IV, seeking immediate action to address Executive Order 89-03, issued by the Governor of South Carolina on January 18, 1989, which had the effect of prohibiting disposal facilities in that State from accepting hazardous wastes from states that have obstructed or prohibited disposal of wastes within their borders. This letter, which movants allege was discovered after the May 15 motion was filed, alludes to actions

of North Carolina as leading to South Carolina's retaliation.[4/] Also attached to the addendum was a copy of a letter, dated May 19, 1989, from U.S. Senator Dave Durenberger to Mr. John Cannon, Acting Assistant Administrator (SW&ER), which reiterated the Senator's opposition to the withdrawal of North Carolina's hazardous waste program authority[5/] and referred to a meeting earlier that year attended by Mr. Cannon with Environmental Committee Staff and Region IV and North Carolina State officials wherein the instant proceeding was discussed.[6/] While this letter is cited as an

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[4/] It has been reported that the impetus for reopening the hearing was the mentioned executive order issued by the Governor of South Carolina. See Environmental Reporter, Current Developments, April 28, 1989, at 2685.

[5/] Senator Durenberger, along with five other members of the Senate Committee On Environment and Public Works, signed a letter to Administrator Lee Thomas, dated January 22, 1988, opposing the proceeding to withdraw North Carolina's hazardous waste program authority upon the ground the North Carolina statute at issue was a more stringent State law specifically authorized by RCRA § 3009.

[6/] While the addendum states that Mr. Cannon may have ultimate decision-making authority in this matter, any doubts in this respect should have been laid to rest by the Administrator's memorandum to Daniel J. McGovern, Administrator of Region IX, dated June 1, 1989, delegating final decision-making authority herein to Mr. McGovern, without the need for the concurrence of the Assistant Administrator for SW&ER. Notwithstanding this delegation, Respondents insinuate (Motion, dated August 14, 1989, at 9, 34 and 48) and Petitioners, HWTC and GSX agree (Petitioners' Reply To Respondents' Motion For Hearing On _Ex Parte_ Communications, dated August 24, 1989, at 7, note 6) that it is unlikely that a decision in this proceeding will be made without the concurrence of Administrator Reilly. Petitioners also agree with Respondents that it is unclear whether the Assistant Administrator For SW&ER is still a decisionmaker. By memorandum, dated September 15, 1989, Mr. Cannon made it clear that he retained neither a decision-making nor an advisory role herein. See infra at 33.

example of the magnitude of identified ex parte contacts, the fact the meeting referred to was attended by a State official seemingly removes it as an instance of such a contact.[7]

At the prehearing conference held on May 31, 1989, immediately prior to the commencement of the hearing, the motion to stay the hearing pending disclosure of ex parte communications was denied. The denial was on the understanding that EPA was in the process of completing a disclosure of all communications relating to the proceeding with EPA decisionmakers and their advisors which might be deemed to be ex parte and that this disclosure would be completed before the conclusion of the hearing. Respondents immediately filed a Petition For Review of the denial in the U.S. Court of Appeals For The Fourth Circuit, seeking a stay from the court. The motion for a stay pending review by the court was denied on June 2, 1989, by Judge Dickson Phillips, sitting as a single Circuit Judge, after a hearing on the motion. Judge Phillips issued an order explaining his reasons for the denial, The State of North Carolina, et al. v. EPA, No. 89-2097, 881 F.2d 1250 (4th Cir., June 8, 1989).

Pointing to the testimony of Ms. Susan Absher, a witness for EPA at the hearing on May 31, 1989, to the effect that the North Carolina law at issue herein and this proceeding were used as an

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[7] Counsel for North Carolina identified the official as Mr. Paul Wilms, Director of the Division of Environmental Management, during a colloquy on this matter on September 18, 1989 (Tr. 1914).

example of the appropriate manner of applying the RCRA consistency standard in monthly conference calls and semi-annual meetings, Respondents supplemented their motion for ex parte disclosure on June 5, 1989. The supplemented motion requested that ex parte disclosures include all internal documents used to describe the consistency standard which refer to the North Carolina law or this proceeding, all training material of a similar nature, and memoranda memorializing the dates, content and participants in the meetings, whether or not by telephone.

On July 12, 1989, Respondents filed a motion for a stay of the hearing then scheduled to recommence on July 18 pending disclosure of ex parte communications, disclosure of such communications and a hearing thereon. The motion complained of EPA's contemplated incomplete, untimely and inadequate disclosure at an unspecified future date. Specifically, the motion asserted that notwithstanding assurances of EPA counsel at the hearing before Circuit Judge Phillips and that his order clearly contemplated that both written and oral communications would be disclosed, EPA's planned disclosures would not include oral communications of past employees or communications, written or oral, of employees advising decisionmakers.[8/] The letter, supra note 8, listed EPA officers and employees, past and present, who were regarded as decisionmakers:

[8/] The scope of EPA's contemplated disclosures was apparently discussed by counsel for the State, EPI and EPA on June 26, 1989 (letter from Dan McLawhorn, North Carolina Attorney General's Office, to Joshua Sarnoff, OGC, EPA Headquarters and Alvin Lenoir, ORC, Region IV, dated June 28, 1989).

Lee Thomas, Winston Porter, Bruce Weddle, Administrator Reilly, John Cannon, John Moore, Greer Tidwell, Patrick Tobin, James Scarbrough and Lee DeHihns.

EPA filed the first of four installments of disclosure data on July 17, 1989.[9/] The memorandum identified the time frame of the disclosures as beginning on November 3, 1987, the date of the Acting Regional Administrator's order commencing the proceeding to and including May 31, 1989, the date of the commencement of the hearing and the ALJ's order for full disclosure. Region IV decisionmakers were identified as [former Regional Administrator] Jack Ravan, Lee DeHihns, III, Greer C. Tidwell and Patrick Tobin. Additional disclosures were from [advisors to decisionmakers] Jim Scarbrough, Otis Johnson and Alvin Lenoir. Headquarters decisionmakers were identified as Lee Thomas, William Reilly, John Moore, Winston Porter, John Cannon and Dan McGovern. Additional disclosures included Bruce Weddle, Tina Kaneen, Dan Beardsley and Headquarters staff personnel who appeared on the calendars of decisionmakers. The scope of the disclosures, acknowledged to be incomplete, allegedly attempted to include all contacts with decisionmakers relative to the instant hearing and the Task Force on state capacity issues. Materials furnished include calendars

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[9/] Memorandum from Alvin R. Lenoir, Assistant Regional Counsel, Region IV, to ALJ Spencer T. Nissen. Documents in this installment are referred to by the letter A followed by the number, while documents in the succeeding installments are referred to by the letters B, C & D followed by the number. See the Appendix to Respondents' motions, dated October 16, 1989. All of these documents are admitted into evidence as ALJ exhibits.

of meetings with Headquarters and EPA Region IV decisionmakers regarding the North Carolina withdrawal proceeding, participants in the meetings or discussions, a memorandum concerning postponement of the proceeding, Task Force findings on RCRA and CERCLA waste management capacity issues, briefing papers for the Administrator on capacity issues, an agenda of Region IV Senior Staff Meetings, an agenda outline and a list of attendees at a Regional Administrators' winter meeting[10/] and outlines an agenda of various meetings where waste management capacity and waste minimization issues were discussed, e.g., South-eastern Hazardous Waste Management Roundtable Meeting and Thirteenth Annual Governor's Conference on the Environment. With two exceptions,[11/]

[10/] Mr. McGovern and Mr. Tidwell are listed as attendees of this meeting held on February 24 and 25, 1988. They apparently had been appointed Regional Administrators, but had not officially assumed their positions at the time. A document entitled "NC RCRA" (apparently A-6) regarding the RA's meeting states that "NC RCRA was discussed on 2/24" (Id. at 2).

[11/] Memoranda, dated July 11, 1989, from Christina Kaneen, OGC, EPA Headquarters, concern a meeting with representatives of GSX and former Assistant Administrator Dr. J. Winston Porter on March 16, 1988, and a second meeting on April 22, 1988, with representatives of HWTC and staff from the Office of Solid Waste and Emergency Response. No notes were taken of the first meeting and Ms. Kaneen's memorandum is based on her recollection in July 1989. GSX representatives stated that state barrier laws were seriously hampering their waste management operations in the Southeastern U.S., that GSX and HWTC would prevail on the merits and urged EPA to proceed with the N.C. withdrawal hearing. Dr. Porter informed the GSX representatives that he was not free to discuss any of the issues in the proceeding. The second memorandum was prepared from Ms. Kaneen's notes and from an agenda presented by HWTC representatives (Richard Fortuna, Executive Director and David Case, General Counsel). Messrs. Fortuna and Case asserted that withdrawal of North Carolina's program authorization was appropriate, because the facts were strongly on their side. They (continued...)

EPA has made no attempt to summarize the discussions of the instant proceeding at various Task Force and other meetings. It also has made no attempt to secure statements from past EPA employee decisionmakers.

On July 21, 1989, while the resumed hearing was under way,[12/] Respondents supplemented their motion for an evidentiary hearing and disclosure of the substance of all ex parte communications. This motion erroneously quoted the ALJ as observing from the bench on July 19, 1989, that it was possible the Agency had developed a "secret record" in this case. This statement was immediately repudiated, the ALJ pointing out, that what he had actually said was that one of the purposes of the ex parte rules was to prevent the development of or reliance on any secret record. (Hearing transcript, July 21, 1989 at 864). Moreover, the ALJ declared that no decision he had any part of would be based on any secret record.

The supplemented motion stated that the tantalizing glimpses of the "secret record" provided to date suggest that EPA has made an arbitrary and capricious 180-degree turn in the road as to whether to continue this proceeding and that this turn was largely

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[11/] (...continued)
urged EPA to proceed with the hearing and make a decision. None of the EPA representatives responded to or commented on these remarks. The remainder of the meeting concerned state capacity issues more generally.

[12/] Respondents' motions to delay the hearing pending full disclosure by EPA have consistently been denied. Rulings on other aspects of Respondents' motions, e.g., for an evidentiary hearing on ex parte communications, have been deferred until EPA completes its disclosure.

in response to pressure from the hazardous waste treatment industry. In support of this allegation, Respondents cited a memorandum, dated December 15, 1988, from EPA counsel Alvin Lenoir to Regional Administrator Tidwell, which in turn referred to a letter, dated December 6, 1988, from counsel for GSX to then Administrator Lee Thomas, threatening legal action unless he acted within seven days to schedule a hearing to begin with 30 days.[13/] While copies of counsel for GSX's letter were sent to parties on the service list herein and thus the letter cannot be considered ex parte, Respondents allege that private pressure exerted in the course of a formal adjudicatory proceeding, rather than reasoned decision-making, resulted in the decision to proceed with the hearing. The supplemental motion asserts that EPA officials had determined that the wiser course, consistent with the Congressional mandate, was to dismiss the withdrawal proceedings against North Carolina. Respondents contend that, if the matter is open to serious debate within the Agency, then EPA should, consistent with on-the-record withdrawal proceedings established by RCRA and EPA's own regulations, want all sides of the debate to be aired. The motion asserts that experts on both sides of such a debate should contest and be cross-examined. Respondents argue that, if EPA is not now irrevocably biased against Respondents due to hazardous waste treatment industry ex parte communications, then it should

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[13/] As indicated, supra at note 3, GSX and HWTC commenced a mandamus action in the U.S. Court of Appeals for the D.C. Circuit on December 21, 1988, for an order compelling EPA to proceed with the hearing.

have nothing to fear by disclosing what is alleged to be a secret record on the merits favorable to Respondents. It is argued that disclosure is not only legally required, but the only fair thing to do.

Respondents also complain of EPA's change of position herein, from a neutral fact-finding stance at the outset of these proceedings to prosecutorial as announced by Alvin Lenoir at the beginning of the hearing on May 31, 1989.[14/] This change assertedly resulted from private influence in the public sphere exerted through ex parte communications and is prejudicidal, because EPA is withholding information favorable to Respondents.[15/] The only example of such withholding given, however, is a statement in the May 27, 1988, briefing paper for the Administrator (Document A-11) to the effect that there is no current capacity shortage [for treatment and disposal of hazardous waste]. Whatever the foundation for this statement may be, it is difficult to find any prejudice to Respondents resulting from the withholding of such information, because extensive testimony and documentary evidence as to hazardous waste treatment capacity in the Southeastern United

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[14/] By a letter, dated July 14, 1989, the Administrator informed Congressman Charles Rose that the hearing "provides interested parties a forum in which to examine the facts associated with the case* *." The Administrator addressed an apparently identical letter to Congressman Florio on the same date. The available copy, however, does not contain the quoted language.

[15/] In the mentioned ruling on procedural motions, supra at 2, it was held that EPA's professed position of neutrality meant that it had an obligation to produce evidence favorable to North Carolina as well as that which was unfavorable.

States, and North Carolina in particular, has been introduced at the hearing and the treatment capacity in North Carolina would seem to be a matter peculiarly within the knowledge of North Carolina officials.

Respondent's supplemental motion requested full written disclosure of ex parte communications, an evidentiary hearing thereon and a delay in the hearing until disclosure. Petitioners replied to the motion on July 24, and EPA filed its response on July 26, 1989. Petitioners and EPA urged that the hearing on the merits continue through July 28, 1989. The ALJ denied the motions for a stay of proceedings and deferred ruling on the other aspects of Respondent's motions pending the promised full disclosure by EPA.

By letter, dated August 9, 1989, EPA submitted what was stated to be its final and complete disclosure of alleged ex parte materials. The disclosure included an opening statement for [Task Force] meetings [with various State officials, representatives of industry and environmental groups] for the formulation of a national policy on RCRA consistency,[16/] a paper setting forth options identified by the Task Force, a summary of comments

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[16/] The statement refers to the North Carolina proceeding and states that the legal and factual issues associated with that proceeding are not topics for discussion. The fact that the Task Force journeyed to Raleigh, N.C. to meet with the Attorney General's Office, State hazardous waste staff, citizen and environmental groups, while meetings with officials from other States were apparently held in Washington (Task Force on National Review of Hazardous Waste Consistency and Capacity Issues, Document B-3) suggests, however, that North Carolina received special attention from the Task Force.

submitted to the Task Force by States (including North Carolina), copies of correspondence from environmental groups and others urging the Administrator to withdraw the instant action against North Carolina, copies of correspondence from various Congressmen and U.S. Senators, and citizen/environmental groups, also urging withdrawal of the instant action, some of which have previously been referred to herein (ante at 6), a list of principal Task Force findings, the recommendation of Dr. J. Winston Porter, then Assistant Administrator for SW&ER based on the Task Force findings[17/] and various other correspondence related to the instant proceeding.[18/]

[17/] Task Force findings included the statement "(w)ith our present regulations virtually any environmental benefit is sufficient to allow a state to be more stringent than the national program" (undated draft memorandum from Dr. Porter to Lee M. Thomas, Document B-9). The draft includes a recommendation that the instant proceeding be canceled. This recommendation was not included in the finalized version of Dr. Porter's recommendations to the Administrator (memorandum, dated May 16, 1988 (A-9)).

[18/] This correspondence includes a memorandum, dated April 17, 1989, from Greer C. Tidwell to the Administrator, confirming Mr. Tidwell's decision to recuse himself from any decision-making in this proceeding; a memorandum, dated June 1, 1989, from the Administrator delegating final decision-making authority herein to Daniel J. McGovern, Regional Administrator of Region IX; and a memorandum from Mr. McGovern, dated July 17, 1989, stating that to the best of his recollection he has had no discussion regarding the substantive issues relating to the North Carolina RCRA withdrawal proceeding with any interested person outside the Agency, with any Agency staff member who is performing or has performed a prosecutorial or investigative function in that proceeding or any representative of such persons. Mr. McGovern also denied receiving any written <u>ex parte</u> communications concerning the substance of the dispute from any person in these categories.

The mentioned disclosure resulted in the motion filed by Respondents referred to in the opening sentence of this order. Respondents complained of EPA's failure with the exceptions noted (supra at note 11) to memorialize oral communications. As examples of glaring omissions, Respondents referred to a breakfast meeting on March 16, 1989, with the Administrator attended by representatives of the hazardous waste treatment industry and at least one environmental organization,[19/] wherein the instant proceeding was discussed,[20/] a Region IV-Headquarters telephone conference and a meeting on April 6, 1989, with Jonathan Cannon and representatives of Chemical Waste Management and HWTC wherein barriers [to the transportation of hazardous waste] in the Southeastern U.S. were discussed (Decision-Maker Meetings Re North Carolina, Document A-2). The mentioned document reflects that the decision to proceed with the North Carolina hearing had been made by the Administrator earlier that day. Additionally, Respondents referred to a set of

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[19/] A newspaper article indicates that the mentioned breakfast meeting was hosted by Jay D. Hair, President of the National Wildlife Federation, and quotes the Administrator as saying "I was lobbied to do the very thing that we are doing" (Winston-Salem Journal, April 21, 1989). Any lobbying would presumably be by Mr. Dean Buntrock, Chairman and other representatives of Waste Management, Inc. (WMI), a large waste management firm.

[20/] Mr. Hair was one of the signers of a letter from environmental groups to the Administrator, dated April 20, 1989, which stated, inter alia, that EPA's decision [to proceed with the North Carolina hearing] "would sadly reverse one of the few correct environmental decisions made by the Reagan administration." The letter further states that "(b)ehind the complex legal morass in this case is a straight forward public relations maneuver by the hazardous waste treatment industry." (B-26).

questions and answers, Document B-49, for which neither the author nor the recipients were identified. Respondents further complained that EPA's disclosures did not include a complete statement of reasons for Agency changes in position during the hearing, a statement of the reasons prior decisionmakers recused themselves or had been removed and a description of prior communications to Mr. McGovern relevant to the positions of the parties in this proceeding.

Respondents have identified as final decisionmakers required to make full disclosure: Lee Thomas, William Reilly, Winston Porter, Jonathan Cannon, Lee DeHihns, Greer Tidwell and Daniel McGovern. Additionally, Respondents say that any staff to these officers and employees of the Agency who discussed the North Carolina proceeding or issues of law raised thereby or any other person who is likely to advise these officials must be included in those required to make full disclosure.[21/] Respondents also requested that every EPA participant in a long list of meetings be required to separately and individually memorialize their recollec-

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[21/] Individuals in this category listed by Respondents include:

> Bruce Weddle, Dan Beardsley, Christina Kaneen, Patrick Tobin, James Scarbrough, John Sargent, Louise Wise, Harless Benthul, Alvin Lenoir, Jack Moore, Craig DeRemer, Sylvia Lowrance, Josh Sarnoff, Barbara Grimm, Suzanne Rudzinski, Joe Carra, Dan Guiyard, Tom Neesmith, Caron Falconer, Mike Taimi, Otis Johnson, Tom Devine, Jeff Denit, Linda Fisher, Jim Barnes, Gerald Yamada, Lon Crampton, and Terry Davis.

tion of statements in each meeting relevant to the North Carolina withdrawal proceeding including, but not limited to, questions of law, law as applied to the facts and questions of fact.[22]

While, as noted, Respondents complain of inadequate and incomplete disclosure, their fundamental position is that an administrative agency simply cannot become involved in an informal rulemaking process, such as the Task Force herein, during and directly concerning a formal adjudication, without creating incurable harm.[23] This is asserted to be especially true when final decisionmakers in the adjudication also participate in the policy process. Respondents contend that the procedural irregularities of this case, as well as the bias and prejudgment stemming from extensive, significant ex parte communications, necessitate immediate termination of this proceeding (motion at

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[22] Meetings listed (Request For Relief at 50) include the following:

> May 15, 1989; April 14, 1989; April 6, 1989; March 29, 1989; March 20-21, 1989; March 16, 1989; March 13, 1989; March 6, 1989; February 23, 1989; February 22, 1989; February 2, 1989; February 1, 1989; January 24, 1989; January 23, 1989; January 3, 1989; August 3, 1988; July 14, 1988; July 7, 1988; June 15, 1988; June 14, 1988; May 27, 1988; May 11, 1988; May 10, 1988; April 22, 1988; March 16, 1988; February 24, 1988; February 10, 1988; January 28, 1988; January 25, 1988; and January 15, 1988.

[23] As evidence that the policy review was intended to resolve issues in the instant proceeding, Respondents refer to the memorandum from Dr. Porter to Patrick Tobin, dated January 29, 1988 (A-7, B-34), providing in pertinent part: "(i)n order for us to resolve the issues involved in your current North Carolina hearing, I request that you seek a four-month delay in this hearing."

12). The same point is made in slightly different language: "(i)t is the proceeding itself, continued without a reasonable basis, after extensive ex parte communications, and with the intention of making an 'example' of North Carolina, which prejudices Respondents" (Motion at 48). The only authority cited at this point, however, is National Small Shipments Traffic Conference v. ICC, 590 F.2d 345 (D.C. Cir. 1978), which stands for the proposition that the remedy for ex parte communications is disclosure and opportunity for comment and rebuttal.

Respondents characterize Mr. Tidwell as a "prosecutor" who actively lobbied to overturn EPA policy as announced by Lee Thomas in the December 23, 1988, memorandum,[24/] while serving as a "final decisionmaker" in this proceeding. They point out that Mr. Tidwell recused himself, but not before he was able to influence a process imbued with ex parte contacts so that the present Administrator issued an order reopening the hearing. Respondents cite a statement attributed to Regional Administrator Greer C. Tidwell to support their contention that the hearing was reopened "to make an example of North Carolina."[25/]

[24/] The memorandum provides in pertinent part: "(t)he Regions should, therefore, decide whether to initiate proceedings to withdraw State RCRA programs for prohibitory actions after determining the CERCLA process has proven ineffective" (Id. at 2).

[25/] Motion at 27, 38 and 43. The press release announcing the decision to proceed with the hearing, dated April 19, 1989, quotes Mr. Tidwell as stating "(r)esumption of the North Carolina hearing should signal other states that may be considering restrictive legislation that EPA is very concerned about these actions and the threat they pose to ensuring sufficient waste management capacity in the Region."

As in prior motions, Respondents point to EPA's change of course, i.e., the decision to reopen the hearing, EPA's change of position from neutral to prosecutorial and alleged withholding of information favorable to Respondents; and an alleged taint "permeating the whole Agency" as examples of injury arising from ex parte communications. The alleged taint assertedly arises from the fact that the Agency attempted to resolve the issues herein through informal rulemaking, i.e., creation of the Task Force (supra, note 23), that this process resulted in the decision to discontinue this proceeding and the Thomas policy memorandum of December 23, 1988, and that the reversal of this decision, after ex parte contacts with members of the hazardous waste treatment industry and others, might lead a disinterested observe to conclude that, either a final decision adverse to North Carolina has already been made or, at the very least, the final decisionmaker(s) are biased against North Carolina (Motion at 45, 46).

Petitioners' Reply

While Petitioners asserted that Respondents' allegations of bias and ex parte communications were merely tools for an improper attack on the policy decision [to proceed with the hearing], they acknowledged that EPA's disclosures were incomplete (Reply, dated August 24, 1989, at 1). Citing Document A-2, EPA Decisionmaker Meetings Re: North Carolina, Petitioners pointed out that memoranda summarizing potentially relevant oral communications are almost entirely absent. Petitioners agreed with Respondents that

the failure to memorialize the Administrator's March 16, 1989, breakfast meeting with representatives of Waste Management and the National Wildlife Federation, the failure to explain the conclusory allegations in the April press release and to identify the author and recipients of the question and answer paper (B-49), were major failings of EPA's disclosures. Accordingly, Petitioners' position at the time was that the quickest way to lay Respondents' unfounded claims to rest was to hold a hearing. The purpose of the hearing, according to Petitioners, was to ensure that all prohibited ex parte communications have been disclosed and to determine if EPA decisionmakers have been so tainted by ex parte communications that they cannot render a fair decision in the North Carolina proceeding (Reply at 4).

EPA's Response

EPA asserted that its disclosures were complete, that there is no need to further examine alleged ex parte issues and strongly opposed Respondents' motion for an evidentiary hearing (EPA Response, dated August 28, 1989). It goes without saying, however, that, if the merits of this proceeding were discussed at the Administrator's breakfast meeting on March 16, 1989, such discussions must be disclosed. EPA's reliance on newspaper accounts for such disclosure is obviously misplaced. Other examples of incomplete or inadequate disclosures included the fact that EPA has not identified the author or the recipients of the question and answer paper (B-49), which clearly contains comments on the merits, has not identified the author of the memorandum,

dated April 28, 1989 (Exh 5 to Respondents' motion), which Respondents allege contains adverse findings of fact[26] and has failed to memorialize a meeting with Jonathan Cannon and representatives of HWTC and the hazardous waste treatment industry on April 6, 1989. Respondents' complaint that EPA has failed to memorialize a Headquarters-Region IV conference call is in a different category.[27]

EPA says that Respondents engaged in _ex parte_ activities in order to derail this proceeding. As support, EPA points to letters, allegedly instigated by Respondents, from several Senators, Congressmen and environmental groups opposing this proceeding, to a contact with Mr. Thomas L. Adams, Assistant Administrator for Enforcement initiated by Mr. Lacy H. Thornburg,

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[26] The memorandum states in pertinent part: "(t)he state's authorization is being questioned because North Carolina has adopted hazardous waste standards that are so strict no waste disposal from other states would be permitted in the state, imposing an unfair burden on other states."

[27] The mentioned telephone conference was apparently held on January 23, 1989, between representatives of OGC, ORC and the State Programs Branch of the Office of Solid Waste (memorandum, dated January 20, 1989, B-52). The memorandum indicates that topics for discussion were the policy statement [the Thomas memorandum] regarding hazardous waste management capacity and RCRA consistency issues, steps for concluding the North Carolina withdrawal proceeding and potential consistency issues in South Carolina. Although no decisionmakers appear to have participated in the call, Tina Kaneen, OGC, a legal advisor to former Assistant Administrator Winston Porter and presumably to Acting Assistant Administrator Jonathan Cannon is listed among the participants. EPA argues that this call is protected by attorney-work product and attorney-client privilege. These contentions are considered to be valid.

Attorney General of North Carolina[28/] and to a meeting on May 12, 1989, with the Administrator, initiated by Richard Regan of the Center for Community Action, an organization permitted to make a limited appearance herein, wherein Mr. Regan reportedly expressed his views as to the merits of the North Carolina law at issue in this proceeding (A-2).

While depicting itself as an agency overwhelmed by Respondents' political and procedural machinations, EPA denies, that the ex parte communications that did occur related to substantive issues or the merits of the case (Response at 4-6). It asserts that the discussions related to whether the hearing should be postponed and other nonsubstantive matters (Response at 9). EPA acknowledges, however, that Task Force and other Agency personnel simply did not expect the hearing to resume (Id. at 6). This seemingly makes it more likely that the rules concerning ex parte communications would be treated lightly or disregarded entirely. EPA denies that Regional Administrator Tidwell sought

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[28/] A letter to Mr. Thornburg from Mr. Adams, dated January 20, 1988 (B-37), refers to a question posed by the Attorney General at a conference of the National Association of Attorneys General concerning EPA's plan to assume hazardous waste management in North Carolina. The letter states that "(a)s promised, I have conveyed your question and impressions to J. Winston Porter* *." Although counsel for North Carolina vigorously excepted to EPA's characterization of this contact at the September 5 conference, the circumstances readily support an inference that it represented an attempt to indirectly impart Mr. Thornburg's views on the merits of the instant proceeding to one of the then final decisionmakers.

to make an example of North Carolina[29] and denies that it has withheld or is withholding information favorable to Respondents. EPA acknowledges that it was wavering as to whether to discontinue or to proceed with the hearing and says that the December 23, 1988, policy was not a resolution of the internal conflict, but merely another indication of the ongoing struggle (Response at 10).

Additional EPA Disclosures

In response to my order, dated August 30, 1989, EPA produced a complete list of decisionmakers and their advisors (EPA Response, dated September 1, 1989, Exh C-1). Headquarters decisionmakers are listed as Lee Thomas, William Reilly, Jack Moore, Winston Porter and Jonathan Cannon. Advisors include former Deputy Administrator James Barnes, former General Counsels Frank Blake and Lawrence Jensen and former EPA employees Marcia Williams and Jack McGraw. Present EPA employees include attorneys Lisa Friedman, Joshua Sarnoff and Acting General Counsel Gerald Yamada. Other current employees listed as advisors are Gordon Binder, Special Assistant to the Administrator and Bruce Weddle.[30] Region IV decisionmakers

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[29] If a purpose of rescheduling the instant hearing was to deter other states from enacting restrictive legislation relating to hazardous wastes, it appears to have failed, because Alabama has reportedly passed a law which prohibits the import of hazardous waste into that state from 22 other states and the District of Columbia, which have no commercial treatment or disposal facilities. Pesticide and Toxic Chemical News, September 6, 1989, at 13.

[30] Respondents have previously made an issue of EPA's refusal to permit access to Mr. Weddle, who apparently has assumed another position in EPA unconnected with hazardous waste. Counsel have now informed me, however, that they have interviewed Mr. Weddle.

are Greer Tidwell and Lee DeHihns. Advisors are listed as Patrick Tobin, James Scarbrough, Otis Johnson and Jay Sargent. Advisors to Mr. McGovern are Bill Wick, Deputy Regional Counsel and Alex Wolfe, EPA Headquarters, position not stated.

At the mentioned conference with counsel on September 5, EPA was ordered to make the following additional disclosures at the resumption of the hearing on September 18, 1989:

1. Furnish a statement from the Administrator as to substance of conversations with officials from Waste Management, Inc. and Mr. Hare at the breakfast meeting on March 16, 1989.

2. Supply a statement from Dan McGovern as to whether he recalls any discussions wherein North Carolina was used as an example of the appropriate resolution of RCRA consistency issues. In particular discussion at RA's meeting on February 24, 1988.

3. Identify the author of the opening statement to the Task Force (B-1), by whom and to whom delivered.

4. Identify the author of the February 23, 1989, briefing paper for the Administrator (A-19).

5. Supply a copy of any signed or executed versions of the Administrator's decision paper.

6. Identify the author of a memorandum entitled "Update of Activities," dated April 28, 1989 (Exh 5 to Respondents' motion, dated August 14, 1989).

7. Furnish memorialized versions of meetings held on February 7, 9 and 23 and April 6, 1989.

8. Supply further documents, i.e., agenda and matters for discussion at Task Force meetings.

Counsel for GSX agreed to supply statements as to meetings with Region IV officials and company representatives on February 7, 1989 and March 16, 1988 (Tr. 83, 84).

In accordance with the mentioned order, EPA made what was again stated to be a final submittal of alleged ex parte communication documents on September 18, 1989. Disclosures included a memorandum from Suzanne Rudzinski, Chief State Program Branch, OSWER, dated September 15, 1989, concerning a meeting John Cannon held with Richard Fortuna, HWTC, and Jodi Bernstein, Chemical Waste Management (CWM), on April 6, 1989 (Exh C-3). The memorandum reflects that Mr. Cannon's reply to inquiries as to whether the North Carolina program withdrawal proceeding would be reopened was merely that the issue was under consideration within the Agency and that a decision was expected to be announced in the near future. Responding to the ALJ's request for a statement from the Administrator as to his recollections of the March 16, 1989, breakfast meeting with the President of the National Wildlife Federation and representatives of WMI (note 19, supra and accompanying text), the Administrator by memorandum, dated September 15, 1989, attached a copy of a memorandum to him from the Inspector General, dated August 24, 1989, which stated that a preliminary inquiry into allegations that the Administrator had violated EPA's Standards of Conduct in authorizing the hearing to consider withdrawal of North Carolina's RCRA authority had been closed, because no evidence was found to support the allegations.[31]

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[31] Exh C-4. Attached to the referenced IG memorandum was a memorandum, dated August 23, 1989, entitled "Preliminary Inquiry Closing Memorandum Allegations of Violations of Ethical Standards of Conduct," which summarized the results of the investigation. An allegation that Mr. Tidwell may have violated criminal provisions of RCRA, specifically § 3008(d)(3), by omitting material (continued...)

The Administrator emphasized that he received, but did not review, position papers delivered to him by Waste Management, Inc. (Exh 15B to the mentioned IG memorandum [apparently at the breakfast meeting on March 16, 1989].[32/]

EPA disclosures included a memorandum to the file from Regional Administrator Daniel McGovern, dated September 15, 1989, which supplements his prior memorandum on the same subject, dated July 27, 1989 (Exh C-14). Mr. McGovern states that to the best of his recollection he has not discussed or heard discussions concerning the substance of the instant dispute at any meetings with Regional Administrators or in any telephone calls with Regional Administrators. He further states that immediately prior to his designation as a decisionmaker he had conversations in which the

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[31/] (...continued)
facts from the Federal Register notice (54 Fed. Reg. 15940, April 20, 1989), announcing a resumption of the North Carolina withdrawal hearing was dismissed based on an opinion from the Department of Justice that the cited section was not intended to place in jeopardy officials who prepare announcements such as the mentioned notice and fail to include every material fact. The allegation that Mr. Tidwell may have violated EPA Standards of Conduct was to be addressed in a separate inquiry.

[32/] The list of exhibits attached to the IG's "closing memorandum," note 31, supra, identifies Exhibits 15A and B as "Briefing Package and Position papers for March 16, 1989." These exhibits were provided the ALJ by a memorandum from the Administrator, dated September 26, 1989. Unfortunately, these exhibits encompassing pages 44 through 182, are not identified as "15A" or "15B." It is inferred, however, that the "position papers" provided by Waste Management, referred to by the Administrator, include pages 44 through 56, because these pages set forth positions likely to be maintained by the hazardous waste treatment industry. This inference is supported by the IG interview with Mr. Jim Range, WMI (infra at 46).

matter was described in general factual terms by Deputy Administrator Jack Moore, Regional Counsel Nancy Marvel, Regional Counsel Waste Branch Chief Bill Wick and non-prosecutorial staff at EPA Headquarters (primarily Tina Kaneen, OGC).

Attached to Mr. McGovern's memorandum is a memorandum from William D. Wick, Acting Deputy Regional Counsel, who, as noted (supra at 25), is an advisor to Mr. McGovern. Mr. Wick states that his primary role is to assure that Mr. McGovern does not receive any ex parte communications and to advise on procedural issues. Mr. Wick further states that to the best of his recollection, since acting as McGovern's advisor on this matter, he has had no discussions relating to this matter with any interested persons outside the Agency, with any Agency staff member who is performing (or has performed) a prosecutorial or investigative function in the proceeding, or with any representative of such persons. He recalls that in his former capacity as Hazardous Waste Branch Chief, ORC, he participated in meetings and telephone conference calls with his counterparts in other Regions, wherein status updates of major cases were provided. He states that a summary factual update of the North Carolina proceeding was given on at least one such occasion, but that he does not recall its content.

Bruce Weddle is identified as the author and primary deliverer of the Opening Statement For [Task Force] Meetings On National Policy Regarding State RCRA Consistency (Document B-1). Dan Beardsley was also a deliverer of this opening statement [at other Task Force meetings]. The authors of the February 23, 1989,

briefing paper for the Administrator (A-19) are identified as Suzanne Rudzinski and Judi Kane, State Programs Branch, EPA Headquarters. Editorial comments were provided by representatives of OGC and Region IV.

Although the undated "decision document" signed by Regional Administrator Greer C. Tidwell (B-17) was apparently hand carried to the Administrator on April 6, 1989, the date he authorized resumption of the hearing, EPA reports that the document was never signed by Mr. Reilly. The "question and answer" paper (B-49) was authored by Otis Johnson, Chief, Waste Planning Section, and Tricia Herbert, State Authorization Unit, EPA, Region IV. Comments on the paper were supplied by Suzanne Rudzinski, Susan Absher and Judi Kane. The paper was finalized on April 12, 1989, after the Administrator had made the decision to proceed with the hearing and distributed in Region IV to Greer Tidwell, Pat Tobin, Jim Scarbrough, Carl Terry and Loretta Hanks. In Headquarters, the paper was distributed to Division Directors, Office of Waste Programs Enforcement, Division Directors, Office of Solid Waste; Bruce Diamond;[33/] Lisa Friedman [OGC] and Regional Waste Management Division Directors. The paper describes the North Carolina statute at issue herein as "arbitrary," states EPA's policy reasons for

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[33/] Mr. Diamond is identified as Director, Office of Waste Programs Enforcement in a memorandum from Sylvia K. Lowrance, Director, Office of Solid Waste, dated April 24, 1989, informing addressees that inquiries concerning the proceeding should be referred to either Carl Terry, EPA, Region IV or Robin Woods, EPA Headquarters (Exh C-24).

proceeding with the hearing, i.e., to forestall restrictive legislation by other states and appears to treat withdrawal of the North Carolina program authorization as a "fait accompli."

Through confusion or inadvertence, EPA furnished the author of the press release, dated April 19, 1989, announcing resumption of the hearing (supra at note 25), rather than of the "Update of Activities" paper (note 26, supra, and accompanying text), which Respondents contend contains findings of fact adverse to the State. It is noted, however, that EPA has stated that the author of the mentioned press release is Carl Terry, Public Affairs Specialist, Region IV and that Mr. Terry is listed as the contact persons in the latter document.

EPA supplied a brief summary of the meeting with Region IV officials attended by representatives of GSX on February 7, 1989 (A-6). Participants were Greer Tidwell, Lee DeHihns and Pat Tobin from EPA and William Stilwell and Roger Davis representing GSX. According to EPA, the meeting was requested by GSX and principally concerned the affect an executive order, recently issued by the Governor of South Carolina, would have on [hazardous waste treatment] capacity. Any mention of North Carolina was assertedly limited to a general discussion as to the possible relationship between actions concerning hazardous waste in one state as affecting actions regarding such waste in the other state. EPA's posture was allegedly to stress cooperation among the states and urge a regional solution to hazardous waste capacity problems. The affidavit of the President of GSX, Mr. William Stilwell (Exh C-19),

essentially confirms this version of the meeting. Mr. Stilwell states that he requested the meeting primarily to meet Mr. Tidwell, whom he did not know, that the executive order issued by the Governor of South Carolina was discussed and that Mr. Tidwell said his staff was working with the Governor's staff to resolve it. Regarding the "stalled" North Carolina hearing, Mr. Tidwell is reported to have stated that EPA had "backed away" from the proceeding over his objection. Mr. Stilwell said that GSX was extremely disappointed that EPA had backed away and opined that the Agency had failed to do its job. According to Mr. Stilwell, the meeting closed with Mr. Tidwell discussing the concept of a regional compact dealing with hazardous waste.

The list of EPA Decision-maker Meetings Re: North Carolina (A-2) refers to a meeting on February 9, 1989, of State Waste Programs Directors (eight Region IV States) regarding capacity and EPA's suspension of the N.C. proceeding with Greer Tidwell and John Cannon. Elaborating on this meeting, EPA now states that it was a routine scheduled meeting of EPA-State Directors held in Tampa, Florida and that the discussion never focused on specifics of particular states, but rather concerned the role of the states in developing a regional agreement and implementing such an agreement. An agenda for this meeting (A-18) reflects that Region IV Administrator Tidwell discussed waste generation, treatment and disposal capacity, CERCLA capacity certification, interstate transportation of wastes and general policy options with respect thereto.

The briefing of Administrator William K. Reilly to consider whether to reopen the North Carolina hearing was held on February 23, 1989 (A-2). The briefing paper (A-19), stating the pros and cons of proceeding with the North Carolina hearing, was authored by Suzanne Rudzinski and Judi Kane, State Programs Branch, EPA Headquarters with editorial comments provided by Josh Sarnoff, OGC and Jim Scarbrough, Pat Tobin and Otis Johnson, Region IV. Attendees at the meeting were William Reilly, Greer Tidwell, John Cannon, Jack Moore, Lee DeHihns, Sylvia Lowrance, Gerald Yamada, Joe Carra, Pat Tobin, Josh Sarnoff, Louis Crampton, Linda Fisher and Terry Davis. According to EPA, [the merits of the North Carolina proceeding] were not discussed, and the discussion focused on the policy implications of proceeding or failing to proceed with the action. A decision was made to have EPA personnel discuss the matter with environmental groups, members of Congress and Congressional staff to ascertain their reaction to proceeding with the hearing. The Administrator allegedly tentatively approved reopening the hearing, subject to a determination of the magnitude of political opposition.[34/]

EPA has refused to furnish any notes or memoranda concerning the January 23, 1989, telephone conference initiated by OGC and ORC

[34/] Disclosure Statements, Exh C-13. The IG summary of the interview with Administrator Reilly on August 1, 1989, does not support this statement, but quotes Mr. Reilly as saying he requested Tidwell to ascertain the mood (reaction) of Congress, before he (Reilly) made a decision as to whether to proceed with the hearing.

upon the ground the discussion was held for the purpose of developing case strategy and thus qualifies as attorney work-product and/or attorney-client privilege. As indicated, supra at note 27, these contentions are considered to be valid. In a memorandum addressed to the ALJ, dated September 15, 1989, Mr. Jonathan E. Cannon, Acting Assistant Administrator for SW&ER, refers to the fact that the Administrator's memorandum, dated June 1, 1989, delegating decisional authority to Daniel J. McGovern expressly provides that the delegation "is without the need for the concurrence of the Assistant Administrator for Solid Waste and Emergency Response" (Exh C-17). Mr. Cannon states that "* *I do not intend to advise Mr. McGovern concerning this issue." This is considered to be a final recusal by Mr. Cannon and obviates any concerns that he retains any decision-making role herein.

GSX has supplied an affidavit from Mr. Nelson V. Mossholder, formerly Vice-President for Business Development of GSX, concerning his recollections of a meeting held at EPA Headquarters on March 16, 1988 (Exh C-18). This meeting was also memorialized by Christina Kaneen (supra at note 11). Mr. Mossholder attended the meeting in the company of GSX President William Stilwell and Michael Tonger, a Washington, D.C. Attorney representing GSX. Three representatives of EPA were present: Dr. Winston Porter, a representative from the Office of General Counsel and a representative of the Office of Legislative Liaison. Mr. Mossholder doesn't remember the names of attending EPA personnel other than Dr. Porter. Mr. Mossholder states that GSX requested the meeting

in order to respond to a letter [concerning the North Carolina proceeding] written to EPA by six Senators in January 1988 (note 5, supra), and that he was the primary spokesman for GSX. He expressed GSX's view that a hearing was necessary in order to establish a factual record upon which a decision could be made. Assertedly, this "* factual record would be helpful both under RCRA and in order to determine whether the state had met its capacity assurance obligations under RCRA" (sic) [SARA]. He further stated that EPA needed to proceed with the hearing in order to avoid actions by other states intended to restrict the interstate transportation of hazardous waste. He pointed out that EPA had decided to initiate the proceeding and argued that backtracking would send the wrong signal to other states. Mr. Mossholder said that Senate Bill 114 [the North Carolina Act] had effectively killed the GSX proposal and that GSX was of the opinion it could win, if it had its day in court. In response to questions from Dr. Porter, Mr. Mossholder described in general terms some of the features of the proposed facility. Dr. Porter was noncommittal when queried as to his views on proceeding with the hearing.

<u>The Administrator's Advisory Role</u>

By a memorandum, dated September 26, 1989, the Administrator, citing the Inspector General's closing memorandum (supra at note 31 and accompanying text) informed the ALJ that he did not believe there was any need for him to recuse himself (Exh D-2). He stated that he intended to retain his authority to advise Mr. McGovern. Attached to the memorandum was a redacted copy of the exhibits to

the mentioned closing memorandum from the IG. Also attached to the memorandum were various documents, including the apparently unsigned memorandum, dated May 17, 1989, from EPA employees, William Sanjour and Hugh B. Kaufman, to the IG (Exh D-3) which resulted in the IG inquiry, a copy of articles from the Winston-Salem Journal, dated April 21, April 22 and May 12, 1989 (Exhs D-7, D-9 & D-8), and a copy of IG memoranda, dated May 19 and June 27, 1989, containing an investigative plan and preliminary inquiry opening, File No. 89-4034 (Exhs D-12 & D-11).

Administrator Reilly was interviewed by special agents of the IG on August 1 and August 15, 1989 (Exhs D-14 & D-48). According to the summary of the first interview, Reilly stated that the only briefing he had regarding the North Carolina hearing prior to the March 16 breakfast meeting was on February 23, 1989. Attendees at this briefing have previously been identified (ante at 32). Mr. Tidwell recommended resumption of the North Carolina hearing, because an executive order issued by the Governor of South Carolina banning the import of hazardous waste from certain states, including North Carolina, was wreaking havoc in Region IV. Reilly reportedly was aware of no division of opinion among those present at the briefing and was led to believe that resumption of the hearing was fully consistent with the policy of his predecessor, Lee Thomas. As indicated (supra at note 34), Mr. Reilly requested Mr. Tidwell to ascertain the reaction of Congress before deciding whether to proceed with the hearing. Based on a recommendation from Acting Deputy Administrator Jack Moore, Mr. Reilly made the

decision to resume the hearing on April 6, 1989. Mr. Reilly relied upon the advice of Messrs. Tidwell, Cannon and Moore, because he considered them to be most experienced in the matter.

Regarding the March 16 breakfast meeting, Mr. Reilly is quoted as saying that he was invited to the meeting by Jay Hair, President of the National Wildlife Federation, in order to meet one or more of the Federation's Board of Directors. Mr. Reilly did not know who would be at the meeting and is quoted in the first interview as expressing surprise that officials of WMI, Messrs. Buntrock, Barber, Rooney and Range were in attendance. In the second interview, Mr. Reilly expressed the belief he was informed by Mr. Hair prior to the breakfast meeting that Mr. Buntrock, Chairman of the Board of CEO of WMI and a member of the Board of NWF would be at the breakfast and was only surprised that other officials of WMI were present.[35/] The general issue of states acting to prevent the import of hazardous wastes was discussed. The States of

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[35/] The newspaper article entitled "South Carolina Bars 32 States On Disposal of Hazardous Waste," page 182 of the Briefing Package and Position Papers, note 32, supra) contains a handwritten note as follows:

> Bill - If at all possible I would like to arrange a breakfast meeting with you, Dean Buntrock (Chairman/ CEO, Waste Management Inc. and member of NWF Board) and myself to discuss national implication of above situation and for you to get to know Dean better.
> How 'bout Breakfast March 16 Crystal Gateway
> March 17 Marriott Arlington
> (site of our
> annual meeting)
>
> Thanks,
> Jay

Alabama and Indiana were mentioned and the likelihood of the movement spreading to other states discussed. He recalled that Mr. Buntrock was in favor of handling such matters under CERCLA. Regarding the North Carolina hearing, Mr. Reilly assumed the matter was raised, but could recall no specifics of the discussion. He stated that his knowledge of the North Carolina hearing was limited to the February 23 briefing and that he would be unable to discuss the matter in detail in any event. As of March 16, Mr. Reilly had made no decision regarding the North Carolina hearing and that the breakfast meeting had no bearing on his decision. While Mr. Reilly would not say that he was misquoted in the Winston-Salem Journal article, which referring to the breakfast meeting reports him as saying in effect that he was lobbied [to proceed with the hearing] (supra at note 19), he asserted that the article was wrong, because Mr. Buntrock was in favor of handling such matters under CERCLA.

At the second interview of Mr. Reilly (Exh 48), which was apparently conducted because of written information in his appointment files furnished to him by officials of WMI at the March 16 breakfast meeting, he denied reading, prior to the breakfast, the briefing package pertaining to matters of interest to Dr. Jay Hair, prepared by his staff assistant, Patricia Thorne, or the written materials provided by WMI at the conclusion of the breakfast. Mr. Reilly stated that topics set forth in the position paper furnished by WMI entitled "State Initiatives To Inhibit Development Of Hazardous Waste Disposal Capacity And To Restrict Interstate Shipment Of Hazardous Waste" (pages 44-46 of the

exhibits) were not reviewed in detail. He reiterated that Mr. Buntrock stressed such issues should be handled under CERCLA, because "that was where the money was," referring to the ostensible ability to withhold remedial funding. Mr. Reilly informed the IG special agents that he did not believe any attempt was made by WMI officials to influence his decision regarding pursuing the North Carolina RCRA withdrawal hearing[36/] and that the WMI papers must have been returned to Ms. Thorne along with the NWF briefing package. Mr. Reilly requested a review of Conservation Foundation

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[36/] It is unlikely that Mr. Reilly would entertain this belief had he read the WMI position papers. The paper entitled "State Initiatives To Inhibit Development Of Hazardous Waste Disposal Capacity and To Restrict Interstate Shipment Of Hazardous Waste" can only be described as a "brief for proceeding with the North Carolina hearing." The paper describes as "* a troubling trend heading for a full-tilt stampede, [the fact that] a number of states are beginning to impose two types of restrictions--disallowing facility development and resisting interstate waste transport." Actions to those ends in several States including in North Carolina, South Carolina and the proposed legislation in Alabama are specifically mentioned. The paper asserts that "(d)uring the Reagan Administration, EPA badly mishandled this problem," that "we are heading toward Balkanization of the RCRA and Superfund programs" and that EPA must make its presence felt. The paper describes the statute which is the genesis of this proceeding, as follows: "North Carolina has enacted legislation intended to block the permit for a proposed commercial hazardous waste treatment facility by requiring a technically unachievable and environmentally unnecessary '1000X dilution' factor on the facility's wastewater treatment discharges." Referring to EPA's policy of attempting to resolve such problems under CERCLA § 104(k), the paper asserts that the § 104(k) process will not work here, because it fails to address States [such as Alabama] which generate relatively small volumes of waste but host large regionally oriented facilities. Although the paper's recommended solutions do not specifically include resumption of the North Carolina hearing, the recommendations include that result for the EPA is urged to break its silence immediately; to emphatically announce its opposition to such State actions and to indicate that RCRA program withdrawal is the logical result.

records regarding corporate contributions, which revealed that WMI had contributed $25,000 and was one of 60 or 70 business contributors. The Foundations' budget during Mr. Reilly's last year as president was 5.2 million dollars and he denied that a $25,000 contribution would influence his judgment.

The memorandum from William Sanjour and Hugh B. Kaufman, which resulted in the IG investigation alleges that Mr. Reilly had breakfast on April 17, 1989, with former EPA Administrator William Ruckelshaus, who is presently CEO of Browning-Ferris Industries [a large waste management firm]. Mr. Ruckelshaus is alleged to be a member of the board of the Conservation Foundation. Regarding this meeting, Mr. Reilly stated that he had breakfast at the Jefferson Hotel with Mr. Ruckelshaus at the request of the White House on April 17, to persuade Mr. Ruckelshaus to be chairman of a panel of the National Science Foundation. Mr. Reilly denied that hazardous waste issues were discussed with Mr. Ruckelshaus.

Acting EPA General Counsel Gerald H. Yamada was also interviewed by special agents of the IG on August 1, 1989 (Exh D-15). Mr. Yamada confirmed attending the briefing of the Administrator on February 23, 1989, conducted by Regional Administrator Tidwell and his staff concerning issues related to the North Carolina hearing. The background of the proceeding, the North Carolina statute, the Thomas policy memorandum and the ramifications of failing to pursue the hearing were discussed. Region IV was afraid of the domino effect of the North Carolina law. Mr. Yamada considered Mr. Tidwell to be very objective in his

presentation and stated that everyone present agreed with his (Tidwell's) position, but that work must be done on Capitol Hill to assure that resumption of the hearing would not constitute a [political] problem. Regarding Regional Administrator Greer Tidwell, Mr. Yamada stated that because Tidwell was actively involved in [advocating the withdrawal] process, it was suggested (by whom not stated) that he recuse himself. This was because there may be an appearance [of partiality] problem.[37]

Sometime after the decision to proceed with the hearing had been made, Mr. Reilly called Yamada to ascertain if there was any validity to the ex parte issues which had been raised in the proceeding. Mr. Yamada didn't think so and issued a memorandum to that effect on May 19, 1989 (Exh D-16). Because the suspension was indefinite and Reilly was not familiar with the issues, Yamada was of the opinion that the ex parte rules would not apply to Reilly until after the decision on April 6, 1989, to resume the hearing. Even if the ex parte rules applied prior to April 6, the rules would only apply to the merits, not the decision [to proceed with the hearing]. Mr. Yamada is also quoted as opining that discussions on the merits could not have taken place prior to the decision to proceed with the hearing, because the discussions were not sufficiently detailed and because Reilly was not sufficiently versed on the merits. The mentioned memorandum was written on the

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[37] The summary of EPA Decisionmaker Meetings Re North Carolina (A-2) indicates that Mr. Tidwell announced his recusal during a conference call on April 14, 1989.

assumption that the Administrator wished to retain an advisory role to the final decisionmaker and sets forth the general rule concerning ex parte communications, i.e., that Mr. Reilly should avoid any discussion regarding the merits of the proceeding (other than with the final decisionmaker or staff consulting him) after the decision to commence the proceeding had been made. Additionally, Mr. Reilly was advised to place in the record of the North Carolina withdrawal proceeding copies of any written ex parte communications and summaries of any oral ex parte communications that might nevertheless occur. Citing the Administrator's inherent authority to control which adjudications should be pursued and EDF v. U.S. EPA, 510 F.2d 1292 (D.C. Cir. 1975), the memorandum expresses the opinion that discussions with Agency staff and outside parties concerned solely with whether to resume the hearing were not within the restrictions on ex parte communications.[38]

The summary of the IG interview of Mr. Tidwell, conducted on May 24, 1989 (Exh D-17), sets out the background of the North Carolina withdrawal proceeding, Mr. Tidwell's views as to why the hearing should be held and that he inherited the controversy when he was appointed Regional Administrator in March of 1988. Mr. Tidwell confirmed that he, Jonathan Cannon, Pat Tobin, Director, Waste Management Division, Region IV and Paul Wilms of the North Carolina Department of Environmental Management met with

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[38] Noting that this memorandum was written two days after the Kaufman-Sanjour complaint was filed with the IG, Respondents characterize the memorandum as self-serving (Motion at 10, note 3).

Committee Staffs of the U.S. Senate and House of Representatives. At least six Senators opposed the hearing, while the Committee Staff of the House was reportedly in favor of proceeding with the hearing.

Mr. John A. Moore, formerly acting Deputy Administrator of EPA was interviewed by agents of the IG on August 1, 1989 (Exh D-21). Mr. Moore informed the agents that he had no input into then Administrator Lee Thomas' decision to suspend the North Carolina hearing. He believes that issue was rekindled after Thomas left by South Carolina's decision to limit import of hazardous waste and indications that Alabama was about to take similar action. He recalled briefings given to him and Reilly by Regional Administrator Tidwell and his staff. He stated that Tidwell was convincing in his recommendation to resume the hearing, because Tidwell would have a credibility problem with other states in Region IV, if EPA failed to take action regarding North Carolina. This combined with the actions of South Carolina and the proposed actions of Alabama to limit the import of waste, the reservations of the Governor of North Carolina as to the environmental basis for the North Carolina statute and the non-binding nature of the statute, i.e., the automatic voiding provision if EPA determined the law was not consistent with RCRA and a basis for program withdrawal, formed the basis for Moore's recommendation to Reilly to resume the hearing. Mr. Moore does not believe that Mr. Tidwell's recommendation was made to benefit the hazardous waste industry, but out of concern for the domino effect in Region

IV. He (Moore) doubted that Reilly was sufficiently knowledgeable about the issues in the North Carolina situation to engage in detailed discussions or have a meaningful conversation concerning the subject.

Lee M. Thomas, formerly Administrator of EPA and presently CEO of Law Environmental, Inc. of Kennesaw, Georgia, was interviewed by IG agents on May 26, 1989 (Exh D-22). Mr. Thomas recited that North Carolina had passed a law which would virtually eliminate the establishment of the hazardous waste treatment facilities which would discharge treated wastes into the surface water system of the State. The legislation appeared to be directed toward [blocking] a proposed GSX facility on the Lumber River, rather than protection of the environment. Acting Region IV Administrator Lee DeHihns and his staff met with Thomas in 1987 to convince Thomas to hold a hearing for the purpose of withdrawing North Carolina's RCRA program authority. While under RCRA states may impose more stringent regulations, the Region was of the opinion that the North Carolina statute was not passed with the proper intent and was inconsistent with RCRA. After he approved the Region IV proposal and the hearing was announced, Mr. Thomas received letters from members of Congress and environmental groups opposing withdrawal of North Carolina's program authority. Mr. Thomas decided to form a task force to examine the possibility of handling hazardous waste treatment capacity problems under CERCLA, rather than RCRA. The IG Preliminary Inquiry Closing Memorandum, but not the summary of the Thomas interview, reports Mr. Thomas as saying that the Task

Force did not arrive at a consensus, but leaned toward addressing the North Carolina issue under CERCLA. He concluded that CERCLA was a more viable vehicle [for addressing capacity problems] and issued a policy memorandum to that effect on December 23, 1988. Mr. Thomas understood that his policy memorandum permanently canceled the North Carolina hearing.[39] He is of the opinion that the reversal of his decision by the current Administrator was a mistake, because, inter alia, EPA will be viewed as sympathetic to the hazardous waste industry and insensitive to local environmental issues and health concerns of the population of the Lumberton area.

Dr. Jay D. Hair, President & CEO of the National Wildlife Federation was interviewed by agents of the IG on August 7, 1989, concerning the March 16 breakfast meeting with Administrator Reilly (Exh D-25). Dr. Hair confirmed hosting the breakfast at the University Club on that date attended by Reilly, Dean Buntrock, CEO of WMI and other officials of WMI. He (Hair) also confirmed that

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[39] The IG Closing Memorandum cites the Federal Register Notice of August 29, 1988 (53 Fed. Reg. 32899), providing that the North Carolina hearing is "postponed until further notice" and that "EPA is suspending the proceeding pending a national policy review of consisting (sic) and capacity issues" and states that the hearing was not permanently canceled as Mr. Thomas believed. This error on Mr. Thomas' part is one for which he may readily be forgiven, because the February 23, 1989, "briefing paper" for the Administrator (A-19) states that "(b)ecause of this [the Thomas] policy, it had been assumed that EPA would terminate withdrawal proceedings." See also the agenda for the January 23, 1989 telephone conference (B-52) which indicates subjects for discussion include "steps for concluding the North Carolina withdrawal proceedings." Moreover, as we have seen (supra at note 2) the General Counsel has taken the position that the proceeding was no longer pending after an indefinite postponement of the hearing was announced.

Mr. Buntrock is one of 29 members of the Board of Directors of NWF. Dr. Hair said that he and Reilly are personal friends and meet approximately twice a month. Dr. Hair thought that the breakfast would be a good opportunity for Mr. Reilly to meet Mr. Buntrock. Reilly was told Buntrock would be at the breakfast, but was not aware other officials of WMI would be in attendance. Dr. Hair had two issues he wished to discuss: 1, the need to place greater emphasis on recycling of wastes, and 2, proposals of South Carolina and Alabama to limit the interstate transportation of hazardous waste. While Dr. Hair is an advocate of states passing restrictive (more stringent) legislation, he was concerned over the precedent being established. He is aware of the North Carolina hearing and of the dispute over the proposed GSX hazardous waste facility on the Lumber River. He denied that issues concerning the hearing and the policies of former Administrator Lee Thomas were discussed. Dr. Hair does not believe that any lobbying occurred. He stated that Reilly received a folder of information from Mr. Buntrock, but he (Hair) does not know what it contained.

Mr. Dean L. Buntrock, CEO of WMI, confirmed that he was invited to breakfast on March 16, 1989, by Jay Hair to meet newly appointed EPA Administrator William Reilly (Exh D-26). He said that the breakfast had been scheduled for two or three weeks, but had been postponed because of scheduling conflicts. He indicated that March 16 was a propitious day for all concerned because Reilly was scheduled to speak at the dedication of the new offices of NWF. Mr. Buntrock had WMI officials Walt Barber, Phil Rooney and Jim

Range accompany him to the breakfast for the sole purpose of meeting Reilly. Topics discussed at the breakfast included Reilly's recent trip to London, the Clean Air Act and recycling. There was also a discussion of the actions of various states including South Carolina in restricting the transport of toxic (hazardous) waste and the effect such actions would have on the Superfund program. He did not recall any discussion of North Carolina. He asserted that his company did not have any business interests in North Carolina and that it was not a topic he or his staff would wish to discuss. Mr. Buntrock confirmed that Jim Range provided a folder of information to Mr. Reilly. Buntrock does not believe that Mr. Reilly was lobbied during the breakfast and asserted that no attempts were made to influence his decision with respect to North Carolina or any other official matter.

Jim Range, Vice President, Government Affairs, WMI was interviewed by agents of the IG on August 14, 1989 (Exh D-50). He confirmed attending the breakfast on March 16, 1989, arranged by Jay Hair, President of NWF. He (Range) was at the breakfast, because it was an opportunity to meet and become acquainted with Administrator Reilly. WMI position papers prepared for the meeting concerned recycling, sham recycling and restrictions limiting the interstate transportation of hazardous wastes. The position papers were not used as an agenda, but for informational purposes. The meeting lasted about one hour and approximately 15 minutes were devoted to the South Carolina decision to refuse to accept out-of-state generated hazardous wastes. Mr. Range acknowledged urging

Reilly "to do something and exercise leadership" on this issue. Mr. Range denied that reopening of the North Carolina was discussed and asserted that WMI did not want the hearing reopened and had made this clear at a CERCLA § 104(k) hearing. He also denied that Mr. Buntrock or other WMI officials lobbied Reilly concerning the North Carolina hearing process. At the conclusion of the breakfast, Mr. Range delivered the position papers to Mr. Reilly.

Mr. Jim Banks, Director of Governmental Affairs for WMI stated that he was asked by Jim Range, WMI Vice President, to prepare three position papers for the March 16 breakfast meeting referred to above (Exh D-51). Bill Brown, who works with Banks, prepared a paper concerning recycling, while Banks prepared the papers on sham recycling and various states restricting the transportation of hazardous wastes. According to Banks, the papers were to be used for informational purposes and to provide a quick review of the issues. The part concerning North Carolina (note 36, supra) was included as part of a brief history of state actions to restrict interstate transportation of hazardous wastes. WMI was concerned about the trends, because it operates a hazardous waste facility in Emelle, Alabama. South Carolina had recently refused to accept hazardous wastes from other states and Alabama was considering similar action. Nevertheless, Banks reportedly was of the opinion that the decision to reopen the North Carolina RCRA hearing was a mistake, because it placed EPA in a "no-win position" resulting in Congressional and environmental opposition. Mr. Banks said that he went on record with WMI's position that the CERCLA §

104(k) capacity assurance provision was a better method of dealing with North Carolina issues. This statement was made at a Region V symposium in Chicago on August 4, 1989. This is the 104(k) hearing referred to in the interview with Mr. Range. Sylvia Lowrance of EPA and Velma Smith of EPI attended the symposium. Mr. Range discussed the March 16 breakfast meeting with Banks. Mr. Range reported that he had presented the issue of interstate barriers [to hazardous waste transportation] and had urged Reilly to take a stand, rather than standing mute.

Respondents' Present Motions

In accordance with the schedule previously established, the State of North Carolina, EPI and the Conservation Council (Respondents) filed motions based on EPA's most recent disclosures on October 16, 1989. The motions ask that the proceeding be dismissed, because the "secret record, now revealed" demonstrates that the decision-making process is so infused with bias and prejudice that Respondents have been deprived of their due process rights. Alternatively, Respondents request that the Administrator be removed from any role as a final decisionmaker herein, because he is biased and prejudiced as a result of *ex parte* contacts and has prejudged the matter. Finally (and also alternatively), Respondents ask for an immediate hearing to complete *ex parte* disclosures and to determine whether EPA is incurably biased due to *ex parte* contacts.

In support of these requests, Respondents contend (1) that the Administrative Procedure Act (APA) is applicable to this

proceeding; (2) that both the APA ex parte rules and EPA's ex parte regulation were applicable while this proceeding was suspended; (3) that ex parte discussions of whether to continue this proceeding constituted communications on the merits; (4) that the IG investigation does not absolve the ALJ from his responsibility to consider and address Respondents' ex parte claims and (5) EPA's ex parte communications resulting in bias and prejudice may not be excused by countervailing allegations of ex parte communications committed by Respondents.

As to the applicability of the APA, Respondents recognize that RCRA § 3006(e), the statutory provision under which the instant proceeding is being conducted, provides for a public hearing, but does not expressly require that such hearing be "on the record" (5 U.S.C. § 554(a), "Adjudications"). They point out, however, that the Clean Water Act (33 U.S.C. §§ 1326 & 1342) also does not expressly require the public hearing therein provided for to be on the record, but that proceedings under these sections have, nevertheless, been repeatedly held to be subject to the APA, citing, e.g., Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978) and Marathon Oil Co. v. EPA, 564 F.2d 1283 (9th Cir. 1977). Respondents emphasize that the section providing for judicial review of actions under §§ 6925 or 6926 of RCRA (§ 7006(b), 42 U.S.C. § 6976) states that such review shall be in

accordance with sections 701 through 706 of Title 5.[40/] They note also that EPA appears to have adopted the position that withdrawal proceedings must be on the record and [thus that the APA applies], because the Part 22 Rules as modified (40 CFR § 271.23(b)(4)(i)) specifically provide that the hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter. Moreover, provisions of the Part 22 Rules providing for filing the transcript and submission of proposed findings and conclusions (40 CFR §§ 22.25 and 22.26) are specifically made applicable to this proceeding (40 CFR §§ 271.23(b)(3) (xii) and (xiii). Although not cited by Respondents, 40 CFR §§ 271.23(b)(7) & (8) provide for preparation of a recommended decision and certification of the record by the ALJ to the [Regional] Administrator and by implication that the RA's decision must be on the record so certified. Lastly, Respondents rely on Judge Phillips' opinion in North Carolina v. EPA, supra, which assumed the applicability of the APA, and a letter from, and certain remarks of, the ALJ.[41/]

[40/] Respondents refer to this standard as a "relatively deferential substantive review" and argue that Congress must have intended the more stringent procedural requirements of the APA, 5 U.S.C. §§ 554 and 557, to apply (Motions at 7).

[41/] Letter, dated June 20, 1989, to Ms. Gail McRae, Four-County Community Services, Inc., stating in part "(t)he [North Carolina withdrawal] hearing is a formal adjudicatory proceeding in accordance with the Administrative Procedure Act." Although my remarks at the September 5 conference with counsel are accurately quoted, the Order Addressing Procedural Motions assumed the applicability of the APA.

Respondents, of course, argue for the applicability of the APA, because it purportedly provides the basis for the motion to dismiss.[42/] Respondents vigorously dispute the EPA General Counsel's suggestion that the ex parte rules were inapplicable during the period the proceeding was suspended (Motion at 9-13). They point out that the APA is quite explicit as to when the ex parte rules are applicable,[43/] that EPA's own rule as modified (40 CFR § 271.23(b)(3)(v)) applies from the time of the issuance of the order commencing proceedings (November 3, 1987, in this instance), that cancellation of the proceeding would have necessitated a notice in the Federal Register which did not occur and that EPA argued in the Court of Appeals for the D.C. Circuit (supra at note 3) that the proceeding was merely postponed.

[42/] Respondents have misconstrued the purpose of the ALJ's inquiries as to whether the March 20 and 21 briefings of Congressional Committee Staff by EPA officials were attended by officials from North Carolina. My thought was not that such attendance might constitute an ex parte communication by the State, but that attendance by North Carolina officials would at least arguably prevent the briefings from being ex parte contacts by or to EPA personnel. See ante at 6.

[43/] The APA provides, in pertinent Part, § 557(d)(1)(E):

> (E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

To support the argument that discussions during the suspension period as to whether to proceed with the hearing constituted communications on the merits, Respondents assert that EPA has misconstrued EDF v. EPA, 510 F.2d 1292 (D.C. Cir. 1975) and rely on suggestions in PATCO v. FLRA (PATCO II), 685 F.2d 547 (D.C. Cir. 1982) to the effect that even a procedural inquiry may amount to a subtle attempt to influence the outcome of a decision and that disclosure of such contacts in doubtful cases was the better course. According to Respondents, EDF stands only for the well-recognized rule that communications between the prosecutorial and adjudicative staffs of an agency are appropriate prior to the initial filing of an administrative complaint (Motions at 15). Respondents acknowledge that not all ex parte communications after an adjudication begins are communications on the merits, but argue that the kind of communications undertaken in this case after the commencement of an adversarial adjudication against the State of North Carolina were clearly prohibited ex parte communications on the merits of the proceeding.

Respondents assert that an investigation by the IG into possible ethical violations, while warranted, cannot absolve this tribunal of its responsibility to enforce ex parte and due process requirements of the APA. Alluding to remarks of the ALJ at the September 5 conference with counsel to the effect that no party appeared to be free from sin in the matter of ex parte communications, Respondents object to what they perceive as an attempt to require "clean hands" as a condition to imposing

sanctions or granting relief for violations of ex parte rules. Respondents argue that case law does not support such a doctrine and that, in any event, the magnitude of their encroachments on the rule cannot compare with the persistent lobbying behind closed doors by EPA staff and members of the hazardous waste treatment industry (Motion at 17-19). Respondents argue that the single incident referred to by the ALJ cannot be an ex parte communication on the part of the State, because the official involved was not authorized to represent North Carolina. See note 42, supra. Acknowledging that they wrote a "handful" of letters to EPA officials during the suspension period, Respondents say that all such letters were circulated to all parties herein and usually elicited responses from opposing parties. See, however, supra at note 28, for discussion of a contact with Assistant Administrator Thomas Adams initiated by North Carolina Attorney General Lacy Thornburg and ante at 22, for EPA's allegation that the numerous inquiries concerning this matter were instigated by Respondents.

Respondents' Views Of The Factual Record Evidenced By EPA Disclosures To Date

Respondents rely on four allegedly major events as the factual foundation for their motions: (1) a meeting on February 23, 1989, by the Administrator with EPA staff wherein he was effectively lobbied by Mr. Tidwell "to go after North Carolina," (2) the breakfast meeting on March 16, 1989, wherein the Administrator was allegedly lobbied for the same result by representatives of the hazardous waste management industry; (3) a briefing paper and

further consultations by the Administrator with his staff on April 6, 1989, wherein the decision to proceed with the hearing was made; and (4) the general release on April 12, 1989, of the "question and answer" document written and disseminated within the Agency by Sylvia Lowrance.

The details concerning the mentioned meetings and documents have been discussed above and will not be repeated here. Suffice it to say, however, that Respondents assert EPA's disclosures concerning these events are inadequate and that EPA has erroneously chosen to rely on interviews conducted by the IG rather than preparing comprehensive disclosures [as it is obligated to do]. Quoting from the log of EPA Decision-Maker Meetings Re: North Carolina (A-2), Respondents say that not only was the North Carolina statute mentioned at the Administrator's briefing on February 23, 1989, but that the statute was characterized in a manner that goes to the heart of the merits of this proceeding. Referring to the briefing paper for this meeting (A-19), it is alleged that North Carolina was blamed for events considered highly undesirable by EPA staff, thereby creating the clear impression that North Carolina must be punished so that it will stop inciting other states. Of the three options presented to the Administrator, Respondents say he obviously chose the first in ordering a resumption of the withdrawal hearing, i.e., "take a strong stand in ensuring consistent State programs." According to Respondents, this option was presented to the Administrator not as a fact-finding alternative, but as an action resulting in a decision

adverse to North Carolina, thereby sending a strong signal to other allegedly "obstreperous" states. This view of the matter is, according to Respondents, confirmed by the IG interviews with Messrs. Tidwell, Yamada and Moore, which indicate that the primary reason for "prosecuting" North Carolina was an alleged "domino" effect, if the hearing was not resumed.

Turning to the March 16 breakfast meeting, Respondents point out that the meeting was initiated by NWF President Jay D. Hair, when he appended a note to the Administrator on a copy of a news article captioned "South Carolina Bars 32 States On Disposal Of Hazardous Waste." See supra at notes 19 and 35. Respondents quote from the WMI position papers (supra at note 36), which the Administrator denies having read, and describe as "lacking in credibility" the Administrator's statement that he thought the meeting was purely social when he accepted the invitation. They also cite the article in the Winston-Salem Journal of April 21, 1989, which quotes the Administrator as saying "I was lobbied to do the very thing we are doing," i.e., resume the hearing. Respondents say that lobbying at the breakfast concerning Alabama and South Carolina coincides precisely with Mr. Tidwell's argument that unless he acted promptly to strike down the North Carolina law, he would have no credibility in the Region and in effect, that the statements [to the IG] after reflection of the Administrator and others who attended the breakfast, should be viewed with skepticism (Motion at 26).

Concerning the April 6 decision to resume the hearing, Respondents refer to the issue or briefing paper from Messrs. Cannon & Tidwell to the Administrator (B-17), which states, among other things, that ultimate program withdrawal authority is not required, because the North Carolina statute contains an automatic repeal clause, if EPA decides that withdrawal is appropriate. In short, Respondents say that the Administrator was informed that he could nullify the North Carolina law without taking responsibility for administering its hazardous waste program. Respondents claim that the Administrator has in effect admitted that his decision to resume the hearing was a decision on the merits, which was influenced by biased and prejudiced communications. As support, Respondents quote from articles in the Winston-Salem Journal, April 22, 1989 (D-9), and the New York Times, July 25, 1989 (D-54). In the former article, the Administrator is quoted as saying that North Carolina has triggered a bout of protectionism that threatens the foundation of regional waste management compacts and that, while RCRA clearly allows a state to go farther [be more stringent] than the national RCRA, if it [state law] goes so far as to preclude a state from accommodating its own wastes, it imposes a requirement on other states to accept "our stuff" and if that catches on nationally, what do we do about the waste problem? The Administrator is further quoted as saying that states such as South Carolina have reacted by refusing to accept wastes from other states for disposal in its landfill and that Alabama was considering such a move, which

would restrict the last landfill in the Southeast. This, Reilly is reported to have said, "was not going to be a solution we can all live with and so the purpose of the hearing really is to vent some of these issues."

In the New York Times article, the Administrator is reported to have stated that senior advisors have told him the State's [North Carolina's] standards not only exceeded Federal regulations, but also were so stringent that disposal companies could not comply. Mr. Reilly is further quoted as stating "I have made no decision, other than to hold a hearing." Additionally, the article quotes Regional Administrator Tidwell as saying that "the North Carolina law risks a kind of domino effect, in which other states, believing they bear an unfair share of the Nation's toxic waste burden, would close their borders to wastes from other states, as South Carolina has already started to do."

Respondents describe the "question and answer document" (B-49), which was widely disseminated within the Agency, as "highly prejudicial" and as "prejudging every material element of Respondents' case" (Motions at 29). Quoting extensively from the document, Respondents assert that the positions espoused are identical to EPA's positions at the hearing and that the record establishes these "prosecutorial positions" have matured into the official position of the Agency. In further arguments this paper is referred to [as proof] that "Headquarters dictated the answers to the ultimate issues before the hearing began" (Motions at 33).

Unless their requests for relief are granted, Respondents say that position will undoubtedly prevail in the final Agency decision.

Arguments For Dismissal

As authority for dismissal, or alternatively for the issuance of an order to show cause why the proceeding should not be dismissed, Respondents rely on the APA, specifically 5 U.S.C. § 557(d)(1)(D).[44/] They assert that the "secret record," now

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[44/] The APA, § 557(d), provides:

> (d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law--
>
> (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;
>
> (B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceedings;
>
> (C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:
>
> (i) all such written communications;
>
> (ii) memoranda stating the substance of all such oral communications; and
>
> (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(continued...)

disclosed, shows manifest abuse of the ex parte statute and regulation and that these "due process" violations have resulted in an injury which cannot be cured by any sanction other than dismissal (Motions at 30). Purporting to quote from Charlottesville v. Federal Energy Regulatory Commission, 774 F.2d 1205 (D.C. Cir. 1985), cert. denied, 475 U.S. 1108 (1986), Respondents say that EPA has failed the test established by that case.[45/]

From the standpoint of fundamental fairness, Respondents state that the most pertinent case is Utica Packing Co. v. Block, 781 F.2d 71 (6th Cir. 1986), wherein it was held to be a denial of due process for the Secretary of Agriculture, after an adverse decision by the regularly appointed judicial officer, to appoint a

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[44/] (...continued)

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

* * * *.

[45/] Actually, the quote is from PATCO II, 685 F.2d at 564:

* * * In enforcing this standard, a court must consider whether, as a result of improper ex parte communications, the agency's decision-making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair either to an innocent party or to the public interest that the agency was obliged to protect. * * * *.

replacement judicial officer for that particular case, who ruled in favor of the Department on a motion for reconsideration. The court held that this was a case where the "risk of unfairness" was intolerably high and reinstated the decision of the first judicial officer which had dismissed the complaint. This result was reached even though appellants were unable to prove any actual bias on the part of the replacement judicial officer or his legal advisor.

According to Respondents, two issues raised in Utica are pertinent here: (1) separation of functions in administrative adjudications and (2) whether fundamental fairness has been sacrificed to gain a desired decision. As to the first issue, Respondents say that under these standards the Administrator is disqualified and his decision to retain "final [decisional] authority" is a basis to dismiss. This is assertedly because of the indisputable fact that "Anglo-American law does not permit anyone to be the judge of his own case" (Utica at 77).

As to the second issue, Respondents again quote from Utica to the effect that while the requirement for a separation of functions is relaxed in administrative adjudications, the requirement for a fair trial before a fair tribunal has not been eliminated. This concept requires the appearance of fairness and the absence of probability of outside influences on the adjudicator. Respondents claim to have met their burden of showing "the risk of unfairness to be intolerably high," because "(1) a decisional official acting as agent of the prosecutorial staff convinced the Administrator in ex parte communications that the North Carolina statute was

unlawful and (2) Headquarters dictated answers to the ultimate issues before the hearing began." (Motions at 33). According to Respondents, the Administrator has retained to himself the power to implement those announced findings.

Respondents argue that the continuation of these withdrawal proceedings, allegedly due to insistent pressure from EPA staff and representatives of the hazardous waste disposal industry, is a problem that cannot be obviated by recusal of a few key decisionmakers. They claim that Mr. Tidwell was an "interested person" within the meaning of the APA,[46/] assertedly intent on determining the outcome of this proceeding through ex parte communications. Citing a "Motion for Preliminary Injunction" in an action styled "National Solid Wastes Management Association and Chemical Waste Management, Inc. v. The Alabama Department of Environmental Management, et al., No. CV-89-G-1722W (N.D. Ala.), which seeks to enjoin enforcement of the Alabama law (supra at note 29), Respondents assert that Dean Buntrock of WMI is also clearly an interested person within the meaning of the APA.[47/]

[46/] PATCO II quoted legislative history (H.Rep. No. 880, Pt. I, 94th Cong., 2d. Sess. at 19-20, reprinted U.S.Code Cong. & Adm. News, 1976, at 2183) defining "interested person" within the meaning of 5 U.S.C. § 557(d)(1)(A) as "any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have." 685 F.2d at 562.

[47/] Chemical Waste Management, Inc. is a subsidiary of Waste Management, Inc.

Respondents argue that the phrase "merits of the proceeding" as used in the APA, 5 U.S.C. § 557(d)(1), must also be construed broadly and assert that EPA's contention the merits were not discussed at the Administrator's briefing on February 23, 1989, cannot withstand scrutiny (Motion at 34). According to Respondents, the record shows that the ultimate merits were the basis of the decision to resume the hearing, because Mr. Tidwell was convincing in his argument that the North Carolina law was a "sham" enacted with the sole purpose of preventing the GSX facility from being built. Administrator Reilly neither heard nor considered Respondents' defenses to these allegations. It is alleged that the reasons the Administrator agreed to reopen the case include his determination on the ultimate issues, because "EPA obviously cannot send its intended signal to other states unless the 'prosecution' prevails and the North Carolina program authority is withdrawn" (Motion at 35, 36).

Argument For Removal Of The Administrator

Respondents contend that the Administrator should be removed from any role in this proceeding, because he has become irrevocably biased and prejudiced as a result of contacts with similarly biased members of his staff and improper *ex parte* contacts with outside parties (Motions at 36). Respondents allege that communications between the Administrator and his staff addressed the facts, the law, and therefore the merits of the proceeding. They complain that the Administrator was bombarded by similar communications from outside parties, including prominent members of the hazardous waste

management industry and that, although Regional Administrator Greer Tidwell recused himself from further participation, it was not until after he had infected the Administrator with his biased attitudes and beliefs.

Respondents allege that the decision to proceed with the hearing, as repeatedly defined by all parties pressuring the Administrator, was really a decision to make an example of North Carolina by prosecuting it, finding against it and withdrawing its RCRA program authority. According to Respondents, the Administrator's public statements, as reported by the news media, indicate that he intends this result and his ex post facto rationale, that the only purpose of the hearing was to provide a forum for airing the facts is not supported by the record.

Quoting the APA, 5 U.S.C. § 556(b)[48/] and 5 U.S.C. §

[48/] The cited section (5 U.S.C. § 556(b)) provides:

> (b) There shall preside at the taking of evidence--
>
> (1) the agency;
>
> (2) one or more members of the body which comprises the agency; or
>
> (3) one or more administrative law judges appointed under section 3105 of this title.
>
> This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other
> (continued...)

557(d)(1)(D) giving the ALJ authority to require a party knowingly violating the ex parte prohibitions to show cause why his claim or interest in the proceeding should not be dismissed or otherwise adversely affected, Respondents contend that the greater power must include the lesser, i.e., requiring recusal of a decisionmaker when warranted.

Argument For Ex Parte Hearing

Asserting that the failure of the ALJ to order an ex parte hearing (assuming their other requests for relief are denied) will be a clear abuse of discretion and a manifest denial of due process, Respondents claim that their worst fears have been realized: a biased Agency process has led the Administrator to announce he will make the final decision and his most trusted advisors have told him the answer before the hearing is completed (Motions at 38). The rationale for the decision, according to Respondents, is not founded on the narrow technical merits of the North Carolina law, but rather on the policy and political consequences of failing to strike it down regardless of individual merit. Respondents say that the magnitude of their injuries herein make the basis upon which a hearing was ordered in PATCO v. FLRA PATCO I), 672 F.2d 109 (D.C. Cir. 1982) pale in comparison.

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[48](...continued)
disqualification of a presiding or participating employee, the agency shall determine the matters as a part of the record and decision in the case.

They point out that in PATCO I an FBI investigation was deemed inadequate to assure full disclosure and argue that the IG investigation herein is also inadequate. They further point out that the court's order in PATCO I contemplated that testimony would be taken from any person required "to determine the nature, extent, source and effect of any and all ex parte communications and other communications and other approaches that may have been made to any [decisionmakers] * * [while the case was before the Agency]" 672 F.2d at 113. Applying that standard, Respondents contend that testimony in the instant matter should be taken from Messrs. Tidwell, Buntrock, Range, Banks and Hair. They list other witnesses that should be required to give testimony:

1. Tina Kaneen: author of critical memoranda on ex parte communications; adviser to the Thomas task force; source of information to Daniel McGovern;

2. Joshua Sarnoff: attendee of February 23 meeting, author of February 6, 1989, brief in D.C. Circuit Court of Appeals;

3. The Division Directors, Office of Solid Waste and Office Waste Programs Enforcement, Region IX -- The April 12, 1989 question and answer document was sent to those employees who will be able to describe its distribution in Region IX, especially vis-a-vis Daniel McGovern, C-7;

4. Nancy Marvel -- Region IX Counsel present during the McGovern briefing, C-8;

5. Bill Wick -- Region IX Acting Deputy Regional Counsel present during the McGovern briefing (C-8), ex parte adviser to Mr. McGovern, C-8; Regional Counsel adviser to the Waste Branch Chief, regarding the distribution of the April 12 question and answer document;

6. Gordon Binder -- Special Assistant to Administrator Reilly, responsible for set up of the March 16, 1989 breakfast meeting, D-12;

7. Mr. Barber and Mr. Rooney of Waste Management, Inc.-- present at the March 16 breakfast and not interviewed by the OIG, D-14; and

8. Sylvia K. Lowrance, Director, Office of Solid Waste, EPA Headquarters -- regarding the content of B-49, the decision to disseminate it, and its status as EPA policy.

Respondents assert that if the ex parte standard [of full disclosure] has not been satisfied through the testimony of the listed individuals, then those persons listed in August 14 motion (supra at note 21) should also be called and examined (Motions at 40-41).

Petitioner's Opposition

Opposing Respondent's motions, Petitioners point out that EPA's creation of the RCRA/CERCLA Task Force virtually invited ex parte communications and that North Carolina enthusiastically supported creation of Task Force.[49/] According to Petitioners, it was not until later that Respondents began complaining about ex parte communications.

Petitioners express the belief that the Administrative Procedure Act is inapplicable, asserting that the APA applies only when a "hearing on the record" is statutorily required (Opposition at 4). Acknowledging that EPA regulations require that withdrawal

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[49/] Petitioners' Brief In Opposition To Respondents' Motions For Dismissal, Removal of Administrator Reilly, Hearing On Ex Parte Communications and Oral Argument hereinafter Opposition, at 2. Petitioners' cite a letter from North Carolina Attorney General Lacy Thornburg to Assistant Administrator Winston Porter, dated February 4, 1988 (B-19), opining that EPA has "acted prudently" [in postponing the hearing] and establishing a national review process [to address consistency and capacity issues].

proceedings be determined on the record (40 CFR § 271.23(b)), Petitioners assert that this regulatory requirement is not sufficient to trigger application of the APA. For this conclusion, they rely primarily on U.S. Lines v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978). Apart from Respondents' motion to dismiss, which is asserted to be without merit, Petitioners state that whether the APA is applicable is somewhat academic, because EPA's ex parte rule (40 CFR § 22.08) applies in any event.

Petitioners agree with Respondents that the proceeding was never canceled or terminated and that 40 CFR § 22.08 applied during the lengthy postponement period. They acknowledge that their agents probably participated in a few isolated and wholly inconsequential violations of the ex parte rules during the postponement period, but contend that: "(1) any such violation was inadvertent and arose in the context of a permissible discussion concerning whether the North Carolina proceeding should go forward; (2) the substance of all such communications have been fully revealed and Respondents have had ample opportunity to reply; and (3) respondents and parties allied with them in this proceeding violated the ex parte rules as often as petitioners and in much greater detail" (Opposition at 5-6). For these reasons, Petitioners argue that Respondents have not been prejudiced by Petitioners' violations of EPA's ex parte rules.

Petitioners dispute Respondents' contention that discussions during the postponement period as to whether to resume the North Carolina hearing were on the merits, pointing out that "the merits"

have been defined by the ALJ's prehearing order (Order Establishing Issues, dated May 3, 1989). Petitioners say that the ultimate issue is whether North Carolina's RCRA program authorization should be withdrawn, rather than whether there should be a hearing in the proceeding or whether the hearing should have been resumed once postponed. They point out that the latter decisions, not being final orders, are not judicially reviewable, citing North Carolina v. EPA, supra at 7.

Petitioners further argue that discussions as to whether to proceed with the North Carolina hearing involve interpretation and application of EPA regulations are thus similar to the telephone calls from the Secretary of Transportation urging "expeditious handling," which were held in PATCO II, supra not to constitute "merits of the case." They point out that the Secretary's calls in PATCO II were made while a decision was being actively considered, while the discussions herein took place while the proceeding was suspended. According to Petitioners, to rule that the newly appointed Administrator could not discuss the matter of proceeding with the North Carolina hearing would be, in effect, to paralyze the Agency. For all these reasons, Petitioners contend that communications relating to whether the instant matter should go forward do not relate "to the merits" as that term is used in the APA (Opposition at 10).

Petitioners agree that the IG's report does not relieve the ALJ of the necessity to enforce applicable rules relating to ex parte communications. They point out, however, that the report,

absolving the Administrator of ethical violations, provides strong evidence that Respondents present claims of unethical behavior and bias are without foundation. While chiding Respondents for being justifiably worried that their "unclean hands" may present an equitable barrier to the relief they seek, Petitioners say they have chosen not to make an issue of Respondents' acknowledged ex parte violations, because these communications generally echo Respondents' arguments and evidence at the hearing.

Addressing Respondents' motion to dismiss, Petitioners point out that Respondents appear to have blended two separate, but related arguments: (1) that the proceeding should be dismissed, because the Administrator has prejudged the merits of the case and (2) violations of ex parte rules by EPA personnel warrant dismissal in accordance with 5 U.S.C. § 557(d)(1)(D). Petitioners further point out that Respondents' contention that the Administrator's decision to resume the hearing is in itself evidence of prejudgment is contrary to the D.C. Circuit's decision in EDF, supra.

Petitioners say that Respondents' misguided legal arguments pale in comparison to their distortion of the factual record. With regard to the February 23 briefing of the Administrator, Petitioners assert there is no evidence the merits of the proceeding, i.e., the issues identified in the ALJ's prehearing order were discussed. Petitioners deny that the briefing paper contains any suggestions or recommendations as to the ultimate outcome of the proceeding or that it may fairly be characterized as creating "the clear impression that North Carolina must be

punished." They assert that this position is supported by the IG interviews with Messrs. Reilly, Yamada, Moore and Tidwell (Opposition at 16). Petitioners argue that only an extremely active imagination could construe the March 16 breakfast meeting as convincing evidence of the Administrator's bias and prejudgment.

Disputing Respondents' assertion that the briefing paper presented to the Administrator on or about April 6, 1989 (B-17), "suggests that withdrawal will be the result of the North Carolina proceeding," Petitioners quote from the paper which states in part [proceeding with the hearing]: "allows consistency/stringency issue to be addressed on its own merits after consideration of the facts[.]" Petitioners further point out that factors favoring and opposing a decision to proceed are presented to the Administrator and that opposition to proceeding with the hearing from environmental groups and concerns of Congressional staff are reported. Alluding to the unreliability of news reports concerning this proceeding,[50/] Petitioners state that the Administrator's reported statements (Winston-Salem Journal, D-9) that "the purpose of the hearing is to vent some of these issues" and (New York Times, D-54) "I have made no decision other than to hold a hearing"

[50/] Attached to Petitioners' Opposition (Appendix C) is a retraction by the Raleigh News and Observer of statements attributed to Special Deputy Attorney General Daniel F. McLawhorn in an article published October 11, 1989, as to the outcome of the IG investigation of the Administrator.

directly contradict Respondents' allegations of bias and prejudgment.

Petitioners acknowledge that the question and answer paper (B-49) addresses the merits of the withdrawal proceeding and that a review of that paper by a decisionmaker or his advisors would be an improper ex parte communication (Opposition at 20-21). They point out, however, that there is no evidence Mr. McGovern or Mr. Reilly have ever seen this paper let alone adopted any of its conclusions. Moreover, they assert that Respondents have long been aware of the existence of the paper and have had ample opportunity to respond.

In conclusion, Petitioners state that even if the APA were applicable, dismissal would not be appropriate, because it would not be consistent with the "interests of justice" [to them] or with "the policy of the underlying statutes" (i.e., RCRA) (5 U.S.C. § 557(d)(1)(D) (Opposition at 22). They further argue that Respondents have shown no sound basis for removal of the Administrator as a decisionmaker nor for a hearing on ex parte communications (Opposition at 23-25).

EPA's Response

It is unnecessary to discuss EPA's opposition to Respondents' motions in any detail.[51/] Suffice it to say that EPA argues there

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[51/] The Motion To File Out Of Time "EPA's Response To Respondents' Motion To Dismiss Proceeding, Or In The Alternative Remove Decisionmaker And Complete Ex Parte Disclosure," filed November 6, 1989, which was unopposed, is granted.

is no evidence that "tentative and final decisionmakers are biased" and that no legitimate purpose would be served by a further "exploration of alleged ex parte contacts" (Response at 1-2). EPA states that Respondents endorsed the "national policy review" and that even after raising ex parte concerns, Respondents continued to lobby the Agency in the manner of which they now complain.

EPA cites Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989) as dispositive of the applicability of the APA and emphasizes that EPA's ex parte rule (40 CFR § 22.08) doesn't provide for dismissal (Opposition 5-8). EPA claims to have supplied all information requested and to have volunteered information not required and contends that, even if the APA were applicable, there is no basis for further relief. Additionally, EPA points out that in accordance with 40 CFR § 271.23(b)(1), the Administrator [or his delegate] is required to find that "cause exists" to commence a withdrawal proceeding and that this determination, no less than the preliminary findings in EDF, supra, is not evidence of bias or prejudgment. Citing Withrow v. Larkin, 421 U.S. § 35 (1975), EPA says all that is required is for the decisionmaker to retain an open mind and to be willing to receive and evaluate evidence in a fair and impartial manner. Reiterating its contention that the discussions which took place were procedural and concerned with whether to resume the hearing rather than its outcome, EPA asserts that neither removal of the Administrator or a hearing on ex parte communications is warranted.

Accordingly, EPA urges that Respondents' requests for relief be denied.

Respondents' Reply

In their Reply, dated November 16, 1989,[52/] Respondents allege: (1) that they have not unduly and unnecessarily delayed the principal proceeding;[53/] (2) that they have met their burden for a hearing on ex parte [communications] and bias or prejudgment; (3) that final decisionmakers, appointed after a prosecution has begun, may not receive the same depth of briefing as the preprosecution decisionmaker without violation of the ex parte standards; and (4) the proceeding is controlled by and subject to the APA.

Regarding the allegations of Petitioners and EPA that North Carolina supported creation of the Task Force, Respondents point to the letter from counsel for North Carolina, dated April 22, 1988, warning EPA that it must accept consequences of attempting to combine two incompatible processes, i.e., quasi-judicial

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[52/] Respondents' Reply In Support Of Motion To Dismiss Proceeding, Or In The Alternative Remove Decisionmaker, and Complete Ex Parte Disclosure, hereinafter Reply. By an order, dated November 7, 1989, Respondents' motion for oral argument on their pending motions was denied. Respondents were, however, permitted to file a reply brief.

[53/] Because the ALJ agrees that the principal cause of delay after the hearing resumed on May 31, 1989, is EPA's tardiness in completing required disclosures, this issue will not be further addressed. It should be emphasized, however, that the IG's closing memorandum concerning the investigation of the Administrator is dated August 23, 1989.

adjudication and policy formulation [of the same or closely related issues]. They accordingly argue that under the circumstances Respondents made the only choice available, they participated in the ongoing administrative policy-making process rather than risk a failure-to-exhaust-administrative remedies defense (Reply at 2).

Concerning their burden to demonstrate the necessity for a hearing, Respondents emphasize that Petitioners, in their reply to Respondents' August 14 motions, recognized the inadequacy of EPA's disclosures and that a hearing was necessary. See ante at 21. See also transcript of the September 5 counsels' conference at 18, remarks of counsel for GSX, "(w)e've agreed to the need for a hearing." Respondents point out that the only new information submitted since that time is the IG investigation and argue that Petitioners' contention the IG investigation resolved all issues concerning ex parte communications is erroneous.[54/] In any event, Respondents point out that Petitioners concede that the question and answer paper contains ex parte communications on the merits. They argue that the record shows advisors to decisionmakers prepared the paper and received it and that the "preparation, distribution and status" of this document alone are sufficient and compelling reasons for holding a hearing (Reply at 7).

[54/] In support of this assertion, Respondents rely on a letter from J. Richard Wagner, a self-described "whistleblower" in the OIG, to Congressman John D. Dingell, dated October 18, 1989, questioning the professional competence and thoroughness of the IG investigation (Exh C to Reply).

Respondents allege that EPA continues to cloud the status of the Administrator as a decisionmaker and say that the governing standards must be applied based upon the assumption Mr. McGovern will review the ALJ's recommended decision and defer to the Administrator as to the ultimate decision. As to legal issues, Respondents contend that the crux of the matter is the briefings provided the Administrator, that EPA's theory is contrary to the express language of § 554(d), that the boundary separating permissible and impermissible discussions is the commencement of proceedings and that once the prosecution begins, the statutory separation of judicial functions provides no exception.

According to Respondents, Chemical Waste Management, supra, cited by EPA, supports their position that the APA applies rather than that of EPA (Reply at 11-15).

D I S C U S S I O N

A. Applicability of APA

Section 3006(e) of the RCRA (42 U.S.C. § 6926(b)) provides that the Administrator shall withdraw authorization of a State program whenever he determines after "public hearing" that a State is not administering and enforcing a program authorized by this section in accordance with the requirements thereof.[55/] Neither the

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[55/] Section 3006(e) provides:

> (e) Withdrawal of Authorization--Whenever 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 (continued...)

Act nor its legislative history[56/] specifies that the contemplated hearing must be "on the record" or otherwise describes the hearing to be provided. Under these circumstances, Chemical Waste Management, Inc. v. U.S. EPA, 873 F.2d 1477 (D.C. Cir. 1989), teaches that Chevron principles apply (Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)) and that deference is due to an agency's permissible interpretation of the type of hearing contemplated by a statute it is charged with administering, no less than its interpretation of other provisions of such a statute. Here EPA, in issuing proposed rules which became the Consolidated Rules of Practice (40 CFR Part 22), concluded that formal hearings [in accordance with the APA] were required for the issuance of compliance orders or the suspension or revocation of permits under § 3008(b).[57/] This conclusion was affirmed when the

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[55/] (...continued)
ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subtitle. 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.

[56/] Legislative history, House Report No. 94-1491, 94th Cong. 2nd Sess. (1976) at 57-58, reprinted U.S. Code Cong. & Adm. News (1976) at 6296, merely repeats the statutory language and does not provide a rationale therefor.

[57/] See 43 Fed. Reg. 34738 (August 1978):

1. The statute explicitly requires an opportunity for a "public hearing" before these steps may be taken. Although there are many cases where, in EPA's opinion, this language should not be read to require formal adjudicatory procedures, the nature of the decision at issue in these cases indicates (continued...)

final "rules of practice" were issued.[58/] The adoption of the Part 22 Rules, as modified, for withdrawal proceedings would seem to be persuasive evidence that EPA was of the view the same considerations also applied to withdrawal proceedings.[59/]

[57/](...continued)
to us that such formal procedures were probably intended. In these cases the Agency will be accusing someone of violating established legal standards through their past conduct, and will be seeking to impose a sanction for it. These are the kinds of "accusatory" cases for which the statutorily independent "hearing examiners," established by the APA to preside over formal hearings, were largely intended. In addition, the facts at issue will be specific ones involving the past conduct of regulated persons.

2. The statute on its face contains some indication that formal hearings were intended. Though this might not be enough in itself to require a formal hearing, in this context it reinforces the arguments based on the nature of the decision summarized above.

[58/] 45 Fed. Reg. 2430 (April 9, 1980) provides:

> Hearings under all but one of the four statutory provisions [including RCRA § 3008] covered by these rules will be held in conformity with the adjudicatory hearing provisions of the Administrative Procedure Act (APA). The only exception is hearings to assess penalties for violating regulations on fuels or fuel additives under section 211 of the Clean Air Act. The reasons for concluding that the formal APA hearing requirements do not apply to this section were set forth at 40 FR 39963, August 29, 1975, when the original hearing rules under that section were promulgated.

[59/] See 44 Fed. Reg. 34258 (June 14, 1979) (Exh D to Respondents' Reply):

> § 123.15(b) sets out a formal hearing process for withdrawing State programs (other than UIC programs, which are covered in Subpart C). This process may be initiated by the Administrator on his or her own motion or in response to a formal petition from any interested person. In order to avoid the need for the Agency to develop a new set of formal hearing procedures, this paragraph adopts by reference certain
> (continued...)

Chemical Waste Management, supra, however, concluded that EPA's determination the APA applied was not due to its interpretation of the statutory language, but rather of the peculiar nature of the issues raised by such orders (873 F.2d at 1481). Accordingly, the court held that, even though an amendment to § 3008(b) effected by the Hazardous and Solid Waste Act Amendments of 1984 (HSWA), Public Law 98-616, 98 Stat. 3257-58 (November 8, 1984), made it clear that the public hearing provided by § 3008(b) also applied to "Interim Status Corrective Action Orders" under § 3008(h), which was also added to the Act by HSWA, EPA could properly provide for informal hearings on such orders when a hearing was requested (40 CFR Part 24). Therefore, it must be concluded that the controlling intent as to whether withdrawal proceedings are subject to the Administrative Procedure Act is that of Congress and where it cannot be said that Congress intended such

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[59](...continued)
provisions from the regulations of Part 22 of this Chapter. (Part 22 regulations were proposed on August 4, 1978, 43 FR 34730, and will be promulgated shortly in essentially the form proposed. All citations are to the proposed version.)

proceedings be "on the record,"[60/] the APA is not applicable, even though the rules of practice contemplate formal hearings in accordance with that Act.[61/]

It is, of course, recognized that EPA would be required to explain any departure from its present policy that formal hearings are required in proceedings for the withdrawal of a State's program authorization,[62/] and that it is difficult at this time to envisage an explanation sufficient to "pass muster." In any event, due process considerations preclude what appear to be Respondents' principal concern, i.e., the decision herein will be based on, or

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[60/] Because APA sections providing for judicial review of agency action (5 U.S.C. §§ 701-706) apply irrespective of whether hearings are required to be on the record (see, e.g., Citizens To Preserve Overton Park v. Volpe, 401 U.S. 415 (1971)), the amendment to § 7006 effected by § 27 of the Solid Waste Disposal Act Amendments of 1980 (94 Stat. 2349), so as to add thereto § 7006(b) providing for review in the U.S. Courts of Appeals of certain actions under §§ 3005 and 3006 and that such review be in accordance with 5 U.S.C. §§ 701-706, lends no support to the argument Congress intended that withdrawal proceedings be "on the record."

[61/] The fact that public hearings under § 7001 (42 U.S.C. § 6971) entitled "Employee Protection" are expressly required to be "of record" and subject to 5 U.S.C. § 554 supports the conclusion that Congress had no similar intention with respect to withdrawal proceedings under § 3006(e).

[62/] Chemical Waste Management, supra. See also Michigan Consolidated Gas Co. v. Federal Energy Regulatory Commission, 883 F.2d 117 (D.C. Cir. 1989) (Commission held to have adequately explained deviation from prior policy).

affected by, "extra-record evidence" or information submitted to decisionmakers in prohibited ex parte communications.[63]

B. Dismissal

Because the Administrative Procedure Act is not applicable, there is no statutory basis for Respondents' motion to dismiss. Even if the APA were applicable, however, and even if egregious and knowing violations of ex parte rules were established, the section of the APA, relied upon by Respondents (5 U.S.C. § 557(d)(1)(D), supra at note 44) can be construed as authorizing dismissal of a party's claim or interest only "to the extent consistent with the interest of justice and the policy of the underlying statutes." RCRA § 3006 requires that, in order to be authorized, a State's program must, inter alia, be consistent with the Federal program. Dismissal of this proceeding would leave unresolved the question of whether Senate Bill 114, the North Carolina law at issue, is consistent with RCRA, and thus dismissal cannot be held to be consistent with the policy of the underlying statute.

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[63] See U.S. Lines v. Federal Maritime Commission, supra. Although due process doesn't require formal hearings in accordance with the APA, it requires, as a minimum, notice of the violations or allegations involved, impartial decisionmakers, and an opportunity to be heard. It is apparent that no meaningful opportunity to be heard has been afforded if a decision, or any part thereof, is based on evidence not available to the person or individual charged.

The *ex parte* rule, applicable here (40 CFR § 22.08),[64] makes it clear that the remedy for violation of the rule is disclosure and opportunity to reply or rebut rather than dismissal. Because the proceeding was never formally terminated, it is concluded that § 22.08 applied during the suspension period. Petitioners have agreed that EPA's *ex parte* rule applied during the lengthy postponement period (Opposition at 5) and EPA has acquiesced in the position the rule applies (Response at 8-9). Respondents have had ample opportunity to reply to and rebut any information or arguments presented in alleged *ex parte* communications shown by this record. It is significant that they have made no move to reopen the record on the merits, which closed, insofar as the receipt of evidence is concerned, on September 20, 1989. Any

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[64] 40 CFR § 22.08, as amended by § 271.23(b)(3)(v), provides:

§ 22.08 Ex parte discussion of proceeding.

> At no time after the issuance of the order commencing proceedings shall the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factual related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

decision must be based on the record complied at the hearing and there is no sound basis for Respondents' contention that their due process rights have been or will be violated by proceeding to a decision on the merits. The flagrant situation in Utica Packing Co. v. Block, supra, cited by Respondents, is not present here. Respondents' motion for dismissal will be denied.

C. Recusal Of The Administrator

Respondents' contention that the Administrator must recuse himself or be removed from any decision-making role herein is based on: (1) the Administrative Procedure Act, e.g., 5 U.S.C. § 556(b) providing for the filing of a timely and sufficient affidavit of personal bias or prejudice as to a presiding or participating employee, and (2) prejudgment by the Administrator. Regarding (1), while Respondents have repeatedly alleged that the Administrator is biased and prejudiced against them because of ex parte communications, they certainly have not filed a timely and sufficient affidavit to that effect. In any event, the APA is not applicable and it is unnecessary to further address this claimed basis for the Administrator's recusal.

Regarding (2) above, there can be no doubt that evidence the Administrator had prejudged the facts or the result herein would require his recusal. See, e.g., Antoniu v. Securities and Exchange Commission, 877 F.2d 721 (8th Cir. 1989) (speech by Commissioner of SEC to the effect that petitioner, a convicted securities broker or dealer, should be permanently barred from employment in the securities business, indicated prejudgment of facts as well as law

of the case and required nullification of all proceedings in which Commissioner participated after his speech). Here, the newspaper articles quoting remarks of the Administrator with reference to the instant proceeding, upon which Respondents primarily rely, simply do not support a similar conclusion of prejudgment. For example, the quotes of the Administrator in the Winston-Salem Journal of April 22, 1989 (ante at 56-57) seem to reflect no more than the Administrator's concern that the actions of some states in restricting the import of hazardous wastes or the construction of treatment facilities for such wastes would invite or provoke similar actions by other states, thereby exacerbating hazardous waste treatment and disposal capacity problems. Moreover, any contention that these statements are evidence of prejudgment is vitiated by the Administrator's further statement that the "purpose of the [North Carolina] hearing is to vent some of these issues." Similarly, although the New York Times article quotes the Administrator as stating he had been told by senior advisors that North Carolina's "standards were so stringent that "disposal companies could not comply," he also reported to have said "I have made no decision other than to hold a hearing." These statements cannot reasonably be construed as evidence of prejudgment. This conclusion is supported by the Administrator's letter to Congressman Charles Rose (supra at note 14), "the hearing provides a forum to examine the facts."

Respondents' argument that the Administrator's decision to resume the hearing based on advice from Mr. Tidwell and other

senior staff members to the effect that reopening the hearing was necessary in order to "send the proper signal" to other states considering restrictive legislation proves too much. Firstly, acceptance of the contention the Administrator's decision in that regard constitutes convincing evidence of impermissible prejudgment would seemingly preclude EPA from instituting proceedings against or withdrawing North Carolina's program authorization irrespective of the program's inconsistency with RCRA. This would frustrate the requirement of State program consistency contained in § 3006 of the Act. Moreover, such a result is contrary to EDF, supra, which holds that the Administrator could make the requisite findings to commence a suspension proceeding under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§ 136 to 136y), i.e., determine that action is necessary to prevent an imminent hazard, without impermissibly prejudging the result of the proceeding. EDF applies "four-square" here, because 40 CFR § 271.23(b)(1) requires the Administrator [or his delegate] to determine "whether cause exists to commence a proceeding under this paragraph."

Secondly, the premise that only withdrawal of North Carolina's program would send the "requisite signal" to other states, overlooks the fact that Respondents themselves have characterized this proceeding as "burdensome."[65/] Accordingly, the mere existence

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65/ "The State is being subjected to a complex proceeding, involving not only time and expense, * *" (Motion To Dismiss Or To Rescind Order Commencing Proceedings, dated February 12, 1988, at 2); "(t)he clearest, most plausible explanation for the events that have brought this burdensome litigation to North Carolina's doorstep * * *" (Motion For Evidentiary Hearing On Ex Parte (continued...)

of this proceeding and the knowledge that EPA was watching closely would appear to have some deterrent affect on state legislative initiatives concerning hazardous wastes.[66/] Be that as it may, the evidence does not establish that the Administrator has prejudged either the facts or the result and his recusal is not required.

D. Evidentiary Hearing

Respondents rely on four events to support their contention that a hearing to elicit all the facts concerning alleged ex parte communications and bias is necessary: (1) the briefing of the Administrator on February 23, 1989; (2) the March 16 breakfast meeting hosted by National Wildlife President Jay Hair, which was attended by the Administrator and representatives of Waste Management, Inc.; (3) the decision on April 6, 1989, to proceed with the hearing and (4) the "question and answer paper."

As to (1), representatives of the IG interviewed five of the individuals who were present at the briefing: Administrator Reilly, then acting General Counsel Gerald Yamada, former Deputy Administrator John Moore, then acting Assistant Administrator Jonathan Cannon and Regional Administrator Greer Tidwell. The

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[65/](...continued) Communications And Extant Procedural Irregularities And For Complete Disclosure Of All Ex Parte Communications, dated August 14, 1989, at 27.

[66/] It must, of course, be acknowledged that reopening of the hearing herein apparently did not deter Alabama from passing legislation restricting the import of hazardous waste (supra at note 29).

substance of these interviews, except for that of Mr. Cannon,[67] has been summarized above and will not be repeated. The interviews are not contradictory and support the conclusion that the merits of the North Carolina law were not discussed. The interviews show that Mr. Tidwell urged the hearing be reopened, primarily because of the thought failure to do so would encourage other states to enact similar [restrictive] legislation. This reason for resumption of the hearing could be construed as carrying with it the necessary implication that in the view of Mr. Tidwell and other Agency officials present at the briefing (there being no reported disagreement) the North Carolina law at issue here was inconsistent with RCRA. As we have seen, however, the 40 CFR § 271.23(b)(1) requires a finding that "cause exists to commence withdrawal proceedings" and does not constitute impermissible prejudgment. Moreover, <u>EDF</u>, supra, stands for the proposition that discussions between an agency head and prosecutorial staff as to whether an ongoing proceeding should be expanded to include additional parties or charges are permissible.[68] There is no evidence that any EPA

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[67] The interview of Mr. Cannon (D-20) simply confirms in general terms that Mr. Tidwell recommended resumption of the hearing in order to deter other states in the Region from actions restricting the import of hazardous waste.

[68] Although Respondents contend EDF stands for no more than the settled rule that discussions between an agency head and prosecutorial staff prior to the commencement of an action are permissible, they understandably make no reference to the examples, 510 F.2d at 1305, which support the conclusion in the text.

staff engaged in prosecuting this action were present.[69] In view of the above, it is concluded that the facts concerning the February 23 briefing of the Administrator have been adequately set forth and no impermissible discussions have been shown to have occurred. Moreover, even if these discussions were ex parte communications concerning the merits, Respondents have had ample opportunity to reply thereto. Respondents have not demonstrated a reason for a further exploration of the facts concerning the February 23 briefing and their request for a hearing with respect thereto is without merit.

The same conclusion is applicable to the Administrator's March 16 breakfast meeting. Although there is a conflict between the stated position of Waste Management officials at this meeting, as expressed in interviews with agents of the IG, and the briefing papers delivered to the Administrator at the close of the meeting, as to the wisdom of proceeding with the North Carolina hearing, it is concluded that the facts concerning this meeting have been sufficiently disclosed. It is, of course, true that the IG investigation does not relieve the ALJ and other Agency decisionmakers of the obligation to follow and enforce rules concerning ex parte communications. In matters such as the adequacy of EPA's factual disclosures, however, each case must turn on its own peculiar facts and the mere fact the FBI investigation

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[69] The record does not support Respondents' contention that Mr. Tidwell acted as a "prosecutor."

in PATCO I, 672 F.2d 109, supra, was insufficient to satisfy the court that the facts concerning improper contacts had been fully elicited, provides no support for the conclusion the IG investigation here is inadequate.

The decision on April 6, 1989, to proceed with the North Carolina hearing is not evidence of impermissible prejudgment. Although the decision paper (B-17) recommends that the hearing be reopened and states reasons therefor, it also states that [resumption of the hearing] "(a)llows consistency/stringency issues to be addressed on its own merits after consideration of the facts." (Id. at 2). Individuals involved in the decision have been interviewed by agents of the IG and, as we have seen, these interviews do not support the contention the line separating findings of cause to initiate an action or prosecution and impermissible prejudgment has been crossed. Moreover, it has been concluded above that discussions by the Administrator and his staff as to whether to proceed with the North Carolina hearing do not constitute prohibited ex parte communications. In any event, Respondents have had ample opportunity to reply to and rebut adverse arguments in the briefing and decision papers and have, therefore, been afforded the remedy contemplated for violations of the ex parte rule.

As noted (ante at 30), the "question and answer paper" (B-49) appears to treat withdrawal of North Carolina's program authorization as a "fait accompli," e.g., "(w)hy are we determining to withdraw North Carolina's program in light of the December 23,

1988 Policy * * *?" The paper clearly contains other statements relating to the merits, e.g., the dilution factor imposed by the North Carolina law is described as "arbitrary" (Id. at 3). A permissible inference, however, from the evidence of the authors of the paper and its distribution (ante at 29) is that the purpose of the paper is to explain EPA's rationale for reopening the hearing and to enable recipient's to answer anticipated questions relating thereto in a consistent manner. In any event, there is no evidence that decisionmakers, other than Mr. Tidwell who has recused himself, ever saw the paper and no evidence to support Respondents' extravagant claim that the paper is proof EPA Headquarters dictated the answers to the issues before the hearing began. Moreover, as noted previously, Respondents have had an ample opportunity to reply to and rebut any arguments or information in the paper.

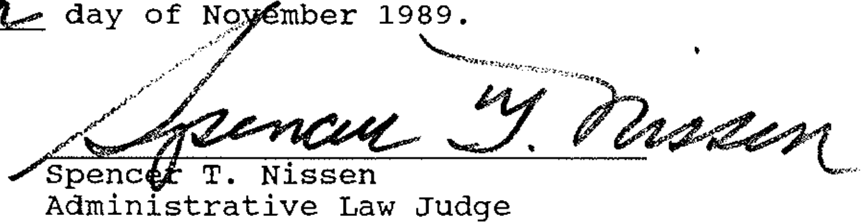
For the above reasons, it is concluded that the facts concerning alleged *ex parte* communications and the substance thereof have been placed on the record and no necessity for a hearing thereon has been shown. Accordingly, Respondents' motion for a hearing thereon will be denied.

O R D E R

Respondents' motions for dismissal of this proceeding, for recusal of the Administrator and for a complete disclosure of *ex parte* communications, including a hearing thereon, are denied. In accordance with the understanding reached at the conclusion of the hearing on the merits on September 20, 1989 (Tr. 2170),

proposed findings and conclusions and briefs in support thereof will be submitted within 45 days of the date of this order or on or before January 15, 1990. Reply briefs will be filed within 20 days of the receipt of submissions of opposing parties.

Dated this 30th day of November 1989.



Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of this ORDER DENYING MOTIONS FOR DISMISSAL OF PROCEEDING, FOR RECUSAL OF THE ADMINISTRATOR AND FOR A COMPLETE DISCLOSURE AND HEARING ON ALLEGED EX PARTE COMMUNICATIONS, dated November 30, 1989, in re: Proceedings to Determine Whether to Withdraw Approval of North Carolina's Hazardous Waste Management Program, was mailed to the Regional Hearing Clerk, Reg. IV, and a copy was mailed to each party in the proceeding as follows:

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December 1, 1989

Helen F. Handon
Secretary