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CONFLICT AMONG THE CIRCUITS: WHO MAY CONDUCT INSPECTIONS UNDER THE CLEAN AIR ACT?

ENVIRONMENTAL LAW, CLEAN AIR ACT—The Environmental Protection Agency may obtain a warrant *ex parte* to permit on site inspections of chemical plants by a nongovernmental employee of a private contractor hired by EPA. The employee of a private contractor is an "authorized representative" of the EPA under the Clean Air Act. *Bunker Hill Co. v. Environmental Protection Agency*, 658 F.2d 1280 (9th Cir. 1981).

The Ninth Circuit in *Bunker Hill Co. v. Environmental Protection Agency*¹ held that under section 114 of the Clean Air Act (hereinafter section 114),² the Environmental Protection Agency (EPA) could authorize Irwin Weisenberg, an employee of private contractor Del Green Associates, to conduct an inspection for possible emissions violations at Bunker Hill's lead and zinc smelter in Kellogg, Idaho. The EPA notified Bunker Hill prior to the inspection that Weisenberg and an Agency employee would conduct the inspection to determine whether the plant was in compliance with the requirements of the Clean Air Act. Bunker Hill questioned whether the EPA could authorize Weisenberg's inspection of the plant, but indicated that it would permit the inspection by a non-EPA employee if he signed a hold harmless and secrecy agreement and abided by certain conditions. The EPA did not respond to Bunker Hill's request. Thereafter, EPA and Weisenberg attempted to conduct the inspection. Bunker Hill refused to permit the inspection, and the EPA departed after a day of unsuccessful negotiations. The EPA then obtained an inspection warrant from a United States magistrate and returned to the plant. Bunker Hill again refused entry, and filed a complaint in federal district court to quash the inspection warrant and to obtain declaratory relief. The District Court held in favor of the EPA.

1. 658 F.2d 1280 (9th Cir. 1981).

2. 42 U.S.C. § 7414(a) (Supp. III 1979). Section 114(a) of the Clean Air Act, which contains the inspection provisions for stationary sources, provides that "the Administrator or his authorized representative" may enter and inspect the premises of potential polluters. Under Section 114(c), any information acquired under subsection (a) may be disclosed "to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter. The Clean Air Act, § 114, 42 U.S.C. §§ 7401-7626 (Supp. III 1979), authorizes the Administrator or his "authorized representatives" to conduct inspections of stationary sources. The Clean Air Act was passed in 1955 and substantially amended in 1970 and 1977. The EPA and Bunker Hill arguments centred around the 1970 amendments. The basic purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1) (Supp. III 1979).

On appeal to the Ninth Circuit, Bunker Hill argued that the EPA could authorize only governmental officers and employees to conduct searches under section 114. The plant further contended that if a nongovernmental employee were permitted to conduct an inspection, then Bunker Hill could place conditions and restrictions on the private employee's entry, including the right to retain custody of all photographs taken at the plant and the right to keep any film which contained trade secrets. Bunker Hill further demanded that Mr. Weisenberg meet OSHA requirements applicable to Bunker Hill employees working in the areas Mr. Weisenberg would inspect.³ Finally, Bunker Hill insisted that it could require Mr. Weisenberg to sign a "secrecy and hold harmless" agreement before it would permit entry.⁴

Bunker Hill argued that section 114(c)'s listing of "officers, employees or authorized representatives" gave all three terms a synonymous meaning when used to indicate to whom the EPA could disclose confidential information and that the legislative history of the Act compelled the court to define "authorized representative" as a governmental employee. Bunker Hill and EPA argued that sections 114(a) and (c) should be read as parts of a consistent whole. The Agency read section 114(c), however, as differentiating among "officers," "employees," and "authorized representatives." The EPA centered its argument on the "plain meaning" of the term "authorized representative".

The Ninth Circuit rejected Bunker Hill's construction of section 114(a) of the Clean Air Act, and its confidentiality concerns, and rejected the reasoning of *Stauffer Chemical Co. v. Environmental Protection Agency (Stauffer I)*⁵ which held that the Clean Air Act did not permit the EPA to authorize a nongovernmental employee to conduct an on site inspection. In *Stauffer I*, a case factually similar to *Bunker Hill*, the Tenth Circuit held that an employee of a private contractor was not an "authorized representative" of the EPA under the Clean Air Act for purposes of on site inspections.

In *Stauffer I*, Stauffer Chemical Company demanded that two employees of a private contractor sign nondisclosure and hold harmless agreements prior to entry into the plant. Further, Stauffer reserved the right to exclude the private employees from any areas except emission

3. In re Clean Air Act Administrative Inspection of the Bunker Hill Company, No. 80-2087, slip op. (D. Id. Oct. 15, 1980), reprinted in 11 ENVTL. L. REP. 20558 (1981). "OSHA" stands for Occupational Safety and Hazards Act, 29 U.S.C. §§ 651-678 (196), which sets standards for safety in industrial areas such as Bunker Hill's lead and zinc smelter, as well as in other places of employment. Bunker Hill required Mr. Weisenberg to present evidence of a recent medical examination and results of a quantitative fit test showing that the respirator to be worn by Mr. Weisenberg would fit properly.

4. 11 ENVTL. L. REP. 20558.

5. 647 F.2d 1075 (10th Cir. 1981).

sources, and to refuse to disclose certain information. Stauffer and the EPA attempted to negotiate, but the EPA eventually sought an administrative search warrant. A United States magistrate granted the warrant, permitting the EPA and "authorized employees of EPA's contractor" to inspect Stauffer's plant. Stauffer again refused to admit the inspection team, and again imposed conditions on entry. Stauffer went to the United States District Court for the District of Wyoming to apply for a temporary restraining order and to move to quash the warrant. This suit resulted in a permanent injunction against EPA. The EPA appealed this decision to the Tenth Circuit in *Stauffer I*. The Court held that private contractors were not "authorized representatives" of the Administrator under § 114.

In *United States v. Stauffer Chemical Company (Stauffer II)*,⁶ Stauffer argued successfully that the EPA was collaterally estopped from raising the issues in the Sixth Circuit that the Tenth Circuit had previously decided. In *Stauffer II*, the Court considered the issue of who could conduct on site inspections in dicta, and agreed with the Tenth Circuit that the term "authorized representative" included only governmental employees.

In *Aluminum Co. of America v. Environmental Protection Agency*,⁷ the Fourth Circuit had the opportunity to consider the same issue, but chose to remand the case on different grounds.⁸ No other courts of appeal to date have considered this issue.⁹

The central issue has become, in all three Circuit decisions, the meaning of "authorized representative." The Ninth Circuit has emphasized the ordinary meaning of the phrase, the language of the Clean Air Act, and the purpose of the Act in reaching the decision that "authorized representative" means anyone whom the Administrator authorizes to represent him. The Sixth and Tenth Circuits emphasized the language of the Act

6. 684 F.2d 1174 (6th Cir. 1982).

7. 663 F.2d 499 (4th Cir. 1981).

8. ALCOA appealed a district court decision affirming a United States magistrate's denial of ALCOA's motion to quash warrant. The Fourth Circuit found that under 28 U.S.C. §§ 636(b)(1)(B) and 636(b)(3), a judge must grant a *de novo* review of a magistrate's order. The magistrate found that the issues raised in ALCOA's motion were moot and that ALCOA had waived its right to contest the warrant because, unlike the factual circumstances in *Bunker Hill* and *Stauffer I* and *II*, EPA was accompanied by a United States marshal who indicated that he would force compliance with the warrant if entry were denied, and ALCOA delayed too long in contesting the warrant. In *Bunker Hill* and *Stauffer I* and *II*, the plants refused to obey the warrants, but were not held in civil contempt. In ALCOA, the magistrate found that private employees were authorized representatives under section 114(a).

9. The United States district courts in *United States v. Stauffer Chemical Co.*, 511 F. Supp. 744 (M.D. Tenn. 1981), *In re Clean Air Act Administrative Inspection of the Bunker Hill Co.*, 11 ENVTL. L. REP. 20558 (1981) and *In re Aluminum Co. of America*, No. M-80-13 (M.D.N.C. July 9, 1980), slip op. reported in 11 ENVTL. L. REP. 20554 (1981), found that private contractors can be "authorized representatives" under section 114(a). In *re Stauffer Chemical Co.*, No. M-80-017 (D. Wyo. June 24, 1980), slip op., reported in 11 ENVTL. L. REP. 20560 (1981), found that private contractors cannot be authorized representatives of the EPA.

and the legislative history in reaching the contrary decision that the Administrator can only authorize EPA employees or officers to represent him.

THE "PLAIN MEANING" TEST

In *Caminetti v. United States*,¹⁰ the United States Supreme Court adopted the rule that courts should construe statutory language in its ordinary or "plain meaning" sense unless another meaning appears in the statute. The EPA emphasized the reasoning of *Caminetti* in arguing that Congress gave the Ninth Circuit no reason to believe that "authorized representative" as used in the Clean Air Act should have any other meaning than that in Webster's New World Dictionary: "a person duly authorized to act or speak for others."¹¹ The EPA then concluded that the Administrator could authorize Del Green Associates to act for him.

In addition to arguing that the plain meaning of the term in § 114(a) required no further definitional search, the EPA insisted that Congress' listing of "officers," "employees," or "authorized representatives" in § 114(c) evidenced an intent to differentiate among the three categories. The EPA noted that Bunker Hill's definition of "authorized representative" as "officer" or "employee" would effectively delete the term from § 114(c), since it would then have no meaning different from the other words in the list. The EPA emphasized that the Clean Air Act must have an internal consistency, and concluded that "authorized representative" as used in § 114(c) could not have a separate meaning when used in § 114(a).¹² The EPA also noted that "Administrator" as used in section 114(a) was synonymous with employees and officers of the EPA, since the Administrator could delegate his inspection power to officers or employees under section 301(a) of the Clean Air Act.¹³ Section 301(a)(1) authorizes the Administrator to delegate all but certain powers to any officer or employee. Thus the phrase "Administrator or his authorized representative" in section 114(a) would mean any EPA employee or an authorized private contractor or private employee.¹⁴

Bunker Hill argued that the Clean Air Act indicated a different meaning of "authorized representative" which contradicted the EPA's view of the "plain meaning" of the term. Bunker Hill insisted that the term "authorized representative" in section 114(a) must exclude private contractors

10. 242 U.S. 470 (1917).

11. Appellee's Reply Brief at 11, *Bunker Hill Company v. United States Environmental Protection Agency*, 658 F.2d 1280 (9th Cir. 1981) [hereinafter cited as "Appellee."] The Ninth Circuit in *Bunker Hill* used the Oxford English Dictionary to find that "[i]t is not disputed that . . . a representative is 'one who represents another as agent delegate, successor, or heir.'" 658 F.2d at 1283, citing 8 OXFORD ENGLISH DICTIONARY 482 (1970).

12. Appellee, *id.* at 14.

13. 42 U.S.C. § 7601(a)(1) (Supp. III 1979).

14. Appellee, *supra* note 11, at 15.

to be consistent with sections 301(a)(1) and 208.¹⁵ Bunker Hill insisted that the general power under section 301(a)(1) to delegate the Administrator's authority to EPA employees excluded nongovernmental employees from performing any functions under the Clean Air Act. Section 208, which is the inspection provision for automobile manufacturers, gives inspection authority to "officers or employees" of the EPA.¹⁶ Bunker Hill argued that section 114(a) should be construed consistently with section 208. Finally, Bunker Hill contended that officers, employees, and authorized representatives have a synonymous meaning when used in section 114(c) to designate to whom the EPA may reveal information obtained during inspections.¹⁷ Thus "officers and employees" has the same meaning as "authorized representatives" in section 114(c), according to Bunker Hill's argument. Bunker Hill insisted that if the court followed EPA's argument that "authorized representative" meant a private contractor to its logical conclusion, it would lead to the illogical result that only the Administrator or a private contractor could conduct inspections, since section 114(a) empowered only the "Administrator or his authorized representative" to conduct inspections.¹⁸

The Ninth Circuit held that the plain meaning of the term "authorized representative" was a clear indication of legislative intent.¹⁹ Thus, under *Caminetti*, the court only had to consider whether the legislative history of the section "compel[led] a different conclusion."²⁰ The Ninth Circuit agreed with the EPA that the legislative history did not compel the court to give "authorized representative" a different meaning than the meaning Webster's gives the term. The court also agreed with the EPA and with Bunker Hill that § 114(a) should be read consistently with § 114(c). The court agreed with the EPA that the grammatical structure of the phrase "officers, employees, or authorized representatives" in § 114(c) showed an intent to differentiate among the three groups. The Ninth Circuit thus found that § 114(c) backed up the plain meaning interpretation of the term, rather than compelling a different conclusion.

The Tenth Circuit in *Stauffer I*, noting that the Clean Air Act did not expressly define "authorized representative," declined without comment to apply the "plain meaning" test to the term.²¹ The court instead based its decision entirely on the legislative history of the Act.²²

15. Appellant's Brief-in-Chief at 7-8, *Bunker Hill Company v. United States Environmental Protection Agency*, 658 F.2d 1280 (9th Cir. 1981) [hereinafter cited as "Appellant"].

16. 42 U.S.C. § 7525(c) (Supp. III 1979).

17. Appellant, *supra* note 15, at 8-9.

18. *Id.*, at 9.

19. 658 F.2d at 1283.

20. *Id.*

21. The Tenth Circuit stated that it "declined to give a 'literal interpretation' to the term" and believed that the plain meaning test did not "solve the problem, . . ." 657 F.2d at 1078.

22. *Id.*

The Sixth Circuit declined to find that the plain meaning test dictated the result in *Stauffer II*. The court noted that the plain meaning of statutory language is not always decisive, especially where the legislative history suggests a different result. The court found that "authorized representative" in section 114(c) meant someone other than officers or employees. However, the court did not give a similar meaning to the term in § 114(a), based on the omission in that section of the term "officers or employees." The court adopted reasoning similar to Bunker Hill's argument that "authorized representative" in section 114(a) could not mean persons other than officers or employees because that interpretation would lead to the absurd result that officers or employees could not conduct searches. The court noted that under section 114(d), added by the Clean Air Act amendments of 1977, the Administrator or his authorized representative must give notice to the state pollution control agency before an inspection. The Sixth Circuit reasoned that Congress could not have intended to entrust "sensitive intergovernmental communication" to private contractors.²³ The Sixth Circuit also addressed EPA's argument that the difference between the language of the provisions on automobile manufacturers and those on stationary sources showed a deliberate choice by Congress to broaden the power of the Administrator in conducting searches of stationary sources. The court stated flatly that wherever possible, provisions of the same statute should be interpreted consistently.

The conflict between the inspection provisions for automobile manufacturers and for stationary sources could indicate a purposeful congressional choice to limit the EPA's inspection power for automobile manufacturers and broaden the Agency's power for stationary sources. Indeed, Congress has authorized inspections of stationary sources for much broader purposes than it has for automobile manufacturers, including establishing and monitoring EPA standards.²⁴ This conflict, however, could also reflect that the House drafted the provisions for automobile manufacturers, and the Senate drafted the provisions for stationary sources. The legislative history indicates that neither the House nor the Senate carefully considered its use of language when drafting the Clean Air Act. The difference in phraseology between § 114(a) and § 114(c), although perhaps reconcilable under the EPA arguments, indicates that the Senate did not fully consider the ramifications of its use of "authorized representative" within a single section of the Act. It is more likely that it did not bother to trace the use of the term throughout the entire Act. The EPA insisted in *Bunker Hill* that the difference between sections 114 and

23. 684 F.2d at 1183.

24. Compare 42 U.S.C. § 7414(a) and 7525(c). Under 7525(c), the Administrator can inspect new vehicles and the records and processes the manufacturer uses to conduct tests under § 7525.

208 evidenced a clear intent to grant the Administrator greater inspection authority for stationary sources. Bunker Hill contended the opposite, that sections 208 and 114 must be interpreted as consistent provisions. In view of the lack of clarity in the legislative history, and the contradictory language of the Act, it appears that the House and Senate did not realize the contradiction between section 208 and section 114, and that "authorized representative" may have been a Senate afterthought, meant to include all those whom the Senate feared it may have forgotten.

The lack of an easily discernible consistency in the Clean Air Act does militate against the application of the plain meaning test to the term "authorized representative." Once the search for the meaning of "authorized representative" strays from § 114(a), questions arise as to why section 114(c) gives "officers, employees, or authorized representatives" the authority to see materials obtained during inspections, but gives only the "Administrator or his authorized representative" the power to conduct inspections. It defies traditional statutory construction, however, to assume that two subsections of a short section of the Clean Air Act should be read inconsistently, without any sign from Congress that it intended to give "authorized representative" two different meanings. The "plain meaning of "or" is "... a word to indicate ... an alternative between different things" or "the synonymous, equivalent, or substitutive character of two words or phrases."²⁵ Thus § 114(c) arguably could support either the EPA or the Bunker Hill position. "Authorized representative," however, becomes a meaningless term if it is the equivalent of "officers" or "employees" since officers and employees are already authorized representatives of the EPA under section 301(a). Also, since "officers" and "employees" are not equivalent terms, it does not make grammatical sense to argue that Congress intended in § 114(c) to give a list of synonyms which merely redefine each other. Contrary to Bunker Hill's argument, Congress could not have intended the impractical result that only the Administrator could perform the duties given the "Administrator" under the Clean Air Act. The term "or his authorized representative" becomes meaningless unless Congress intended the term to mean persons other than EPA personnel. Even after this analysis, however, the lack of completely consistent language in section 114 remains bothersome. The lack of consistent provisions for automobile manufacturers obscures rather than clarifies congressional intent. And the legislative history leaves a chaotic impression.

The plain meaning of the term "authorized representative" in § 114(a) seems to give power to the Administrator to authorize inspections by private contractors. Section 114(c) strengthens rather than weakens the

25. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) 1585 (1976).

EPA argument. Entry into the morass of the other provisions of the Act and the legislative history confuses rather than clarifies the issue, and does not compel a different conclusion as to the meaning of "authorized representative" under the *Caminetti* standard. The definition of "authorized representative" in § 114(c) as including persons other than officers or employees, and in § 114(a) as excluding everyone except officers or employees leads to an internal inconsistency in a single section of the Act. It is more reasonable to infer that Congress intended § 114(a) to be read consistently with § 114(c) than that it intended § 114 to be consistent with § 208. Further the provisions for inspection of automobile manufacturers under § 208 can be reconciled with § 114 under the theory that Congress granted more authority to the Administrator under § 114 because of greater inspection responsibilities for stationary sources.

The Tenth Circuit did not consider the language of the Act. This led to a decision based only on congressional considerations before and after the enactment of the Clean Air Act. The actual wording of the Act is the best reflection of Congress' final intent. The Ninth Circuit used sound reasoning in looking at the language of the Act before considering the legislative history.

The issue of who may authorize a person to represent the Administrator during inspections remains unanswered. Section 114(a) grants the power to "'authorized representatives' of the United States" to inspect industry records. This at least arguably suggests interagency cooperation within the confines of the federal bureaucracy, or that Congress itself would determine who could conduct inspections. The Act does not clearly indicate that the Administrator can choose his representative under section 114. Section 301(a) gives the Administrator the power to delegate authority to officers or employees. Under the Ninth Circuit and EPA reasoning, this would mean private contractors are specifically excluded from the Administrator's delegation powers, just as private contractors are specifically excluded from conducting inspections of automobile manufacturers. However, section 301(a) can also be interpreted as a general grant of power to the Administrator to delegate all his powers, except his rulemaking power, to officers or employees. Section 114, then, would be a specific exception to section 301 allowing the Administrator to delegate his authority and choose his representative for EPA inspections.

At the very least, "authorized representative" is a catch-all term, without a clear meaning, which Congress inserted because of uncertainty as to who should conduct inspections. If that is the case, the courts should give deference to EPA's interpretation, since EPA is charged with administering the Act.²⁶

26. See the discussion of the Ninth Circuit's treatment of this issue, *supra* text accompanying notes 15-16.

LEGISLATIVE HISTORY

The Tenth Circuit in *Stauffer I* examined the legislative history of the Clean Air Act and noted that the congressional conference committee which had originally considered the enactments accepted a Senate amendment which authorized entry and inspection by "DHEW personnel"²⁷ [emphasis added]. The Tenth Circuit also compared the Clean Air Act with the Clean Water Act, which contains a virtually identical inspection provision. The court found an expression of legislative intent to limit inspection authority to department personnel in the Clean Water Act, and imputed a similar intent to the Clean Air Act,²⁸ based on the Report of the Senate Public Works Committee on the Clean Water Act. The report noted that under the Clean Air Act, as well as under the Clean Water Act, only full time EPA employees had the authority to enter and inspect.²⁹ Although the Sixth Circuit did not specifically adopt the Tenth Circuit reasoning, it indicated a general approval of that decision.

Bunker Hill's argument was consistent with the Tenth Circuit reasoning in *Stauffer I*. Bunker Hill pointed out that in the original version of section 114, "the Secretary or his authorized representative" could conduct inspections and issue abatement orders.³⁰ Bunker Hill argued that since only governmental personnel could issue abatement orders, Congress must have had governmental personnel in mind when it used the term "authorized representatives"³¹ Bunker Hill also noted that the Senate version of section 208 juxtaposed "authorized representative" and "officer or employee,"³² indicating that the two phrases had a synonymous meaning.

The EPA argued that Congress intended to increase the enforcement capabilities of the EPA for stationary sources when it amended the Clean Air Act in 1970. The Clean Air Act did not originally give the EPA entry rights to stationary sources,³³ and limited access to the records of motor vehicle manufacturers to EPA officers or employees.³⁴ When Congress

27. H. REP. NO. 1783, 91st Cong., 2d Sess. 45 (1970), reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5356, 5379-81; CONGRESSIONAL RESEARCH SERV., SENATE COMM. ON PUBLIC WORKS, 93D. CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 at 570 (Comm. Print 1974) [hereinafter cited as LEGIS. HIST.]. The Report states that "[t]he provisions of the conference substitute with regard to inspections, monitoring and entry follow substantially the provisions of the Senate amendment." Due to purposeful choice or bad draftsmanship, however, the Clean Air Act does not use the term "personnel" in section 114.

28. 33 U.S.C. § 1318(a)(B) (1976).

29. S. REP. NO. 414, 92d Cong., 2d Sess. (1971), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3668, 3729.

30. S. REP. NO. 4358, 91st Cong., 2d Sess. (1970), reprinted in LEGIS. HIST. 531, at 570.

31. Appellant, *supra* note 15, at 10.

32. S. REP. NO. 4358, 91st Cong., 2d Sess. (1970) § 209(a) reprinted in LEGIS. HIST. at 598.

33. 1967 Clean Air Act § 108(j)(1), 42 U.S.C. § 1857(d)(j)(2) (1964 Supp. IV).

34. *Id.*, § 207(a), 42 U.S.C. § 1857f-6(a) (1964 Supp. IV).

authorized a greater federal enforcement role in 1970, the House bill limited entry rights to stationary sources in accord with entry rights to motor vehicle manufacturers.³⁵ The Senate bill, EPA argued, broadened the Clean Air Act to permit "the Secretary or his authorized representative" to inspect stationary sources and motor vehicle manufacturers.³⁶ The Conference Committee adopted the broadened Senate version for stationary sources, and the more restrictive House version for motor vehicle manufacturers.³⁷ EPA dismissed Bunker Hill's legislative history arguments in footnotes, noting that Congress had not enacted the amendment allowing EPA "authorized representatives" to issue abatement orders,³⁸ and that the Conference Report summaries of the House and Senate bills were "too sketchy" to form any conclusions.³⁹ EPA also dismissed Bunker Hill's Clean Water Act arguments, since a different Congress enacted the Clean Water Act.

The Ninth Circuit found indications of congressional intent in the legislative history of the Clean Air Act which contradicted the *Stauffer I* reasoning and Bunker Hill's arguments. The Ninth Circuit compared the House and Senate versions of the Act and agreed with EPA that the Conference Committee adopted the Senate version, which gave the right to enter and inspect to "the Secretary or his authorized representatives,"⁴⁰ for the inspection of stationary sources, and adopted the House version of the bill, which limited the right to enter to "officers or employees,"⁴¹ for the inspection of motor vehicle manufacturers. The court saw this as an indication that Congress expressly limited the inspection right where it deemed necessary. The Ninth Circuit also noted that the 1970 Conference Committee, upon which the Tenth Circuit and Bunker Hill relied, did not carefully consider congressional intent when it prepared its Report, but rather pasted together sections from the House and Senate versions, and rewrote others.⁴² Thus the Court found the Report of little help in determining the actual congressional intent behind section 114.

The legislative history of the Act generally obscures congressional intent. The Senate originally permitted "authorized representatives" to perform functions clearly outside the scope of a private contractor's pow-

35. H. REP. NO. 17255, 91st Cong., 2d Sess. (1970) § 112(f) *reprinted* in LEGIS. HIST. at 923.

36. S. REP. NO. 4358, 91st Cong., 2d Sess. (1970) § 116(a)(3) *reprinted* in LEGIS. HIST. at 570.

37. LEGIS. HIST. at 166, 198.

38. Appellee, *supra* note 11, at n. 1.

39. *Id.*

40. 658 F.2d at 1283.

41. *Id.* at 1283. Compare 42 U.S.C. 7414(a)(2) (Supp. III 1979) with 42 U.S.C. 7525(c) (Supp. III 1979).

42. 658 F.2d at 1284.

ers.⁴³ The final version of the Clean Air Act, however, does not grant an "authorized representative" of the Administrator any authority which is outside the scope of the authority of the private sector. The contradictory language of the preliminary version of the Clean Air Act, which gives "authorized representatives" of the Administrator power which Congress could not grant to nongovernmental employees, does not provide much insight into Congress' final intent and should not be influential. The final version of the Clean Air Act provides firmer ground for determining the meaning of "authorized representative."

The original Senate version of section 114, the final version of the Clean Air Act, and the Conference Report indicate that Congress did not carefully consider its use of language. The Clean Water Act, enacted later than the Clean Air Act, provides little insight, contrary to the opinion of the Sixth and Tenth Circuits. Since 33 U.S.C. § 1318(a)(B) of the Clean Water Act was copied directly from the Clean Air Act, the drafters of the Clean Water Act apparently put little thought into their legislative intent. Further, the legislative history of the Clean Water Act and other provisions of the Clean Air Act are in conflict.⁴⁴ Therefore, the legislative history does not "compel a different conclusion" under the *Caminetti* standard than Congress intended the term "authorized representative" in section 114 to have its plain meaning.

ADDITIONAL ARGUMENTS

The Ninth Circuit also deferred to EPA's definition of the term "authorized representative" since the plain meaning of the term and the legislative history, together with EPA's continued use of private contractors, indicated that EPA's definition was correct. In support of this decision, the court cited *Udall v. Tallman*,⁴⁵ which noted that the Supreme Court, faced with a construction problem, traditionally showed "great deference" to the interpretation of those charged with administering the statute. Bunker Hill argued that EPA originally had defined "authorized representative" to exclude private contractors.⁴⁶ EPA denied that its of-

43. Under S. REP. NO. 4358, 91st Cong., 2d Sess. (1970), reprinted in LEGIS. HIST. at 570, an authorized representative of the Administrator could issue abatement orders.

44. The district court in *Stauffer II* noted that under the legislative history of the Clean Water Act, private contractors could not enter private plants "in pursuit of research and development," while under the Clean Air Act, 42 U.S.C. § 7403(b)(4), the private sector could "conduct investigations and research and make surveys concerning any specific problem of air pollution." 511 F. Supp. 744, 747 (1981).

45. 380 U.S. 1, 16 (1964).

46. Appellant, *supra* note 15, at 17-18, citing 41 Fed. Reg. 36,902, 36,923 (Sept. 1, 1976). Bunker Hill also cited a memorandum from Cassandra Dunn, Regional Counsel for the EPA for Region IX, who stated in 1973 that "[i]t appears that the term 'authorized representative' is used synonymously with officers and employees of EPA for purposes of entering only and cannot be

ficial position had ever withheld inspection authority from private contractors.⁴⁷ The Ninth Circuit agreed with the EPA that the continued use of private contractors for technical help with EPA inspections, and congressional appropriations for the use of private contractors, indicated congressional approval. The court reasoned that Congress would not tacitly approve the EPA's actions, as indicated by congressional inaction and the appropriations, if the original legislative intent had not been to allow non-governmental employees to inspect private plants.⁴⁸

The Ninth Circuit also found that Bunker Hill's trade secrets were adequately protected by present restraints against a private contractor's revelation of confidential materials and EPA safeguards in its contract with Bunker Hill. Sanctions include disbarment and suspension from present and future contracts.⁴⁹ Thus, Bunker Hill could sue Del Green as a third party beneficiary for any damages it incurred as a result of Del Green's release of Bunker Hill's trade secrets. The EPA could also bring an action against Del Green or refuse to grant Del Green more EPA contracts. The Ninth Circuit therefore found that Bunker Hill's fears that private contractors would release secret information were groundless.

In *Stauffer II*, Stauffer was attempting to exclude employees of a private contractor whom it had previously admitted to another plant in Florida.

delegated to contractors because 'authorized representative' is the only enumeration used in 42 U.S.C. § 1857c-9(a)(2).'' Cited in 11 ENVTL. L. REP. at 20561.

Bunker Hill actually misquoted the statement in the Federal Register. In its Brief, Bunker Hill quoted the Administrator as stating that "only EPA officers or employees may act as 'authorized representatives' for the purpose of exercising a right of entry onto certain private premises." Appellant at 18. In reality, the Administrator clearly stated that he disagreed with the comment that contractors should not be considered "authorized representatives" of the EPA. The Administrator stated that under the Clean Water Act, the legislative history indicates that "only EPA officers or employees may act as 'authorized representatives' for the purpose of exercising a right of entry onto certain private premises." The Administrator goes on to state, however, that under the Clean Air Act, and under section 308(b) of the Clean Water Act, "it appears clear that by authorizing disclosure to 'officers, employees, or authorized representatives' of the United States, Congress meant something more than disclosure only to officers and employees." The Administrator also noted that the legislative history of the Clean Water Act was based on a reference to section 208 of the Clean Air Act, not to section 114. Bunker Hill's selective reading of the Administrator's interpretation of 114 illustrates some of the difficulty of relying on language outside of the Clean Air Act to determine the meaning of section 114(a).

In *Stauffer II*, the district court noted that Stauffer had "overstate[d] its case" when it cited the identical comment in the Federal Register, and found the EPA's continued use of private contractors for inspections was "clear evidence" the EPA interpreted "'authorized representative" to include private contractors. 511 F. Supp. 744, 749 (1981).

47. Appellee, *supra* note 11, at 24-26.

48. 658 F.2d at 1284.

49. 40 C.F.R. § 2.211(d) (1978). The Ninth Circuit noted the harshness of this penalty since EPA contracts often involve millions of dollars. Additionally, willful violation of the EPA confidentiality regulations may result in criminal prosecutions, *id.*, and every contract with the EPA must contain confidentiality safeguards. 41 C.F.R. § 15-7.350.

Although Stauffer claimed they were admitted against company policy, any trade secrets which Stauffer sought to protect were already known to the same employees. The court stated in *Stauffer II* that "Hawks and Saunders [the employees] were brought along on this visit because they had recently conducted an EPA overview inspection at Stauffer's elemental phosphorous furnace plant in Tarpon Springs, Florida, and thus were familiar with the processes and equipment involved."⁵⁰ Stauffer also rejected a nondisclosure agreement it had previously accepted in Montana, demanding in addition to the current provisions, control over the inspection areas and two weeks' advance notice of any inspection. The lower court termed the latter demand "obnoxious."⁵¹ Industry has thus sought to increase protection of its trade secrets beyond the scope of plans it previously accepted. Certainly, the demand of two weeks' notice has little to do with the protection of trade secrets. Finally, industry is protected by statute, by regulation, and by agreements between the EPA and the industries inspected. Bunker Hill's argument that it must deny admittance to private contractors to its plant to protect trade secrets thus appears fallacious.

Finally, the Ninth Circuit considered the overall scheme of the Clean Air Act in determining that Congress intended that the EPA seek the aid of the private sector in conducting searches. The court noted, "this act was intended to comprehensively regulate, through guidelines and controls, the complexities of restraining and curtailing modern day air pollution."⁵² Congress would not have authorized the EPA to cooperate with air pollution control agencies, or to make grants to those agencies, or to contract with public or private agencies, the court reasoned, if it did not intend for those agencies to conduct inspections.⁵³

CONCLUSION

The crucial issue in all three Circuit cases was who would control EPA inspections. Bunker Hill demanded exclusive control over the areas of inspection, and disclosure of information. The industry required Mr. Weisenberg to submit his reports to Bunker Hill, regardless of the information they contained. Bunker Hill's exclusive control of inspection areas, and of disclosure, would amount to no inspection at all. Bunker Hill would admit EPA employees, but they did not possess the same

50. 684 F.2d at 1178.

51. 511 F. Supp. at 745.

52. 658 F.2d at 1284.

53. *Id.*

expertise because the EPA does not have the budget to hire full-time experts to conduct inspections.⁵⁴

The conflict in opinion among the Circuits creates great uncertainty in EPA's administration of the Clean Air Act. No court has yet held an industry in contempt for refusing to allow nongovernmental employees to enter its plant. Industries can presently deny entry to inspectors armed with search warrants with relative immunity, without the requirement of a temporary restraining order. The Ninth Circuit declined to hold Bunker Hill in contempt for refusing to allow the inspection after a United States magistrate had issued the warrant, due to the complexity of the issue. The Wyoming federal district court in *In re Stauffer* declined to cite Stauffer for contempt, and noted that the EPA's use of an *ex parte* warrant forced Stauffer to risk a possible citation for contempt to determine the legal issue before entry was effectuated.⁵⁵ EPA regulated industries can now halt inspections while they gamble on a favorable decision.

There is an inevitable tension between the EPA and regulated industries. Industries have challenged the monitoring requirements contained in the Clean Air and Clean Water Acts, part of the same supervisory scheme as the entry and inspection provisions, as an unconstitutional taking of property, and as a violation of the Fifth Amendment privilege against self-incrimination and compulsory self-disclosure.⁵⁶ Bunker Hill previously attempted to require the United States to sign an indemnification and hold harmless agreement prior to inspection by federal employees under the Clean Water Act and the Rivers and Harbors Act.⁵⁷ The EPA asked for an expedited appeal in *Bunker Hill*, based on the industry's "long history of pollution emissions violations . . . ," and the belief that Bunker Hill

54. Appellee, *supra* note 11, at n.2. The EPA noted that the district court record indicated that the "EPA does not have the budget authorization, or need, to employ someone of his [Mr. Weisenberg's] qualifications on a full-time basis." The district court in *In re Stauffer Chemical Co.* noted, however, that the EPA employees present at the time of the attempted inspection of Stauffer's plant were competent to perform the inspection. The court felt this indicated that the EPA wanted a test case, and termed the amount of force exercised by EPA "excessive and intrusive." In a statement which was perhaps overly dramatic, considering the nature of the case, the court noted "Such tactics are more characteristic of a police state than of our Constitutional Republic." 11 ENVTL. L. REP. 20563.

55. 11 ENVTL. L. REP. at 20562.

56. *U.S. v. Tivian Laboratories, Inc.*, 589 F.2d 49 (1st Cir. 1978), *cert. denied*, 442 U.S. 942 (1979), held that self-monitoring under the Clean Air Act did not constitute an unconstitutional taking under the Fifth Amendment, but that Tivian was entitled to a ruling as to whether it should receive reimbursement for expenses incurred in compliance.

57. *United States v. Bunker Hill Co.*, 417 F. Supp. 332 (D. Idaho 1976). The court held that the Federal Water Pollution Control Act, 33 U.S.C. § 1251-1576 (1976), and the Rivers and Harbors Act of 1899, 33 U.S.C. § 441-467 (1976), did not require the United States to indemnify Bunker Hill, and that such an agreement would be unenforceable. In *Bunker Hill Co. v. Env'tl. Protection Agency*, 572 F.2d 1286 (9th Cir. 1977), Bunker Hill sought review of the EPA's rejection of portions of a state implementation plan under the Clean Air Act.

was in violation of "two consent decrees, settling two lawsuits of long duration concerning the firm's violation of federally enforceable air quality standards."⁵⁸ Both sides have previously compromised on the issue, and have later refused to comply with the terms of the compromise.⁵⁹

At the heart of any discussion of congressional intent in drafting any section of the Clean Air Act should lie the Act's basic purpose to regulate industry's use of the environment. The Sixth and Tenth Circuits based their opinions primarily on a legislative history which is unclear. It is clear, however, that Congress intended to protect the environment, and that Congress gave the EPA the authority to provide that protection under the Clean Air Act. The EPA has determined that, due to budgetary constraints, the job would be impossible without the use of private contractors. Congress has appropriated funds for that purpose, and has not amended the Clean Air Act to instruct the EPA that its interpretation is wrong. Indeed, Congress had the opportunity in 1970 to give the provisions on stationary sources a meaning equivalent to those on automobile manufacturers. Instead, Congress gave the EPA more authority to conduct inspections of stationary sources. In the face of EPA's continuing interpretation of the term consistently with its ordinary meaning, and Congress' apparent approval of that interpretation, the Sixth and Tenth Circuits should have been more reluctant to rely so strongly on an ambiguous legislative history and on the Clean Water Act which became law after the Clean Air Act.

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58. Motion of Appellee for Expedited Appeal at 2, 658 F.2d 1280 (9th Cir. 1981).

59. As noted earlier, Stauffer admitted the same private employee to another plant. It subsequently refused to admit that same employee in *Stauffer II*. The EPA noted in *Bunker Hill* that Mr. Weisenberg had "inspected Bunker Hill on two occasions with Bunker Hill's knowledge and without objection." Appellee, *supra* note 11, at n.2. In *re Stauffer Chemical Co.* noted, however, that the EPA had issued conflicting opinions on the definition of "authorized representative" and had previously compromised with Stauffer on a non-disclosure and hold-harmless agreement. In all federal litigation, however, the EPA has insisted that "authorized representative" includes non-EPA employees. In reality, EPA has inertia in its favor, since the EPA promulgated regulations which permitted disclosure of confidential information to private contractors in 1975. See 41 Fed. Reg. 36,902 (Sept. 1, 1976). 40 C.F.R. s2.301(h) permits "disclosure to authorized representatives." 40 C.F.R. s2.301(h)(2)(i) defined 'authorized representative' as "a person under contract or subcontract to EPA."