Trade Secrets v. Environmental Protection: Conflict Over the Use of Private Contractors to Conduct E.P.A. Inspections

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INTRODUCTION

The Clean Air Act\(^1\) establishes a comprehensive national regulatory system to control the discharge of pollutants into the atmosphere and to "protect and enhance the quality of the Nation's air resources."\(^2\) Both the state and federal governments bear significant enforcement responsibilities under the Act. The Environmental Protection Agency (EPA) annually conducts compliance inspections in approximately ten percent of each state's major stationary air pollution sources. Comparison between the results of the EPA inspections and the state enforcement records provides a check on the effectiveness of state regulation, as well as a secondary enforcement mechanism.\(^3\)

Section 114 of the Act\(^4\) authorizes the EPA to obtain the information necessary to perform its duties. Section 114(a)(1)\(^5\) authorizes the EPA to require the owner or operator of a regulated facility to maintain records, install monitoring equipment and submit reports and other information. Section 114(a)(2)\(^6\) grants the EPA Administrator or his or her authorized representative a right

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\(^2\) Id. § 7401(b)(1).
\(^3\) Id. §§ 7407-14, 7424; United States v. Stauffer Chem. Co., 684 F.2d 1174, 1177 (6th Cir. 1982).
\(^4\) 42 U.S.C. § 7414.
\(^5\) Id. § 7414(a)(1).
\(^6\) Id. § 7414(a)(2). This portion of the statute reads as follows:

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

Recently, several regulated companies have challenged the legality of the EPA's use of private inspectors and refused to admit them unless they signed certain non-disclosure and hold-harmless agreements.\footnote{United States v. Stauffer Chem. Co., 511 F. Supp. at 744; In re Clean Air Act Inspection of Bunker Hill, 15 Env't Rep. Cas. (BNA) 1063 (D. Idaho 1980), aff'd, 658 F.2d 1280 (9th Cir. 1981); In re Aluminum Co. of Am., 15 Env't Rep. Cas. (BNA) 1116 (M.D.N.C. 1980), remanded, 663 F.2d 499 (4th Cir. 1981) (remanded due to district judge's failure to clearly indicate he afforded parties a de novo determination); In re Stauffer Chem. Co., 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980), aff'd, 647 F.2d 1075 (10th Cir. 1981).}

The companies contend that Congress, in granting “the Administrator or his authorized representative” a right of entry, intended to limit such authority to EPA employees and officers and that the EPA therefore lacks statutory authority for its

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

\footnote{In re Clean Air Act Inspection of Bunker Hill, 15 Env't Rep. Cas. (BNA) at 1063 and United States v. Stauffer Chemical Co., 684 F.2d at 1174, represents the cases in which the EPA's use of private contractors has been challenged. In the former, the EPA notified the Bunker Hill Company that an EPA employee accompanied by a private contractor would inspect the company's lead zinc smelter complex. Bunker Hill demanded that the contractor agree in writing to be excluded from any plant areas containing manufacturing processes or information considered confidential by the company, and to have withheld from him, at the company's discretion, any other “inappropriate information.” 15 Env't Rep. Cas. (BNA) at 1064.}

\footnote{In United States v. Stauffer Chemical Co., the EPA attempted to conduct a surprise inspection under its oversight program, employing an EPA official, a state official and two private contractors who possessed special expertise in the processes to be inspected. Stauffer refused them entry and demanded agreements similar to those required by Bunker Hill, with the additional demand that the EPA provide notice two weeks before inspection. 684 F.2d at 1178 & n.2.}
actions. They further contend that inspection by private contractors threatens the secrecy of valuable manufacturing processes which the companies consider to be trade secrets. The risk is claimed to arise from the existence of substantial business relations between the contractors and competing companies and the lack of practical legal means to prevent unauthorized disclosure.

The courts have focused on two issues in resolving the conflict. Primary attention has been given to determining congressional intent in enacting section 114(a). As will be shown, the search for congressional intent is often fruitless, since both the EPA and the regulated companies can support their contradictory interpretations of the Act. As a result, courts faced with the same evidence have reached divergent results. Three federal district courts have recognized statutory authorization in section 114(a)(2) for the EPA's use of contractors, while one district court has

In each case, after attempts at agreement failed, the EPA obtained an administrative search warrant. When the companies continued to obstruct the private contractor's entry, the EPA sought enforcement in the federal district courts. The companies countered with motions to quash the warrants. 684 F.2d at 1176-77; 658 F.2d at 1282.

10 The district court of Wyoming issued the following finding of fact: Many of the processes used at the Leefe Plant are highly proprietary and involve the application of trade secrets or confidential "know-how" and information developed by Stauffer during its years of operation. Among these secret processes is a method for providing fuel for use in calcining (i.e. roasting) the phosphate ore, which method is believed by Stauffer to be unique in the industry. Some of these trade secrets, including those related to the process modifications of the calciner involving its fuel supply, could be noted by an inspector merely by visual observation of equipment in the facility. In re Stauffer Chem. Co., 14 Env't Rep. Cas. (BNA) at 1737.
11 The Restatement of Torts, reflecting the common law approach, defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it," and lists six factors relevant to the determination of trade secret status. RESTATEMENT OF TORTS § 757 comment b (1939). The broad definition developed through private litigation may not apply to public law issues which involve different considerations. See McGarity & Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, 93 HARV. L. REV. 837, 862 (1980).
13 See id.
14 United States v. Stauffer Chem. Co., 511 F. Supp. at 748; In re Clean Air Act
agreed with the position of the regulated companies.\textsuperscript{15} On the appellate level, the Ninth Circuit has found authorization,\textsuperscript{16} while the Sixth\textsuperscript{17} and Tenth\textsuperscript{18} have not.

To a lesser extent, courts have focused on the availability and effectiveness of alternate means of protecting the regulated company's trade secrets to determine the EPA's authority to use private contractors. Unfortunately, the courts' judgments on this issue have not been uniform.\textsuperscript{19} Clearly, however, agency regulations and procedures do provide or could provide substantial protection for the regulated companies. However, as a Wyoming district court has noted, the costs to the regulated company of pursuing its remedies should disclosure occur could be substantial and the results uncertain.\textsuperscript{20} Judicial decisions fail to compare the burdens placed on the EPA if the use of contractors is forbidden, with the burdens placed on regulated companies by their use. The courts' failure may be partly attributed to their preoccupation with inconclusive searches for congressional intent.

This Note critically examines efforts at divining congressional intent, as well as the availability of alternative means for protecting trade secrets. It also examines the treatment of confidential information in other statutory contexts raising similar issues. Congress has demonstrated a willingness to allow private contractors access to confidential information in some of these contexts, indicating that there is no inherent presumption against the EPA's practice. Given the ambiguities of the Clean Air Act and the availability of alternative protections for regulated companies, those companies

\textsuperscript{15} In re Stauffer Chem. Co., 14 Envt' Rep. Cas. (BNA) at 1740.
\textsuperscript{16} Bunker Hill Co. v. EPA, 658 F.2d 1280, 1284 (9th Cir. 1981).
\textsuperscript{17} United States v. Stauffer Chem. Co., 684 F.2d at 1189-90.
\textsuperscript{18} Stauffer Chem. Co. v. EPA, 647 F.2d 1075, 1079 (10th Cir. 1981).
\textsuperscript{20} In re Stauffer Chem. Co., 14 Envt' Rep. Cas. (BNA) at 1741.
should have to demonstrate a large disparity between the potential for economic harm to them resulting from the EPA’s use of private contractors and the benefits to the EPA, and therefore the public at-large, resulting from their use. Absent such a showing, the courts should defer to the EPA’s interpretation of its legislative mandate.21

I. DIVINING CONGRESSIONAL INTENT

A. Legislative Histories

Chief Justice Marshall once observed: “Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived.”22 The observation aptly describes the efforts of the parties and the courts to extract congressional intent from the words “authorized representative.”

According to the “plain meaning” rule, words with unambiguous meanings must be accorded their ordinary meanings absent a clear expression of a contrary congressional intent.23 In Bunker Hill Co. v. EPA,24 the Ninth Circuit accepted the EPA’s contention that the ordinary meaning of “authorized representative” is “any person duly authorized to act or speak for another or others,”25 and found that there was no compelling evidence of contrary congressional intent in the legislative history of the Clean Air Act.26 The Tenth Circuit summarily rejected “such a literal interpretation” of the phrase in Stauffer Chemical Co. v. EPA27 and turned instead to legislative history for guidance.28 Likewise, in United States v. Stauffer Chemical Co.,29 the Sixth Circuit re-

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21 Bunker Hill Co. v. EPA, 658 F.2d at 1284. The court observed: “When faced with a problem of statutory construction this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration . . . .” Id. (quoting Udall v. Tallman, 380 U.S. 1 (1965)).
24 658 F.2d at 1280.
25 Id. at 1283.
26 Id.
27 647 F.2d at 1078.
28 Id. at 1078.
29 684 F.2d at 1174.
jected the "plain meaning" approach and looked to legislative history without demanding "compelling" evidence of a limited congressional intent. 30

The legislative history of section 114 is highly ambiguous. The EPA and those courts which found in its favor rely heavily on a comparison between the final form of the statute and the Senate 31 and House 32 bills which gave rise to it. The district court in United States v. Stauffer Chemical Co. observed: "The philosophy of the Senate and House versions appears to have differed. The Senate version granted the agency more power and authority to enforce the provisions [of the Act] . . . . The Conference Committee obviously chose the Senate version over the House version." 33

The original House version authorized only "officers or employees duly designated by the Secretary" to enter and inspect any facility "which the Secretary has reason to believe is or may be in violation of regulations." 34 Notice was mandated before each inspection. 35 In contrast, the original Senate provision authorized entry and inspection without notice and on broader grounds by "the Secretary or his authorized representative." 36 The conference committee chose the broader Senate version which appears in section 114(a)(2).

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30 The court stated the rule as follows: "The plain meaning of statutory language is not always decisive . . . . This is especially true where the legislative history suggests a different interpretation." Id. at 1183. See also Watt v. Alaska, 451 U.S. 259, 266-67 (1981) (apparent meaning is not conclusive, but subject to the purpose of the act and the circumstances of enactment).


34 H.R. 17255, supra note 32, at 33-34, reprinted in AIR LEC. HIST., supra note 31, at 918.

35 Id.

36 S. 4358, supra note 31, § 116(a)(3) at 40, reprinted in AIR LEC. HIST., supra note 31, at 570.
The evolution of the stationary source inspection provisions of section 114(a)(2) contrasts sharply with the conference committee's treatment of motor vehicle emission inspections in sections 206 and 208. There, the original House and Senate versions differed in two major respects. First, the Senate version granted "authorized representatives of the Secretary" a right of entry, while the House version limited its grant of authority to "officers or employees duly designated by the Secretary." These versions were consistent with the respective House and Senate stationary source provisions. Second, the House, again, required prior notice of inspection while the Senate did not. The conference committee once again deleted the House notice requirement but this time retained the language limiting the right of entry to officers and employees. This indicates that the conference committee did not blindly adopt Senate language in the stationary source provisions and House language in the motor vehicle emission sections, but rather examined the differing provisions for their substantive effect. The specific exclusion of motor vehicle manufacturers subject to sections 206 and 208 from the purview of section 114(a) in the 1977 amendments to the Clean Air Act

39 H.R. 17255, supra note 32, § 206(c), at 43, reprinted in AIR LEG. HIST., supra note 31, at 928.
40 Id.; S. 4358, supra note 31, § 206(b)(4)(D), at 61, reprinted in AIR LEG. HIST., supra note 31, at 591.
42 The Sixth Circuit thought otherwise. The court stated:
Since section 114 was taken from the Senate bill and sections 206 and 208 from the House bill, rather than showing a conscious choice on the part of Congress, it seems more likely that the final product was a result of the two bills being tacked together without any thought being given to this small difference in their wording. Allowance must be made for human error and inadvertence in drafting legislation.
reinforces this conclusion. This apparently conscious distinction between the treatment afforded stationary and mobile sources combined with the incorporation of the more expansive enforcement provisions of the Senate bill in preference to those of the House bill provides substantial evidence that Congress intended "authorized representatives" to encompass more than officers or employees. The Ninth Circuit observed: "Hence, where Congress meant to limit inspections to officers and employees it did so. Congress must be deemed to have understood its choice of the phrase 'authorized representative' in contrast to the limited phrase 'officers and employees.'"44

Courts holding against the EPA have, of course, found the above argument unpersuasive.45 They base their rejection of the argument primarily on language in the House managers' statement accompanying the conference report,46 and on inconsistencies in the Senate bill.

In describing the Senate bill's inspection provisions, the House managers wrote: "[T]he Senate authorized entry and inspection by DHEW personnel of buildings, facilities, and monitoring equipment for purposes of setting standards and enforcing them . . . . The provisions of the conference substitute with regard to inspections, monitoring and entry follow substantially the provisions of the Senate amendment."47 This statement led the Sixth and Tenth Circuits to conclude that the ostensibly distinct phrases "authorized representatives" and "officers and employees" in fact shared identical meanings in the minds of congressional members.48 However, it seems questionable to allow House members

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46 The decisions mistakenly refer to the language of the "conferees" and the conferees' report. In fact, the language is attributable only to the House members of the conference committee. See H.R. REP. No. 1783, supra note 41, at 42, 47-48, reprinted in AIR LEG. HIST., supra note 31, at 197 and 1970 U.S. CODE CONG. & AD. NEWS 5379-81.
47 Id. At the time of the conference report, HEW was scheduled to administer the Clean Air Act.
to provide the definition for a phrase employed by the Senate and thereby harmonize what, on their faces, seems to be conflicting statutory expressions.

Nonetheless, other sections of the Senate bill also suggest a blurring of the apparent distinction between the two phrases. In section 209(a), the Senate bill stated that certain manufacturers "shall, upon request of an authorized representative of the Secretary, permit such officer or employee" to inspect and copy required records.\(^\text{49}\) Here, "officer or employee" clearly refers back to "authorized representative" and implies a congruence between the two phrases. To cite another example, in section 115(c), concerning inspection of facilities generating hazardous air pollutants, the right of entry is given to "an officer or employee duly designated."\(^\text{50}\) No language in the pertinent Senate and House reports explicitly recognizes a distinction between the scope of the terms "authorized representative" and "officers and employees."\(^\text{51}\)

Given the paucity of evidence in the legislative history of the Clean Air Act itself, the courts have examined references to the Act in congressional materials related to subsequent legislation. Section 308(a)\(^\text{52}\) of the Federal Water Pollution Control Act is modelled after section 114(a). Like the latter, it uses the phrase "authorized representatives" to describe those who may exercise a right of entry for inspection purposes. In the report accompanying the Senate bill, the Senate Committee on Public Works explained the scope of the entry provision with a reference to the Clean Air Act:

It should also be noted 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


\(^{50}\) S. 4358, supra note 31, § 115(c), at 37, reprinted in AIR LEG. HIST., supra note 31, at 567. See also S. Rep. No. 1196, supra note 31, at 96.


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.\(^{53}\)

Ordinarily, post-enactment statements in committee reports have limited value in determining congressional intent.\(^{54}\) The Sixth Circuit, however, found this to be "an exceptional case." Because the court considered the acts to be "in pari materia with one another," because section 308(a) was intentionally imitative of section 114(a), because the Senate report "was authored a scant ten months after passage of the Clean Air Act," and because the intent of section 114(a)(2) is ambiguous, while that of its sister provision, section 308(a), is "clear," the court was willing to place significant value on the later Senate report's interpretation of section 114(a)(2).\(^ {55} \)

The Senate Public Works Committee has not been consistent in its post-hoc interpretation of section 114(a)(2), however. The Comprehensive Environmental Response, Compensation and Liability Act of 1980\(^ {56} \) granted "any officer, employee, or representative duly designated by the President" a right of entry onto facilities containing or generating hazardous wastes.\(^ {57} \) In the Senate report accompanying the bill, the Public Works Committee made an analogy between the authority granted by the Clean Air Act and that granted by other environmental legislation:

To implement the site and facility investigation and response authorities contemplated by this bill, the Administrator will fre-


\(^{54}\) See Consumer Prods. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 116-19, 118 n.13 (1980) (subsequent committee statements "provide an extremely hazardous basis for inferring the meaning of a Congressional enactment"); United States v. Clark, 445 U.S. 23, 33 n.9 (1980) ("the views of some Congressmen as to the construction of a statute adopted years before by another Congress have 'very little, if any, significance' "); United States v. Price, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). But see Andrus v. Shell Oil Co., 446 U.S. 657, 666-72, 666 n.8 (1980) (court relied on subsequent congressional hearings and reports, saying "arguments predicated upon subsequent congressional actions must be weighed with extreme care, [but] they should not be rejected out of hand").


TRADE SECRETS

B. Internal Consistency

Turning from legislative history to the statute itself, courts have attempted to harmonize the use of "authorized representative" in section 114(a)(2) with its use elsewhere in the Act. Courts finding for the EPA have focused on section 114(c), which accords trade secret protection to qualifying information obtained by the EPA under section 114(a), "except that such . . . information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter." The use of the disjunctive "or" indicates that the meaning of "authorized representative" is broader than "employees and officers." Some courts thus reasoned that under the imperative of consistent interpretation within a statutory section, "authorized representative" should have the same expansive meaning in section 114(a) as in section 114(c).

While accepting the first half of the syllogism, courts finding for regulated companies have refused to extend section 114(c)'s use of "authorized representative" to the phrase in section 114(a)(2). According to the Sixth Circuit, "the interpretation of the word 'representative' in these various sections is simply a matter of grammar." While the context of section 114(c) requires a broader meaning, that of section 114(a)(2) is more consistent with a narrower use.

59 42 U.S.C. § 7414(c) (Supp. IV 1980).
62 The Sixth Circuit reasoned that if "authorized representative" in § 114(a)(2) meant someone other than an EPA employee or officer, then the section would have to be read
Having distinguished section 114(c), the Sixth Circuit focused on section 114(d), which requires "the Administrator (or his representatives)" to notify the appropriate state agency before conducting an inspection under section 114(a)(2).\footnote{42 U.S.C. § 7414(d) (Supp. IV 1980).} The court reasoned that such a function—"sensitive intergovernmental communication"—was wholly inconsistent with an interpretation of "authorized representative" which included non-governmental personnel. Since both section 114(a)(2) and section 114(d) governed inspections, the court reasoned that they should be construed consistently, and therefore the narrower meaning required by section 114(d) should extend to section 114(a)(2).\footnote{The court's reasoning is flawed. The same contextual analysis used by the court to refute the EPA's § 114(c) argument applies here. While both sections are concerned with inspections, the role of "representatives" in the two sections is completely different, and the two sections do not require a consistent meaning any more than § 114(c) did under the court's logic.}

The Sixth Circuit's reasoning obscures the more significant logical relationship between sections 114(a)(2) and 114(c). The drafters of section 114(c) clearly envisioned the disclosure to private contractors of information obtained by an EPA employee who conducts a section 114(a)(2) inspection alone. Why not, then, allow the contractor to obtain the information firsthand by accompanying the EPA employee during the inspection? What is the functional difference between a review of records, reports, photographs, samples and other items obtained by an EPA employee and the actual inspection of the premises?\footnote{See United States v. Stauffer Chem. Co., 511 F. Supp. at 748.} Any "protection" afforded by requiring the former procedure results from its inefficiency.

Looking to other provisions of the Act, the Sixth Circuit found support for its narrow interpretation in section 301(a), the Act's general delegation of powers provision. That section states: "The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations, as he may deem necessary."\footnote{42 U.S.C. § 7601(a) (Supp. IV 1980).} The court reasoned that section 301(a) to deny them the right of entry for inspections. United States v. Stauffer Chem. Co., 694 F.2d at 1185.
necessarily limited the scope of "authorized representative" to EPA officers and employees. As to the differences between sections 206 and 208 and section 114, the Sixth Circuit reasoned that the more restrictive language of the motor vehicle sections should govern both types of provisions in order to avoid the "illogical and inconsistent" position of allowing private contractors to inspect stationary sources, while forbidding their use in inspecting moving emission sources.

II. AVAILABLE ALTERNATIVES TO BLANKET PROHIBITION

The Sixth and Tenth Circuits concluded, primarily through statutory interpretation, that Congress did not intend to allow the EPA to use private contractors under section 114(a)(2). These courts, therefore, did not evaluate the adequacy of the protection afforded regulated companies under the EPA's private contracting procedures. In contrast, by relying primarily on relevant EPA regulations, courts holding for the EPA found the procedures adequate to protect the regulated companies' proprietary interests.

Section 2.211 of Title 40 Code of Federal Regulations (C.F.R.) imposes penalties on both federal employees and private parties under contract to the EPA for the wrongful disclosure of business information obtained through EPA activities. According to subsection (d) of the regulation:

Each contractor or subcontractor with EPA and each employee of such contractor or subcontractor, who is furnished business information by EPA . . . shall use or disclose that information only as permitted by the contract or subcontract under which the information was furnished. Any violation of this paragraph shall constitute grounds for debarment or suspension of the con-

68 Id. at 1186.
71 40 C.F.R. § 2.211(a)-(c) (1980).
tractor or contractor’s employee in question. Willful violation of this paragraph may result in criminal prosecution.\(^7\)

Section 2.301(h) of 40 C.F.R.\(^7\) contains special requirements for the disclosure of information to private contractors under section 114 of the Clean Air Act. While it is unclear whether the section applies to information obtained through section 114(a)(2) inspections,\(^4\) the EPA has generally followed the requirements of the section in its contracts with private inspectors.\(^7\) The contracts forbid the contractor to use information obtained during the inspection in any way other than that contemplated by the contract and prohibit the contractor or its employees from disclosing any information without the EPA’s approval.\(^7\) The contractor also must execute written agreements with its employees binding them individually to the nondisclosure terms of the contract.\(^7\) Finally, the contractor must agree that the contract’s confidentiality terms are for the benefit of and may be enforced by both the EPA and the business whose proprietary information will be disclosed.\(^7\) The regulated company will therefore have a contractual cause of action for injunctive relief and civil damages against a contractor or its employee who breaches the contract’s confidentiality provisions.\(^7\)

\(^{72}\) Id. § 2.211(d).
\(^{73}\) Id. § 2.301(h).
\(^{74}\) See 40 C.F.R. § 2.301(b)(1)(i), (b)(2). The Tennessee district court apparently considered § 2.301(h) applicable. See United States v. Stauffer Chem. Co., 511 F. Supp. at 749.
\(^{76}\) 40 C.F.R. § 2.301(h)(2)(ii)(A); In re Clean Air Act Inspection of Bunker Hill, 15 Envtl Rep. Cas. (BNA) at 1084.
\(^{78}\) 40 C.F.R. § 2.301(h)(2)(ii)(C); In re Clean Air Act Inspection of Bunker Hill, Envtl Rep. Cas. (BNA) at 1064.
\(^{79}\) The Tennessee district court also expressed the opinion that the aggrieved company would have a right of action against the EPA “if it can show that EPA could have reasonably foreseen a likelihood of unauthorized use or disclosure.” United States v. Stauffer Chem. Co., 511 F. Supp. at 749.

One commentator has suggested a bonding requirement for all contractors given access to confidential information under the Toxic Substances Control Act. The bond would provide regulated companies a source of recovery against financially weak contractors. Furthermore, the bonding companies, in an effort to avoid such judgments, would undoubtedly take steps to insure and improve the effectiveness of contractors’ security.
The possibility of a lawsuit based on the EPA-mandated contractual provisions, along with the threat of EPA sanctions under 40 C.F.R. section 2.211(d) provide a substantial deterrent to unlawful disclosure. Of course the private contractual remedy requires self-help and all of the expense, time and uncertainty of litigation. On the other hand, denying the EPA the authority to use private contractors does not save those expenses; rather, it shifts them to the Agency, and finally to the public, in the form of increased administrative costs or decreased ability to police the Clean Air Act. Unfortunately, the courts have made no serious attempt to ascertain the costs and benefits to each party resulting from the use or nonuse of private contractors. Perhaps such a comparison is more appropriately left to the legislative branch. However, as shown, neither the statute nor its legislative history produces a consistent judgment resulting from such an analysis.

Section 2.301(h) of 40 C.F.R. also requires that the proprietor of disclosed information receive notice of the intended disclosure and of the identity of the contractor and be given an opportunity to submit comments or objections.81 In a section 114(a)(2) inspection, this would require notice before the inspection. While such notice was given to Bunker Hill Company,82 the inspection in United States v. Stauffer Chemical Co.83 was part of a surprise measures. These private efforts would augment those of the EPA's Security and Inspection Division, which is responsible for policing contractor security generally. Note, Protection for Trade Secrets Under the Toxic Substances Control Act of 1976, 13 U. Mich. J.L. Ref. 329, 362 (1980).

80 For example, the Sixth Circuit drew the following comparison: By differing with the district court, we do not denigrate the court's able opinion, for cogent arguments can be raised on both sides. The EPA filed affidavits in the court below stating that forbidding it to use contractors in Clean Air oversight inspections would hamper or even cripple the program and it might also be argued that, in this era of government cutbacks, it is preferable to permit the EPA to use contractors rather than hire more full time employees. On the other hand, the execution of search warrants is a traditionally governmental function and Stauffer and other owners of commercial property have legitimate concerns regarding the safety of trade secrets when employees of contractors, who may have other clients and conflicting interests, are permitted to conduct inspections under ex parte search warrants issued where the property owner is afforded no opportunity to be heard. United States v. Stauffer Chem. Co., 684 F.2d at 1189.


82 Bunker Hill Co. v. EPA, 658 F.2d at 1282.

83 United States v. Stauffer Chemical Co., 684 F.2d at 1178.
inspection program. However, an opportunity to raise trade secret questions or challenge the use of particular contractors could be provided without revealing when the actual inspection will take place.

III. PROTECTIONS AFFORDED TRADE SECRETS UNDER OTHER STATUTES

A. Occupational Safety and Health Act

An issue analogous to the EPA's use of private contractors has arisen under the Occupational Safety and Health Act (OSHA). In *Owens-Illinois, Inc.*, the Occupational Safety and Health Review Commission (OSHRC) ruled that the government could employ private contractors to conduct discovery inspections of parties charged with violating OSHA, despite the manufacturer's objections that valuable trade secrets would be exposed and that section 15 of OSHA limits access to confidential information to federal employees. In its holding, the Commission overruled a well-established line of cases which initially limited conduct of discovery inspections to OSHA personnel, with a subsequent proviso that the employer first be required to demonstrate the existence of trade secrets which would be revealed by the inspection and that the Secretary could overcome the objection through a sufficient showing of necessity. In *Owens-Illinois, Inc.*, the

86 Owens-Illinois' factory was cited for violations of Occupational Safety and Health Act (OSHA) noise standards. The company contested the citation, commencing a quasi-judicial administrative proceeding. Such proceedings are conducted under the Federal Rules of Civil Procedure. Here, the Secretary sought inspection under Rule 37(a)(2). OSHRC Docket No. 77-648, O.S.H. Dec. (CCH) ¶ 23,218, at 28,070-01; Annot., 50 A.L.R. Fed. 892, 894 (1980).
88 The inspection provision in OSHA may be found at 29 U.S.C. § 657 (Supp. IV 1980).
Commission re-examined the earlier doctrine in light of its practical effects and found that proprietors' trade secrets could better be guarded through protective orders, contract provisions and the Commission's disciplinary powers.\(^91\) Any additional protection afforded by prohibiting the use of private inspectors was outweighed by its regulatory costs. The Commission observed:

> Based on the Commission's experience with the trade secret issue following its decision in *Reynolds I*, we are persuaded that such protective orders are preferable to barring the use of outside experts. *Reynolds I* appears to have prompted numerous employers to oppose discovery entries by outside experts on the ground that trade secrets might be revealed. While certainly the concern expressed for protecting the confidentiality of trade secrets has been genuine in the majority of those cases, in some instances the objection may have been raised not out of any real fear that trade secrets would be revealed but rather as a strategy to hinder the Secretary in the prosecution of cases by sharply restricting the experts he could employ to aid his prosecution . . . .\(^92\)

The Commission envisioned a three-part protective order.\(^93\) First, the Secretary was required to notify the employer of the identity of the expert who would be conducting the inspection. This would provide the employer an opportunity to challenge the use of experts whom it felt to be untrustworthy or to have objectionable business connections with competitors. Second, the expert would have to sign a confidentiality oath. Violation of the oath would constitute violation of a Commission order, with the concomitant penalties.\(^94\) Finally, the expert's contract was to contain a non-disclosure provision explicitly enforceable by the employer. The Commission's proposed protective order was modeled after federal courts' efforts to protect trade secrets in discovery proceedings.\(^95\)


\(^{94}\) 1978 O.S.H. DEC. (CCH) ¶ 23,318, at 28,07 n.11; 50 A.L.R. FED. 892, 901 n.11 (1980).

\(^{95}\) See, e.g., Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir. 1965);
B. Other EPA-Administered Statutes

In the Solid Waste Disposal Act Amendment of 1980, Congress amended the Resources Conservation and Recovery Act to allow the EPA to use private contractors for inspection purposes. Before the amendment, the right of entry was given only to an "officer or employee of the Environmental Protection Agency, duly designated by the Administrator." The amendment added the words "or representative" after the word "employee." Committee reports explicitly stated that the language was added to provide for the use of private contractors.

The Toxic Substances Control Act authorizes "the Administrator and any duly designated representative of the Administrator" to conduct inspections of "any establishment, facility or other premises" containing or producing "chemical substances or mixtures." A district court held in Aluminum Co. of America v. Dubois that "duly designated private contractors" were encompassed by the congressional grant of authority. The court was persuaded by the Act's legislative history and the provision of criminal misdemeanor penalties for private contractors who wrongfully disclosed confidential information. Section 14 specifically warrants disclosure of confidential information to private contractors if necessary for the contractor to perform work under

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the Act. The EPA clearly indicated to Congress that it intended to hire contractors to perform investigatory functions.

As noted earlier, the legislative history of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 indicates that it extends the right of entry for inspection purposes to contractors as well. On the other hand, the inspection provisions of the Federal Fungicide, Insecticide and Rodenticide Act and the Noise Control Act expressly limit entry to EPA officers and employees and, as already discussed, the legislative history of the Clean Water Act indicates that "authorized representative" in its inspection provision is limited in meaning to employees and officers of the EPA.

**Conclusion**

Clearly, Congress has not developed a uniform policy on the EPA's use of private contractors to enforce the various statutes which it administers. Absent such a policy, the courts have closely examined individual statutes for an indication of congressional intent. In the case of the Clean Air Act, the search produces inconclusive results. Without a finding of clear congressional intent, the courts should be willing to engage in a detailed balancing of the interests at stake. The additional costs imposed on the EPA, and thereby the taxpayer, by requiring the Agency to conduct inspections solely with its own staff should be compared with the probable losses sustained by regulated industries through disclosure of their trade secrets by inspecting contractors. The courts have yet to do this.

It is clear, however, that substantial protection can be afforded confidential information by means that are short of absolute exclusion of private contractors. The EPA currently includes confi-
dentification provisions in its inspection agreements with private contractors which may be enforced by the company whose confidences have been breached. Furthermore, the EPA may impose sanctions against offending contractors or their employees under 40 C.F.R. section 2.211(d). These protections should be augmented by allowing inspection targets an opportunity to raise trade secret questions and challenge the use of particular contractors before inspection occurs and by imposing a bonding requirement on contractors who will have access to confidential information in the course of their inspections. All of these measures would greatly reduce the danger to regulated companies' proprietary interests. Furthermore, prohibiting the use of private contractors might not provide a substantial amount of additional protection, since information obtained by EPA personnel may be divulged eventually to private contractors under the provisions of section 114(c).

The burden thus should be placed on industry to show that the incremental protections afforded by blanket prohibition outweigh the concomitant administrative costs. Absent such a showing, the courts should not invoke a questionable reading of section 114(a)(2) of the Clean Air Act to deny the EPA authority which it considers necessary to meet its responsibilities under the Act.

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