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Kim A. Griffith

EPA ENJOINED FROM USING CONTRACTORS TO INSPECT EMISSION SOURCES

ENVIRONMENTAL LAW–CLEAN AIR ACT: An employee of a private company under contract with the Environmental Protection Agency (EPA) to aid in carrying out oversight inspections is not an authorized representative of the EPA Administrator under the Clean Air Act. *Stauffer Chemical Co. v. Environmental Protection Agency*, 647 F.2d 1075 (10th Cir. 1981).

The Stauffer Chemical Company (Stauffer) owns and operates the Leefe Plant, a phosphate ore processing plant near Sage, Wyoming. Many of the processes used at the Leefe Plant involve trade secrets discernable through observation of the equipment at the plant. To safeguard its confidential methods, Stauffer has generally denied access to areas of the Leefe Plant that use trade secrets and confidential processes. Stauffer has permitted, however, entry by EPA employees and state Department of Environmental Quality employees carrying out their statutory responsibilities to conduct oversight inspections at the Leefe Plant.[1]

An EPA inspection team arrived unannounced at the Leefe Plant on April 10, 1980. The team consisted of an EPA environmental engineer, an official of Wyoming's Division of Air Quality, and two employees of GCA Corporation, a North Carolina firm under contract with the EPA to aid in oversight inspections.[2] The EPA engineer was to be present at all times to supervise the GCA consultants who were to conduct the inspection. To protect its trade secrets, Stauffer refused to admit the team unless the GCA consultants signed a nondisclosure and hold harmless agreement.[3] The EPA team refused to comply with Stauffer's conditions and left the plant.

The EPA sought an administrative search warrant after a month of negotiations with Stauffer proved futile. The warrant issued *ex parte.*

1. Pursuant to the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. II 1978 & Supp. III (1979), the EPA conducts oversight inspections to evaluate the effectiveness of state inspection and regulatory procedures and to assess compliance with the act by major sources of air pollution within each state.

2. The EPA uses independent contractors to conduct such inspections to free EPA employees for other tasks.

3. Such an agreement would impose a duty of confidentiality on EPA contractors with regard to information obtained during a plant inspection. Breach of that duty could result in liability for any damages arising therefrom.

The EPA inspection team, including the GCA employees, attempted to execute the warrant on May 13, 1980. Stauffer again refused entry to the team unless the GCA contractors signed nondisclosure agreements. The team again refused to accept Stauffer's conditions and left the plant.

In *Stauffer Chemical Co. v. Environmental Protection Agency,* the chemical company brought suit in federal district court to quash the warrant and to enjoin its execution.[4] The court immediately issued a temporary restraining order. Later, the district court permanently enjoined the EPA's use of GCA or other employees of companies under contract with the EPA in inspections at the Leefe Plant. The EPA appealed the injunction to the Tenth Circuit Court of Appeals.

The issue before the court of appeals in *Stauffer* was whether an employee of a private firm under contract with the EPA is an "authorized representative" of the EPA Administrator for the purpose of assisting in oversight inspection of emission sources under § 114(a)(2) of the Clean Air Act.[5] That section provides that *"the Administrator or his authorized representative,* . . . shall have a right of entry to, upon, or through any premises . . . and may at reasonable times have access to and . . . inspect any monitoring equipment or method . . ." (emphasis added).[6] The act, however, does not define "authorized representative."

Stauffer contended that the act does not empower private contractors to enter plant premises. The EPA argued that legislative intent could best be determined by applying the "plain meaning" test, which looks to the ordinarily understood meaning of a statutory phrase to determine its legal significance. The plain meaning of "authorized representative," the EPA asserted, is one duly authorized to act or speak for another. The court of appeals refused to apply such a literal interpretation and turned to the legislative history of the act for guidance.[7]

The court focused on § 116 of the senate bill that ultimately provided the substance of § 114(a)(2) of the act. Section 116 *"authorized entry and inspection by DHEW* [Department of Health, Education and Welfare] *personnel* of buildings, facilities, and monitoring equipment . . ." (emphasis added).[8] DHEW administered the act

4. The caption of the case in the district court was In re Stauffer Chem. Co., No. M80-017 (D. Wyo. June 24, 1980), 11 Envt'l L. Rep. 20560 (June 1981).

5. 42 U.S.C. § 7414(a)(2) (Supp. II 1978 & Supp. III 1979).

6. *Id.*

7. 647 F.2d at 1078.

8. H.R. (Conf.) Rep. No. 1783, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5356, 5380.

before Congress created the EPA. The court therefore read DHEW personnel to mean EPA personnel.[9]

The EPA contended that the senate language did not explicitly limit the authorization to DHEW personnel. The court rejected this argument, stating that an affirmative grant of authority to a specified group precludes a grant of that same authority to another group.[10]

The court also looked to the legislative history of § 308 of the Clean Water Act for further guidance.[11] The Report of the Senate Public Works Committee on § 308 stated that:

> the authority to enter, *as under the Clean Air Act,* is reserved to the Administrator and his authorized representatives *which such representatives must be full time employees of the Environmental Protection Agency.* The authority to enter is *not* extended to contractors with the EPA in pursuit of research and development (emphasis added).[12]

The court found the legislative history of § 308 persuasive and supportive of its holding because of the close subject matter relationship between the Clean Water Act and the Clean Air Act.[13] The court reasoned that to rule that an employee of a firm under contract with the EPA could be an authorized representative under the Clean Air Act, but not under the Clean Water Act would be anomalous. The *Stauffer* court therefore held that only EPA personnel were authorized to conduct inspections under § 114(a)(2).[14]

The court of appeals emphasized that the question before it was not firmly settled because of the Clean Air Act's internal inconsistencies. The court also acknowledged that its holding was contrary to the holdings of *Bunker Hill Co. v. EPA*[15] and *In re Aluminum Co. of*

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9. 647 F.2d at 1078.

10. *Id.*

11. Section 308 of the Clean Water Act, codified at 33 U.S.C. § 1318(a)(B) (1976, Supp. I 1977, Supp. II 1978), provides that *"the Administrator or his authorized representative,* . . . shall have a right of entry to, upon, or through any premises . . . and may at reasonable times have access to and . . . inspect any monitoring equipment or method . . . (emphasis added). This language is identical to that in § 114(a)(2) of the Clean Air Act.

12. S. Rep. No. 414, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3729.

13. The legislative history of § 308 was published two years after § 114(a)(2) of the Clean Air Act. The court noted that such post-enactment legislative history generally receives less weight than history connected with the enactment of the statutory language under scrutiny. Nonetheless, the close subject matter relationship between the two acts led the court to rely on the legislative history of § 308.

14. 647 F.2d at 1079.

15. Bunker Hill Co. v. EPA, No. 80-2087 (D. Idaho October 15, 1980). The decision was appealed to the Ninth Circuit, No. 80-3446, where arguments have been heard and an opinion is pending.

America.[16] The *Stauffer* court's holding is also squarely opposed to that of the Middle District of Tennessee in *United States v. Stauffer Chemical Co.*,[17] a case involving one of Stauffer's facilities in Tennessee.

The United States Supreme Court will likely consider the § 114(a)(2) issue because of the differing constructions that section is receiving in the federal courts.[18] Resolution of the issue could have a significant impact on the EPA's oversight capabilities. The monitoring mandated by the Clean Air Act may be severely impaired if the *Stauffer* reasoning is upheld and if proposed cutbacks in federal agency funding result in a reduced EPA staff.

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16. In re Aluminum Co. of America, No. M-80-13 (M.D. N.C. July 9, 1980). On appeal before the Fourth Circuit, No. 80-1599, the cause was remanded with instructions on October 29, 1981.

17. United States v. Stauffer Chem. Co., 511 F. Supp. 744 (M.D. Tenn. 1981). Decided several weeks before the principal case, this case upheld the EPA's authority to use non-agency employees in oversight inspections under § 114(a)(2). The Tennessee district court reasoned that the "authorized representative" language of that section, when contrasted with other provisions of the act which used the terms "officers and employees," must be interpreted to permit entry by non-agency employees. The court found the legislative history of the Clean Water Act to be of questionable relevance and determined that sufficient protection against disclosure by EPA contractors existed to render unfounded Stauffer's fears of exposure of its proprietary processes.

18. Although the government did not petition for *certiorari* in *Stauffer*, the *Bunker Hill* and *Aluminum* cases, *supra* at n. 15 and n. 16, respectively, may be vehicles for presenting this issue to the Supreme Court.