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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 Withdrawal Proceedings - Equal Access To Justice Act - Adversary Adjudications

Public hearing provided by RCRA section 3006(e) in proceedings for the withdrawal of a state's program authorization is not a hearing required by the Act to be "on the record" in accordance with section 554 of the Administrative Procedure Act and thus is not an "adversary adjudication" within the meaning of the Equal Access To Justice Act (5 U.S.C. § 504). The fact that applicable rules of practice require that state program authorization withdrawal hearings be on the record did not subject such proceedings to the APA and thus could not convert such proceedings into "adversary adjudications" contemplated by the EAJA.

Resource Conservation and Recovery Act - State Program Authorization Withdrawal Proceedings - Equal Access To Justice Act - Substantially Justified

Even though proceeding for the withdrawal of North Carolina's RCRA program authorization was ultimately dismissed, test for determining whether the agency's position was "substantially justified" within the meaning of EAJA is one of reasonableness and where it was found that the proceeding was highly controversial and the result arguable, the Agency's position was "substantially justified" and entitlement to a fee and expense award under the EAJA was not established.

RECOMMENDED DECISION ON APPLICATION FOR ATTORNEY'S FEES AND OTHER EXPENSES BY THE ENVIRONMENTAL POLICY INSTITUTE

Under date of June 28, 1990, the Environmental Policy Institute (EPI), presently Friends of the Earth, [1] filed an application for attorney's fees and other expenses incurred in this proceeding pursuant to the Equal Access To Justice Act (EAJA) (5 U.S.C. § 504). [2] Fees and expenses sought total $193,195.14. The application asserts that EPA must award fees and expenses because (1) the Agency conducted an adversary adjudication, (2) EPI was a party to that adjudication, (3) EPI prevailed, and (4) the position

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[1] In its reply to EPA's opposition to its fee and expense application, EPI states that it has recently merged with Friends of the Earth and the Oceanic Society and now operates under the name of Friends of the Earth (FOE) (Reply, dated September 27, 1990, at 1, note 1). Although the application requests that FOE be substituted for EPI for the purposes of the fee application, it continues to refer to the applicant as EPI. This practice will be followed herein.

[2] The Equal Access To Justice Act (5 U.S.C. § 504) provides in pertinent part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

of the Agency was not substantially justified and no special circumstances exist which would make an award unjust.

Although expressing doubt that EPA's regulations (40 CFR Part 17) implementing the EAJA were applicable, the application states that it was submitted in conformance therewith. [3/] Rather than submitting net worth information as required by section 504(b)(1)(B) and 40 CFR § 17.5, EPI has submitted a copy of correspondence from the Internal Revenue Service which establishes that it is an organization exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954 and thus an eligible party irrespective of its net worth. [4/]

On September 11, 1990, EPA filed an opposition [answer] to EPI's application for fees and expenses. Reduced to essentials, EPA argues that the application should be denied because the underlying withdrawal proceeding was not an "adversary

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[3/] EPI's doubts were occasioned by 40 CFR § 17.4 (1989) which provides in pertinent part that "(t)he Act applies to an adversary adjudication pending before EPA at any time between October 1, 1981 and September 30, 1984." The expiration date was repealed and the Act amended in 1985 (Act August 5, 1985, P.L. 99-80, 99 Stat. 186) and the Act remains in effect. Any doubts as to the ALJ's authority to act herein were laid to rest by an order issued by the Administrator on August 27, 1990, designating the undersigned to issue a recommended decision and, in common with final decision-making authority in the underlying proceeding, delegating authority to issue a final decision on the fee and expense application to Regional Administrator Daniel W. McGovern.

[4/] Letters from the District Director of the IRS, dated December 20, 1974, and May 25, 1977 (Appendix E). EPI states that it has fewer than 500 employees (Application at 16).

adjudication" within the meaning of the EAJA and that, in any event, the position of the Agency was substantially justified.

As indicated (supra at note 1) EPI filed a reply to EPA's opposition [answer] on September 27, 1990. [5/] Vigorously disputing EPA's assertion that the purpose of initiating the proceeding was to provide a forum for the impartial resolution of disputed or uncertain facts, EPI maintains that "investigation" and "adjudication" are entirely different and that the moment EPA commenced these proceedings, it launched an adversary adjudication in which it played a prosecutorial role. EPI also attacks what it characterizes as EPA's suggestion that, although the Rules of Practice (40 CFR Part 22 as modified by section 271.23(b)) call for "on the record" hearings, the Agency was free to modify the rules in accordance with "Chevron" principles [6/] during the course of the litigation.

[5/] Although contemplated neither by the 40 CFR Part 17 rules nor by the Administrator's August 27 order, the reply is accepted and will be considered.

[6/] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

FINDINGS OF FACT [1/]

1. The proceeding pursuant to section 3006 (e) of the Solid Waste Disposal Act, as amended (RCRA) (42 U.S.C. § 6926) to determine whether to withdraw approval of North Carolina's hazardous waste program authority was commenced by an order, signed by the Acting Regional Administrator of EPA, Region IV on November 3, 1987, published in the Federal Register (52 Fed. Reg. 49303-306, November 17, 1987).

2. The mentioned order was precipitated by and based on an amendment to Article 9 of Chapter 130A of the General Statutes of North Carolina, section 130A-295.01 enacted by the General Assembly on June 22, 1987 (Senate Bill 114), which allegedly rendered the State's hazardous waste program inconsistent with RCRA. The order constituted EPA's response to petitions, filed by GSX Chemical Services, Inc. (GSX) and the Hazardous Waste Treatment Council (HWTC) pursuant to 40 CFR § 271.23(b), requesting that North Carolina's hazardous waste program authorization be withdrawn.

3. Pursuant to 40 CFR § 271.23(b)(1), North Carolina filed an answer on December 16, 1987, essentially denying the allegations in the order which were the basis of the alleged inconsistency with RCRA. The order established a deadline of December 2, 1987, for filing motions to intervene, for filing

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[1/] Unless otherwise indicated, findings of fact are taken from the Recommended Decision, dated April 11, 1990. Familiarity with that decision is assumed.

motions to make limited appearances and to file amicus curiae briefs (52 Fed. Reg. 43904). The Environmental Policy Institute (EPI), an environmental group, filed a motion to make a limited appearance pursuant to section 271.23(b)(5) and a motion for an extension of time in which to file a motion to intervene, which motions were granted. On December 22, 1987, EPI filed a motion to intervene, which was granted over the opposition of GSX by an order, dated January 6, 1988.

4. Although a hearing on the issues raised by the Regional Administrator's November 3 order was originally scheduled to be held in Raleigh, North Carolina on January 12 and 13, 1988, the hearing was continued for various procedural and policy reasons and ultimately postponed indefinitely (53 Fed. Reg. 32899, August 29, 1988). The policy reason for rescheduling the hearing was to allow time for the Task Force commissioned by then Administrator Lee M. Thomas to issue a report and policy recommendations on RCRA and CERCLA (Superfund) (42 U.S.C. § 9601-9675) consistency and capacity issues. Findings of the Task Force resulted in a policy memorandum issued by Administrator Thomas on December 23, 1988, which was interpreted within the Agency as requiring or leading to cancellation of the North Carolina withdrawal proceeding.

5. Activities of the Task Force and discussions within the Agency leading to resumption of the hearing provided the basis for several motions by North Carolina and allied parties that the proceeding be dismissed, because of an alleged irrevocable

taint arising from ex parte contacts or, alternatively, that the hearing be continued pending full disclosure by EPA of alleged ex parte communications and for a hearing thereon. These motions and EPA's inability to make timely disclosures ordered by the ALJ were the primary reason the hearing extended over a period of several months rather than being completed in a continuous session. The mentioned motions were decided in an order, dated November 30, 1989, which concluded, inter alia, that the Administrative Procedure Act (APA), upon which the motions to dismiss were based, was not applicable and that EPA had made full disclosure of facts concerning alleged ex parte communications and the substance thereof.

6. During pretrial proceedings, factual issues to be addressed at the hearing were rewritten (Order Establishing Issues, Attachment B to Recommended Decision). Although this "rewrite" resulted in part from EPA's acknowledgment that certain allegations in the November 3 order were not factual disputes to be resolved at the hearing, [8/] the ultimate and controlling issues were not thereby affected. These issues, of course, turned on "consistency" as defined in 40 CFR § 271.4 and in particular, whether Senate Bill 114, the North Carolina Act, unreasonably restricts, impedes, or operates as

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[8/] United States Environmental Protection Agency's Motion To Recommend and To Specify Procedures and Motion In Opposition to Respondent North Carolina's Motion to Take Additional Discovery, dated January 25, 1988, at 3 (Fee Application, Appendix H).

a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal within the meaning of section 271.4(a). An affirmative finding as to this provision, would, in accordance with the terms of section 271.4(a), mandate a finding of inconsistency. The other controlling issues were whether SB 114 had any basis in human health or environmental protection and whether SB 114 acted as a prohibition on the treatment, storage or disposal of hazardous waste within the meaning of Section 271.4(b). A negative finding as to the first proviso and a positive finding as to the second proviso would permit, but not require, a finding that SB 114 was inconsistent with RCRA.

7. While the earliest version of SB 114 introduced in the North Carolina Senate appeared to be directed primarily at preventing the State's Hazardous Waste Treatment Commission from selecting or operating a hazardous waste facility and the Governor's Waste Management Board from approving the operation of such a facility, sponsors of the bill, Senators J. Richard Condor and Aaron Plyler, represented Scotland County in the Senate. The proposed GSX hazardous waste treatment facility near Laurinburg, North Carolina was to be located in Scotland County and the bill's sponsors left little doubt that blocking or delaying the proposed GSX facility was their purpose in introducing the bill. This bill as well as subsequent versions of SB 114, including the version which became law,

were sent to EPA for comment as to the effects of such legislation on the State's hazardous waste program authorization. EPA's comments were uniformly negative, stating that passage of such legislation would authorize EPA to withdraw approval of North Carolina's program authorization. In commenting on the version of SB 114 which contained the dilution factor and was enacted into law, EPA stated that the assumption wastewater from a commercial facility was more hazardous than wastewater from other facilities was incorrect, that the dilution factor of one thousand-to-one is clearly arbitrary and without technical basis and that refusing to consider the benefit of further dilution through a POTW was environmentally unreasonable and technically unsound. During committee deliberations on the bill, representatives of the Governor's office spoke against the bill, agreeing with EPA that the dilution factor was arbitrary, because concentration, not volume, was the important consideration. In replying to EPA's request for information after SB 114 was enacted, the Secretaries of the North Carolina Departments of Human Resources and of Natural Resources and Community Resources made it clear that the bill would have been vetoed had the Governor the authority to do so and that the bill was considered to be an arbitrary and capricious intrusion into the orderly regulatory process and without technical basis and beneficial effects. This

correspondence makes it clear that these officials considered the bill was directed solely at GSX.

8. Disclosure data concerning alleged ex parte communications furnished by EPA in response to orders of the ALJ indicate that a major impetus for reopening the hearing was the thought discontinuing the proceeding against North Carolina would encourage other states in the Region to enact similar restrictive legislation and thus exacerbate a perceived shortfall in hazardous waste treatment and disposal capacity (Order Denying Motions For Dismissal, etc., dated November 30, 1989, at 6, 19 (note 25), 30, 35, 39 and 42). Indeed, on January 18, 1989, the Governor of South Carolina issued an executive order 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. The State of Alabama was considering and subsequently enacted legislation restricting or prohibiting the import of hazardous waste into Alabama under similar circumstances. [2/]

[2/] See National Solid Wastes Management Association and Chemical Waste Management, Inc. v. The Alabama Department of Environmental Management, et al., _____ F.2d _____, 31 ERC 1793 (11th Cir. 1990).

9. The decision, which recommended that the withdrawal proceeding be dismissed, was issued on April 11, 1990. [10/] The decision focused on nine issues involved in the "rewrite" of the allegations in the order initiating the proceeding, including the controlling issues referred to in finding 6 (Attach B to Recommended Decision). The decision (Summary Findings at 97 et seq.) answered in the negative the question of whether SB 114 unreasonably restricts the free movement of hazardous waste across the State's borders for treatment, storage or disposal as specified in section 271.4(a). This conclusion was reached because the Act, with the single exception of facilities owned by the State solely for the purpose of treating hazardous waste generated by agencies or subdivisions of the State, applied to commercial HWTFs without regard to the source of the waste. Secondly, it was concluded that a large facility of the type proposed by GSX could be constructed at other locations within the State in compliance with the Act. Thirdly, a smaller facility having a discharge of approximately 72,000 gpd could be constructed at the GSX

[10/] Although at the opening of the hearing counsel for EPA rejected the characterization of EPA as a neutral party and stated that EPA intended to put on a prima facie case [in favor of withdrawal of North Carolina's RCRA program authorization], EPA did not submit a posthearing brief advocating that result. Instead, EPA, under date of February 15, 1990, submitted a two-page statement to the effect that Region IV did not believe it was appropriate to prejudge either the ALJ or the Final Decision-maker, but that the record should be adequate for decision-making purposes.

Laurinburg site, although it would not be economic to do so. The issue of whether SB 114 operates as a prohibition on the treatment, storage or disposal of hazardous waste within the State as provided by section 271.4(b) was answered in the negative for the same reasons.

10. The question of whether SB 114 had any basis in human health or environmental protection within the meaning of section 271.4(b) was addressed from several angles, i.e., the basis for the Act's distinction between commercial and noncommercial facilities, the basis for the dilution provision which, inter alia, disregards treatment and dilution which may occur in a POTW and applied irrespective of the quality of the discharge and the basis for the State's contention the Act imposed more stringent requirements expressly authorized by RCRA section 3009. As to the first of these issues, it was concluded that the record supported a finding that commercial HWTFs are likely to have more pollutants than a normal industrial discharger, that the effluent from such facilities is likely to be more variable and complex than effluent from other industrial facilities and that there was a greater possibility of additional contaminants or breakdown products being formed due to synergistic or other effects and a greater likelihood of interferences or upsets of the POTW into which the HWTF discharges. For these reasons, it was determined that there was a basis in human health or environmental protection for the Act's differing treatment of commercial and noncommercial

HWTFs. The basis for disregarding toxicant removal rates in a POTW was evidence that removal rates vary widely and that, absent detailed information as to the treatability of specific pollutants and constituents, there is no way of determining in advance what such removal rates would be. Moreover, it was pointed out that during permit negotiations the State, the LMAC and GSX had agreed that, because no one knew what the removal rate in the LMAC POTW would be, the conservative, "safe position," was to assume there would be no such removal. If this was a reasonable position for permit issuers and regulators, it was no less reasonable for the drafters of SB 114. SB 114 was determined to be a sizing or siting statute and held to be a more stringent provision expressly authorized by section 3009 to the extent it encouraged or required the siting of HWTFs below public drinking water intakes.

11. Senate Bill 114 was determined to have effects protective or beneficial to human health or the environment in the event either or both permit limits or water quality standards were being violated. Additionally, it was concluded that SB 114 reduced the volume of discharges in relation to the flow of the receiving stream, assured better mixing of effluent before it reached the City of Lumberton's drinking water intake and tended to prevent the receiving stream from becoming effluent dominated. The decision also cited evidence that, "all else" being equal, the greater discharge posed the greater risk.

12. Petitioners, Laidlaw Environmental Services, Inc. (Laidlaw, formerly GSX Chemical Services, Inc.) and the Hazardous Waste Treatment council, filed exceptions to the recommended decision on May 4, 1990. Petitioners excepted to findings and conclusions to the effect that SB 114 did not unreasonably restrict the free movement of hazardous waste across the State's borders for treatment, storage or disposal or operate as a prohibition on the treatment, storage or disposal of hazardous waste in the State by facilities subject to the Act; that there was a basis in human health and environmental protection for the Act's distinction between commercial HWTFs and noncommercial facilities; that the Act had a basis in the protection of human health and the environment; and that to the extent the Act required or encouraged the siting of HWTFs below public drinking water intakes, it was a more stringent regulation expressly authorized by RCRA section 3009. In support of these exceptions, petitioners submitted a brief, which, inter alia, argued that the recommended decision effectively eliminated RCRA withdrawal proceedings as a viable mechanism for dealing with inconsistent state legislation, that the ALJ's failure to examine and determine the actual purpose of SB 114 opens the door to an infinite variety of "sham" legislation, that the ALJ erred in concluding that the record established a sufficiently reasonable [health or environmental] basis for SB 114, and that the conclusion SB 114 acted as a "prohibition" within the meaning of section

271.4(b) only if it were an "outright ban" on the import of hazardous waste for treatment, storage or disposal was erroneous. North Carolina and allied parties (respondents) excepted to the recommended decision, actually order of November 30, 1989, only insofar as it held that the Administrative Procedure Act was not applicable to withdrawal proceedings under RCRA section 3006(e) (Exception, dated May 8, 1990).

13. In his "Decision," dated May 31, 1990, Regional Administrator Daniel W. McGovern, to whom final decision-making authority had been delegated, agreed with the ALJ that North Carolina's hazardous waste program had not been shown to be inconsistent with the Federal program or programs applicable in other States and dismissed the proceeding. He emphasized that 40 CFR § 271.4(b) was in the conjunctive, i.e., any aspect of a State program which has no basis in human health or the environment and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent, so that both conditions or provisos must be satisfied before a finding of inconsistency could be made. Additionally, he pointed out that even if such a finding were made, withdrawal of a State's program authorization was discretionary not mandatory. Because a large facility of the type proposed by GSX could be built at other locations within the State and a smaller facility in compliance with SB 114 could be constructed at Laurinburg, he concluded that the

second proviso had not been satisfied. Accordingly, he found it unnecessary to address the question of whether the North Carolina Act had any basis in human health or environmental protection and ruled that the discussion of this issue by the ALJ as well as the issue of whether SB 114 could be regarded a more "stringent" siting requirement authorized by RCRA section 3009 should be considered as dicta.

14. Regional Administrator McGovern denied the exceptions to the recommended decision filed by petitioners. See "Appendix C" to the decision. He noted that petitioners' exceptions were based on two broad arguments, i.e., the ALJ's failure to examine and determine the actual purposes of SB 114 opens the door to "sham" legislation and the ALJ's interpretation and application of RCRA's consistency requirement permits states to justify protectionist legislation. As to the first issue, he found that the recommended decision appropriately focused on formal actions taken by legislative committees and testimony before such committees rather than on statements of individual legislators. He implicitly approved of the legal standard, based on Fourteenth Amendment cases, utilized by the ALJ in evaluating the purpose of SB 114, and concluded that petitioners had failed to show that the purpose of the Act as stated could not have been its actual goal. He accepted the conclusion in the recommended decision that SB 114 was not action limiting or striking down of the State's authorities within the meaning of section 271.22(a)(1)(ii) and, relying,

as did the ALJ, on a statement in the preamble to the regulation (45 Fed. Reg. 33384, May 19, 1980), affirmed the ruling that a single instance of failing to issue a permit would not justify withdrawal of the State's program authorization in accordance with section 271.22(a)(2)(i). Mr. McGovern affirmed the ALJ's conclusion that SB 114 did not unreasonably restrict, impede or operate as a ban on the free movement of hazardous waste within the meaning of section 271.4(a) when interpreted in the light of the preamble to the regulation (45 Fed. Reg. 33395) and thus North Carolina's hazardous waste program was not inconsistent when measured against section 271.4(a). He also ruled that in view of explanatory remarks in the preamble to the regulation (45 Fed. Reg. 33395), the ALJ had correctly equated the phrase "acts as a prohibition" in section 271.4(b) with a complete prohibition.

15. The Regional Administrator dismissed as moot respondents' exception to the ruling the Administrative Procedure Act (APA) was not applicable to RCRA withdrawal proceedings. On June 8, 1990, EPI filed a motion for reconsideration and clarification of the decision, requesting that the Regional Administrator: (1) reconsider and clarify his holding to state unequivocally that use of formal APA procedures in the North Carolina withdrawal proceedings are "under section 554" and thus an "adversary adjudication" within the meaning of the Equal Access to Justice Act, 5 U.S.C. § 504, or (2) in the

alternative, reconsider and reverse his holding that the required use of formal APA procedures in these proceedings is moot and clarify that formal APA procedures under 5 U.S.C. § 554 are required in state program withdrawal proceedings under section 3006(e) (42 U.S.C. § 6926(e)). Pointing to the Administrator's order designating the undersigned to issue a recommended decision on EPI's fee application, the Regional Administrator observed that the recommended decision must necessarily determine whether the instant proceeding is an "adversary adjudication" within the meaning of the Equal Access to Justice Act (Decision On Motion For Reconsideration, dated August 28, 1990). He stated that it was preferable that the ALJ decide all issues relating to the fee application and that it would be administratively inefficient for him to decide those issues at present. Accordingly, he denied the motion for reconsideration.

16. Although the fee application appears to be adequately documented and to comply with 40 CFR § 17.13, because of the recommendation herein, no detailed examination thereof has been made. It should be noted, however, that the application claims attorney's fees in excess of $75 an hour and expert witness fees in excess of $24.09 per hour, which rates are in excess of those authorized by 40 CFR § 17.7. The EAJA, 5 U.S.C. § 504(b)(1), provides that attorney's fees in excess of $75 an hour may not be paid unless the agency determines by <u>regulation</u> that special factors, e.g., cost of living or

limited availability of qualified attorneys, justify a higher fee (emphasis added). It should also be noted that Laidlaw and HWTC have filed a petition for review of the final Agency decision in the U.S. Court of Appeals for the D.C. Circuit (Hazardous Waste Treatment Council, et al. v. William K. Reilly, et al., Docket No. 90-1443) and that 40 CFR § 17.14(c) provides that, if judicial review is sought of the final agency disposition of the underlying controversy, proceedings for the award of fees will be stayed pending completion of judicial review. Although this provision may preclude final Agency action on the fee application until the petition for review is decided, it is concluded that it presents no bar to the issuance of this recommended decision.

C O N C L U S I O N S

1. State program authorization withdrawal proceedings in accordance with RCRA section 3006(e) (42 U.S.C. § 6926(e)) are not "adjudications" required by statute to be determined on the record after opportunity for an agency hearing within the meaning of the APA (5 U.S.C. § 554) and thus are not "adversary adjudications" within the meaning of the EAJA (5 U.S.C. § 504(a)(1)).
2. The mere fact that the Agency rules of practice governing state program authorization withdrawal proceedings (40 CFR Part 22, as modified by section 271.23(b)) contemplate formal "on the record" proceedings and that the North Carolina

withdrawal proceeding was conducted in accordance with the mentioned rules, does not have the effect of converting the proceeding into an "adversary adjudication" within the meaning of the EAJA.

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

4. A recommendation will be made that EPI's application for attorneys' fees and expenses be denied.

D I S C U S S I O N

I. RCRA Withdrawal Proceedings Are Not Adversary Adjudications

Legislative history of the EAJA indicates that its purpose was to encourage small business to resist unreasonable government action [11/] and an organization which voluntarily moves to intervene in a proceeding as EPI did herein can hardly claim that it was a victim of government harassment. [12/] The EAJA (5 U.S.C. §

[11/] See House Report No. 96-1418, 96th Congress, 2d Sess., at 5, reprinted (1980) U.S. Code Cong. & Adm. News at 4984.

[12/] It is at least doubtful if there can be intervention as a matter of right under the Consolidated Rules of Practice (40 CFR Part 22). See, e.g., Rockwell International Corp., TSCA Appeal No. 87-5 (Order On Interlocutory Appeal, October 23, 1987 (emphasizing differences between FRCP rule on intervention and section 22.11 of Consolidated Rules of Practice).

504(b)(1)(B)), however, defines party primarily with reference to the APA (5 U.S.C. § 551(3)) and because, for all that appears, EPI complies with that definition, [13] its fee application is not objectionable for that reason.

The EAJA (5 U.S.C. § 504(b)(1)(C)) defines an "adversary adjudication" as an adjudication under section 554 of Title 5 in which the position of the United States is represented by counsel or otherwise. The cited section of the APA (5 U.S.C. § 554(a)) provides in pertinent part: "(t)his section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * * *." [14] The "statute" referred to in the quoted language is the act under which the underlying proceeding is being, or was, conducted, in this case RCRA section 3006(e) (42 U.S.C. § 6926(e)).

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[13] The APA (5 U.S.C. § 551) defines party thusly:

> (3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;
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> * * * *.

[14] The APA (5 U.S.C. § 551(7) & (6)), respectively, defines "adjudication" as meaning agency process for the formulation of an order and "order" as meaning the whole or a part of a final disposition, whether affirmative, negative, injunctive or declaratory in form of an agency in a matter other than rule making but including licensing.

Although RCRA sections 3006(e) and 3008(b) provide for public hearings, neither section requires that such hearings be "on the record." [15/] There is, of course, substantial authority for the proposition that the crucial question is the type of hearing contemplated by Congress and that the presence of the words "on the record" are not essential to a holding the APA applies. See, e.g., Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978) (public hearing under section 316 of CWA, 33 U.S.C. § 1326, held to be subject to APA). It is also true that the Part 22 rules of practice which, as modified by section 271.23(b), were adopted for withdrawal proceedings under RCRA section 3006(e) contemplate formal on the record hearings in accordance with the APA. See Order Denying Motions For Dismissal, etc., dated November 30, 1989, at 75-79.

In Chemical Waste Management, Inc. v. U.S. EPA, 873 F.2d 1477 (D.C. Cir. 1989), the court examined RCRA section 3008(b) and concluded that the requirement for a "public hearing" did not indicate whether Congress intended formal or informal hearing procedures to be used. 873 F.2d at 1480. Moreover, the court determined that EPA's conclusion Congress intended formal procedures for hearings on orders under section 3008(a) was based

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[15/] EPA's regulation implementing the EAJA (40 CFR § 17.3(a)) provides that to the extent they are adversary adjudications, proceedings to which the rule applies include at (9), a hearing to consider the issuance of a compliance order or the assessment of a penalty under RCRA section 3008. Hearings under RCRA section 3006 are not mentioned.

on the nature of the issues raised by such orders rather than on the statutory language (Id. at 1481). The court therefore concluded that EPA was free to change its interpretation in this respect in implementing the Hazardous and Solid Waste Amendments of 1984, provided its interpretation was otherwise legally permissible and adequately explained.

In the mentioned order of November 30, 1989, the requirement for a public hearing in section 3006(e) and the legislative history of that section were reviewed and it was concluded that there was no indication that Congress intended formal "on the record" hearing procedures to apply to withdrawal proceedings. Although EPA, in adopting the Part 22 rules, as modified, to withdrawal proceedings, made it clear that formal APA procedures were intended, Chemical Waste Management, supra, was cited for the proposition that this result was based on the nature of the issues raised by such proceedings rather than requirements of the Act. Accordingly, it was concluded that the controlling intent was that of Congress and, because it could not be said that Congress intended withdrawal hearings to be "on the record," the APA was held not to be applicable. The fact that public hearings under section 7001 (42 U.S.C. § 6971) entitled "Employee Protection" are expressly required to be "of record" and subject to 5 U.S.C. § 554 buttresses

the conclusion that Congress had no similar intention with respect to withdrawal proceedings under section 3006(e). [16/]

Respondents have objected to the mentioned holding of the order of November 30, 1989, asserting that the order ignores "Chevron" principles, i.e., deference must be given to the Agency's interpretation of an unclear or ambiguous statute. While there can be no doubt that the requirement of the rules of practice that withdrawal proceedings be formal and on the record, no less than the Rule 22.08 prohibition on ex parte communications, is binding on the ALJ and the parties hereto, this requirement exists by force of the regulation and is not dependent on whether Congress intended withdrawal proceedings to be subject to the APA. Moreover, Chemical Waste Management, supra, supports the view that the regulation providing for formal hearings is not a requirement of RCRA. Respondents' exception to the November 30 ruling is, therefore, without merit and the ruling that the APA is not applicable is affirmed.

Citing Escobar Ruiz v. I.N.S., 838 F.2d 1020 (9th Cir. 1988), which held that an "adjudication under section 554" means an "adjudication as defined by section 554" and that deportation proceedings were therefore "adversary adjudications" within the meaning of the EAJA, EPI argues that the controlling factor is

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[16/] It is well settled that when Congress includes particular language in one section of statute and omits it in another section of the same act, it is generally presumed that Congress acted intentionally in the disparate inclusion or exclusion. Russello v. United States, 464 U.S. 16 (1983).

whether formal APA procedures were in fact used rather than whether such procedures were required to be used (Application at 3-8). It points out that in Appendix C to his decision, Regional Administrator Daniel W. McGovern specifically found that this proceeding has been conducted in accordance with the APA. The result contended for is, according to EPI, in accord with the goals of the EAJA. EPI says that the policy of the EAJA would be flouted if the government could burden parties with formal procedures and then deny fee awards because the government believed it was merely exercising its discretion to use formal procedures. EPI argues that what matters under the EAJA is what the government actually did and not whether it might have done something else.

Whatever may be the validity of Escobar Ruiz, supra, [17/] EPI's broad argument that agency practice, rather than the requirements of the particular statute, controls founders on the principle that waivers of sovereign immunity must be strictly construed. See St. Louis Fuel and Supply Co., Inc. v. F.E.R.C., 890 F.2d 446 (D.C. Cir. 1989), wherein it was held that section 7193(c) of the Department of Energy Organization Act (42 U.S.C. § 7193(c)) providing for an "opportunity for hearing" and setting forth minimum procedural requirements, but not requiring such hearings

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[17/] Although Escobar Ruiz was severely criticized in Owens v. Brock, 860 F.2d 1363 (6th Cir. 1988), the statute in Escobar Ruiz (8 U.S.C. § 1252(b)) required any determination of deportability to be made upon a record in a proceeding at which the alien shall have a reasonable opportunity to be present and Escobar Ruiz might be supportable for that reason. See Judge Nelson's concurring opinion in Owens, 860 F.2d at 1369-70.

to be "on the record," did not invoke the APA and thus were not "adversary adjudications" within the meaning of the EAJA. The fact that the agency had enhanced the statutory requirements by regulation to include essentially the same procedures as required by the APA (5 U.S.C. § 554) was held not to change the result. The court relied on the rule that waivers of sovereign immunity are to be strictly construed and was impressed by the fact that in other sections of the DOE Act, Congress, as it did with RCRA herein, expressly invoked the APA. The court concluded that Congress wrote into the EAJA a "bright-line rule," i.e., "(a)ttorneys' fees may be awarded in adversary adjudications governed by APA section 554; they may not be awarded in adversary adjudications that Congress did not subject to that section" (890 F.2d at 451) (emphasis added). See also Advanced Medical Systems, Inc., Nuclear Regulatory Commission, Atomic Safety and Licensing Appeal Board, ALAB-929; 31 N.R.C. 271; 1990 NRC Lexis 10 (March 30, 1990), holding that where the Atomic Energy Act did not require formal "on-the-record" hearings in license suspension or revocation actions, Commission rules and long-standing practice to afford on the record hearings in such proceedings did not invoke the APA and could not serve as a basis for an award of attorneys' fees under the EAJA.

For the above reasons, it is concluded that the withdrawal proceeding against North Carolina under section 3006(e) of RCRA was

not an adversary adjudication within the meaning of the EAJA and that EPI's fee application must be denied as a matter of law. [18/]

II. EPA's Position Was Substantially Justified

If Escobar Ruiz, supra, be considered the better rule, EPI's fee application nevertheless fails to pass muster, because the Agency's position in the underlying withdrawal proceeding was substantially justified.

Legislative history of the EAJA, House Report No. 96-1418 at 10, reprinted 1980 U.S. Code Cong. & Adm. News at 4989, reflects that the test for whether the government's position is substantially justified is essentially one of reasonableness. No presumption that the government's position was not subtantially justified arises from the fact the government lost the case nor is the government required to established that its decision to litigate was based on a substantial probability of prevailing (Id.

[18/] Because of Judge Dickson Phillips' decision denying respondents' petition for a stay of the hearing on the merits pending full disclosure of alleged ex parte communications, North Carolina, et al. v. EPA, 881 F.2d 1250 (4th Cir. 1989), EPI argues that the applicability of the APA has been decided and is controlling as the "law of the case" (Application at 13-15). Judge Phillips, in common with the ALJ prior to issuance of the November 30 order, assumed applicability of the APA, because the rules of practice required that the hearing be on the record. Indeed, the portion of respondents' brief to Judge Phillips quoted in the Application at 14 emphasizes the regulation rather than the Act, i.e., "(t)he nature of the instant Agency proceedings is * * * acknowledged by EPA regulations requiring EPA proceedings to withdraw state RCRA certification to be on the record * * *." Under these circumstances, Judge Phillips did not hold that RCRA required on the record hearings and the "law of the case" doctrine affords no assistance to EPI.

4990). The Supreme Court has held that "substantial" for purposes of EAJA court proceedings (28 U.S.C. § 2412(d)) means justified in substance or in the main, that is, justified to a degree that could satisfy a reasonable person. See Pierce v. Underwood, _____ U.S. _____, 108 S.Ct. 2541 (1988) at 2550.

Having set forth the appropriate standard, the conclusion that EPA was substantially justified in initiating and pursuing the withdrawal proceeding against North Carolina need not long detain us. It should be noted at the outset that the North Carolina withdrawal proceeding was highly controversial both within and without the Agency. Ample evidence of disagreement within the Agency is found in the policy memorandum issued by former Administrator Lee Thomas which was interpreted within the Agency and by Mr. Thomas [19/] as leading to termination of the proceeding against North Carolina. This position was, of course, reversed by Administrator William K. Reilly when, following staff briefings, he ordered a resumption of the hearing. Evidence of controversy outside EPA is found in letters from members of Congress and environmental groups opposing withdrawal of North Carolina's RCRA program authorization and in various newspaper articles concerning the proceeding. See Order of November 30, 1989. See also Snyder, The EPA-North Carolina Dispute; The Right of States To Pass Stricter Laws Under The Resource, Conservation and Recovery Act, 8 Virginia Journal of Natural Resources Law 171 (1988).

[19/] See Order of November 30, 1989, at 44, note 39.

On the merits, statements of the sponsors of SB 114 in the North Carolina General Assembly as well as the fact the Act was passed after a draft RCRA permit had been issued for the GSX facility, could lead a reasonable person to question whether protecting public health was the actual purpose of the bill. As we have seen, the Governor's office and executive departments of North Carolina opposed SB 114 as an intrusion into the orderly and scientific permitting process. Moreover, the regulatory requirement that an authorized state program be "consistent" with the federal program and programs in other states, 40 CFR § 271.4, had not previously been litigated and it was an open question, and remains arguable, as to whether the health or environmental justification offered for SB 114 is sufficient to satisfy section 271.4(b). The Regional Administrator found it unnecessary to address this issue, holding that the conclusions in the recommended decision in that regard were dicta.

The heart of Mr. McGovern's decision is that SB 114 does not unreasonably restrict or operate as a ban on the free movement of hazardous waste across the State's border within the meaning of section 271.4(a) nor does it act as a prohibition on the treatment, storage or disposal of hazardous waste within the meaning of section 271.4(b). These determinations were based on findings that a large, sophisticated facility of the type proposed by GSX could be constructed at other locations within North Carolina in compliance with SB 114 and that a smaller facility could be constructed at the GSX Laurinburg site in compliance with the Act,

even though it would not be economic to do so. While these determinations are considered to be amply supported by the record, petitioners' exceptions indicate there is reason to argue whether the result herein is consistent with the intent of RCRA. This argument would, of course, be more forceful, if, as petitioners' argue, SB 114 were determined to be "sham" legislation having no basis in human health or protection of the environment. Moreover, the likelihood that, if no action were taken against North Carolina, other states would be encouraged to enact similar legislation, and thus the RCRA consistency requirement would become a "dead letter," is seemingly sufficient reason in and of itself for holding that the action against North Carolina complies with the reasonable man standard of Pierce, supra.

Because the North Carolina withdrawal proceeding was highly controversial and the result arguable, EPA's position in initiating and pursuing the proceeding was "substantially justified" within the meaning of EAJA. Accordingly, EPI has not established entitlement to a fee and expense award under the EAJA.

EPI argues that EPA's failure to submit a posthearing brief advocating withdrawal of North Carolina's program authorization is tantamount to an admission the Agency had "no case" and no justification for instituting the proceeding. As we have seen, the Agency was substantially justified in initiating and pursuing the withdrawal proceeding against North Carolina. Although the Agency's failure to take a position in posthearing submissions might be susceptible to the interpretation EPI places upon it, it

is certainly not the only interpretation. Because he had advocated resumption of the hearing to the Administrator, Regional Administrator Greer Tidwell recused himself as a decision-maker and a more likely reason for EPA's posthearing stance is simply that it did not wish to be seen as attempting to unduly influence the ultimate decision.

A recommendation will be made that EPI's fee and expense application be denied.

RECOMMENDATION

It is recommended that EPI's fee and expense application under the Equal Access To Justice Act be denied.

Dated this 2nd day of November 1990.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the original of this RECOMMENDED DECISION ON APPLICATION FOR ATTORNEY'S FEES AND OTHER EXPENSES BY THE ENVIRONMENTAL POLICY INSTITUTE, dated November 2, 1990, 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 (addressees listed below):

Helen F. Handon
Secretary

DATE: November 2, 1990

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